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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Freshwater Wetlands Protection Act Rules

Readoption with amendments: N.J.A.C. 7:7A

Adopted Repeals: N.J.A.C. 7:7A-4.6, 5.2A, 5.10C, 5.11A, 5.20A, 5.26A and 10.7

Proposed: September 4, 2007 at 39 N.J.R. 3587(a)

Adopted: , 2008 by Lisa P. Jackson, Commissioner, Department of Environmental Protection

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

Authority: N.J.S.A. 13:9B-1 et seq.

DEP Docket Number: 17-07-08/575

Effective Date: October 6, 2008

Expiration Date: September 4, 2013

The Department of Environmental Protection (Department) is readopting the Freshwater Wetlands Protection Act (FWPA) Rules, N.J.A.C. 7:7A, with amendments. The FWPA rules establish the procedures by which the Department reviews permit applications under the FWPA (N.J.S.A. 13:9B-1 et seq.). As authorized by the statute, the FWPA rules govern the removal, excavation, disturbance or dredging, drainage or disturbance of the water level or water table, dumping, discharging or filling with any materials, driving of pilings, and placing of obstructions in a freshwater wetland, and the

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destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees. The FWPA rules also regulate the discharge of dredge and fill material in State open waters. Finally, the FWPA rules prohibit within a wetland transition area (an upland area that may extend 50 or 150 feet from the wetland boundary depending upon the wetland classification): removal, excavation, or disturbance of soil, dumping or filling, erection of structures, placement of pavement and the destruction of plant life that would alter the existing pattern of vegetation.

In addition, since March 2, 1994, New Jersey's freshwater wetlands program has operated in place of the Federal wetlands permitting program, also known as the "Federal 404 program" as implemented by the Army Corps of Engineers (ACOE). The Federal 404 program is Section 404 of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq. The authority for the Department to assume the federal permitting authority also derives from the Federal Clean Water Act at Section 404(g). The United States Environmental Protection Agency (EPA) oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and EPA. The requirement imposed by the Federal Clean Water Act on a State assuming the federal permitting authority is that the State implement equally stringent regulatory standards to those currently in place for the Federal 404 program for the protection of waters of the United States, including wetlands.

The proposal was published on September 4, 2007. The comment period, originally scheduled to close on November 3, 2007, was extended to January 2, 2008. See 39 N.J.R. 4899(a); Nov. 19, 2007. The Department is not adopting the following proposed amendments: changes to the stormwater provisions of the rules at N.J.A.C. 7:7A-2.11 and at 4.3, as described in response to comment 89; the requirement at N.J.A.C. 7:7A-4.3(b)1i to minimize impacts to wetlands when applying for general permits, as described in response to comments 159 through 163; the requirement to mitigate under certain general permits, as described in response to comments 180 through 183; and the changes to Subchapter 16, Enforcement, as described in response to comments 442 through 448.

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Summary of Hearing Officer's Recommendation and Agency Response

The Department held public hearings on the proposal on October 4, 2007 at 2:00 P.M., at the Pequest Fish Hatchery in Oxford; October 11, 2007 at 2:30 P.M. in the DEP Public Hearing Room in Trenton, and on October 16, 2007 at 2:00 P.M. at the Gloucester County Office of Government Services in Clayton. Susan Lockwood was the hearing officer at all hearings. The three hearings were attended by a total of 21 people and four gave testimony. The hearing officer recommended that the proposal be adopted 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. 17-07-08/575
Department of Environmental Protection
401 East State Street, Floor 4
P.O. Box 402
Trenton, New Jersey, 08625-0402.

The Department accepted comments on the proposal through January 2, 2008. Eighty-seven commenters provided timely written and/or oral comments. The following persons submitted comments:

1. Adams P.E., Christopher S.; Civil Dynamics, Inc.
2. Aversano III, Esq., James; Tyler and Carmeli, P.C.
3. Briant, Jr., Robert A.; Utility and Transportation Contractors Association of New Jersey
4. Brogan, David H.; New Jersey Business & Industry Association
5. Broubalow, Michele D.; Town of Phillipsburg
6. Brown, James Kent

7. Calvani, Jeffrey; Clearview Lake Property Owner's Association., Inc.

8. Canning, William; Lake Reality

9. Cerchiaro, J. Russell; Schering-Plough

10. Comes, Laurent; Robert O'Mara; Richard P. Quinn; Fayson Lakes Association

11. Conway, Marion; Rock Properties, Inc.

12. Cooke, Christopher P.; Lake Community Property Owners Association, Inc.

13. Coughlin, Christopher F.; Camp Wyanokie Commission

14. Davis Jr., J. Eric, U.S. Fish and Wildlife Service

15. Derkacs, Rob; Andy DeVincenzi, Nick Kirkos, Don Ploch, Bill Rixon; Scenic Lakes Community Association

16. DeVito, Emile; New Jersey Conservation Foundation

17. Digangi, Jr., Tom; Building Contractors Association of New Jersey

18. Ditchey, Eric J.; Council for Safe Dams

19. Dressel, Jr., William G., N.J. State League of Municipalities

20. Fair, Abigail; Association of New Jersey Environmental Commissions (ANJEC) (on behalf of ANJEC, American Littoral Society, Clean Ocean Action, Delaware Riverkeeper Network, Environment New Jersey, Great Swamp Watershed Association, New Jersey Conservation Foundation, Sierra Club, New Jersey Chapter, and South Branch Watershed Association)

21. Filipek, Frank R.; Mayor, Borough of Bellmawr

22. Fittz, Joan; New Jersey Manufactured Housing Association

23. Fowler, Michael P.; Township of Brick

24. Furnari, Ralph; Public Service Electric and Gas Company

25. Gall, Michael

26. Gallagher, Mark, and Geoffrey Goll, Princeton Hydro, LLC

27. George-Cheniara, Esq., Elizabeth; New Jersey Builders Association

28. Grassia, Angela; Washington Township Municipal Utilities Authority

29. Grasso, Jarrod C.; New Jersey Association of Realtors

30. Green, Elkins; New Jersey Department of Transportation

31. Greene, Amy S.; Amy S. Greene Environmental Consultants

32. Griber, Penelope A.; D.W. Smith Associates, LLC

33. Grubb, Richard C.; Richard Grubb & Associates, Inc.

34. Gulbinsky, Ellen; Association of Environmental Authorities

35. Haines, Jr., William S., Burlington County, Board of Chosen Freeholders

36. Haley, Henry J. and Michael C. Dupras; Consulting Engineer Services

37. Hartwyk, Christopher M.; The Port Authority of New York and New Jersey

38. Helmer, David; Morris County Park Commission

39. Holbrook, Gray Z.

40. Illegible; Member, Summit Lake Homeowners Association

41. Ivanciu, Ileana S.; American Council of Engineering Companies of New Jersey

42. Jaggard, R. Thomas; Burlington County, Board of Chosen Freeholders

43. Jubic, Jr., Robert J.; Atlantic City Electric Company

44. Kafrouni, Ileana; New Jersey Meadowlands Commission

45. Klose, Eileen; Township of Hampton

46. Kunze, Richard; Township of West Milford

47. Labriola, Joseph A.; RCC Design, Inc.

48. Lacey, Ronald K.; Jersey Central Power & Light

49. Leavens III, William B.; Musconetcong Watershed Association

50. Lentner, Howard H.; Rock Properties, Inc,

51. Lindloff, Stephanie; Restoring Rivers Initiative

52. Littell, Robert E., Senator, and Assemblywoman Alison Littell McHose; N.J. State Legislature

53. Magill, Ronald E.

54. McEachen, Paul J.

55. McGuinness, Michael G.; National Association of Industrial and Office Properties

56. McLaughlin, Jack; Highland Lakes Country Club and Community Association

57. Mintz, Howard; Lake Iosco Company

58. Morris, Dawn; Lake Wanda Property Owners Association

59. Musilli, Steven T.; Cherry Hill Township

60. Purcell, Monique; N.J. Department of Agriculture

61. Ramberg, Susan J.; Lake Plymouth Community Association, Inc.

62. Ranft, Richard; Erskine Lake Property Owners Association

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63. Renna, Mark; Evergreen Environmental
64. Robert, Marshall; Rowbear Consulting
65. Ross, Jr., Warren M.; Beaver Lake Realty Company
66. Roth, Stacey P.; Pinelands Commission
67. Sachau, Barbara
68. Schneider, Philip
69. Shallcross, Amy L.; New Jersey Water Supply Authority
70. Shivery, Jr., George; Township of Greenwich
71. Sidhom, Emad; United Water New Jersey
72. Smith, Frances; New Jersey Coalition of Lake Associations
73. Smith, Marianne; Hardyston Township
74. Solomon, Mark A.; Pepper Hamilton, LLP (for Educational Testing Service)
75. Spragens, Lori C.; Association of State Dam Safety Officials
76. Springate, Megan
77. Steinbacher, Joy; Friends of Lake Neepaulin, Inc.
78. Sweeny, Stephen M., Senator, Assemblyman John J. Burzichelli, and Assemblyman Douglas H. Fisher; N.J. State Legislature
79. Tambini, Steven J.; New Jersey American Water
80. Tittel, Jeff; New Jersey Sierra Club
81. Torregrossa, John; Lake Plymouth Community Association, Inc.
82. Truncer, James J.; Monmouth County Park System
83. von Autenried, Ronald; Buck, Seifert & Jost, Inc.
84. Walker, Jesse
85. Waltman, Jim; Stony Brook Millstone Watershed Association
86. Westergaard, Richard; Gloucester County
87. Zirpoli, Dana

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: We know global warming is coming with huge climate effects. We need to stop overbuilding and pay more attention to erosion. I also note that a 100-year storm is still used as the common standard when 500 year storms are common. How can we be so negligent to not recognize the changes in climate that have taken place over the last 50 years? How can we not be prudent and protect people's lives when we know these changes are in process? (67)

RESPONSE: The FWPA establishes regulated areas and regulated activities. It directs the Department to regulate wetlands as defined in the Act, and other waters of the State; dictates the width of a transition area or buffer adjacent to the wetlands; and establishes a list of activities regulated or prohibited within these areas. The FWPA and implementing rules do not refer to the 100-year storm since this is not germane to the regulation of wetlands. The 100-year flood is applicable in the regulation of activities and development in flood plains under the Flood Hazard Area Control Act, and the Department's implementing rules at N.J.A.C. 7:13. The Department promulgated comprehensively revised and updated flood hazard rules in November 2007. See 39 N.J.R. 4573(a). Any approvals issued by DEP under the FWPA must also meet the requirements of those rules.

2. COMMENT: New Jersey is a diverse state comprised of many environmentally sensitive areas from mountainous regions of the northwest to the salt marshes of the coasts. The multitude of freshwater wetlands that transect the state both feed and support the other regions. All of the areas contain fragile habitats and affect one another. I commend the DEP for the forward thinking process of trying to protect these environments. In most cases, the loss of freshwater wetlands is irreplaceable even with mitigation. As developers become more aggressive, the rule regulating their work in watersheds must also become aggressive if New Jersey's fragile ecosystems are to be protected. I would ask the Department to move forward to adopt the proposed changes to the rules. While some may dislike them, they are necessary to keep New Jersey green and to protect our natural resources for generations to come. (53)

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

3. COMMENT: In comparison to surrounding states, New Jersey has one of the strongest sets of state laws and regulations to protect archaeological resources and historic properties. One of the cornerstone historic preservation laws is New Jersey's Freshwater Wetlands Protection Act because it requires archaeological investigations. Investigations lead to the identification and investigation of archaeological sites which has contributed to a greater understanding of New Jersey's history and pre-Contact history. Without the Freshwater Wetlands Protection Act, invaluable information about archaeological resources throughout the State would be lost. As such, I support the adoption of the proposed rules. (25, 84)

RESPONSE: The Department acknowledges the comment in support of the rules. However, it is important to note that the authority to protection historic resources comes from the Department's assumption of the Federal 404 permitting authority under the Federal Clean Water Act and not explicitly from the FWPA. Because the Federal program protects historic resources, the Department's program protects such resources as well.

4. COMMENT: The amendments will significantly complicate and prolong the permit review process, which is already too long. It is unacceptable to have a general permit review dragged out for over a year because of the work backlog and these changes will not be significantly environmentally beneficial to offset the increased workload and additional costs they will create. Since we know that the State budget is in deficit and State agencies do not seem to be hiring any new staff, it is not clear how the Department intends to handle the increased workload these rule changes will incur. Discussion with the regulated community could have added valuable information to the Department's determination of what rule changes were necessary. This has been done in the past and hopefully can be done again in the future. (32, 41)

5. COMMENT: The proposal taken as a whole will lead to less protection of the State's aquatic ecosystems; cripple efforts to improve the water quality in the most impacted parts of the State; cause investment in poor functioning wetlands; confuse the regulated public by adding unclear standards; double permit compliance costs and triple permit backlog and waste precious environmental protection funding; increase court costs in order to defend numerous primary provisions that are not based on the rule of law; and discourage the regulated community in developing innovative projects to improve the local environment. (55, 64)

RESPONSE TO COMMENTS 4 AND 5: The adopted amendments are mainly clarifications intended to make it easier for the Department to process a wetland permit application. Although the time for an applicant to prepare an application may increase, because, for example, the applicant will have to provide the history of ownership of the property, the review time for the Department will decrease because the Department reviewer will no longer have to make phone calls and do the research needed to determine whether previous permits have been obtained which may affect the applicability of general permits on the property. All provisions are based upon the FWPA and/or the Federal Clean Water Act (33 U.S.C. 1251 et seq.). Further, by clarifying the rules, the Department makes it easier for the applicant to comply, thus further ensuring the protection of the wetland resource which the rules are adopted to protect. Consequently, the Department does not agree that the amendments will double compliance costs, triple permit backload, will not have environmental benefit, will waste funding, or result in additional court cases. In the response to comments 17 through 20 below, the Department has responded to the commenter's suggestion regarding discussing rule amendments in advance of an official rule proposal.

6. COMMENT: According to the proposal summary, the Department is permitting 120 acres a year of wetland disturbance. Looking at Rutgers' data and the Department's own Land Use cover data, between 1995 and 2002, we lost 12,862 acres of wetlands but yet the Department is accounting for only about a tenth of that. So there is something fundamentally wrong with the permitting system and how we are looking at wetlands.

Part of it is that we are not looking at secondary cumulative impacts, and we are not looking at adverse modifications to wetlands because of projects in adjacent areas. For example, when a road is being put in, the storm drain prevents the water from going down the hill so the wetland dries out. Another example, when they blast a wetland and the water table lowers, the wetland loses its water and dries out. Also the practice of putting stormwater detention basins in wetlands needs to be addressed. These rules micromanage small permitting without looking at the bigger, broader picture. We were hoping to see major changes because we see wetland losses still extremely high, even though the permitting sector shows relatively minimal impact. The reason is because we are not looking at secondary impacts. (80)

7. COMMENT: We believe that the Department is missing an important chance to correct deficiencies and problems in the current wetlands program. Although the Wetlands Act was a landmark piece of legislation in 1988, we have learned more about the importance of wetlands since then. New Jersey has experienced the consequences of losing these important areas firsthand, as one record flood after another destroys property and threatens lives, and stream quality continues to decline in many areas of the state. We need to address and correct the significant flaws in the wetlands program to bring it up to date with our current understanding of wetlands protection.

The most important problem with the Wetlands rules as currently proposed is that they do not look at secondary and cumulative impacts within a watershed. Wetlands permits are given out on a case-by-case basis, as opposed to being examined according to what the impact will be on the totality of the watershed. Secondary impacts from those permits, such as additional runoff and non-point pollution, are also not considered. (80)

RESPONSE TO COMMENTS 6 AND 7: The Department acknowledges that there are differences between the wetlands data developed through the permitting program and that generated from the land use/land cover mapping project. There are several reasons for these differences. First, the land use/land cover layer was mapped from interpretation of aerial photography while the permitting program data were generated from onsite inspections. While air photo interpretation is an extremely useful tool in natural resource

management, some of the information which is used to make a jurisdictional wetlands determination during an onsite investigation, for example, soil borings or depth to ground water, cannot be generated during the photo interpretation process. Soils maps are used as a collateral source in the land use/land cover wetland mapping process, as are several other types of data, such as topographic maps and historic maps. However, information from these collateral sources, can never replace information that is gained from a site-specific wetlands jurisdictional investigation. In addition, the photos used to generate the land use/land cover data represent a fixed point in time, and the ground conditions captured in the photos, particularly in regard to the presence or absence of standing water or soil saturation which are key photographic wetland indicators, may or may not be typical of the area being mapped over most years. Consequently, there are areas mapped as wetlands in the land use/land cover data, which will be determined not to be wetlands when an onsite jurisdictional determination is undertaken.

Second, the land use/land cover mapped wetlands data include both naturally vegetated wetlands, and several classes of disturbed wetlands. These disturbed areas are included because they represent potential wetland sites based on visible saturation on the photographic imagery, their location in the landscape, and secondary data such as soils maps. These disturbed areas often do not support typical wetlands vegetation, and may not be providing typical wetland functions although mapped from the photography. Development on such a site would appear as a wetland loss using the land use/land cover data; however, an onsite field inspection prior to development may show these disturbed wetland areas were not, in fact, wetlands under the jurisdictional criteria. Consequently, they would not be counted in the Department's permitting statistics.

Third, the wetland loss numbers, based on the land use/land cover data, include changes in wetlands due to both natural and artificial development processes. Wetlands naturally transition to other land use types. For example, vegetated wetlands along a watercourse shoreline often transition naturally to open water. These natural changes are included in the total wetland loss number reported from the Department's land use/land cover data. Such wetland changes would not be reflected in the permit data.

Thus, due to these multiple factors, there will always be differences between wetlands data generated from aerial photo interpretation and that generated from onsite field investigations. The Department is working towards reducing these discrepancies, by improving both the mapping process and the permit tracking process; but because the intent of the two processes is fundamentally different, there will always be differences in the wetlands data generated from both approaches.

To further facilitate the assessment of the permitting program, and the overall status of wetlands statewide, the Department is adopting the requirement that applicants provide a determination of the total area of wetlands on the site at the time the permit application is submitted. This is intended to collect additional on-the-ground statistics regarding the actual extent of wetlands on individual sites and to contribute to the collective knowledge regarding the amount of wetlands statewide.

The Department also acknowledges that more is known about the importance of wetlands than was known when the FWPA became law in 1987, and has worked to make the rules more protective of these resources. The FWPA directs the Department to regulate specific impacts to a freshwater wetland: removal, excavation, disturbance or dredging; drainage or disturbance of the water level or water table; dumping, discharging or filling with any materials; driving of pilings; placing of obstructions; and the destruction of plant life. The Department also addresses development with the potential to adversely affect wetland hydrology, flooding, or stream quality through other rules. For example, previous stormwater management practices allowed stormwater to be collected on a site, retained in one location, and discharged to a surface water feature. Such practices could result in denying a natural source of hydrology to a wetland on or offsite. The Stormwater Management rules at N.J.A.C. 7:8 now require stormwater to be retained onsite and encourage the use of vegetation for more natural retention. This newer methodology may also provide positive benefits to wetlands by preserving the source of hydrology while protecting wetlands from stormwater contaminants. In another example, under the water allocation permitting program, the Department evaluates potential impacts to water bodies and wetlands in the area to be affected by placement of large capacity (that is, greater than 100,000 gallons per day) ground-water diversions.

8. COMMENT: The Highlands Act gives the Department authority to restrict permitting in the Highlands. The Department should look at doing something stronger for the Highlands area because wetlands in the Highlands preservation area are considered Highland waters and get stronger protection. (80)

RESPONSE: Activities in wetlands in the Highlands are already limited under the Highlands Water Protection and Planning Act (Highlands Act), N.J.S.A. 13:20-1 et seq. and the Department's implementing rules at N.J.A.C. 7:38. In the Preservation Area, the only activity permitted in Highlands open waters, which by definition includes wetlands, or their 300-foot buffer is linear development for which there is no feasible alternative (see N.J.A.C. 7:38-3.6). Consequently, the only acceptable proposed activity in wetlands in the Preservation Area is linear development for which a full alternatives analysis is required, and for which mitigation is required if approved. Since the Highlands Act was enacted in 2004, there have been no Highlands Protection Act Approvals (HPPAs) issued under N.J.A.C. 7:38 for activities in wetlands in the Preservation Area.

9. COMMENT: The rules as proposed will impact existing property rights, reducing, and in some cases eliminating, the individual's right to use property. Although identified in part as administrative changes, there are proposed definitional changes that expand the scope of the permit requirements and increase the application requirements for permits. A number of the amendments will directly affect individual residential properties that may be subject to wetland and conservation easements by further limiting mowing, gardening and other related activities. Action allowed under the general permit program will be further restricted. These are not regulatory changes based on scientific principles. These are regulatory changes directed at residential property owners, designed to reduce their existing ability to use property, whether gardens or lawns. A further review of these changes, with consideration of the fact that the proposal is directed toward existing development, is appropriate. There is a need to recognize the obligation of property owners, whether as a result of leases, community rules, or by-laws, that require certain maintenance activities and amenities. Finally, there are safety concerns that may arise

when property is not maintained. Specifically, long grass in yard areas attracts animals and insects, including ticks. Trees located in these areas may require removal.

The revisions to the general permit program, both with respect to scope and complexity, will not only increase the number of applications, but also increase the costs and time for processing. As noted above, a number of these changes are directed at residential properties, including land-leased communities and other types of common ownership. The result will be additional costs placed directly on the homeowners, once again, increasing the cost of homeownership and maintenance in New Jersey. This aspect of the regulation should once again be evaluated. (22)

RESPONSE: The amendments do not expand the scope of permit jurisdiction or further limit the use of property. Activities on property within conservation restrictions have been limited in this manner since the Department began requiring conservation easements or restrictions in 1989. At that time, the Department enabled applicants to change the shape of a transition area by obtaining a transition area waiver, making it critical that the remaining transition area be maintained in its natural condition. Without the ability to ensure that such conditions continue, the Department is unable to make the finding that the remaining transition area is providing the important values and functions for the protection of the adjacent wetland. If the Department cannot ensure that such protections are afforded, the FWPA does not allow any alteration to the transition area.. Consequently, since 1989, the Department has been requiring placement of a conservation easement or restriction upon approval of a transition area waiver (see former N.J.A.C. 7:7A-6.1(h)). By including this requirement at N.J.A.C. 7:7A-2.12, the Department did not change the requirement or its effects, but rather made the requirement more prominent and standardized language. The conservation restrictions and easements themselves already limited the activities to be conducted in a restricted area, but that information was not specifically described in the rules. It is also important to have such language in the rules because transition areas may affect single family properties. Developers frequently design projects maximizing the use of land and leaving future property owners little if any non-regulated areas upon which to conduct future activities. Consequently, it is of critical importance that the limits on such properties be clearly

outlined in a conservation restriction or easement so that unsuspecting purchasers will not buy a property that is not suited for their needs.

Finally, it is unclear why the commenter thinks that changes to the general permits will result in additional permit applications. The need for a general permit depends upon the property, onsite wetlands, and the proposed project. The adopted rules do not require any permit that was not previously required. Concerns about the need to provide mitigation for general permits are addressed in response to comments 180 through 183, below.

10. COMMENT: We are concerned that if these rules are adopted: 1) significant cost and material time delays will be added to County projects; 2) the County's plans for further development of a County park system will be frustrated; and, 3) agriculture, a $135 million industry in Burlington County, may be negatively impacted. In considering the implications of these proposed regulations, we must conclude that the cost to the taxpayer will far outweigh the environmental benefit that may be realized if these rules are adopted.

County and municipal governments, school boards, and water and sewer authorities take on a multitude of development/construction projects in fulfillment of their obligations to the public. In the planning and design of such projects, avoidance of wetlands is always a critical element. Unfortunately, in many circumstances, an alternative to disturbing wetlands does not exist, or the alternative is cost prohibitive. Adoption of the rules as proposed will add tremendous cost to projects in which this is the case. These costs will be borne by taxpayers and/or rate payers of the utility authorities. State regulatory agencies must consider the cost burden of its regulations on other government entities. Absent such considerations, New Jersey residents will never see relief from the high property taxes with which they are presently burdened.

While this is not all inclusive, the following represents the most significant amendments contained in the rule proposal that the County objects to because of cost implications. 1) The requirement for mitigation, valued by the NJDEP at $300,000.00 per acre, under general permits, and for transition area waivers approved under individual permits; 2) The reduction in the area allowed to be disturbed under certain general

permits, from 1 acre to 0.25 or 0.50 acres. This reduction in the allowed area of disturbance for general permits will result in the need for an increased number of individual permits. Not only is this an additional expense, but the time involved in obtaining an individual permit will cause serious delays in the start of many projects, which will likely translate into increased costs; 3) The limitation on the number of permits that can be issued for activities on lands once held in common ownership; and 4) Inclusion in the requirements for transition area waivers of the recording of a conservation easement and fencing.

We are also concerned that, if adopted, the rules will have a significant impact on our ability to develop open space parcels for the use and enjoyment of the public. We note that in enacting many of the State's water quality protection laws, the Legislature intended that water quality be protected and enhanced for recreational purposes. The proposed regulations will severely limit the ability of county and local governments to provide such recreational opportunities to their residents. The citizens of New Jersey have been strong supporters of dedicated tax revenues for the preservation of open space, and the creation of public parks and trail systems. They certainly should not be denied access to, and use of, the assets they invested in. (35)

RESPONSE: When the FWPA was passed in 1987, the intent was to take vigorous action to protect the State's inland waterways and freshwater wetlands, since to that point inland wetlands were protected only indirectly by the State. Although the FWPA established a framework for wetland permitting, the goal was not to allow permitting to incrementally eliminate the wetlands remaining in the State. General permits in particular are only to be issued by the Department if it can make a finding that they will have only minimal cumulative adverse impacts on the environment. After almost 20 years of implementation, the Department can no longer make that finding without requiring some mitigation for certain general permits. The Department is not adopting the mitigation requirement as proposed but is proposing a different mitigation requirement, elsewhere in this Register. Please see responses to comments 180 through 183 below for more discussion about the Department's decision regarding mitigation. The commenter should also note that the Department did not attach a mitigation requirement to the trails and

boardwalks general permit because it does not appear that it is having cumulative impacts. This permit is most commonly used by public agencies for park facilities. The only general permits for which impacts were reduced from one acre to 0.5 acres were general permit 2 (underground utility lines) and general permit 21 (above ground utility lines). The Department is adopting these amendments as proposed. It is unclear why these permits would have an impact on open space or park development. The provisions of the FWPA are not new and the amendments to the rules do not significantly alter their implementation. Rather, they re-emphasize that wetlands provide an important environmental benefit to the public and should be considered when planning any type of development project.

11. COMMENT: We are concerned that the proposed rules will have a negative impact on agriculture. The rule will place additional responsibilities on the Natural Resource Conservation Service (NRCS) to prepare farm conservation plans that will serve a regulatory function within the context of the Freshwater Wetlands Protection FWPA Rules. It is unclear if the NJDEP has the necessary assurances that NRCS, a federal agency, has the needed manpower to prepare and monitor the farm conservation plans that will now be required. Nor has the NJDEP evaluated the impacts to agricultural operations if NRCS cannot provide these services. In addition, there are new requirements to qualify for exemptions for the construction of new farm roads, maintenance of farms roads and the construction of new farm ponds. It is not clear if the added requirements will hinder the ability of farmers to qualify for such exemptions, but it will certainly increase the burden on farmers to demonstrate they qualify. The public has made a significant investment in farmland preservation over the past twenty years. With over 160,000 acres of preserved farmland, and 1,620 preserved farms in the state, it is extremely important that government at all levels acts to ensure that agriculture remains a viable industry. (35)

RESPONSE: The Department has worked with farmers on an as needed basis to ensure that their activities comply with the agricultural exemptions under these rules. Perhaps because it has been almost 20 years since enactment of the FWPA, and because the

nature of farming in New Jersey is changing, some farmers appear to be unaware of the limitations on the agricultural exemptions imposed by the FWPA. Consequently, the Department has had to take enforcement action in order to bring certain agricultural activities into compliance with the limitations in the FWPA, and considers it necessary to more precisely describe the limitations in the rules. Through the enforcement process, the Department has required farmers to work with the NRCS to obtain a farm conservation plan that includes new farm roads or ponds that will meet the Department's criteria for an exemption. The Department is not changing the rules to require farmers to obtain exemption determinations nor is the Department requiring farmers to routinely submit evidence of a farm conservation plan to the Department. However, if there is any question regarding what constitutes an exempt activity, the rules can be consulted. Therefore, the Department does not anticipate that there will be any change in the number of farms seeking advice or farm conservation plans from the NRCS.

12. COMMENT: We are currently preparing to present the necessary documents for Plan Endorsement to the New Jersey State Office of Smart Growth. We hope to receive assurance that once Plan Endorsement is received from the Office of Smart Growth, the NJDEP's rules that are in effect at that time will apply to the endorsed plan, and not be subject to change should the NJDEP revise their rules shortly after we receive endorsement from the State. (45)

RESPONSE: It is unclear how obtaining plan endorsement could be affected by the FWPA rules. The rules apply to specific activities proposed in or adjacent to freshwater wetlands or their transition areas. Plan Endorsement describes the township's overall goals for future growth, development and preservation. If the township has obtained permits for a specific project, those permits will remain valid until they expire after five years. If future activities are proposed in wetlands or wetland transition areas, permits will be required and the applicant will have to comply with the rules in effect at that time.

13. COMMENT: In prior rulemakings the Department rightfully established a number of general permits to enable certain activities to be subject to less rigorous application

requirements and to be reviewed more quickly by the Department, yet still be protective of the environment. Projects that qualified for general permits were recognized to have, by their size or nature, minimal impact to the State's wetlands and transition areas. A number of those general permits are directly applicable to utility activities, particularly linear development projects such as those associated with the construction, use, maintenance, and upgrading of the utility infrastructure. This infrastructure is necessary for utilities to be able to provide, in a safe and reliable manner, essential products and services needed by all of the citizens of New Jersey.

The present proposal, through the imposition of mitigation fees to some general permits, the reduction in the size of wetlands disturbance which disqualifies some projects from qualifying for a general permit, the automatic imposition of a conservation restriction requirement on transition area waivers, and other proposed changes, makes these general permits more like individual permits. This defeats the original purpose of general permits. Additionally, some of the proposed changes will actually have the effect of causing greater disturbance to wetlands and transition areas.

We request that the Department recognize the unique nature and public importance of utility projects. (48)

14. COMMENT: The proposed Freshwater Wetlands rules (N.J.A.C.7:7A) directly conflict with the Board of Public Utilities (BPU) Vegetative Maintenance Standards (N.J.A.C. 14:5-8.1 et. seq. [proposed amendments revise citation to N.J.A.C. 14:5-9.1]). The proposal prohibits utilities from completing crucial vegetative maintenance activities in a timely manner which are required by New Jersey Board of Public Utilities ("NJBPU") regulations, since these proposed regulations now prohibit maintenance activities in transition areas without a permit. The Vegetation Maintenance Regulations, N.J.A.C. 14:5-8.1 et seq., require immediate maintenance of vegetation on high voltage transmission lines as crucial to maintain safe and reliable electric service. The proposal further impedes our ability to maintain these high voltage transmission corridor right-of-ways and will directly and negatively affect reliability. We propose that "vegetative maintenance activities" around utility structures and within utility rights-of-way be

included as an exempt activity, if that activity is required by the Vegetation Maintenance Regulations enacted by the NJBPU.

Furthermore, the Department of Energy (DOE) and Federal Energy Regulatory Commission (FERC) have named New Jersey as a National Interest Electric Transmission Corridor in need of continued maintenance and upgrades in order to reduce a congestion of electric transmission. Therefore, we believe that these proposed regulations should take into account these important upgrades and work together with these other agencies to allow this vital work to be completed without the need for a long permitting process. (4, 24)

15. COMMENT: The proposed regulations, as they would apply to much of New Jersey's electric utility transmission and distribution infrastructure, are an unexplained and unjustified departure from the current FWPA regulations. Moreover, the proposed regulations will hinder development of much needed electric transmission infrastructure by increasing the regulatory obstacles an electric utility must navigate to site such public service infrastructure – or "linear development" – projects. While it appears that the principal motivation for the proposed regulations is adverse environmental impact from commercial and residential real estate development, the Department's proposal goes far beyond that purpose and will have potentially debilitating effects on the public service infrastructure that electric utilities have a mandate to provide under New Jersey law.

It is important to consider the proposed amendments to the Department's FWPA regulations as they relate to electric utility infrastructure. In that regard, to satisfy their statutory obligations to serve the homes, businesses, schools, etc., of their customer-ratepayers, New Jersey's electric utilities are often required to have power lines, pipes and other conduits that traverse wetlands and associated transition and upland areas. Because linear development activity has minimal (and often no) adverse environmental impact, it should be exempt from the new requirements that would arise under the proposed amendments. The absence of significant environmental impact from public utility infrastructure is not hyperbole or wishful thinking, but rather a reality that the Department itself has repeatedly recognized.

More specifically, the Department's recent (February 2006) readoption of the Flood Hazard Act regulations reaffirmed the Department's 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." 38 N.J.R. 947, 949/1 (Feb. 6, 2006). Along the same lines, the Department emphasized that activities such as "the placement of utility poles, jacking of utility lines beneath channels," etc., "when done properly, do not contribute to . . . environmental degradation." The Department's conditional exemption of linear development projects from various stormwater management requirements, N.J.A.C. 7:8-5.2(d) is very similar. Thus, as the Department explained, "[t]he impact of the change in land uses for utility lines and permeable areas are minimal, and the majority of the impact will be mitigated by the dispersed nature of the impact." 35 N.J.R. 119, 131/1-2 (Jan. 6, 2003). In adopting those same regulations the Department also emphasized that utility linear development structures such as power lines that cross special water resource protection areas are "unavoidable" and therefore allowable. 36 N.J.R. 670, 716/2 (Feb. 2, 2004). (43)

RESPONSE TO COMMENTS 13 THROUGH 15: As stated in response to comment 10, when the FWPA was enacted in 1987, the intent was to take vigorous action to protect the State's inland waterways and freshwater wetlands and not to allow permitting to incrementally eliminate the wetlands remaining in the State. General permits in particular are only to be issued by the Department if it can make a finding that they will have only minimal cumulative adverse impacts on the environment. After almost 20 years of implementation, the Department can no longer make that finding without some requirement for mitigation. However, the Department is not adopting the mitigation requirement as proposed but is reproposing a different mitigation requirement, elsewhere in this Register. See response to comments 180 through 183 below about the Department's decision regarding mitigation.

The FWPA at N.J.S.A. 13:9B-2 states that it is the policy of the State to preserve the purity and integrity of freshwater wetlands from random, *unnecessary* or undesirable alteration or disturbance (emphasis added). Although the Department is not adopting the

explicit requirement to minimize impacts to wetlands (see response to comments 159 through 163 below), it is consistent with the FWPA to determine whether an impact proposed in a wetland is necessary or if it can be conducted outside of the wetlands on the site. It is unclear to the Department how requiring a conservation restriction or easement after a transition area waiver has been approved makes a general permit more like an individual permit. The conservation restriction is a condition placed upon an approved permit and not a criterion for permit approval. The difference between obtaining a general versus an individual permit is the criteria for approval and not conditions placed upon approved permits, since the Department can place the same conditions on both types of permits as necessary to comply with the FWPA or federal criteria.

The Department has worked and will continue to work with utilities to accommodate their unique needs, for example, by including language in proposed conservation restrictions or easements facilitating maintenance and other activities that utilities may need to perform in those rights-of-way.

The Department disagrees that utility activities, such as placement of utility poles and jacking of utility lines, are exempt from the Flood Hazard Control Area Rules, N.J.A.C. 7:13. N.J.A.C. 7:13-7.2(c) requires a permit-by-rule for these activities. While a permit-by-rule implies minimal environmental concern for these activities, the activities are not exempt and must comply with the conditions in each permit-by-rule. Relative to the Stormwater Management Rules, N.J.A.C. 7:8, both above and below ground utility lines are presumably exempt because the main focus of the those rules is to regulate placement of impervious cover and above and below ground utility line construction results in little or no impervious cover. However, the FWPA regulates in wetlands the removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind; the drainage or disturbance of the water level or water table; the dumping, discharging or filling with any materials; the driving of pilings; the placing of obstructions; and the destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees. Consequently, the activities undertaken by utility companies, which usually involve excavation, placement of structures and clearing are regulated activities when conducted in wetlands.

16. COMMENT: We obtained necessary governmental approvals for our project, including a Freshwater Wetlands Letter of Interpretation ("LOI"), a transition area waiver, and General Permits 6 and 11, all valid until April 2009. We also received Delaware & Raritan Canal Commission ("DRCC") Storm Water Management approval for a ten year period expiring in April 2014 and a Stream Encroachment Permit valid until September 2008. In connection with the DRCC permits and the wetlands permits, we agreed to and conveyed substantial conservation easements adjacent to the on-site wetlands and to the Stony Brook.

Although we have not begun construction on the 2003 project, we have expended considerable time and energy in obtaining the necessary approvals, as well as millions of dollars in planning and building costs for current and long-term business needs. In order to plan in a fiscally and environmentally responsible manner, we require predictability and stability in the regulations which govern our projects. The proposed regulations potentially undermine our efforts with little or no benefit to the environment.

We recognize the importance of continued vigilance in the protection of New Jersey wetlands. However, increased costs and administration will only serve to hinder our sustainable progress, and jeopardize the significant investment made in New Jersey and the economy of the region with little or no benefit to the environment. More specifically, the Department should recognize the need to protect significant investment in vested permit approvals by providing clear "grandfathering" provisions in the FWPA. (74)

RESPONSE: So long as the permits remain valid and the permit conditions are complied with, the Department does not reexamine permits that have been approved under a previous set of rules. However, upon expiration of a permit, if a new permit is required the Department will require compliance with amended or new rules. It is the practice of the Department's Division of Land Use Regulation that applications submitted before amended or new rules are adopted, and that have been declared complete, are reviewed under the rules in effect at the time of application completion. All other applications will need to comply with the amended or new rules. The Department believes that a permit

term of five years is sufficient in most cases to complete a regulated activity. However, in those cases where more time is needed, the rules at N.J.A.C. 7:7A-14.6 provide for one, five-year extension of waivers, individual and general permits.

17. COMMENT: We are disappointed that there was no pre-proposal notice and consultation with the regulated community as it would have afforded an opportunity to identify potential issues and, where appropriate, address them in advance of publication. We urge the Department to adopt a more pro-active, consultative posture towards those whose interests it regulates. (4, 27, 29, 41, 64)

18. COMMENT: As we have written in past comments submitted to the NJDEP, we urge the Department to convene stakeholder meetings with representatives of the business and construction sectors prior to proposing significant revisions to major chapters of the State's environmental regulatory code. We believe meeting with the regulated community in a stakeholder meeting setting would provide the NJDEP with meaningful dialogue and a balanced approach as the Department considers revising or re-writing major areas, such as the Freshwater Wetlands Rules. (3)

19. COMMENT: We are disappointed and concerned that the proposed rules were published with no input from the regulated community. We are very disturbed that the new rules were expedited through the internal review process without consultation with the regulated community, particularly since we have been told that numerous discussions were held with representatives of the environmental community. The proposed amendments, if adopted, will impose significant new regulatory, financial and paperwork burdens on property owners, developers and DEP staff. Like most of the Department's recent proposals, the proposed amendments make no distinction as to where we are trying to encourage development, and they will further discourage investment in New Jersey.

In addition, we agree with and echo the comments submitted by the New Jersey Builders Association. (55)

20. COMMENT: Rule proposals in New Jersey are controlled by the Administrative Procedure Act (APA). According to the APA, once the DEP publishes a proposed rule for public comment it cannot make any substantial changes between proposal and adoption. Leadership claims they are short staffed and cannot afford to re-propose rules to allow for significant changes, therefore, it is very unlikely that the DEP will entertain significant changes to the wetland rules between proposal and adoption regardless of public comment. The DEP should not treat the public process as a burden and procedural hurdle nor should it take advantage of the APA by proposing controversial changes close to deadlines for regulatory programs. Instead the DEP should anticipate that rules that make significant changes will generate sound comments that if incorporated into the proposals will create a better rule that will benefit both the environment and the public. (64)

RESPONSE TO COMMENTS 17 THROUGH 20: The Department's rulemaking process is governed by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq. Under the APA, the FWPA rules expire every five years unless readopted or extended by action of the Governor. The Department assesses its rules on an ongoing basis in order to identify rule provisions that are problematic or unclear to permitting or enforcement staff or to the public during implementation. Further, because of the need to maintain compliance with all Federal standards to continue implementation of the Department's wetland program in place of the Federal 404 program, the Department also maintains frequent contact with the Federal EPA and ACOE to monitor changes to the Federal program that may result in the need to change the Department's rules. The Department values public input, and may reach out to the public for input n advance of a formal proposal if it appears that such outreach would result in helpful information with regard to how the Department might exercise discretion or to seek comment on potential implementation options. However, if a requirement is mandated by Federal statute and there is no flexibility for implementation, public outreach would likely not be helpful. In the case of this rulemaking, the Department determined that the amendments were required to meet Federal mandates or else were essentially clarifications or enhancements of existing requirements rather than new substantive requirements of the sort for which pre-proposal outreach might be helpful.

The Department does not view the APA as a burden but as the mechanism to ensure that rules are done in a standard, fair and predictable manner. The limitations imposed by the APA on changes made at adoption are intended to ensure that the public has a meaningful opportunity to comment on prospective changes. Also, the Department does undertake additional rulemaking after adopting rules where changes have been suggested during the public comment period and determined appropriate but could not be made on adoption. In fact, the Department is publishing a concurrent proposal in conjunction with the rules being adopted herein to seek comment on certain additional changes to the rules.

21. COMMENT: Among its legislative findings and declarations, the Freshwater Wetlands Protection FWPA states that "to advance the public interest in a just manner the rights of persons who own or possess real property affected by this act must be fairly recognized and balanced with environmental interests ..." (N.J.S.A. 13:913-2). In contrast to this legislative mandate, the proposed FWPA amendments place significant new restrictions on property owners. The proposed requirements, in particular those regarding mitigation, will inevitably increase costs and further deter investment in New Jersey. (4, 27, 29)

RESPONSE: As explained in response to comment 10, when the FWPA was enacted in 1987, the intent was to take vigorous action to protect the State's inland waterways and freshwater wetlands and not to allow permitting to incrementally eliminate the State's remaining wetlands. General permits in particular are only to be issued by the Department if it can make a finding that they will have only minimal cumulative adverse impacts on the environment. After almost 20 years of implementation, the Department can no longer make that finding without some requirement for mitigation. Further, the FWPA at N.J.S.A. 13:9B-2 states that it is the policy of the State to preserve the purity and integrity of freshwater wetlands from random, *unnecessary* or undesirable alteration or disturbance (emphasis added). Consequently, although the Department has determined that it is not necessary to adopt an explicit minimization requirement for general permit reviews, it is consistent with the

FWPA to consider whether impacts to wetlands are necessary. See also the response to comments 159 through 163. Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

Finally, in the years since the FWPA was passed, available developable land has become scarcer, thus increasing development pressure on the State's remaining freshwater wetlands resources. Consequently, it is necessary to ensure that wetland rules are protective enough to discourage indiscriminate use of the State's wetlands resources for development.

22. COMMENT: If the DEP had drafted its rules in cooperation with the regulated community and considered the intent of smart growth principles established in the State, the proposed rules would further the need to clean up the State's already polluted ecosystems. The rules would have been concise and predictable. (64)

RESPONSE: The Department is required to consider smart growth principles when proposing all rules. Smart growth principles direct that development should be focused in areas already containing infrastructure, such as town centers and urban areas, and that undisturbed land, such as properties containing freshwater wetlands, should be considered less desirable locations for development. The Department's freshwater wetlands rules clearly promote these principles by strongly discouraging development of areas containing freshwater wetlands and their transition areas thereby encouraging the development and redevelopment of non-wetland areas. It is unclear what else the commenter believes should have been done to better follow smart growth principles.

23. COMMENT: DEP leadership has framed the proposed changes to the rules as "housekeeping" or "bug fixing" suggesting the DEP planned to implement refinements of the existing program. However, the proposed rules fundamentally change the way DEP regulates wetlands. (64)

RESPONSE: The most significant of the amendments are the standardization of the process for conservation restrictions; the requirement to perform mitigation under certain general permits; the new general permit to accommodate non-motorized multiple use paths, especially multi-use bicycle paths receiving State or Federal funding; the requirement for archaeological review where a site is likely to have historic resources and explicitly forbidding demolition of historic resources without a permit; the new standard condition requiring notification seven days before the commencement of construction and requiring proof that all conservation restrictions have been properly filed; the requirement to request in writing a permit modification before a permit is transferred from one owner to another and requiring proof that all conservation restrictions have been filed; substituting the Department for the Wetlands Mitigation Council as the responsible agency for review and approval of commercial mitigation banks; and adding formulas for calculating the amount of a monetary donation if this option is chosen to satisfy the mitigation requirement for certain general permits. While all of these changes are substantive, they either build upon or refine existing requirements. For example, the requirements for conservation restrictions and easements are consolidated into one subchapter, but the requirement to provide a conservation restriction has been in the rules since 1989 when the transition area provisions were first promulgated. In another example, although the rules will now require that applicants provide the appropriate study with an application that has the potential to impact historic resources, historic preservation requirements have been part of the program since 1994 when the Department assumed the Federal 404 program.

Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

Subchapter 1 General Information

N.J.A.C. 7:7A- 1.4

24. COMMENT: The term "Phase IA historical and archaeological survey" refers to "an archaeological survey the purpose of which is to identify resources completed by an archaeologist whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and related guidance ..." 39 N.J.R. 3620.

The Department should be aware that the defined scope of the survey is not available. It is not identified or explained on the HPO website, and in any current HPO publications. An applicant should not be responsible for conducting a study that has not been clearly defined. These comments are also applicable for the proposed term "architectural survey." (4, 27, 29)

RESPONSE: The Historic Preservation Office routinely provides guidance regarding the appropriate scope of work for Phase IA archaeological surveys upon request. In addition, the Historic Preservation Office will add the guidance regarding the appropriate scope of work for Phase IA archaeological surveys to its website. The architectural survey guidelines have been on the Historic Preservation Office's website since 2001. They are available at: http://www.state.nj.us/dep/hpo/1identify/survarcht.htm .

25. COMMENT: “Conservation restrictions or easements” should be amended to reference N.J.S.A. 13:8B-1 et seq, the “New Jersey Conservation Restriction and Historic Preservation Restriction Act.” We strongly recommend that the definition in these wetlands rules also match that of N.J.S.A. 13:8B-1 et seq. and include the words “an interest in land less than fee simple absolute, stated in form of a right. . .“ after the words “conservation restriction.” (20, 85)

RESPONSE: The Department proposed and is adopting the amendment that adds "or easement" to the term "conservation restriction" but the definition itself is not amended. The definition of the term is drawn nearly verbatim from the definition of "conservation restriction" as it appears in the New Jersey Conservation Restriction and Historic Preservation Restriction Act at N.J.S.A. 13:8B-2b. The Department does not believe that the phrase referenced by the commenters, although it appears in the statutory definition, would add substantively to the list in regulatory definition of the types of instruments in

which a conservation restriction can be incorporated. The Department also notes that the standard language used in its conservation restrictions and easements does refer to N.J.S.A. 13:8B-1 et seq.

26. COMMENT: "Discharge of fill material" should be modified to exempt stump removal done as part of utility vegetation management activities. The proposal would then read: "12. Stump removal, except that done by or for a utility as part of the utility's right-of-way vegetation management activities." The reason for this is that utilities must maintain hundreds of miles of rights-of-way each year. Part of this activity includes vegetation maintenance that is necessary to protect the utility's infrastructure and to comply with the required clearance standards imposed by various regulatory agencies, such as the NJ Board of Public Utilities. While stumps are not routinely removed as part of the vegetation maintenance program, to require a utility to obtain a permit for those stumps that do need to be removed only impedes the vegetation maintenance program while authorization is sought for an activity that has minimal environmental impact. (43, 48)

RESPONSE: The FWPA regulates the destruction of plant life which would alter the character of a freshwater wetland (see N.J.S.A. 13:9B-3). Consequently, the removal of trees, to the extent that doing so alters the character of the wetland, regardless of whether or not the stumps are removed, is a regulated activity. If the Department permits the removal of trees under a wetlands permit, whether for maintenance activities or for new underground or above ground utilities, stump removal is approved as well. The Department added stump removal to the definition to clarify for the purposes of the silvicultural activities exemption that stump removal results in the discharge of fill material and is therefore regulated and not covered by the exemption.

27. COMMENT: "Fair market value" needs to be clarified to explain that the fair market value must reflect all regulatory constraints on development potential, and that the value should be limited to appraisal value, not speculative value. (20, 85)

RESPONSE: As stated in the summary, the definition for fair market value is based on the definition used in the real estate profession. Therefore, the definition of "Fair Market Value" includes the items that the commenter is concerned about, such as regulatory constraints on development potential.

28. COMMENT: The proposed amendment to the term "person" would extend liability beyond the scope necessary to accomplish the goals of NJDEP, and the Freshwater Wetlands Protection Act (FWPA). A stated purpose of the FWPA is to balance the rights of persons who own or possess real property affected by this act, with environmental concerns. Generally the corporations, not the officers or directors directly, own the property subject to the regulation. Imposing personal liability on corporate individuals does nothing to promote balance under the FWPA. (74)

RESPONSE: As stated in the summary, the Department is proposing to amend the definition of "person" to include corporate officers or officials since they may also be responsible for the submittal of applications to the Department. Corporate officers or officials should be responsible and liable for submittal of any potentially incomplete, false, misleading or erroneous information as part of the application. Further, every applicant or agent preparing an application for a permit under the FWPA rules signs a statement at the end of the application which says, "I certify under penalty of law that I have personally examined the information submitted in the document and all attachments and that, based on my inquiry of these individuals immediately responsible for obtaining and preparing the information, I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment." The amended definition is consistent with this requirement. Finally, the Department believes the definition is consistent with the FWPA because complete and accurate applications enable the Department to more efficiently and effectively implement the wetlands protections that the law and these rules establish.

29. COMMENT: The proposed exclusion of a 50-foot wide depression existing in a forested condition from the definition of “swale” will make it impossible to fill these areas. In many cases this will have the effect of enlarging the amount of land contained within the wetlands buffer if a swale is no longer ordinary resource value wetlands thereby increasing the amount of land that cannot be developed. (32)

30. COMMENT: The proposed amendment to the term "swale" would exclude depressions that are "naturally occurring, contains palustrine forest, and is located within an upland forest." 39 N.J.R. 3620. The summary states that the Department "believes" that depressions that meet these criteria are "a critical component of the overall forest system." 39 N.J.R. 3588. As this is conclusory, the Department should provide the underlying basis for this statement. (4, 27, 29)

RESPONSE TO COMMENTS 29 AND 30: The ordinary resource value classification implies that a wetland is of minimum ecological value and therefore merits minimal protection. Forest land, and forested wetlands contain a high ecological value. Removing forest cover has several adverse effects on water quantity and quality. Deforestation results in diminished recharge (that is, a reduction in the amount of water entering the aquifer), increased runoff, and increased turbidity in streams. Forests enhance recharge by lowering ground temperatures which helps to keep water in the soil instead of allowing it to evaporate, providing roughness to the ground that traps runoff, and by having a relatively short growing season. The New Jersey Geological Survey ground-water-recharge model, which relies on a soil-moisture budget, demonstrates that for the same soils, ground-water recharge is highest in forests and shrub areas. Higher recharge results in more abundant and steady ground-water discharge to streams (known as base flow), which is water of high quality.

From a water-quality perspective, a US Geological Survey (USGS) study of the quality of streams in the Upper Delaware River Basin in New Jersey (USGS Fact Sheet FS-090-02) concluded that the, “concentrations of most chemical constituents studied and levels of fecal coliform bacteria were lowest, and concentrations of dissolved oxygen were highest, in streams who's watersheds contain the most forested or undeveloped

land." Other USGS studies, both nationally and in New Jersey, have concluded that levels of nutrients are lowest in forested areas as well. Where nutrients are present, water quality is poorer. These three constituents - dissolved oxygen, coliform bacteria, and nutrients – are good indicators of general water quality. Forest cover also lowers water temperatures, which in beneficial to in-stream organisms because cold water can hold greater amounts of oxygen than warm water. Forests prevent contaminants from reaching surface water by stabilizing the land surface to prevent fine particulates containing contaminants from entering streams. Consequently, palustrine forest is valuable and merits at least a 50 foot buffer.

31. COMMENT: "Vernal habitat" qualifies the presence of obligate or facultative species "immediately adjacent to" an area of ponded water. How is "immediately adjacent" defined? (60)

32. COMMENT: The definition of "vernal habitat" states that a vernal habitat can occur in "or contain a" confined basin depression without a permanent flowing outlet. Obligate and facultative species may be found in "or immediately adjacent to" the area of ponded water. Although fish may be introduced into a vernal habitat through stocking, the habitat is free of reproducing fish populations throughout the year. The term "immediately adjacent to" needs to be defined. Using the term "immediately adjacent to" provides a definition which is too open to interpretation. The area defined as, "immediately adjacent to" should be scientifically based and should be species or family (that is, salamanders vs. frogs) specific, and be demonstrative that the species is using the vernal wetland or State open water for breeding. This should be clarified. (31)

RESPONSE TO COMMENTS 31 AND 32: When the Department refers to species found in or immediately adjacent to the area of ponded water, it means the species can be found in the vegetation associated with the wetlands fringe around a pool of water. The purpose of adding the phrase "immediately adjacent to" is to recognize the fact that a treefrog, for example, may call from vegetation immediately adjacent to a pool of water but not be actually located in the water. Although the Department may consider areas

immediately adjacent to a pool to include the area up to 150 feet from the pool (since if there is a wetland fringe, and threatened or endangered species associated with the wetlands, there would be a 150-foot transition area), the Department intends to classify a vernal habitat based only upon species that are located in the vicinity of the pool (based upon the species in question) and that are associated with the pool.

33. COMMENT: We support the addition of stump removal to the definition of discharge of fill material; the addition of the definition for historic preservation restriction or easement; the change to the HUC definition; the requirement for and definition of Phase 1A historical and archaeological survey; the clarification in the definition of swale which eliminates naturally occurring forested swales; and the clarification to the definition of vernal habitat that states that obligate or facultative species may be adjacent to the habitat. (20, 85)

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

N.J.A.C. 7:7A-1.7 Hearings and appeals

34. COMMENT: All appeals to permit decisions need to be open public knowledge. They should not just be sent to the governing body. The Department should require that they be published in the official newspaper of the governing body. Sending them to local governing boards means those notices can be hidden purposefully and secretively from the public, which has a right to know what in happening in their town and State. (67)

RESPONSE: There are many ways by which the public may obtain notice concerning permit decisions and appeals. Upon making a permit decision, the Department provides copies to the Municipal Clerk and Construction Official of the municipality, the Environmental Commission if it is involved in a particular case, and other parties that might have an interest in a particular project (for example, the Pinelands Commission or concerned citizens who requested notification). In addition, the Department publishes notice of the permit decision in the DEP Bulletin. The date of publication of the decision in the Bulletin starts the period during which the applicant may appeal the decision.

Consequently, a member of the public monitoring the Bulletin, upon reading that a permit decision has been made in a particular case, may contact the Department and ask to be notified if there is an appeal of that project.

In addition, all appeals received by the Department are subject to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., and can be accessed by an interested party using that process.

The FWPA rules also provide a process for notice to the public when the Department agrees to settle a matter that will result in Department approval of a regulated activity for which a hearing request was submitted. That process is set forth at N.J.A.C. 7:7A-1.7(h).

Finally, if an appeal is filed in Superior Court, the court rules specifically state who is to receive the notice of appeal: the entity whose decision is being appealed, and all persons who were parties in the trial or administrative hearing.

Subchapter 2 Applicability

35. COMMENT: The proposed buffer and transition zones modifications may have a negative impact on public water and wastewater treatment plants. Most of these facilities were constructed in low-lying areas that have wetlands on the sites. By reclassifying wetlands to exceptional status and increasing the buffer and transition zone areas, facilities will lose valuable land area in their existing footprint which is needed for additional new treatment processes that will improve the environment. Such restriction if not relaxed could inhibit the operations of the facility, make water quality improvements impossible and increase ratepayer and taxpayer costs to build whole new systems elsewhere at a much higher cost. An example of the type of processes would be nutrient control and heavy metals removal.

When wetlands are classified as exceptional and changed to a HUC 11 level rather than the usual HUC 14, there is a commensurate impact on stream classifications that has the effect of changing the treatment requirements of downstream treatment plants and making those requirements more restrictive. These changes impact capacity usage and discharge limit calculations. These changes may not be related to water quality but

are strictly language and paper changes that are part of the domino effect of this rule proposal. We recommend that a variance or a waiver process be created in the rule, at least for public water and wastewater treatment facilities, to insure that the new treatment requirements can be achieved. (34)

RESPONSE: The Department is unsure what the commenter is referring to when stating that the Department is reclassifying wetlands to exceptional status and increasing the buffer and transition zone areas. The adopted rules do not change the way that wetlands are classified as exceptional, intermediate or ordinary, nor do they change the size of the transition areas. As such, public water and wastewater treatment plants will have no less land area for expansion of treatment facilities than prior to adoption of the rules.

Also, the Department is unsure what the commenter means when referring to the Department classifying wetlands as exceptional and changing them to a HUC 11 level rather than the "usual" HUC 14, and stating that there is a commensurate impact on stream classifications that has the effect of changing the treatment requirements of downstream treatment plants and making those requirements more restrictive. The definition of exceptional resource value comes from the FWPA at N.J.S.A. 13:9B-7 and is not affected by these rules. The definition of HUC, or hydrologic unit code, refers to a location within a drainage area of a water body. HUC 11 indicates a larger subwatershed that is composed of several HUC 14 (or smaller) subwatersheds. The freshwater wetland rules use HUC designation as a means to locate mitigation for wetland impacts. That is, the applicant is required to mitigate within the same HUC 11 as the wetlands that were affected by the permitted activity. The FWPA rules do not regulate sewage treatment facilities differently from other activities or projects and therefore the Department sees no need for any waiver or variance for such facilities.

N.J.A.C. 7:7A-2.1 Jurisdiction; permit or waiver requirement

36. COMMENT: The proposed change stating that any person who manages, oversees, or works on a proposed project may share liability for work or activities that are not performed in accordance with the wetland rules should not be adopted. The reason is that

most utilities, by virtue of the services they provide, have their infrastructures located on linear developments that literally criss-cross the state of New Jersey. It is impractical and unnecessary for utilities to own all of this property in fee simple. Instead, utilities often obtain the right to construct, operate and maintain their infrastructure along these linear developments from the present property owners through easements or license agreements. If the Department adopts the proposed change, property owners may become extremely reluctant to give easements or enter into license agreements that allow others to use their property for fear of becoming responsible for the actions, or inactions, of the easement or license agreement holder. This proposal if adopted may result in property owners refusing to grant easements or license agreements, even to utilities for projects necessary for the public good, or to charge exorbitant fees for such easements or license agreements to cover the additional risk they perceive they are undertaking by allowing others to use their property. For utilities, these charges will be passed on to the utility ratepayers. (48)

37. COMMENT: Proposed N.J.A.C. 7:7A-2.1(e) states that "A permittee shall be responsible for ensuring that the permitted project complies with all requirements in this chapter. However, any person who owns the property on which the project occurs, or who manages oversees or works on the project, may share liability for work or activities that are not performed in accordance with this chapter."

This section should be clarified to read: "If the activity is proposed by and being conducted by the owner of an easement on a property, the underlying property owner shall not be responsible for permit compliance." This will place sole responsibility on easement owners, such as utilities, for permit compliance, relieve underlying property owners of liability related to actions over which they have no control, and also facilitate preparation of applications for activities in easements. This section should also read "Preparers of applications for a regulated activity shall not be liable for any work or activities not performed in accordance with this chapter as they have no control over the activities." It is not fair to implicate a preparer of an application regarding any violations over which they have no control. (31)

38. COMMENT: N.J.A.C. 7:7A-2.1(e) states that any person who owns the property on which the project occurs, or who manages, oversees or work on the project may share liability for work or activities that are not performed in accordance with the chapter. We believe that this is problematic because it expands the responsibility for permit compliance to individuals who may have no knowledge of the permit's requirements. In fact, it is likely that the work many individuals manage or oversee on a project have nothing to do with the provisions of the FWPA. By expanding responsibility, the Department is shifting liability inappropriately. The Legislature emphasized this point when it removed similar overreaching language from P.L. 2006, c.65 (N.J.S.A. 58:10B-24.4) regarding notice requirements for individuals other than the responsible party. Therefore, this proposed amendment should not be adopted. (17)

39. COMMENT: The proposal at N.J.A.C. 7:7A- 2.1(e) improperly expands liability to owners of property. This expansion is beyond the purview of the Act, which imposes liability on those who violate the Act. There is no imputed liability imposed under the Act to property owners. The proposal, however, will impose liability on owners, even if a tenant or third party fills wetlands on the property. This provision is inappropriate, beyond the Act, and unconstitutional. Accordingly, the phrase "However, any person who owns the property on which the project occurs" should be deleted from this section. (4, 24)

40. COMMENT: Proposed N.J.A.C. 7:7A-2.1(e) adds landowners to the list of parties who may be liable for permit and other FWPA violations. Such an extension of vicarious liability will have a negative impact on transmission line development, for which electric utilities often rely on easements or license agreements rather than fee simple title ownership interests. The result of the Department's proposal will be to impose FWPA liability on passive land owners who are not involved with regulated activities. That, in turn, will add expense and delay to the ROW acquisition process, including increased use of condemnation to acquire the necessary ROW interests as landowners understandably resist exposure to FWPA liability. In short, non-permittee landowners cannot control

FWPA-regulated activities on their property and should not have vicarious liability under the proposed regulations. (43)

41. COMMENT: We believe that this section should be rewritten to explicitly state that the failure to obtain a permit or waiver by the owner or permittee to conduct regulated or prohibited activities, or to conduct activities in accordance with an approved permit or waiver is a violation of the FWPA and the FWPA rules. In almost all circumstances for the work that we contractors perform, the responsibility for obtaining a permit or waiver falls to the owner or permittee for the project, and they are the proper entities that should bear any enforcement actions by the Department for non-compliance. (3)

42. COMMENT: The DEP has proposed changes to N.J.A.C. 7:7A-2.1(e) to no longer hold the permittee solely liable for permit violations and expand potential liability to a range of parties that are hired to work on the permit. The DEP proposes to hold any party hired by the permittee to prepare the permit and to oversee the construction of the permitted activity allowed by a wetland permit potentially liable for violations. The language the DEP uses creates joint and several, strict liability so it can fine any party involved in a permit for any or all violations. This allows the DEP to fine the consultants for the violations of her client, the contractor for the violations of the consultant, the wetland scientist who located the wetland line for the actions of a contractor and so on.

Joint and Several Liability has proven to increase uncertainty in permitting programs and makes enforcement much more expensive. Most contractors contract directly with the developer or owner and do not have contracts between each other. Therefore, there is no way for one contractor to sue another contractor for a fine imposed by the DEP. By abandoning its responsibility to identify parties actually responsible for the violation, the DEP gives innocent parties no choice but to sue the DEP to avoid paying for another's careless action. Lawsuits are very expensive and consume a lot of time for the DEP. In addition, fear of being fined for other's actions will discourage many qualified consultants from working on wetland permits and will increase the costs of the consultants that have to work on permits.

Under current industry practice, only the permittee has the power to control sharing of liability. They are the ones who contract with the various people to work on the project. It is not possible for a consultant hired independently to file suit against a contractor who was the party that actually violated the permit since there is no contracting status between the consultant and the contractor. Furthermore, most professional liability insurance policies cover only negligent acts, errors or omissions. Insurers do not cover claims that cannot be linked to negligent errors and will not cover a claim by the DEP to resolve a permit violation. The real result of the proposed rule is not improved wetland protection but just the opposite. Most qualified consultants will stop providing services for wetland permits. This makes it less likely that wetlands will be properly delineated and more likely applications will be deficient and take longer to approve. Joint and several liability should be the enforcement tool of last resort. Many states only allow joint and several liability to be used in permit enforcement actions only if there is a legislative mandate to do so. Can the DEP point to a New Jersey law that gives it the power to require joint and several liability for violations of permits? Government agencies that propose controversial approaches usually include the public in an open and frank debate before a rule proposal to determine first if there are any actual environmental benefits then determine if those incremental benefits outweigh the negative chilling effects they have on the community. (64)

RESPONSE TO COMMENTS 38 THROUGH 42: The adopted rule states that any person who owns the property on which the project occurs, or who manages, oversees or works on the project *may* share liability. Property owners are always responsible for activities conducted on their property so the addition of this language in the Department's rules does not change existing law. Thus while the permittee is the main entity responsible for activities conducted on the permittee's property, others may share liability if they exercised control or influence in decisions or physical activities relating to compliance aspects of a permit or rule.

The Department expects that a person managing, overseeing, or working on a project authorized by the permit, will have knowledge of the permit authorizing the work. The Department would not normally hold a property owner liable for penalties in a

situation in which a power company or other easement holder unilaterally took action contrary to a permit or law without the consent of the property owner. As such, the amendment should not affect property owners' willingness to give easements or enter into license agreements that allow others to use their property for fear of becoming responsible for the actions, or inactions, of the easement or license agreement holder, nor charge exorbitant fees. The Department is required, pursuant to the rules of evidence, to prove a party's culpability in order to successfully prosecute legal action against that party.

The Department disagrees that property owners have no control over actions of others who work on their property conducting activities like easement maintenance. As owners of the land, property owners can and should exert great control over what occurs on their land. The Department has found that the active knowledge and involvement of a property owner in what is or is not occurring on their property has a tremendously positive impact on compliance. It is the Department's experience that property owners have more timely and effective recourse to compel third party compliance with environmental requirements or limitations on their property than the Department does.

The Department does not intend to pursue penalties against entities such as consultants or permit preparers who otherwise have no ongoing control over how the authorized activity was implemented or how the project was completed. The Department does intend to hold contractors, who physically perform the permitted work on a site authorized by a permit in contravention of that permit, responsible for knowing and complying with the conditions of a permit pertinent to their work. The Department believes that contractors "on the bulldozer" or otherwise making decisions in the field as to site grading, clearing, and/or construction authorized under a permit have a responsibility to know and comply with the permit authorizing the work. As professionals who make their living in construction and land clearing activities, the Department believes it is appropriate to hold those responsible for their actions in compliance with the permit. The Department believes it is appropriately clarifying, as a deterrent to future violations, that those responsible for committing those violations will be held responsible for required restoration and any associated penalty.

Finally, the rule does not state that preparers of applications are responsible for activities performed on a property under N.J.A.C. 7:7A-2.1(e), and as such special language to exclude them from liability is not needed. The Department does not normally hold permit preparers liable for the physical implementation of a permit in the field unless the permit preparer has an ongoing responsibility, authority, or involvement in ensuring that the permit was ultimately complied with.

43. COMMENT: We have concerns with N.J.A.C. 7:7A-2.1(e). We believe that a "knowing standard" should be applied to N.J.A.C. 7:7A-2.1(e) if the Department seeks to broaden the responsibility for ensuring that a permitted project complies with all requirements of the FWPA rules from the permittee to any person who owns the property on which the project occurs, or who manages, oversees or works on the project. Though the enforcement provisions in N.J.A.C. 7:7A-16 provide "knowing standards," based on major, moderate or minor violations of seriousness and conduct, it is our contention that such "knowing standards" should be applied before, rather than after, the enforcement action (that is, penalty or fine) takes place. We suggest rewriting the proposed regulation to read liability be shared for work or activities that are knowingly, purposefully or recklessly not performed in accordance with this chapter. (3)

RESPONSE: N.J.A.C. 7:7A-2.1(e) states that any person who owns the property on which the work occurs, or who manages, oversees, or works on the project, *may* share liability for work or activities that are not performed in accordance with the chapter. Consequently, and as stated in response to comments 39 through 43, factors such as whether or not a particular entity involved in a project knows about a violation, or purposefully or recklessly allowed a violation to occur, will be considered by the Department when it determines whether or not that entity will share liability for work or activities that are not performed in accordance with the chapter.

44. COMMENT: We support the idea of the New Jersey Department of Environmental Protection (NJDEP) having the ability to directly fine a contractor for a permit violation if the situation warrants it. (30)

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

N.J.A.C. 7:7A-2.4(d)4

45. COMMENT: N.J.A.C. 7:7A-2.4(d)4 provides that detention basins are classified as ordinary resource value despite the classification of the water body or wetland that they discharge to. This provision should encourage use of artificial wetlands for stormwater management, the most effective best management practice for quality control. As such, we support this provision as long as all other wetland regulations are complied with. (20, 85)

RESPONSE: The Department acknowledges the comment in support of the rules. Although the freshwater wetland rules require compliance with the Stormwater Management rules (N.J.A.C. 7:8), the freshwater wetland rules do not establish the types of mechanisms by which the stormwater requirements may be satisfied. Those requirements are contained within the Stormwater Management rules, N.J.A.C. 7:8.

46. COMMENT: We commend the Department for recognizing and clarifying in these wetlands rules that a detention facility created by humans could result in the area transforming into only an ordinary wetlands at best, regardless of the classification of the waterbody or wetland to which it discharges. (48)

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

47. COMMENT: Proposed N.J.A.C. 7:7A-2.4(d)4 states that detention facilities are ordinary resource value if constructed in uplands regardless of the wetland resource classification of the body of water or wetland to which it discharges. Bodies of water do not have resource classifications, they have water quality classifications. The rule should therefore read “regardless of the wetland resource classification of the wetland or the water quality classification of the body of water to which it discharges.” (31)

RESPONSE: The Department agrees and has modified N.J.A.C. 7:7A-2.4(d)4 on adoption accordingly, to reference the classification of the body of water as FW-1 or FW-2 trout production, since these surface water classifications are those established by the FWPA at N.J.S.A. 13:9B-2.4b as requiring classification of a wetland as exceptional resource value. The surface water classifications of water bodies are established under the Surface Water Quality Standards at N.J.A.C. 7:9B.

N.J.A.C. 7:7A-2.6

48. COMMENT: N.J.A.C. 7:7A-2.6(b)1i(1) provides that normal property maintenance does not allow fields to be converted to lawn. Fields need to be maintained as fields. The Watershed Association supports this provision. (85)

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

49. COMMENT: The proposed rule amendment at N.J.A.C. 7:7A-2.6 that prohibits normal property maintenance activities in a deed restricted transition area will require a lot more enforcement time since experience shows that people living next to transition areas like to control the growth of weeds and will mow the area. (32)

RESPONSE: The FWPS provides for alterations to the transition area provided that “the proposed activity would have no substantial impact on the adjacent freshwater wetland…” (See N.J.S.A. 13:9B-18). In addition, the FWPA allows transition area averaging plans so long as the altered transition area continues to provide the values and functions identified at N.J.S.A. 13:9B-16. Consequently, when the Department approves a transition area waiver, the Department must be able to ensure that the remaining transition areas continue to protect the adjacent wetland and continue to provide all values and functions of a transition area. The establishment of a conservation restriction or easement for the transition area is the method used to ensure continued protection of the transition area. If the Department cannot effectively preclude further alteration to the

transition area, it cannot approve a transition area waiver. By requiring filing of the conservation restriction or easement, property owners will receive notice of the restrictions associated with the protected area on the property. The Department's enforcement section is aware of and supports the proposed amendment to this provision.

50. COMMENT: If enacted, proposed N.J.A.C. 7:7A-2.6(b) will prohibit normal property maintenance activities, such as mowing and landscaping, from being conducted in a transition area that is subject to a conservation restriction or easement unless the activities have been specifically permitted by the conservation restriction or easement. However, normal property maintenance in a transition area that is not subject to a conservation restriction or easement will be allowed. DEP provides no scientific basis to have different requirements for transition areas subject to a conservation restriction or easement and those that are not subject to a conservation restriction or easement. The end result will preclude certain homeowners from being able to mow, groom, and landscape their yards to prevent overgrowth, and provide pest control, while others in a similar location will be able to perform those activities. DEP must provide a valid scientific reason for treating those transition areas differently. Indeed, no extra protection or regulation is necessary nor required for a transition area merely because of a legal constraint such as a conservation restriction or easement unless there is some technical or scientific provision in a particular easement or restriction. In any case, a rule of general applicability, such as N.J.A.C. 7:7A-2.6(b), based solely on the nature of the legal constraint and not on any scientific, or environmental basis, is arbitrary, capricious, and/or unreasonable. (2, 4, 24)

51. COMMENT: Proposed N.J.A.C. 7:7A-2.6(b)1i(8) reduces the size of gardens allowed in transition areas from 10,000 square feet to 2,500 square feet and outright prohibits gardens in transition areas subject to a conservation easement. With respect to the prohibition of gardens in transition areas subject to conservation easements, as set forth above, there is no scientific basis to differentiate between transition areas subject to conservation restriction and transition areas that are not subject to conservation

easements. Thus, proposed N.J.A.C. 7:7A-2.6(b)1i(8) is arbitrary, capricious, and/or unreasonable. (2)

RESPONSE TO COMMENTS 50 AND 51: The FWPA establishes the widths of transition areas for all exceptional and intermediate resource value wetlands so that the adjacent wetlands are adequately protected (i.e, "buffered") by the transition area. When the Department considers whether or not to grant a transition area waiver, it must determine that the proposed change in the wetland transition area will not alter the ability of the transition area to continue to provide the same level of protection to the adjacent wetland as did the original transition area. The same level of protection cannot be provided by the buffer if there are further alterations to the already altered transition area such as the mowing of vegetation or the placement of new gardens. For example, if a transition area has been reduced in some locations from 50 to 25 feet, and then further altered through mowing or replaced with a garden, it cannot provide the water quality protections nor the habitat functions of the original 50 foot wide transition area. Consequently, there is a scientific basis for limiting activities in an altered transition area that does not come into play when the transition area is left whole and unaltered.

52. COMMENT: It is neither fair nor equitable for DEP to apply proposed N.J.A.C. 7:7A-2.6(b) to conservation restrictions or easements that were executed and recorded prior to the adoption of the proposed rules. Proposed N.J.A.C. 7:7A-2.6(b) prohibits normal property maintenance in a transition area subject to a conservation restriction or easement, unless the recorded conservation restriction or easement specifically allows the normal property maintenance to occur. The conservation restrictions or easements recorded before the adoption of the proposed rules could not have been drafted with the requirements of proposed N.J.A.C. 7:7A-2.6(b) in mind. Homeowners purchased property based on the wording of the existing conservation restriction or easement and the regulations in effect at that time. In all likelihood, numerous conservation restrictions or easements generally do not explicitly state that normal property maintenance such as mowing and landscaping may occur in transition areas since these actions were allowed under DEP's own rules. Existing conservation restrictions or easements simply refer to existing regulations, which presently do allow normal property maintenance in the

transition area subject to the conservation restriction or easement. Therefore, if proposed rule N.J.A.C. 7:7A-2.6(b) is to be adopted, it must be applied to conservation restrictions or easements recorded after the date of adoption of the proposed rules. All conservation restrictions or easements recorded before that date, must be "grandfathered" to allow normal property maintenance in the transition area subject to the conservation restriction or easement, as that was the intent of those conservation restrictions or easements; and, homeowners purchased their property based on that intent. Retroactive rulemaking is especially abhorrent absent any scientific support for the rule. (2)

RESPONSE: Historically, the Department has treated and enforced the conservation restriction on a transition area required as a condition of a permit or transition area waiver approval as not allowing any activities in the protected area unless the conservation restriction specifically provides for them. The amendment clarifies the rule on this point. The conservation restriction is necessary to ensure that the transition area that the Department allows to be altered under the permit or waiver continues to provide the values and functions of a transition area. For example, in the case of a transition area reduction, the conservation easement or restriction is intended to preserve the remaining area in its natural state. In the case of a transition area averaging plan, the conservation restriction or easement informs the property owner of the location and shape of the remaining transition area and protects the entire area in its natural state.

When a property owner properly records a conservation restriction or easement, the terms and conditions contained within that restriction or easement are the terms and conditions that will apply to the restricted area in perpetuity. There will be no additional or different requirements attached to the property by the Department.

53. COMMENT: At N.J.A.C. 7:7A-2.6(b)1i(1) and N.J.A.C. 7:7A-2.6(b)1i(2), DEP is proposing to prohibit frequent mowing of fields in a transition area; however, frequent mowing of lawns will continue to be allowed. These proposed rules denote a major change in non-regulated activities homeowners can perform in a transition area. If N.J.A.C. 7:7A-2.6(b)1i(1) and N.J.A.C. 7:7A-2.6(b)1i(2) are adopted as proposed, frequent mowing of fields in a transition area will require a transition area waiver, when

under the current rules a transition area waiver is not required; however, mowing of lawns will not require a transition area waiver. DEP states that it is proposing this change in order to make clear that converting an existing field to a lawn is not considered normal property maintenance, and thus is a regulated activity if it occurs in a transition area. However, in the existing freshwater wetlands rules, action beyond "frequent mowing" of a field is needed to convert it into a lawn, such as planting of grass or other vegetation, using fertilizer, etc. Therefore, if adopted, these proposed rules will substantially curtail the rights homeowners presently have to mow any part of a transition area on their property that is considered to be a "field."

DEP has failed to provide any scientific or technical basis for prohibiting the frequent mowing of fields. Fields can be, and should be, mowed frequently in order to protect from overgrowth into residential areas, and for pest control. In addition, there is no environmental benefit to prohibiting the mowing of fields. The vegetation still remains but is only shorter, and the root system will not be impacted by merely mowing as DEP alleges. For these reasons, proposed N.J.A.C. 7:7A-2.6(b)1i(1) and N.J.A.C. 7:7A-2.6(b)1i(2) are arbitrary, capricious, and/or unreasonable. (2)

RESPONSE: The commenter has apparently confused several sections of the rules. N.J.A.C. 7:7A-2.6(b)1, which has not been amended, allows normal property maintenance activities to occur in a transition area. However, if the transition area has been altered and is subject to a conservation restriction or easement, the property maintenance activities are no longer permitted in the restricted transition area unless explicitly permitted by the terms of the restriction. As stated in response to comments 51 and 52, this is necessary and scientifically justifiable because when the Department considers whether or not to grant a transition area waiver, it must determine that the proposed change in the wetland transition area will not alter the ability of the transition area to continue to provide the same level of protection to the adjacent wetland as did the original transition area. The same level of protection cannot be provided by the transition are, or "buffer," if there are further alterations to the already altered transition area such as the mowing of vegetation. Generally, fields are mown one or two times a year, to discourage encroachment by woody vegetation and invasive species. Thus, such mowing

is not frequent and enables the field to retain a greater variety of vegetation with a deeper root system, and less compacting of the soil that helps to better control runoff. Lawns are mowed two to four times per month, which results in a shallower root system, more soil compaction and greater runoff. Consequently, lawns do not provide the same amount of protection for an adjacent wetland and the Department will require a transition area approval to convert fields to lawns. Consequently, there is a scientific basis for limiting activities in an altered transition area that does not come into play when the transition area is left whole and unaltered.

54. COMMENT: It should also be noted that proposed N.J.A.C. 7:7A-2.6(b)1i(1) and N.J.A.C. 7:7A-2.6(b)1i(2) prohibit "frequent mowing" of fields. This makes those proposed rules ambiguous and vague. What is considered "frequent mowing?" Five times per year? Once per month? Two times per year? For a homeowner, or any reasonable person, these rules are extremely confusing as to when a transition area waiver is needed for mowing, and will lead to unnecessary legal issues and unfair enforcement actions. In the event N.J.A.C. 7:7A-2.6(b)1i(1) and N.J.A.C. 7:7A-2.6(b)1i(2) are adopted, which they should not be, those rules must be stated with specificity so that a property owner, especially an individual, can easily determine when a transition area waiver is required for mowing. (2)

RESPONSE: The amendment is phrased in terms of prohibiting the conversion of a field to a lawn by any of the indicated methods, of which frequent mowing is one. The emphasis is that the field cannot be converted to a lawn, not that a specific frequency of mowing might have that result. Generally, fields are mown one or two times a year, enabling the field to retain a greater variety of vegetation with a deeper root system, and less compacting of the soil that helps to better control runoff. Lawns are mowed two to four times per month, which results in a shallower root system, more soil compaction and greater runoff. Consequently, lawns do not provide the same amount of protection for an adjacent wetland and the Department will require a transition area approval to convert fields to lawns.

55. COMMENT: To the extent DEP is persistent in prohibiting the mowing of fields in transition areas, homeowners should be allowed to landscape their property to mitigate pests and allow for rodent and insect control, and this may include mowing portions of fields regularly. For example, in many areas of New Jersey, deer ticks present a severe health risk to homeowners, and to small children. Tall grass is a certain habitat for deer ticks. At a minimum, homeowners should be allowed to regularly mow wide paths in the fields comprising the transition area on their property so that the property can be used and the risk associated with pests, including but not limited to, deer ticks, can be minimized. A property may contain a garden in an area that is removed from the house. Access to that garden may be through a field in a transition area. If these rules are enacted, the homeowners would not be able to access the garden except by passing through the tall grass of the un-mowed field in the transition area. This exposes the homeowners and small children to an increased risk of encountering deer ticks, and increasing the risk of contracting Lyme's Disease, which is not an acceptable result of governmental regulation. In addition, forcing the homeowners to apply for a transition area waiver to authorize this activity would be extraordinarily costly to the homeowners, will create unnecessary staff work for DEP, and should not be required. Homeowners should simply be allowed to perform necessary pest control mowing of fields in transition areas so that they can use their property and minimize the risk of encountering pests, such as deer ticks, without any prior approval from DEP. The proposed rules should be modified accordingly. (2)

RESPONSE: Property owners that purchase property containing wetlands and/or wetland transition areas need to be aware of the limitations associated with that property. If they need to use the entire property and cannot honor the limitations established by the conservation restriction or easement, or those associated with the regulated activities contained on the property, they should reconsider acquiring such a property and seek one that has fewer restrictions on it. If they own the property at the time that the conservation restriction or easement is placed, they can discuss with the Department any desire to use some or all of the transition area for various activities, and the Department will work with them to help ensure that whatever transition area waiver is obtained recognizes

reasonable potential future uses to which the property will be put. Finally, as stated in response to comment 55, mowing may occur in the transition area so long as it does not result in the conversion of the transition area to a lawn.

56. COMMENT: There are normal maintenance activities that would have a de minimis impact on transition areas (a normal transition area, or a transition area subject to a conservation restriction or easement), and these activities should not be regulated. For example, running an underground waterline, sprinkler system, or an electric line, to a garden may be necessary for the gardening activities, and would have a de minimis impact to the transition area. It is not clear in the proposed rules whether or not these activities would be allowed to occur without the need to apply for a transition area waiver. Certainly, these activities should not require a transition area waiver, given their de minimis impact. Thus, the proposed rules must be changed to expressly allow de minimis impact to a transition area, without the need for the homeowner to apply for a transition area waiver. (2)

RESPONSE: N.J.A.C. 7:7A-2.6(b) contains the list of activities the Department believes are of minimal impact and which therefore may be conducted in the transition area without a transition area waiver. The Department believes that any other activities, including those described by the commenter, will have greater than minimal impacts and will therefore require a transition area waiver approval by the Department before they can be legally conducted in a transition area. For instance, installing an underground waterline, sprinkler system, or an electric line would require the “removal, excavation, or disturbance of the soil,” which is a regulated activity at N.J.A.C. 7:7A- 2.6(a)1, and as such requires a transition area waiver.

57. COMMENT: We do not agree with the Department that the conversion of a field to a lawn should require a new permit. Accordingly, the second sentence of this section should be deleted. (4, 24)

RESPONSE: The Department’s rationale for disallowing the conversion of a field to a lawn is explained in the summary of the rule proposal. The Department does not consider

converting an existing field to a lawn as normal property maintenance, since a field contains a greater variety of vegetation with a deeper root system and less compacting of the soil, resulting in better surface water runoff control, and greater ecological values and functions for the protection of the adjacent wetland than a lawn can provide. Therefore, the Department is adopting the amendment as proposed, which indicates that an existing field can be maintained as a field but cannot be mowed to become a lawn. Conversion from a field to a lawn requires approval from the Department in the form of a transition area waiver.

58. COMMENT: The proposed rules must be clarified to expressly allow the use of motorized vehicles in a field within a transition area. Access to areas of a property may require traversing a field in a motorized vehicle, which may create a beaten path through the tall grass. The proposed rules should expressly allow it to occur. (2)

RESPONSE: As stated in response to comment 57, N.J.A.C. 7:7A-2.6(b) contains the list of activities the Department believes are of minimal impact, and which therefore may be conducted in the transition area without a transition area waiver. The Department strongly disagrees that it should allow motorized vehicles within a transition area. The beaten path the commenter describes certainly alters the soil and vegetation of the transition area in an unacceptable manner and affects its ability to continue to provide the values and functions of a transition area for the adjacent wetland.

59. COMMENT: DEP's proposed reduction of the size of the garden from 10,000 square feet to 2,500 square feet is also arbitrary, capricious, and/or unreasonable. There is no evidence which suggests that the size of homeowner gardens is negatively impacting freshwater wetlands. Lawn gardens have been associated with home ownership since the time when folks migrated out of the cities. Government should minimize its regulation of gardens, and homeowners' properties for that matter, to areas that are essential for the promotion of public health, safety, and the environment. The size of a garden does not impact public health, safety and/or the environment, and in that respect should not matter

to DEP; however, the size of a garden may matter to a homeowner in terms of maximizing the use and enjoyment of her or his property. (2)

60. COMMENT: The reason DEP bases its reduction of gardens is not related to public health, safety, or the environment. DEP states that it is reducing the size of gardens because some lots are less than 10,000 square feet, and that a 10,000 square foot garden will encompass the entire transition area. DEP could simply propose a rule that reduces the size of a garden for lots less than 10,000 square feet if it has any evidence such a change is necessary; however for lots greater than 10,000 square feet, there is not even a stated reason in the proposal to reduce the size of an allowable garden. Moreover, it is not clear what activities are permitted to occur in a garden. For example, can a homeowner plant vegetables, fruit trees, flowers, herbs, and create bee hives? There are no health, safety or environmental reasons to prohibit these activities, so they should be authorized by the proposed rules. For these reasons, proposed N.J.A.C. 7:7A-2.6(b)1i(8) is arbitrary, capricious, and/or unreasonable. (2)

RESPONSE TO COMMENTS 59 AND 60: With regard to N.J.A.C. 7:7A-2.6(b)1i(8), the Department reduced the acceptable garden area from one quarter acre to 2,500 square feet because many lots in the State are themselves less than one quarter acre, and allowing such impacts for a garden could result in the complete elimination of a transition area. However, regardless of the size of a lot, 2,500 square feet provides a sufficiently large area for vegetable or flower gardening while limiting the impact to transition areas and wetlands. It is important to note that the 2,500 square foot area limit is for new gardens in transition areas, and that existing gardens, no matter what size, can continue to be cultivated. Also, owners of lots that are larger than 10,000 square feet should have ample space to be able to avoid placing gardens in transition areas. Furthermore, the commenter should be aware that any garden or portion thereof, that is located outside of transition areas, does not count towards the 2,500 square foot limit. With regard to what activities are permitted to occur in a garden, the activities described by the commenter (planting vegetables, fruit trees, flowers, herbs, and creating bee hives) are appropriate.

Finally, the Department does not agree that there are no health or safety reasons for limiting activities in a transition area since the transition area protects the environmentally beneficial values of the freshwater wetland that it buffers, which include helping to purify groundwater; mitigating the impact of floodwaters, and subsequent damage to personal property and danger to life; and providing valuable wildlife habitat and open space.

61. COMMENT: N.J.A.C. 7:7A-2.6(b)li(8) reduces the size of an unregulated garden as normal property maintenance from 0.25 of an acre to 2,500 square feet. It also prohibits creation of gardens in forested transition areas or transition areas subject to conservation easements. We support these provisions. However, N.J.A.C. 7:7A-2.6(b)li(5) allows non-native plant replacement. We strongly suggest that the rule require the use of native species or at the very least prohibit planting invasive non-native species as replacements. (20, 85)

RESPONSE: The Department acknowledges this comment in support of the rules at N.J.A.C. 7:7A-2.6(b)li(8). With regard to allowing the use of non-native plant replacement, this is only allowed when non-native species will not significantly change the character of the existing vegetational community in the transition area, for example, in kind replacement of non-native ornamental trees. If non-native plants already exist in the transition area, there would not be any additional impact to the wetlands if they are replaced by the same or other non-native plants.

62. COMMENT: We would like clarification regarding the rationale for the placement of chain link fence being a regulated activity when conducted in a transition area, but not being a regulated activity under N.J.A.C. 7:7A-2.6(b)2 if installed on the boundary between the transition area and upland area. The rationale discussion in the rule proposal indicates that there would be concern regarding the cement footings associated with installation of chain link fence in the transition area. What is the environmental concern regarding these cement footings? How would the impact area be calculated? Would the

impact calculation be based solely on the size and number of the footings or the entire length of fence? (30)

RESPONSE: The proposal summary for N.J.A.C. 7:7A-2.6(b)3 explains that the Department proposed to exclude chain link fences from the definition of "temporary structures," which are permitted without approval in the transition area, because "chain link fences are installed with cement footings and therefore are not temporary". N.J.A.C. 7:7A-2.6(b)3 allows only temporary structures without foundations, or that are in place no longer than six months. Chain link fences with footings, which essentially are foundations for the fence posts, would not be removed in six months**,** and therefore are not temporary structures. A chain link fence with footings is regulated as the erection of a structure under N.J.A.C. 7:7A-2.6(a)3. Fences, including chain link, installed on the boundary between transition area and upland are not regulated since they are at the meeting point between regulated and non-regulated features. However, any fence within the transition area would need to comply with N.J.A.C. 7:7A-2.6 in its entirety.

63. COMMENT: N.J.A.C. 7:7A-2.6(b) states that maintenance of existing fields, pruning of trees and shrubs, and selective cutting of trees cannot take place in transition areas contained within a conservation restriction or easement. There is a need for clarification as to how this section relates to agricultural exemptions. It is recommended that language be inserted to cross reference the agricultural exemptions at N.J.A.C. 7:7A-2.8.

Furthermore, N.J.A.C. 7:7A-2.6(b) appears to indicate that property owners with transition areas within a conservation restriction would not be permitted to replace existing non-native plants with native plant species, or plant native species occurring in transition areas in the local region, unless specifically indicated in the conservation restriction. We believe that allowing such activities in a transition area would be beneficial to the goals of the wetlands program, whether or not the area has a conservation restriction. (60)

RESPONSE: If a property contains a conservation restriction or easement placed to provide compliance with the freshwater wetlands rules, the property owner is limited to

conducting those activities which are specifically permitted as part of the conservation restriction or easement regardless of the activities that occur on the rest of the property outside the area of easement or restriction. Since agricultural activities are exempt from freshwater wetland requirements, it is not likely that agricultural lands will contain such an easement or restriction placed by the Department. Therefore, the Department does not think it is necessary to cross reference the agricultural exemptions within the conservation restrictions or easement provisions. However, if agricultural land does contain such a restriction or easement, the limitations of the easement or restriction should be addressed with the Department at the time the easement or restriction is placed on the property. If a property owner would like to replace existing non-native plants with native plant species or to plant native species occurring in transition areas in the local region in a restricted area, the Department can work with the applicant to allow such activities as part of the approved conservation restriction or easement. The Department agrees that planting of native species in transition areas is generally beneficial to the goals of the FWPA program. Therefore, such activities should be included in the conservation restriction or easement before it is filed in accordance with N.J.A.C. 7:7A-2.12(e). The Department will also reexamine its conservation restriction or easement forms to determine if the forms should be updated in accordance with the rules, to include the suggested change. Finally, de minimis modifications to allow subsequent planting of native species may sometimes be allowed in accordance with N.J.A.C. 7:7A- 2.12(i) and (j).

64. COMMENT: At N.J.A.C. 7:7A-2.6(b)1ii, the proposal should include a definition for the term “alteration.” (86)

RESPONSE: N.J.A.C. 7:7A-2.6(b)1ii already defines “alteration” by providing examples of what constitutes a substantial alteration. The language states that activities which involve or cause substantial alteration or change of the transition area include, but are not limited to, extensive removal, alteration, or destruction of vegetation by clear cutting, cutting, mowing, burning or application of herbicides, planting of ornamental plants or lawns for landscaping purposes, regrading or significant changes in the existing surface

contours and the placement of fill, pavement or other impervious surfaces. As such, a separate definition of "alteration" is not warranted.

65. COMMENT: N.J.A.C. 7:7A-2.6(b) should be modified to specifically exempt utility vegetation maintenance activities that occur within transition areas from being regulated activities by identifying such activities as part of normal property maintenance. To accomplish this, a new N.J.A.C. 7:7A-2.6(b)1i(10) should be adopted to read: "Maintenance of utility rights-of-way to comply with vegetation clearance standards as established by an authorized State or federal agency." The reason for this is that electric utilities must maintain their rights-of-way to prevent disruption of electric service by the contact of the electric conductors (wires) with trees within and along the rights-of-way. Standards to meet both safety and reliability have been developed by agencies including the NJ Board of Public Utilities (NJBPU), the Federal Energy Regulatory Council (FERC), and the North American Electric Reliability Council (NERC). These standards include not only prescribed clearances within the 'wire zone" and "border zone", but also the requirement to remove "danger trees," that is, trees that as a result of their height, health, condition or location pose a threat to the electrical conductors. Electric utilities are required to maintain their rights-of-way to comply with these standards. As such, vegetation maintenance of the rights-of-way to comply with such safety and reliability standards are part of the "normal property maintenance" of electric utility rights-of-way and should clearly be recognized as such by these wetlands regulations. (48)

RESPONSE: For several reasons, the Department disagrees that maintenance activities should not be regulated under the rules. First, depending on the length of the rights-of-way and amount of wetlands present, maintenance activities in transition areas can potentially affect sizable areas. Therefore, some regulatory oversight is necessary to avoid unnecessary or excessive environmental impacts. Second, the applicant does not have to obtain transition area permits or waivers for maintenance activities for the entire right of way but only for those portions of the right of way containing wetlands and/or wetland transition areas. As such, it is not an undue burden to require a permit for these activities. Finally, rights-of-way maintenance activities can generally be performed

under a general permit 1 authorization for maintenance and repair of existing features (N.J.A.C. 7:7A-5.1). General permit 1 has fewer requirements than most general permits, and authorization is therefore easy for an applicant to comply with and obtain from the Department. In addition, the Department will issue a general permit 1 for large rights-of-way areas for utilities, including entire townships or counties.

66. COMMENT: At N.J.A.C. 7:7A-2.6(b)1i(2), the language should be clarified to include maintenance of existing recreational fields by minor regrading and reseeding in the list of activities that cannot be conducted unless explicitly contained within the easement language. (31)

RESPONSE: Since minor regrading and reseeding of an existing recreational field is carried out in order to maintain the recreational field in a usable condition, these activities are contemplated by and allowed under the general description of "normal property maintenance," that is, "activities required to maintain lawfully existing artificial and natural features, landscaping and gardening," at N.J.A.C. 7:7A-2.6(b)1i and is not excluded under new (b)1i(2). The Department therefore does not believe the suggested change is necessary.

67. COMMENT: N.J.A.C. 7:7A-2.6(b)1i(1) provides that normal property maintenance does not allow fields to be converted to lawn. Fields need to be maintained as fields. We support this provision. (20)

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

N.J.A.C. 7:7A-2.8 Activities exempted from permit and/or waiver requirement

68. COMMENT: The feedback from DEP on exemption requests needs to be a more open process. Any exemption request needs to be put online and advertised in a local paper so that all local residents in an area know what is happening to the land in their

area. Far too often, the building requests are so quiet that nobody knows what happened to land until it is fully built upon. (67)

RESPONSE: In determining requirements for applications, the Department balances the type and detail of information needed to obtain enough information for the application in question, the need or right of the municipality or county to know about a specific application, and right of an applicant to a fair application process. Because a letter of exemption is not required but is optional, and most of the exemptions relate to agriculture and forestry activities, the Department believes that notice would be unnecessarily burdensome. However, the Division of Land Use Regulation publishes notice of receipt and decision for all applications, including those for exemptions, in the DEP Bulletin. The public can access the Bulletin at www.state.nj.us/dep/bulletin/.

69. COMMENT: Farming exemptions need to be looked at more closely. We have facilities that produce much animal waste and we need to see that farms do not get away with that kind of massive production of animal waste. No farm needs to be run that way. If you produce waste, even on a farm, you need to spend the money to treat that waste so that it does not impact your neighbors. Our laws are far too lenient on farms because of the powerful farm lobby. The health of all of us means farmers can no longer get away with the pollution they have been creating. (67)

RESPONSE: The FWPA rules exempt normal farming, silviculture and ranching activities from the need to obtain a permit so long as an activity was established and ongoing as of June 30, 1988 (the day before the rules were first promulgated). However, such activities cannot be extended into new wetland areas without a wetlands permit. Thus, to the extent that an agricultural operation, including the placement of animal waste, may be proposing to expand into a wetland area, the Department has the authority to review such operation for compliance with wetland permitting standards. If animal waste is being placed outside the wetlands, the Department does not have authority through the freshwater wetland rules to regulate that placement. However the Department, in conjunction with the New Jersey Department of Agriculture, implements

Combined Animal Feeding Operations (CAFO), and Animal Feeding Operation (AFO) standards through the New Jersey Pollution Discharge Elimination System (NJPDES) permitting program. As such, CAFO and AFO standards, and NJPDES permits, are the proper regulatory avenues for specifically addressing agricultural animal wastes outside of wetland areas.

70. COMMENT: The exemption at N.J.A.C. 7:7A-2.8(b)3 should apply for the entire farm property when it may be unfeasible for economic or other reasons to actively farm the entire property continuously. (47)

RESPONSE: As stated in response to comment 70, normal farming, silviculture and ranching activities are exempt from the need to obtain a permit so long as an activity was established and ongoing as of June 30, 1988. The definition of "established, ongoing farming, ranching or silviculture operation" is “activities on *areas* subject to a farming, ranching, or silviculture use as of June 30, 1988, which use has been pursued continuously since June 30, 1988. Activities on *areas* lying fallow as part of a conventional rotational cycle that does not exceed five years are part of an established operation. Activities which bring an *area* into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the *area* on which it was conducted has been converted to another use or has lain idle for so long that modifications to the hydrological regime are necessary to resume operations, or for more than five years, whichever is shorter” (emphasis added). This definition is consistent with the federal definition for exempt farming activities. The Department’s understanding is that given the limited size of farms in New Jersey, five years is a reasonable rotation cycle. Consequently, farmers do not have to actively farm the entire property at all times to maintain an exemption.

71. COMMENT: Spelling out some of the agriculture exemptions to make sure that people do not go beyond the scope of the exemption is very useful. (20)

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

72. COMMENT: N.J.A.C. 7:7A-2.8(b)3 indicates that a farming exemption applies only to the part of a farm that has been actively farmed since June 30, 1988. We support this clarification. (20, 85)

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

73. COMMENT: We believe that the proposed new restrictions on farmland exemptions placed at N.J.A.C. 7:7A- 2.8(b)3 are beyond the statute, and do not serve any public purpose. As proposed, the exemption would not apply if the property has not been actively farmed since June 30, 1988. Thus, any new farms would not be eligible for the exemption. We currently own approximately 2000 acres of farmland assessment lands. Given the economics of farming, existing farms may or may not be farmed during the course of any particular year or number of years. Under this provision, those lands would lose the exemption. Further, any lands that we may dedicate in the future would no longer be eligible for the exemption. There is no legitimate public policy reason for severely limiting this exemption. In contrast, there have been continuous public policy reasons to encourage the support of farming, particularly by utilizing incentives for the private sector to encourage the investment in farmed areas as a means of not only promoting agriculture in New Jersey, but also preserving open space. These amendments remove one important incentive to advance this open space policy. We believe that the amendments to this section should not be adopted. (4, 24)

RESPONSE: Rather than imposing a new restriction, the language at N.J.A.C. 7:7A-2.8(b)3 clarifies the existing farmland exemption. The June 30, 1988 date cited in adopted N.J.A.C. 7:7A-2.8(b)3 provides continuity and consistency with the longstanding definition at N.J.A.C. 7:7A-1.4 of “established, ongoing farming, ranching or silviculture operation” which also establishes the June 30, 1988 date as the date by which a property must have been farmed for purposes of qualifying for an exemption from the Act. The addition of the June 30, 1988 date at N.J.A.C. 7:7A-2.8(b)3 is intended to similarly clarify that for purposes of qualifying for this exemption, a property or part of the

property upon which farming activities are occurring in wetlands, had to be actively farmed since June 30, 1988, the day prior to effective date of the FWPA on July 1, 1988. Wetlands areas that were not farmed prior to enactment of the FWPA do not qualify for this exemption, and the proposed amendment does not alter this requirement. Furthermore, the amendment stating that, "The remainder would not be eligible for the farming exemption" is intended to clarify that the conversion of new areas of wetlands to farming activities is not exempt. This is entirely consistent with the exemption provision contained in the Act and that has been included in the rules since 1988. The phrase does not change the meaning or eligibility of properties, or portions of properties, satisfying the exemption requirements.

The Department's understanding is that given the limited size of farms in New Jersey, five years is a reasonable rotation cycle. Consequently, farmers do not have to actively farm the entire property at all times to maintain an exemption. Thus, the exemption language at N.J.A.C. 7:7A-2.8(b)3 does not provide a disincentive to continue farming or to preserve farmland as part of an open space policy. It emphasizes the fact that a wetland property cannot be purchased today and converted to new farming activities without a freshwater wetlands permit.

74. COMMENT: At N.J.A.C. 7:7A- 2.8(b)4 and (d), the proposal should include definitions for the terms "Forest Management Plan" and "Woodland Management Plan." (86)

RESPONSE: The FWPA at N.J.S.A. 13:9B-4b provides an exemption relating to forestry based on the conduct of "normal harvesting of forest products in accordance with a forest management plan approved by the (New Jersey) State Forester." Such plans are reviewed in accordance with the "New Jersey Forestry and Wetlands Best Management Practices Manual" (October 1995), available from, and produced by the Department's Division of Parks and Forestry. The manual generally encourages management of forestland for non-commodity benefits, such as wildlife, recreation, aesthetics and water quality, as well as for traditional commodities like timber and wood products. The FWPA does not provide an exemption for forestry activities in accordance with a

woodland management plan, because these plans are prepared mainly for property tax assessment purposes pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-23.3, are not required to consider the same non-commodity benefits as plans approved by the State Forester, and do not usually address wetlands. Hence, the language at N.J.A.C. 7:7A-2.8(b)4 and (d) indicates that a forest management plan is required for exemptions allowed by the FWPA, and not a woodland management plan, that does not address wetlands. Forest management plans and woodland management plans are used by farmers, ranchers, silviculturists, and/or other private woodland owners, who are familiar with the plans and who apply for approval of the plans under rules or guidelines that are not part of the FWPA or these rules.

75. COMMENT: Clarification is necessary on whether "qualifying" for a farmland assessment requires that a property actually have a farmland assessment. County park systems lease agricultural fields to farmers as a land management practice, and to support the regional agricultural industry. While the farming activity meets the criteria of the Farmland Assessment Program, county-owned land is exempt from local and county property taxes. Therefore, farmland assessment is not applied for or granted. The interpretation of "qualifying" affects how certain freshwater wetlands rules would apply to these properties. (82)

RESPONSE: N.J.A.C. 7:7A-2.8(c) states, that "… properties which have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq., are exempt from the requirement of a freshwater wetlands or open water fill permit, or transition area waiver." Therefore, in the case where a property is owned by an entity not subject to the farmland assessment program, so long as a property is "eligible" for farmland assessment, that is of adequate size and actively farmed, such that it could otherwise receive a farmland assessment, the property would be eligible for the exemptions under N.J.A.C. 7:7A- 2.8. Thus, the County park systems, or similar tax exempt organizations or government entities, may continue to lease agricultural fields to farmers as a land management practice and to support the regional

agricultural industry. If there is any question regarding the application of the exemption provisions to a particular property, the owner should contact the Department.

76. COMMENT: At N.J.A.C. 7:7A- 2.8(c)1ii, the proposal should include a definition for the term "alter." (86)

RESPONSE: The term "alter" as used at N.J.A.C. 7:7A- 2.8(c)1ii has its commonly understood meaning of "to change." At N.J.A.C. 7:7A- 2.8(c)1ii, the term "alter" is used in the context of ditching or water control facilities, which must not alter the bottom elevations of any watercourse. As stated in the proposal summary, the installation of a ditch or water control structure cannot alter (change) the bottom elevation of any watercourse, since such alteration could result in additional drainage of surrounding wetlands.

77. COMMENT: We support the determination at N.J.A.C. 7:7A-2.8(c)2i that pond construction is not considered a change in use. However, N.J.A.C. 7:7A-2.8(c)2ii(5) states that the pond is "sized appropriately for the intended use." We believe that a farm pond designed in accordance with the Natural Resource Conservation Service (NRCS) standards and practices, found in the Field Office Technical Guide (FOTG), would provide for a suitably sized pond. We recommend that language in this section be revised to indicate that pond design should be consistent with the appropriate NRCS, FOTG Standards and Practices. N.J.A.C. 7:7A-2.8(c)2ii(6) should be revised to reflect that the farm conservation plans are designed by the NRCS or authorized agents, and approved by the local soil conservation district. The NRCS is not an approval agency. (60)

RESPONSE: N.J.A.C. 7:7A-2.8(c)2ii(6) requires that the farm pond be part of a farm conservation plan approved by the NRCS. The Department therefore assumes that the NRCS assists with design and sizing of the farm pond, in accordance with the appropriate FOTG. To make this requirement more prominent, the Department on adoption has reordered the requirements for an acceptable farm pond and placed the requirement for a farm conservation plan at the beginning of the list.

The Department agrees that farm conservation plans are developed in conjunction with the NRCS or authorized agents, and approved by the local soil conservation district (SCD). On adoption, the Department is modifying N.J.A.C. 7:7A-2.8(c)2i(1) and (c)3i(1), and N.J.A.C. 7:7A-2.10(b)3 on adoption to clarify that the plans should be part of a farm conservation plan developed in conjunction with the Natural Resources Conservation Service and approved by the Soil Conservation District, as appropriate.

78. COMMENT: At N.J.A.C. 7:7A- 2.8(c)2i, a field in which no crops or pasturing has occurred for five years or more should be considered inactive. (86)

RESPONSE: N.J.A.C. 7:7A- 2.8(c)2i already provides that a field in which no crops or pasturing has occurred for 5 years or more is considered abandoned and is not considered an actively farmed area.

79. COMMENT: At N.J.A.C. 7:7A- 2.8(c)2ii(6), the proposal should include a definition for the term "Farm Conservation Plan." (86)

RESPONSE: A "Farm Conservation Plan" as used in the rules refers to a plan that is developed in accordance with requirements of the USDA, Natural Resource Conservation Service (NRCS) with the overall purpose on conducting agriculture while also: reducing soil erosion; solving soil, water quality and conservation, air quality, and agricultural waste management problems; reducing potential damage caused by excess water or drought; enhancing fish and wildlife habitat; and improving the long term sustainability of all lands including cropland, grazing lands, forest lands, and developed or developing lands. The NRCS website provides a glossary of terms including "Conservation Plan" (see www.policy.nrcs.usda.gov/viewerFS.aspx?id=3084), which according to the NRCS is used interchangeably with "Farm Conservation Plan." The definition for Conservation Plan from the above-noted Federal website is as follows: "A record of the client's decisions and supporting information, for treatment of a unit of land or water as a result of the planning process, that meets Field Office Technical Guide quality criteria for each natural resource (soil, water, air, plants, and animals) and takes into account economic

and social considerations. The plan describes the schedule of operations and activities needed to solve identified natural resource problems, and take advantage of opportunities, at a resource management system level. The needs of the client, the resources, and federal, state, and local requirements will be met."

80. COMMENT: Public park and open space agencies at the municipal, county, and state levels frequently acquire farm properties as part of their land inventories. Existing farm roads often provide the only maintenance and public access (foot, horse, and bicycle traffic) to portions of these properties. The requirement that farm roads employing the placement of fill be removed within 30 days of the cessation of agricultural use should be waived for public park land, where the road use is not associated with development as that term is defined in the Municipal Land Use Law, N.J.S.A. 40:55D-4. Absent such an exemption, this provision could create significant hardship for public land managers throughout the State. (82)

81. COMMENT: Proposed language at N.J.A.C. 7:7A-2.8(c)3 states that once a property no longer qualifies for farmland assessment, any roads that were constructed using fill material must be removed within 30 days. This would have a serious impact on park development plans. It is often the case that farmland is acquired under the open space program for the purpose of developing all or a portion of the property as parkland. A portion may eventually be sold as preserved farmland. Auction of the farmland and/or development of the park may occur years afterwards. The land may be maintained in agricultural use under a lease agreement, but the assessment of that property will change. The requirement to remove the roads when this occurs will negatively impact the value, and continued use of the parcel for agriculture. Moreover, it is the practice to use existing roadways, those areas that are already disturbed, as the major elements of the trail system that will be part of the park. (35)

RESPONSE TO COMMENTS 80 AND 81: The exemptions at N.J.A.C. 7:7A-2.8(c)3 apply only to farming and forestry activities as specified in the Freshwater Wetlands Protection Act at N.J.S.A. 13:9B-4a. However, as stated in response to comment 76, in

the case where a property is owned by an entity not subject to the farmland assessment program, so long as a property is "eligible" for farmland assessment, that is of adequate size and actively farmed such that it could otherwise receive a farmland assessment, the property would be eligible for the exemptions under N.J.A.C. 7:7A-2.8. Thus, the County park systems, or similar tax exempt organizations or government entities, may continue to use and maintain agricultural roads in anticipation of resale of the property for agricultural use.

However, any change in use, for activities other than agriculture, does not qualify for a farming or forestry exemption. Such activities are regulated and must be conducted in accordance with approved permits or waivers. The Department has provided various permitting options useful for public parks such as general permit 17, for trails and boardwalks, and 17A for multiple use paths. The Department also notes that because hiking trails may need less width than a farm road, it would not be necessary to leave in place fill from a farm road upon conversion to a hiking trail. Finally, the requirement to remove roads pertains only to those that have used fill material in wetlands and transition areas. Roads built without the use of fill material, or entirely outside of wetlands and transition areas, do not need to be removed.

82. COMMENT: The commenters support the amendment at N.J.A.C. 7:7A-2.8(c)3i that provides that alternative locations for farm roads must be explored and that the farm roads must service farming, not development. ANJEC supports this clarification. (20, 85)

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

83. COMMENT: N.J.A.C. 7:7A-2.8(c)3i(1) should be revised to reflect that the farm conservation plans are designed by the Natural Resource Conservation Service (NRCS) or authorized agents, and approved by the local soil conservation district. The NRCS is not an approval agency. N.J.A.C. 7:7A-2.8(c)3i(2) indicates that if there is an alternative location for a farm road that the alternative location shall be used. We recommend that language in this section be revised to indicate that the farm road should be situated in a

manner consistent with the appropriate NRCS, Field Office Technical Guide (FOTG) Standards and Practices.

We do not disagree with setting reasonable limitations on farm road widths through wetlands and transition areas. However, we propose that the language in this section be revised to differentiate between the road surface and shoulders, to provide the necessary clearance for farm equipment. We recommend that language in this section be further amended to indicate that the farm road should be sized in a manner consistent with the appropriate NRCS, FOTG Standards and Practices. (60)

RESPONSE: The Department agrees that farm conservation plans are developed in conjunction with the NRCS or authorized agents, and approved by the local soil conservation district (SCD). The Department has amended language on adoption to clarify that the plans should be designed in accordance with NRCS standards, and by the SCD, as appropriate. Regarding changing the language to require compliance with the FOTG, the NRCS FOTG for Access Roads (Code 560) indicates that "access roads should be located where minimal adverse impacts will affect wetlands, waterbodies, wildlife habitat, and air quality. Consideration should be given to the following: … Effects on wetlands and water-related wildlife habitats that would be associated with the practice." This is generally consistent with freshwater wetland rule requirements that require review of potential impacts to freshwater wetlands and State open waters from proposed activities. Further, the width limitations contained in the FOTG are consistent with those in these rules. However, since these rules deal specifically with farm roads to be placed in wetlands, while the FOTG addresses farm roads in general, the Department has determined that specific standards are necessary in its rules relating to farm roads in wetlands. The Department established a total road width of 14 feet for most roads, which is consistent with the FOTG which establishes a travel "lane" of 10 feet with 2 feet of shoulder width on each side. The Department has also accommodated greater widths when necessary for larger farm equipment. Consequently, the Department does not believe it is necessary to differentiate between road surface and shoulders.

84. COMMENT: At N.J.A.C. 7:7A- 2.8(c)3i(6), the proposal should include a discussion on how to maintain wetland hydrology. (86)

RESPONSE: It is not clear what sort of discussion on maintaining wetland hydrology the commenter is suggesting. N.J.A.C. 7:7A-2.8(c)3i(6) requires the installation of pipes when a farm road is placed in a wetland because the installation of pipes allows water to traverse the road so that neither side of the road is deprived of water and thus the wetland hydrology (in simple terms, the source, distribution and circulation of water) is maintained.

85. COMMENT: N.J.A.C. 7:7A-2.8(g)4 clarifies that once an exempted "project" has been built and a certificate of occupancy issued, the exemption has been used up and is exhausted. We support this clarification. (20, 85)

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

86. COMMENT: Pursuant to N.J.S.A. 13:9B-6, activities in areas under the jurisdiction of the New Jersey Meadowlands Commission shall not require a freshwater wetlands permit or be subject to transition area requirements. This exemption from the Freshwater Wetlands Protection Act is clear and longstanding, and to the extent that any of the proposed amendments to N.J.A.C. 7:7A attempt to modify the exemption, we hereby object to such modification. (44)

RESPONSE: There is nothing in the Department's readopted rules that addresses or alters the exemption for activities under the jurisdiction of the New Jersey Meadowlands Commission.

N.J.A.C. 7:7A-2.10 Exemption letters

87. COMMENT: It should not be necessary to obtain an exemption letter for activities which meet the agricultural exemptions in these rules. The $240 exemption letter fee is

unreasonable. Also, N.J.A.C. 7:7A-2.10(b)3 should be revised to reflect that farm conservation plans are designed by the Natural Resource Conservation Service (NRCS) or authorized agents and approved by the local soil conservation district. The NRCS is not an approval agency. (60)

RESPONSE: N.J.A.C. 7:7A-2.10(a) indicates that "a person with a project or activity which qualifies for an exemption under this subchapter may obtain a letter from the Department certifying that an activity is exempt." As such, letters of exemption are not routinely required by the Department, but are an option the Department offers for those who seek the letter for planning, tax or other purposes. However, if a property owner does apply for a letter of exemption, the $240 fee covers the Department's review costs. Finally, the Department agrees that farm conservation plans are developed in conjunction with the the NRCS or authorized agents, and approved by the local soil conservation district (SCD). The Department has amended language on adoption to clarify that the plans should be designed in accordance with NRCS standards, and approved by either the NRCS or local SCD, as appropriate.

N.J.A.C. 7:7A-2.11 Stormwater management

88. COMMENT: N.J.A.C. 7:7A-2.11 requires a project that meets the stormwater definition of "major development" to meet the stormwater regulations for the entire project, not just the part that needs the permit. We support this clarification. (20, 85)

89. COMMENT: The proposed addition at N.J.A.C. 7:7A-2.11 requiring compliance with the Stormwater Management rules should not be adopted. It is inappropriate for the Department to attempt to extend the wetland rules to areas outside of the wetlands or transition areas as the Department is attempting to do with this proposed change. Activities that are regulated under the Stormwater Management rules are spelled out in those rules and to reiterate those requirements in the wetlands rules is not only duplicative and unnecessary, it only serves to clutter up and camouflage the wetlands rules. (48)

RESPONSE: Upon consideration of comments received and because the Department is currently evaluating various issues related to the implementation of the Stormwater Management rules at N.J.A.C. 7:8 through its permitting programs, the Department has determined to modify on adoption the stormwater management rule at N.J.A.C. 7:7A-2.11 as well as the corresponding stormwater management conditions for general permits at N.J.A.C. 7:7A-4.3(b)10 and for individual permits at N.J.A.C. 7:7A-7.2(b)15. The rules as modified provide that the trigger for stormwater review in the context of a wetlands permit review is that the proposed regulated activity meets the definition of "major development" under the Stormwater Management rules at N.J.A.C. 7:8-1.2. Once stormwater review is triggered, then the entire project of which the proposed regulated activity is a part must comply with any applicable Stormwater Management provisions at N.J.A.C. 7:8. As noted in the proposal summary, this is the threshold for and scope of stormwater review that the Department currently employs for activities under the wetlands general permits. It is also the threshold for and scope of stormwater review currently employed in reviewing activities under wetlands individual permits. Thus, the rule as adopted relating to stormwater review generally at N.J.A.C. 7:7A-2.11 as well as the specific rules related to stormwater review for general permits and individual permits are stated in equivalent terms that reflect the Department's current approach to stormwater reviews for wetlands permits, pending the aforementioned evaluation of stormwater management implementation across the Department's land use regulatory programs and any possible rule revisions that might result.

The means to implement the Stormwater Management rules at N.J.A.C. 7:8 is through the Department's various permitting programs. As stated in the Stormwater Management rules at N.J.A.C. 7:8-1.1, Scope and purpose, specifically N.J.A.C. 7:8-1.1(b), those rules establish "design and performance standards for stormwater management measures required by rules pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.; the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq.; the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.; the Waterfront Development Law, N.J.S.A. 12:5-3; the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; and the Dam Safety Act, N.J.S.A. 58:4-1 et seq."

90. COMMENT: Proposed new N.J.A.C. 7:7A-2.11, Stormwater Management, requires an applicant seeking a FWPA permit for a "major development" project to comply with the Department's stormwater management rules at N.J.A.C. 7:8. This new provision is intended to clarify that the entirety of the project, not just the proposed general permit activity, will be subject to the Department's stormwater management rules if such project meets the definition of "major development" contained within those rules. We conduct the review of applications for general freshwater wetland permits for development activities that also require submission of an application to the Pinelands Commission. We amended the stormwater management requirements of the Pinelands Comprehensive Management Plan (CMP) in May 2006. Consequently, the stormwater requirements of the CMP are the same as or more stringent than the Department's stormwater management rules. Given this, and that applications for development within the Pinelands must comply with the stormwater requirements of the Pinelands CMP, we assume that its review of an application in accordance with its stormwater requirements at N.J.A.C. 7:50-6.84 and an applicant's satisfaction of those requirements will be sufficient to demonstrate compliance with proposed new rule N.J.A.C. 7:7A-2.11. (66)

RESPONSE: Since the stormwater requirements of the Pinelands CMP are the same as, or more stringent than, the Department's stormwater management rules, the Department agrees that compliance with the Pinelands CMP and an applicant's satisfaction of the stormwater requirements at N.J.A.C. 7:50-6.84 will be sufficient in the Pinelands to demonstrate compliance with the stormwater provisions at N.J.A.C. 7:7A-2.11. The rule at N.J.A.C. 7:7A-2.11 has been modified on adoption to make it clear that the Pinelands Commission has the authority to apply equal or more stringent stormwater management rules to activities in and around freshwater wetlands within its jurisdiction.

N.J.A.C. 7:7A-2.12 Conservation restrictions or easements

91. COMMENT: A conservation restriction should allow the landowner to return to farming temporarily fallow/formerly active agricultural lands within a five year period as

part of normal crop rotation practices or due to other unforeseen circumstances. Provided there was no change in the use of the property, as outlined under the Municipal Land Use Law, the exemption should be forever. (47)

RESPONSE: The rules do not preclude the Department from allowing agricultural activities to continue in the transition area. If the applicant submits information, and the Department makes a finding that the restricted, farmed transition area will continue to provide adequate protection to the adjacent wetland, the Department can make a provision for ongoing agricultural activities as part of the conservation restriction or easement.

92. COMMENT: The DEP has revealed to the public that it routinely requires deed restrictions for transition area waivers and mitigation sites. It has developed a model deed restriction language and posted it on the DEP website. The rule proposal clearly shows that the DEP intends to use these model deeds when it expands the practice to a wider range of permitted activities. Furthermore, the DEP has proposed to blur the distinction between conservation restrictive covenants and easements and treat them as one and the same. The model deed restrictions are 10 to 12 pages long including not only restricted covenants but easements that give DEP property rights, not just in the regulated area but over the entire property where the regulated activity occurs. These rights are to be acquired by easement through the express condition of getting the permit. The new property rights include but are not limited to: the right to enter the owner’s property to perform corrective action, even over the owner’s objection; the right to control commercial transactions on the property; the right to acquire property for failure to pay taxes; the right to additional remedies over and above those allowed by law and the right to force property owners to maintain the property to DEP's satisfaction. The notion of using conservation easements to acquire property rights as a general condition to a wide range of permits is a radical and potentially dangerous new area for the DEP. By redefining a restriction as an easement, the DEP has boldly announced to the public that it is going to exercise its police power used to protect public health and safety to a prior or public use. Therefore, the DEP is moving away from a well-settled jurisprudence related

to environmental regulation to the very unsettled area of taking without compensation. To defend against claims of unconstitutional taking, the DEP is now going to have to explain how the easements improve protection of the environment. How can it acquire fundamental property rights for public use and not pay for it? Why does it need to acquire property rights outside the regulated area? Why is it important for the DEP to have an interest in acquiring a property for nonpayment of taxes? For how much does the Department intend to sell the easements it does acquire and to whom, how many easements are expected to be acquired on an annual basis, and how does the DEP intend to enforce and monitor these easements? (64)

93. COMMENT: The proposed rules do not address the problems caused should the DEP sell a conservation easement on land that abuts rights of way for public infrastructure. If a public agency needs to acquire land for infrastructure purposes, it must approach the non-profit for a release. Since the easement still retains restrictions issued to the state, the local or county government cannot use its powers of eminent domain to acquire the release for fair market value. The non-profit does not have to consider the public safety responsibilities that bind public agencies, and the county cannot condemn the property since it retains its state interest elements. Therefore, they can refuse to release the conservation restriction and block important infrastructure projects, or charge the taxpayers well above fair market value. (41)

RESPONSE TO COMMENTS 92 AND 93: The Department is not using conservation restrictions to obtain property interests in properties containing freshwater wetlands, transition areas and historic resources. Rather, after an applicant has obtained a wetlands permit or transition area waiver for a proposed project, the Department requires the placement of a conservation restriction or easement on the remaining wetlands, transition areas or historic resources on the site to ensure these areas are protected in perpetuity, and to provide notice to future owners that these protected resources exist on a site. Consequently, the applicant will have use of the property since the easement or restriction is required only as part of an approved permit or waiver, and thus there is no basis upon which to claim a taking without just compensation.

Regarding the commenter's concern that DEP is blurring the distinction between conservation restrictive covenants and easements, the definition of conservation restriction in the rules is taken almost verbatim from the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq., which states that a conservation restriction means "a restriction, easement, covenant, or condition, in any deed, will or other instrument…appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded conditions…." Consequently, the terms conservation restriction, conservation easement, and deed restriction tend to be used interchangeably and for the purposes of the practical application of the Department's rule it is not necessary to make any distinction.

The Department has been applying conservation restrictions or easements for mitigation sites since the FWPA regulatory program began in 1988. Since 1989, by regulation, the Department has been requiring conservation restrictions or easements on transition areas remaining after transition area waivers are approved. Historic resource restrictions have been required through the FWPA regulatory program, when appropriate, since 1994. Since 2001, the protection of wetlands and transition areas has been implemented by using conservation restrictions on a case-by-case basis when it was necessary for the protection of the wetlands or transition areas remaining onsite. The amendments relating to conservation restrictions or easements standardize these requirements to eliminate any uncertainty or inconsistency in language and application of the conservation restrictions or easements. The Department cannot sell environmentally sensitive property subject to a restriction or easement. The owner of the property retains all rights, including the right to engage in uses of the restricted area not inconsistent with the purpose of the conservation restriction or easement and the right to manage the restricted area in accordance with the FWPA and these rules. Further, the conservation restriction or easement conveys no additional right of access by the general public to any portion of the property. It is appropriate for the Department to inform the grantor, as part of the restriction, that it continues to be responsible for the taxes for the entire property since the restriction limits only those portions of the property containing wetlands and/or wetland transition areas. Further, because the property contains environmentally sensitive features contained within a conservation restriction or easement held by the Department,

it is also reasonable for the Department to be notified if the grantor becomes delinquent in payment of taxes or assessments, such that a lien against the land is created, and to have the option to purchase the restricted area if deemed appropriate or to take such other actions as may be necessary to protect its interest in the restricted area and to assure the continued enforceability of the conservation restriction or easement.

Finally, the Department enforces its conservation restriction or easements by performing compliance reviews of land use permits and waivers which require the filing of a restriction or easement. The Bureau of Coastal and Land Use Compliance and Enforcement ensures that the required restriction or easement has been submitted to and approved by the Department and filed with the county clerk. Failure to file a conservation restriction or easement as required subjects the permittee to enforcement action including, but not limited to, compliance with all permit or waiver conditions after the fact and the assessment of a civil administrative penalty. The current conservation restriction forms have been in use since 2006, and have not resulted in the problems concerning the commenters. Those restrictions contain the provision for making de minimus modifications as described in the adopted rules.

94. COMMENT: It is unclear whether provisions that reach into the land planning process like the provision to require notice as part of a building permit are valid, since regulation of this area of law is reserved exclusively to local governments. (64)

RESPONSE: Since the placement of a conservation restriction or easement to satisfy a Department requirement affects the owner's ability to conduct activities on a portion of a property, it is important to notify a county or municipality that such a restriction exists when submitting an application for a land use approval to these governmental agencies. The Department views this as a notification to the government entities and not an attempt to regulate activities at the county or local level.

95. COMMENT: Since the DEP hopes to acquire hundreds if not thousands of these easements every year, I recommended the DEP review this approach carefully because it significantly expands how the DEP will control wetlands and landowners in this state.

Furthermore, since the DEP intends to use the model easements that are already posted on the DEP website, it should modify the language published in the rule so that it leaves the rule and the model easements consistent. Otherwise, the forms as published exceed the rule and could not be enforced. It is well within the DEP's right to create forms to improve administrative efficiency. However, it is not acceptable to use creation of a form to add substantive new regulatory requirements outside of rule making. Finally the DEP should change its provisions designed to force the Grantors of easements to file easement in the courthouse. For more than 200 years, the vast majority of deeds in New Jersey have been filed by the grantees of property rights because real estate recording acts are designed to protect the grantees from grantors. Therefore it is foolish for a grantee to rely upon the grantor to file the proper papers in the courthouse. Every person who has ever bought a house knows how important the deed search is to protect their interests. Therefore, the DEP should remove all provisions that force the applicant/grantors to file deeds to protect the DEP/grantee as these provisions create an undue burden on the regulated public. It is much more efficient and will protect the environment better to have the DEP file the deeds themselves. If it is a funding problem, the DEP should revise the permit fee schedule to include the filing costs. It is not good regulatory policy to try to change the entire recording custom of this state. (64)

RESPONSE: As stated in response to comments 92 and 93, the Department has been requiring conservation restrictions or easements as part of the FWPA rules since 1989 so this is not a new concept with unanticipated consequences. A review of the Department's database indicates that since 2001, the Department has required 48 conservation restrictions or easements for wetland protection, four for mitigation sites, and 412 to protect modified transition areas. Therefore, based upon past experience, the Department does not anticipate requiring thousands of restrictions per year.

It is unclear why the commenter believes the Department's restrictions or easements are inconsistent with the rules. Upon completion of the rulemaking process, the Department will review the existing form conservation restriction or easements to determine if any changes are necessary for consistency or as a result of changes made in the rules.

Because the Department is one agency that makes decisions on almost 5,000 applications annually for activities and projects located throughout all 21 counties of the State, it is neither cost-effective nor efficient for the Department to record the restrictions or easements that are required as a condition of approval for a Department permit or waiver. Further, the Department disagrees that it is inconsistent with the "recording custom" in the state. Not all government entities record their own conservation restrictions. For example, if a conservation restriction is required as part of a subdivision approval, the language may be reviewed by the governing entity but then filed by the property owner with the property deeds.

96. COMMENT: Most easements and restrictive covenants are specifically tailored to the particular parcel and rarely if ever change. They are powerful since they run with the land and are binding on generation after generation even when laws change. By contrast, comprehensive environmental regulations are designed to be ever changing to adapt to the changing needs of society and the environment. They get readopted every few years and occasionally get repealed and replaced. A property owner could violate both the regulations and the easement or restriction. How will the owner and DEP sort out the proper enforcement for these two distinct and complex areas of law? What happens when over time the rules change and the DEP is bound by conflicts between current regulatory scheme and easements? How does the DEP expect property owners to be able to determine allowed activities from disallowed activities? (64)

RESPONSE: When a conservation restriction or easement is recorded by a property owner, their requirements and restrictions are intended to be binding in perpetuity. Thus, whatever requirements and restrictions are in the particular conservation restriction or easement must be followed and will not be altered as a result of new or changed regulatory requirements. However, the current restrictions allow for de minimus modifications, and provide that the restrictions can only be lifted in accordance with N.J.S.A. 13:8B.

97. COMMENT: A violation of the wetlands rules is enforced through the administrative process while property interests are enforced in Superior Court. Therefore, the DEP is moving away from the well-settled jurisprudence related to environment regulation to the unsettled area of regulatory taking which presents the following questions: does the DEP enforce a violation of an easement as an administrative matter first, assess a fine and then move to Superior Court to enforce the property right? If so, will the proofs used in the administrative proceeding be binding in the subsequent Superior Court case? Will there be two proceedings for the same act? If the DEP chooses to enforce the property right in Superior Court and it turns out the activity was also a regulatory violation how does the court proceed? Does it toll the Superior Court action to await the final action in the Office of Administrative Law? If the violation occurs during the permit period and the easement violation is in a portion of the easement not included in the permitted activity, will the DEP take enforcement action under N.J.A.C. 7:7A-16.8 or 16.9 or both? What happens to the administrative proceeding if the property owner brings suit in Superior Court for DEP breach of its duty to the property owner? Does the lawsuit brought against the DEP for breach of its easement have to be tolled until the administrative proceeding ends? A clause gives the DEP priority to acquire a property owner's interest for non-payment of property tax. How does the DEP intend to defend this right in the event of foreclosure by a bank, against a Sheriff tax sale, or in a bankruptcy? Can a federal bankruptcy trustee force the DEP to exercise its right to acquire the owner's interest for Fair Market Value in order to speed distribution of assets to other creditors? How does the property owner resolve orders from health departments, police officers and fire departments to remove or control vegetation in wetlands and transition areas controlled by an easement? (64)

RESPONSE: The FWPA provides the Department with the authority to remedy violations by issuing an order, bringing a civil action, levying a civil administrative penalty, or petitioning the Attorney General to bring a criminal action (see N.J.S.A. 13:9B-21). The venue for the proceeding varies with the type of action taken, and the type of action depends on the specific circumstances of the alleged violation. Consequently, cases may be brought administratively, or in Superior Court, or both.

The mere act of requiring a conservation restriction or easement is not a regulatory taking, because the Department uses conservation restrictions or easements as a condition of a permit approval, to ensure that resources remaining on a site after a regulated activity is performed are protected in perpetuity, and not to prevent all activity on a property. By virtue of the fact that conservation restrictions or easements are conditions of approved permits, the applicant has received approval to perform a regulated activity as part of a project and has therefore has not been deprived of reasonable use of the property.

Regarding whether proofs used in an administrative proceeding would be binding in a subsequent Superior Court case, it depends upon the circumstances of the specific case. The courts have found that certain facts found in administrative proceedings are binding in subsequent proceedings, while others may not be. Generally, if an issue is fully litigated in one forum, and a decision on that issue is made on the merits, the decision will be binding on the party that had the full opportunity to litigate the issue in the first forum. Pertaining to whether there would be two proceedings for the same action, this again depends upon the specifics of the particular case, since the Department may proceed either administratively or in Superior Court, and neither option is exclusive. Also, if the Department chooses to enforce a property right in Superior Court, and it then discovers that the activity is also a regulatory violation, the Department normally would have the option to enforce the regulatory violation through its administrative processes or in Superior Court.

Regarding whether a Superior Court action is tolled pending the outcome of an administrative hearing in the Office of Administrative Law, in almost all circumstances if an administrative hearing is in process and there is no final agency decision, the Superior Court will wait for the final agency decision before proceeding. If there is no final agency decision, generally a Superior Court lawsuit would be deemed premature or unripe, and will not proceed until the administrative proceeding is over.

If a violation of a conservation restriction or easement occurs, the Department has the discretion to take enforcement action under N.J.A.C. 7:7A-16.8 or 16.9, depending on the specifics of the particular situation, and what is most appropriate.

A property owner can raise many issues in an administrative proceeding. If a property owner brings suit in Superior Court for breach by the Department of its duty to the property owner while there is a pre-existing administrative proceeding, such a Superior Court action ordinarily could not supersede or displace the pending administrative proceeding.

Regarding how the Department would defend the right to acquire a property owner's interest for non-payment of property tax, in the event of foreclosure by a bank, against a Sheriff tax sale, or in a bankruptcy, the Department would determine what is appropriate based on the specifics of the particular situation. A federal bankruptcy trustee cannot force the Department to exercise its right to acquire the owner's interest for fair market value in order to speed distribution of assets to other creditors. While the Department has the right to acquire the owner’s interest, under normal circumstances it cannot be forced to acquire a property interest involuntarily.

Finally, regarding how a property owner would resolve orders from health departments, police officers and fire departments to remove or control vegetation in wetlands and transition areas controlled by an easement, the Department is not aware of any situation where such circumstances have arisen. If such issues arise in the future, local officials and property owners should contact the Department for guidance.

98. COMMENT: The rules propose to use easements to convert non-regulated activities into regulated activities. This appears to be an effort to regulate non-regulated activities. This is inconsistent with the Act. (41, 64)

RESPONSE: The rules do not attempt to “convert non-regulated activities into regulated activities.” N.J.A.C. 7:7A-2.12(c) states that, “The conservation restriction or easement shall require that the designated area be permanently preserved in its natural state, and shall prohibit all *regulated activities* as described at N.J.A.C. 7:7A-2.3 and 2.6, and any other activities that inhibit the natural succession of vegetation unless specifically authorized” (emphasis added). Disallowing activities that inhibit the succession of vegetation in the restricted area is necessary, because once a transition area waiver (or in certain instances a general permit), has been issued by the Department, the remaining

transition area must be preserved in its natural state to ensure that it continues to provide transition area functions. The activities listed at N.J.A.C. 7:7A-2.6(b) are not allowed in transition areas subject to a conservation restriction to protect the functions of the transition area that remains after the authorized alteration of a portion of the original transition area. This is an appropriate condition of an approval to disturb a transition area and in some cases a wetland.

99. COMMENT: Regulating exempt activities will create considerable enforcement confusion since a property owner who has an easement cannot perform some non-regulated activities while his neighbor can. Furthermore, it is possible that some easements will only affect transition areas. How will the enforcement agent know from afar where the wetlands begin and the transition area ends? (41, 64)

RESPONSE: As stated in the response to comment 98, once a transition area waiver, or in certain instances a general permit authorization, has been issued by the Department, and a conservation restriction or easement is recorded by the applicant, all activities in the transition area are subject to the conservation restriction. The Department's Bureau of Coastal and Land Use Compliance and Enforcement performs compliance inspections at sites that are subject to conservation restrictions or easements. If the terms of the restriction or easement are not being met, a notice of violation is issued. Department files with site plans indicating the wetlands and transition area limits and the location, terms and limits of any restriction or easement placed on the property are reviewed as part of the compliance inspection. Finally, owners of property with transition areas that are not governed by a transition area waiver, and thus do not have areas on their property that are subject to a conservation restriction or easement, can perform the activities indicated at N.J.A.C. 7:7A- 2.6(b)1 through 3. Enforcement inspectors have access to permitting files and are trained in wetland identification. If a regulated activity has occurred in either a transition area or wetland, the inspectors will be able to determine whether the activity is regulated or not, and whether a permit or waiver has been approved for the activity in question.

100. COMMENT: The property rights acquired by the NJDEP in exchange for granting a permit are called exactions. Exactions are standard practice by municipalities to get money and concessions from developers to mitigate for off-site impacts. Courts have found them constitutional if narrowly applied and there is a significant connection between the exaction and the proposed harm. The DEP is interested in obtaining expanded regulatory authority and benefits that reduce the value of the property upon which the development is located. If challenged, the DEP will have to prove that it has the legal right to expand regulation through a condition of the permit and that the expanded regulation is narrowly applied to the harm caused by the application that cannot be achieved by a less cumbersome process. (41, 64)

RESPONSE: Exactions are generally offsite improvements required as a condition of approving a development. Common examples would be the requirement to provide land for a road widening or a new sewer plant. A conservation restriction or easement is not an exaction, but a means to ensure that the remaining portions of a transition area will remain undisturbed so that the transition area can continue to perform its functions after the authorized alteration of other portions of the original transition area. This will ensure that successors in title have notice that a portion of the property is restricted. A conservation restriction or easement is a restriction on land use, not a required off-site improvement. Therefore, the Department does not agree that a requirement to deed restrict the modified transition area is an exaction. In addition, the Appellate Division of Superior Court has determined that the Department is allowed to require a conservation restriction or easement as a condition of a permit approval, as part of a conservation strategy. See in re: Protest of Coastal Permit Program Rules, 354 N.J. Superior 293, 367-68 (Appellate Division 2002).

101. COMMENT: The conservation easement authority cited by the DEP was created by the legislature as a tool to authorize voluntary agreements fairly negotiated between the state and private owner to preserve land for public conservation use or benefit for acquisitions not otherwise required by law. The legislature did not intend that the DEP would convert this program into a regulatory scheme to provide the DEP with enhanced

enforcement powers beyond what is included in the Wetlands Act. The DEP should rewrite the rules to continue to use the conservation easement as an extraordinary tool to supplement protections that are needed to adapt to unique situations encountered on specific sites for site-specific reasons. (41, 64)

RESPONSE: There are several purposes for establishing a conservation restriction, as identified in the definition of conservation restriction or easement at N.J.A.C. 7:7A-1.4. These include, but are not limited to, retaining land and water areas predominantly in their natural, scenic or open or wooded conditions, for conservation of soil and wildlife, and for outdoor recreation or park use. When a government agency seeks to obtain land for a public purpose, such as outdoor recreation and parks, or to preserve a desirable use such as agriculture, it may purchase the land outright from the owner, or purchase the development rights and place a conservation restriction on the land to ensure that the use for which public funds were expended is protected in perpetuity. When a property owner receives a transition area waiver and/or a general permit and is thereby authorized to disturb the transition area, it is reasonable to require a conservation restriction or easement as part of the permit process to ensure that there are no additional environmental impacts beyond those allowed by way of the permit or waiver, and that future owners are fully informed of limitations on the property. Because the type of transition area waiver that an owner may obtain is dependent upon site-specific conditions and the project that the applicant seeks to undertake, these are unique situations encountered on specific sites for site-specific reasons. As such, both to protect the remaining wetland and transition area and to inform future owners of the final configuration of such features remaining on a site, it is necessary to place the remaining wetland and transition area in a conservation restriction or easement.

102. COMMENT: The federal program requires a legal instrument over stream restoration projects because, on a nationwide basis, most states do not have the strict transition area or stream buffer rules. Since New Jersey has strict buffer rules, why does the DEP require burdensome conservation easements to protect stream restoration projects when the existing buffer regulations are sufficient? (41, 64)

RESPONSE: It is not clear to what federal program the commenters are referring Further, it is not clear why the commenter believes that the Department's rules automatically require a conservation restriction in conjunction with a stream restoration project. If a permittee is performing bank stabilization in accordance with N.J.A.C. 7:7A-5.20, there is no blanket requirement for mitigation at the conclusion of the project. If a permittee is performing bank stabilization to mitigate for disturbance to a stream, then the mitigation project is subject to a conservation restriction to ensure that the mitigation site is protected in perpetuity. These rules do establish standard transition area requirements. However, once an environmentally sensitive area has been altered in an effort to improve or restore it as mitigation for other impacts, the Department has determined that is is necessary to provide added protection for that area by imposition of a conservation restriction. The conservation restriction helps ensure that the mitigation project will be successful and will continue to compensate for the impacts to environmentally sensitive areas that were authorized under a Department wetlands permit.

103. COMMENT: Conservation easements proposed by DEP include numerous provisions that will discourage voluntary restoration of habitats on private property. Has the DEP considered the impact to the voluntary improvement of the environment caused by these proposals? Has the DEP discussed the impact its conservation easement provisions will have on NRDC sponsored habitat restoration projects? Has the DEP discussed the proposals with the Department of Agriculture to determine if there is adverse impact on farmland preservation programs? (41, 64)

RESPONSE: It is not clear why the commenter believes that the conservation easement provisions in the rules will discourage voluntary restoration of habitats on private property, since the requirements have not changed significantly, and to date there have been no conflicts. If an applicant or property owner is interested in improving habitat and transition area function in a transition area which will be encumbered by a conservation restriction or easement, the Department will consider such a proposal, and work with the applicant or property owner to incorporate any necessary provisions in the conservation

restriction or easement. Contrary to what the commenter states, the Department believes that conservation restrictions or easements may encourage private property owners to restore habitats. Since restricted areas must be preserved in a natural state for perpetuity, owners may determine that habitat improvement is a useful or desirable activity to conduct in such areas.

The Department assumes that rather than the Natural Resource Defense Council (NRDC), the commenters are referring to the Natural Resource Conservation Service (NRCS). Regardless, the Department has determined that conservation restrictions or easements are a necessary and appropriate tool for protecting remaining resources after a project has been conducted. Therefore, activities conducted by any agency in the State of New Jersey in a regulated wetland, State open water or transition area are required to comply with the FWPA regulations including placement of a conservation restriction or easement.

Because the requirement for the placement of conservation restrictions or easements on properties that have been the subject of permitting has been in effect since 1989 and has not affected voluntary restoration of habitats on private property, to the Department's knowledge, the Department did not discuss its easement requirements with the Department of Agriculture or NRCS.

104. COMMENT: The rules for mitigation banking require compliance with conservation easement requirements under N.J.A.C. 7:7A-2.12. The DEP has included many unusual requirements in these model easements. Please explain the reason that the DEP would require the developer of a mitigation site to pay for defective work. The proposed model easements prevent an owner from allowing a contractor to file a mechanics lien. Contractors often file mechanics liens in contract disputes. The only way the owner could prevent the lien would be to pay for defective work or materials then claim against the contractor. The DEP should avoid placing easement restrictions that affect the standard contracting approaches in the state. This approach almost always results in increased legal costs without improving mitigation site construction. (41, 64)

RESPONSE: The mitigator should do what is necessary to monitor the mitigation project to ensure it is properly constructed. If the mitigator diligently monitors the work, he or she should not have to pay for defective work, but will be able to require corrections as the work proceeds.

Also, in consultation with the Department, N.J.A.C. 7:7A-2.12(b) allows modifications to the "form" conservation restriction or easement to address site-specific situations, so if there is a circumstance meriting a change to this provision, the Department may accommodate it.

Finally, the language in question has been included by the Department in the deed restriction for several years, but the Department is not aware that it has ever created the problem described by the commenter. If the Department becomes aware that the language is in fact causing problems, it will revisit the language to make possible amendments.

105. COMMENT: We applaud the idea of getting permit conservation easements filed on the buffer areas and other areas that in the past have only appeared on plot plans, and it is very important to make sure that they are filed. The grantee, which is the DEP should file them because if DEP does not, more time will be spent checking to see that the grantors filed them. It might be a good idea for DEP to file them and increase the fee to cover the costs. It is absolutely imperative that the conservation easements have the right to enforce and the right to enter onto the property in order to determine whether or not the conservation easements are being violated. They are property rights and the DEP has every right to extract these conservation easements as a result of granting wetland permits. We applaud that effort and are happy to provide any assistance that we can in fine tuning the draft easements. (16)

RESPONSE: The Department agrees that it is important to verify that a conservation restriction or easement has been properly recorded. However, as stated in response to comment 96 above, it is not cost effective or efficient for the Department to record the restrictions or easements. By combining the requirement to provide proof of recording of a restriction or easement with the new requirements at N.J.A.C. 7:7A-13.1(a)14,

requiring applicants to notify the Department before commencing construction, and at N.J.A.C. 7:7A-14.3(c)i(6), requiring applicants to officially transfer a permit to another person, the Department is establishing better mechanisms to help ensure that recording occurs when it is most critical. The Department's restrictions and easements do contain language to ensure its rights to enforce the terms of the restriction or easement, and to enter onto the property in order to determine compliance with terms of the conservation restriction or easement.

106. COMMENT: The expanded conservation easement chapter is excellent. Monitoring easements is very difficult and municipalities are discovering that keeping track of all the conservation easements they have taken is hard. I am glad to see that mitigation bonding requirements have been increased and the requirements might provide some kind of easements as well. (20)

RESPONSE: The Department acknowledges the comment in support of the conservation restriction or easement section. In addition, it appears that the commenter is referring to the amendments at N.J.A.C. 7:7A-15.13(c), where the Department is amending the amount of the financial assurance required for a proposed mitigation project. N.J.A.C. 7:7A-15.13(c)1 addresses the financial assurance necessary to ensure that construction of a site is completed. N.J.A.C. 7:7A-15.13(c)2 addresses a maintenance assurance to ensure success of the mitigation project for the duration of the required monitoring period. The Department amended the amount required for maintenance from 30 percent of the costs of construction to 115 percent of the estimated cost of monitoring and maintaining the site, including the cost to replant the mitigation area because maintenance should be more properly tied to the costs for maintenance instead of to the construction costs for the site. The requirement for protecting a mitigation area from future development was amended only to require consistency with the new section at N.J.A.C. 7:7A-2.12 regarding conservation restrictions and easements.

107. COMMENT: Language at N.J.A.C. 7:7A-2.12 may conflict with the continuation of ongoing agricultural activities. To avoid potential conflict, we suggest inserting language

consistent with the NJDEP Highlands Rules at N.J.A.C. 7:38-6.3 which states, "…except for those activities necessary to maintain the conservation restrictions. For example, if an owner wants to manage forest on a site by obtaining a forest management plan, the Department would consider this when imposing the conservation restriction."

We recommend that N.J.A.C. 7:7A- 2.12(d) be amended to clarify that owners of former agricultural lands under conservation restriction should be permitted to mow, manage and perform practices that promote the natural succession of vegetation. If not, invasive species will most likely inhibit natural succession. (60)

RESPONSE: The Department believes that the language at N.J.A.C. 7:7A- 2.12(d) adequately protects the right to perform ongoing agricultural activities in transition areas that are encumbered by a conservation restriction or easement. The right to continue agricultural activities would be protected by including language in the conservation restriction or easement allowing the continuation of activities such as agriculture, or active maintenance to control and/or eradicate invasive species. Such language would need to be reviewed and approved by the Department to ensure that the restricted transition area would continue to serve the purposes of a transition area as enumerated at N.J.A.C. 7:7A-2.5. However, the Department does not agree that active maintenance activities are necessary or desirable in restricted transition areas in all cases.

108. COMMENT: After approval of a transition area waiver, the modified transition area and associated wetlands must be permanently restricted with conservation easements. We strongly support this. (20)

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

109. COMMENT: The requirement for conservation restrictions or easements after approval of a transition area waiver, or for approved mitigation sites, results in an unjustifiable loss of developable land. Blanket use of these restrictions also hinders future flexibility, and encroaches on the constitutional protections of private property owners' reasonable use of their land. The summary indicates that currently NJDEP uses

a case by case analysis in determining whether a conservation restriction or easement is necessary to protect adjacent wetlands or transition areas that remain after a transition area waiver has been approved (see 39 N.J.R. 3591). The rigidity of these proposals ignore site specific issues, and eliminates future flexibility which would serve both the State, and an owner. (74)

110. COMMENT: We have significant concerns regarding the new and potential onerous requirement of imposing a conservation easement on any transition area waiver, as required by N.J.A.C. 7:7A-2.12. This requirement is beyond the purview of the Freshwater Wetlands Protection Act (Act), and could potentially impose such restrictions on maintenance work in rights of way to effectively undermine safe, adequate and reliable service. Under the proposed regulation, any time a transition area is modified, a conservation easement is required that permanently preserves the property.

As a fundamental legal matter, we believe that the imposition of a conservation restriction or easement as part of a transition area waiver is not authorized by the Act. There is no section of the Act which allows NJDEP to require, as part of a transition area waiver, an applicant to record a conservation restriction or easement. Further, as currently written, this proposed section effectively states that only one transition area waiver is allowed in a transition area. The Act imposes no restriction on a person's ability to re-apply for a transition area waiver. Fundamentally, when the Legislature intends on imposing a conservation restriction, deed notice, or other similar documented restriction on title or the use and enjoyment of a property, the Legislature has adopted specific provisions in a legislative program authorizing such restrictions. See for example the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-13. Thus, we believe that this proposed new section violates the Act and should be deleted. (4, 24)

111. COMMENT: By requiring a deed restriction on the entire area and adjacent wetlands, the rules negate the ability to conduct future activities within the regulatory limits. This is particularly the case due to the strict limitations on releasing deed restrictions under the applicable statutes and the provisions concerning modifying deed restrictions under the proposed rules. The increased use of conservation restrictions to

restrict land use in perpetuity will have serious future ramifications for development and redevelopment. (4, 27, 29, 55)

RESPONSE TO COMMENTS 109 THROUGH 111: As stated in response to comments 93, 94 and 96, since 1989 the Department has been requiring conservation restrictions or easements on remaining or modified transition areas as part of approved transition area waivers, and since1988 conservation restrictions or easements have been required for mitigation sites. Since that time, numerous development projects have been conducted statewide, indicating that past use of these restrictions has not prevented development of appropriate land areas. The placement of a conservation restriction or easement on a portion of a property is required only upon modification of a transition area and/or creation of a mitigation site as a condition of permit approval. Therefore, at the time the conservation restriction or easement is required, a site has received approvals for development and therefore an applicant has had reasonable use of the land. This furthers the purpose of the Act to prevent any unnecessary alteration of freshwater wetlands ecosystems. In addition, the addition of language for de minimis impacts at N.J.A.C. 7:7A-2.12(i) allows for flexibility even after a conservation restriction or easement has been filed. Finally, the case by case analysis cited by one of the commenters indicates not rigidity, but flexibility, on the part of the Department to work with property owners and developers toward common goals of wetland protection and reasonable use of private property.

112. COMMENT: The NJDEP has proposed amendments to the existing rules governing freshwater wetlands (N.J.A.C. 7:7A) which will significantly increase the scope of the current regulations and extend the control imposed by the state upon New Jersey residents. This is particularly true as it relates to homeowners that have conservation easements on their property. The proposed rules will make it illegal to mow or maintain these conservation easements, which in many cases represents the backyard of a homeowner. There is no provision to “grandfather” homeowners with existing conservation easements (or transition areas) which may have a dramatic impact on the homeowner’s ability to use their land (and upon which they pay taxes). Neither the

benefit to drinking water quality, nor the scientific basis for extending the NJDEP control over homeowners is clear. Regardless, it will have a direct impact on how New Jersey residents preserve and enjoy their own backyards. (6)

RESPONSE: As stated in response to comments 92 and 93, since 1989 the Department has been requiring conservation restrictions or easements on remaining or modified transition areas as part of approved transition area waivers. In the past there was some confusion regarding the requirements for submitting and recording conservation restrictions or easements. The requirements at N.J.A.C. 7:7A-2.12 are not new; they consolidate and clarify in one section existing requirements. By allowing de minimis modifications of previously recorded restrictions or easements, N.J.A.C. 7:7A-2.12(i) adds flexibility to the conservation restriction and easement provisions. The requirements in N.J.A.C. 7:7A-2.12 will only apply to conservation restrictions or easements required after the effective date of these amendments. All previously recorded conservation restrictions or easements are governed by language contained within that conservation restriction or easement. The Department strongly recommends that during the design phase of a building project, the property owner (or applicant) ensure that the design allows reasonable use of the property, especially as it relates to areas that would be restricted under a conservation restriction or easement. Finally, the benefit of transition areas to freshwater wetlands, and therefore drinking water quality, is documented. Transition areas (or buffers) are an integral part of the wetland system providing protection from pollutants, sedimentation, and erosion, and therefore there is a clear nexus to the protection of water quality.

113. COMMENT: This proposed new section of the Freshwater Wetlands Protection Act Rules will require permanent deed restrictions on transition areas and wetlands, upon the Department's approval of a transition area waiver or wetland permit. This will inhibit future use of the site, and will have adverse impacts on long range park development projects where development is to be phased in over multiple years. (35)

RESPONSE: As stated in response to comments 92 and 93, the Department has been requiring conservation restrictions or easements on remaining or modified transition areas as part of approved transition area waivers since 1989. The requirements at N.J.A.C. 7:7A- 2.12(a) are not new, but only consolidate in one section the existing requirements. In the past there was some confusion regarding the requirements for submitting, and recording, conservation restrictions or easements. N.J.A.C. 7:7A-2.12 does not add new requirements but consolidates and clarifies those existing provisions. In fact, N.J.A.C. 7:7A-2.12(i) adds flexibility to the previously existing conservation restriction and easement provisions by allowing de minimis modifications of previously recorded restrictions or easements. Long range park development planning can help to avoid a situation where an area has been restricted but is now slated for park development. Identifying such areas in advance, as part of an application to the Department, will enable the Department to work with the applicant to establish a conservation restriction or easement that does not inhibit future plans. In addition, an amendment at N.J.A.C. 7:7A-3.4(b)3iii allows a partial wetland line delineation of up to 10 percent of a publicly owned site, if the site is 10 acres or larger. This amendment should better accommodate public entities such as municipal, county or State park programs that may have a proposed project that will affect only a small portion of a larger parcel of land. The Department will work with a park agency to establish a conservation restriction or easement on a property with a partial wetland line delineation to enable future activities. In addition, language at N.J.A.C. 7:7A-2.12(i) allows for de minimis modifications. For proposed changes that are more than de minimis, a property owner can still attempt to change a recorded conservation restriction or easement via the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A.13:8B-1 et seq., as enumerated at N.J.A.C. 7:7A-2.12(h). These regulatory provisions should allow ample opportunity for parkland authorities to develop parks appropriately, while protecting sensitive ecological features such as wetlands.

114. COMMENT: Public utility rights-of-way should be exempt from the requirement to place a conservation restriction or easement. Additionally, this proposal should be modified to limit its applicability only to those modified transition areas for which the

Department demonstrates a need to impose a conservation restriction or easement to protect the adjacent wetlands, and any imposed conservation restriction or easement should be limited to only that portion of the transition area necessary to protect the adjacent wetlands that are at risk.

The Department must recognize the unique need of public utilities to be able to construct, use, maintain and upgrade their infrastructure within their existing rights-of-way, including those sections of the rights-of-way that are wetlands or transition areas that were previously disturbed for the initial installation of the utility infrastructure. Electric utilities often construct new transmission lines along existing rights-of-way. This is not only less impacting to the environment, but also less costly for the utility and its ratepayers. To unilaterally require every transition area that is modified through a transition area waiver to thereafter be permanently protected from any future development will preclude utilities from being able to provide the additional infrastructure necessary to reliably serve their customers through using their existing developed rights-of-way. This proposed rule will in fact have the unintended effect of forcing utilities to disturb new routes for any additional infrastructure. In any event, there is no rationale or justification why every transition area modification needs to result automatically in the transition area, either in part and certainly not in whole, being placed under a conservation easement or restriction simply because an activity was undertaken on the site that required a modification to some part of the transition area. Again, the unintended effect of this proposal will be to force a project sponsor to develop a virgin site because another less impacting site is unavailable because it was once previously disturbed and now has a conservation restriction or easement imposed on it. (4, 24, 48)

115. COMMENT: The DEP needs to redraft the proposed easements to allow for repair and improvement of existing public infrastructure like roads, bridges, power lines sewer lines and parks without these improvements needing a release from the easements. Eliminating the need to release the easement will not reduce protection of these areas since infrastructure agencies will still have to secure a permit for impacts to these transition areas and wetlands. If the DEP retains this provision as written, it will simply increase taxpayer burden without improving environmental protection. (41, 64)

116. COMMENT: One of the most significant – and troublesome – aspects of the proposed amendments is N.J.A.C. 7:7A-2.12, which requires, as a condition to a transition area waiver, permanent use restrictions on the affected wetlands and corresponding transition areas, including approved mitigation sites. This new provision is quite sweeping and would replace a number of existing provisions. Thus, as stated in proposed N.J.A.C. 7:7A-2.12(c), an area designated with a conservation restriction or easement would be "permanently preserved in its natural state, and [the restriction would] prohibit all regulated activities as described at N.J.A.C. 7:7A-2.3 and 2.6, and any other activities that inhibit the natural succession of vegetation unless specifically authorized." There are a number of deficiencies in the Department's proposal.

To begin, there is no explanation as to why this new requirement is necessary, particularly as it would affect public utility infrastructure. For example, nowhere has the Department suggested why the current regulatory criteria for conservation restrictions and easements are not functioning appropriately or providing the required level of environmental protection. While the Department has discretion to reevaluate prior determinations and change course, in doing so an agency must explain the basis for the modified position, such as new information or other changed circumstances. In addition, there must be an evidentiary basis in the rulemaking record to support the agency's new position. Although these matters are fundamental requirements of the New Jersey Administrative Procedure Act (APA), in this case the Department has failed to offer any explanation for its change of position (or to provide justification in the rulemaking record for the new position).

In addition, the proposed regulation's mandate that the designated area is to be "permanently preserved in its natural state" with a prohibition on "all regulated activities . . . and any other activities that inhibit the natural succession of vegetation unless specifically authorized" flatly contradicts the New Jersey BPU's Vegetation Management (Tree Trimming) Standards. See Adopted Amendment: N.J.A.C. 14:5-6.1, et seq., 38 N.J.R. 5396 (Dec. 18, 2006). As the BPU explained in proposing those regulations, "[v]egetation management is a crucial component of each electric utility's effort to provide safe and reliable service" because "[c]ontact between vegetation and an

energized facility can cause fire, service disruptions and safety hazards for the local population." 37 N.J.R. 4385(a) (Nov. 21, 2005). As the BPU further explained, "[a] uniform set of requirements governing the performance of vegetation management is needed to ensure that electric utilities use proper vegetation management techniques [for] the safety of workers and the general population, and the continued reliability of the electric distribution system, while minimizing impacts on valuable vegetation." Id.; see also Boss v. Rockland Electric Co., 95 N.J. 33 (1983) (under N.J.S.A. § 48:2-23 factual determination of whether removal of certain trees was necessary and safe is within the special competence of the Board of Public Utilities). A consistent theme of New Jersey court decisions involving the scope of BPU authority is that the BPU's "sweeping grant of power is 'intended to delegate the widest range of regulatory power over utilities,'" BPU v. Valley Road Sewerage Co., et al., 154 N.J. 224, 235 (1998), and that, in fact, "[i]t is rather difficult to conceive of a subject which requires more uniform regulation at a high and broad level of authority than the method of transmission of electric power." In re: Public Service Electric and Gas Co., 35 N.J. 358, 373 (1961).

In furtherance of those purposes, the BPU's vegetation management regulations provide, among other things, that electric utilities must ensure compliance with: 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.

The conflict between the BPU's regulation (See N.J.A.C. 14:5-8.6(e)) and proposed N.J.A.C. 7:7A-2.12(c) is very clear. Suffice it to say, BPU's mandate that "[o]nly grass vegetation not exceeding a height of 18 inches is permitted within three feet of any structure in a right-of-way" cannot co-exist with the Department's requirement – in N.J.A.C. 7:7A-2.12(c) – that "the [designated] area be allowed to succeed naturally, that is, grow from a field, to a scrub-shrub and eventually to a forested condition."

Aside from the deficiencies noted above, it also bears emphasis that the requirement for a conservation restriction or easement prohibiting all regulated activities in the linear development corridors in which public utility infrastructure is located will be counterproductive for New Jersey's environment as well as the state's growing economy. As explained in JCP&L's comments, the result of these new restrictions, as they would apply to utility infrastructure, will be to force development of a multiplicity of right-of-way corridors rather than maximizing the use of existing corridors through periodic upgrades in capacity and related infrastructure improvements. The effect of proposed N.J.A.C. 7:7A-2.12(c) will clearly be, as stated in the proposed regulation, to "prohibit all regulated activities . . . and any other activities that inhibit the natural succession of vegetation." While the proposed regulation will tend to require development of duplicative utility right-of-way corridors, the public policy of New Jersey should instead be to encourage maximum utilization of existing corridors. The environmental consequences of requiring a multiplicity of transmission corridors where upgrading or expanding facilities in an existing ROW is an alternative are self-evident, and the economic downside is self-evident as well.

A two-part corollary to the preceding point is New Jersey's need to improve electric reliability and facilitate renewable sources of electric energy. In terms of reliability, New Jersey needs to increase its electric power transmission infrastructure. See Initial Order On Reliability Pricing Model, PJM Interconnection, L.L.C., 115 FERC 61,079, at P 31 (2006) (referring to "multiple reliability criteria violations in PJM, particularly in New Jersey") (PJM Interconnection, LLC, is the principal regional entity for facilitating transmission of electric power in the mid-Atlantic states). And aside from reliability concerns, New Jersey is also committed to increasing the state's reliance on renewable energy sources, which will often be sited in remote locations that require upgraded transmission to deliver power to the state's growing load centers. Unfortunately, the proposed amendments to the FWPA would lead in the opposite direction and seriously inhibit development of vitally important electric power transmission infrastructure.

In conclusion, proposed N.J.A.C. 7:7A-2.12 should not apply to electric utility infrastructure. Alternatively, the proposed amendments to that section should be limited

in two ways. First, the amendments should only apply to those modified transition areas for which the Department makes specific factual findings of a need to impose a conservation restriction or easement to protect the adjacent wetlands, and any resulting conservation restriction or easement should be confined to the portion of the affected transition area for which such protection is necessary. Second, the prohibitions in the proposed amendments to N.J.A.C. 7:7A-2.12 should not apply retroactively to existing ROWs for public utility infrastructure (whether held by easement, license or other indicia of access rights). (43)

RESPONSE TO COMMENTS 114 THROUGH 116: The Department does not agree that public utility rights-of-way should be exempt from the conservation restriction or easement requirement. Rights-of-way traverse the entire state, and occupy thousands of acres, with much potential impact to wetlands and transition areas that merit the full scope of regulatory protection. All wetlands have been shown to be valuable resources and the FWPA provides all but ordinary resource value wetlands with a protective transition area. Further, the statute does not limit transition areas to specific areas but rather places them within 50 or 150 feet of intermediate and exceptional resource wetlands, respectively. Consequently, all portions of the transition area are necessary to protect the adjacent wetland and there is no need for the Department to perform a risk assessment before imposing a conservation restriction or easement on a modified transition area.

The Department does not agree that the conservation restriction or easement requirements will force utilities to relocate new lines instead of using existing rights of way, or will affect reliability. The Department has required conservation restrictions or easements since 1989, and to date this has not resulted in an inability for utility companies to use their rights of way, and has not affected reliability, maintenance or expansion. The Department has worked, and will continue to work, with utilities to include language in proposed conservation restrictions or easements facilitating maintenance and other activities that utilities may need to perform in those rights-of-way. In this manner, already developed rights-of-way can be reused to accommodate new lines, as they have been since 1989.

It is also important to note that in many instances utility right of way maintenance can be accomplished by using general permit 1. General permit 1 authorizes activities in freshwater wetlands and State open waters, required to carry out the repair, rehabilitation, replacement, maintenance or reconstruction of a previously authorized, currently serviceable structure, fill, roadway, *utility line* (emphasis added), active irrigation or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988 or permitted under this chapter. No permit or waiver is required to conduct utility line maintenance activities in transition areas because such activities do not constitute regulated activities in transition areas (see N.J.A.C. 7:7A-2.6, regulated activities in transition areas). Therefore, unless new utility lines are being constructed, ongoing maintenance of existing lines will not be affected by the conservation restriction requirement. Finally, the amendments will not be applied retroactively; they will be effective upon publication in the New Jersey Register.

117. COMMENT: As a policy matter, transition areas, and their associated wetlands, should not be encumbered by conservation restrictions or easements because both areas can change naturally, and the value of maintaining those areas in exactly the same way can conflict with the development of the science related to preserving wetlands. The Legislature, in protecting valuable wetlands, apparently knew this fact because it did not take the additional step of requiring conservation restrictions on wetlands or transition areas. Wetlands and transition areas are already burdened simply by the fact that the Act prohibits their disturbance without certain permits and approvals. The requirement of a conservation easement is not only redundant to the restrictions in the statute, but effectively removes permitting flexibility provided for in the Act. If it is the Department's intent to protect a resource, then this goal can be accomplished simply by modifying the rule to encourage development within existing disturbed corridors, rather than imposed by the illegal, and draconian requirement of requiring a conservation restriction on the remainder of the transition area. (4, 24)

RESPONSE: As stated in response to comments 92 and 93, the Department has been requiring conservation restrictions or easements on reduced and modified transition areas

as part of approved transition area waivers since 1989. The use of conservation restrictions or easements is authorized by the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq. However, it is unclear what the commenter means when stating that "the value of maintaining those areas in exactly the same way can conflict with the development of the science related to preserving wetlands." Wetlands exist and function without human maintenance so protecting them by way of a conservation restriction or easement is not detrimental to wetland science. The requirement for a conservation restriction or easement is not redundant because it protects in perpetuity the reduced or altered transition area, that in turn protects the adjacent wetland. Furthermore, a conservation restriction or easement does not remove permitting flexibility since they are applied after a waiver or permit is issued by the Department, allowing reasonable use of the property. De minimis modifications can also be made in accordance with N.J.A.C. 7:7A-2.12(i). Thus, if an applicant needs to modify a project that would affect transition areas contained within a conservation easement, and the applicant can demonstrate that the proposed modification would result in equivalent or greater protection for the wetland (perhaps because the wetland boundary has changed naturally), a request for a de minimis modification would be appropriate.

Finally, the Department believes that its permitting requirements already serve to encourage people to place their activities outside of regulated wetlands and transition areas, since they can do so without regulation. However, once an applicant makes the choice to pursue a permit or waiver to conduct an activity in a regulated area, it is incumbent on the Department to protect that resource to the greatest extent possible, and conservation restrictions and easements are a tool for this purpose.

118. COMMENT: Relative to language at proposed N.J.A.C. 7:7A-2.12(a), for a wetland transition area, the conservation restriction or easement should only apply to the transition area authorized for modification and its adjacent wetland, and should not be required for other wetlands and their adjacent transition areas on the site. The rule should therefore state: "A 'modified transition area' includes the area of transition area reduction, the area of transition area compensation as well as all the remaining

contiguous transition area and the adjacent wetland on a site." Wetlands and adjacent transition areas not associated with the wetland whose transition area is proposed to be modified should not be subject to conservation restriction or easement.

There has been much confusion about expiration of a Letter of Interpretation regarding a property that has received a wetland transition area waiver and has been deed restricted. Once a conservation restriction or easement has been placed on a wetland, that wetland boundary and resource classification should be considered the permanent wetland boundary, and there should be no ability or requirements to alter that wetland delineation in the future. (4, 27, 29, 31)

RESPONSE: The language at N.J.A.C. 7:7A-2.12(a) which states that any transition area modified by a transition area waiver is subject to a conservation restriction or easement was included because there had been some confusion regarding what areas of transition areas and/or wetlands needed to be restricted once a transition area is modified through a waiver. However, the language in the Department's sample restrictions has for many years clearly stated that the modified transition area in its entirety is subject to the restriction after a transition area waiver is approved. The transition area in its entirety provides the protections to the adjacent wetlands and therefore once an applicant had obtained a transition area waiver to modify the transition area, the remaining modified transition area becomes critical to ensuring protection for the wetland. Once a site is developed, no further incursion into regulated areas is allowed. The conservation restriction or easement does not in any way limit a property owner from developing other non-regulated (non-wetlands, non-transition areas or state open waters) areas of a site, and N.J.A.C. 7:7A- 2.12(i) also provides the ability to request de minimis changes to the conservation easement or restriction boundaries.

All Department approvals under the FWPA rules have five-year terms, in which time it is anticipated all regulated activities can be completed. Consequently, the means to ensure that the wetland line remains fixed and the transition area width does not change is to complete the regulated activities within the time limits of the permit or waiver. The Department does not agree that a wetland line or resource value classification should remain unchanged in perpetuity if no regulated activities have been

undertaken, regardless of whether or not the conservation restriction has been recorded. The conservation restriction or easement is based upon an approved permit or waiver that meets current regulatory standards. For example, if a waiver is obtained in 2008 and the conservation restriction recorded, but no regulated activities are conducted, and the owner subsequently decides in 2018 that he/she wishes to conduct such activities, the Department does not agree that it is appropriate to allow regulated activities to occur without reevaluating the site in consideration of conditions at that time.

Requirements regarding what approvals must be obtained under different scenarios involving expired transition area waivers are set forth at N.J.A.C. 7:7A-6.1(e).

119. COMMENT: Proposed N.J.A.C. 7:7A- 2.12(a) provides that NJDEP will restrict wetlands remaining on a site after a wetland permit is approved, if circumstances make such restriction necessary in order to protect the remaining wetlands. NJDEP provides no guidance as to the definition of "necessary." The Department should provide clear and definite standards for when permanent protection by a conservation easement or restriction is necessary. (74)

RESPONSE: As described in the proposal summary, the Department will consider imposing a conservation restriction or easement on a property with remaining wetlands if circumstances make such restriction necessary in order to protect the remaining wetlands. For example, the Department would deem it appropriate to place a conservation restriction on remaining wetlands and transition areas on a site if the remainder of the site has been totally developed and nothing remains except for the wetlands and modified transition areas, because without such restriction, future prospective property owners may have expectations about uses for the remainder of the site that are incompatible with the functions and values of the wetlands. In another example, the wetlands and transition areas may be the minimum remaining habitat for a threatened or endangered species. In a third example, the wetlands and transition areas may be incorporated as part of a special water resource protection area for the protection of Category 1 waters. In each of these and other similar cases, the wetlands would merit the added protection of a conservation restriction or easement.

120. COMMENT: The proposed requirement to permanently protect any transition area modified through a transition area waiver and its adjacent wetlands from future development through a conservation restriction or easement is not practical for public roadway projects. There may be instances where future roadway improvements within the modified transition area or adjacent wetlands may be warranted. In addition, there could be situations where the wetlands adjacent to the modified transition area may be beyond the right-of-way. It is not practical or financially prudent for a public entity to be responsible for purchasing property or easements that it does not need in order to place a conservation restriction on private property. The proposed rule states that wetland areas "remaining on a site" after the NJDEP approves a wetland permit may be restricted in those cases where the NJDEP determines that the restriction is necessary to protect the remaining wetland. For public roadway projects, the existing and/or proposed right-of-way limits should be the limits of the "site." In addition, the proposed requirement at N.J.A.C. 7:7A-2.12(a) should be reconsidered and not apply to public roadway projects. State right-of-way is not available for use by private individuals. Also, if a future improvement in a regulated area is proposed, it will be necessary to obtain a wetland permit or transition area waiver anyway; therefore, the need for a conservation restriction/easement seems to be redundant. (30)

RESPONSE: The intent of N.J.A.C. 7:7A-2.12 was to extend the use of conservation restrictions or easements from transition areas remaining after the performance of activities in accordance with a transition area averaging plan to all transition area waivers except redevelopment and access waivers, not to change the applicability or use of such restrictions or easements in relation to public roadway projects. The Department agrees that for public roadway projects, conservation restrictions or easements in many instances are not practical, may inhibit future roadway improvement projects, and may need to include areas outside the control of the public agency. In the Department's experience, public projects most commonly use wetland permits and rarely need transition area waivers only and the Department's rules do not in all cases require conservation restrictions or easements after a wetland permit is obtained. However, in the case where a

public road project obtains a transition area waiver that would require a conservation restriction, the Department will work with the applicant to determine how to apply the conservation restriction or easement to avoid conflicts with the possible future plans of the public project.

121. COMMENT: N.J.A.C. 7:7A-2.12(a) requires a conservation easement to be held by DEP. The intention of the rule is to permanently protect the transition area (and mitigation areas under proposed 7:7A-15.2(i)). Easements must be monitored and defended to be effectively permanent. Given the vicissitudes of funding (for example, state agencies are currently subject to a hiring freeze), placing increasing obligations on DEP staff puts a strain on resources that endangers the easement. It is now common practice for easements to be co-held by multiple parties so as to provide better protection. Accordingly this section should require conservation easements to be co-held by a third-party land conservation organization.

Also, after approval of a transition area waiver, the modified transition area and associated wetlands must be permanently restricted with conservation easements. We strongly support this. (85)

RESPONSE: The Department agrees that easements must be monitored to be enforceable. The Department's Bureau of Coastal and Land Use Compliance and Enforcement performs inspections on many permitted projects to make sure conservation restrictions or easements are properly filed, and that all conditions are being complied with. If the restrictions or easements are not properly filed, or conditions are not being complied with, a notice of violation is issued and penalties may be assessed.

Regarding easements being co-held by a third-party, the Department does not believe that it is appropriate to include a third party land conservation organization in the case of an easement required as a condition of approval pursuant to the Freshwater Wetlands Protection Act since it is the Department's responsibility to implement and enforce the State's wetland program. Finally, the Department acknowledges the commenter's support of the rules requiring the permanent restriction with conservation restrictions or easements of modified transition areas and associated wetlands.

122. COMMENT: Proposed N.J.A.C. 7:7A-2.12(b) provides applicants with the form for conservation restriction or easements. Applicants are precluded from unilaterally changing the form but must consult with the Department. The proposed rule would allow the Department to alter the terms of the form restriction where "necessary to address site-specific conditions." Alteration of the standardized form is favorable to a "one-size fits all" approach as case specific issues may arise that require revision to the form language. For instance, a restricted area may have structures within the area that DEP authorizes. The standardized language of the conservation restriction form must necessarily be revised to allow construction to take place and future maintenance.

However, the summary document discussion does not acknowledge the necessity for this degree of flexibility and should be revised. The summary statement, "if the form is altered, the Department will reject the altered form", should be struck to avoid future confusion. (4, 27, 29)

RESPONSE: Since the Department first began requiring conservation restrictions or easements, it has provided the public with a standard form. However, before the form was referenced in the Department's rules, applicants took the Department's form and altered it as they saw fit, attempting to debate each provision with Department staff. This is time consuming and counter productive since the provisions of the form were designed in conjunction with the Attorney General's Office to comply with State law. Consequently, the Department has decided require the use of its form, with the proviso that no alterations may be made without Department consent and only to address site-specific conditions. The Department will reject alterations to the form that fall outside these parameters.

123. COMMENT: The provision which states, "the applicant shall not alter the form except in consultation with the Department and when the Department agrees that an alteration is necessary to address site-specific conditions" is too broad. It should be more specific and be replaced by "agrees that an alteration is necessary to achieve the goals of this regulation." The purpose should be to condition allowable transition area alterations

to those that would actually enhance the function of the transition area, rather than simply accommodate the desires of an owner. (20, 85)

RESPONSE: The provision provides the Department with the ability to address site specific conditions is necessary in order to ensure the continued ability of property owners to conduct activities that are not contrary to the protection of wetlands on a property. The Department worked with the Attorney General's office on the conservation restriction or easement language, to ensure that the language is comprehensive and appropriately addresses the rights of property owners as well as the protection of wetlands and transition areas. For example, a particular property may have agricultural activities being conducted on it and the continuation of these activities may be requested and may not affect the wetlands on the property. In another example, a utility company may need to maintain the ability to conduct maintenance activities within a restricted area and may also want to retain the ability to place additional lines in the same right of way. Such activities are not contained within the language of the Department's standard conservation restriction but can be addressed on a site-specific basis in order for the conservation restriction process to achieve its purpose.

124. COMMENT: It is unreasonable to expect that all land areas involved in the waiver process are now in a "natural state" or that natural succession can really be anticipated on most (especially former agricultural) sites. We recommend that an invasive plant control plan be permitted or required where risk of rapid invasion by invasive species is, in the judgment of the Department, a threat to the functioning of the transition area. (20, 85)

RESPONSE: The Department acknowledges that not all areas associated with transition areas are in a "natural state," and that invasive plant species may take over once the area is not maintained per land management practices prior to the conservation restriction or easement. The Department would be amenable to working with an applicant to include language in the conservation restriction or easement for control of invasive species and/or the planting of native species, since such language would be environmentally beneficial. However, the Department does not think it appropriate to require active invasive plant

management of all areas under a conservation restriction or easement, and therefore has not included such a requirement in the standard language of the conservation restrictions or easements.

125. COMMENT: At proposed N.J.A.C. 7:7A- 2.12(c)1, a conservation restriction or easement shall include a requirement for each owner of the land to notify the county and municipality when applying for a local approval. The Department should clarify this provision as it implicates the Municipal Land Use Law to make notice of a DEP deed restriction as an application requirement for local and county approvals. (4, 27, 29)

126. COMMENT: N.J.A.C. 7:7A- 2.12(c)1 requires a land owner to notify the county and/or municipality of the conservation easement whenever submitting any application for a local approval involving the land. We support this provision for initial notification, but recommend that local government should also receive a DEP certification that terms and conditions are currently being met (compliance letter). Such compliance letters should also be provided at the time of property transfer. (20, 85)

RESPONSE TO COMMENTS 125 AND 126: In the same way that utility easements are shown on site plans submitted to local and county governments, the purpose of requiring an applicant to submit notification to the county or municipality of a conservation restriction or easement with an application for a local approval is to inform the reviewing agency that certain restrictions on the use of the land already exist. The Department will not provide status updates on the condition of the easement since any easement enforcement will have to occur at the State, not local level. However, in accordance with N.J.A.C. 7:7A- 13.1(a)14 the Department's Bureau of Coastal and Land Use Compliance and Enforcement must be notified of any impending construction in regulated areas, and does perform compliance inspections on sites that have conservation restrictions or easements. If the terms of the restriction or easement are not being met, a notice of violation is issued. As part of the notice of violation, the mayor, municipal council, municipal engineer, and municipal construction official are notified of the violation, as well as the health department in certain circumstances. Therefore, notice of non-

compliance will be provided. Finally, since conservation restrictions or easements must be inserted into a property's deed (in accordance with N.J.A.C. 7:7A- 2.12(c)2), and notices of violation are also inserted in the deed (see N.J.A.C. 7:7A-16.17) a buyer should become aware of any restrictions or easements on the property and any outstanding violations as part of the purchase process.

127. COMMENT: This proposed new section of the rules will require that agricultural fields that will no longer be maintained as part of a farming operation after a permit is approved be allowed to revert to their natural state, and not be subject to mowing or other practices that would prevent or inhibit natural succession. With this action, the Department is proposing to dictate property usage and maintenance to a property owner that goes well beyond the spirit and intent of the Freshwater Wetlands Protection Act. In addition, by not managing this land, invasive plant species may dominate, which in turn may cause problems for neighboring agricultural land. Existing viewsheds along waterfront parcels will be permanently altered if allowed to revert to a natural state, and access to the water will be difficult, if not impossible to obtain. (35)

RESPONSE: The requirements at N.J.A.C. 7:7A-2.12(d) are part of a restriction or easement entered into by an applicant/property owner as part of an approval to use the property as requested by the applicant through the permitting process. It is part of the balancing process described in the Freshwater Wetlands Protection Act whereby applicants obtain reasonable use of the property through the permitting process, while the Department ensures continuing protection for the wetland resources of the State. Therefore, the requirement for restrictions or easements after permitting has occurred is not inconsistent with the intent of the Act. As stated in response to comment 124, the Department is amenable to allowing the control of invasive plant species, and the planting of native species, if language to do such is part of the conservation restriction or easement reviewed and approved by the Department. The Department does not agree that this will cause problems for neighboring agricultural lands since this is no different than what occurs throughout the State where different property owners own and manage adjacent parcels differently. Further, the conservation easement or restriction is only

being placed on the transition areas and/or wetlands, so unless such areas comprise an entire property, the restriction may be limited in scope. Finally, vegetated buffers are extremely important to the quality of water resources and their protection is one of the goals of the Act and these rules. The protection of viewsheds is not an environmental factor addressed by the FWPA and these rules.

128. COMMENT: N.J.A.C. 7:7A-2.12(e) states that applicants for permits shall provide a copy of the conservation restriction or easement to the Department within 60 days of receipt of an approved permit. This should be extended to at least 90 days. Sometimes there are delays in receipt of permits, and time should be provided to draft the easement and accompanying mapping information. (31)

129. COMMENT: Without waiving our objections to the imposition of a conservation restriction for a transition area waiver, we object to the requirement to provide the conservation restrictions or easements within 60 days of receipt of an approved permit and that the restriction or easement be recorded before the commencement of site preparation or regulated activities. Electric or gas maintenance or construction projects involve large properties that can require many decisions regarding location and types of restrictions necessary. These decisions can take months of negotiations with property owners and tenants. This timeline not only increases the up front time prior to a permit application, but potentially delays critical time in upgrading and developing new infrastructure. Work on properties with multiple owners could require more time for signatures of these areas. We suggest that the proposed language be modified to indicate "provided to the Department within 120 days of receipt of an approved permit and shall be recorded at the county clerk's office within a year of the approved permit." (4, 24)

RESPONSE TO COMMENTS 128 AND 129: N.J.A.C. 7:7A-2.12(e)1 provides that applicants for permits shall provide a copy of the conservation restriction or easement to the Department within 60 days from receipt of the permit, not 60 days from the date of issuance. Therefore, this should address the commenter’s concern with regard to delays in receiving permits from the Department. In a circumstance such as the one the

commenter describes, where additional time may be required before providing a draft conservation restriction to the Department, the permittee should contact the Department to indicate that work is progressing but additional time is needed to complete it.

130. COMMENT: N.J.A.C. 7:7A- 2.12(e)1 requires that a copy of the conservation easement be sent to the DEP within 60 days of receipt of an approved permit. This requirement should be met before the permit is issued to ensure that it actually happens. There should also be a "baseline condition" report prepared prior to recording the deed and transmitting it to the Department. This report should describe the existing conditions of the easement at the time of transfer, identify the "conservation values" present, and any identifiable threats to the attainment of these values. (20, 85)

RESPONSE: The Department does not require submittal of the draft conservation restriction or easement prior to permit issuance because many times changes will continue to be made until the permit is approved. For example, the final metes and bounds description or final project layout with conservation restriction or easement limits can only be specifically determined upon completion of the permitting process. Also, the Department and the public should already have the type of information that would be contained in a "baseline condition" report, since such information would be submitted to the Department as part of the permit application, and/or as part of a previous letter of interpretation application. As such, a "baseline condition" report would be redundant.

131. COMMENT: Proposed N.J.A.C. 7:7A-2.12(e)1 requires applicants (except for mitigation banks and land donations) to submit a copy of the draft conservation restriction or easement within 60 days of receipt of an approved permit or waiver. The current absence of a time frame for departmental review and approval of recording deed restrictions has led to significant delays. N.J.A.C. 7:7A- 2.12(e) should be revised to include a 30-day time frame for DEP to review the draft deed restrictions and provide written approval. Where the specified time frame is not met, the submission should be deemed approved. (4, 27, 29)

RESPONSE: As stated in response to comment 122, before the Department adopted a standardized form, applicants altered the Department's form resulting in the need for a time-consuming review, and often debate with an applicant about the terms of the conservation restriction or easement. With the amended language, the Department believes that it will be more readily able to review the draft restriction within a reasonable period of time. The Department will not establish a binding 30-day period for its review since it is unable to predict its workload and other situations that may arise with a particular restriction or easement. Default approval of a conservation restriction would not ensure that the restriction adequately protects the transition area and/or wetland resources it is intended to protect.

132. COMMENT: N.J.A.C. 7:7A-2.12(e)2 requires the recording of the restriction upon property transfer or "before the commencement of site preparation or regulated activities." This requirement is not only onerous, but has the potential to unnecessarily burden property, as the property transfer may have no bearing on whether the property is developed. For example, property may be transferred but development does not occur. Here, administrative burdens will be created to submit applications to modify or release the restriction. Other provisions already require notice of property transfers to be provided to DEP. The proposed recording requirement should be limited to regulated activities. (4, 27, 29)

RESPONSE: The Department must assume that when it receives an application for a wetland permit or transition area waiver the project in question will be constructed. As a result, all requirements for approval must be satisfied when the Department is asked to review the project, and the conservation restriction or easement will be required at that time. Further, the Court found in Island Venture Associates v. DEP, 179 NJ 485 (2004) that the Department could not enforce a conservation restriction or easement against a successor owner, where the restriction had not been properly recorded. In light of this court decision, the Department has determined that it must require recording of the conservation restriction or easement before a property transfers.

133. COMMENT: Conservation Easements must be shown on a site plan which depicts the approved project and any other constraints like wetlands or contamination. The reason for this provision is not clear. Is the requirement that the easement be shown on the site plan when a development application is being submitted to the municipality? (20, 85)

RESPONSE: All applications for local approvals requested after the conservation restriction or easement is approved and recorded (for example a subdivision review by a municipal planning board) must consider the conservation restriction or easement. Therefore, areas subject to a conservation restriction or easement must be shown on a site plan so that other reviewers outside the Department are aware of the restriction or easement. Further, although the Department requires that the restricted area be identified by metes and bounds, it may be difficult to locate the restricted area without reference points and landmarks. In fact, all applications for Department letters of interpretation, general and individual permits, and transition area waivers require that wetlands and transition areas be depicted on site development plans.

134. COMMENT: Geographic positioning system (GPS) coordinates should be required to complement the metes and bounds descriptions required for the deed to facilitate geographic information system (GIS) mapping and future monitoring of easements. (20, 85)

RESPONSE: The survey requirements for conservation restrictions or easements at N.J.A.C. 7:7A- 2.12(g) are consistent with the requirements at N.J.A.C. 7:7A-3.1(i) (Letters of Interpretation), and incorporate the comprehensive survey requirements at N.J.A.C. 7:7A-10.1(q). The Department believes that these comprehensive survey requirements will facilitate future monitoring of easements. Further, at this time, the Department's access to GPS units is limited as is the ability of the Division to include conservation restrictions or easements on GIS.

135. COMMENT: There should not be de minimis exemptions. All changes should be fully reviewed so that they are in full public view. (67)

RESPONSE: The rule does not establish an exemption but does establish standards for de minimis modifications of the restricted area boundary for a transition area waiver or wetland permit. In order to request a de minimis modification, an applicant will have to apply for a modification to the permit or waiver which contained the original requirement for a conservation restriction/easement. In making such application, public notice is required in accordance with N.J.A.C. 7:7A-10.8 for the proposed modification. Like all wetland applications, the request for modification of the permit or waiver together with the request for the de minimis modification will only be approved after a review by the Department indicates compliance with all requirements under these rules. The requirements for demonstrating a de minimis modification include that the proposed change to the restricted transition area will result in an increased level of protection for the regulated resource, or at least an equivalent area of resource protection, as the original, restricted transition area. The Department believes that including a process for such de minimus modifications is necessary for the conservation restriction process to be implemented in a practical manner.

136. COMMENT: The Department should quantify, using acreage, the definition of “de minimis” modifications allowed to a restricted area boundary established in a conservation restriction or easement. (47)

RESPONSE: The Department considered including acreage criteria in the definition of a de minimis modification. However, the Department determined that the importance of the acreage involved in a modification was relative to the size of the property and thus not necessarily a good indication of whether a proposed change is de minimis. That is, proposing to modify a restriction that would result in 0.25 acre of change would potentially have a greater impact on a site that is 0.5 acre overall, as opposed to a 0.25 acre change on a 10 acre site. The Department concluded that the more important factor

is the value of the areas being affected by the change for the continued protection of the wetlands and not the size of the area.

137. COMMENT: N.J.A.C. 7:7A- 2.12(i) and (j) provide that the Department shall allow de minimis modifications of the conservation easement boundary if the easement expressly reserves the right of the permittee to undertake such modifications. We strongly object to this section. The whole point of conservation easements is to make protection perpetual. Thus, amendment or modification of easements should be extremely difficult. Further, changes require signoff by the Commissioner of the NJDEP. Since the easement would be held by the NJDEP, the normal, advantageous three party amendment process would, in effect, be "short circuited." If the Department adopts the language for de minimis changes, few potential easement donors would not request that provision. The workload for DEP staff would increase significantly. (20, 85)

RESPONSE: Allowing de minimis modifications will not change the “perpetuity” of conservation restrictions or easements. Furthermore, there are strict limits included in N.J.A.C. 7:7A- 2.12(i) for allowing de minimis modifications. These include only allowing de minimis modifications if the restriction or easement had been properly recorded, the modifications result in greater protection to the wetlands and transition areas or at a minimum result in an equivalent area of resource protection that does not compromise the original protected resource, and the proposed modification must be consistent with all other federal, state and local regulations. In the past, the Department has received many requests to modify conservation restrictions or easements for various reasons. Such modifications ranged greatly in scope and intent but regardless of the purpose or the possible merits of the modification, the Department had no mechanism to address such requests. The Department believes the adopted rule establishes strict standards regarding when such requests will be considered and should therefore reduce the Department’s workload.

138. COMMENT: Once properly recorded, a transition area deed restriction remains forever. However, if the proposed project was never constructed, the new rules will allow

a property owner to apply for a new transition area waiver if it can be proved that a "de minimis" modification will result. The requirements to meet the "de minimis" condition area vague. Each proposed modification will have to be reviewed on a case by case basis because the proposed changes must increase the level of protection to the transition area and not compromise in any way the original protected resource. There is no definition of what that means or how to comply. (4, 27, 29, 32)

139. COMMENT: It is unclear what situation would be allowed under this definition of de minimis that would not allow the original protected resource to be compromised in any way. It almost sounds like the only modification that would be allowed under de minimis would actually have to provide a net benefit. If this is the correct interpretation, this could present a problem for future roadway improvements in areas protected by conservation restrictions/easements. It is also suggested that some examples be included to clarify this. Perhaps a definition of de minimis could be included in N.J.A.C. 7:7A-1.4. (30)

RESPONSE TO COMMENTS 138 AND 139: The FWPA lists the functions and values of a transition area at N.J.S.A. 13:9B-16. The statute limits transition area modifications to those that result in a transition area that continues to provide the functions and values of transition areas. Consequently, someone proposing an activity in a transition area must comply with all provisions of the rules including the requirement for recording a conservation restriction or easement, since the Department has determined that these measures are necessary to maintain the functions and values of transition areas. The Department is requiring that a request for a de minimis change to a conservation restriction or easement accompany a request for a modification of the transition area or wetland. Consequently, when determining whether or not a change to the restricted area is de minimis, the Department will consider both the area proposed to be included in a revised conservation restriction or easement together with the potential impacts to the wetland resulting from the modified transition area boundary. For example, if the original conservation restriction or easement protected three acres of forest which buffered a wetland containing wood turtle habitat, and the revised buffer provides three acres of

fallow fields and allows encroachment closer to the wood turtle habitat, the Department will not be able to make a finding that the modified transition area is of equal or greater value or continues to provide adequate protection to the adjacent wetland and habitat it was originally protecting. Therefore, the change is not de minimis. In another example, if the original restriction or easement encompassed five acres of forest, the proposed restriction or easement will also encompass five acres of forest, and the proposed new area of encroachment will not have a negative affect on the adjacent wetland or will in fact move impacts farther from the wetland boundary, the change will be considered de minimis. Consequently, applicants will need to demonstrate how the proposed area of modified transition area continues to provide the same or better values and functions when compared to the original, approved application.

140. COMMENT: If language expressly reserving the right of the permittee to undertake de minimis modifications of the restricted area is not contained in the deed restriction, then the permittee will be required to modify the restriction in accordance with N.J.S.A. 23:8B-1 et seq. This is an unrealistic requirement, since many projects that have recorded deed restrictions were never built and new property owners may have to perform minor modifications for new projects. This requirement complicates and prolongs the process. (32)

RESPONSE: Absent the provision for de minimis changes in the amendments, all proposed changes to properly recorded conservation restrictions or easements require review and approval in accordance with the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq. The Department determined that it was desirable to include a provision for de minimis changes since experience indicates that some proposed changes have little or no effect on the adjacent wetland, or in fact would provide greater protection for the wetland. Consequently, the Department includes in the standard deed restriction the appropriate language making it possible for applicants obtaining approvals under the rules to retain the right to make a de minimis change if necessary in the future.

141. COMMENT: N.J.A.C. 7:7A-2.12(k) prohibits de minimis modifications for conservation restrictions or easements associated with mitigation sites. The justification provided in the summary is that "mitigation sites are planned and constructed by the same owner" unlike "conservation easements associated with transition area waivers which are frequently associated with development sites designed by one entity, but sold to another for final development and construction." The Department's basis is insufficient for the proposed absolute ban on modification of mitigation sites. The Department has not accounted for instances where the modification would enhance or promote the mitigation effort. Given the proposed extensive mitigation requirements, greater flexibility should be provided. (4, 27, 29)

RESPONSE: N.J.A.C. 7:7A-2.12(k) provides that the boundary established in a conservation restriction or easement associated with a mitigation site cannot be modified. The boundary refers to the limit of the site, as defined by surveyed metes and bounds. Unlike a conservation restriction or easement associated with a transition area waiver which is directly related to a development project (that is, the transition area shape was altered to accommodate a project and the newly shaped transition area is protected by the conservation restriction), the location, configuration and size of the mitigation site is not directly related to the configuration of the project. Rather, the mitigation site is located where it will have the greatest chance of success, and the quantity or size of the mitigation site established based upon the type of mitigation and the quantity of wetland impacts. Consequently, once the Department agrees with the permittee on the location, type and size of the mitigation site, the Department can think of no reason that future alteration of the boundaries would be necessary or beneficial. If instead the commenters are concerned with the actual mitigation that occurs within the boundary, and are suggesting that changes to the mitigation plan should be allowed to enhance or promote the mitigation effort, when the Department establishes a mitigation plan with an applicant, the plan includes the ability to correct and change the mitigation as necessary to ensure its success. It also requires an agreement for long-term management and maintenance of the mitigation site. These requirements enable the mitigator to do what is necessary to enhance or promote the mitigation effort and are not precluded by the

requirement to protect the mitigation site with a conservation restriction or easement under which the boundaries of the restricted area cannot be changed.

142. COMMENT: Proposed N.J.A.C. 7:7A-2.12(l) and (m) discuss approval of amended conservation restrictions and easements. While the applicant is required to amend a conservation restriction or easement within 30 days, DEP would have 60 days to review a draft document pursuant to proposed N.J.A.C. 7:7A-2.12(e). The discrepancy in timeframe for the submission and approval of amended conservation restriction or easement should be corrected. The timeframe recommended and comments provided for proposed subsection (e) are applicable here. (4, 27, 29)

RESPONSE: N.J.A.C. 7:7A-2.12(e), N.J.A.C. 7:7A-2.12(l) and (m) do not establish timeframes for Department review. The 60-day timeframe at N.J.A.C. 7:7A-2.12(e) is for submittal of a draft conservation restriction or easement by the applicant to the Department after a permit or waiver is issued by the Department. The Department will comment on the draft conservation restriction or easement, providing any comments to the permittee in a reasonable time frame that will depend upon whether the applicant has used the Department's form without unauthorized alteration, or has attempted to alter the form without approval. Unauthorized alterations will delay the process.

The 30- and 60-day timeframes at N.J.A.C. 7:7A-2.12(l) and (m), are for permittee submittal of information after the Department has approved a modified conservation restriction or easement boundary, and for re-recording of the amended conservation restriction or easement, respectively.

143. COMMENT: We are recommending that a new section be added to N.J.A.C. 7:7A-2.12 that would read "(n) Conditions in a permit issued to an interstate public authority, such as The Port Authority of New York and New Jersey, shall constitute compliance by such interstate public authority with any requirement in this Chapter for Department approval of long-term protection of wetlands and wetland transition areas which may be applicable to such interstate public authority's performance of activities on properties within its statutorily defined jurisdiction pursuant to effectuation of its statutorily defined

purpose or purposes. Such permit conditions may, in the Department's discretion, include a requirement that a Memorandum of Understanding (MOU) be entered into to ensure the long-term protection of certain wetlands on property that is the subject of the permit."

There are numerous reasons for this additional section. First, Port Authority property is already being held in the interest of the public for the benefit of the people of the States of New Jersey and New York, the metropolitan area and nation to provide for and promote, in an environmentally responsible manner, the transportation and commercial needs of the public. Second, the legislatures of the states of New Jersey and New York have acted with the consent of the U.S. Congress in creating the Port Authority. Through its Compact, the Port Authority has been given certain mandates for the protection and welfare of the public, which could be compromised by subjecting its property interests to encumbrances such as would be inherent in a conservation easement, which also by its terms would contemplate liens against a public property which is otherwise not lienable in law.

Third, there is a recognized and defined need in the Compact for the Port Authority to be able to act within a margin of flexibility in carrying out its statutory mandates with respect to its jurisdictionally-defined property interests, which would be further compromised if the New Jersey statute governing conservation easements were to be applied. Fourth, the New Jersey Statute authorizing conservation easements (N.J.S.A. 13:8B-1 et seq.) would require a lengthy process of regulatory and external review and approvals before any de minimis modifications could be made to a property or to allow any portion of a subject property to be released from the easement's terms. This could compromise the ability of the bi-state agency to perform its essential governmental functions and to act expeditiously for the safety, welfare and security of its vital network of public transportation systems.

Fifth, Port Authority operations are often dependent on federal oversight and federal grants, which by their terms do not authorize the Port Authority to encumber its property without advance federal approval and this would institute another process of review and proceedings to further complicate the agency's ability to perform its functions. Sixth, by its statute, a permanent interest in a Port Authority property may not

be granted without the approval of its bi-state Board of Commissioners, which is further subject to veto by the Governors of the two states. In addition, no fee interest in property may be relinquished unless the property is first declared surplus to the agency.

Seventh, Port Authority properties are limited to a defined jurisdictional area (the Port District) and are integral to the safe and secure functions of its interstate transportation facilities, which cannot be relocated. In the dense region of the State where its facilities lie, it may not always be possible, without compromising safety and security, to encumber certain portions of property that must serve vital public transportation needs and infrastructure. The Port Authority was provided with the legal mandate to make those determinations and to complicate its ability to do so, could endanger the public interest. The situation may arise for example, where such an encumbrance is infeasible in the interest of public welfare, and a comparable substitute property may not be available in the Port District, or may require extensive application of the public resources of the agency that may be otherwise targeted to meet exigent and critical needs. Eight, the Port Authority has a long standing history of serving and protecting the public and the environment in a responsible manner. The Department has in the past recognized this, as well as the bi-state nature of the agency and the essential governmental functions that it serves within the Port District. On that basis, a Memorandum of Understanding (May 12, 1982) was agreed to between the Department and the Port Authority with respect to the environmental protection of waterfront development interests.

Ninth, the Department has accorded the New Jersey Meadowlands Commission the recognition of a Memorandum of Agreement (November 9, 2005) pursuant to N.J.A.C. 7:7E-3.45(g) of its most recently proposed Coastal Zone Management Rules (March 5, 2007) at 39 N.J.R. 725(a) for the purpose of regulating development within the jurisdiction of the Commission. Tenth, the rules allow the Department the discretion to require a conservation restriction or a substitute equivalent measure to protect and preserve sensitive properties from future development. An example of this may be found at N.J.A.C. 7.8-5.3(c) in conjunction with the Department's stream encroachment program rules. The Port Authority submits that the proposed revision suggests such a substitute and equivalent measure. Finally, under the proposed change, permit

conditions, and the terms of any MOU which may be required thereunder, would serve as the mechanism for long-term protection of such wetland properties in lieu of a conservation easement. (37)

RESPONSE: The Department does not believe that protection and welfare of the public would be compromised by subjecting Port Authority property interests to encumbrances such as a conservation easement. If the commenter is concerned about encumbering its property with a conservation restriction or easement to satisfy a mitigation requirement, then the mitigation could be done on a property purchased expressly for mitigation, and not integral to the commenter's operations. Other options include mitigation banking, or a monetary contribution. The Department appreciates the interest of The Port Authority of New York and New Jersey in entering into Memoranda of Understanding (MOU) to ensure the long-term protection of certain wetlands on property that is the subject of a permit. However, it is not clear why this would be a more efficient mechanism than the placement of a conservation restriction on a specific property. The concerns of the applicant may be more easily be incorporated in a conservation restriction limited to a specific property than in a separate MOU. Further, the Department believes that the use of conservation restrictions or easements at N.J.A.C. 7:7A-2.12 is much narrower, and more specific than the broader waterfront development interests that may have been governed by past MOUs. That is, conservation restrictions or easements are applied only to transition or wetland areas remaining on a site after a permit or waiver has been obtained. Conservation restrictions or easements are used to ensure that the transition area as modified under the permit or transition area waiver continues to protect the values and functions of the wetlands. They are not a planning tool to address future development. The Department will work with the commenter to ensure that any restriction or easement that is required is drafted so as to not prohibit future maintenance of areas or structures, to avoid the need to remove the restriction to allow such activities to occur. Further, the amended rules include a mechanism to facilitate de minimis modifications of a restricted area boundary in accordance with the standards at N.J.A.C. 7:7A-2.12(i).

Finally, the Department does not agree that there are equally effective legal mechanisms to ensure protection of remaining transition areas, wetlands or mitigation sites. In fact, when addressing mitigation sites, the FWPA states that, "the Department…may consider the option of permitting the creation of freshwater wetlands or the restoration of degraded freshwater wetlands offsite on private property *with the restriction on those wetlands of any future development*…." (emphasis added; see N.J.S.A. 13:9B-13.) Consequently, the FWPA identifies restrictions as an appropriate mechanism for protecting mitigation sites.

Subchapter 3 Letters of Interpretation

144. COMMENT: An issue that needs to be addressed is the use of "substantive reliance" for letters of interpretation (LOIs). This is a practice, rather than a written rule, and we believe that it violates the intent, as well as the language, of the Wetlands Act. The law very clearly gives the DEP the ability to reopen LOIs based on new information, and DEP should do so. Otherwise, the department creates an incentive for consultants to lie or try to get away with undersizing wetlands delineations, if not worse abuses. There should be a clear policy in the Wetlands Rules disallowing "substantive reliance" as a practice. (80)

RESPONSE: Substantive reliance, to which the commenter is referring, is a legal term of art that is not currently governed by rules or regulations. However, in light of N.J.S.A. 13:9B-8(i), the Department has included a provision for relying on a letter of interpretation at N.J.A.C. 7:7A-3.6(a) which preserves the Department's ability to make some changes based upon new information. The rules provide that a person who is issued a letter of interpretation shall be entitled to rely on the determination of the Department, concerning the presence or absence, or the extent of freshwater wetlands and/or State open waters, for a period of five years from its issuance, unless the letter of interpretation is determined to have been based on inaccurate or incomplete information, in which case the Department may void the original letter of interpretation and issue a new letter of interpretation reflecting the actual conditions on the site. For example, the

LOI may be revised to reflect additional wetland areas identified after LOI issuance; or if a threatened or endangered species habitat is disclosed or discovered after the LOI was issued, the Department may correct the resource value classification.

While some consultants may try to undersize wetlands delineations, Department staff perform thorough inspections of every proposed wetland delineation submitted with an LOI application. In addition, Department staff review Landscape Mapping for possible presence of threatened or endangered species habitat, and often perform additional field visits to check for such habitat. Therefore, the Department is confident that when an LOI is issued, the thorough review has identified all wetland and State open water resources and given such wetlands their proper resource value classification and transition area. Finally, since an LOI is valid for five years, the Department can reassess a site's wetlands and State open water resources if there is a request for an LOI extension, or a totally new LOI application.

N.J.A.C. 7:7A-3.1 Basic LOI information

145. COMMENT: At N.J.A.C. 7:7A-3.1, by allowing municipalities and counties to require LOIs, the Department is impermissibly amending the Municipal Land Use Law and the Freshwater Wetlands Protection Act. (32)

146. COMMENT: Proposed N.J.A.C. 7:7A-3.1(b)1 allowing a municipality or county to require a LOI for compliance with local planning approvals and ordinances as a condition of application completeness is beyond the scope of powers delegated to NJDEP. The delegation of wetland LOI authority to municipalities is the province of the legislature. Moreover, this provision conflicts with the Municipal Land Use Law ("MLUL") which provides that local approval should be conditioned upon subsequent approval of a governmental agency. The NJDEP does not have the authority to unilaterally amend the MLUL. (74)

147. COMMENT: Proposed N.J.A.C. 7:7A-3.1(b) provides that a municipality or county may require a Letter of Interpretation (LOI) for local planning approvals, for compliance

with ordinances, or for other purposes, as a condition of application completeness or approval.

The FWPA explicitly assigns jurisdiction over freshwater wetlands, including a LOI to DEP and preempts all other regulatory bodies from regulating freshwater wetlands. N.J.S.A. 13:9B-30. This specifically includes municipalities. See also, New Jersey Chapter of NAIOP v. NJDEP, 241 N.J.Super. 145 (App. Div. 1990) cert. den. 122 N.J. 374; Matter of Waterfront Development Permit No. 87-1235-1, 257 N.J.Super. 524 (App. Div. 1992). It does not authorize the delegation of that authority. Specifically, N.J.S.A. 13:9B-8 states that an applicant may "request from the department a letter of interpretation to establish that the site of the proposed activity is located in a freshwater wetland or transition area." (Emphasis supplied.) The Department cannot provide municipalities with the legal authority to require LOIs as a checklist item, especially since DEP cannot legally require submissions of LOI requests. (4, 27, 29)

148. COMMENT: Under proposed N.J.A.C. 7:7A-3.1(b)1, local governments would have authority to require a project applicant to obtain an LOI from the Department “for planning approvals, for demonstrating compliance with ordinances and for other purposes.” Inclusion of the “for other purposes” category substantially broadens this regulation, which could be distorted as a means to delay construction of much needed electric infrastructure improvements. (43)

149. COMMENT: How can the DEP enforce the rule allowing a municipality to condition its approval on securing a letter of interpretation when an LOI is not a precondition of its own permits? (64)

RESPONSE TO COMMENTS 145 THROUGH 149: The Department is not affecting the Municipal Land Use Law or the FWPA by stating that a municipality or county may require an applicant to obtain a Letter of Interpretation (LOI) as a condition of application completeness or as a condition of approval for a planning approval. If a municipality or county wants to require an LOI as part of an application for a planning approval, they will have to take all necessary steps at the county or municipal level, and in accordance

with the Municipal Land Use Law, to include this requirement as part of their local or county ordinance and completeness checklist. By including this statement in the freshwater wetland rules the Department is indicating that such a requirement does not violate the FWPA or these rules. It is not stating a preference regarding whether or not a particular municipality or county may, or may not, choose to make this a requirement. The FWPA precludes municipalities from enacting any law, ordinance, or rules and regulations *regulating* freshwater wetlands. A Letter of Interpretation does not regulate freshwater wetlands or freshwater wetlands transition areas. Rather, it provides valuable information regarding the location of such resources on a parcel—an important and useful factor when considering the layout of a proposed development. Consequently, some municipalities and counties may want to make this a requirement and the Department wants to make it clear, by stating it in the rules, that such requirement is not inconsistent with the FWPA. There is no issue of enforceability because this provision does not constitute a requirement, is entirely optional, and subject to proper actions being taken by a municipality or county that desires to pursue it.

Finally, the phrase "for other purposes" is included in the rule because the Department cannot anticipate every situation where a municipality or county may require a Letter of Interpretation as part of an application process.

150. COMMENT: N.J.A.C. 7:7A-3.1(b)1 states that a municipality or county may require an applicant to obtain a Letter of Interpretation (LOI) as a condition of application completeness, or condition of approval or for other purposes. This requirement may negatively implicate agricultural development activities that are exempt from the wetlands regulations but require municipal approval. We suggest revising this section to require a LOI only for those activities where the county or municipality has a clear concern regarding the proximity of wetlands to the development activity proposed, and not just for "other purposes." (60)

RESPONSE: As noted in the prior response to comment the phrase "for other purposes" is included in the rule because the Department cannot anticipate every situation when a municipality or county may benefit from the information provided by an LOI and

therefore may want to require that an applicant obtain an LOI. It is not clear what type of local application a township or county would be reviewing for agricultural development activities that could be affected by this provision. If an agricultural development is proposed in an area that has not previously been subject to farming and is a wetland, it is not exempt from the FWPA, which exempts only established, ongoing farming activities. Consequently, there may be some type of municipal application for agricultural development for which it is appropriate for a municipality to require an LOI, or if not an LOI, a Letter of Exemption from the Department that describes the scope of exempt activities.

151. COMMENT: N.J.A.C. 7:7A-3.1(b) provides that a municipality or county may require a Letter of Interpretation for local planning approvals, compliance with ordinances, or other purposes as a condition of application completeness or approval. This provision will facilitate development application review at the local level as town boards need to know the site constraints while reviewing a development application. (20, 85)

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

152. COMMENT: The proposed addition at N.J.A.C. 7:7A-3.1(b) that allows a municipality or county to require an applicant to obtain an LOI should not be adopted or, at a minimum, should be revised to delete the clause that suggests the LOI be made a condition of municipal or county application completeness. The proposal is unnecessary because it simply puts forth a Department opinion which has no basis for being included within a set of rules and regulations. Inclusion of this paragraph will undoubtedly be interpreted by many municipalities as a mandate to require an LOI for every project proposed within its borders that requires a municipal planning approval. To be perceived as uniformly applying this requirement, municipalities may require every project application before them to have an LOI in hand before the municipal application will be heard. This will only add extensively to an already lengthy overall permit approval process, even for projects that clearly have no wetlands nearby. Requests for even a

simple presence/absence LOI determination take months to secure from the Department. At a minimum, the Department should be encouraging and supporting these processes to proceed simultaneously, not sequentially. (4, 24, 48, 55)

RESPONSE: The provision states that a municipality or county *may* require an applicant to obtain a Letter of Interpretation (LOI) as a condition of application completeness, or as a condition of approval for a planning approval. Although the existing rules do not prevent a municipality or county from requiring an LOI, on several occasions the Department has been asked to support or oppose the effort by a municipality or county to adopt such a requirement. The FWPA precludes municipalities from enacting any law, ordinance, or rules and regulations *regulating* freshwater wetlands, but an LOI does not regulate freshwater wetlands or associated transition areas. Rather it provides valuable information regarding the location of such resources on a parcel—an important and useful factor when considering the layout of a proposed development. By including this statement in the freshwater wetland rules, the Department is indicating that such a requirement does not violate the FWPA or these rules. Some municipalities and counties may want to make this a requirement and this informational statement in the rules merely clarifies that their doing so is not inconsistent with the FWPA.

The Department has made great efforts to minimize the average time it takes to obtain an LOI. An LOI line verification will be completed within 90 days if no revisions are needed; LOI-presence/absences determinations may take 30 to 45 days. However, processing times depend upon workload, the size and complexity of the site, and the time of year when the LOI is requested. If revisions are necessary, the LOI cannot be issued until the consultant provides the revisions, the surveyor corrects the plans, and the new plans are submitted and re-reviewed by the Department.

153. COMMENT: Regarding mapping of a State open water boundary, it should be noted that when a State open water occurs within the outer limits of an adjacent wetland, the field delineation should demarcate the outer-most wetland line. State open waters that are interior to wetlands do not need to be delineated in the field. It is sufficient to show interior State open waters based on topographic and survey base map information. In

addition, N.J.A.C. 7:7A-10.3(d)1, regarding mapping requirements for wetlands and State open waters, should be referenced at N.J.A.C. 7:7A-3.1(i). (31)

RESPONSE: When a water feature, like a stream, exists within the boundaries of a freshwater wetland, the Department agrees that it is not necessary to separately identify the feature, or to label it as a "State open water," since for permitting purposes the water feature would not be separately considered. Rather, the field delineation should demarcate the outer-most wetland limits only and there is no requirement to separately identify the water feature. It is not necessary to add the reference to N.J.A.C. 7:7A-10.3(d)1 since the provisions of Subchapter 10 specify the application requirements for Letters of Interpretation and refer applicants to the application checklist for Letters of Interpretation, which incorporates the requirements of N.J.A.C. 7:7A-3.1(i) and adds greater detail.

154. COMMENT: If the County requires an applicant to obtain an LOI, a copy of the LOI application, maps, surveys, or plans should be submitted to the County for review and comment. (86)

RESPONSE: N.J.A.C. 7:7A-10.8 requires that a copy of the complete LOI application be sent to the clerk of the municipality where the project site is located. The County Planning Board will receive notification of the application but not the complete package. The Department's notice requirements are intended to strike a balance between the public's interest in obtaining information about an application, and the applicant's ability to apply without having to meet onerous requirements. Therefore, interested County officials can review the LOI application materials at the pertinent municipal clerk's office, at the Department's Trenton offices, or can require the applicant to provide such materials to the County when it requires the LOI as part of the County approval process.

N.J.A.C. 7:7A-3.4 Line verification LOI

155. COMMENT: We welcome the amendment to permit a partial wetland line delineation of up to 10 percent of a publicly owned site of 10 acres or larger. This change recognizes the reality of the many park improvement projects that involve a small portion of a large property, and saves taxpayers the unnecessary expense of a full delineation. (82)

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

156. COMMENT: The Department proposes to amend N.J.A.C. 7:7A-3.4(b)3iii to allow a partial wetland line delineation of up to 10 percent of a publicly owned site if the site is 10 acres or larger. We agree with this proposed amendment. This would relieve the public entity of a considerable financial burden if a delineation of an entire site is not required. It will also save NJDEP review time. (31)

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

N.J.A.C. 7:7A-3.6 Effect, duration, and extension of a letter of interpretation

157. COMMENT: The articulated purpose of reviewing LOI extension requests is to allow investigation of the conditions of the property subject to the LOI, and to assess potential changes in the resource classification of wetlands. Disallowing “early” requests for an extension seriously disrupts the ability of an institution to engage in long-range facilities planning and undercuts long term vesting of rights. Fairness requires that previous requests for LOI extensions made before the final year of validity remain effective to protect current LOI holders. (74)

RESPONSE: It is not clear why the commenter believes that disallowing LOI extension requests prior to one year of expiration would disrupt the ability of an institution to engage in long-range facilities planning. For example, if an LOI was due to expire in 2010, but the applicant instead requests an extension in 2008, the LOI that would be received would be valid until 2013 while one obtained in 2010 would be valid until 2015

so there does not appear to be an advantage to requesting an LOI extension far in advance from the expiration date. Further, the applicant can assess with some certainty what the resource classification of wetlands will be, and therefore the width of the transition area, by reviewing the Department's Landscape maps, and Surface Water Quality Standards, N.J.A.C. 7:9B. The LOI makes the final and official determination of wetlands resource value.

Finally, it is not clear what the commenter means by fairness requires that previous requests for LOI extensions made before the final year of validity remain effective to protect current LOI holders. If the commenter means that pending LOI extension requests made prior to the effective date of the amendment, and more than one year before the LOI expiration date, should be reviewed by the Department, the Department has determined that it will review and process all LOIs that have already been received and that are complete for review before the new rules are adopted.

Subchapter 4 General Provisions for General Permits

N.J.A.C. 7:7A-4.2 Using a general permit to authorize specific activities

158. COMMENT: At N.J.A.C. 7:7A-4.2(c)2ii, "eliminates of the wetlands" should read "eliminates the wetlands." (86)

RESPONSE: The Department has corrected this typographical error at N.J.A.C. 7:7A-4.2(c)2ii on adoption.

N.J.A.C. 7:7A-4.3 Conditions that apply to all general permit authorizations

159. COMMENT: The proposal would require that wetland disturbances authorized by general permits be "minimized," requiring documentation that demonstrates a proposed activity has been designed to configure a project so that most, or all of it, is contained in uplands on the site, or in uplands and transition areas on the site. Therefore, even the limited impacts allowable under the general permits would require backup to substantiate

minimization. This would ultimately limit the types of improvements which would previously have been undertaken in these areas. It would also extend the already long NJDEP review period by involving the overburdened NJDEP staff into the site planning and design process for even minor projects. This concept is in direct contradiction to the original point of the general permits--making permits for minimal disturbances standard and relatively simple to obtain. Moreover, the proposed rule change lacks meaningful standards as to how minimization will be evaluated. As such, the rule change is likely to result in inconsistent decision making regarding applications, and also appears to contradict the original intent of the general permitting program. (4, 9, 27, 29, 64)

160. COMMENT: The proposed "minimization" requirement injects NJDEP into project specific site planning and is counter intuitive to the purpose of obtaining a general permit. Though the cumulative general permit impact statistics presented in the summary are significant, the general permit process is necessary to continue development in the State, and we submit, of a constitutional dimension by allowing reasonable use of property. "Minimization," as proposed, is beyond the scope of NJDEP authority. (74)

161. COMMENT: Proposed N.J.A.C. 7:7A-4.3(b)1 states that activities performed under a general permit shall be associated with a proposed project, "and shall be minimized" in accordance with N.J.A.C. 7:7A-4.3(b)1i. N.J.A.C. 7:7A-4.3(b)1i states that "minimized" means that the project has been configured so that most or all of it is contained in the uplands on the site, or in the uplands and transition areas on the site, and that the wetlands have been avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement. The requirement to minimize activities is unnecessary and should be eliminated. General permit activities have already been deemed to result in de minimis impacts to wetlands. The analysis of minimization will slow down the review process and may be a subjective evaluation. Furthermore, the requirement for wetland mitigation will be a great impetus to minimize wetland impacts. (31)

162. COMMENT: The proposed amendments give us great concerns about adding on to the procedural aspects of general permits. By their nature, general permits are those that should provide the Department with the ability to review the context and nature of the request for an action that is minor in its impact on the environment. Before adopting a general permit, the DEP must satisfy that, individually and cumulatively, the activity will have minimal adverse environmental impact.

The proposed requirement for a minimization analysis for activities authorized under general permits defeat the whole purpose of the general permit: to give the regulated community a benchmark, and to allow the Department to focus on more important environmental issues, and attend to larger and more environmentally significant individual permit matters. Requiring applicants to explain to the Department's satisfaction why the disturbances being proposed could not be avoided will inject Department staff into the site planning and design process, even for minor projects. Since the average processing time for most wetland permits is already in the nine-month range, this proposal can only increase delays and add to the cost of development.

In addition, the proposal requires and amends mitigation for eight general permits (double the current four), far exceeding the stringency of the federal nationwide permit program. The three mitigation options all require considerable financial expenditures and will discourage interest in any regulated activities requiring these general permits. (55)

163. COMMENT: N.J.A.C. 7:7A-4.3(b)1i requires that general permit activities shall be associated with a proposed project, and that activities shall be minimized so that the project has been configured so that most or all of it is contained in the uplands on the site, or in the uplands and transition areas on the site. The regulation proposed goes on to say that the applicant is not required to reduce the scope of the project. We support the first part of this proposed regulation but strongly oppose the latter part which says an applicant is not required to reduce the scope of the project. If an applicant can better comply with the regulations by reducing the scope of the project, he/she should. (20, 85)

RESPONSE TO COMMENTS 159 TO 163: As discussed in the proposal summary, the Department has been keeping permitting statistics from the start of the wetlands program

because it is required to make a finding that the general permits do not have more than minimal adverse environmental impacts when performed separately and cumulatively. Department reports show the loss of approximately 100 acres of wetlands per year under the FWPA permitting program, and that over the past 20 years, 78 percent of the wetland impacts have occurred under general permit approvals. Consequently, the Department continues to believe that general permits are having cumulative impacts.

However, the Department has determined not to adopt the minimization requirement because the Department does not want to imply that a separate, additional, review is required to demonstrate that impacts have been minimized, and because there are already several provisions in the FWPA and rules upon which the Department may rely in those cases where impacts to wetlands have not been minimized in a general permit application. For example, at N.J.S.A. 13:9B-2, the FWPA states that the intent of the Act is to "preserve the purity and integrity of freshwater wetlands from random, *unnecessary* or undesirable alteration or disturbance…." (emphasis added). More specifically relating to general permits, at N.J.S.A. 13:9B-23d, the Department has the authority for a specific permit application to "modify a general permit…by adding special conditions." The Department may also, "rescind a general permit and require an application for an individual permit if the Commissioner finds that additional permit conditions would not be sufficient and that special circumstances make this action necessary to ensure compliance with [the FWPA] or the Federal Act." (See N.J.S.A. 13:9B-23d). Similar provisions exist in the FWPA rules. For example, general permits 10A and 10B, two of the most widely used general permits, contain extensive minimization requirements at N.J.A.C. 7:7A-5.10A(c), (d), (e) and (f), and N.J.A.C. 7:7A-5.10B(b), (c), (d) and (e), respectively. N.J.A.C. 7:7A-4.3(b)1, implies that general permit impacts should be minimized by stating that, "The Department shall not authorize activities under a general permit for the purpose of eliminating a natural resource in order to avoid regulation," and N.J.A.C. 7:7A-13.2(a), allows the Department to establish permit conditions, as necessary, to ensure that general permit activities comply with the FWPA, the Federal Clean Water Act, and the Water Pollution Control Act.

As explained in response to comments 180 through 183, the Department is not adopting the general permit mitigation requirements as proposed. Elsewhere in this issue

of the New Jersey Register, the Department is proposing a different mitigation requirement to apply to certain general permits. Due to the planning and expense related to undertaking mitigation, the Department anticipates that applicants for general permit authorizations will seek to minimize impacts to avoid the need to provide mitigation.

Ensuring that activities are minimized will not further limit the types of improvements that can be undertaken pursuant to general permits or unreasonably limit the use of the property. The purpose of the FWPA is to protect freshwater wetlands. As such, applicants must consider project layout in relation to wetland impacts in order to avoid impacts altogether or to meet the standards in the rules.

Finally, the Department does not agree that applicants should be required to reduce the scope of a project by considering offsite alternatives to avoid wetlands altogether where the wetland impacts are otherwise within the limits of the applicable general permit. The FWPA clearly contemplates that minimal impacts to wetlands will occur under the general permits. The general permit provisions in the FWPA rules therefore are intended to strike a balance between minimal impacts to wetlands and an individual's ability to use a property.

164. COMMENT: Despite the existence of freshwater wetlands rules that are intended to implement a policy of No Net Loss of wetlands in New Jersey, freshwater wetlands acreage continues to decrease. The summary of the proposal in the NJ Register acknowledges this loss stating that 78% of the wetland acreage lost per year is due to issuance of statewide general permits (GPs). (85)

RESPONSE: The Department acknowledges that impacts continue to accrue to freshwater wetlands and that many of the cumulative impacts have resulted from general permits since individual permits require mitigation, while to date, general permits have not. Please note that the Department reports show the loss of approximately 100 acres of wetlands per year under the FWPA permitting program, and that over the past 20 years, 78 percent of the wetland impacts have occurred under general permit approvals. The provisions of the FWPA are intended to balance the rights of those who own property with the goal of protecting freshwater wetlands. Consequently, wetland impacts do occur.

However, as development pressure on wetlands increases because the State's upland areas are dwindling, the Department has readjusted the balance over time by reducing allowable impacts under general permits individually or in combination, and by proposing mitigation to ensure that wetlands continue to be protected and do not become an easy target for development when uplands are no longer unavailable. While the proposed amendments to Subchapter 5 which would have required mitigation for certain of the more frequently use general permits are not being adopted, the Department is proposing a mitigation requirement for general permits elsewhere in this Register in furtherance of its no net loss policy.

165. COMMENT: The Department is proposing to amend N.J.A.C. 7:7A-4.3, conditions that apply to all general permit authorizations, to require that all activities to be performed under a general permit be "minimized." Specifically, the proposed rule would require the applicant to demonstrate that the proposed activity has been designed to configure a project such that most or all of it is contained in the uplands on site, or in the uplands and transition areas on site. The proposed rule, however, does not require the applicant to reduce the scope of the project or to consider offsite alternatives. We support the Department's goal to minimize disturbances in wetlands as a result of freshwater wetlands general permits. However, we want to ensure that the proposed amendments do not lead to regulated activities being conducted within wetlands located in the Pinelands Area that are not consistent with the wetlands requirements of the Pinelands CMP. The Pinelands CMP at N.J.A.C. 7:50-6.6 provides that "[d]evelopment shall be prohibited in wetlands and wetlands transition areas … in the Pinelands except as expressly authorized in this Part [Subchapter 6, Part 1]. Only activities permitted in wetlands pursuant to this Part shall be permitted in wetlands transition areas pursuant to N.J.A.C. 7:50-6.14." The Commission's concern stems from the fact that the list of activities permitted in wetlands is very limited and that in some instance, for example N.J.A.C. 7:50-6.13, linear improvements, an analysis of off-site requirements is required. However, in order for a regulated activity that involves the discharge of dredge or fill material under the Federal 404 program in the Pinelands Area to be authorized, such activity must satisfy the requirements of both the FWPA rules and the CMP. We assume that the proposed

amendments to N.J.A.C. 7:7A-4.3 will be applied consistently with this regulatory reality. (66)

RESPONSE: As explained in response to comments 159 through 163, the Department has determined to not adopt the amendment requiring minimization of general permits impacts. To the extent that the Pinelands CMP continues to provide a stricter standard than that proposed under the FWPA rules, by requiring use of upland areas that are not wetland buffers, the Department has acknowledged in its rules at N.J.A.C. 7:7A-1.6(b) that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction. Therefore, the stricter standards of the CMP will govern in the Pinelands. In addition, N.J.A.C. 7:7A-4.3(b)1i has been modified on adoption to emphasize this point.

166. COMMENT: Proposed N.J.A.C. 7:7A-4.3(b)5i requires any permittee who encounters a "possible historic property" to "preserve the resource." N.J.A.C. 7:7A-4.3(b)5ii allows for the withholding of a GP authorization where the applicant, its consultants, engineers, surveyors, and/or agents significantly adversely affect a historic property. The Department, however, may issue the GP where circumstances justify issuing the general permit authorization. The purpose of these new provisions is, "to make it clear that if a possible historic resource is encountered during construction, the permittee must preserve the resource and contact the Department before proceeding." However, requiring preservation of a resource that is "possible," instead of the prior emphasis on a "probable" resource, would include a much broader range of resources whose protection has not been justified in the proposal. As the proposal does not define "possible resource," the permittee would not know what resources must be preserved.

The applicant should only be required to preserve resources that are supportable, obvious, and above-surface and are listed or eligible to be listed on the New Jersey or National Register of Historic Places. The Department must also specify what preservation measures and administrative actions would be required of applicants. (4, 27, 29)

RESPONSE: The term was changed from "probable" to "possible" at N.J.A.C. 7:7A-4.3(b)5i because the criteria for protecting historic resources is, as noted by the commenter, to protect anything that may be listed on or eligible for listing on the State or National Registers. For structures, it is "possible" that anything that is 50 years of age or older may be listed on or eligible for listing on the State or National Registers. However, the "probability" of listing does not depend upon the eligibility of the structure but rather on the knowledge, interest and diligence of government entities that would have to prepare the application for listing. Consequently, it is more appropriate to protect "possible" resources. In addition, the identification of a "probable" historic property requires a professional assessment. However, the identification of a "possible" historic property requires only that the lay discoverer determine that it is historic (human-made and 50 years old or older) and not less than 50 years old (modern). Therefore, "possible" is more appropriate in ensuring the exercise of appropriate caution until the potential that the resource is an historic property eligible for listing can be assessed in accordance with the National Historic Preservation Act. Further, the National Historic Preservation Act protects all historic resources including archaeological resources which are not above-surface. For example, Native American artifacts are not likely to be located above-surface but are an important part of our national heritage meriting the full protection of the law. The preservation measures and other actions required by applicants must be determined on a case by case basis because it is entirely dependent upon the type of resource onsite, the project proposed for the site, and the anticipated impacts of the proposed project on the resource. However, the Department will work with the applicant to avoid, minimize, or mitigate the adverse effects to the historic resource.

167. COMMENT: Proposed N.J.A.C. 7:7A-4.3(b)5ii should not be adopted as it ultra vires, violative of the Administrative Procedure Act, is unduly onerous, and not supported by public policy. The NJDEP Division of Land Use Regulation process currently requires that a project shall not adversely affect properties that are listed or eligible for listing on the New Jersey or National Register of Historic Places (N.J.A.C. 4.3(b)5). Therefore, a regulatory mechanism already exists that notifies the State Historic Preservation Office (SHPO) and other agencies having jurisdiction over the project

location and requests information. Applicants typically include agency correspondence within the application, and if an agency is interested in a project, contact is made to the Department. Withholding approval of General Permit for historical component reasons seeks to further delay the approval process, potentially putting the review of historic issues within the Division of Land Use Regulation, when SHPO is the authority on historic issues. (4, 24)

168. COMMENT: The proposed amendment to N.J.A.C. 7:7A-4.3(b)5ii, which concerns historic preservation review by the Department and the State Historic Preservation Office (SHPO) in the context of general permits, should be clarified. More specifically, the Department should acknowledge that its determination as to whether a particular general permit authorization would significantly adversely affect an historic property will be based on the findings of the SHPO, the agency of New Jersey government with primary responsibility for such matters. (43)

RESPONSE TO COMMENTS 167 AND 168: The prohibition against the Department's approving a permit, including general permit authorizations, that would have negative impacts to historic resources has been a requirement of the FWPA permitting program since 1994, when the Department assumed the authority for the Federal 404 permitting program. It was required by the EPA as part of the Department's original application for assumption. As a result, since that time, by way of a Memorandum of Agreement and subsequent rules (adopted in 2003), the Division of Land Use Regulation has had a working arrangement with the State Historic Preservation Office (SHPO) to help with the review of applications to ensure that no permit is approved that would have negative impacts on a historic resource. Consequently, the Department's rules provide protection to historic resources equivalent to that which is provided under Section 106 of the National Historic Preservation Act when used in conjunction with the Federal 404 Program.

In the Department's experience, there is strong public support for protecting historic resources. Furthermore, while N.J.A.C. 7:7A-4.3(b)5 provides the criteria relating to historic resources by which the Department may approve a general permit,

N.J.A.C. 7:7A-4.3(b)5ii states that adversely affecting a historic resource shall preclude issuance of a general permit unless the Department can find that all conditions for permit approval are satisfied, including those at N.J.A.C. 7:7A-4.3(b)5. Finally, while SHPO is the Department's authority on historic resources, the Division of Land Use Regulation has the authority to deny general permit authorizations which may affect such resources, based on SHPO's advice.

169. COMMENT: N.J.A.C. 7:7A- 4.3(b)10 proposes that if a project, which requires general permit activity, meets the threshold of major development as defined under the New Jersey stormwater regulations, DEP will not authorize the GP unless the whole project complies with the stormwater regulations at N.J.A.C. 7:8. We support this provision. (20, 85)

170. COMMENT: Not only should N.J.A.C. 7:7A-4.3(b)10 not be adopted, this entire condition should be deleted from the wetlands regulations. It is inappropriate for the Department to extend the wetland rules to areas outside of the wetlands or transition areas. Activities that are regulated under the Stormwater Management rules are spelled out in those rules and to reiterate those requirements in the wetlands rules is not only duplicative and unnecessary, it only serves to clutter up and camouflage the wetlands rules. (48)

RESPONSE TO COMMENTS 169 AND 170: The Department has determined to modify the stormwater-related provisions on adoption, including the general permit condition at N.J.A.C. 7:7A-4.3(b)10. As explained in response to comments 88 and 89, upon consideration of comments received and because the Department is currently evaluating various issues related to the implementation of the Stormwater Management rules at N.J.A.C. 7:8 through its permitting programs, the Department has determined to modify on adoption the stormwater management rule at N.J.A.C. 7:7A-2.11 as well as the corresponding stormwater management conditions for general permits at N.J.A.C. 7:7A-4.3(b)10 and for individual permits at N.J.A.C. 7:7A-7.2(b)15.

However, the means to implement the Stormwater Management rules at N.J.A.C. 7:8 is through the Department's various permitting programs. As stated in the Stormwater Management rules at N.J.A.C. 7:8-1.1, Scope and purpose, specifically N.J.A.C. 7:8-1.1(b), those rules establish "design and performance standards for stormwater management measures required by rules pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.; the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq.; the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq.; the Waterfront Development Law, N.J.S.A. 12:5-3; the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; and the Dam Safety Act, N.J.S.A. 58:4-1 et seq."

It is important to note that if a project requiring a FWPA permit also requires a permit in accordance with the Flood Hazard Area Control Act, Coastal Area Facility Review Act or Waterfront Development Act, the trigger for stormwater review will be whether all activities onsite meet the definition of "major development" under the Stormwater Management rules at N.J.A.C. 7:8-1.2.

N.J.A.C. 7:7A-4.3 Conditions that apply to all general permit authorizations

171. COMMENT: N.J.A.C. 7:7A-4.3(b)16 provides that only GPs 1, 6 and 16 be allowed in vernal habitats if the appropriate conditions are met. We strongly support as much protection for vernal habitats as possible. These are vitally important habitats for a number of species and were too easily disturbed in the past without this proposed protection. It does not conflict with the wetlands legislation. (20, 85)

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

172. COMMENT: We commend the Department for recognizing that general permits for certain activities should not be unilaterally prohibited from occurring in vernal habitat or transition area adjacent to vernal habitat. However, the Department should extend the exception to general permits 2, 4, 10A, 10B, 12 and 21. The proposal would then read: "16. With the exception of activities associated with general permits 1, 2, 4, 6, 10A, 10B,

12, 16 and 21, activities authorized under a general permit shall not take place in a vernal habitat…."

The reason for this is that electric utility infrastructure is generally linear in nature. It is not practical or reasonable to have to construct a linear utility project under general permits 2 or 21, or to construct the necessary roads under general permit 10A or 10B to gain access to the utility's infrastructure, or to conduct necessary survey or investigation work under general permit 12, in such a way as to avoid all vernal habitat or transition areas adjacent to vernal habitats. Being required to avoid a vernal habitat or its transition area, when constructing a linear development such as a utility transmission line, may actually result in a larger environmental impact than if the utility were able to construct its infrastructure through such an area. While such construction may include the construction of an access road to enable equipment to get to transmission pole or tower locations, generally the construction associated with the electric utility project is simply the installation of a utility pole or tower. With respect to general permit 4, Hazardous Site Investigation and Cleanup, contamination does not always avoid vernal habitat and its associated transition areas. Not to allow the use of general permit 4, simply because an area is a vernal habitat or transition area to a vernal habitat, can be counterproductive and potentially impede a company's ability to address a contamination issue efficiently. (48)

173. COMMENT: Proposed N.J.A.C. 7:7A-4.3(b)16 would allow activities under General Permits 1, 6, and 16 to impact vernal habitat. No reason is provided for not extending this additional authority to public utility infrastructure projects under General Permits 2 and 21. In that regard, it is often quite difficult to avoid vernal habitat in constructing utilities' linear development projects, and attempting to do so can increase – rather than reduce – adverse environmental impacts. N.J.A.C. 7:7A-4.3(b)16 should be modified to allow activities under General Permits 2 and 21 in vernal habitat areas. (43)

RESPONSE TO COMMENTS 172 AND 173: Vernal habitats are important ecological features that merit protection. Formerly, the Department did not authorize any activities in vernal habitats under general permits. However, N.J.A.C. 7:7A-4.3(b)16 as amended

allows the use of certain general permits in vernal habitats for activities that will not have new or negative impacts to the vernal habitats. For example, general permit 1 is for maintenance activities. Consequently, the vernal habitat may have either been eliminated by the originally approved activity in the wetland, or ongoing maintenance should have no new effect. The condition as it relates to general permit 6 was held invalid (see In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J.478 (2004)). However, the court found that the Department can impose additional conditions or deny general permit 6 authorizations on a case by case basis and when the issuance of a general permit 6 authorization would be in conflict with the Federal 404 program or the FWPA. General permit 16 is for fish and wildlife enhancement activities. Consequently, potential vernal habitat concerns can be addressed as part of the overall habitat enhancement plan.

The protection for vernal habitats by way of a condition on general permits has been in place since 2001. In the Department's experience, there have not been conflicts between the need to permit a clean up of contamination using general permit 4 and the requirement to protect vernal habitats.

Finally, the Department recognizes that utility work tends to be linear in nature. However, vernal habitats constitute a small percentage of freshwater wetlands. Therefore, utilities that seek to perform work in or near vernal habitat should make every effort to avoid the habitat or else obtain an individual permit for such activities.

174. COMMENT: We suggest that proposed General Permit 6A, Transition Areas Adjacent to Non-Tributary Wetlands, be added to the list of the general permit exceptions included at N.J.A.C. 7:7A-4.3(b)16. (30)

RESPONSE: Transition areas are an integral part of vernal habitats. Allowing impacts to transition areas would result in serious impacts to the vernal habitat. However, as explained in response to comment 173, the prohibition on the use of general permit 6 in vernal habitats was held invalid (see In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J.478 (2004)). For consistency with the Court decision the Department is adding general permit 6A to the list at N.J.A.C. 7:7A-4.3(b)16. The court did, however, find the Department can impose additional conditions or deny general permit 6

authorizations on a case by case basis, and when the issuance of a general permit 6 authorization would be in conflict with the Federal 404 program or the FWPA. By treating general permits 6 and 6A in the same way, in relation to the review of vernal habitats, the Department will have the ability to examine vernal habitats in their entirety and conduct the program in accordance with the Court's decision.

N.J.A.C. 7:7A- 4.4 Use of multiple general permits

175. COMMENT: N.J.A.C. 7:7A-4.4(a)1 and (a)3 state that if an application contains more than one activity on a single site, the Department may authorize the activities under one or more general permits, provided that requirements at proposed N.J.A.C. 7:7A-4.4(a)1, 2, 3, 4 and/or 5 are met. Proposed additional language at N.J.A.C. 7:7A- 4.4(a)1 and 3 appears to contradict the use of general permit 6. The example used regarding a road crossing that will impact 0.60 acres (0.35 under a GP6) of wetlands would still be in compliance with the GP6 conditions provided that the wetland was not a water of the United States. GP6 conditions state that impacts can occur to one acre of wetlands that are not the waters of the U.S., and cannot exceed one acre of impact to transition areas. The IP requirement for this scenario contradicts the usage and conditions of the GP6. Also, clarification is needed of this rule if it will be interpreted for overlapping wetland TAs, or for separate areas on a project site, or both. (31)

RESPONSE: The Department agrees that some clarification may be necessary regarding the application of N.J.A.C. 7:7A-4.4(a)1 and 3. N.J.A.C. 7:7A-4.4(a)1 states that, "other than the combination of general permits 6 and 6A, the Department shall not authorize the combination of two different general permits, or a general permit and a transition area waiver, for a *single activity*" (emphasis added). The example provided in the summary states that an applicant may not combine 0.25 acres under general permit 10B with 0.35 acres under general permit 6 for a road crossing that would impact 0.60 acres, since a road crossing is limited to a total of 0.25 acres. Rather, an individual permit would be required for a road crossing of 0.60 acres. As the commenter correctly infers, this does not preclude the applicant from seeking a general permit 6 for the entire 0.6 acre road

crossing if the wetland to be affected is not a water of the United States. Continuing with this example, because general permit 6 was being used for an impact in excess of 0.5 acre, no additional general permits would be available in combination with general permit 6 (except for general permit 6A), in accordance with N.J.A.C. 7:7A-4.4(a)3.

The commenter also seeks clarification regarding how the rule will be interpreted for overlapping wetland TAs, or for separate areas on a project site, or both. N.J.A.C. 7:7A-4.2(c)2i states that, "If the activity authorized under the general permit eliminates the wetland in its entirety, the transition area associated with that wetland may also be eliminated in its entirety without a separate transition area waiver, except in the case where there is a second wetland with a transition area overlapping the first. In the latter case, a separate transition area waiver is required." The same rationale would apply in a scenario where a general permit would eliminate a portion or all of a transition area, but there is a second wetland with a transition area overlapping the first. In the latter case, a separate transition area waiver or general permit would be required, and could be issued so long as all other requirements at N.J.A.C. 7:7A-4 are met.

N.J.A.C. 7:7A-4.4 Use of multiple general permits

176. COMMENT: Proposed N.J.A.C. 7:7A-4.4(a)3 prevents the combination of general permit 6 with any other general permit (exceeding 0.5 acres) on the same site, except for 6A, in which case the total impact to wetlands in transition areas shall not exceed one acre. The proposal does not provide any rationale for limiting disturbances to 0.5 acres, nor does it clearly articulate a baseline purpose for preventing permit combinations. The Department must re-propose this regulation with its rationale to provide interested parties with a basis for assessing and commenting on the proposed restriction. Where the applicant is able to meet all of the existing requirements for a general permit, then the applicant should be permitted to enjoy the benefits of those permits. These proposals threaten reasonable use of property. Additionally the proposed section does not address the effect of N.J.A.C. 7:7A-4.4(a)(3) on existing general permits for a single site that include general permit 6 and another general permit. The rules should make clear how N.J.A.C. 7:7A-4.4(a)(3) will affect available rights to extend general permit

authorizations. In particular, where owners obtain these permits they should be able to rely on their effectiveness. (4, 27, 29, 74)

RESPONSE: As stated in the summary for N.J.A.C. 7:7A-4.4(a)3, if an applicant is authorized to use general permit 6 for more than 0.5 acres of impacts, it cannot be combined with any other general permit authorization on the same site. The rationale for this is that while the FWPA at N.J.S.A. 13:9B-23b requires the Department to permit up to one acre of impacts to a wetland which is not a surface water tributary system discharging into an inland lake or pond, or a river or stream, it does not require that additional impacts be permitted by way of additional general permits when used in combination. Consequently, the Department will require an individual permit if an applicant proposes the use of general permit 6 for more than 0.5 acres in combination with other general permits for additional wetland impacts. This 0.5 acre limit should allow reasonable use of property, while being protective of non-surface water connected wetlands. Regarding the effect of N.J.A.C. 7:7A-4.4(a)3 on existing general permits for a single site that includes general permit 6 and another general permit, existing permits are valid for five years from the date of issuance, and do not have to comply with new rule requirements while valid. Finally, with regard to how N.J.A.C. 7:7A-4.4(a)3 will affect the right to extend an existing general permit authorization, these permits can be extended so long as they meet all requirements at N.J.A.C. 7:7A-14.6. Depending on the combination of permits and the acreage of fill and disturbance previously authorized, some permits may be eligible for extension, and others may not.

177. COMMENT: Proposed N.J.A.C. 7:7A-4.4(a)4 prohibits the issuances of GPs 10A and 10B (minor road crossings) for the same site. The summary offers no insight for the preclusion, other than to state that since general permit 10A and 10B offer two approaches to enabling a road crossing under a general permit, the Department has determined that if all impacts cannot entirely satisfy either option, then the impacts are of such an extent that an individual permit is required. Where the applicant is able to meet all existing requirements for GPs 10A and 10B, either individually or cumulatively, then the Department should grant the authorization of both GP 10A and 10B. The Department

also proposes to require mitigation for GPs 10A and 10B, which is intended to address adverse impacts due to regulated activities. The proposed restriction against using GP 10A and 10B on the same site is unnecessary and unsupportable. (4, 27, 29)

RESPONSE: General permit 10A and 10B offer approval for the same type of activity (road crossing), but with slightly different scenarios. The 10A offers a short crossing scenario which allows up to 100 feet and one quarter acre of disturbance, and also a long crossing scenario which allows up to one eighth acre but without a length limit. The 10B is essentially the same, except that it allows up to one quarter acre of disturbance, also without a length limit, but for which an alternatives analysis must be performed. Since the 10A and 10B are essentially the same permit, but with slight variations, allowing the use of 10A and 10B on the same site, would essentially be allowing up to 0.5 acres of disturbance for an activity that should only be allowed to impact 0.25 acres. To allow more than the 0.25 acres would also not be in keeping with the FWPA which requires that activities authorized under general permits cause only minimal adverse environmental impact when performed separately and cumulatively. The Department has determined not to adopt the mitigation requirement for certain general permits at this time. Please see response to comments 180 through 183 for further discussion about the mitigation requirement for general permits.

178. COMMENT: N.J.A.C. 7:7A-4.4(a) states that if an application contains more than one activity on a single site, the Department may authorize the activities under one or more general permits provided that requirements at proposed N.J.A.C. 7:7A- 4.4(a)1, 2, 3, 4 and/or 5 are met. At proposed N.J.A.C. 7:7A-4.4(a)5, the proposed language is confusing. The proposed language should not be at N.J.A.C. 7:7A-4.4(a)5, but put under GP 10A or B. Furthermore, the use of a shared driveway requires a waiver from zoning requirements for most municipalities. Add a line to GP 10A and B that references this rule. This requirement should be waived if a shared driveway is not permitted under local zoning rules. (31)

RESPONSE: Although it may appear that the requirements at N.J.A.C. 7:7A-4.4(a)5 refer only to road crossings, N.J.A.C. 7:7A-4.4(a)5i may also apply to utility line crossings. Further, it reduces redundancy to place this provision in one location, applying to the use of multiple permits, rather than to place the same provision within three separate rule provisions. Regarding the provision at N.J.A.C. 7:7A-4.4(a)5ii that requires the use of shared driveways in the case where the alternative would be multiple wetland crossings, the Department does not agree that simply because a variance is required by some municipalities to use a shared driveway, the requirement should be waived. The Department's requirement applies to driveways crossing wetlands while a township ordinance may apply to all driveways without consideration of environmental impacts. The Department believes that it is appropriate for the municipality to consider environmental impacts in meritorious cases. Further, because the use of shared driveways helps to limit impervious cover, municipalities may be reconsidering a strict prohibition against the use of shared drives based on updated stormwater requirements that require all stormwater to be accounted for and remain onsite.

179. COMMENT: Further restrictions are proposed at N.J.A.C. 7:7A-4.4(a)5 against multiple crossings of the same wetland or State open waters. The proposed exception is where this would be the only access to an otherwise developable lot that would reduce or eliminate the disturbance to a wetland or State open water, and shared driveways are used to the maximum extent possible to access multiple lots. Where multiple crossings meet GP 10 criteria, then the Department should allow these crossings. Also, as no explanation is given for these new restrictions on multiple crossings, the Department must re-propose them together with its rationale so that interested parties will have a basis for assessing and commenting on the proposal. (4, 27, 29)

RESPONSE: As stated in response to comment 178, the requirements at N.J.A.C. 7:7A-N.J.A.C. 7:7A-4.4(a)5i are not only applicable to road crossings but may also apply to utility line crossings. This provision, together with N.J.A.C. 7:7A-4.4(a)5ii, which requires that applicants share driveways to the greatest extent possible to access multiple

lots, helps to ensure that impacts to wetlands have been minimized. This rationale was fully explained in the summary in the discussion regarding minimization of impacts.

Subchapter 5 Adopted General Permits

180. COMMENT: The DEP plans several changes to the general permitting program including minimization, adding deed restrictions and increasing the mitigation requirements. The entire purpose for general permits is for regulatory efficiency. By creating a range of permits designed to regulate with little, if any, delay or paperwork for activities having minimal impacts, the DEP not only reduces its own time to review and approve permits, but it is also a powerful tool to reduce overall impacts to wetlands. General permits are favored by developers because they are faster, less expensive and more reliably issued than individual permits. Therefore, developers have reduced the impacts to many projects, to wetlands and transition areas. However, if the DEP starts to treat general permits like mini-individual permits, and requires alternatives analyses to prove minimal impact, this discourages minimization. By their very nature, alternative analyses require more time to review and are subjective. They require judgment on reasonable costs, efficient use of lands, and on what is feasible and not feasible. Frequently reviewer opinions and applicant opinions differ on sufficiency of the analyses which results in numerous meetings and supplemental submissions. If the development community can no longer rely on the general permitting program to speed approvals, it has much less incentive to reduce project scopes to avoid wetland impacts. Therefore it is more likely that some developers will use individual permits to increase wetland impacts in order to increase the amount of development available to pay for the increased administrative costs. The DEP should eliminate the need for minimization for activities that are below the 0.1 acre of disturbance to be consistent with federal policy. Furthermore, by eliminating minimization requirements for projects located in smart growth areas, DEP could encourage growth away from more sensitive wetlands and improve environmental protection. (4, 27, 29, 41, 64).

181. COMMENT: Relative to N.J.A.C. 7:7A-5.2(f) (general permit 2-underground utility lines), 5.6(d) (general permit 6-non-tributary wetlands), 5.10A(f) (general permit 10A-very minor road crossings), 5.10B(e) (general permit 10B-minor road crossings), and 5.21(e) (general permit 21-above ground utility lines), these proposed additions should not be adopted.

The Department developed the general permit concept on the recognition that certain projects, by their nature or size, would have minimal but acceptable impact on wetlands or State open waters when weighed against the value of or need for the proposed project. The Department further recognized that applications for such projects should require less rigorous applications and require less review time, because of their minimal environmental impact. The general permits proposed for modification are the primary general permits used by electric utilities for the construction of their transmission infrastructure, projects which are undertaken for the overall public good. These proposals negate the entire general permit concept, at least as it pertains to electric utilities' abilities to develop and maintain the infrastructure required to provide safe, reliable electric service to the citizens of New Jersey. Mitigation for such small disturbances is unnecessary. The project review will be unnecessarily lengthened as the permit will not be issued until approval of a mitigation plan is obtained. It is doubtful, if adopted, that a permittee could even comply with the last condition of this paragraph that would require performance of the mitigation prior to or concurrent with the general permit activities if the plan involves anything other than making a monetary payment for the mitigation. (48)

182. COMMENT: We are extremely concerned that changes to general permits (GP) 2 and 21 will make them increasingly less useful, and add significant regulatory burden without concomitant environmental benefits. GPs have allowed the company to effectively expand, upgrade and maintain existing power and utility infrastructure while still limiting wetlands disturbances. However the proposed changes to GPs 2 and 21 reduce permanent acreage disturbance from one acre to one-half acre; require mitigation for all disturbances to freshwater wetlands and state open waters; and require mitigation to be in place at the time of the application (N.J.A.C 7:7A-15.3). These new regulations

greatly reduce the practicality of these general permits, and will require individual permits for numerous minor utility activities with greater than 0.5 acre of disturbance, thereby greatly limiting our ability to complete critical activities necessary for the health safety and welfare of the citizens of New Jersey, which in turn could cause decreased reliability of utility services.

Upgrades to our existing facilities, maintenance on high voltage transmission rights-of-way and new facilities are all an integral part of a functioning utility business. Without a mechanism to complete these activities in a timely manner it becomes increasingly difficult to safely and reliably provide electric and gas services to the residents of New Jersey.

The Department's position that the 0.5 acre limitation is necessary to comply with Federal law is not accurate. While it is true that the United States Army Corps of Engineers has reduced coverage of the matching nationwide permits to 0.5 acres, the scope of the jurisdiction of the Federal 404 program is much more limited than New Jersey's program. Specifically, New Jersey law and, in particular, GPs 2 and 21, also cover transition areas. To the extent GP 2 and 21 set limits on coverage in transition areas, that limit is solely driven by NJDEP, and not by USACE. While the current one acre limit for the use of GP 2 or 21 is not appropriate, reducing that limit is much more problematic. Accordingly, the first sentence in N.J.A.C. 7:7A-5.2(c)(1) should be amended to state: "Permanent above-ground disturbance of wetlands or open waters shall be no greater than 0.5 acres, and permanent above-ground disturbance of transition areas shall be no greater than 1.0 acres." Similarly, N.J.A.C. 7:7A-5.21(b)(2)(i) should be changed to state as follows: "No greater than one acre for transition areas, and no greater than 0.5 acre for freshwater wetlands and/or State open waters."

Finally, the requirement imposing mitigation for general permits is unnecessary, and, in the case of GPs 2 and 21, is extremely problematic. The ACOE nationwide permit program imposes a procedure that presumptively requires mitigation for disturbances of wetlands greater than 0.1 acre, but allows an applicant flexibility in suggesting mitigation. The proposed amendments to the GPs and, in fact, the entire rule go well beyond the nationwide permit program by requiring mitigation for all wetlands There is simply not policy or legal reason to remove the de minimis limitation that is granted by

the ACOE. By way of example, and specifically applying to GPs 2 and 21, the first sentence of proposed N.J.A.C. 7:7A-5.2(f) and proposed N.J.A.C. 7:7A-5.21(f) should be deleted and replaced with the following: "Mitigation shall be performed in accordance with the ACOE Nationwide Permit General Condition Number 20, for all permanent loss and/or disturbances greater than 0.1 of an acre of wetlands." (4, 24)

183. COMMENT: The Department proposes to reduce the permitted permanent impacts allowed under the general permits for underground utility lines (GP 2) and above ground utility lines (GP 21) from one acre to one-half acre. This proposed change is quite significant, and the Department's proposed action is erroneous on several bases.

First, the Department lacks statutory authority to limit the impact of a general permit to less than one acre. The FWPA states that "[t]he department shall issue a general permit for an activity in a freshwater wetland . . . which would not result in the loss or substantial modification of more than one acre of freshwater wetland." N.J.S.A. 13:9B-23(b) (emphasis added). Thus, as New Jersey's Supreme Court has explained in interpreting the very same statute at issue here, "the Legislature intended a general permit to be issued if activities in isolated freshwater wetlands neither (i) disturb or destroy more than one acre, nor (ii) take place in wetlands of exceptional resource value." In re Freshwater Wetlands Protection Act Rules, 180 N.J. 478, 493-94 (2004). Put another way, the Legislature has already determined that permits for impact areas of up to one acre are eligible for general permit coverage and the Department is bound by that determination.

Aside from its lack of statutory authority, the rationale proposed by the Department is unsound. The Department suggests that such a reduction will make these permits "consistent with the Federal nationwide permit for utility lines (NP 12)." But contrary to the Department's statements, the general permits at issue here (GP 2 and GP 21) are not analogous to NP 12. Thus, even though wetlands are regulated by the federal Clean Water Act (CWA) as well as New Jersey's FWPA, "there are some important differences" between the two statutes. MCG Assocs. v. DEP, 278 N.J. Super. 108, 112 (App. Div. 1994). A major difference, which is on point here, is the absence of CWA authority "to regulate land adjacent to wetlands, such as a buffer area between the

wetland and the adjoining upland." Id. at 112-113. In contrast, the FWPA "mandates [regulation of] buffers around wetlands." Id.

Such differences in statutory authority are evident in the different scope of the Corps of Engineers' nationwide permits, such as NP 12, and the Department's general permits. Thus, while a nationwide permit like NP 12 protects the "waters of the United States," as defined in 33 C.F.R. Part 328 (i.e., open waters and freshwater wetlands), the Department's General Permits 2 and 21 protect not only open waters and wetlands, but also transition areas, that is, the wetland-adjacent upland areas to which the nationwide permit does not apply. Put another way, the considerably broader coverage of General Permits 2 and 21 readily distinguishes them from NP 12 and refutes the Department's contention that the one-half acre limit under NP 12 must also control the Department's General Permits 2 and 21.

Finally, N.J.S.A. 13:9B-23(c) states that the Department "shall issue additional general permits" if the criteria specified in the statute are satisfied (e.g., the regulated "activities will cause only minimal adverse environmental impacts"). In proposing to amend General Permits 2 and 21 from one acre to one-half acre, the Department has not identified any changed circumstances under which the current one-acre limit for the two general permits would no longer comply with the statutory conditions noted above. Lacking such evidence, the Department has no rationale for its action (other than the previously refuted contention concerning federal conformity). See Pub. Serv. Elec. and Gas Co. v. NJDEP, 101 N.J. 95, 103 (1985). (43)

RESPONSE TO COMMENTS 180 THROUGH 183: The Federal State Program Regulations governing assumed State wetland programs (40 CFR Part 233) provide that States may adopt and enforce requirements which are more stringent and operate a program with greater scope than required by Federal law (40 CFR 233.1(c)). However, the regulations also state that any approved State program shall, at all times, be conducted in accordance with the requirements of the Federal Clean Water Act. The regulations further provide that while States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose (see 40 CFR 233.1(d)). Therefore, the Department is required to be as stringent as the Federal program in every

aspect of its program and the fact that it protects transition areas does not excuse it from maintaining general permits that are as stringent as their Federal counterparts.

Regarding the mitigation requirement for general permits, the Department has been keeping permitting statistics from the start of the wetlands program because it is required, by the FWPA at N.J.S.A. 13:9B-23c, to make a finding that the adopted general permits will have only minimal adverse environmental impacts when performed separately and cumulatively. The Department's statistics show the loss of approximately 100 acres of wetlands per year under the FWPA permitting program. General permits account for 78 percent of the total wetland losses over the past 20 years. Consequently, general permits are having cumulative impacts which, together with the change in the Federal ACOE regulations, prompted the Department to require mitigation for certain general permits.

At the time of proposal, the Department considered setting a 0.1 acre threshold on the mitigation requirement since the ACOE was adopting this threshold. However, the Federal rules leave discretion to the ACOE to require mitigation for all impacts on a site but do not provide criteria by which an applicant will know in advance when mitigation for all impacts of less than 0.1 acres will be required. Because rulemaking under the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. requires that the Department incorporate decision standards into the rules, the Department did not believe it could craft a rule that would be as stringent as the Federal rules in all cases in the absence of a federal standard. Since that time, the Department has had additional discussions with the ACOE and has determined that it is possible to provide a standard similar to that being used by the ACOE. Therefore, the Department is not adopting the mitigation condition for general permits as proposed and is instead proposing a different standard, similar to that in the ACOE program, elsewhere in this Register.

Although the Department has determined it is not necessary to explicitly state the requirement to minimize impacts, as stated in response to comments 159 through 163, the Department will continue to ensure that wetland impacts are minimized using the authority of the FWPA and various specific provisions of the FWPA rules.
The Department does not anticipate that, rather than minimize impacts under general permits, applicants will instead seek additional wetland impacts under an individual

permit because, as the commenter points out, such applications are more costly, require more documentation and analysis, and are more likely to be denied than general permit authorizations. Further, if an applicant cannot justify placing an activity in a wetland by using general permits it is hard to envision how he or she will be better able to justify impacts to wetlands using an individual permit since the presumption that must be rebutted, when the Department determines whether or not to approve an individual permit, is that there is an alternative non-wetland location, either off or onsite, more suitable for the conduct of a non-water dependent activity.

Finally, the provision of the FWPA that refers to the ability to fill no more than one acre of wetlands that are not exceptional resource value (N.J.S.A. 13:9B-23) applies only to non-surface water connected wetlands. This provision resulted in adoption of general permit 6. General permit 6 is separate and distinct from general permits 2 and 21. General permits 2 and 21 are subject to conditions as adopted by rule. As such, the Department may reduce from 1.0 to 0.5 the allowable acreage of regulated areas to be disturbed under general permits 2 and 21. Therefore, in order to remain as stringent as the Federal program in all ways, and to avoid more than minimal impacts, the Department reduced the limits of general permits 2 and 21.

184. COMMENT: The Department proposes to require and amend mitigation for eight GPs, whereas only four GPs currently require mitigation. In addition to stating the Department's intent to monitor impacts from all GPs to determine if mitigation should be a standard condition, the proposal justifies the proposed mitigation requirements in order to alleviate the ongoing loss of wetlands in the State, to continue to be able to make the finding that the adopted general permits will cause only minimal adverse environmental impact when performed separately and cumulatively, and to remain as stringent as the federal program in all ways. However, the Department's proposed mitigation requirements actually far exceed the stringency of the federal nationwide permit program. This is evident as the DEP regulates transition area and proposes mitigation requirements for transition areas under proposed GP 6A and the individual transition area waiver. Consequently, the state program is in effect more stringent overall than the federal program. (4, 27, 29, 41)

185. COMMENT: The federal no net loss policy is a nationwide goal that includes consideration of restoration activities including those in the Everglades and Upper Mississippi River. That is why it does not require no-net loss on a permit-by-permit basis. DEP claims it needs to follow the ACOE lead in requiring mitigation to meet the no-net-loss mandate. The DEP could easily comply with the federal mandate by pointing out that it requires 2:1 ratios on individual permits. Please explain why the DEP is concerned about meeting the minimum thresholds when it can point to the fact its existing program is already more stringent. Success rates between state and federal mitigation projects are similar, if the federal program only has a 1:1 ratio for wetland mitigation, how can the state program that requires 2:1 be less stringent? (41, 64)

RESPONSE TO 184 AND 185: As stated in response to comments 180 through 183, the Federal State Program Regulations governing assumed State wetland programs (40 CFR Part 233), provide that States may adopt and enforce requirements which are more stringent and operate a program with greater scope than required by Federal law (40 CFR 233.1(c)). However, the regulations also state that any approved State program shall, at all times, be conducted in accordance with the requirements of the Federal Clean Water Act. The regulations further provide that while States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose (see 40 CFR 233.1(d)). Therefore, the Department is required to be as stringent as the Federal program in every aspect of its program and the imposition of mitigation for certain general permits for which there are Federal equivalents is required if the Department intends to maintain its assumed program. Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register. Finally, the Department requires a ratio of two acres of wetlands to be created for every one acre of wetlands destroyed to ensure the loss of functions and values is fully mitigated, to account for any failures that will occur, and to account for the time lag between the time of impact and the time until the constructed wetland has fully

compensated for the functions and values lost. If you ignored those factors and looked strictly at the number of acres of mitigation that have been required, and assume 100 percent success, this would not be enough to mitigate for general permits since the Department has approved roughly four times the amount of acreage impacts through general permits than through individual permits. The Federal regulations require a minimum ratio of 1:1 if no functional assessment method is available. However, on a case by case basis, the ACOE considers factors that will require greater than a 1:1 ratio and provides the rationale for the ratio determined to be necessary as part of the administrative record for the permit action. Consequently, the Department does not agree that its mitigation program exceeds that of the Federal program, or that mitigation performed as a result of individual permits offsets the impacts caused by GPs.

186. COMMENT: The federal program includes a preference for restoration of damaged wetlands. The DEP program favors converting stable uplands to wetlands. Why should the DEP program disfavor restoration in conflict with the federal program? (64)

RESPONSE: Under the FWPA rules, the creation and restoration of wetlands are valued equally, as evidenced by the fact that the same mitigation ratio is applied for both, that is, an applicant is required to create or restore two acres of wetlands for each one acre of wetland disturbance. A March 2002 report entitled, “Creating Indicators of Wetland Status (Quantity and Quality): Freshwater Wetland Mitigation in New Jersey," prepared by Amy S. Greene Environmental Consultants, Inc., in conjunction with the Department, demonstrated that restored wetland projects are generally more successful than creation projects in which uplands are converted to wetlands. As a result, the Department recognizes the difficulty of creating wetlands from uplands and requires significantly more substantial information to be submitted, including an analysis of the existing and proposed hydrology for the proposed project, also known as a water budget. The Department is currently developing a water budget manual with a grant from the U.S. Environmental Protection Agency to assist applicants in properly developing a water budget for a proposed mitigation site so that the chance of success for creation mitigation increases.

187. COMMENT: The federal program favors stream restoration when streams are impacted. The DEP program discourages stream restoration by including provisions that make stream restoration too difficult and too expensive to perform. Why are the proposed DEP rules inconsistent with the federal rules? Stream restoration can significantly reduce non-point source suspended solid sources in urban streams. Reducing this discharge will improve water quality in degraded stream segments. Please explain why the DEP Land Use Regulation Division would not encourage use of wetland mitigation rules to improve water quality in the states streams. (41, 64)

RESPONSE: The intent of the wetland mitigation rules is not to improve stream corridors and water quality in the State's streams, but to replace the functions and values of wetlands that are lost due to activities authorized under a permit. Since one of the many functions and values of a wetland is protection of water quality, the implementation of wetland mitigation projects does indirectly improve the water quality of the State's streams. Although not the subject of this rule proposal, the comprehensively revised Flood Hazard Area Control Act Rules (N.J.A.C. 7:13) specifically require mitigation for stream impacts as well as impacts to the associated riparian buffer, thus providing direct improvement to the water quality of the State's streams through mitigation for permitted impacts.

188. COMMENT: We wish to express opposition to the proposed requirement for mitigation for wetlands general permits 6, 10A, 10B, 11, 18, 21, 23 and 27. Under the new rules, mitigation would be required for many of the projects that municipalities perform in order to enhance public safety and welfare, including transportation, stormwater and dam safety improvements. Even redevelopment projects contribute to public safety and welfare by encouraging economic growth. The rules would impose the burden of additional costs and permitting delays on these important projects. Because it is impractical for many municipalities to perform wetlands mitigation themselves, compliance with the new rules would entail the purchase of credits from a mitigation bank. While the rule proposal noted that the DEP estimates the costs of wetlands

mitigation at $300,000 per acre of wetland impacts, it should be noted that the cost of credits in certain wetland mitigation banks is even higher. The costs of mitigation would make many of these projects prohibitively expensive, delaying or preventing municipalities from performing the infrastructure improvements necessary to protect public health and safety. (5, 21, 23, 59, 70)

189. COMMENT: Regarding proposed mitigation for general permits 2, 10A, and 11, mitigation should not be required for minor disturbances/discharges to wetlands and State open waters similar to the 0.1 acre threshold for disturbance in the U.S. Army Corps of Engineers Nationwide Permit Program. The Department should adopt a 0.1 acre threshold as this will encourage the applicant to minimize a crossing where it is not possible to completely avoid a freshwater wetland or State open water. This will also eliminate placing an unnecessary regulatory burden on an applicant for an unavoidable "de minimis" impact. (47)

190. COMMENT: We respectfully request that the NJDEP reconsider the proposal to require mitigation for General Permit impacts that would be more stringent than the U.S. Army Corps of Engineers (ACOE) requirements (that is, requiring mitigation for projects with less than 0.1 acre impact), at least for public roadway projects. This requirement would impose an additional financial burden on an already constrained budget to perform much-needed improvements to public roadways. Since these impacts are so small, not much will be gained from requiring mitigation for them. Similar to the USACOE rules, perhaps the NJDEP could require mitigation for impacts of 0.1 acre or less on a case-by-case basis, if warranted. (30)

RESPONSE TO COMMENTS 188 THROUGH 190: As stated in response to comments 180 through 183 above, the requirement for mitigation for several general permits is necessary to remain as stringent as the Federal 404 program. Neither the FWPA nor the Federal 404 program excludes activities performed by municipal governments from compliance with all provisions of the statutes. While the Department recognizes that wetland mitigation is not normally the purview of municipal governments, if a

municipality, or group of municipalities, anticipates long-range needs for mitigation, they may consider establishing their own mitigation bank or consolidated wetland mitigation sites. The FWPA also provides that counties may, in consultation with their municipalities, identify areas suitable for wetland mitigation. In this way, the benefits of restored or created wetlands will be retained locally, while the governments will be able to better anticipate and control the costs of mitigation. There are likely many other local opportunities for mitigation projects. The Mitigation Unit in the Department's Land Use Regulation Division will work with any entity that would like to explore these options.

The Department also anticipates that because of the increased need to perform mitigation, additional mitigation banks will be established thereby making credit purchase more competitive.

Also as stated in response to comments 180 through 183 above, at the time of proposal, the Department considered setting a 0.1 acre threshold for the mitigation requirement since the ACOE was adopting this threshold. However, the Federal rules leave discretion to the ACOE to require mitigation for all impacts on a site but do not provide criteria by which an applicant will know in advance when mitigation for all impacts of less than 0.1 acres will be required. Because rulemaking under the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., requires that the Department incorporate decision standards into the rules, the Department did not believe it could craft a rule that would be as stringent as the Federal rules in all cases in the absence of a federal standard. Since that time, the Department has had additional discussions with the ACOE and has determined that it is possible to provide a standard similar to that being used by the ACOE. Therefore, the Department is not adopting the mitigation condition for general permits as proposed and is instead proposing a different standard elsewhere in this Register.

191. COMMENT: Although several mitigation options are provided under the rules at N.J.A.C. 7:7A-15.5, the Department presumes that onsite and offsite restoration, creation or enhancement and offsite upland preservation are not feasible, in the absence of demonstration that these mitigation measures would be “environmentally beneficial." Consequently, the applicant must fulfill its mitigation obligation through mitigation credit

purchase, monetary contribution or land donation. Of the three options, the summary expresses a preference for credit purchases and states, “it is the Department's hope that the amended rules will reinforce the need for mitigation banks and encourage the creation of new banks in various watersheds throughout the State."

Any one of these three options requires considerable financial expenditures, essentially discouraging interest in any regulated activities requiring these GPs. The new mitigation requirements and standards for monetary contribution are onerous, particularly as applicants are limited in their selection of a mitigation approach. The proposed requirements would consequently dissuade the use of GPs. (4, 27, 29, 65)

RESPONSE: As explained in response to comments 180 through 183, the Department does not believe that requiring mitigation for general permits will result in applicants seeking additional wetland impacts under an individual permit instead, because such applications are more costly, require more documentation and analysis, and are more likely to be denied than general permit authorizations. Further, unlike general permits, in order to obtain an individual permit, the applicant must rebut the presumption that there is an alternative non-wetland location, either off or onsite, more suitable for the conduct of a non-water dependent activity. Finally, applicants conducting mitigation for individual permits who cannot perform mitigation onsite are required to first seek to purchase credits from a local mitigation bank. Such credits are likely to be as costly if not more costly than the Department’s estimate of $300,000 per acre, since the Department’s estimate is based on an average cost. Those applicants who obtain an individual permit but for whom there is no available mitigation bank are required to determine a monetary contribution by calculating the cost to purchase and restore existing degraded freshwater wetlands versus the cost to purchase property and create freshwater wetlands of equal ecological value to those which are being lost. The assessment includes an estimate of how much it would cost to enhance or restore a degraded wetland of the same type and of equal ecological value to those that are being impacted under the permit. For example, if forested freshwater wetlands are being disturbed under the permit, the cost estimate must assume establishment of a forested freshwater wetland. The cost estimate must include all costs necessary to complete the proposed mitigation and monitoring and must include, at

a minimum: engineering costs, including surveying of land, soil erosion and sediment control plan, grading plan, soil removal plan, wetland planting plan, calculation of a water budget; environmental consultant fees, including preparation of a seeding/planting and restoration plan, interface with engineering plans and personnel, permit processing costs; the cost of obtaining a No Further Action letter from the Department; attorney fees, including fees for the preparation of a conservation restriction; costs of financial assurance; site preparation and construction costs; vegetation planting costs; costs of supervising construction; and the cost of a monitoring program and monitoring reports for five years, including report preparation and data collection.

Consequently, the option to make a monetary contribution or to contribute to an already existing bank is not as costly or demanding as the requirements for mitigation applicable to an individual permit. Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

192. COMMENT: The Department is proposing mitigation for GPs 2, 6, 10, 11, 18 and 21 but does not specify the amount. I am assuming the ratio will be 2:1. (32)

RESPONSE: For the reasons described in response to comments 180 through 183, the Department has determined not to adopt the mitigation requirement for certain general permits as proposed and is instead proposing a different requirement, similar to that contained in the Federal ACOE regulations, elsewhere in this Register.
However, for all mitigation projects, the type of mitigation determines the amount of required mitigation. If the applicant chooses to create wetlands, the requirement is two acres created for every one acre eliminated or disturbed. Other ratios apply to the other mitigation options.

193. COMMENT: Mitigation is not practical for small disturbances and most of the mitigation banks that could have sold credits are out of space or out of business. In the absence of approved banks, the applicants are required to make monetary contributions.

At a Mitigation Council meeting in the past, the Council said it had collected millions of dollars but had not constructed or contributed to the construction of one mitigation bank. If the existing rules did not accomplish on-the-ground mitigation, the proposed rules will not accomplish on-the-ground mitigation for general permits. The Department should not wait too long to reevaluate the monetary contribution for general permits. (32)

RESPONSE: The wetland mitigation fund represents dollars received in lieu of on-the-ground mitigation. Therefore to fully mitigate for wetland losses using a contribution, the Council must use the fund for projects that result in the restoration, enhancement, preservation and/or creation of wetlands. It is not the responsibility of the Mitigation Council, and in fact would be inconsistent with its purpose, to use money from the mitigation fund to construct a wetland mitigation bank. A wetland mitigation bank is established to sell credits to permittees whose purchase of credits as mitigation for permitted impacts has been or will be approved by the Department. If the Council used mitigation funds to construct a mitigation bank that then sold credits for new wetland impacts, mitigation would be insufficient and the State would be losing wetlands because the original impacts (which resulted in the money in the fund) will remain unmitigated. Consequently, the Mitigation Council can only use the fund for on the ground mitigation projects that are not banks.

The Mitigation Council has made great strides in providing funds for on the ground mitigation projects. Currently, there are six projects approved for a total of over $3 million in funding. Two additional projects have received a funding commitment of over $1 million based upon conceptual proposals. In addition, the Council has approved the construction of 11 independent mitigation banks.

194. COMMENT: The Department is proposing that mitigation proposals be submitted with general permit applications so even though a project may not get constructed it still needs approval of a mitigation plan to obtain a general permit. This is an unnecessary expenditure of money since developing mitigation plans is expensive, and will simply add to the high cost of homes in New Jersey causing more people to leave the State in search of affordable housing. (32)

RESPONSE: For the reasons described in response to comments 180 through 183, the Department has determined not to adopt the mitigation requirement for certain general permits as proposed and is instead proposing a different requirement, similar to that contained in the Federal ACOE regulations, elsewhere in this Register. In that proposal, the Department has also revised the timing for submittal of a mitigation proposal.

It is important to note, however, that the Department does not consider a mitigation proposal as part of the review or consideration for any type of permit. A mitigation proposal will not and cannot influence a permit decision. As stated in response to comment 193, mitigation requirements vary depending upon the mitigation option selected. Hence the cost of preparing a mitigation proposal will vary as well. Unlike a letter of interpretation, which may be requested for planning purposes only, the Department must assume that when it receives an application for a wetland permit the project in question will be constructed.

195. COMMENT: DEP should reconsider the mitigation provision to exempt mitigation requirements from smart growth areas to encourage growth where it belongs. Specifically, the DEP should refer to N.J.S.A. 13:1D-146. This is a provision of Public Law 2004, Chapter 89 that is not related to expedited permitting suspended by Executive Order 45. Furthermore, since vernal habitats are not regulated by the federal program, this provision cannot affect assumption and therefore remains in effect. The DEP is bound by this law. Therefore it should revise the general permit regulations to allow activities in vernal habitats in smart growth areas. (64)

RESPONSE: As stated in response to comments 180 through 183, the requirement for mitigation for several general permits is necessary to remain as stringent as the Federal 404 program. However, the Department has determined not to adopt the mitigation requirement as proposed and is instead proposing a different requirement, similar to that contained in the Federal ACOE regulations, elsewhere in this Register. Neither the FWPA nor the Federal 404 program excludes activities in smart growth areas from compliance with all provisions of the statutes. Vernal habitats that meet the federal

definition of a water of the United States are protected under the Federal 404 program. Although the Courts have found that the Department cannot impose a standard condition precluding use of general permit 6 in vernal habitats (see In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478 (2004)), the court found that the Department can impose additional conditions or deny general permit 6 authorization on a case by case basis to protect vernal habitats and when the issuance of a general permit 6 authorization would be in conflict with the Federal 404 program or the FWPA. Regardless, the Department believes that vernal habitats are unique ecological systems that merit protection to the extent that State law allows.

Finally, the Department is committed to supporting the smart growth policies of the State. One of the State Plan policies is the protection and enhancement of water resources through coordinated planning efforts aimed at reducing sources of pollution and other adverse effects of development, encouraging designs in hazard-free areas that will protect the natural function of stream and wetland systems, and optimizing sustainable resource use. By requiring that all wetland impacts be minimized by using upland areas and wetland transition areas before using general permits for impacts to wetlands, the rules encourage development to relocate outside wetland areas and in support of smart growth policies. In addition, by requiring mitigation for wetland impacts from general permits, the rules also encourage development to relocate outside wetland areas and require the replacement of these areas where impacts are permitted. This is also consistent with the goals of protecting the quality of the environment, encouraging growth in areas suitable for growth, and promoting reinvestment in older communities where such features are not present.

196. COMMENT: The Department notes in the summary that the permitted losses from general permits are about a hundred acres a year and to offset that it is looking at alternative analysis, or mitigation. The Federal Program can be and has in fact, been specific about where certain general permits like Nationwide 26, are issued. In some states they have excluded it from being issued in certain sensitive areas. I think we should follow the same kind of policy. (20)

RESPONSE: When the Army Corps of Engineers readopts the nationwide permits, States are afforded the opportunity to comment on discharges within their jurisdiction, through the Water Quality Certification (WQC) process. When a State approves the WQC for a particular federal permit, it indicates that it is accepting the nationwide permit discharge into State waters without the need for additional State review. Consequently, some States have excluded the use of various nationwide permits in certain waters. Since New Jersey has its own permitting program, it has traditionally denied WQC for most of the nationwide permits because since a State permit is required, the State's limitations and standards are the acceptable limits established for New Jersey. The Department does have the authority, through the FWPA, to require individual permits when additional permit conditions would not be sufficient and special circumstances make this action necessary to ensure compliance with the FWPA or the Federal Act (see N.J.S.A. 13:9B-23d). Further, the Department also has the authority at N.J.S.A. 13:9B-23c to issue general permits for particular regions of the state. For example, general permit 23 for cranberry growing operations is limited to operations in the Pinelands. At this time, the Department does not have documentation showing that any particular region of the State (aside from Pinelands and Highlands, each of which is subject to region-specific legislation) would merit exclusion from general permits. Further, it remains unclear whether the Department could prevent the use of general permit 6 for non-surface water protected wetlands in any particular region of the State since this permit is established by statute.

Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

Please also note that the Army Corps of Engineers eliminated nationwide permit 26 from its regulations approximately 10 years ago.

197. COMMENT: I think that general permits support infrastructure that we should be discouraging, as the State Plan does. Let us try smart growth and not issue general permits because somebody applies for them. It is where they apply for them that is important. This is what the Department is doing in the water quality management

planning rules--trying to make sure that there is not unnecessary sprawling infrastructure. (20, 85)

RESPONSE: The FWPA directs the Department to regulate activities in order to avoid or control specific impacts to a freshwater wetland: removal, excavation, disturbance or dredging; drainage or disturbance of the water level or water table; dumping, discharging or filling with any materials; driving of pilings; placing of obstructions; and the destruction of plant life. Unlike the Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.), the FWPA establishes a permitting program rather than a planning program. However, the Department's FWPA rules clearly promote smart growth principles by strongly discouraging development of areas containing freshwater wetlands and their transition areas thereby encouraging the development and redevelopment of non-wetland areas and focusing development in areas already containing infrastructure, such as town centers and urban areas.

198. COMMENT: I thought mitigation for small disturbances are going to mitigation banks. We do not have many mitigation banks. Now that we have good stormwater management rules we have BMPs. Why can't we at least make it an option to have artificial wetlands built on-site, which is the best place for mitigating for loss of wetlands, and that can compensate for loss of large amounts. If you have large enough sites, some of the stormwater BMPs would lend themselves toward mitigating wetland losses. (20, 85)

RESPONSE: An applicant can do an onsite or offsite wetland mitigation project provided the applicant can demonstrate that the project would be environmentally beneficial. To demonstrate benefit to the environment, the applicant must consider the following: (1) Size. Generally, the larger a mitigation area, the greater its potential environmental benefit. A mitigation area that is associated with a large existing wetland complex is more likely to be environmentally beneficial because it is better able to sustain fluctuations in environmental conditions, for example, drought; (2) Location in relation to other preserved open space. A mitigation area adjacent to public land or other

preserved areas is more likely to be environmentally beneficial because it is protected from encroaching development; (3) Habitat value. A mitigation area that will provide valuable habitat for critical wildlife species or threatened or endangered species is more likely to be environmentally beneficial because such habitat is scarce; and (4) Interaction with nearby resources. A mitigation project is more likely to be environmentally beneficial if it complements existing nearby resources. For example, a mitigation project that adds riparian wetlands habitat adjacent to an existing stream enhances the environmental value of both the riparian area and the stream.

The use of stormwater best management practices (BMPs) as wetland mitigation sites is not appropriate, since these systems are designed to treat stormwater, primarily for the purpose of removing suspended sediments and contaminants from the stormwater. The use of constructed wetlands for achieving water quality under the Stormwater Management rules (N.J.A.C. 7:8) only addresses a single function that wetlands can provide, that of water quality. The wetlands that are impacted through a permit authorization have several other functions and values that must be mitigated in addition to water quality. Further, the Department's mitigation study (see response to comment 186) found that the contribution of stormwater negatively affects the success of mitigation projects. There are several reasons that stormwater discharges should not be used as the source of hydrology for a wetland mitigation site: they may contain contaminants accumulated from the sites which they serve; they may contain seeds or rhizome fragments of invasive species that would be introduced into the mitigation project; they may still contain some level of suspended sediments that would contribute to sedimentation, adversely affecting the mitigation project, or may have large sediment inputs when rapid storm events cause stormwater to discharge over the spillway without receiving any type of pre-treatment; and, most importantly for long-term success of a mitigation project, they may not be reliable sources of hydrology.

Therefore, because stormwater treated in accordance with BMPs is not treated for the parameters that can potentially adversely affect a mitigation project, stormwater is not an appropriate hydrology source for a wetland mitigation site.

199. COMMENT: Stormwater treatment wetlands effectively remove and treat many of the diffuse pollutants found in stormwater runoff including E. coli and other pathogens. Why does the DEP prevent owners from constructing stormwater treatment mitigation wetlands in the developed areas of the state? (41, 64)

RESPONSE: N.J.A.C. 7:7A-15.2(d) provides that "to be approved under this subchapter, mitigation must have a high probability of long term success." In addition, N.J.A.C. 7:7A-15.16(d) provides that "At the end of the post-planting monitoring period for a restoration, creation, or enhancement project, the mitigator shall demonstrate to the Department that the mitigation project is successful. … At a minimum, the mitigator shall demonstrate that the post-planting monitoring period required by the approved mitigation proposal has been successfully completed and the monitoring data show that the vegetation in the mitigation area meets the requirements for the types of species, area of coverage, and survival rate, as set forth in the approved mitigation proposal." It has been the Department's experience that wetland mitigation sites supported by stormwater promote the introduction, and sometimes dominance of, invasive species. Mitigated wetlands which have invasive species are not considered successful, since the vegetation in the mitigation area does not meet the requirements for the types of species, area of coverage, and survival rate required by N.J.A.C. 7:7A-15.16(d). That wetland mitigation sites supported by stormwater allow for introduction of invasive species is documented in the Department's 2002 mitigation report (see response to comment 186). In part, the report states that, "Stormwater-driven mitigation wetlands were also found to be more likely to have in excess of 50% cover of nuisance and invasive vegetation than mitigation wetlands driven by other sources of hydrology." Consequently, the Department does not permit the use of stormwater as the source of hydrology for wetland mitigation sites.

There is no prohibition against an applicant seeking to perform stormwater management by creating wetlands, specifically for that purpose. However, the Department considers such projects as stormwater management and not as wetland mitigation.

200. COMMENT: We wish to express opposition to the proposal by the NJDEP to expand the wetlands mitigation requirements of the rules (N.J.A.C. 7:7A). The proposed requirement of mitigation for wetlands General Permits 6, 10A, 10B, 11, 18, 21, 23 and 27 would greatly expand the range of projects for which wetlands mitigation is required. The new rules would require mitigation for many sewer and water infrastructure improvement projects that are the responsibility of municipal authorities.

Because it is impractical for most municipal authorities to perform wetlands mitigation themselves, compliance with the new rules would entail the purchase of credits from a mitigation bank for these projects. The estimated the cost of wetlands mitigation in Gloucester County is approximately $400,000 per acre of wetland impacts. Many existing pump stations and sewer mains were constructed in wetland or buffer (transition areas) prior to the existence of wetlands regulations. Improvements have been completed under the general permit with successful restoration of the disturbed areas. The costs of mitigation would make many of these projects prohibitively expensive, preventing municipal authorities from performing the infrastructure improvements necessary to enhance public safety and welfare. (28)

RESPONSE: As stated in the summary, the requirement for mitigation for several general permits is necessary to remain as stringent as the Federal 404 program. The FWPA at N.J.S.A. 13:9B-2 states that it is the policy of the State to preserve the purity and integrity of freshwater wetlands from random, *unnecessary* or undesirable alteration or disturbance (emphasis added). In addition, the Department has been maintaining permitting statistics from the start of the wetlands program because it is required, by the FWPA at N.J.S.A. 13:9B-23c, to make a finding that the adopted general permits will have only minimal adverse environmental impacts when performed separately and cumulatively. The Department's statistics show the loss of approximately 100 acres of wetlands per year under the FWPA permitting program. General permits account for 78 percent of the total wetland losses over the past 20 years. Consequently, adopted general permits are having cumulative impacts. However, for the reasons described in response to comments 180 through 183, the Department has determined not to adopt the mitigation requirement for certain general permits as proposed and is instead proposing a different

requirement, similar to that contained in the Federal ACOE regulations, elsewhere in this Register.

The FWPA at N.J.S.A. 13:9C-2 allows a County to identify areas that could be used for wetlands creation, enhancement, or restoration. If a County anticipates multiple projects with impacts to freshwater wetlands, it might be cost effective to work together with local municipalities to identify such land and to establish a mitigation bank to be used for future County, and perhaps municipal, projects.

201. COMMENT: We recommend that instead of allowing continued loss of wetlands through general permits that allow infrastructure expansion, it is more logical for the wetlands and other Land Use Regulatory Programs to inhibit infrastructure expansion and promote growth where infrastructure already exists. This policy is part of the Water Quality Management Planning rules and makes eminent good sense as the state tries to promote smart and more economic growth. In the wetlands program, for example, general permits for infrastructure expansion should be structured to discourage their use in the Highlands and other environmentally sensitive areas. (20)

RESPONSE: The FWPA directs the Department to regulate activities in order to avoid or control specific impacts to a freshwater wetland: removal, excavation, disturbance or dredging; drainage or disturbance of the water level or water table; dumping, discharging or filling with any materials; driving of pilings; placing of obstructions; and the destruction of plant life. Consequently, unlike the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., and the Highlands Water Protection and Planning Act, N.J.S.A. 13:20, the FWPA establishes a permitting program without explicit planning components. However, the Department's FWPA rules clearly promote smart growth principles by strongly discouraging development of areas containing freshwater wetlands and their transition areas thereby encouraging the development and redevelopment of non-wetland areas and focusing development in areas already containing infrastructure, such as town centers and urban areas.

202. COMMENT: Mitigation is proposed for several general permits. Mitigation for the general permits will of necessity have to meet the requirement that small wetland impacts be mitigated at wetland mitigation banks in a hierarchy that starts with the one closest, and ends up with anywhere in the State. There are not many mitigation banks in the state so most mitigation will take place beyond the immediate sub-watershed of the impact. Allowing many small mitigation projects to move beyond the sub-watershed where they occur will impact water quality significantly. It is not clear why artificial wetlands, where possible as nonstructural stormwater Best Management Practices, could not be used to mitigate small wetlands losses on site. (20)

RESPONSE: The Department's mitigation hierarchy requires that mitigation credits be purchased in the same HUC 11 as the impact; or in the adjacent HUC 11; or in the same watershed management area; or, finally, from a mitigation bank which includes the disturbance site in its bank service area. Thus, the Department does not allow the purchase of credits anywhere in the State to mitigate for wetland impacts. While some bank service areas include multiple watersheds, none of the service areas is statewide. In fact, while some of the older mitigation banks approved by the Department service multiple watersheds, all of the newer ones only provide service within the same watershed where they are located.

The Department agrees that allowing many small mitigation projects to be undertaken beyond the sub-watershed where the wetlands impacts occur will impact water quality significantly. While it is not always possible to purchase mitigation credits in the same or adjacent watersheds to that where the wetlands disturbance is taking place, the hierarchy provided at N.J.A.C. 7:7A-15.5(d)1 through 4 formalizes this preference. Finally, as stated in the response to comment 199, it has been the Department's experience that wetland mitigation sites supported by stormwater promote the introduction, and sometimes dominance of, invasive species. Mitigated wetlands which have invasive species are not considered successful since the vegetation in the mitigation area does not meet the requirements for the types of species, area of coverage, and survival rate. Please also note that for the reasons described in response to comments 180 through 183, the Department has determined not to adopt the mitigation requirement for

certain general permits as proposed and is instead proposing a different requirement, similar to that contained in the Federal ACOE regulations, elsewhere in this Register.

N.J.A.C. 7:7A-5.2 General permit 2-Underground utility lines

203. COMMENT: Proposed N.J.A.C. 7:7A-5.2(c)1 reduces the permitted, permanent impacts from one acre to 0.5 acre. The rationale provided for this restriction is to be consistent with the Federal nationwide permit for utility lines (NP 12) allowing 0.5 acres of permanent impacts for under and above ground lines. This basis is insufficient to warrant reduction of impacts to 0.5 acres. (4, 27, 29)

204. COMMENT: The proposal to change the allowed area of disturbance to no greater than 0.5 acres should not be adopted. The reason for this is that the Department's rules need only be consistent with the federal rules, not identical to them. The Department has provided no rational justification for the need for this change. These are two of the primary general permits used by electric utilities for the construction of their transmission infrastructure. To reduce the allowable disturbance area in half would remove this useful permit option from some utility projects, and needlessly subject needed transmission construction projects to a lengthier permit process with no real additional environmental protection. (48)

RESPONSE TO COMMENTS 203 AND 204: As stated in response to comments 184 and 185, the Federal State Program Regulations governing assumed State wetland programs (40 CFR Part 233), provide that States may adopt and enforce requirements which are more stringent and operate a program with greater scope than required by Federal law (40 CFR 233.1(c)). However, the regulations also state that any approved State program shall, at all times, be conducted in accordance with the requirements of the Federal Clean Water Act. The regulations further provide that while States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose (see 40 CFR 233.1(d)). Therefore, the Department is required to be as stringent as the Federal program in every aspect of its program, including establishing general

permit limits that are consistent with or more stringent than those established for the nationwide permits under the Federal 404 program. Also, the FWPA at N.J.S.A. 13:9B-2 states that it is the policy of the State to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance and to make a finding that the adopted general permits will have only minimal adverse environmental impacts when performed separately and cumulatively. For these reasons, the Department reduced allowable impacts under general permit 2 from one acre to 0.5 acres.

The commenters should also note that in relation to the requirement for mitigation, N.J.A.C. 7:7A-5.2(c)1 states that the installation of a utility line in scrub shrub or emergent wetlands is not considered a permanent disturbance and is therefore not subject to the mitigation requirements.

205. COMMENT: General permit 2 for underground utility lines increases the loss of wetlands and opens the area for invasive species and should be strictly limited. (80)

RESPONSE: As explained in response to comments 203 and 204, the limits of permanent disturbance allowed under general permit 2 have been reduced from 1.0 to 0.5 acres. In addition, although the Department has determined not to adopt the mitigation requirement for general permit 2 as proposed, a different requirement, similar to that in the Federal ACOE regulations, is proposed elsewhere in this Register.

206. COMMENT: We commend the Department for recognizing and clarifying in these wetlands rules that installation of a utility line in scrub shrub or emergent wetlands is not a permanent disturbance of those wetlands. (48)

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

207. COMMENT: The Department correctly recognizes that disturbance of a shrub or emergent wetlands when utility lines are installed should not be deemed a permanent disturbance requiring mitigation. However, the summary states, “the utility line, if properly installed, will allow the wetlands to re-establish and, therefore, no mitigation,

other than restoration, is required." As restoration is a mitigation measure, this requirement for ensuring restoration of the wetlands should be specified in the rules. (4, 27, 29)

RESPONSE: N.J.A.C. 7:7A-5.2(d)3 requires replanting of disturbed areas with indigenous wetlands plants. As such, the restoration requirement is already contained in the rules.

208. COMMENT: The summary states that from 2000 through 2006, the Department approved 334 GPs for underground utility lines with impacts to 30.67 acres (about 5 acres a year). These impacts are not so significant as to require mitigation, particularly given the anticipated expense for applicants. Further, as stated above, restoration of disturbed wetlands is required for the installation of these utility lines. (4, 27, 29)

209. COMMENT: The sole evidence on which the Department relies in requiring mitigation for General Permits 2 and 21 is that in the seven years between 2000 and 2006 "the Department approved 334 general permits for underground utility lines with impacts to 30.67 acres." On the other hand, the Department acknowledges that it did not determine "what portion [if any] of those impacts were permanent," and a headcount of acreage subject to permits for underground utility lines (30.67 acres impacted by 334 permits over seven years, or about 0.092 acres per permit) is not evidence, substantial or otherwise, to support imposition of a mitigation requirement as a condition to General Permit 2. In addition, in the case of above ground utility lines, the subject of General Permit 21, the Department fails to provide any rationale whatsoever to justify the new mitigation requirement. Instead, the Department merely notes that the "proposed requirement for mitigation for above ground utility lines is consistent with that proposed for underground utility lines." While that would be the result of the Department's proposal, it is not a rationale for the Department's action. (43)

RESPONSE TO COMMENTS 208 AND 209: In proportion to the impacts under all of the general permits that the Department considered should have a mitigation

requirement, 30.67 acres over a 7-year span is a significant cumulative impact. While impacts to emergent and scrub shrub wetlands can be mitigated by restoration, impacts to forested wetlands are permanent and may result in additional unmeasured impacts, such as the introduction of invasive species. Consequently, the Department determined mitigation should be required for general permits 2 and 21. Further, the Department stated in the summary of the general permit provisions (see 39 N.J.R. 3593) that the Federal Army Corps of Engineers 404 regulations, adopted in March 2007, made mitigation a standard condition of all Nationwide permits. Since general permits 2 and 21 are equivalent to Nationwide permit 12, for above and underground utilities, it is appropriate to require mitigation as a condition for non-permanent impacts resulting from general permits 2 and 21 Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

N.J.A.C. 7:7A- 5.6 General permit 6—Non-tributary wetlands

210. COMMENT: Wetlands that are considered Waters of the United States by DEP would be impacted by the rule change at N.J.A.C. 7:7A-5.6. The DEP's rationale for the proposed rule change is to reduce the amount of wetlands that could be filled under general permits in response to a Federal limit of one-half (0.5) acre on Nationwide Permits. However, the proposed new rules appear to reduce the amount of wetlands fill under certain general permits more than would be required to comply with the Federal rules. Many areas that are regulated as freshwater wetlands in New Jersey are not subject to Federal regulation. Recent U.S. Supreme Court decisions (that is, SWANCC, Rapanos, and Carabell) have altered areas that are regulated as "waters of the United States" under the Federal Act. Examples of wetlands that are regulated under the Freshwater Wetlands Protection Act, but are not currently defined as Waters of the United States pursuant to the Federal Act, include isolated wetlands, and wetlands located in ditches and swales. (9)

RESPONSE: The FWPA provides the Department with the authority to promulgate ruels to regulate wetlands statewide. Further, the FWPA provides the definition of wetlands to be regulated (see N.J.S.A. 13:9B-3). The FWPA also requires the Department to issue a general permit for up to one acre of impacts for activities in a freshwater wetland which is not a surface water tributary system discharging into an inland lake or pond, or a river or stream (see N.J.S.A. 13:9B-23b), which the Department has adopted as general permit 6. Finally, at N.J.S.A. 13:9B-27, the FWPA requires the Department to secure the assumption of federal permit jurisdiction.

Consequently, the Department has the authority under the FWPA, and has used that authority, to adopt rules more stringent than the Federal 404 rules in order to address development pressures in New Jersey that are not being experienced nationwide. For example, the FWPA program protects transition areas, which are not protected under the Federal program, considers vegetation removal to be a regulated activity which is not regulated under the Federal program, and has reduced most of the limits on its general permits from those provided under the Federal program. However, the FWPA limits the Department's ability to establish requirements more stringent than the Federal program in relation to general permit 6 because the FWPA sets forth specific permitting criteria. Consequently, general permit 6 has been further limited by regulation only to the extent necessary to remain consistent with Federal standards. For example, if a wetland is regulated at the Federal level, because comparable nationwide permits allow only 0.5 acre of impacts and require mitigation, the Department limits impacts under general permit 6 to 0.5 acre and proposed a mitigation requirement. Consequently, the proposed amendments to N.J.A.C. 7:7A-5.6 were specifically intended to require mitigation for wetlands that are considered waters of the United States in order to remain as stringent, but no more stringent, than the Federal program. Thus, with the exception of impacts to wetlands for which general permit 6 is applicable, the lack of regulations for certain wetlands under the Federal program does not negate the Department’s authority under the FWPA to protect all wetlands meeting the FWPA’s statutory definition, nor does it allow the Department to impose any less stringent requirements for any purpose (see 40 CFR 233.1(d)). Although the State program provides greater protection overall, the Department is required to be as stringent as the Federal program in every aspect of its

program including establishing general permit requirements that are consistent with, or more stringent than, those established for the nationwide permits under the Federal 404 program. Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permit 6 as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

211. COMMENT: General permit 6 for isolated wetlands is the most requested wetlands permit, as well as the most abused. Many of the wetlands that have been classified as isolated wetlands are not. The DEP needs to tighten its oversight and guidance to prevent consultants from misrepresenting wetlands as isolated when this is not, in fact, the case. This problem is tied to the issue of "substantive reliance" because when consultants tell the DEP that wetlands are isolated, and this is later disproved, there is no recourse. (80)

RESPONSE: All wetland delineations that are part of an application for a letter of interpretation or general permit are field verified by Department staff. While general permit 6 is the most requested general permit, the Department has a high degree of confidence that, with minimal exceptions, all wetlands identified as non-surface water connected in a final LOI or general permit authorization, are indeed non-surface water connected. Further, in the Department's experience, the majority of the substantive reliance arguments are related to changes in resource classification and not to determining whether a wetland is surface water connected.

212. COMMENT: The proposed rule change states that mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters that are waters of the United States. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5, and shall be submitted as part of the general permit application. This proposed rule change would create a significant new economic and procedural burden. Because many areas that are regulated by NJDEP as "waters of the United States" are no longer subject to federal regulation pursuant to Supreme Court decisions, the State required mitigation would exceed that required under the Federal Act. Procedurally, we question the need to fully develop a mitigation plan in advance of a

decision on the general permit application, as the NJDEP can simply prevent project implementation prior to the approval and implementation of a mitigation plan.

In addition, if credit purchase and onsite mitigation are not feasible, mitigation shall be performed through a monetary contribution in accordance with N.J.A.C. 7:7A-15.21. For a general permit, the amount of the monetary contribution shall be determined as the acreage of wetlands/State open water impacts multiplied by $300,000.00, adjusted annually for inflation. We have typically relied upon general permits for ongoing site projects because of the minimally disruptive nature of the projects. This provision would raise the cost of projects significantly for no apparent environmental benefit. (9)

213. COMMENT: Proposed N.J.A.C. 7:7A-5.6(d) requires mitigation "for all permanent loss and/or disturbances of freshwater wetlands or State open waters that are waters of the United States" and provides that NJDEP will not issue General Permit 6 unless a mitigation proposal is approved. Prohibiting the approval of General Permit 6 until the mitigation proposal itself is approved directly affects the schedule of development activities. The Department must adopt reasonable time limits within which it will act on mitigation plans. Further, NJDEP should clarify the necessity for this change in the timing of approvals generally. (4, 27, 29, 74)

RESPONSE TO COMMENTS 212 AND 213: As stated in the summary, in proposing mitigation as a requirement for certain general permits, the Department had several goals: to alleviate the ongoing loss of wetlands in the State, to continue to be able to make the finding that the adopted general permits will cause only minimal adverse environmental impact when performed separately and cumulatively, and to remain as stringent as the federal program in all ways. Consequently, while the change to Federal regulations was the catalyst for the Department's reexamining the general permitting process in regard to the need for mitigation for general permits, the Department is not limited to requiring mitigation only for impacts regulated by the Federal government since, as explained in response to comment 210, the FWPA gives the Department the authority to be more stringent than the Federal program.

For the reasons described in response to comments 180 through 183, the Department has determined not to adopt the mitigation requirement for general permit six as proposed and is instead proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

Further, as stated in response to comment 195, in the concurrent proposal of the mitigation requirement, the Department has revised the timing for submittal of a mitigation proposal.

Finally, the Department does not agree that there is no benefit to requiring mitigation for general permits. Since the FWPA became effective in 1988, the Department had documented the permanent loss or disturbance of more than 2,000 acres of wetlands under the permitting program, the majority of which, 78 percent, was due to general permits for which mitigation was not required.

N.J.A.C. 7:7A- 5.6A General permit 6A—Transition areas adjacent to non-tributary wetlands

214. COMMENT: We strongly support N.J.A.C. 7:7A-5.6A which addresses impacts to transition areas adjacent to non-tributary wetlands, and regulations for those transition areas which exclude impacts to exceptional resource value wetlands, special aquatic site open waters, USEPA priority wetlands, or state open waters greater than one acre in size. (20, 85)

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

215. COMMENT: The proposed addition of general permit 6A for regulated activities in transition areas adjacent to wetlands and/ or State open waters that are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream, will affect rights in existing general permit 6. The summary explains that the purpose of general permit 6A is to alleviate “confusion” in distinguishing between impacts in wetlands and transition area. This explanation is an inadequate basis for creating a new general permit. The proposal does not provide a baseline for evaluating

how a separate general permit for transition areas will resolve the "confusion issue." Rather, the new general permit appears to create more steps in the administrative process for the purpose of accounting for impacts. NJDEP should consider alternatives to a new general permit 6A that would enable NJDEP to monitor and distinguish between impacts occurring in wetlands and transition areas that do not disturb existing protections of transition areas covered by general permit 6. (4, 27, 29, 74)

RESPONSE: The Department is required by statute to provide a general permit for impacts of up to one acre to non-surface water connected wetlands. Thus, the Department promulgated general permit 6. There is no statutory requirement for providing a general permit or transition area waiver for impacts to transition areas adjacent to such wetlands. When the Department began to issue authorizations under general permit 6 for transition area impacts, the limit on allowable impacts in wetlands approvable under the general permit and the limit on allowable impacts in the transition area approvable under the general permit were not separate and distinct. Consequently, when authorizations were issued under general permit 6 the impacts to both wetland and/or transition area were not consistently calculated. By separating the impacts to wetlands from those in transition areas so that the allowable impacts to each are governed by two different general permits, at N.J.A.C. 7:7A-5.6 and 5.6A, and by establishing specific limits for the use of these general permits in combination, at N.J.A.C. 7:7A-4.4(a)3, the confusion regarding the applicable impact limits under general permit 6 has been addressed.

216. COMMENT: Proposed N.J.A.C. 7:7A-5.6A(a) states that "General permit 6A authorizes regulated activities in transition areas adjacent to freshwater wetlands and/or State open waters if the freshwater wetlands or State open waters are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream." State open waters do not have transition areas. The Department should delete references to State open waters. (31)

RESPONSE: The commenter is correct and N.J.A.C. 7:7A-5.6A has been modified on adoption to delete all references to State open waters, since the general permit applies only to transition areas, and the FWPA establishes transition areas only for wetlands.

217. COMMENT: The proposal should include a definition for the terms “special aquatic site” and “USEPA priority wetlands.” (86)

RESPONSE: Definitions for “special aquatic site” and “EPA priority wetlands” are already in the rules at N.J.A.C. 7:7A-1.4.

N.J.A.C. 7:7A-5.8 General permit 8—House additions

218. COMMENT: We support the change to N.J.A.C. 7:7A-5.8 which will now authorize the reconstruction of a destroyed dwelling (existing prior to July 1, 1988) within the same footprint, plus 750 square feet of additional area, because it avoids confusion regarding the nature of improvements to existing houses. The structure must have been “habitable” at time of destruction, which means it could have been legally occupied and had utilities, including septic or legal sewer connection. Proof of previous existence includes remaining foundation or deed or plot plan showing size and location of building footprint. We suggest that aerial photography could also be used establish pre-existing building locations. (31)

RESPONSE: The Department acknowledges this comment in support of the rule. Where it exists, the Department will consider aerial photography to assist with verification regarding the pre-existing size and location of houses for which application is being made under N.J.A.C. 7:7A-5.8.

N.J.A.C. 7:7A-5.9 General permit 9—Airport site line clearing

219. COMMENT: Regarding N.J.A.C. 7:7A-5.9, Airport site line clearing, there is no explanation provided. I think airports are getting away with increasing their size in

wetlands and this needs to be stopped. It creates flooding hazards for residents when the wetlands are paved for airports. We need more stringent regulations specifically devoted to airports that address the full environmentally devastating impact that they create. (67)

RESPONSE: N.J.A.C. 7:7A-5.9(a) provides that the general permit for airport sight line clearing authorizes the selective cutting of certain vegetation in freshwater wetlands and transition areas at a public use aeronautical facility, as defined in the New Jersey Department of Transportation (DOT) rules. The general permit for airport sight line clearing does not apply to activities associated with airport enlargement. Specifically, N.J.A.C. 7:7A-5.9(c) states that general permit 9 covers only activities necessary to enable an aeronautical facility to comply with DOT rules. The cutting of vegetation in wetlands and/or transition areas as part of a project that increases the area of pavement of buildings at an airport is not authorized under general permit 9, and would require an individual permit.

N.J.A.C. 7:7A-5.10A General permit 10A—Very minor road crossings
N.J.A.C. 7:7A-5.10B General permit 10B—Minor road crossings

220. COMMENT: We have great concern for the impact the proposed amendments will have on being able to maintain existing county roads, bridges and drainage facilities. The work we do on roads is for the safety of the traveling public.

We understand and accept the need to mitigate for major improvements that require individual permits. We can also accept the need to mitigate for general permits if we were constructing a new roadway section. However, the requirement to mitigate for general permits in all cases such as bridge replacement, and minor improvements along roads, would make our task burdensome and significantly more expensive to taxpayers. Most of the time, wetlands mitigation cannot be performed on site since our project is a linear project, and there are often houses or commercial sites close to the road that prevent any on-site mitigation. The requirement for us to pay $300,000.00 per acre for mitigation is considerably higher than any wetlands mitigation bank that is now available.

We feel that this mitigation cost should be waived or significantly reduced for County projects that are being done for the safety of the traveling public.

The requirement of mitigation for general permits should be waived for improvements to existing roads, bridges and drainage facilities since these are being done for the safety of the traveling public. The regulations in general do not address the difficulty in addressing and avoiding wetlands impacts on road projects, in particular existing roadways. We also feel that the historic/archaeological assessments should be waived for improvements to existing roads, bridges and drainage facilities, unless those improvements affect a National or State Registered property. (42)

221. COMMENT: Of the general permits identified for mitigation requirements, it seems particularly onerous to require mitigation for general permits 10A and B (road crossings). We routinely obtain road-crossing permits for local governmental entities that are widening existing roads. Since these projects are funded from public sources (generally tax dollars), they are usually only undertaken when required for safety reasons. To require mitigation for these projects would seem to place an additional burden on local governments already financially challenged.

When used by private landowners, general permit 10 allows access to developable land that is otherwise inaccessible. Provided that all avenues of access have been investigated, and a wetland crossing is determined to be the only means of access, then mitigation should not be required provided that the applicant demonstrates that the crossing minimizes disturbance. (36)

RESPONSE TO COMMENTS 220 AND 221: The Department appreciates the fact that public road projects are often done with public safety in mind. However, as stated in the summary, the Department approves more authorizations for minor road crossings annually than under any other general permit. For example, from 2000 through 2006, the Department approved 915 authorizations for minor road crossings. Further, neither the FWPA nor the Federal 404 program excludes activities performed by governments from compliance with all provisions of the statutes, including mitigation requirements and requirements to assess impacts to historic properties. However, for the reasons described

in response to comments 180 through 183, the Department has determined not to adopt the mitigation requirement for certain general permits as proposed and is instead proposing a different requirement, similar to that contained in the Federal ACOE regulations, elsewhere in this Register.

While the Department recognizes that wetland mitigation is not normally the purview of local or county governments, if a County, or group of municipalities together with a County, anticipate long-range needs for mitigation, they may consider establishing their own mitigation bank. The FWPA at N.J.S.A. 13:9C-2b also provides that counties may identify areas suitable for wetland mitigation. Counties could work with municipalities to identify such areas. In this way, the benefits of restored or created wetlands will be retained locally, while the governments will be able to better anticipate and control the costs of mitigation. There are likely many other local opportunities for mitigation projects. The Department will work with any entity that would like to explore these options.

The Department's mitigation hierarchy ranks the purchase of credits in a mitigation bank higher than providing a monetary contribution. The use of a wetland mitigation bank is the preferred mitigation alternative since the lost functions and values will be immediately replaced at the bank. A monetary contribution does not have the same immediate replacement of functions and values because it takes time for the Council to receive an approvable project for funding. The Department determined the cost to mitigate for one acre of wetlands by reviewing applications for contributions that had been presented to the Wetland Mitigation Council. Each monetary contribution proposal includes an evaluation of the following costs for restoring existing, degraded wetlands at a 3:1 ratio (wetlands to be restored to wetlands lost) and for creating wetlands at a 2:1 ratio (wetlands to be created to wetlands lost): land appraisal, purchase price, engineering, environmental consulting fees, obtaining a no further action letter, attorney fees, site preparation and construction, plant purchase and planting, construction supervision, and the cost of monitoring the site. Based upon this assessment, the Department determined that it costs approximately $300,000 to mitigate for impacts to one acre of wetlands.

Finally, it is not clear in what way the commenters believe the rules should be amended. N.J.A.C. 7:7A-12.2(l) requires assessment of projects to ensure that an activity shall not adversely affect historic resources which are listed or eligible for listing on the New Jersey or National Register of Historic Resources. This provision is consistent with requirements for review of historic resources under the Federal 404 program.

222. COMMENT: Proposed subsection N.J.A.C. 7:7A-5.10B(a) requires the crossing to be necessary to access an otherwise inaccessible, developable upland area and maintains impacts limit of 0.25 acres. Individual permits require the applicant to consider off-site access. In limiting the issuance of GP 10B for only those cases restricted by accessibility, the result is that there would be no distinction between the proposed GP 10B and an Individual Permit. (4, 27, 29)

RESPONSE: N.J.A.C. 7:7A-5.10B(a)1 provides that the crossing must be necessary to access an otherwise inaccessible, developable upland site, and to re-emphasize the requirement at existing N.J.A.C. 7:7A-5.10B(b)1 that there is no alternative *onsite* location for the road crossing that would have less adverse environmental impact. For instance, if there are non-regulated areas on a site that could reasonably be used for a roadway location, and such location would minimize environmental impact, that area must be used to access the developable upland area instead of a regulated freshwater wetland, State open water, or transition area. If such non-regulated areas for roadway access do not exist on a site, and all other requirements of N.J.A.C. 7:7A-5.10B are met, then the road crossing would be authorized under the general permit. In contrast, an individual permit is subject to an analysis that requires consideration of practicable alternatives to the regulated activity, including off-site alternatives. See N.J.A.C. 7:7A-7.2.

223. COMMENT: The proposal should include a definition for the term “developable.” (86)

RESPONSE: "Developable" is used with respect to "upland" in N.J.A.C. 7:7A-5.10B. The term "developable upland" is already defined at N.J.A.C. 7:7A-1.4..

N.J.A.C. 7:7A-5.11 General permit 11—Outfalls and intake structures

224. COMMENT: NJDEP proposes to require mitigation for general permit 11. The summary indicates that because general permit 11 is the second most frequently requested general permit, mitigation is necessary. However, the statistics indicate that only an average of 5 acres per year are affected by general permit 11. The cumulative impact of general permit 11 does not warrant the increased costs that are associated with mandatory mitigation. Again, because water of necessity drains to low points, outfalls therefore often are necessary in or adjacent to wetlands. It is submitted that this change is also of a constitutional dimension, as it affects the basic ability to make reasonable use of private property. (74)

225. COMMENT: The Department proposes to require mitigation for GP 11. By way of explanation for this new requirement, the summary document notes that GP 11 was the second most frequently used general permit. In 2000 through 2006, 776 outfall structures were approved that affected 29.81 acres of wetlands (an average of 5 acres per year). The aggregate impact is negligible and does not warrant mandatory mitigation. (4, 27, 29)

226. COMMENT: Of the general permits identified for mitigation requirements, it seems particularly onerous to require mitigation for general permit 11. Requiring mitigation for the construction of outfall structures seems to penalize applicants for conforming to Soil Erosion and Sediment Control requirements. We know of few clients who would insist on placing outfall structures in the wetlands (and incurring the cost of permitting), if not so required by the Soil Conservation Districts.

The published rule proposal indicates that, from 2000 to 2006, the Department approved 776 outfall structures for a total of 29.81 acres of disturbance. This equates to approximately 1,670 square feet of disturbance per outfall. Once constructed, with the exception of the actual structure and scour pad, the remaining disturbed areas generally

revegetate, and continue to function as a wetland. Therefore, the actual permanently disturbed area would seem to be less. It is suggested that the Department consider these points prior to requiring mitigation for this general permit. (36)

RESPONSE TO COMMENTS 224 THROUGH 226: The impacts under the 27 different general permits in the FWPA rules, if examined individually and averaged over time, may appear minimal. However, as explained in the summary and in responses to prior comments, the Department has documented the loss of a significant acreage of wetlands under general permit authorizations, and authorizations under general permit 11 have contributed to that loss. Consequently, the Department determined that some mitigation is necessary. Note that for the reasons described in response to comments 180 through 183, the Department has determined not to adopt the mitigation requirement for certain general permits as proposed and is instead proposing a different requirement, similar to that contained in the Federal ACOE regulations, elsewhere in this Register.

Adopting a permit requirement such mitigation for general permit 11, does not in and of itself constitute a taking of property without just compensation as implied by the commenter. Such a determination must be made on a case-by-case basis, taking many factors into consideration regarding the history, economics, environmental impacts and permitted uses on a specific site.

N.J.A.C. 7:7A-5.14 General permit 14—Water monitoring devices

227. COMMENT: We commend the Department on the proposed changes to general permit 14, water monitoring devices. Allowing a “blanket” authorization for the placement of monitoring wells, specifically during a site investigation performed under N.J.A.C. 7:26E, and under NJDEP oversight, is a great benefit to the regulated community. (36)

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

N.J.A.C. 7:7A-5.15

228. COMMENT: N.J.A.C. 7:7A- 5.15 for mosquito control activities requires a display advertisement in local newspapers. It should also be sent to the town clerk so the municipality is officially notified. (20, 85)

RESPONSE: The FWPA was amended in 1995 at N.J.S.A. 13:9B-23c(4) to provide that county or municipal entities must be given the option of placing a display advertisement as an alternative to other notification requirements. Consequently, if the county or municipal entity chooses to use a display advertisement, it is not required to provide any additional notification, in accordance with the statute.

N.J.A.C. 7:7A-5.16 General permit 16—Habitat creation and enhancement

229. COMMENT: The DEP should reconsider mandatory requirements for conservation easements on general permit 16 for habitat enhancement. Streams are the most under restored habitats in the state. Streams are some of the most important and productive habitats. It is time to encourage owners to restore these vital ecosystems. Stream restoration is different than habitat restoration currently being permitted by the state. Streams are linear systems that function not only as infrastructure to carry away flood waters, their floodplains are wildlife corridors, utility corridors, transportation corridors and are historically the boundary between property owners. Therefore most stream restoration projects of any significance will need to be a cooperative effort among many stakeholders. The DEP should add provisions in general permit 16 for habitat enhancement that encourages restoration of urban streams on private property. Despite being some of the most productive ecosystems, urban streams are the most under-restored habitats in the state. DEP should consider relaxing limitations on GP 16 to allow private property owners on their own initiative or in cooperation with local governments or non-profits to identify and execute habitat restoration in streams. Currently, it is limited to state or federal sponsors or projects under USDA auspices. These agencies rarely work in the developed areas with private property owners. Given the number of private parties who need to give permission to restore streams, the DEP should exempt stream restoration projects from needing conservation easements. Stream corridors are already

protected by many, many regulations and new easements would not improve protection. This permit should also be redrafted to allow multiple benefits from a single restoration project and to eliminate the restriction that it can only consider habitat functions. For instance a habitat improvement that can be combined with a flood control project, or combine GP 16 with GP 10 minor road crossing for NJDOT reconstruction projects. This process is especially beneficial for urban streams since many public works sponsors will include mitigation elements within a project but will not independently fund habitat restoration. This approach can use other sources of money to restore damaged ecosystems. (64)

230. COMMENT: All qualified projects and project applicants should have equal access to this GP. Currently, GP 16 precludes use by the private sector unless a state or federal sponsor is involved directly or through funding. The private sector should be afforded access to this GP if the private sector mitigation or mitigation bank project meets the requirement of being solely for habitat creation or enhancement. The lack of the private sector ability to use this GP without being non-profit or a government agency contradicts the FWPA goal of mitigation using private lands versus public lands and inhibits private sector investment in the restoration of the state's habitats. There are many private land opportunities for the private sector to perform habitat creation and enhancement and equal access to this GP would promote such activities. The end result will be enhanced habitat; indistinguishable to our main constituents: ducks. (63)

RESPONSE TO COMMENTS 229 AND 230: General permit 16 is applicable to stream restoration since it authorizes habitat creation and enhancement activities in freshwater wetlands, transition areas, and State open waters (which include streams). While the Department agrees that stream restoration projects are valuable, the Department does not agree that such projects should be undertaken without a sponsor, as defined in the general permit at N.J.A.C. 7:7A-5.16(b). The sponsor is important not only to provide a source of funding for the project, but also to provide the expertise necessary to ensure that the project achieves the goals of habitat restoration, creation or enhancement. Further, the purpose of a conservation restriction or easement is to ensure that once the restoration,

creation or enhancement activities have been successfully undertaken, the area of habitat enhancement in the wetland will not be subsequently developed. Given the development pressures in New Jersey, wetland restoration projects that encompass stream restoration merit this added level of protection. Finally, general permit 16 cannot be used to authorize a project not specifically designed for habitat enhancement or creation, such as a stormwater detention basin which incidentally creates wildlife habitat. However, if a project is designed specifically for habitat creation or enhancement as part of an acceptable plan, it may be combined with other types of approvals.

N.J.A.C. 7:7A-5.17A General permits 17A—Non-motorized multiple-use paths

231. COMMENT: I agree that there should be no width limitation for multiple use paths, especially those under review and approval by the NJDOT. (47)

RESPONSE: Because of the variables involved in establishing path widths under the New Jersey Department of Transportation (DOT) and the American Association of State Highway and Transportation Officials (AASHTO) standards, the impacts to wetlands for multiple use paths under general permit 17A are limited by acreage rather than by path width.

232. COMMENT: We welcome this new general permit that addresses an existing policy and regulatory conflict between the Departments of Environmental Protection and Transportation, and will permit public agencies to construct multiple use paths that conform to standards for accessibility by persons with disabilities.

However, the limit of 0.25 acre of disturbance will render the permit useless for many linear park developments. For example, the Park System manages a linear rail trail that is approximately 20 miles in length, and abuts a 378-acre county park. Because these two facilities extending over roughly 25 percent of the county's land area are considered "contiguous" and a single "site" under the definitions of the Freshwater Wetland rules, the total disturbance permitted under proposed General Permit 17A is only

0.25 acre. It is recommended that publicly owned sites be exempted from this limit of disturbance, as is the case with General Permit 17 (N.J.A.C. 7:7A-5.17(b)). (82)

233. COMMENT: While Burlington County is supportive of this permit in concept, the County objects to the proposal to limit the spatial coverage to 0.25 acre. A six foot wide regional trail covering many miles, in most cases will exceed the 1,815 linear feet of wetlands disturbance allowed under this rule change. The proposed spatial limits to this particular permit will prohibit the construction of both regional trails and park trail systems, thereby denying the public access to open space purchased by taxpayers for that very purpose. (35)

234. COMMENT: N.J.A.C. 7:7A-5.17A allows 0.25 acre of impacts. The limit of 0.25 acre of impacts under a GP17A should be increased to one acre for trails on public lands because of intended public use. A provision could be added that sets no limit on impacts to wetland transition areas for a trail under a GP17A. In northern New Jersey the most appropriate areas for paths in terms of slope and other factors are often adjacent to wetlands. (31)

RESPONSE TO COMMENT 232 THROUGH 234: The Department, in consultation with the Department of Transportation, determined that 0.25 acres of disturbance is a reasonable limit for non-motorized multiple-use paths. By allowing 0.25 acres of disturbance, the Department is allowing over 1000 feet of linear impacts to a wetland if a path is 10 feet wide. Although the purpose of the permit is to better accommodate public projects, it is not intended to allow unlimited linear impacts to wetlands. For example, the Department's general permit for very minor road crossings at N.J.A.C. 7:7A-5.10A limits impacts to 100 feet and 0.25 acres of disturbance. Minor road crossings at N.J.A.C. 7:7A-5.10B can be longer if no alternative alignment is possible, but are still limited to 0.25 acres. Consequently, the Department does not agree that it is appropriate to waive this limitation for parks since without an acreage limitation, multiple use paths could potentially result in greater impacts to wetlands than road projects. Like road projects,

multiple use paths must be designed to avoid and minimize impacts to wetlands, State open waters and transition areas if an applicant wants to make use of the general permit.

235. COMMENT: I have a concern on buffers. On this concept of bike paths, I am not sure what the standard is but since the rule mentions the federal standard my understanding is that it is a 12 foot wide cut. I think that would be too invasive along the wetlands for a bike path. I think it would undermine the whole concept of having a buffer and I can see certain counties that are trying to push economic development using bike paths as a way to eliminate stream buffers and wetland buffers, so they can have nice views for buildings, for example. (80)

RESPONSE: There is no set width for multiple use paths. Many of these paths require review and approval by the New Jersey Department of Transportation (DOT). DOT applies various State and Federal standards, including the American Association of State Highway and Transportation Officials (AASHTO) standards, for determining the appropriate width of such paths. For example, some paths may be 8 feet wide if bicycle use is expected to be low and the path can be designed to afford safe passing opportunities. A wider path is necessary if there is a higher usage anticipated by bicycles, joggers and skaters and/or if there are steep grades in the location of the path. Paths may also be wider when they are designed to be separated, by way of grading, to provide clearance from obstructions like trees, guardrails or fences, and to keep them away from canals, ditches or steep embankments. There are also various requirements for side slopes that may result in the paths affecting a wider area of environmentally sensitive area. Consequently, N.J.A.C. 7:7A-5.17A(c) provides the flexibility to design a path with the width that is necessary for the intended use so long as the path is designed in compliance with the AASHTO Guide for the Development of Bicycle Facilities, published 1999, as amended and supplemented. It is available at www.communitymobility.org/pdf/aashto.pdf. Given the time, effort and costs associated with locating, designing and installing such paths, the Department is hopeful that they will be constructed for the purpose they are intended and not simply to eliminate a resource.

236. COMMENT: The proposal should discuss the requirements for threatened and endangered species surveys, and soil sampling (for example, in the vicinity of abandoned rail lines). (86)

RESPONSE: The Department is assuming the commenter is referring to requirements for threatened or endangered species surveys and soil sampling in the context of placing a multiple use path. The rules address both of these issues in relationship to all permits. At N.J.A.C. 7:7A-2.4(c), the rules state that the Department identifies present or documented habitat for threatened or endangered species using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened or endangered wildlife species. In addition, as needed, Department staff field verify habitat for threatened or endangered species that is initially identified on the Landscape Project. The Landscape Project can help an applicant locate a suitable location for a multiple use path and is available on the Department's website at www.nj.gov/dep/gis/depsplash.htm#.

Relative to soil sampling, there are numerous provisions in the rules that require soil sampling when the presence of contaminated soils is known or suspected. Those most applicable to general permits are N.J.A.C. 7:7A-4.3(b)11, 10.4(a)4, and 10.5(a)3. Such sampling must be carried out in accordance with the Department Oversight of the Remediation of Contaminated Sites rules at N.J.A.C. 7:26C.

N.J.A.C. 7:7A-5.18 General permit 18—Dam repair

237. COMMENT: As legislators representing the 24th district, which has the highest concentration of dams in the state, we are very concerned about the impact of the regulatory proposal on dam safety. This proposal would require mitigation for wetland impacts associated with dam rehabilitation and removal projects. The costs associated with dam rehabilitation are burdensome enough now. Should these new regulations go into effect, the state will only be adding to the overall price tag of these dam repair projects. This will further act as a disincentive for present owners to undertake dam improvements and will ultimately only succeed in compromising the public's safety. We

strongly urge you to reconsider this rule proposal and the detrimental impact it will have on dam safety in New Jersey, and most particularly, our legislative district. (1, 52)

238. COMMENT: We are writing with our concerns over new proposed amendments to the Freshwater Wetlands Act requirements by the New Jersey Department of Environmental Protection regarding the "mitigation to dam repair." Currently there is an exemption of up to 1 acre. The costs for repairs of nearly 1700 dams throughout New Jersey, as most will need in coming years, will be cost prohibitive to most local governments and private entities with this proposed change. We worked aggressively to have legislation passed; P.L. 2005, c. 94, which provides low interest loans for many of these needed repairs.

Since that original step, we sponsored legislation to assist counties and municipalities with a 50% grant funding through a ballot question and bonding in the amount of $90 million dollars for the "Public Dam Rehabilitation Project Bond Act". Although that legislation has not passed, we will be pre-filing the legislation for the next session. As you know, the New Jersey Department of Environmental Protection is now in the legal process of trying to hold counties and municipalities responsible for these dam repairs. If we understand the proposed rule changes correctly, a county or municipal road which passes over a dam, the state will assess them as partial ownership, thereby making them responsible for a share in the repair costs. As we stated, many local governments will be unable to manage such a costly burden.

We are requesting additional hearings across the state due to the significant impact of the proposed amendments to the "Freshwater Wetlands Protection Act". This will give counties, municipalities and the public an opportunity to comment on this important matter. (78)

239. COMMENT: We would like to express our severe concerns regarding the Department's proposal to amend general permit 18, to require wetlands mitigation if a dam repair results in an expansion of the dam.

We are currently in the process of reviewing the condition of our dams that have been recently inspected, and the repairs they need. Dam repairs are not undertaken for

development purposes, but for safety purposes. These rehabilitation services are not elective, but necessary to achieve compliance with the New Jersey Safe Dam Act (N.J.S.A. 58:4). However, the Department's grouping of private dam owners together with developers, and imposing impact fees eight times higher than single property owners, does not recognize this distinction, and has no rational basis.

Proposed general permit 18 rules are unfair and unnecessary. This impacts New Jersey's nationally recognized dam safety program, and its demonstrated commitment to public safety. New Jersey's taxpayers, directly and indirectly, will bear the cost of this rule, and the good faith of the State of New Jersey in partnering with dam owners will be severely damaged. We strongly encourage the NJDEP to reconsider these proposed changes, and eliminate the mitigation requirement for dam rehabilitation or removal in light of your responsibility. (7, 15)

240. COMMENT: Regarding the requirement for mitigation as part of the general permit 18, after reviewing the proposal we are concerned that its enactment will harm dam safety efforts in New Jersey. The Department regulates over 1,700 dams and considers 323, or nearly 60% of the high and significant hazard dams, to be deficient. Rehabilitation or removal is often the only and sometimes best way to deal with these deficient dams. The cost of rehabilitation is typically the biggest hurdle to improving dam safety. With the cost to rehabilitate a dam in New Jersey averaging $1,500,000, many owners do not have sufficient resources to undertake badly needed upgrades or repairs. Adding additional costs to the project for wetland mitigation will only further discourage dam owners from doing what needs to be done.

The regulatory community needs to work together to provide an atmosphere that promotes dam safety. The proposed changes to the regulations requiring mitigation is counter productive. If these proposed changes are adopted, the end result will be fewer safe dams, and an increased potential for catastrophic dam failure. (18, 75)

241. COMMENT: Our lake is currently under a dam restoration project, and we have received a loan from the State in the amount of $743,600.00. We understand that under the Water Mitigation (Permit 18) Highlands Act there is a Category C1 being

implemented. This legislation may result in an increase to our dam project of $50,000.00 to $100,000.00. Please note that we are a small lake consisting of approximately 86 homeowners. A large percentage of our homeowners are retirees on fixed incomes. Therefore, a large increase in the cost of dam restoration would put an extreme burden on our homeowners. We ask that you consider exempting private lakes from the above legislation in order to achieve the goal of making private dams environmentally safe, without putting an extreme burden on small, private lake communities. We appreciate your time and consideration in this matter. (40)

242. COMMENT: We are very concerned about the proposed changes to N.J.A.C. 7:7A-5.18(f) regarding the requirement for mitigation as part of general permit 18. We join with other New Jersey Lake Communities in expressing our very serious concerns regarding these changes. The proposed changes seem counter to the intent of our dam rehabilitation projects and would negatively impact our financial ability to complete these mandated remediation projects.

NJDEP has classified our dam and required rehabilitation. We have had a cooperative and professional relationship with the Bureau of Dam Safety and Flood Control. We have sought their advice on the required changes we must make, and our engineering firm has adapted our plans to meet their every suggestion. The cost to rehabilitate the dam is already estimated to be in the range of $250,000.00, which already poses a nearly insurmountable challenge to our small community of summer bungalows and rental rooms. The proposed remediation of wetlands would add enough to make this project completely unaffordable to us. We estimate complying with this requirement could cost an additional $100,000.00. This is not accounted for in our loan with the NJDEP and would most certainly put the cost of the project out of our reach. The availability of the loan is the only way that we could give consideration to proceeding with this project.

Our planned dam remediation work is intended to preserve wetlands and increase safety for the nearby community. It seems inappropriate to categorize disturbance to wetlands resulting from rehabilitating a dam to bring it into compliance with Dam Safety Standards as “random, unnecessary or undesirable alteration or disturbance.” Our dam

secures a small pond and the proposed changes are extremely excessive for the improvements we have planned. The proposed requirements for GP 18 will place this project outside of what is financially possible for our small summer community. We request that the NJDEP eliminate the expanded and unreasonable mitigation requirement for dam rehabilitation projects such as ours. (11, 87)

243. COMMENT: We oppose the proposed changes that will require mitigation for wetland impacts associated with dam rehabilitation and dam removal projects. These projects are undertaken for the benefit of the public, and this proposal will add substantial costs to them. The extra expense will discourage such projects and compromise public safety. Many dams are owned by municipalities, and adding further cost to this already expensive work may prevent municipal officials from doing all that should be done to protect their residents. On behalf of our members, we ask that you reconsider the imposition of these costs on dam rehabilitation and removal projects. (19, 46, 65)

244. COMMENT: Please follow the torrent of good advice you have received on using common sense concerning N.J.A.C. 7:7A, and the proposed amendment of general permit 18 requiring wetland mitigation for minor changes in a dam's footprint. The NJDEP should be encouraging lake associations to be part of the team, not treating them like busybodies who have no right to speak. (39)

245. COMMENT: We object to the proposed amendment which would require mitigation if expansion of a dam results in permanent impacts. We are steward to 12 dams, which are on public county park property that was either donated or preserved through state and/or county open space funds for recreation, conservation and preservation purposes. Plans are in various stages of preparation for rehabilitation, or other work on several of these dams, or under NJDEP order for various studies which might result in orders to expand these dams.

We are of the opinion that requiring mitigation for dam expansion will add to the costs of this work, and decrease the chances of obtaining money from the already high competition of other programs for funding from the pool of taxpayer's money. The

economic impact of this proposal is high, and the proposed process will tend to delay or hinder such necessary improvements to dams. Failure of dams needing these necessary improvements could have significant effect on lives and property. The NJDEP should consider an exemption to the proposed amendment for public and non-profit agencies whose mission is to protect and preserve open space for conservation and recreation purposes. (38)

246. COMMENT: The proposal to amend general permit 18 to require wetland mitigation in conjunction with dam restoration would result in a potential $50,000.00 to $100,000.00 increase in the cost of average dam rehabilitations. Is this really necessary, or is NJDEP just looking for more revenue? For a small lake community such as ours, already struggling to secure the funding to cover the existing cost of attorney fees, required engineering studies and plans, permit fees, and the actual rehabilitation construction, the addition of yet another expensive requirement is too much to bear. We do not have a large, well-to-do population to spread out these prohibitive costs. The project we have undertaken, to come into compliance with the New Jersey Dam Safety Act, is done with great personal sacrifice by a few property owners. The survival of our lake as a vital water resource is imperative not just for our immediate lake community, but for the surrounding community at large.

To the best of our ability, environmental concerns are responsibly considered before any projects are undertaken. We value all the natural resources that surround us. But that includes the health and well-being of the human population as well. Do not allow wetland concerns to reach a point of overriding the mitigation of loss of human life and property in already established communities, by making dam rehabilitation costs so prohibitive. The removal of Upper Lake Plymouth dam would make it more devastating if the whole Kittatinny Ridge was on fire, to our dam breaching and flooding our the roadway temporarily. Please step back and consider the whole picture and reconsider these proposed rule changes. (8, 61, 81)

247. COMMENT: We have great concern regarding the proposed readoption of N.J.A.C. 7:7A- 5.18(f) with amendments. There are many small, private communities with limited

populations who contribute to the maintenance of lakes and dams. With the assistance of the legislature, we are now able to access low interest loans to address these repairs. However, the cost of repairs may still be in excess of $600,000.00 to repair two existing dams. The passage of this proposal would add an additional expense of over $150,000.00, which would be a great burden to the members of our lake community. We are repairing our dams in compliance with the DEP to ensure that the dams are safe, not for development purposes. Therefore, we feel that passage of this proposal would not be in the best interests of the lake communities, but would only put an undue burden on the membership. Please reconsider proposed readoption with amendments N.J.A.C. 7:7A-5.18(f), as it is unfair to the taxpayers of the lake communities. (12, 72)

248. COMMENT: I am writing this letter to express our concern over a newly proposed change to N.J.A.C. 7:7A-5.18(f) that I think will have unintended consequences from its original intent. It has been brought to our attention that a change will institute a new fee of approximately $75,000.00 per quarter acre of any wetlands that is deemed impacted due to development. While we applaud the efforts that the NJDEP has undertaken to preserve important and irreplaceable State resources, I am requesting that the repairs to existing dams be specifically excluded from this proposed change.

After a long and complex process, we have recently secured State funding through the Dam Loan Program that was passed by voters several years ago. The process is now complete, and a set amount of funding has been set aside to enable our community to repair two dams that are in need of repair. While the amount that has been allotted to our Association is estimated to be sufficient to complete the proper repairs, the additional burden that this proposed change would put on our membership would become too large to bear. We are a very active community, and we pride ourselves as being the stewards of five lakes of various sizes within our association. We have worked well with the NJDEP in taking the proper steps to continue to maintain a level of commitment that will insure the integrity of the New Jersey waters that flow through our neighborhood.

Our fear is that if this additional financial burden is placed upon us, we will not be able to complete the repairs, which in turn could endanger our community as it currently exists. The two dams we plan to repair retain approximately 43 and 74 acres of water,

which can successfully be preserved if an exemption is made to exclude dam repairs for this proposed change. We respectfully request that the NJDEP exempt dam repair in this new rule change. (12)

249. COMMENT: We own, operate, and/or maintain seven dams in New Jersey, all Class One High Hazard Potential structures. The dams require on-going maintenance. Each year, repairs and rehabilitation of components at each of the dams are completed. When rehabilitation to improve the structure and/or spillway capacity is required, the cost can range from one million to ten million dollars, or more. A major rehabilitation is planned for one of our dams in the next five years to improve spillway capacity.

We respectfully submit that projects involving dam rehabilitation and/or removal be exempt from the proposal to add mitigation. Our interpretation of the proposed rule language is that dam rehabilitation or removal would require wetland mitigation if additional wetland impacts are created outside of a dam's original footprint. In our opinion, the proposed changes to the regulations requiring mitigation for dam rehabilitation and/or removal projects are counter productive. If these proposed changes are adopted, the added cost for wetland mitigation may prevent some dam owners from being able to proceed with rehabilitation or removal, and the end result will be fewer safe dams. Dam rehabilitation should not be considered "development." Dam owners are complying with NJDEP Dam Safety Standards. We strongly encourage the Department to reconsider these proposed changes and eliminate the mitigation requirement for dam rehabilitation or removal, in light of the commitment of the Department to dam safety. (71)

250. COMMENT: We join with representatives of other New Jersey lake communities, to express our severe concerns regarding the Department's proposal to amend general permit 18 requiring wetlands mitigation if a dam repair results in an "expansion" of the dam. We are a community of 500 homes which has three dams that need to be rehabilitated. We are currently working on the first dam with two more to go. It is going to be difficult to complete all three dams on the current budget, never mind adding a possible $50,000.00 to $70,000.00 for two additional permits. This would be an

additional financial strain on us. Every home in our community currently is paying a 20 year assessment for the dam rehabilitation. This additional cost would add extra years for what we believe is an unnecessary fee for permit 18.

For years the NJDEP has been telling lake communities that it is necessary to rehabilitate the dams for public safety. The Freshwater Wetlands Protection Act at N.J.S.A. 13:9B-2 states that it is the policy of the State to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance. So, is rehabilitating a dam for public safety unnecessary? The Department's grouping of private dam owners with developers, and imposing impact fees eight times higher than single family property owners, does not deserve this recognition and has no rational basis. The proposed modifications to general permit 18 requiring mitigation will result in nothing more than to slow the pace of needed dam repair and to drive up the costs to dam owners, including the State of New Jersey's public park system, private lake communities, and drinking water purveyors. Commissioner Jackson's commitment to dam repair and public safety cannot be reconciled with this proposal.

We urge the Department to carefully examine and ultimately reject modifications to general permit 18. The proposed rule unfairly and unnecessarily impacts New jersey's nationally recognized dam safety program and its demonstrated commitment to public safety. New Jersey's taxpayer's, directly and indirectly, will bear the costs of this rule, and the good faith of the State on New Jersey in partnering with dam owners will be severely damaged. (10, 56)

251. COMMENT: We are very concerned about the proposed changes to N.J.A.C. 7:7A-5.18(f), regarding the requirement for mitigation as part of general permit 18. The proposed changes seem counter to the intent of our dam rehabilitation projects, and would negatively impact our financial ability to complete these mandated remediation projects. NJDEP has classified our dams as high hazard, and has required rehabilitation. The cost to rehabilitate these two structures is already estimated to be in the range of $650,000.00 to $900,000.00, which already poses a nearly insurmountable challenge to our small community. The proposed remediation of wetlands could add at least

$150,000.00 to $200,000.00. It would also increase the number of studies required, and increase the total time required to complete the project.

Our ongoing dam remediation work is intended to preserve over 66 acres of wetlands held in Lake Iosco. We have a long track record of preservation and environmental protection on all our property. The proposed requirements for general permit 18 could place this project outside of what is financially possible for our small community (43 homes), and ultimately jeopardize a much larger wetland and conservation area. We request that the NJDEP eliminate the expanded and unreasonable mitigation requirement for dam rehabilitation projects such as ours. (57)

252. COMMENT: We are very concerned about the proposed changes to N.J.A.C. 7:7A-5.18(f) regarding the requirement for mitigation as part of general permit 18. As owners of a 138 acre open space parcel inclusive of a 3.5 acre lake, we are proud to join with other lake owners to express our severe concerns regarding the proposal to amend general permit 18, requiring wetlands mitigation if a dam repair results in an “expansion” of the dam.

The proposed changes seem counter to the intent of our state’s progress towards garnering improved awareness of preventative maintenance and compliance among the private dam owners in the state. Private dam owners in this state are primarily focused on the important aspects of maintaining safe dams, not expansion of their footprints. The consequence of this proposal, and the grouping of private dam owners with developers, would negatively impact our financial ability to complete mandated remediation projects. I urge you and your office to reconsider the negative impacts of this proposal and reject the changes. The addition of cost and delays likely to be associated with the additive administration, offers no real benefit to the taxpayers of New Jersey with regard to safety or environmental protection. We request that the NJDEP eliminate the expanded and unreasonable mitigation requirement for dam rehabilitation projects such as ours. (13)

253. COMMENT: In 2002, we formed an organization to purchase properties around Lake Wanda, avoid the lake being drained, repair the dam, and make Lake Wanda a family oriented community. The Lake Wanda dam is classified as a class III, low hazard

dam. We hired an engineering firm to help steer us in the right direction for repairing the dam, and to apply for the dam loans available through the state. We purchased the properties and then cleared the 496 foot dam, the top, its back slope, and out approximately 20 feet to give our engineers a clear view for them to prepare a design plan. We did this work ourselves to help keep the costs down, and saved the community approximately $50,000 to $60,000, and to stay in compliance with the Dam Safety rules. We have been approved for a loan and are awaiting a supplemental loan to begin the project. Currently the total project is estimated at $941,000, and is estimated at 14 months from start to finish after all funds are approved. The proposed rule changes will drastically affect our goal to repair the dam so we can save the lake. The financial impact of these increased costs will drive the project cost significantly higher. This could exceed our community's ability to move forward and repair the dam because of the financial impact, and we could possibly lose the lake as a result. We are requesting that these proposed modifications be rejected so we can move forward with our continued commitment to repairing the dam. We are not a developer, and our only wish is to repair the dam and save the lake. (58)

254. COMMENT: We respectfully submit that projects involving dam rehabilitation and/or removal should be exempt from the proposal to add mitigation. It is our understanding that as proposed the rule change would require that if an applicant repairs or maintains a dam without expansion, the repair and maintenance activities will not result in new impacts to wetlands or waters, and therefore will not require mitigation. However, when a dam repair includes an expansion resulting in permanent impacts, mitigation will be required.

From the above, we interpret that dam rehabilitation or removal would require wetland mitigation if additional wetland impacts are created outside of a dam's original footprint. In our opinion, the proposed changes to the regulations requiring mitigation for dam rehabilitation and/or removal projects are counter productive. If these proposed changes are adopted the added cost for wetland mitigation may prevent some dam owners from being able to proceed with rehabilitation or removal, and the end result will be fewer safe dams. Dam rehabilitation should not be considered "development". Dam

owners are complying with NJDEP Dam Safety Standards. We strongly encourage the NJDEP to reconsider these proposed changes and eliminate the mitigation requirement for dam rehabilitation or removal in light of the commitment of the NJDEP to dam safety. (83)

255. COMMENT: I am very concerned about the proposed changes to N.J.A.C. 7:7A-5.18(f), regarding the requirement for mitigation as part of general permit 18. NJDEP has classified our dams, and has required rehabilitation. The cost to rehabilitate our dams is already estimated to be very expensive, which already poses a nearly insurmountable challenge to our small community, which is only financed through membership dues. The proposed remediation of wetlands could add at least $200,000.00 to $300,000.00. It would also increase the number of studies required, and increase the total time required to complete the project.

Our ongoing dam remediation work is intended to preserve our wetlands and make our dams safe. We have a long track record of preservation and environmental protection on all our property. The proposed requirements for general permit 18 could place this project outside of what is financially possible for our small community, and ultimately jeopardize a much larger wetland and conservation area. We request that the NJDEP eliminate the expanded and unreasonable mitigation requirement for dam rehabilitation projects such as ours. (68)

256. COMMENT: We were recently made aware of the proposed changes to N.J.A.C. 7:7A-5.18(f) regarding the requirement for wetlands mitigation as part of general permit 18. We own two dams, one of which is classified as High Hazard, that need to be rehabilitated. We are in the process of finalizing our construction documents and hope to begin construction in 2008.

The current estimated cost of our project is $1.1 million. We applied for, and were approved for, a low interest loan for that amount under the NJ Dam Restoration & Inland Water Project Loan Program. Repayment of that amount will present a significant challenge to the surrounding community. Our engineer has told us that our mitigation costs could be as high as $150,000.00. Since these requirements were not in effect when

we applied for our low interest loan, they are not included in the requested loan principal. That means that we would need to finance these costs independently at a much higher interest rate. This would further impact our ability to pay for the project. It is our understanding that the proposed changes to general permit 18 would also require additional engineering studies which would undoubtedly delay the project.

We do not believe that private dam owners trying to do the right thing, and maintain our dams, should be negatively impacted by regulations intended to stop developers from destroying wetlands. It makes no sense that private dam owners should be required to pay wetlands mitigation fees while repairing our dams, thereby preserving wetlands. We request that the NJDEP reconsider making these changes, and not add any additional requirement or mitigation costs to dam rehabilitation projects. (62)

257. COMMENT: We express our severe concerns regarding the Department's proposal to amend general permit 18. The amendment would require wetlands mitigation if a dam repair results in an expansion of the dam. Our efforts have resulted in the rehabilitation of four of the five dams we own, and have included our receipt of financial assistance (through low-interest loans authorized under various bond acts) from the State of New Jersey for three of the dams. Dam repairs are not undertaken for development purposes, but for safety purposes. These rehabilitation activities are not elective but necessary to achieve compliance with the New Jersey Safe Dam Act (N.J.S.A. 58:4). However, the Department's grouping of private dam owners together with developers, and imposing impact fees eight times higher than single family property owners, has no rational basis.

According to a 2006 report issued by the Association of State Dam Safety Officials, New Jersey had 213 high hazard, and 354 significant hazard dams. More recently, the American Society of Civil Engineers (ASCE) in its 2007 Report Card reported that 310 high hazard and significant hazard dams in New Jersey are in need of repair, with estimated repair costs at approximately $300 million. Using the ASCE estimate of $1 million for each dam repair, this proposed rule change will add a minimum of 5% to 10% ($50,000 to $100,000) to the average cost of dam repairs after factoring in the purchase of mitigation credits, and related professional engineering, wetland and legal

fees. Therefore, additional costs associated with the rehabilitation of the remaining dams will range from $15 million to $30 million, and may exceed this estimate. (56)

258. COMMENT: The Department's proposal to amend general permit 18, requiring wetlands mitigation in cases in which dam rehabilitation results in an expansion of a dam is, in our opinion, overly broad and imposes severe financial burdens on projects already underway and planned. We recommend reconsideration and revision.

In response to the mandate of NJDEP Division of Dam Safety and Flood Control, our organization has engaged an engineering firm to oversee rehabilitation of the dam at our small pond, obtained a loan from the NJDEP, and scheduled the work to be completed in late 2008. The wetlands mitigation proposal would have a significant impact on the scheduled work by delaying its completion and inordinately raising the cost. This additional cost, estimated at $75,000.00 or more, which could not be foreseen because of its ex post facto character, would impose a substantial and possibly crushing burden on our association's already strained finances by increasing the cost of dam rehabilitation by one-third or more.

We have over the years striven diligently to protect the natural environment and to preserve wetlands. Planned dam rehabilitation work will protect the watershed and provide safety for our downstream neighbors. We will continue our dedication to preservation and safety.

We request that NJDEP modify its proposal clearly to distinguish between essential projects like ours, which will bring our dam into compliance with dam safety standards, from other developments deemed to be "random, unnecessary or undesirable alterations or disturbances." Such a modification would serve the object of preservation while, at the same time, avoiding the placement of excessive burdens on small lake communities whose dam rehabilitation projects serve the broad public purposes of safety, flood control, and conservation of natural resources. (50)

259. COMMENT: We want to express our concerns regarding the proposed changes to the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:7A). Our primary concern is

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related to the new remediation of wetlands standards that will be required in order for proposed dam rehabilitation projects to receive approval for a general permit.

We, along with numerous other municipalities in the area, will potentially be affected by the proposed rules due to the fact there are a number of lake communities that will at one point or another need dam repairs that will require a general permit from the NJDEP. The Freshwater Wetlands Protection Act rules propose that in order for the projects to receive approval, they would be required to have an approved mitigation plan that would replace any disturbed wetlands with a monetary contribution to a wetlands bank. The mitigation requirement in the rules would require an estimated $300,000.00 contribution for every acre disturbed by the project. This requirement would ultimately result in the lake communities having to bear additional costs for projects that are already imposing a large financial burden. Furthermore, many of the dam rehabilitation projects have been funded by loans and grants made through the NJDEP. However, at the time these funds were made available they did not take into account the additional costs the project would incur if mitigation was required as a condition for approval. The inability of communities to anticipate the potential cost increases generated by the proposed regulations has resulted in many communities accepting loans and grants that may ultimately be unable to meet the costs of the projects. These communities will now be forced to spend additional sums of money, or face letting the lake dams that give their properties value, fall into hazardous disrepair.

The rules as currently proposed also do not provide any detailed methodology as to how the cost of mitigation contributions will be determined. The rules do mention that the proposal is in accordance with federal standards, and the proposed mitigation rules are similar to those proposed by the USEPA. However, there is no clear explanation for how the base cost per acre is determined. It is arbitrary and unreasonable for the NJDEP to impose mitigation costs on property owners without providing a clear explanation as to how those costs were determined. Complying with the rules as currently proposed will occur at no small cost to homeowners, and the NJDEP should therefore provide a more explicit explanation to their methodology.

The heightened requirements that the proposed Freshwater Wetlands Protection Act rules will impose on dam repair and rehabilitation projects are not only an increased

financial burden for our area's lake communities, but are also seemingly in contradiction to the actions taken by other NJDEP Programs. The NJDEP Division of Dam Safety and Flood Control has inspected a number of dams in our area and determined that action must be taken to repair at least one of the dams, or the dam will have to be replaced. The proposed rules, and the costs of wetlands mitigation, could potentially prevent lake communities from being able to perform the necessary dam repairs, resulting in lakes having to be drained due to Division of Dam Safety and Flood Control's mandates. Draining the lakes would ultimately have a far more devastating impact on the wetlands than the temporary disturbance that would occur during a dam rehabilitation project.

The preservation of natural freshwater wetlands is an admirable goal in light of the increasing development pressure felt throughout the state. We fully acknowledge the ecological benefits that well-maintained and preserved wetlands provide in preventing flooding, protecting the ground water supply, and sustaining numerous threatened and endangered species. However, the currently proposed rules will place a misplaced and unfair burden on the numerous lake communities in our area. Dam rehabilitation and repairs are not significant development activities that create a large scale disturbance of wetlands. The Township asks that you please reconsider the current rule proposal, and the potential negative economic impact that will likely be felt by our communities. (65, 73, 77)

260. COMMENT: Of the general permits identified for mitigation requirements, it seems particularly onerous to require mitigation for general permit 18. The proposed requirement to perform mitigation for dam repairs/upgrades (resulting in new disturbances) should not even be considered. We are aware of few dam owners who perform repairs or upgrades except to conform to dam safety requirements. The current cost of repairs/upgrades is sufficiently high to discourage dam owners from performing the work. The additional cost of mitigation will likely result in the work not being performed or delayed, or the dam being breached and the water body drained.

Specifically, within the southern New Jersey area, where ponds and lakes are generally man-made, existing dams are significant and should be encouraged to be maintained. In addition to providing an ecosystem that would not normally exist, these

water bodies provide a significant economic and recreational value to the region. The ecological benefits provided by these dammed water bodies far outweigh the impacts to wetlands incurred through rehabilitation, repairs, and upgrades. (36)

261. COMMENT: For the following reasons we respectfully requests that the NJDEP reconsider the new requirement contained within proposed N.J.A.C. 7:7A-5.18(f), and eliminate the mitigation requirements for dam rehabilitation or removal. First, dam rehabilitation should not be considered "development" as it is a necessary investment and a critical component to maintaining existing water supply infrastructure and the safety and security of the communities. Moreover, the rehabilitation is being performed in compliance with the NJDEP's Dam Safety Standards. Second, decommissioning and certain types of repairs of dams that would be impacted under this proposal could become prohibitively expensive. While our ratepayer customers would bear this additional cost for company owned dams, dams owned by private owners with limited resources may not be able to act in the interest of community safety in a timely manner. Finally, we are also concerned with the length of time it would take for the permitting review and approval process to be completed. The regulatory lag that could result from this process would adversely affect the completion of time-critical dam rehabilitation projects, resulting in situations that could threaten the public health, safety and welfare. (79)

262. COMMENT: We recommend that projects involving dam removal and/or those dam modifications designed to provide fish passage (for example, fish ladders) be exempt from the proposal to add mitigation to N.J.A.C. 7:7A- 5.18(f). We support and provide assistance to dam removal and fish passage projects in New Jersey through the *Partners for Fish and Wildlife* and *Coastal* programs. The Service participates in these projects because they can provide fish passage for anadromous fish, and in the case of dam removal are instrumental in restoring the natural ecology of our streams and rivers. Typically dam removal and fish passage projects have minimal impacts to wetlands or waters, but occasionally temporary and/or minor impacts on wetlands will result as a component of these projects. These minor and/or temporary impacts on wetlands are

typically compensated by the restoration of fish passage and restoration of riverine ecology, without the necessity of providing specific wetland mitigation.

We have a responsibility to encourage dam removal and fish passage projects to support habitat restoration and enhancement. We hope that the NJDEP shares this stewardship responsibility. As such, we recommend that the proposed amendment to N.J.A.C. 7:7A-5.18(f) exempt those projects that are designed as dam removal or fish passage projects. (14)

263. COMMENT: As a stream and wetland restoration oriented firm we are troubled by the proposed amendment to the Freshwater Wetlands (N.J.A.C. 7:7A) regulations, especially as it relates to general permit 18 (Dam Repair). The Department has proposed amendments to general permit 18 at N.J.A.C. 7:7A- 5.18(f) to require that wetland mitigation "shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters." Although not clearly stated, the proposed rule would appear to require mitigation for the reduction in the area of impounded water that is artificially created by a dam, and the wetlands associated with the man made impoundment that would occur as a direct result of a dam removal. We sincerely hope that this is not the intent of this rule change since it would serve to eliminate or at least significantly curtail the removal of dams as a restoration option for many rivers and streams in New Jersey. Contrary to the position set forth in the proposed amendments, we strongly encourage the Department to consider dam removal as a river restoration activity that could also be considered as mitigation for other regulated impacts covered by the Freshwater Wetlands Protection Act. We also encourage the Department to include specific language for General Permit 18 that would be designed to facilitate the removal of dams. The removal of dams as mitigation is an approach that has been used in other states including Massachusetts, North Carolina, New Hampshire, Wisconsin, and Pennsylvania. Moreover, this approach can also serve as a mechanism to help the NJDEP eliminate failed or abandoned dams. There are numerous dams throughout the state that are in dire need of repair or removal, many of which are owned by people that do not have the financial resources to pay for the repairs needed to either comply with NJDEP requirements, or for the removal of the dam. The opportunity to remove dams as

a means of satisfying NJDEP mandated mitigation would serve to create a mechanism that could facilitate the removal of unused or failed dams, and thereby enhance the state's riverine resources.

In general, the restoration of naturally sustainable riverine and riparian habitats is a principal purpose of dam removal. The conversion of an artificial open water environment to a natural and free flowing river provides significant ecological and water quality improvements, including restoration of riparian wetlands and floodplains. The New Jersey Wildlife Action Plan released earlier this year by the N.J. Division of Fish and Wildlife indicates impacts of dams as "Dams alter the physical, chemical and biological stream environment, sometimes destroying 30-60 percent of the freshwater mussel fauna upstream and downstream of the structure. The most detrimental effect of dams on freshwater mussels, however, is the elimination of host fish species, which disrupts the mussels' reproductive cycles. Dam construction also results in rare stream dragonflies being replaced by common pond species, and blocks the migration of anadromous fishes." This also states that "persistence of dams" has an impact on riparian and riverine species. It is also important to understand that many of the recent dam removals in New Jersey have been provided funding through partnerships with various federal resource agencies, U.S. Fish and Wildlife Service, Natural Resource Conservation Service, and National Marine Fishery Service, with the support of the N.J. Division of Fish and Wildlife because of the benefit to the state's rivers and streams.

We encourage the Department to continue its support for the removal of unused dams as a viable means to restore streams and riparian habitats, and to facilitate these restoration opportunities by rewriting the language proposed for general permit 18 to include specific and clearly written provisions that pertain specifically to dam removal. The current wording of the proposed amendments is not only silent with regard to dam removal. It also provides language that could be interpreted to require mitigation for any reduction in the area of an impoundment related to a dam removal. We sincerely hope that it is not the Department's desire to require mitigation for dam removals since it would add a considerable cost to an already expensive and complicated process, and would likely curtail the removal of unused and failed dams. It would be extremely unfortunate if the proposed rule would make river restoration through dam removal cost

prohibitive, because the restoration of a sensitive natural resource was required to provide mitigation for the loss of man induced resources. (26)

264. COMMENT: We are very concerned about the proposed rule which would require wetland mitigation if additional wetland impacts are created outside of a dam's original footprint. We are concerned that the proposed rule could result in wetland mitigation requirements for the alteration or loss of artificial, non-sustainable, open water wetland environments as part of the dam removal process. Specifically, with respect to dam removals, the term "impact" could be broadly interpreted as impacts to the regulated open waters of impoundments upstream from a dam to be eliminated.

Riparian restoration is a principal purpose of dam removal. Conversion of a manmade open water environment to a free running river provides significant ecological and water quality improvements, including restoration of riparian wetlands and floodplains. Experiences throughout the country show that dam removal may result in a change in type, extent and location of wetlands in the previously dam-affected area, but natural wetlands are restored where conditions exist to support them. Dam removal provides benefits to a river system that are far reaching including increased flood attenuation, and restoring the ability for reptiles, amphibians, water dependent mammals, and migratory and resident fish species to migrate up and down stream without manmade obstructions.

In addition, the removal of obsolete dam structures is nearly always good for water quality. Dam removals are such an effective means of improving river water quality, and enabling passage of the aforementioned fauna, that draining artificially created ponds should be considered mitigation, and used to offset mitigation requirements for other projects. I understand that this procedure is used in other states, and I consider this to be a progressive means of improving river function which the Department should adopt. If the impact of a removal is left to the judgment of a regulator, there may be significant increases in project engineering costs due to the necessity of arguing the case for the removal. Further, the costs of beneficial dam removal will increase due to requirements for off-site improvements, or payments in lieu of wetland mitigation.

There are more than 1,700 dams currently under regulation in New Jersey and likely many more dams that are not recorded because they do not meet the state's regulatory definition. The Garden State's riverine environments and species have suffered as a result. An increasing number of communities are expressing interest in eliminating public safety hazards, improving natural flood protection, and restoring rivers through dam removal. It would be extremely unfortunate if the Department, through this proposed rule, caused river restoration to be prohibitively expensive because the worthy act of restoring a naturally sustainable resource required mitigation for loss of a manmade resource. (49, 51)

265. COMMENT: We are concerned about the proposed changes to N.J.A.C. 7:7A-5.18(f) regarding the requirement for mitigation as part of general permit 18, dam repair. The proposed regulations include a provision stating that if an applicant repairs or maintains a dam without expansion, the repair and maintenance activities will not result in new impacts to wetlands or waters and therefore will not require mitigation. It is unclear what will be considered as an expansion – does it refer to expansion of the dam's footprint or the impoundment? Many dam rehabilitations include increasing the outlet capacity or the dam footprint to increase stability. Both of these repair efforts are intended to increase the safety of the dam but may include impacts to freshwater wetlands and, depending on the interpretation of the proposed regulations, may require mitigation.

While we fully support wetlands and riparian area restoration, and commend the Department in its efforts through this rule-making, the Department must recognize the difference between projects undertaken for profit and projects undertaken for the protection of public safety and the environment. Many of the State's dams are owned by private individuals, lake associations, and communities that typically struggle to fund rehabilitation of their dams to comply with Dam Safety Standards. The owners do not profit from rehabilitation of the dam and, in essence, are preserving the aquatic habitat created by the impoundment, lake or pond. Adding the additional costs for mitigation credits will only cause avoidance or delay of dam rehabilitation and may result in similar catastrophic failures as experienced in Burlington and Morris Counties over the last several years.

We have an active Source Water Protection Program, which has led to land acquisition for the protection of water quality and volume. These lands are acquired by leveraging our funds with those of our preservation partners, including Townships, Counties, land trusts, and conservation foundations, as well as Green Acres and the Environmental Infrastructure Trust. Because of the relatively pristine nature of the properties, they tend to be in desirable locations and are costly to purchase. Many of these properties contain manmade ponds, lakes and in-stream impoundments, which may have antiquated dams in need of repair, rehabilitation or removal. Diverting funds to purchase wetlands mitigation credits will only reduce our and our partners' resources for land preservation and stewardship as well as other environmental and riparian area restoration projects.

The disturbance to wetlands for dam rehabilitation should be avoided and wetlands should be restored and possibly enhanced after the work is completed. However, such disturbances should not be considered "random, unnecessary or [an] undesirable alternative," considering the consequences of delaying or avoiding dam rehabilitation. Failure of a dam may result in the loss of life and property damage, and most certainly will cause significant damage of the downstream riparian area and the loss of aquatic habitat. Wetlands mitigation is important, but dam safety is paramount to the protection of the public health and welfare. (69)

RESPONSE TO COMMENTS 237 THROUGH 265: The Department acknowledges the commenters' concerns about the need to proceed with dam repairs without additional real or perceived impediments. Although the Department's database indicates individual dam repair projects undertaken as part of general permit 18 result in small impacts for which mitigation would not be cost prohibitive, the funding that many communities are depending on for dam repair did not include funding for mitigation. Because the Department has made it a priority to ensure that all dams have been properly repaired and remain safe, the Department has decided not to adopt the requirement to provide mitigation for general permit 18.

N.J.A.C. 7:7A-5.21 General permit 21—Above ground utility lines

266. COMMENT: The commenter commends the Department for recognizing and clarifying in these wetlands rules that installation of a utility line in scrub shrub or emergent wetlands is not a permanent disturbance of those wetlands. (48)

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

267. COMMENT: The proposal to change the allowed area of disturbance to no greater than 0.5 acres should not be adopted. The reason for this is that the Department's rules need only be consistent with the federal rules, not identical to them. The Department has provided no rational justification for the need for this change. These are two of the primary general permits used by electric utilities for the construction of their transmission infrastructure. To reduce the allowable disturbance area in half would remove this useful permit option from some utility projects, and needlessly subject needed transmission construction projects to a lengthier permit process with no real additional environmental protection. (48)

RESPONSE: The Department must maintain its freshwater wetlands program as stringent as the Federal program in all ways. The Federal requirements state, "while States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." (See 40 CFR Part 233(d), 404 State Program Regulations). Consequently, the State cannot permit impacts in excess of those permitted under the Federal program. The U.S. Army Corps of Engineers nationwide permit 12 for utility lines contains a 0.5 acre impact limitation. Consequently, the Department has amended this general permit to reduce the impact limit to 0.5 acres in order to remain as stringent as the Federal program.

268. COMMENT: At N.J.A.C. 7:7A-5.21(e), add "proposal" after mitigation to read: "Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation <u>proposal</u> shall meet…" (31)

RESPONSE: The Department does not agree that the suggested change is warranted. The actual mitigation project must meet the requirements contained in the rules at N.J.A.C. 7:7A-15.5, mitigation for smaller disturbances. Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

269. COMMENT: General permit 21 for above ground utility lines increases the loss of wetlands and opens the area for invasive species and should be strictly limited. (80)

RESPONSE: General permit 21 for overhead utility lines is necessary to supply necessary services to the public. The amendment to N.J.A.C. 7:7A-5.21(b)2i reduced the allowable acreage under general permit 21 from 1.0 to 0.5 acres of permanent disturbance and the Department believes this is a strict limit on wetland impacts. While it is true that temporary disturbance of scrub shrub or emergent wetlands may allow introduction of some invasive species, the utility line, if properly installed, will allow the wetland to re-establish with a proximate seed source from removed vegetation. Therefore, the introduction of invasive species should be kept to a minimum.

N.J.A.C. 7:7A-5.23 General permit 23—Expansion of cranberry growing operations in the Pinelands

270. COMMENT: Regarding N.J.A.C. 7:7A-5.23, cranberry growing, we have had corruption in this area in New Jersey in the not too distant past. Any transactions relating to cranberry growing needs to be in full public view and on the public record. (67)

RESPONSE: All applicants for authorization under general permit 23 must provide the same public notification required for all general permit applications in accordance with N.J.A.C. 7:7A-10.8. Complete copies of applications are available for public review at the municipal clerk's office of the municipality where the application property is located,

and also at the Department's Trenton offices. As such, general permit 23 applications are handled in the same way as all other general permit applications. They are in public view and part of the public record.

271. COMMENT: We are vehemently opposed to general permit 23 as we were at its inception. We believe that wetlands in the Pinelands are unique. To take important forested wetlands in the Pinelands, which is part of an ecosystem that is a United Nations designated International Biosphere Reserve, and to arbitrarily give out ten acre cuts of wetlands that cannot be replaced with mitigation, we find objectionable. There is nothing that can be done to mitigate the destruction of ten acres of these precious wetlands – ten acres making general permit 23 the largest general permit we have. An intact ecosystem is replaced with an industrialized monoculture. These wetlands are irreplaceable. They contain White Cedar swamps and other habitat for all types of plant and animal species, and are home to many endangered species. Once gone, they can never be restored.. Planting a few white cedars is not going to make up for the destruction of those wetlands created by nature over thousands of years. Cranberry development not only clear cuts and burns down forests, which adds to the thermal pollution of ecologically significant Pinelands streams, it also digs out wetlands and replaces them with an alien environment that looks like a giant waffle with dikes, roads and pumping stations. Subsequent cranberry production involves the use of fungicides and pesticides, as well as throwing sand into the bogs, which then gets into our streams. Unfortunately, we do not know the full extent of the environmental impacts because the Army Corps of Engineers exempted cranberry farming from the State's Clean Water Act. We cannot afford further destruction of wetlands in environmentally sensitive areas, and more chemicals and pollution going into streams in the Pinelands. Cranberry bogs can be created in upland areas instead of using wetlands, and the DEP should eliminate general permit 23, and only allow expansion of cranberry bogs in upland areas.

The other concern is that the only people who seem to apply for the permit are people that get caught with violations. I have a real concern that this is not a real permit, it is an excuse for people who got caught. (80)

272. COMMENT: We finished the restoration of the 23 acre, what was formally known as the DeMarco Enterprise, wetland violation building of cranberry bogs. Just this month we completed 80 acres of cranberry bog restoration under the Federal Wetlands Reserve Program with the US Department of Agriculture and the Natural Resource Conservation Service. Modernized cranberry bogs bear no resemblance to anything natural, anything having to do with habitat, anything having to do with wetland structure, function or any kind of benefit that wetlands provide. Modernized industrial cranberry bogs, the kind that are being built in the last ten or twenty years, are nothing more than the roof top of a K-Mart with cranberries growing on them. They are storm drains and never contain any water during a growing season. They rush the water into the downstream, stream channel as fast as possible. The only time there is any water is during harvest, just so it looks pretty and during the winter to protect the cranberry vines, when the wetlands are at high water table. They industrialize cranberry bogs. We should be doing everything possible not to allow the expansion of cranberry bogs into any Pineland wetlands whatsoever. (16)

273. COMMENT: N.J.A.C. 7:7A-5.23 allows disturbance of 10 acres of wetlands for expansion of cranberry growing activities. We strongly object to this permit. (20, 85)

RESPONSE TO COMMENTS 271 THROUGH 273: In adopting a general permit for the expansion of cranberry operations in the Pinelands Region, the Department recognized the historical existence of cranberry agriculture in the region, and the fact that the Pinelands Commission strongly urged the Department to adopt a permit for agricultural activities that are compatible with the wetlands program, when it signed an agreement with the Department for purposes of assuming the Federal program. The limits were negotiated for several years among all stakeholders and were upheld in Court. Further, contrary to the commenter's contention, an attempt to legalize an illegal cranberry farm expansion using the general permit was unsuccessful. To date, the permit has been used infrequently. However, the Department believes it is necessary to maintain the general permit for those who can meet all criteria.

274. COMMENT: The Department is proposing to amend N.J.A.C. 7:7A-5.23, expansion of cranberry growing operations in the Pinelands, to eliminate the existing mitigation requirements, which requires donation of Pinelands Development Credits, to fund the Atlantic White Cedar Restoration Program required by N.J.A.C. 7:7A-5.23(n). Unlike the other general permits, general permit 23's use is limited to the Pinelands Area. The Department is proposing to change the mitigation required for such permit to be consistent with the mitigation requirement for other general permits, mainly acquisition of wetland mitigation credits in accordance with N.J.A.C. 7:7A-15.5. The Commission has serious concerns regarding the benefit of this mitigation approach to the resources of the Pinelands Area. Moreover, the Pinelands Commission does not believe that the Department has the authority to unilaterally eliminate the existing mitigation requirements for the GP 23 by merely amending its rules. Rather, elimination of the existing mitigation requirements of the GP 23 would require revocation of the GP 23 itself in accordance with N.J.A.C. 7:7A-5.23(r) and the terms of the Memorandum of Agreement that the Department executed regarding this GP dated November 4, 1999. Specifically, the November MOA between the Department, the Commission and the Pinelands Development Credit Bank establishes the framework for Atlantic white cedar restoration projects required by Section 404 of the Clean Water Act and the FWPA rules at N.J.A.C. 7:7A-5.23(n), and expressly provides at paragraph III, that it, and thus the Department's obligations under the MOA and under the Atlantic White Cedar Program required under N.J.A.C. 7:7A-5.23(n), shall continue in effect until the GP 23 is terminated or revoked. Moreover, modification or amendment to the MOA is only valid if it fully complies with the requirements of N.J.A.C. 7:7A-23(n) and is accomplished by written modification or amendment duly executed by all parties. As evidenced by N.J.A.C. 7:7A-5.23(q), one of the requirements for the continuation of the GP 23 was reasonable progress towards the goals in the Department's overall plan for Atlantic white cedar restoration. In fact, if the NJDEP Commissioner found that the pace of impacts from authorizations under the GP 23 was out of proportion to the pace of restoration efforts, the Department was to stop issuing authorizations under the GP 23, until the pace of impacts was again proportional to the restoration efforts. The Department cannot separate the goals of Atlantic white cedar restoration from the GP 23 by changing the

mitigation requirements. The Department should not amend N.J.A.C. 7:7A-5.23 as proposed, and should retain the existing mitigation obligations. (66)

RESPONSE: As explained in response to comments 180 to 183, the Department is not adopting the mitigation requirement for general permits as proposed and is proposing elsewhere in this Register a different requirement, similar to that in the Federal ACOE regulations. In addition, in consideration of this comment and in consultation with the Pinelands Commission, the Department reexamined the terms and conditions of the memorandum of agreement (MOA) adopted in June 1999 as it relates to general permit 23. In addition, the Pinelands Commission has confirmed that no mitigation has been undertaken in accordance with the MOA as the result of any authorization under general permit 23. Because the agreement was previously negotiated, the Department and Commission agree that possible changes and updates to the MOA should also be negotiated before any changes are made to the rule. Should a future decision be made to amend the MOA that would have an effect on general permit 23, the Department will propose rule changes at that time. Therefore the Department is not adopting any of the proposed amendments to N.J.A.C. 7:7A-5.23, and is not amending the mitigation provisions of general permit 23 in the concurrent proposal.

275. COMMENT: We appreciate the continuation of general permit 23, but are greatly concerned about the changes in N.J.A.C. 7:7A-5.23(l) through (v), which will impact the cranberry agricultural sector by requiring mitigation in accordance with Subchapter 15. The mitigation process outlined in Subchapter 15 appears to be another lengthy, costly and burdensome process. In addition, the process would place a conservation restriction on the compensation areas. We urge the retention of the existing mitigation process for general permit 23, as the proposed process would create an extreme disincentive to cranberry growers who are considering the expansion of their bogs. This in turn would have a negative effect on the cranberry industry, and negate the expansion of cranberry bogs, which are protective of the natural resources and the wetlands of the Pinelands. (60)

RESPONSE: As explained in response to comment 274, the Department has determined that it is not adopting the proposed changes to the mitigation requirements for general permit 23. Instead, before making any changes to the rule, the Pinelands Commission and the Department have agreed to reexamine the MOA between the two agencies, which currently governs mitigation for general permit 23. Should a future decision be made to amend the MOA that would have an effect on general permit 23, the Department will propose rule changes at that time.

276. COMMENT: At N.J.A.C. 7:7A-5.23(l), add "proposal" after mitigation to read: "Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation proposal shall meet…" (31)

RESPONSE: As explained in prior responses to comments, the Department is not adopting any of the proposed amendments to general permit 23.

N.J.A.C. 7:7A-5.24 General permit 24—Spring developments

277. COMMENT: General permit 24 for spring development allows agricultural uses on top of springs, some of the most environmentally sensitive areas in the headwaters of our watersheds. Development on a spring adds quite a bit of pollution and degrades our streams. (80)

RESPONSE: Spring water from farmed wetlands can be an important source of water for livestock. Safeguards have been built into the general permit to limit wetland impacts. These include not allowing diversion or use of the water for irrigation; limiting impacts to one quarter acre; prohibiting the draining of additional wetlands and removal of wetlands from jurisdiction; limiting activities to established, ongoing farming, ranching or silviculture operations; and requiring such activities to be located in a farmed wetland, since these wetlands are often already somewhat degraded and disturbed. Regarding the concern about pollution and stream degradation, livestock drinking areas which draw water from the spring development must be located outside of wetlands and

State open waters. Authorization under general permit 24 will not be approved unless the activity is necessary to implement a farm management plan developed by NRCS and approved by the local SCD. The Department notes that this general permit is used infrequently. Since 2001, the Department has approved only two authorizations under general permit 24.

N.J.A.C. 7:7A-5.26 General permit 26—Minor channel or stream cleaning for local government agencies

278. COMMENT: General permit 26 for stream cleaning allows towns and other groups to come in and clear cut, removing everything in and around a stream. This not only increases erosion, it causes a loss of forest, which leads to an increase in water temperature. We believe this GP has been misused, adding more siltation and harming our streams. (80)

RESPONSE: General permit 26 only allows a minimum amount of tree and brush clearing to allow equipment access, if necessary. The conditions for general permit 26 to minimize vegetation disturbance are found at N.J.A.C. 7:7A-5.26(b)6 through 8. These conditions include encouraging work from only one stream bank, avoiding heavy equipment usage in the stream channel, and preserving southerly and westerly stream bank vegetation. Additional conditions for the use of general permit 26 are found at N.J.A.C. 7:7A-5.26(b) and (c). These include requiring that activities must be necessary and in the public interest, not allowing the alteration of the natural banks of the stream, limiting removal to accumulated sediment, limiting removal of sediment to a distance of 500 feet, requiring that the stream have a documented history of flooding, precluding the use of the permit in a Pinelands or Category One water and in an area that has threatened and endangered species, and requiring disposal of sediment outside of freshwater wetlands, State open waters and transition areas.

279. COMMENT: We respectfully suggest that general permit 26 be expanded to include State agencies if written permission was obtained from the entity that has jurisdiction over the waterbody. (30)

RESPONSE: N.J.A.C. 7:7A-5.26(a) states that "General permit 26 authorizes a county, municipality or a designated agency thereof to conduct activities …." This language is consistent with the 1998 stream cleaning amendments to the Flood Hazard Area Control Act at N.J.S.A. 58:16A-67 and has not been used to date to permit State agencies to undertake the work as a designated agency. Consequently, the rule has been adopted without change. The Department notes that if a proposed cleaning activity is on property not owned by the designated agency, the agency must have permission of the property owner to perform the work. This permission is documented by the owner's signature on the Division of Land Use Regulation's permit application form. Finally, the commenter should be aware that for certain types of drainage improvement projects, such as unclogging and/or repair of culverts, a general permit 1 for maintenance and repair of existing features may be applicable.

N.J.A.C. 7:7A-5.27

280. COMMENT: I am concerned with the standard in general permit 27 where you can use two acres of wetlands around a GP in a Brownfield in an urban area but you have to use less than an acre in a rural suburban area. I think it undermines environmental protection in urban areas. (80)

RESPONSE: In accordance with N.J.A.C. 7:7A-5.27(c), activities under general permit 27 may disturb no more than one acre of freshwater wetland and/or State open water, which is not a water of the United States, or 0.5 acres of a wetland that is a water of the United States. In addition, the permit allows one acre of impacts to transition areas adjacent to wetlands. With the exception of being able to disturb one acre of transition area in addition to one acre of wetland disturbance, the limits under general permit 27 are the same as those under general permit 6. Redevelopment is desirable and helps protect

freshwater wetlands by focusing development in areas that have already been disturbed, regardless of whether they are in an urban or suburban setting. Consequently, allowing the use of additional transition area is a relatively small incentive to redirect development to appropriate areas.

281. COMMENT: At N.J.A.C. 7:7A-5.27(d), add “proposal” after mitigation to read: “…permanent loss and/or disturbances of freshwater wetlands or State open waters authorized under a GP27. The mitigation proposal shall meet…” (31)

RESPONSE: The Department does not agree that the suggested change is warranted. The actual mitigation project must meet the requirements at N.J.A.C. 7:7A-15.5, mitigation for smaller disturbances—not the mitigation proposal.

282. COMMENT: Proposed N.J.A.C. 7:7A-5.27(d) requires mitigation for all impacts due to redevelopment in place of the current requirement for mitigation when the impacts exceed 0.5 acres. The Department's proposed mitigation requirement is inconsistent with State policy that recognizes the importance of redevelopment to the future of New Jersey. In 1992, the New Jersey Legislature adopted the "Local Redevelopment and Housing Law (N.J.S.A. 40A:12A-1 et seq.). The first of the findings, determinations, and declarations of the Legislature states: “There exist, have existed and persist in various communities of this State conditions of deterioration in housing, commercial and industrial installations, public services and facilities and other physical components and supports of community life, and improper, or lack of proper, development which result from forces which are amenable to correction and amelioration by concerted effort of responsible public bodies, and without this public effort are not likely to be corrected or ameliorated by private effort.” Imposing mitigation requirements in redevelopment areas will add yet another DEP-imposed impediment to redevelopment.

Most of the wetlands in redevelopment areas are so degraded that it would be impossible to conduct mitigation onsite. The proposal recognizes this as it notes that the majority of applicants receiving general permits will not have suitable conditions

available onsite to perform mitigation and will likely have to go to an approved mitigation bank or make a donation.

Pursuant to the standard mitigation hierarchy at N.J.A.C. 7:7A-15.5, smaller disturbances require purchase of mitigation credits from an approved mitigation bank, with recent purchases being in the range of $150,000.00 to $185,000.00 per acre. As a result, the proposed mitigation requirement would impair the economic feasibility of much-needed redevelopment projects.

In contrast to the reporting provided for the other GPs proposed to require mitigation, the proposal does not indicate the impacts to wetlands due to the approval of GP 27. We submit that the impacts are minimal, particularly as GP 27 has been seldom issued. The cumulative number of GP 27 authorizations over the six-years time period is 8 GPs, with total wetlands impacts of 2.02 acres. This clearly demonstrates the Department's lack of commitment to the State's policy in support of redevelopment. The Department should withdraw the proposed mitigation requirement for GP 27. (4, 27, 29)

283. COMMENT: The proposal requires mitigation for all impacts due to redevelopment (as opposed to the current requirement for mitigation when the impacts exceed 0.5 acres). This is in direct conflict with State policies that recognize the importance of and support redevelopment. Since most of the wetlands in redevelopment areas are too degraded for on-site mitigation to be feasible, this represents another obstacle to redevelopment in New Jersey. (55)

RESPONSE TO COMMENTS 282 AND 283: When considering which general permits would require mitigation, the Department evaluated those for which there have been cumulative impacts and those for which there was a comparable Federal permit requiring mitigation. General permit 27 is most similar to nationwide permits 29, for residential development and 39 for commercial and institutional developments. Both nationwide permits limit impacts to 0.5 acres and both are included among the nationwide permits for which mitigation has become a standard condition. Consequently, the Department believes it is necessary to add a mitigation requirement to general permit 27 to remain consistent with the Federal program, although to date, the permit has been rarely used.

However, or the reasons described in response to comments 180 through 183, the Department has determined not to adopt the mitigation requirement for certain general permits as proposed and is proposing a different requirement, similar to that contained in the Federal ACOE regulations, elsewhere in this Register.

The mitigation requirement for general permit 27 is not inconsistent with State policy that recognizes the importance of redevelopment to the future of New Jersey. N.J.A.C. 7:7A-5.27(e), which states that disturbance under general permit 27 shall not count towards the one acre of disturbance allowed under multiple general permits at N.J.A.C. 7:7A-4.4, is intended to facilitate redevelopment projects.

The commenter also states that the proposed mitigation requirement would impair the economic feasibility of much-needed redevelopment projects. However, the potential effect of mitigation on redevelopment projects will vary greatly according to project location, real estate market conditions, type and size of project, and impacts to wetlands. If the commenter is concerned about the potential need to make a contribution to satisfy the mitigation requirement, it may be cost-effective for purposes of redevelopment for applicants to explore mitigation banking. Applicants can work together to establish a bank which can then be used to satisfy mitigation requirements as needed. The Department will work with all applicants who are interested in pursing this course of action.

Subchapter 6 Transition Area Waivers

N.J.A.C. 7:7A-6.1 General transition area waiver provisions

284. COMMENT: We are concerned about the rule on eliminating buffers when there is small wetlands because it is easier to get a fill permit than it is, sometimes, to get a permit for the buffer, and that, in practice, many small, quarter acre or less, wetlands will just become part of the road. The developers will actually plan their road to wipe the wetlands out, so they can eliminate their buffers as well. Whether it is intentional or not, the consequence of getting rid of the buffers is the elimination of small wetlands around the State. (80)

RESPONSE: Since the purpose of the transition area is to provide protection for freshwater wetlands, the rules afford the greatest level of protection to freshwater wetlands, and a lesser level of protection to adjacent transition areas. If the Department determines that an activity or project meets the requirements for a permit which results in the elimination of a wetland, then the purpose for the transition area is likewise eliminated. The provision at N.J.A.C. 7:7A-6.1(a)6ii explains this. It is also important to note that N.J.A.C. 7:7A-4.3(b)1 does offer protection to small wetlands by stating that the Department shall not authorize activities under a general permit for the purpose of eliminating a natural resource in order to avoid regulation.

285. COMMENT: N.J.A.C. 7:7A-6.1(b) provides that the DEP shall impose certain conditions in a transition area waiver "to ensure that an activity does not result in a *substantial* impact on the adjacent wetlands." (Emphasis added.) This provision violates the intent of transition area protection. (20, 85)

RESPONSE: This provision is the basis for all transition area waivers, and comes from the FWPA. The FWPA states that the Department shall grant a transition area waiver reducing the size of a transition area to not less than the minimum distance established in the FWPA provided that the proposed activity would have *no substantial impact* on the adjacent freshwater wetland (emphasis added, see N.J.S.A. 13:9B-18a).

286. COMMENT: The proposed addition at N.J.A.C. 7:7A-6.1(b)3, requiring fencing of transition areas should not be adopted. While undoubtedly there are times when appropriate fencing should be employed to protect sensitive adjacent resources during the construction of a project, it is unnecessary and unreasonable to unilaterally impose this condition on all transition area waivers. Permit reviewers, in carrying out their duties, have the ability and authority to determine when such precautions are necessary on a specific project, and to impose such requirements on those projects. There is no reason why such fencing must always be installed. Therefore, it is inappropriate to make this a general condition to be imposed on all transition area waivers. Even if it is determined by

the permit reviewer that on specific projects fencing must be installed to protect sensitive adjacent resources during project construction, it is unnecessary and counterproductive to require that fencing thereafter to be permanently maintained. The need to periodically access an area to inspect and maintain a permanent fence may result in greater disturbance to the area intended to be protected, than if no fence were ever installed. (48)

287. COMMENT: We object to the application of permanent fencing on active and right-of-way utility sites. We agree that fencing the transition area prior to construction helps protect it from construction disturbances. However, construction areas typically are demarcated through soil erosion fencing required by the Regional Soil Conservation Districts. Requiring additional fencing around transition zones is duplicative.

Additionally we object to the placement of permanent fencing on sites with utility uses, especially high voltage transmission right-of-ways. The requirement to place fencing along the perimeter of the transition area places an undue hardship on utilities as it obstructs necessary access through right-of-ways and other active sites to complete maintenance, perform safety evaluations, and complete emergency repairs. Accessing utility facilities quickly and efficiently, especially on high voltage transmission corridors is vital for the utility to maintain safe and reliable utility services. Without the ability to access and immediately repair utility facilities, customers in New Jersey would be subject to extended service interruptions and safety of utility workers' and the public-at-large would be negatively compromised. Furthermore, in some locations, the installation of fencing on high voltage transmission corridors could violate the High Voltage Proximity Act, N.J.S.A. 34:6-47.1 et seq.

Finally, our stationary sites such as generating stations, switchyards, substations, metering and regulating stations, often have existing paved and/or graveled areas within the fenced perimeters that also fall within transition zones. These areas also require continuous access as many of them are active and also require security access. Prohibiting access to these utility areas places undue restrictions on necessary utility activities, restricting use of sites, which have been active in some cases for more than a century. Further, we are concerned that such restrictions may run contrary to Federal security law, particularly in light of new security provisions as a result of terrorism. We

suggest the following sentence be added to the end of this subsection: "Uses which require continuous access to transition and/or wetland areas for the health, safety and welfare of the community, or uses where fencing is prohibited under Federal or State law, are exempt from placing permanent fencing." (4, 24)

288. COMMENT: Proposed N.J.A.C. 7:7A-6.1(b)3 requires construction of a fence around the transition area and/or wetland affected under a transition area waiver. The fence is to be "permanently maintained, so as to clearly delineate its boundary and to prevent people from entering" the transition area and/or wetland. This proposal should not be adopted for several reasons.

First, the proposed amendment directly conflicts with the Department's rules governing Letters of Interpretation (LOI), which expire after five years due to the expectation that wetland and transition area boundaries will shift. See N.J.A.C. 7:7A-3.6(a) and (b). In contrast, the fence placement requirement of proposed N.J.A.C. 7:7A-6.1(b)3 appears to assume a static fence around a shifting surface area, which is not possible. Second, a permanent fence designed "to prevent people from entering" will also exclude fauna, which is not sound environmental management. In addition, fencing along transmission corridors would bifurcate transition areas and wetlands; each would be cut off from the other, which is likely to have an adverse environmental impact and could obstruct time sensitive maintenance and repair of transmission facilities. Finally, the Department retains authority to require fencing on a case-by-case basis (such as to protect ecologically sensitive areas during construction) and the across-the-board fencing requirement in proposed N.J.A.C. 7:7A-6.1(b)3 is unnecessary. (43)

289. COMMENT: Is it the intent to apply the requirement at N.J.A.C. 7:7A-6.1(b)3 (fencing) only during construction? If so, the rationale seems to be misleading when it states that it is also to demarcate the sensitive area for future owners of the property. If not, and if the fence is meant to be permanent, this requirement does not appear to be practical for public roadway linear development projects. The requirement could result in the need to place fencing beyond NJDOT Rights-of-Way or very close to a roadway, which could result in a safety hazard. (30)

RESPONSE TO 286 THROUGH 289: The provisions at N.J.A.C. 7:7A-6.1(b) are conditions that *may* be added to an approved transition area waiver. N.J.A.C. 7:7A-6.1(b) states, "the Department shall include in a transition area waiver additional conditions *as necessary* to ensure that an activity does not result in a substantial impact on the adjacent wetlands, and does not impair the purposes and functions of transition areas as set forth in N.J.A.C. 7:7A-2.5" (emphasis added). Consequently, the fence provision at N.J.A.C. 7:7A-6.1(b)3 is not a requirement for all approved transition area waivers, and the project reviewer can determine when this may be required. It is entirely possible that many of the situations described by the commenters would require fencing only during construction activities, but not on a permanent basis. Ultimately, the Department's decision would be based on what is necessary to protect the wetland resource, in consideration of the wildlife that may be present, and based on sound, practical environmental management.

The placement of a fence is not contrary to the five year expiration of LOIs. An LOI expires after five years, so that if the applicant wants to renew the LOI, the Department will have the ability to re-evaluate both the wetland line and the resource classification of the wetland. If a permit or waiver is approved and an activity conducted, there is no ongoing requirement for the former applicant to continue to revise the wetland line or to update an LOI. Consequently, placement of a fence at the conclusion of the permitting/waiver process does not interfere with LOI requirements.

290. COMMENT: Public utilities should be exempt from the requirement to record a conservation easement as required at N.J.A.C. 7:7A-6.1(b)4. This proposed requirement. should be reworded as follows: "4. The permittee shall execute and record a conservation restriction or easement, in accordance with the procedures at N.J.A.C. 7:7A-2.12, which prohibits any regulated activities in the transition area and wetlands as appropriate, except that such conservation easement or restriction is not required of any transition area waiver granted for the construction or maintenance of any utility infrastructure." Additionally with respect to non-utility projects, this proposal should be modified to limit its applicability only to those modified transition areas for which the Department demonstrates a need to impose a conservation restriction or easement to protect the

adjacent wetlands, and any imposed conservation restriction or easement should be limited to only that portion of the transition area necessary to protect the adjacent wetlands that are at risk.

The Department must recognize the unique need of public utilities to be able to construct, use, maintain and upgrade their infrastructure within their rights-of-way, including those sections of the rights-of-way that are wetlands or transition areas that were previously disturbed for the initial installation of the utility infrastructure. Electric utilities often construct new transmission lines along existing rights-of-way. This is not only less impacting to the environment but also less costly for the utility and its ratepayers. To unilaterally require every transition area that is modified through a transition area waiver to thereafter be permanently protected from any future development will preclude utilities from being able to provide additional infrastructure necessary to reliably serve their customers through using their existing developed rights-of-way. This proposed rule will in fact have the unintended effect of forcing utilities to disturb new routes for any additional infrastructure. The Department should be encouraging and supporting utilities to use their existing rights-of-way to the maximum extent possible for the construction of additional infrastructure to meet the needs of the citizens of New Jersey and not proposing regulations that would not simply impede but would absolutely prohibit the utilities from additional use of their existing rights-of-way. In any event, there is no rationale or justification why every transition area modification needs to result automatically in the transition area, either in part and certainly not in whole, being placed under a conservation easement or restriction simply because an activity was undertaken on the site that required a modification to some part of the transition area. Again, the unintended effect of this proposal will be to force a project sponsor to develop a virgin site because another less impacting site is unavailable because it was once previously disturbed and now has a conservation restriction or easement imposed on it. (4, 24, 48)

RESPONSE: The purpose of providing standard conservation restriction/easement language at N.J.A.C. 7:7A-2.12, standardized requirements for the imposition of a conservation restriction/easement at N.J.A.C. 7:7A-6.1(e), and standardized forms for the

language of a conservation restriction or easement is to make this process as consistent and predictable as possible. However, the Department recognizes that not all cases are the same and that conservation restrictions may need tailoring to meet specific circumstances. The case of public utilities in a right-of-way is one example where the Department will have to evaluate the conditions within the conservation restriction or easement. If a utility is using another entity's easement, the Department may not be able to impose a conservation restriction or easement. If it is determined that such a restriction is appropriate, the conservation restriction or easement certainly must be written to allow maintenance activities to occur. Therefore, although the Department will not change the rules as suggested, the commenter's concerns can be adequately addressed by the rules as written.

291. COMMENT: The proposed rule states that a conservation restriction or easement will be required for a transition area waiver other than for redevelopment or access, restricting future activities in the entire transition area and adjacent wetlands on the site. There may be instances where future roadway improvements within the modified transition area or adjacent wetlands may be warranted. For public roadway projects, we contend that the existing and/or proposed right-of-way limits should be the limits of the "site." In addition, we respectfully suggest that the proposed requirement at N.J.A.C. 7:7A-6.1(e) be reconsidered and not apply to public roadway projects. Our right-of-way is not available for use by private individuals. Also, if we propose a future improvement in a regulated area, it will be necessary to obtain a wetland permit or transition area waiver anyway; therefore, the need for a conservation restriction/easement seems to be redundant. (30)

RESPONSE: The intent of N.J.A.C. 7:7A-6.1(e) was to extend the use of conservation restrictions or easements from transition areas remaining after the performance of activities in accordance with a transition area averaging plan to all transition area waivers except redevelopment and access waivers, not to change the applicability or use of such restrictions or easements in relation to public roadway projects. The Department agrees that for public roadway projects, conservation restrictions or easements in many instances

are not practical, may inhibit future roadway improvement projects, and may need to include areas outside the control of the public agency. In the Department's experience, public projects most commonly use wetland permits and rarely need transition area waivers only and the Department's rules do not in all cases require conservation restrictions or easements after a wetland permit is obtained. However, in the case where a public road project obtains a transition area waiver that would require a conservation restriction, the Department will work with the applicant to determine how to apply the conservation restriction or easement to avoid conflicts with the possible future plans for the public project.

292. COMMENT: N.J.A.C. 7:7A-6.1(e)1ii and 2ii allow for reconfiguring the project to intrude into a conservation easement. We strongly object to this provision as noted in above comments on N.J.A.C. 7:7A-2.12(i) and (j). (20, 85)

RESPONSE: The Department assumes the commenter is referring to N.J.A.C. 7:7A-6.1(e)1ii and 2i, since there is no (e)2ii. Over the past several years, the Department has been trying to balance the need to protect wetland transition areas by way of recording conservation restrictions with the timing of the approved permit, and variations in the development process. For example, some owners design a development project, obtain all permits including transition area waivers and then sell the property with its approvals to a development company. Others sell the land without approvals to the development company which then proceeds to design a project and obtain approvals.

In the first case, it is important to have a properly recorded conservation restriction at the time of sale to put potential purchasers of the property on notice that there are limits to the development potential of the property. However, the development company purchasing a property may subsequently decide that it wants to redesign the project. If the owner properly filed the conservation restriction, the developer may be very limited in how much redesign can be done. However, if the developer can stay predominantly within the limits established by the approvals, the Department does not object to working with the developer to make changes meeting the definition of de minimis, since no impacts have yet occurred. Without this flexibility, the original owner

of the property may be tempted to delay recording the restriction and a prospective buyer would be unaware of the restriction and limitations. This may lead to a violation and less protection for the wetlands transition area.

The provisions at N.J.A.C. 7:7A-6.1(e) are intended to address circumstances that may occur when different owners are involved with one piece of property during different points in the construction of the project. The Department affords more flexibility in those cases where no activities have occurred, before the transition area waiver expires but the restriction was recorded, versus cases where construction has already begun. The provisions are intended to provide the greatest level of protection to a wetland transition area, while recognizing that changes in property ownership may necessitate minor changes to the overall project design.

293. COMMENT: Proposed language at N.J.A.C. 7:7A-6.1(e)1, 2 and 3 does not address the ability of the applicant to apply for an extension of a transition area waiver. A greater problem is that a subdivision may have been approved and the compensation area for a given lot, be provided on another lot, then the ability to obtain a new transition area averaging waiver would be lost. This section should therefore instead read that if a conservation easement or restriction has been properly recorded, the transition area waiver remains in effect in perpetuity. This also avoids the problem of homeowners assuming they have use of a portion of their lot in the reduction area, then later constructing a pool or other amenity. Provision of the ability to modify the transition area waiver is a good one, but applying for a new transition area waiver after the conservation easement or restriction has been placed is very problematic. (31)

RESPONSE: The transition area waiver is valid for a period of five years, regardless of whether or not a conservation restriction or easement has been recorded. If construction occurs in the five-year period, there is no need for a new waiver since these are construction permits and not operating permits that remain in place once construction has been completed. However, if construction does not occur, and the waiver expires, a new waiver is required because transition areas are protected under the FWPA and a waiver is the mechanism established by the FWPA to enable the Department to review current

conditions and to ensure that impacts to the transition area will not result in substantial impacts to the adjacent wetlands. Conceivably, an applicant could defer construction on a site for decades. Consequently, if a project has not been completed and the approval expires, a new approval is required. The Department acknowledges that this may be problematic if construction on one lot was averaged on another, which is the reason that N.J.A.C. 7:7A-6.1(e)2i requires that subsequent applications for transition area waivers be based upon the plan originally submitted to the Department for the expiring transition area waiver.

294. COMMENT: Proposed N.J.A.C. 7:7A-6.1(e)3 and 4 require a new transition area waiver where construction activities have not begun during the initial five year permit period and the transition area waiver expired. Five years is not a sufficient period of time. The FWPA does not set time limitations on the approval of DEP permits and also does not set expiration periods for approvals. For example, letters of interpretation do not contain any statutory time restrictions for continuing validity. As a result of the enormous volume of regulations requiring compliance, many projects today require more than five years to obtain all of the necessary approvals and to complete. It is not uncommon for some permits to expire while others are still in process. This is why corporate entities engage in long-range facilities planning--so they can build when the business demand requires. Again, the rule proposal undermines that objective. A ten year vesting period would be more appropriate since it allows projects adequate time for completion after obtaining a transition area waiver. NJDEP should commit to a set time clock in reviewing the waiver applications to facilitate any amendments. (4, 27, 29, 74)

RESPONSE: The Department assumes the commenter is referring to N.J.A.C. 7:7A-6.1(e)1 and 2 since (e)3 does not seem applicable to the comment and there is no (e)4. The duration of Department approvals is partially based upon the requirement that the freshwater wetland rules must be reevaluated and readopted every five years and the requirement in the FWPA at N.J.S.A. 13:9B-23c that general permits be reviewed every five years and if not reissued expire. Generally, however, natural systems are dynamic, changing over time. Endangered and threatened species may be discovered, water quality

classifications may change, and an area of wetlands may expand or shrink. Therefore, the Department believes that it is important to reexamine areas to determine if such changes have occurred and has tried to balance that need with providing an applicant with sufficient time to undertake construction of a project. The Department believes that five years provides that balance. The Department does provide for one five-year extension of its permits and approvals at N.J.A.C. 7:7A-14.6. However, the extensions contain the caveat that the rules governing the site may not have undergone "significant change" between the date the permit was issued and the date the application for extension is submitted, thus ensuring compliance with the most current rule requirements.

It is not clear to the Department what the commenters mean by stating that the Department should "commit to a set time clock in reviewing the waiver applications to facilitate any amendments." The Department reviews all applications using the regulations in place at the time the application is declared complete for review, regardless of whether it is a new application, or a request for a five-year extension and the five year duration of the approval does not commence until the waiver is approved.

295. COMMENT: DEP will not allow a buffer averaging plan to include part of a road crossing because combining a buffer averaging plan with the road crossing general permit could potentially increase disturbance beyond the 0.25 acre threshold. This is probably already being done in the majority of cases, and in a case where a plan was submitted that confused the crossing with part of the averaging plan, I am sure the DEP reviewer would bring that to the applicant's attention for correction prior to permit issuance. (32)

RESPONSE: As stated in the summary, the Department clarified N.J.A.C. 7:7A-6.1(h) to better state the intent which is to not allow a second transition area waiver to be used in combination with a general permit to increase the impacts associated with one activity, such as one minor road crossing. This is not a new requirement nor a new concept since this requirement in one form or another has been in the rules since at least 1992.

296. COMMENT: The proposal should include definitions for the terms "annual post-planting monitoring program," "corrective measures," and "de minimis modification." (86)

RESPONSE: The requirements for an "annual post-planting monitoring program" to ensure the reestablishment of vegetation in temporarily disturbed areas are contained in the rules at N.J.A.C. 7:7A-6.1(b)5. N.J.A.C. 7:7A-6.1(b)5 states that an applicant will be required to monitor the site through two complete growing seasons to ensure that the disturbed area has been successfully revegetated to the extent that the plantings have a minimum 85 percent survival and coverage rate. "Corrective measures," as used in N.J.A.C. 7:7A-6.1(b)5, are additional actions that will need to be taken by the applicant if the minimum 85 percent survival and coverage rate is not realized at the end of two years. Specific corrective measures will vary with the site and circumstances. In general, however, because the section addresses revegetating an area containing acid producing soils, a corrective measure necessary to ensure successful revegetation might involve ensuring that the acid producing soils are sufficiently buried and that vegetation has been reestablished on the site. Finally, regarding a definition for de minimis modification, as used at N.J.A.C. 7:7A-6.1(e)2, the term refers to the changes to a conservation restriction that are described in detail at N.J.A.C. 7:7A-2.12(i), so it is not necessary to repeat the criteria in this section.

297. COMMENT: N.J.A.C. 7:7A-6.1(i) does not allow for a transition area waiver for linear development to be approved for encroachment within 75 feet of an exceptional resource value wetland. We believe that an exception to this should be made for public linear development projects that have compelling public need and no practicable alternative. For example, a safety improvement may be needed for an existing roadway that is already within 75 feet of an exceptional value wetland. (30)

RESPONSE: Because N.J.A.C. 7:7A-6.1 applies generally to all transition areas, N.J.A.C. 7:7A-6.1(i) was added for clarity to indicate that in the case of a transition area adjacent to an exceptional resource value wetland, regardless of the other provisions in

the section, the transition area cannot be reduced below 75 feet. The same provision already existed at N.J.A.C. 7:7A-6.2(d)3i, and is a requirement of the FWPA at N.J.S.A. 13:9B-18c, which states that the transition area distance from a freshwater wetland of exceptional resource value may be reduced to no less than 75 feet. The only exception to this requirement is when a wetland is eliminated in its entirety, in which case the transition area is likewise eliminated, as provided at N.J.A.C. 7:7A-6.1(a)6ii, and when a transition area waiver is approved in accordance with individual permit wetland criteria as provided at N.J.A.C. 7:7A-6.3(g). When reviewing a request for a transition area waiver in accordance with individual permit criteria, the Department will consider the compelling public need for the project, and whether there are practicable alternatives as part of that review.

N.J.A.C. 7:7A-6.2 Transition area averaging plan waiver

298. COMMENT: N.J.A.C. 7:7A-6.2(b)4 clarifies the existing rule to note that an averaging plan won't be approved if a structure intervenes with the proposed averaging compensation area and the wetland. The commenters support this clarification and appreciate the plain language. (20, 85)

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

299. COMMENT: The proposal should include a definition for the term "intervening structure." (86)

RESPONSE: The Department does not agree that a definition for "intervening structure" is needed. The Department is using the common meaning of "intervening" (to lie between) and as such no regulatory definition is needed. The word "structure" is used numerous times in the rules to refer to something built or constructed. As explained in the proposal summary, if something (a "structure") is built or constructed between a wetland and transition area, the transition area cannot function to protect the wetland from impacts.

300. COMMENT: At proposed N.J.A.C. 7:7A-6.2(c)2iii the inclusion of the condition regarding an average transition area width that is less than 25 feet is very confusing, and should be removed. The averaging waiver already requires that the area of transition area before averaging, is equal to the area after averaging, which is measurable and should be sufficient wetland protection. (31)

301. COMMENT: N.J.A.C. 7:7A-6.2(c)2iii provides that when reducing a transition area to 10 feet for a continuous distance of 100 linear feet or more, the resulting average transition area width cannot be less than 25 feet. We support this provision. (20, 85)

302. COMMENT: N.J.A.C. 7:7A-6.2(c)2iii provides that when reducing a transition area to 10 feet for a continuous distance of 100 linear feet or more, the resulting average transition area width cannot be less than 25 feet. This is too narrow. Consistent with the minimum 50-foot riparian buffer area included in the recently adopted Flood Hazard rules, an appropriate buffer for water quality should not be less than 50 feet. (85)

303. COMMENT: There is some confusing language proposed in connection with buffer averaging plans referring to reducing the buffer down to 10 feet for 100 continuous linear feet that would result in a buffer less than 25 feet. The language needs to be clarified and more specific. (32)

RESPONSE TO COMMENTS 300 THROUGH 303: The Department agrees that including the 25 foot average width provision in N.J.A.C. 7:7A-6.2(c)2iii, which addresses the reduction of the transition area to 10 feet for more than 100 feet, is not clear. As explained in the proposal summary, the intent is to add the requirement that an averaging plan that results in an average transition area of less than 25 feet does not provide the values and functions of an intermediate value transition area, and therefore the Department will not permit such an averaging plan. Accordingly, on adoption, the rules is modified to relocate this provision at new N.J.A.C. 7:7A-6.2(c)2vi.

Ensuring that there is equal area in the transition area before and after averaging is important, but so is the proximity of regulated activities to the wetland. Therefore, the minimum and average widths of transition areas are also important to wetlands protection.

Finally, although the Flood Hazard Area Control Act rules (N.J.A.C. 7:13) require a minimum riparian zone width of 50 feet, the Department does not agree that it should require the same width as part of a transition area waiver averaging plan. The riparian zone is established adjacent to a waterway. Transition areas are established adjacent to wetlands. The FWPA establishes the widths of transition areas adjacent to freshwater wetlands, depending upon the resource classification of the wetland. Intermediate resource value wetlands are provided with a transition area of no greater than 50 feet nor less than 25 feet (see N.J.S.A. 13:9B-16b(2)).

304. COMMENT: N.J.A.C. 7:7A-6.2(c)2iii does not allow for a transition area averaging plan that would reduce a transition area to 10 feet wide for a continuous distance of 100 linear feet or more along the freshwater wetlands boundary, resulting in an average transition area width that is less than 25 feet. We believe that an exception should be made for public linear development projects that have compelling public need and no practicable alternative. For example, a safety improvement may be needed for an existing roadway that is already within 25 feet of an exceptional value wetland. (30)

RESPONSE: The Department disagrees that an exception should be made to the requirement that an average transition area width be at least 25 feet for public linear development projects even if there is compelling public need and no practicable alternative. In the Department's experience, many public roadway projects meet the requirements and limitations of general permit and/or transition area waiver authorizations. In addition, the rules at N.J.A.C. 7:7A-6.3(e) provide special activity waivers for linear development projects that have no feasible alternative location. Such waivers do not require compensation areas, as would an averaging plan. Finally, if an applicant cannot get approval for most transition area waivers, a last option would be to apply for a waiver in accordance with individual permit criteria, and the requirements at

N.J.A.C. 7:7A-6.3(g). A waiver in accordance with individual permit criteria will consider compelling public need and alternatives.

N.J.A.C. 7:7A-6.3 Special activity transition area waiver

305. COMMENT: At proposed N.J.A.C. 7:7A-6.3(f)1, the Department is proposing that a deck, if less than five feet from the ground, is eligible for redevelopment since a deck that close to the ground prevents the proper function of the transition area. We support this change. (31)

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

N.J.A.C. 7:7A-6.3 Special activity transition area waiver

306. COMMENT: Should the reference to the conservation restriction or easement requirements reference N.J.A.C. 7:7A-2.12 rather than 12.2? In addition, there appear to be discrepancies in regard to exceptions for conservation restrictions or easements relating to transition area waivers. N.J.A.C. 7:7A-6.1(e) allows for an exception to the requirement for a conservation restriction or easement for transition area waivers for redevelopment or access. N.J.A.C. 7:7A-2.12 does not appear to allow these exceptions. N.J.A.C. 7:7A-6.3(f)4 states that, where practicable, a conservation restriction or easement would be required for a transition area for redevelopment. (30)

RESPONSE: The Department agrees that the language at N.J.A.C. 7:7A-6.3(f)4 should refer to N.J.A.C. 7:7A-2.12 and not 12.2; the correction has been made upon adoption.

The commenter is also correct that the rules are not internally consistent regarding exceptions to the requirements for transition area waivers that require the granting of a conservation restriction or easement. N.J.A.C. 7:7A-6.1(e) excepts redevelopment and access transition area waivers from the requirement to provide a conservation restriction or easement. N.J.A.C. 7:7A-4.2(c) and 7:7A-6.1(a)6 provide details on access transition area waivers. Special activity transition area waivers for redevelopment require a

conservation restriction or easement only when "practicable," in accordance with N.J.A.C. 7:7A-6.3(f)4. To clarify these discrepancies, language has been added on adoption at N.J.A.C. 7:7A-2.12(a) to indicate that a conservation restriction or easement is not required for access transition area waivers and only for redevelopment waivers when practicable. In addition, a cross-reference to N.J.A.C. 7:7A-6.3(f)4 is added at N.J.A.C. 7:7A-2.12(a) and 7:7A-6.1(e) to clarify that a conservation restriction or easement is required for a special activity transition area waiver for redevelopment only when it is "practicable."

307. COMMENT: Proposed N.J.A.C. 7:7A-6.3(g) would require applicants who are issued a transition area waiver based on an individual permit to perform mitigation. The summary document states that applicants were unclear about this requirement since the individual permitting criteria did not address transition area waivers. This statement offers no rationale for a costly new exaction. Mitigation would place an unduly burdensome obligation on applicants who would be limited in how this requirement is to be met. (4, 27, 29)

RESPONSE: As stated in the summary regarding N.J.A.C. 7:7A-15.26, that section applies only for transition area impacts resulting from a special activity waiver based upon individual permit criteria at N.J.A.C. 7:7A-6.3(g). Transition area waivers based upon individual permit criteria are applicable only when none of the other transition area waiver options apply. Consequently, this provision is used infrequently. However, when it is used, because the approval is based upon the same criteria as an individual wetland permit, it is appropriate and consistent to require mitigation for this type of waiver. While it can be inferred that mitigation is required for this special activity waiver, since mitigation is a condition of all individual permit approvals, there were no specific criteria in the prior rules for transition area mitigation. N.J.A.C. 7:7A-15.26 provides those criteria. The definition of "transition area" in the FWPA at N.J.S.A. 13:9B-16a(1) is, "an ecological transition zone from uplands to freshwater wetlands which is an integral portion of the freshwater wetlands ecosystem." It is therefore consistent with the FWPA

to require mitigation for transition areas in these cases since they are a part of and integral to the protection of freshwater wetlands.

308. COMMENT: At proposed N.J.A.C. 7:7A-6.3(g), the Department proposes to add that approved transition area waiver applications, which are based upon individual permit criteria, shall require mitigation. This mitigation requirement is onerous as it essentially requires a 2:1 creation of wetlands as compensation for transition area impacts. This should be clarified and reduced. Either compensation through the preservation of transition area compensation area is provided (this may be applicable for example where an activity that entails impervious surface is proposed closer than 20 feet to a wetland but there is adequate compensation area elsewhere on the site), or mitigation through wetlands mitigation is provided at one half the ratio required for wetland mitigation (1:1 mitigation). (31)

RESPONSE: N.J.A.C. 7:7A-6.3(g) requires mitigation in accordance with new N.J.A.C. 7:7A-15.26. With the exception of purchasing credits from a bank, which credits are for wetlands, N.J.A.C. 7:7A-15.26 requires providing transition areas, and not wetlands, as mitigation for transition areas affected in accordance with N.J.A.C. 7:7A-6.3(g). . There is no creation option at N.J.A.C. 7:7A-15.26 and no requirement to create wetlands to replace transition areas. The provision allows restoration, enhancement, or upland preservation only, specifically because such mitigation can be used in transition areas to mitigate for transition area impacts.

The Department will require 2:1 mitigation for all transition area impacts under N.J.A.C. 7:7A-6.3(g) unless the applicant can demonstrate that less mitigation is sufficient to provide protection to the adjacent wetland. An applicant can demonstrate that less mitigation is sufficient if the applicant can provide a justification through valid site-specific data, scientific literature and/or productivity models that a smaller mitigation area will result in a mitigation area sufficient to compensate for the loss of functions and values associated with the regulated activity. Mitigation cannot be performed at less than a 1:1 ratio.

N.J.A.C. 7:7A-6.4 Matrix type width reduction transition area waiver

309. COMMENT: N.J.A.C. 7:7A-6.4(g) clarifies the procedure for measuring degree of slope. The commenters support this provision. (20, 85)

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

310. COMMENT: The Department is proposing to amend N.J.A.C. 7:7A-6.4(g) to delete the process of averaging slopes across the area and instead, require the identification of the presence of all steep slopes in the transition area. Averaging slopes tend to "mask" actual steepness of slopes within the transition area, which does not provide an accurate representation of potential impacts to wetlands. This should also apply to the transition area averaging waiver requirement regarding measurement of the area of reduction to verify compliance with the restriction from reducing slopes 25 percent or more. (31)

RESPONSE: The rules at N.J.A.C. 7:7A-6.2(b)1, which address the modification of a transition area under an averaging plan, cross-references N.J.A.C. 7:7A-6.4(g) for calculation of the slope. Therefore, the prohibition against averaging slopes also applies to slopes calculated for compliance with averaging criteria.

N.J.A.C. 7:7A-6.5 Hardship transition area waiver

311. COMMENT: We oppose the provisions that include the use of the words "minimum beneficial economically viable use." The standard should be "reasonable use" and should be consistent with the definition of Fair Market Value without additional provisos. A Florida Supreme Court "Estuaries" case stated, "An owner of land has no absolute and unlimited right to change the essential natural character of his land for a purpose for which it is unsuited in its natural state and which injures the rights of others." (20, 85)

RESPONSE: The transition area hardship provisions were incorporated in the rules many years before the rules included a provision for taking without just compensation.

However, much of the analysis and evaluation for a hardship waiver follows the basic steps undertaken to assess a claim of taking without just compensation. Since the Department has a standardized procedure by which to assess such claims in Subchapter 17, the Department is incorporating the same language into the hardship provisions and cross referencing that subchapter. The existing standard for assessing the economic component of a takings complaint is determining whether there is a minimum beneficial economically viable use of the property. The term "minimum beneficial economically viable use" was selected by the Department to make it clear that a use that prevents a hardship or avoids a taking without just compensation is a use that both minimizes environmental impacts and is economically viable. The terms "fair market value" and "reasonable use" do not explicitly express these concepts and therefore were not selected. There are several other factors as well, including the property owner's investment in the property and the environmental impacts of any minimum beneficial economically viable use.

312. COMMENT: Regarding transition areas, we strongly oppose putting conditions on development in transition areas. If a development in a transition area needs to have conditions on it so that it does not impact the wetland, the waiver should not be granted in the first place. (80)

RESPONSE: With the exception of the condition to place a conservation easement or restriction on a modified transition area, the Department requires compliance with all transition area requirements in advance of approving a transition area waiver. Conditions are only used only to address unique, site-specific circumstances. For example, work in a transition area may be permitted because it will not directly affect the adjacent wetland. However, the nature of the work in the transition area may necessitate a timing restriction on when the work may be conducted, in order to protect animal species in the adjacent wetland that are particularly sensitive to noise and commotion during their breeding or nesting season. As another example, underground utility installation in a transition area may not have permanent impacts to the adjacent wetland, but the maintenance of the right-of-way may need to be limited to times that birds are not nesting. Consequently, the

Department retains the ability to add conditions to transition area waivers is necessary and the need to place such conditions is not an indication the waiver should not be approved at all.

Subchapter 7 Individual Freshwater Wetlands and Open Water Fill Permits

N.J.A.C. 7:7A-7.2 Standard requirements for all individual permits

313. COMMENT: N.J.A.C. 7:7A-7.2(b)15 requires that a permit may be issued if an activity is part of a project that in its entirety complies with the stormwater management rules at N.J.A.C. 7:8. The commenters support this provision. (20, 85)

RESPONSE: The Department acknowledges this comment in support of the rules. As explained in response to comment 89, the rules as modified on adoption provide that when a proposed project or activity requires Department approval under the FWPA rules, and the proposed regulated activity meets the definition of "major development" at N.J.A.C. 7:8-1.2, the project in its entirety will be reviewed in accordance with Department Stormwater Management rules at N.J.A.C. 7:8.

Subchapter 10 Application Contents and Procedures

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

314. COMMENT: For survey requirements it is confusing to reference N.J.A.C. 7:36 regarding Green Acres survey requirements here, as the language is very specific to public acquisition of land and may result in unnecessary costs to the applicant. (31)

RESPONSE: The Department did not simply reference N.J.A.C. 7:36. Rather, in order to avoid referencing information that might not apply to the requirements of the freshwater wetland rules, the Department specified that the surveyor should use the information in Appendix 2, scope of work; property surveys at 3.4.2; corner markers at 3.5.2.10.1; deed

description at 3.5.4.; metes and bound description and reduced survey plan at 3.6.6., and digital files at 3.6.7. These are standard protocols that should apply to all surveys regardless of the purpose.

315. COMMENT: Checklists, maps, plans, surveys, reports, certifications, and documentation should be submitted in an electronic or digital format. (86)

RESPONSE: The Department is working toward making it possible for applicants to submit applications electronically (e-permitting). Currently, this is an option in some programs but not in the Division of Land Use Regulation. When e-permitting becomes an option, the Department will revise its rules to facilitate submittal of application materials in electronic formats.

N.J.A.C. 7:7A-10.2 Basic content requirements for all applications

316. COMMENT: The proposed addition at N.J.A.C. 7:7A-10.2(b)8, demonstrating compliance with the stormwater rules, should not be adopted. It is inappropriate for the Department to attempt to use the wetland rules to address issues regulated under the stormwater management rules. Inclusion of conditions in the wetlands rules that pertain to the stormwater management rules only serves to clutter up and camouflage the wetlands rules. (48)

RESPONSE: The Department's Stormwater Management rules, N.J.A.C. 7:8, apply to all projects meeting the definition of "major development" regardless of the additional approvals required under other Department rules. The regulation of stormwater occurs mainly through other review programs like those in the Department and at the municipal level. Consequently, it is necessary to ensure that applicatants seeking wetland approvals for activities that are also major developments comply with the Stormwater Management rules.

317. COMMENT: The proposed addition at N.J.A.C. 7:7A-10.2(e) which provides that failure to provide all information of which the applicant, its consultants, engineers, surveyors, or agents are or should be aware may result in denial or termination of the permit and might subject them to a penalty should not be adopted or at a minimum modified to limit its applicability only to relevant information pertaining to the project for which the application is being submitted. Every applicant has information completely irrelevant to the proposed project, and of which the Department should have no interest in, or authority to see. The Department needs to limit its information requirements to that information that is relevant to the project under review and, more specifically, to the need for assessment of environmental impacts of the proposed project. (48)

318. COMMENT: Proposed N.J.A.C. 7:7A-10.2(e) states that "[f]ailure to provide all information" of which the applicant and its agents "are or should be aware" may result in the denial or termination of a permit, and may, in addition, subject the applicant and its agents "to penalties for submittal of false information." This proposal is unsound for several reasons.

First, the Department is extending liability to parties who have no control over the submission of information, namely the agents of the applicant. It is often the case that the parties who gather and analyze application-related data are not involved in submission of such data to the Department and penalizing them for the actions of others is unjustified. In addition, the Department provides no explanation as to why it is necessary to extend vicarious liability to an applicant's agent in a case where the applicant, but not its agent, should have been aware of the information in question. Finally, while it is one thing to deny a permit due to insufficient information or to penalize submission of information that was intentionally misleading (and N.J.A.C. 7:7A-16.8 already provides penalties for submitting false or inaccurate information), to further penalize a party based on a very subjective "should have known" standard is likely to present significant evidentiary issues. (43)

RESPONSE TO COMMENTS 317 AND 318: N.J.A.C. 7:7A-10.2(e) is within a section entitled "basic content requirements for all *applications*" (emphasis added).

Consequently, the subsection applies to the information submitted as part of an application and to information relevant to that application, not solely information relating to environmental impacts. For example, because of the limitations on the use of multiple general permits, an applicant is required to provide information about the ownership history of a property. Such information is necessary to ensure that a general permit authorization is appropriate under the circumstances as opposed to an individual permit. In another example, known information about a historic or archaeological site must be provided to ensure that the rule requirements are met. The Department would not initiate an enforcement action against an applicant or their professional(s) for inaccurate information or the non-submission of information unrelated to the review of a permit application as it pertains to compliance with the Freshwater Wetlands Protection Act.

The Department does not agree that applicant's agents have no control over the submission of information. Applicants provide certain information to their agents and the agents gather additional information, as part of the application submission process. Therefore, agents have control and knowledge of the information submitted to the Department, and the penalty language at N.J.A.C. 7:7A-10.2(e) is appropriate. The Department does not agree that this provision results in extending "vicarious liability" to an applicant's agent. The Department is required, pursuant to the rules of evidence, to prove a party's culpability in order to successfully prosecute legal action against that party. As such, liability for information which was not, but should have been, submitted by an applicant does not necessarily mean liability for the agent. This same reasoning extends to the provision stating that failure to provide all information of which the applicant or various professionals should be aware may result in denial or termination of the permit, at N.J.A.C. 7:7A-10.2(e). That is, the Department must prove that the applicant or agent should have been aware of certain information.

319. COMMENT: The imposition of civil administrative penalties for submitting inaccurate or false information by "the applicant, its consultants, engineers, surveyors, or agents" fails to acknowledge the foreseeable risk of an administrative misstep in a complex regulatory system. The proposed provision and its broad scope ignore the distinction between violations that are minor and non-minor. New N.J.A.C. 7:7A-16.10

would state that these violations would be "non-minor and, therefore, not subject to a grace period." N.J.A.C. 7:7A-16.10 also states that "each day, from the day that a violator submits inaccurate or false information... to the day the Department receives a written correction ... shall be an additional, separate, and distinct violation" that would be assessed as high as $10,000.00. See N.J.A.C. 7:7A-16.10(c) through (f).

Administratively incomplete applications should not be deemed as “inaccurate or false” and do not warrant assessment of penalties that accrue daily. Additionally, the proposed use of a subjective standard for assessing the civil administrative penalty places unnecessary pressure on applicants and their professional consultants to interpret what requirements they “should be aware of.” Allowing subjective ex post facto determinations of what is expected of applicants and their associates smacks of "gotcha government" and adds to DEP's reputation as being hostile to private parties. The Department should explicitly outline the information that applicants are required to provide. Further, this provision should be revised to exclude the required checklist items that have been completed.

This is especially so where it is widely acknowledged that identification and delineation of wetlands often is a matter of interpretation, and not an exact science. (4, 27, 29, 74)

RESPONSE: On January 4, 2008, the Environmental Enforcement Enhancement Act (EEEA) was enacted and amended the Freshwater Wetland Protection Act enforcement provisions at N.J.A.C. 13:9B-21. The Department is herein readopting without change Subchapter 16, Enforcement, because it separately proposed amendments to Subchapter 16 on August 18, 2008, to incorporate and implement the changes resulting from the EEEA. The proposed amendments include those necessary for implementation of the EEEA as well as amendments that had been included as part of the September 4, 2007 proposal to readopt the FWPA rules, including those the commenters are concerned about. The Department therefore directs the commenters attention to the pending August 18, 2008 proposal, for which the comment period is open until October 17.

N.J.A.C. 7:7A-10.3 Additional application requirements for an LOI

320. COMMENT: State open waters must now be delineated when previously they could be identified by contours. This is not a good change because State open waters have no buffers but anything with a delineated wetlands line does get a buffer. Language must be added clarifying that State open waters that have been identified by wetlands flagging do not require a wetlands buffer. (32)

RESPONSE: The Department has historically required that wetlands and State open waters be delineated since both wetlands and State open waters are regulated under the Freshwater Wetlands Protection Act. However, the rules did not previously specify the type of delineation that was required, especially in the case of a State open water that is a linear feature. Delineating the feature does not trigger the imposition of a transition area. If the feature meets the three-parameter approach and is identified as a wetland, it receives a resource classification and the appropriate transition area is imposed. By clarifying and specifying the accuracy to be used to identify State open waters, the Department is standardizing the requirement so that all applicants provide the same level of detail and the Department has what it needs to conduct a field inspection and to determine compliance with the rules.

321. COMMENT: N.J.A.C. 7:7A-10.3(d)1 should be clarified to add that field delineating of State open waters that are interior to wetlands is not required. In this case, the location of the State open waters based on topographic mapping information is sufficient. (31)

RESPONSE: N.J.A.C. 7:7A-10.3(d)1 already states, "…When delineating a State open water one to five feet in width measured from top of bank, *with no wetland boundary*, the delineation shall indicate the centerline of the State open water with several data points numbered and shown on the plans" (emphasis added). The same caveat applies when delineating a State open water greater than five feet in width, except that a survey line on each side of the State open water is required. Therefore, there is no need for the suggested change.

N.J.A.C. 7:7A-10.4 Additional application requirements for a general permit authorization

322. COMMENT: N.J.A.C. 7:7A-10.4(a)2 requires applicants to submit the total wetland and state open water areas before and after development. We support this provision. This is an important requirement that enables DEP to keep track of changes and permits. (20, 85)

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

323. COMMENT: N.J.A.C. 7:7A-10.4(a)5 through 7 requires documentation of date of subdivision, history of ownership from June 30, 1988 and listing of contiguous lots in common ownership as of June 30, 1988, to demonstrate that no general permit had been previously approved for the lots that would result in segmentation of the project. We strongly support this provision. (20, 85)

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

324. COMMENT: The requirements at N.J.A.C. 7:7A-10.4(a)5 through 7 do not appear to be applicable to public transportation projects. (30)

RESPONSE: The Department agrees that the requirements at N.J.A.C. 7:7A-10.4(a)5 through 7 are not applicable to public transportation projects since they refer to subdivisions of property. An application for a public transportation project should indicate “not applicable” for these checklist items.

325. COMMENT: We object to the addition of requirements placing additional property record burdens on an applicant. Our property records are extensive and complex. By way of example, we own or occupy over 1,100 miles of electric transmission right-of-ways and other easements within the State of New Jersey. These requirements place additional

burdens above and beyond what is necessary on property owners with extensive real estate portfolios with no benefit to the environment. Accordingly, we request that this language be removed from the General Permit requirements. In the alternative, we request that utility rights of way be exempted by adding the following subsection (8): The requirements of sections (5), (6) and (7) shall not apply to general permits issued for regulated activities for above ground or underground utilities. (4, 24)

326. COMMENT: General permits normally associated with utility linear development (for example, general permits 2, 10A, 10B, 12, and 21) should be exempt from these requirements. The reason is that utility linear development projects often traverse significant distances (sometimes miles) and involve numerous lots located across multiple municipalities and counties. Often the utility is not the owner of the properties, but simply holds an easement or license agreement to use the property. Requiring utilities to provide this level of information for each lot of a linear development project is unnecessary and unwarranted. (43, 48)

RESPONSE TO COMMENTS 325 AND 326: The Department does not believe that a blanket exclusion for above and below ground utility lines from the requirement to provide the items at N.J.A.C. 7:7A-10.4(a)5 through 7 is appropriate, since such utilities may be part of private subdivisions and as such may affect the applicability of general permits to that property. However, the Department does agree that these requirements are not required for public utilities which extend across multiple municipalities and counties. Therefore, an application for a public utility project should indicate “not applicable” for these checklist items.

327. COMMENT: DEP is now requiring a complete history of ownership for all property dating to June 30, 1988 to ensure there is no segmenting of projects. The applicant is required to list contiguous lots that were in common ownership and the ownership history of each lot back to 1988. The net effect of this requirement is that it will give the title companies more work and cost the applicants more money to prepare an application.

How many segmented project applications has the DEP received since the rules were adopted? (32)

328. COMMENT: The three proposed requirements for all GP permits at subsection N.J.A.C. 7:7A-10.(a)5 through 7 require documentation of ownership interests from June 30, 1988 to the present. These would require title searches that add to application cost and preparation time. The Department should justify why documentation of ownership is required in all cases. (4, 27, 29)

RESPONSE TO COMMENTS 327 AND 328: As more time passes since initiation of the wetlands program, it is becoming more likely that applications are being submitted for projects on properties that have previously been subject to general permit authorizations. Without the required information, the Department is not able to consistently identify such parcels. Thus the new requirement is intended to provide information for all applications. The Department is not requiring official title searches to obtain this information. Because the time frame in question is 20 years, such information may be accessible in the deed or by checking subdivision history in the municipality where the property is located.

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

329. COMMENT: N.J.A.C. 7:7A-10.6(a)2 requires documentation of the total wetland and state open water areas before and after development. We support this provision. This is an important requirement that enables DEP to keep track of changes and permits. (20, 85)

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

N.J.A.C. 7:7A-10.7 Additional application requirements for a modification or extension

330. COMMENT: The Department proposes extensive new application requirements for permit modifications when a permit approval is transferred to new owners. For example, proposed N.J.A.C. 7:7A-10.7(b)lii(1) requires the notarized signature of each original owner of the site. Another example is N.J.A.C. 7:7A-10.7(b)lii(5), which requires a signed and notarized statement by the new owner or contract purchaser accepting the permit and all conditions. The summary document states that this information is necessary for the Department to track ownership of and responsibility for compliance with Department approvals and attached conditions of approval. The proposed application requirements are unduly burdensome and unnecessary. As such conditions of approvals run with the land, the current owner would be responsible for complying with any restrictions or limitations. Rather than tying up DEP's limited staff resources with approval of these permit modification applications, it would be less onerous on all parties involved if the requirement was to provide notice to the Department of the transfer. Further, the Department should clarify whether these proposed requirements apply to realty transfers to individual property owners and to re-sales. (4, 27, 29)

RESPONSE: The additional requirements will make it easier for the Department to assess compliance with permit requirements and as such will relieve some of the review burden for the Department. The Department believes the new requirements are a proactive mechanism to reduce the potential for permit violations since all parties will have to acknowledge what is required in the permit in order for the permit transfer to occur. It is also a reasonable point in time for the Department to ensure that all conservation restrictions or easements have been properly recorded so that prospective owners have full notice of limitations on the property. Further, it is better for the environment and the protection of wetlands to ensure compliance before activities are conducted in violation of a permit rather than attempt to identify the responsible party and seek remediation after a new owner takes possession of a property and improperly conducts a regulated activity. The requirements will apply to all transfers of property that occur before the permitted activities have been conducted on a site. Once all regulated activities have been completed in compliance with a permit, there is no need to inform the Department of property transfers in the same way that there is no need for applicants to seek renewals of

permits, since FWPA permits are construction permits and the concern is to ensure that regulated activities are conducted in accordance with the wetland or transition area permits. The requirement to compel permittees to identify to the Department when a permit is transferred addresses the Department's enforcement interest in knowing who is authorized to conduct regulated activities under a permit, and the requirement also ensures that transferees have knowledge of the permit conditions and limitations.

N.J.A.C. 7:7A-10.8 Public notice requirements for applications

331. COMMENT: N.J.A.C. 7:7A-10.8(j) provides the same public notice requirements for mitigation proposals as for other wetland activity applications. We support this provision. (20, 85)

RESPONSE: The Department acknowledges this comment in support of the rules. It is important to note, however, that applicants who include onsite mitigation as part of an application for permit approval, may satisfy the mitigation notification requirement with the notice required for the permit application if the application notice includes a description of the mitigation proposal.

332. COMMENT: The current language at N.J.A.C. 7:7A-10.9(c) requires that the applicant must make delivery through the United States Postal Service (USPS). The process of notifying owners within 200 feet through mail return receipt is time consuming, and can delay projects since it excludes overnight delivery services. We suggest modifying the existing notification requirements to be consistent with contemporary mailing practices to include other courier services that track receipt of documents. N.J.A.C. 7:7A-10.9(c) should read “Each notice or application required to be provided under this section shall be sent, by USPS certified mail, return receipt requested, or through another acceptable courier or mail delivery service that tracks receipt of deliveries.” (4, 24)

RESPONSE: The commenter should note that former N.J.A.C. 7:7A-10.9(c) is now N.J.A.C. 7:7A-10.8(c). Although U.S. mail return receipt may be time consuming, it is much less costly than the other services to which the commenter refers. However, so long as the applicant can provide the Department with proof of mailing and delivery, other than a tracking number that would require the Department to search online for verification, the Department will accept other types of delivery services that provide written proofs of letter and package receipt. The Department is modifying N.J.A.C. 7:7A-10.8(c) on adoption to accept other courier or mail delivery services that provide written proof of delivery of letters and packages.

Subchapter 12 Department Review of Applications

N.J.A.C. 7:7A-12.2 USEPA review

333. COMMENT: Regarding N.J.A.C. 7:7A-12.2 USEPA review, leaving out the U.S. Fish and Wildlife Service from this process has its problems. This agency is controlled solely by hunters who have no appreciation for wildlife unless it is game, which they love to shoot. If the New Jersey Division of Fish and Wildlife will be taking over this responsibility, their process is flawed, not providing adequate protection for wildlife or endangered species and only focusing on game animals. Any connection between the Division of Fish and Wildlife and the land use process should be reexamined. (67)

RESPONSE: The amendments at N.J.A.C. 7:7A-12.2(k) delete the detailed description of the process for circulating certain Department permits directly to the U.S. Fish and Wildlife Service for review of the potential impacts to Federally listed threatened or endangered species, and specify that applications will be provided to the Service in accordance with the Memorandum of Agreement (MOA) between the Service and the Department and any amendments or clarifications thereto. Over the past several years, the U.S. Fish and Wildlife Service staff has been reassigned to other duties, requiring the Service and the Department to reassess the method by which applications are reviewed by both agencies. At this time, the Department and specifically the Division of Land Use

Regulation, retains the majority of responsibility for reviewing potential impacts to Federally listed threatened or endangered species, and only provides applications to the Service for comment when a potential impact has been identified. This revised process will become an addendum to the existing MOA and the rules were amended to reflect this change.

334. COMMENT: The Department of Environmental Protection is expanding the permit program to regulate historic resources using the Wetlands Act based on the assertion that it has responsibilities relating to compliance with Section 106 of the National Historic Preservation Act. Furthermore, it asserts that the new historic resource provisions are needed so the state program remains as stringent as the Federal Section 404 Program. These assertions are not supported by Federal Law and the policies as proposed are in contravention to existing Federal and State law, and should be stripped from the rules. According to Memorandum of Agreement through which the Federal 404 Program was assumed, all permits issued by the state are state actions. Section 106 relates only to federal actions and therefore Section 106 is not binding on the state. The DEP demonstrates this knowledge since the rules included in the proposal are fundamentally different than the federal application of 106. The U.S. Supreme Court has concluded that when Congress enables the State to assume a federal program that Congress does so with the foreknowledge that regulations of federal government-wide applicability like Section 106 will not be binding on the state programs. That is why the federal agencies promulgate rules that tell the State how to assume and what to assume. The rules require the federal agency to take a hard look at the state program before it deems it acceptable and signs the assumption agreement. The rules require the agency to look only to state law and state resources in making this determination. If the federal agency finds that the state program is inadequate, it can ask the state to change its laws or it can include conditions in the Memorandum of Agreement needed to make sure important federal interests are protected. In 1994 the EPA performed this review of New Jersey's Wetland Program. At the time of assumption EPA was aware of the state's existing historic preservation law which limited DEP review only to historic resources already listed on the state register and encroached upon by government actors. Therefore, to make sure

that important federal interests were protected the EPA retained its review of discharges affecting National and historical monuments or sites identified or proposed in the National Register. Otherwise EPA found state law not less stringent than the federal 404 program. The EPA can now protect historic government resources through a parallel federal review. Furthermore, if DEP wants to regulate under Section 106, it must apply for and obtain approval from the Department of Interior.

DEP points out that it can use state law to regulate more stringently than Federal law. This is true except when the existing state law prohibits. According to current state law, DEP can only regulate historic resources through the New Jersey Register of Historic Places Rules. N.J.A.C. 7:4-1.1 states "this chapter shall constitute rules of the Department of Environmental Protection concerning the preservation of States historic, architectural, archeological, engineering and cultural heritage..." Since the DEP does not propose changing these rules, state laws bans it from proposing contradictory rules under the Wetlands Act. Even after DEP decides to continue to regulate historic resources, the rules as proposed are inconsistent. One provision leaves it up to an archeologist to determine the required content of a study and another points to a Phase 1A checklist that does not exist, and another requires applicants and their consultants to divulge information about resources on property not even subject to the application. The DEP must re-propose rules that can be followed by the regulated community. Furthermore, none of the rules lay out the process for dealing with impacts to any historic resources discovered. Do not limit the assessment to resources impacted within the jurisdiction of the rules and allows the DEP to require any manner of restriction it deems necessary even if the applicant objects. Therefore, it is impossible for the DEP to enforce these provisions except in an arbitrary manner. State law does not allow arbitrary enforcement of environmental rules. (41, 64)

RESPONSE: The prohibition against the Department's approving a permit that would have negative impacts to historic resources has been a requirement since 1994 when the Department assumed the authority for the Federal 404 permitting program. It was required by the EPA as part of the Department's original application for assumption. As a result, since that time, by way of a Memorandum of Agreement and subsequent rules

(adopted in 2003) the Division of Land Use Regulation (LU) has had a working arrangement with the State Historic Preservation Office (SHPO) to help with the review of applications to ensure that no permit is approved that would have negative impacts on a historic resource. The findings regarding whether or not a proposed activity will have an effect on a historic resource is made by SHPO under its authority and that is the same authority by which SHPO would review applications from an applicant for compliance with Section 106. Consequently, the review of historic resources is described in the SHPO rules, The New Jersey Register of Historic Places rules, N.J.A.C. 7:4, and not in the Freshwater Wetland rules.

As the commenter notes, because the Department is a State and not a Federal agency, it is not required to comply with Section 106. However, it is required to provide protection equivalent to that which is provided by way of Section 106 when used in conjunction with the Federal 404 Program. The Department's procedures fulfill that mandate. Further, as noted by the commenter, the Department's procedures are different from those of the Federal program, and are tailored to work within the Department's permit review procedures.

In the procedure contained in the original MOA which was carried forward into the Department's current rules, LU was screening all incoming applications and forwarding to SHPO applications meeting any one of the criteria at N.J.A.C. 7:7A-12.2(l). SHPO reviewed the applications and, if necessary, made a request to LU to obtain an historic or archaeological survey. Land Use would then require the applicant to perform and submit the survey. Instead, the adopted rules require that the applicant screen their own application and obtain an historic or archaeological survey for any application meeting the criteria at N.J.A.C. 7:7A-12.2(l). In this way, applications can be forwarded to SHPO at the beginning of the application process with sufficient information to determine the potential for impacts to historic and archaeological resources. It is no clear why the commenter thinks that one provision leaves it up to an archeologist to determine the required content of a study, another points to a Phase 1A checklist that does not exist, and another requires applicants and their consultants to divulge information about resources on property not even subject to the application. The rules contain no reference to a Phase 1A checklist and leave no discretion for the contents

of any study to an archaeologist. Rather, the Department is requiring a Phase 1A historical and archaeological survey, as defined in the Department's rules, with the applications containing features listed at N.J.A.C. 7:7A-12.2(l).

The New Jersey Register of Historic Places Rules (N.J.A.C. 7:4) do not prohibit the Department from regulating historic resources under other sets of rules. In fact, other Department rules, for example, the Coastal Zone Management rules (N.J.A.C. 7:7E) also regulate historic resources. Further, because the Department is required to protect historic resources in order to operate its wetland program in place of the Federal, the State would not be able to comply with a federal requirement if it was precluded from conducting these reviews. Nonetheless to ensure consistency, The New Jersey Register of Historic Places Rules, and the review conducted by way of the Freshwater Wetland rules, use the same process for the identification, evaluation, and treatment of historic properties.

335. COMMENT: The Division of Parks and Forestry has hundreds of historic buildings that are falling down all over the state because stringent historic restrictions make them too expensive to maintain or make them unattractive to private investment. Has the DEP considered the indirect impact to private historic buildings when owners abandoned them because they are too expensive to maintain? How is a DEP biologist who issues wetland permits to know what is an effective balance? (41, 64)

RESPONSE: The Department is not aware of any data demonstrating that historic preservation restrictions make historic buildings too expensive to maintain or make them unattractive to private investment. Nor is the Department aware of any data indicating that private owners are abandoning historic buildings because they are too expensive to maintain. However, the projects that are subject to the requirement to protect historic resources are those that are subject to the FWPA and rules. As stated in response to comment 335, applicants needing a freshwater wetlands permit under these rules are subject to the requirement that approval of such permit cannot result in impacts to historic resources. Consequently, the historic buildings described by the commenter are not affected by this requirement unless they are on a property for which a freshwater wetlands application is required. In that circumstance, the application is sent to the State

Historic Preservation Office (SHPO), which houses the Department's experts on preserving, maintaining and reusing historic structures. SHPO provides guidance related to the specific permit application review regarding appropriate measures to avoid, minimize, or mitigate impacts to historic and archaeological resources.

336. COMMENT: The summary regarding proposed changes to subchapter 12 indicates that "… where a private applicant is required to perform an assessment of a site 20-acres or larger, a background investigation with field inspection is estimated to cost around $5,250.00." Further, "… a more thorough field investigation would be required at a cost of approximately $15,750.00." Assuming that the assessment is a Phase IA-level archaeological survey and the "field investigation" is the equivalent of a Phase IB-level archaeological survey, the cost provided is generally insufficient to complete the required work. In order to meet the New Jersey Historic Preservation Office's Guidelines for Phase I Archaeological Surveys, the equivalent of 17 shovel tests per acre must be excavated throughout the limits of disturbance. Although testing is not required in previously disturbed or sloped areas, or a pedestrian survey may be completed in plowed agricultural fields, such locations may only represent a limited portion of a study area. The provided budget would only represent a fraction of the cost to complete a Phase I archaeological survey over a wooded tract ranging from 20 acres to several hundred acres, or for deep testing on a floodplain of the Delaware River, or for a tract with historic buildings and high potential for historic archaeological resources. As such, the cost to complete a Phase I archaeological survey depends on existing conditions, environmental/topographic setting, tract size, proximity to the office, presence of hazardous materials, etc.

It is difficult, if not impossible, to have a fixed dollar amount that will be adequate for every Phase I survey. If the regulations are approved with the fixed dollar amounts provided, the thoroughness of archaeological surveys can only decrease which would undoubtedly lead to less resources being identified. Further, private clients will not be properly apprised of the real cost of archaeological surveys. Clear definitions for "assessments" and "thorough field investigations" would be helpful. Also, a client benefits from having an archaeological survey completed early in the freshwater wetlands

permitting process, whether required by the State Historic Preservation Office or not, so that they know what real cultural resource constraints are present, and so that resources have a greater chance of being protected as development plans may be altered to avoid them. If a significant resource is present, private clients will then know that further work needs to be completed in order to comply with FWPA permit requirements. (33, 54, 76)

RESPONSE: In the Economic Impact analysis in the proposal, the Department is required to provide to the public as much detail as possible regarding the costs associated with the proposed rules. In the past when the Department estimated costs associated with the historic preservation provisions of the rules, it obtained informal cost estimates from consultants performing these tasks. However, the Department acknowledges that there may be significant variation in these costs depending upon the factors noted by the commenter: existing conditions on a site, environmental and/or topographic setting, tract size, proximity to the consultant's office, and the possible presence of hazardous materials. The Economic Impact statement is informational and does not require that actual historic or archaeological surveys stay within the identified ranges. Consultants should undertake as thorough a survey as necessary for the site in question.

337. COMMENT: N.J.A.C. 7:7A- 12.2(l) requires submission of a Phase IA historical and archaeological survey for projects that may affect properties listed, or are eligible for listing, on the New Jersey or National Register of Historic Places directly or indirectly. We support this requirement. (20, 85)

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

338. COMMENT: The proposal to require a Cultural Resource Survey as part of applications for general permits is a concern. We understand that this requirement will apply only to projects which meet specific criteria. However, it is our experience that the review of these reports by the State Historic Preservation Office can be a very protracted process. If this proposed requirement is adopted, consideration must be given to providing an expedited review. (36)

RESPONSE: If an application meets one of the criteria at N.J.A.C. 7:7A-12.2(l)1 through 5, the Department forwards the application to the State Historic Preservation Office (SHPO), and will require a survey in the context of a general permit application that has the potential to affect historic or archaeological resources. Whereas before the amendment, the survey was requested after the review began, under the rule as amended, the survey is required at the beginning of the process. Consequently, the review time frames should be expedited for such applications as a result of the amendments.

339. COMMENT: The proposed amendment at N.J.A.C. 7:7A-12.2(l) to require a Phase IA historical and archaeological survey should not be adopted. The Department already has the authority to require a Phase IA historical and archeological survey, and/or an architectural survey, to assess a project when it deems such information necessary to conduct a review. The Department also has the latitude to make such survey a condition of a permit and not a permit application requirement when the individual project warrants such a course of action. The present mechanism makes much more sense than this proposed change, as it allows for reasonableness and flexibility on the part of the Department. (48)

340. COMMENT: N.J.A.C. 7:7A-12.2(1) describes the Department's responsibilities for compliance with the National Historic Preservation Act. Where there is a "high probability of the presence of historic and archaeological resources," proposed N.J.A.C. 7:7A-12.2(1) requires submission of a "Phase IA historical and archaeological survey, and an architectural survey" with the application. A Phase IA historical and archaeological survey is a significant undertaking that involves more than simple literature searches and due diligence. The surveys are very expensive, ranging in cost from $4,000.00 to $15,000.00. The Department should amend this provision to require this survey in only certain circumstances (that is, where the area is known to have historic significance) as is current practice rather than with the application. Also, as noted earlier, the Phase IA historical and archaeological survey and architectural survey should be further defined prior to their required submission. (4, 27, 29)

RESPONSE TO COMMENTS 339 AND 340: As stated in response to comment 335, since 1994 the wetlands permitting reviewers have been screening all incoming applications, and forwarding to the State Historic Preservation Office (SHPO) those applications meeting any one of the criteria at N.J.A.C. 7:7A-12.2(l). SHPO reviews the applications and makes a request to the permit reviewer to obtain an historic or archaeological survey. At that point, the applicant would be required to perform and submit the survey. Under the rules as amended, the applicants will screen their own applications and obtain an historic or archaeological survey if the application meets the criteria at N.J.A.C. 7:7A-12.2(l). In this way, applications can be forwarded to SHPO at the beginning of the application review process, with sufficient information to determine the potential for impacts to historic and archaeological resources. The Department does not agree that it can make an archaeological or historic survey a condition of a permit, because in accordance with N.J.A.C. 7:7A-4.3(b)5 and 7.2(b)9, the Department cannot approve a permit that has the potential for impacts to historic resources. Consequently, this information must be obtained as part of the permit application and be sufficiently thorough for the Department to determine that the project meets the requirements of the rules.

341. COMMENT: N.J.A.C. 7:7A- 12.2(m) requires submission of color photographs of all buildings, structures, ruins and burial grounds, as well as a key map and copies of correspondence regarding such. We support these provisions as they will facilitate review efficiency and compliance with the historic and archaeological resource requirements. (20, 85)

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

342. COMMENT: N.J.A.C. 7:7A-12.2(m) lists new application requirements for historical or potentially historic resources and archaeological resources, including photographs of all buildings, structures, ruins of buildings and structures, and burial grounds on the site. See N.J.A.C. 7:7A-12.2(m)l. N.J.A.C. 7:7A-12.2(m)3 requires all

information and copies of correspondence, known, received or in the possession of project representatives or the applicant, regarding historic districts, buildings, structures, ruins, burial grounds, and archaeological sites on or near the project site. The proposal does not provide any justification for requiring all information and correspondence from everyone involved in the preparation of the application. This requirement should be more defined and limited, rather than the proposed open-ended obligation. Narrowing the requirement is especially important given the assessment of penalties for submitting "inaccurate or false information" regarding historic resources at proposed N.J.A.C. 7:7A-16.10. (4, 27, 29)

RESPONSE: The purpose of the requirement to provide all information and correspondence is to ensure that applicants do provide all information that might indicate there are known resources on the site. If an applicant has correspondence regarding an historic or archaeological resource on a site, it is important to provide that information with an application since experience has shown that some sites that are very well known locally may not yet be known to the State's reviewers. If letters exist discussing these resources, and the information is not contained in the application to the Department, the Department will consider it a potentially intentional omission. Consequently, the Department believes that the requirements at N.J.A.C. 7:7A-12.2(m)3 are appropriate.

343. COMMENT: We typically complete the Section 106 process prior to submitting a permit application to NJDEP. The approval letter from the State Historic Preservation Office (SHPO) is included as part of the permit application. Therefore, we do not see the need to submit to the Division of Land Use Regulation (DLUR) duplicate copies of documents that have already been approved. This comment is also applicable to N.J.A.C. 7:7A-10.2. (30)

RESPONSE: N.J.A.C. 7:7A-12.2(n) states that "applicants who are or will be pursuing Federal financial assistance, permits, licenses, or other approvals for the project that is the subject of the freshwater wetlands permit application shall supply a copy of the consultation comments provided by the Department's Historic Preservation Office (HPO)

in its role as staff to the Federally designated State Historic Preservation Officer (SHPO) under Section 106 of the National Historic Preservation Act (16 U.S.C. 470(f), together with a statement detailing how the comments have been incorporated into the project, with the State freshwater wetlands permit application. The Department will consider that information as a part of its review under this chapter." Consequently, the Department is not requiring the applicant to provide duplicate copies of documents that have been approved.

344. COMMENT: N.J.A.C. 7:7A- 12.2(p) requires that projects that involve demolition of structures over 50 years old, requiring a wetlands and or state open water permit must have that permit before any demolition occurs. We support this provision. It is unclear, however, how DEP would enforce it. (20, 85)

RESPONSE: The Department acknowledges this comment in support of the rules. Regarding enforcement of the provision, the Department will not approve a permit, pursuant to Section 106 of the National Historic Preservation Act, for an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the permit would relate. Therefore, the consequence for an applicant may be denial of the permit. In addition, the Department may require mitigation for the destroyed resource and may assess substantial penalties pursuant to N.J.A.C. 7:7A-16. In instances where the information is omitted from an application the Department may also pursue a falsification violation. The Department relies on many sources of information to determine the facts of an alleged violation. Some sources are available at the local level such as demolition approvals, and minutes from township meetings. Information is also available in aerial photographs that would indicate where structures had been demolished. Local historical groups may assist in the protection of historic resources by notifying the township and Department if demolition is proposed prior to submittal of a freshwater wetland application.

345. COMMENT: N.J.A.C. 7:7A-12.2(p) prohibits the demolition of buildings or structures potentially over 50 years of age, or the disturbance of soils prior to obtaining

the required freshwater wetlands or State open water permit. Further, it would be a violation to undertake these activities without a permit. On what basis did the Department determine that any building standing at the time of Sputnik 1 is historically significant? Over 500,000 homes were built in New Jersey between the end of the Second World War and 1957; does DEP intend to preserve them and their predecessors? The Department should be more explicit in what buildings fall under proposed N.J.A.C. 7:7A-12.2(p) rather than the obscure "potentially over 50 years of age." This phrase also raises the question of who determines the age of the structure or building to fall in this category. Would this be DEP staff, the applicant, or local construction officials? The lack of a more precise definition in proposed N.J.A.C. 7:7A-12.2(p) leaves too much room for differing opinions and potential penalties. The proposed prohibition fails to account for old structures that are deemed as "unsafe" by the local construction code official. The Department should grant an exception for such circumstances in its rulemaking, particularly for urban areas where older buildings exist and must be removed for safety concerns. This is also appropriate as the Federal wetlands laws and program do not contain any restrictions against anticipatory demolitions. (4, 27, 29)

346. COMMENT: The proposed survey and application requirements for historical "or potentially historic resources" and archaeological resources are expensive, burdensome and unjustified. The proposed prohibition of the demolition of buildings or structures "potentially" over 50 years of age fails to account for old structures deemed unsafe by local construction code officials. The Department should grant an exception for urban redevelopment areas where older buildings must be removed in the interest of safety. (55)

347. COMMENT: The prohibition of demolition of buildings or structures over fifty years of age is both unreasonably burdensome and beyond the purview of the Act. The Department has cited no provision of either Federal or State law which allows the Department to restrict the demolition of a structure over fifty years of age. In fact, there is no provision of either the Clean Water Act or the Act which allows such a restriction.

Accordingly, this provision should not be adopted since it is ultra vires, and is violative of the APA.

As a practical matter, given the breadth of coverage, many of our properties contain buildings or structures potentially over 50 years of age. This section will cause additional delays in permit processing, and will place additional restrictions on the maintenance of properties necessary to maintain safe, adequate and proper utility and generation service. Accordingly, this proposed section should not be adopted. (4, 24)

348. COMMENT: Proposed N.J.A.C. 7:7A-12.2(p), which prohibits otherwise entirely permissible demolition work pending receipt of a freshwater wetlands or state open water permit, should not be adopted. Such demolition work can be a critical path item for utility infrastructure projects and this proposed regulation will add unnecessary delay where the demolition work does not implicate any historic preservation concerns. (43)

RESPONSE TO COMMENTS 345 THROUGH 348: Both the National Register of Historic Places regulations at 36 CFR 60.4, and the New Jersey Register of Historic Places Act rules at N.J.A.C. 7:4-2.3, identify eligible historic resources as those structures that are 50 years of age or greater. Further, Section 106 of the National Historic Preservation Act requires Federal agencies to identify and assess the effects of proposed actions on historic properties; consult with appropriate State and local officials to resolve conflicts; consider the views of the public on preservation issues; and take into account historic preservation values when making final decisions that affect historic properties. Federal Army Corps of Engineers regulations at 33 CFR §320.3(g) state, "The National Historic Preservation Act of 1966 (16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for such listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 et seq.), which amends the Act of June 27, 1960. By this Act, whenever a

federal construction project or federally licensed project, activity, or program alters any terrain such that significant historical or archeological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project." Therefore, as stated in response to comment 336, the Department is required to incorporate similar requirements and a similar review process into its freshwater wetlands program.

The adopted wetland rules, which require an applicant to provide a Phase IA historical and archaeological survey, place the initial responsibility for identifying such resources on the applicant. The applicant can identify such resources by checking historic property maps available at the Department, by speaking with local citizens, or by checking property records at the municipality in question. The Department also identifies such resources when it reviews applications, and inspects sites to verify wetland lines or for permitting purposes.

The Department's rules do not contain a total prohibition against demolition of buildings or structures. Rather, the Department requires that it be given the opportunity to review impacts to such structures before any action is taken, if they are contained on properties for which freshwater wetlands permits are required. As stated in response to comment 336, the projects that are subject to the requirement to protect historic resources are those that are subject to the FWPA and rules. If buildings 50 years of age or older are contained on a property for which a freshwater wetland permit is requested, the application is sent to the SHPO. SHPO provides the Department's expertise on preserving, maintaining and reusing historic structures and will advise LU staff regarding whether it is necessary to preserve the historic structure, or to allow alterations or destruction of a building.

Finally, Federal regulations do contain a prohibition against anticipatory demolition of historic structures. In 1992, Congress added to Section 110 of the National Historic Preservation Act a new provision that directs Federal agencies to withhold grants, licenses, approvals, or other assistance to applicants who intentionally significantly and adversely affect historic properties. This provision, known as the "anticipatory demolition" section, is designed to prevent applicants from destroying

historic properties prior to seeking Federal assistance in an effort to avoid the Section 106 process.

349. COMMENT: The new requirements for historical "or potentially historic resources" and archaeological resources clearly indicates that the Historic Preservation Office (HPO) would require additional staff to ensure timely processing, particularly as processing is not now completed in a timely fashion. Currently, applicants often receive two letters at different points in the study preparation phase – one addressing archaeological issues and another on architectural concerns. The wetlands review staff should coordinate with the Historic Preservation Office staff so that only one response letter is generated addressing all concerns regarding historic and archeological resources and providing a timeframe for comments from HPO. (4, 27, 29)

RESPONSE: The requirements regarding potential historic resources are not new. The Department has used the criteria in N.J.A.C. 7:7A-12.2(l) since 1994 when protection of historic resources became part of the wetlands regulatory program assumed under section 404 of the Clean Water Act. The criteria are used to identify applications with characteristics deemed to present a high probability of the presence of historic or archaeological resources. Without such criteria, *all* applications submitted to the Department would need to undergo a review for potential impacts to properties that are listed or that have the potential for listing on the New Jersey or National Register or Historic Places. The list of criteria for sites with a high probability of having historic resources has been used since 1994 to limit the number of applications undergoing such a review. Consequently, the State Historic Preservation Office (SHPO) will not need additional staff to assist the Division of Land Use Regulation to satisfy its obligations to protect historic resources. In fact, the requirement to submit the various studies needed to assess historic resources with an application for those properties deemed to have a high probability of historic or archaeological resources, will make it more efficient for SHPO to complete its review, and more frequently enable the production of one letter addressing all historic and archaeological resources issues. Through proactive initial submission of a report for sites with a high probability of historic properties rather than submission after a

request for survey from SHPO, the SHPO review time should be reduced and the process under this section of the rules expedited.

N.J.A.C. 7:7A-12.3 Public comment on an application

350. COMMENT: The proposal should include the web site address for access to the DEP Bulletin. (86)

RESPONSE: The web address for the DEP Bulletin is provided in the rules at N.J.A.C. 7:7A-1.7(d). However, to address the commenter's concern, on adoption, the Department is adding the web address for the DEP Bulletin at N.J.A.C. 7:7A-12.3 and 12.4.

351. COMMENT: The applicant should submit a copy of each application to the County. (86)

RESPONSE: The rules at N.J.A.C. 7:7A-10.8(e)4 require applicants to send notice regarding an application to the planning board of each county in which the site is located. If the County Planning Board is particularly interested in an application, the entire application can be reviewed at the clerk's office of the municipality in which the activity is proposed, or at the Department's Trenton offices. The Department receives a large volume of applications. For example, during the period from January 1 through December 31st, 2006, the Department received 5,850 wetland applications, which, if assuming an equal distribution across all counties, would be approximately 278 applications per county per year. Given the volume of applications, the Department believes the counties are better served if they can select and request the applications they determine necessary from the notices they receive.

N.J.A.C. 7:7A- 12.6 Cancellation, withdrawal, resubmission and amendment of applications

352. COMMENT: N.J.A.C. 7:7A- 12.6(f) provides that an applicant submitting an amendment to an application shall provide a copy of the new or changed information to the same persons who received a complete copy of the application. In municipalities, the only person receiving a full copy is the clerk. The clerk does not normally interact with land-use review boards or the environmental commissions. We recommend that the planning board and the environmental commission receive notice of the amendment. (20, 85)

RESPONSE: As the commenter correctly points out, the only entity at the municipal level that receives a complete copy of the application is the municipal clerk. When the Department requires that a complete application be provided to the municipal clerk with notices to the construction official, environmental commission, and planning board, the intent is that any of those entities can obtain the complete application for review from the clerk if they so choose and that the clerk will disseminate copies of the notice to the appropriate boards. Consequently, additional or amended information is also forwarded to the clerk with the intent that other boards with interest in the application will continue to be able to obtain it.

The Department believes this notification process is appropriate because an applicant may submit new or amended information several times to the Department during the permit review process. Many times the amendments are minimal in nature, refine what has already been submitted, and do not substantially change the content of the application. Therefore, it would be excessive to require the applicant to provide notice to the construction official, environmental commission, and planning board, every time additional or amended information is submitted to the Department. For projects of local interest, the local entities and the public can monitor the application by periodically checking with the clerk for any new information submitted by the applicant. Finally, the rules do provide for renotification to the construction official, environmental commission, and planning board, at N.J.A.C. 7:7A- 12.6(f), if the Department determines that a change to an application will increase the environmental impact of the project.

Subchapter 13 Contents of Permits and Waivers

N.J.A.C. 7:7A-13.1 Standard conditions that apply to all permits

353. COMMENT: N.J.A.C. 7:7A-13.1(a)14 requires notification, with proof of recording of a conservation easement, to the DEP seven days prior to the commencement of site preparation or of regulated activities, whichever comes first. In the event that a permit is issued before the conservation easement is recorded, we support this provision. Withholding issuance of the permit until proof of the easement recording would be a much more certain way to obtain compliance. (20, 85)

RESPONSE: The Department acknowledges this comment in support of the rules. However, as stated in the summary, although N.J.A.C. 7:7A-2.12(e)1 requires applicants to submit a copy of the draft conservation restriction or easement within 60 days of receipt of an approved permit or waiver, proof of recording must be provided either when an applicant seeks to transfer ownership of a property with a permit, as required at N.J.A.C. 7:7A-14.3, or when the applicant notifies the Department seven days before the commencement of site preparation or regulated activities, in accordance with N.J.A.C. 7:7A-13.1(a)14; whichever comes first. Although it may ensure compliance if the permit is withheld, it is most critical that the easement be recorded when/if a property is going to change owners or the project is going to construction.

354. COMMENT: The requirement to submit proof of recording of a conservation restriction or easement, if one was required as part of the permit, to the NJDEP along with the construction notification should be deleted from the proposal. The reason is that requiring the permittee to submit proof of recordation of the conservation restriction or easement is not unreasonable, but it should not be required to be submitted along with the construction notification. Permittees already have to wait extraordinary long times to even receive their permit, a process which Commissioner Jackson has recently stated in public forums will only get longer. Permittees often have to get their projects initiated as quickly as possible after receiving their permit if they are to maintain their schedules. The act of recording the conservation restriction is yet another step in the ever-growing

process of environmental permitting, and it is yet another step that is to some degree outside of the control of the permittee, as the various County Clerk Offices each have their own process for recording documents. The permittee should not be further delayed by having to wait for the County recordation process to be completed before submitting the construction notification to the NJDEP, or even before starting actual construction. The construction notification already imposes a seven-day delay before a project may be initiated after the permit has been issued. To further extend that delay by requiring the permittee to complete the conservation restriction recording process before the notification can be submitted to NJDEP is unnecessary, and affords no additional environmental protection to the project site. (48)

RESPONSE: The Department disagrees that requiring proof of recording of a conservation restriction or easement will further delay the process. Permittees can and should record their approved restriction upon receiving an approved permit and should not wait to begin the recording process until construction is imminent. The alternative is to defer the issuance of the permit until receiving proof of recording which would more certainly result in a delay. The Department also disagrees that recording a restriction affords no additional environmental protection. Sites are frequently sold after permits are obtained and it is critical to the protection of the wetland resource that prospective buyers know that the site contains restrictions and where they are located before commencing construction.

355. COMMENT: Construction notification should also be submitted to the Soil Conservation District, County and Municipality. (86)

RESPONSE: The Department requires notification seven-days prior to construction to give it the opportunity to assess compliance with permit conditions, for example, the requirement to record a conservation restriction or easement on the property. The other entities to whom the commenter refers have their own requirements for notification before start of construction. Consequently, it would be redundant to require applicants to notify these entities by way of the Department's notification process.

Subchapter 14 Changes to Issued Permits or Waivers

356. COMMENT: Unless it is made a condition of approval, it is likely that the requirement to obtain a minor permit modification to transfer ownership prior to construction will fall through the cracks since people will not be thinking about this once the permit is issued. (32)

RESPONSE: The Department will add as a condition of approval, the requirement to notify the Department before transferring ownership of the property, since submittal of recorded conservation restrictions/easements will be required at that time, if one exists for the property to be transferred.

357. COMMENT: The proposed amendment to N.J.A.C. 7:7A-14.2 would prohibit anyone from conducting the regulated activities other than the original permittee, unless an official permit transfer has been made through the issuance of a permit modification pursuant to proposed N.J.A.C. 7:7A-14.3. These additional requirements are unnecessary and create an unwieldy administrative process. (4, 27, 29)

RESPONSE: As described in the summary, the amendments to N.J.A.C. 7:7A-14.2 requiring that a permit be officially transferred, and those at N.J.A.C. 7:7A-14.3(c)3, specifying additional requirements for the transfer of a permit from one owner to another, will assist the Department in assessing compliance with the terms and conditions of an approved permit. They will ensure that Department records remain accurate and identify the current owner, while also requiring proof that the original permittee has recorded a conservation restriction or easement if one was required as a condition of the permit to be transferred. The requirement to provide proof of filing of any conservation restriction or easement that was a requirement of the approved permit or waiver to be transferred is necessary to inform the prospective owner about any limitations that may have been imposed on the property by the Department, by way of a conservation restriction or easement.

358. COMMENT: New conditions are proposed for a transfer of ownership or operational control of a project at N.J.A.C. 7:7A-14.3(c)3i(1) through (6). The Department should repropose and explain why this change in rules is required, as conditions applicable to the original owner would also be applicable to a new owner. (4, 27, 29)

359. COMMENT: The proposal imposes significantly expanded application requirements for permit modification if and when a permit is transferred from one party to another. It is not clear as to why a permit modification is required when a permit is transferred (since conditions of approvals run with the land), as opposed to simply requiring that notice of the transfer be provided to the Department. (55)

360. COMMENT: Proposed N.J.A.C. 7:7A-14.3(a) would require that a permit modification be approved every time ownership or operational control of a permitted project changes, and proposed N.J.A.C. 7:7A-14.3(c)3i would prohibit permit transfers without Department approval. These requirements, which can add unnecessary delay to often time-sensitive transactions, are not necessary to make the obligations of a permit binding on those who conduct the activities authorized by the permit. That objective can be accomplished by regulation without requiring individual applications for permit modifications and transfers. (43)

RESPONSE TO COMMENTS 358 THROUGH 360: The proposal summary explained that the new requirements will assist the Department in assessing compliance with the terms and conditions of an approved permit. N.J.A.C. 7:7A-14.3(c)3i(1) and (2) ensure that only a valid, non-emergency permit is transferred, since the terms and conditions of an emergency permit are of limited duration and may be approved with a minimum of written documentation between the Department and the applicant of the duration and scope of the emergency work. Final permit approval is not received until the activity is completed and all documentation has been provided as part of an application for the project “as built.” Consequently, an emergency permit does not run with the land.

N.J.A.C. 7:7A-14.3(c)3i(3) limits the transfer of a permit to a person who currently owns the site or who is under contract to purchase the site, which is the subject of the approval. N.J.A.C. 7:7A-14.3(c)3i(4) allows the transfer so long as it will not alter a basic condition upon which the original approval was granted or otherwise circumvent a requirement of the rules. For example, if after receiving an individual permit based upon a finding of "no alternatives" the property is transferred to a neighboring owner for whom alternatives exist, the basic condition upon which the permit was approved will have been altered and the permitting requirements circumvented. At N.J.A.C.7:7A-14.3(c)3i(5), the permittee is required to notify the Department in accordance with the requirements for a minor modification before the new owner or operator conducts regulated activities and N.J.A.C. 7:7A-14.3(c)3i(6) requires the original permittee, who wants to transfer the property, to provide proof that he or she has recorded a conservation restriction or easement if one was required as a condition of the permit to be transferred. The requirement to provide proof of filing of any conservation restriction or easement that was a requirement of the approved permit or waiver to be transferred is necessary to inform the prospective owner about any limitations that may have been imposed on the property by the Department under a conservation restriction or easement and is in part a response to a poor compliance rate with this requirement, the environmental harm the Department has observed, the impact to unknowing future property owners, the difficulty in enforcing this condition after the property has been transferred, and the harm to innocent purchasers who are not informed of jurisdictional or other limitations on their property at the time of purchase.

Subchapter 15 Mitigation

361. COMMENT: We understand the importance of wetlands with regard to the ecological function that they fulfill. To that end, minimization of disturbances to wetlands should be a goal of not only the NJDEP, but also the regulated community. However, there are instances where wetland disturbance is necessary for the public good, or allow for a landowner to utilize/develop his/her property. The majority of these limited disturbances have been historically authorized through the use of general permits.

Extensive disturbances have generally required authorization through the use of an individual wetland permit, which required compensatory mitigation.

The proposed amendments that would require compensatory mitigation for general permits 2, 6, 6A, 10A, 10B, 11, 18, 21, 23, and 27 provide for concern. A blanket concern is that the NJDEP, through evidence of its own studies, has not been overly successful in overseeing past mitigations through to a successful completion. A large part of this limited success is due to the recognized difficulty in creating functional wetlands. Therefore, it is unclear how NJDEP will be able to effectively provide oversight for the increased amount of potential mitigation sites resulting from the proposed amendments. (36)

RESPONSE: As stated in response to comment 186, the Department conducted a study in 2002 on the success of its mitigation program. The study showed that mitigation was generally unsuccessful, mainly because the applicants were not monitored closely enough to ensure that mitigation was attempted. The study found that created wetlands were unsuccessful for three reasons: the lack of understanding of the hydrology within the site, resulting in sites that are too wet (pond) or too dry (upland) and which therefore did not achieve the targeted plant community; lack of understanding of the site constraints; and poor implementation of the mitigation plan during construction. Since that time, the Department has made many changes to its mitigation program. It provides increased oversight of the design and construction of mitigation projects to achieve successfully constructed mitigation sites rather than trying to fix sites that were not fully successful. Permittees are now required, at a minimum, to hold pre-construction, post-grading and pre-planting meetings on-site. Department staff provide more oversight of all aspects of mitigation project development as well as during the establishment and monitoring periods. In addition, the financial assurance and conservation restrictions for mitigation projects are closely monitored and the Department is providing increased enforcement oversight for all aspects of mitigation. As a result, the Department believes its mitigation program is significantly more successful than it was in 2002.

For impacts meeting the “small disturbance” criteria, most applicants opt to make a monetary contribution if no mitigation bank is available. Contributions may then be

combined to fund one large mitigation project, to be reviewed by the Department and the Wetlands Mitigation Council, and to ultimately be approved by the Council. The Council has approved projects that involve creation, restoration, enhancement and preservation of wetlands. Although creation is an option that is available to applicants, the Department's mitigation study demonstrated that, in general, enhancement and restoration are more successful types of mitigation than creation. Both the Council and the Department recognize the difficulty of creation projects and require more documentation for creation projects than for other types of mitigation, to ensure that the project will be successful,.

Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and is instead proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

362. COMMENT: We recommend that the NJDEP consider those categories of development that could be deleteriously impacted by the requirement for mitigation. Consideration should be given to affordable housing projects. We have worked on affordable housing projects which would not have been able to be constructed if the additional cost of mitigation was added to the overall cost of the project.
(36)

RESPONSE: The Department does not believe that construction of affordable housing should be inhibited because of mitigation requirements under the wetlands permitting program. Townships use a variety of mechanisms to satisfy their affordable housing requirements. Frequently, affordable housing is one small component of a larger, market rate housing project. Consequently, it remains important that such projects consider and be designed to accommodate the environmental constraints on a property, including wetlands and wetlands transition areas. The Department prefers that the costs of mitigation be entirely avoided or else minimized, by avoiding and minimizing impacts to wetlands. Further, the smaller the wetland impacts, the lower the potential costs for mitigation. However, in those cases where impacts cannot be avoided, it is important that

they be mitigated to compensate for the loss of benefits that wetlands provide, such as ground and surface water purification, floodwater retention, and wildlife habitat.

363. COMMENT: The DEP plans to dramatically increase the amount of wetland mitigation. Based upon DEP data, I estimate the new rules will generate between $40 million and $60 million dollars worth of compensatory mitigation every year. Much of this total will come from development in the smart growth areas. However DEP has crafted technical rules that guarantee that all of this investment will be diverted from smart growth areas to developers who will build mitigation banks in the rural parts of the state. This is in direct contravention of Executive Order 38 that directs DEP to use mitigation fees to expedite restoration of environmentally impacted properties. Furthermore, as implemented it is also likely the mitigation provisions will have a disproportionate impact on low-income populations. Overly restrictive technical provisions redirect the mitigation benefit to more affluent areas, while smart growth rules encourage increased environmental impacts to low-income areas. As noted before, nonpoint source pollution is the predominant problem in 98 percent of the state's most polluted waterways. Furthermore, stormwater runoff from existing urban development is the primary nonpoint source in the developed parts of the state. Not only does stormwater runoff contain lots of pollutants, during storm events, the runoff causes flooding that over time has damaged many, many streams in the state. Therefore it is important to not only improve the chemical stability of the urban ecosystems systems. It is also important to restore the physical stability as well. Only after these ecosystem functions are restored can effective habitat function be reintroduced.

However, the proposed rules are biased towards creating wetlands that only have habitat functions and have ignored wetland functions that improve water quality in the streams, and reduce flooding. The DEP is proposing rules that prevent applicants from building mitigation in or adjacent to polluted streams and specifically prohibit applicants from using untreated stormwater runoff from already developed surfaces in any mitigation site. They steer applicants away from stream buffers and away from floodplains, toward sites that will use only pristine groundwater to support wetland plants rooted only in pristine soil. Therefore, the DEP is advocating that applicants only build

poorly functioning wetlands and never purify surface water, never purify groundwater, never improve physical stability of streams, never reduce storm damage, never reduce flooding and never provide spawning habitat for fish. It seems scientifically inconsistent that DEP would propose rules for created wetlands that discount functions to improve water quality and reduce flood damages whether these were the primary functions that formed the justification for protecting natural wetlands in the first place. The rules especially discourage stream restoration projects by only allowing mitigation on land acquired in fee simple. Most damaged urban streams flow through the backyards of thousands of small private property owners. To effectively restore a stream, the governmental unit or non-profit would have to buy many parcels of land. On the other hand it is conceivable that many homeowners would allow non-profit like Ducks Unlimited to sponsor a stream restoration project on their property as long as it was done without damaging or taking their land. (64)

RESPONSE: It is unclear how the commenter arrived at the estimation of potential contributions to the wetland mitigation bank since that depends upon the approved acreage of wetlands affected by permitting, and the option chosen by the applicant to satisfy the mitigation requirement.

EO 38, issued in 2002, is entitled, "Actions by and Coordination among State Agencies to Ensure Smart Growth." EO 38 Directive 10 requires the Department to develop and implement a program using mitigation fees, accounts and other market approaches to expedite the restoration of environmentally impacted properties, facilitate regulatory review, reduce uncertainty and promote cost-effective and environmentally sound approaches to smart growth. The Department implements this directive through the rules governing wetland mitigation at N.J.A.C. 7:7A-15. This subchapter of the rules deals directly with establishment of monetary contributions for mitigation, and mitigation banking, which is the Department's mechanism to provide certainty and to ensure the restoration of environmentally impacted properties. Consequently, the Department's rules are consistent with EO 38.

Monetary contributions received by the Wetland Mitigation Council are recorded by the watershed management area of disturbance. However the use of the contribution

towards a particular project may or may not be within the same watershed management area. The Council prefers to use contributions within the area of disturbance, but the use of the fund is dependent on the projects presented to the Council. Other then monetary contributions, the Department will not permit impacts to one area of the state to be mitigated for in another. The Department's mitigation hierarchy prioritizes mitigation as follows. The first priority is onsite restoration, creation or enhancement. If this is not feasible, the second priority is offsite restoration, creation or enhancement *in the same HUC 11* as the disturbance or in an adjacent HUC 11 within *the same watershed*. Only after these options are exhausted does the Department allow purchase of credits from a mitigation bank *which includes the disturbance site in its service area*, and if that option is not available, restoration, creation or enhancement in the same drainage basin. Finally, after all of these options are exhausted, contributions may be made. Consequently, all of these provisions seek to ensure that mitigation will be performed as close to the site of impact as feasible so there is no bias against any income group in the performance of mitigation.

These provisions also include enhancement among the Department's top priorities. "Enhancement" is defined at N.J.A.C. 7:7A-15.1 as "the improvement of the ability of an existing, degraded wetland or State open water to support natural aquatic life, through substantial alterations to the soils, vegetation and hydrology." However, the applicant should note that the main goal of the Department's mitigation requirements is to replace wetlands with like wetlands. That is, if a forested wetland is destroyed, the Department will not accept the creation of State open waters or emergent wetlands. However, it may accept an enhancement proposal that includes forested wetlands. There is no prohibition against performing mitigation in flood hazard areas if the proposed mitigation is appropriate in light of the wetlands that were destroyed and is in compliance with the Flood Hazard Area Regulations (N.J.A.C. 7:13). When the Department requires mitigation, the purpose is to provide a functioning system—not to provide a mechanism to clean stormwater from an adjacent site (also known as a stormwater detention system), as an alternative wastewater system (also known as an alternative septic system), or to cleanse contamination (also known as a remediation system). While all of these are legitimate uses for constructed wetlands under other programs, under this Chapter the

Department is seeking to replace the lost values and functions of natural wetlands with an equivalent wetland providing equivalent values and functions.

The Department's rules do not limit mitigation to lands owned in fee simple. The rules at N.J.A.C. 7:7A-15.4(e) state that the Department shall approve mitigation through creation, restoration, or enhancement only on property that is owned in fee simple and under the full legal control of the person responsible for performing the mitigation, "or the person responsible for performing the mitigation shall demonstrate that the person has legal rights to the property sufficient to enable compliance with all requirements of his chapter."

Finally, the Wetlands Mitigation Council has provided funding for stream corridor restoration projects. Further, stream restoration projects that would benefit water quality and wildlife habitat are encouraged under general permit 16 for habitat creation and enhancement activities.

364. COMMENT: The Department proposes new calculations for determining the amount of monetary contribution at N.J.A.C. 7:7A-15.21(d). The compensation amount would be determined by the acreage of wetlands/State open water impacts multiplied by $38,000.00 for single family homes, which is used for Individual Permit impacts. Filling for all other development would be determined by the acreage of wetlands/State open water impacts multiplied by $300,000.00. The proposal indicates that the $300,000.00 monetary contribution needed to mitigate for impacts to one acre of wetlands is based "upon an evaluation and assessment of the analyses submitted to the Department and the Mitigation Council for previous monetary contributions" which includes various costs, including land appraisal, site preparation and construction, plant purchase and planting.

These mitigation requirements would be so onerous that applicants would not have an incentive to apply for a general permit. Instead, applicants would prefer to apply for an Individual Permit. This result would be in contrast to the general policy favoring issuance of general permits to individual permits. (4, 27, 29)

RESPONSE: As explained in response to comments 180 through 183, the Department does not anticipate that , rather than minimize impacts under general permits, applicants

will instead seek additional wetland impacts under an individual permit because such applications are more costly, require more documentation and analysis, and are more likely to be denied than general permit applications. Further, if an applicant cannot justify placing an activity in a wetland under a general permit, it is difficult to envision that the applicant would be better able to justify impacts under an individual permit, since the presumption that there is an alternative non-wetland location, either off or onsite, more suitable for the conduct of a non-water dependent activity must be rebutted.

Applicants conducting mitigation for individual permits who cannot perform mitigation onsite are required to first seek to purchase credits from a local mitigation bank. The Department's assessment of credits statewide indicates that they average $300,000 per acre. Those applicants who obtain an individual permit, but for whom there is no available mitigation bank, are required to determine their monetary contribution by calculating the cost to purchase and restore existing degraded freshwater wetlands versus the cost to purchase property and create freshwater wetlands of equal ecological value to those which are being lost. The cost estimate must include all costs necessary to complete the proposed mitigation and monitoring and at a minimum: engineering costs, including surveying of land; soil erosion and sediment control plan; grading plan; soil removal plan; wetland planting plan; calculation of a water budget; environmental consultant fees, including preparation of a seeding/planting and restoration plan; interface with engineering plans and personnel; permit processing costs; the cost of obtaining a No Further Action letter from the DEP; attorney fees, including fees for the preparation of a conservation restriction; costs of financial assurance; site preparation and construction costs; vegetation planting costs; costs of supervising construction; and the cost of a monitoring program and monitoring reports for five years, including report preparation and data collection. Because of these additional requirements, it will not be cost-effective to seek individual permits when general permits are available and would suffice.

Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

365. COMMENT: DEP plans to dramatically increase the amount of wetland mitigation required for permitted projects. Based upon DEP data, more than 100 acres of wetlands are legally filled every year through the general permitting program. The proposed rules would require a contribution of up to $300,000 per acre for wetland mitigation. It is possible then that the DEP would force applicants to generate between $10 million and $20 million dollars worth of compensatory mitigation every year. The proposals discourage small-onsite mitigation projects and encourage contributions to off-site mitigation for which the DEP will give itself complete autonomy to control.

There seems to be a potential conflict of interest by proposing a program to dramatically increase the level of cash contributions required for wetland permits while at the same time eliminating the oversight role of the independent Wetland Mitigation Council. Why didn't the proposal include discussion on how the DEP proposes to deal with the apparent conflict created by eliminating oversight on how the money is spent? (41, 64)

RESPONSE: It is unclear how the commenter arrived at the estimation of potential contributions to the wetland mitigation bank since that depends upon the approved acreage of wetlands affected by permitting, and the option chosen by the applicant to satisfy the mitigation requirement.

The Department has deleted the review of proposed mitigation bank proposals from the list of Council duties and functions, because, as explained in the proposal summary, it is the Department's responsibility to ensure that such banks succeed. However, in accordance with the FWPA, the Mitigation Council is the only entity that can approve monetary contributions to the Mitigation fund and that can disburse that money to undertake mitigation projects. Further, the FWPA establishes the uses to which the Council can apply mitigation contributions. Consequently, the Department has not eliminated the Council’s oversight in determining how mitigation contributions are spent.

366. COMMENT: The DEP Division of Watershed Management has determined that nonpoint source pollution is the predominant problem in 98 percent of the state's most polluted waterways. Within the urban zone, stormwater runoff from existing development

is the primary nonpoint source polluting the streams and lakes. Loss of wetlands and reductions in stream buffers in these older areas are frequently cited as the cause of developed stream pollution. What steps has the Division of Land Use Regulation taken to coordinate the mitigation proposals with the Division of Watershed Management prior to publishing the proposals? As written the proposals do not encourage restoration of urban wetlands or urban riparian buffer restoration. (64)

367. COMMENT: The DEP has invested heavily in protecting streams and wetlands by creating transition and buffer areas but have done little if anything to craft rules that encourage restoration of degraded urban streams. One incising stream can discharge many times the sediment removed by adjacent riparian buffers. Please explain why the proposed wetland mitigation rules do not identify ways to help restore incising streams? (41, 64)

RESPONSE TO COMMENTS 366 AND 367: As stated in response to comment 364, the Department includes enhancement, which would include replacement of stream corridor wetland buffers, among its top mitigation priorities. However, the main goal of the mitigation requirements is to replace wetlands with like wetlands as close to the area of wetland loss as possible. That is, if a forested wetland is destroyed, the Department will not accept the creation of State open waters or emergent wetlands. However, it may accept an enhancement proposal that includes replacing forested wetlands in a stream corridor within the same HUC 11 as the wetlands that were lost to development. As a result, the wetlands mitigation program and the stormwater managerment programs are already complementary. Further, it is not the purpose of the freshwater wetland rules to encourage or discourage any type of restoration or to address incising streams because the type and location of proposed restoration project is not dictated by the Department but by the type and location of wetlands lost as a result of approved development projects.

368. COMMENT: Why did the DEP not address Executive Order 38 that requires it to use mitigation fees to expedite restoration of environmentally impacted properties? (41, 64)

RESPONSE: The Department does not charge mitigation fees. Consequently, there is no money, separate from the wetland mitigation contributions, to perform restoration or any other type of mitigation. As explained in response to comments 365, 368 and 369, wetland mitigation contributions are used to replace wetlands with like wetlands as close to the area of wetland loss as possible.

369. COMMENT: DEP should consider redrafting the provisions to give developers incentives to maximize wetland function of mitigation sites. As the rules are written, the site type that is most predictable to develop and most likely to get fast approval would be a clean, rural, farm site that has been excavated to use clean groundwater as the sole hydrology source. Therefore, the DEP is indirectly encouraging mitigation sprawl in undeveloped areas that use only pristine groundwater to support wetland plants rooted only in pristine soil constructed outside of stream buffers. This type of site only supports a few wetland functions and will not include wetland functions that purify surface water, purify groundwater, improve physical stability of streams, reduce storm damage, reduce flooding and provide spawning habitat for fish. (41, 64)

RESPONSE: The Department's hierarchy of mitigation determines where a permittee can provide mitigation for wetland impacts. Mitigated wetlands are required to provide, at a minimum, equal ecological functions and values to impacted wetlands. Consequently, no incentives to maximize wetland function are necessary since this is a standard requirement for all applicants performing mitigation.

The site most likely to be approved for a mitigation project is a site within the same HUC 11 as the area of impact that has a potential source of hydrology available. This is not likely a farm field unless the field was previously drained and has the potential to have its hydrology restored. Finally, as further explained in response to comment 364, when the Department requires mitigation under these rules, the purpose is to provide a functioning ecological system—not to provide a mechanism to clean stormwater from an adjacent site (i.e., a stormwater detention system), as an alternative wastewater system (i.e., an alternative septic system), or to cleanse contamination (i.e, a remediation

system). A wetland mitigation project that is successful will purify surface and groundwater, may improve physical stability of streams, will reduce storm damage and impacts due to flooding, and may provide habitat for fish and other wetland-dependent animal species.

370. COMMENT: The mitigation proposals clearly discourage mitigation in the regions of the state that contain contaminated property and degraded streams. However, these areas coincidentally are most likely to contain low-income populations. Please explain why the proposed rules do not include provisions to reduce the possible disproportionate impact on low-income populations? Please address the regulatory bias that favors habitat restoration over other wetland functions since this bias also discourages mitigation in low-income parts of the state. (41, 64)

RESPONSE: The mitigation requirements are not intended to discourage mitigation in regions where there is contaminated property and degraded streams. The rules do not allow mitigation on a contaminated site until all areas of contamination are identified and remediation has been completed in order to reduce the potential to reintroduce contamination to the environment or to expose humans to contamination. The Department requires all permittees to complete a thorough site search to document that there is no potential to complete a restoration, creation or enhancement project in the same HUC 11, an adjacent HUC 11 or anywhere within the same watershed management area before allowing a monetary contribution to the Wetland Mitigation Council. Consequently, the site most likely to be approved for a mitigation project is a site that has a potential source of hydrology available within the same HUC 11 as the area of impact.

371. COMMENT: Overall the DEP mitigation program is inconsistent with the federal program and out of step with the needs of this state. (64)

RESPONSE: As explained in the Federal Standards Analysis, the Department's mitigation rules are consistent with Federal mitigation standards adopted by EPA, and the adopted changes bring the Department's rules into closer harmony with the Federal

standards by ensuring that the mitigation option hierarchy remains consistent with the equivalent Federal standards. Further, the Department's mitigation rules are not out of step with the needs of the State since the rules do not stand alone. The mitigation rules only become effective upon approval of a wetland permit with associated impacts. The mitigation requirements then seek to replace the affected wetland with an equivalent wetland in the vicinity of the impact. The Department believes this is entirely consistent with the needs of the State to protect its water resources, with the FWPA, with the Department's goals to protect water resources, and with the State's "smart growth" principles, which discourage development in areas without infrastructure and redirect it to urban areas, town centers and other areas where new environmental impacts should be minimal.

Please note, that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation condition for general permits as proposed and is instead proposing a different standard, similar to that in the ACOE program, elsewhere in this Register.

372. COMMENT: We are glad that the Department is requiring mitigation for general permits but mitigation for the most part does not work. The Department has studies showing mitigation banks failing. How is the Department going to make sure that mitigation is going to actually work and that the compensation to the public for the loss of public resource is actually going to match the destruction? Is fair market value based on raw land or improved planned land, meaning an acre of open space might be worth this much or is a building lot $300,000? That quarter of an acre might be worth $50 or $60,000. One way to make sure that mitigation works is to not give a permit in the first place. (80)

RESPONSE: As explained in response to comment 361, the Department acknowledges that the study conducted in 2002 showed that mitigation was generally unsuccessful, mainly because the applicants were not monitored closely enough to ensure that mitigation was attempted. The study found that created wetlands were unsuccessful for three reasons: the lack of understanding of the hydrology within the site resulting in sites

that are too wet (pond) or too dry (upland) and which therefore did not achieve the targeted plant community; lack of understanding of the site constraints; and, poor implementation of the mitigation plan during construction. Since that time, the Department has made many changes to its mitigation program, including increased oversight and monitoring of projects. As a result, the Department believes its mitigation program is significantly more successful than it was in 2002.

As explained in the summary, the method for determining that it costs $300,000 is based upon an evaluation and assessment of the analyses submitted to the Department and the Mitigation Council for previous monetary contributions. Each monetary contribution proposal includes an evaluation of the following costs for restoring existing, degraded wetlands at a 3:1 ratio (wetlands to be restored to wetlands lost) and for creating wetlands at a 2:1 ratio (wetlands to be created to wetlands lost): land appraisal, purchase price, engineering, environmental consulting fees, obtaining a no further action letter, attorney fees, site preparation and construction, plant purchase and planting, construction supervision, and the cost of monitoring the site. Based upon this assessment, the Department has determined that it costs approximately $300,000 on average to mitigate for impacts to one acre of wetlands.

Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

373. COMMENT: We have tracked the shrinking freshwater wetland acreage since 1991 through NJDEP annual reports to the U.S. Environmental Protection Agency. We find the steady decrease of acreage, primarily through issuance of general permits, to be of grave concern. The Summary of the proposal in the NJ Register acknowledges this loss, stating that 78 percent of the wetland acreage lost per year is due to issuance of general permits (GPs).

The rule proposal attempts to address such loss by requiring mitigation for a number of the GPs. Unfortunately, it is not clear that mitigation projects are more successful now than they were in 2002 when NJDEP published a report on mitigation

based on research conducted by Amy S. Greene Environmental Consultants, Inc. The findings of that research showed that for each acre of wetland impact that required mitigation, only 0.78 acres of wetlands were actually constructed. On average, only 48% of the study sites concurred with their design specifications. Field indicators of relative wetland quality found an average score of 0.51 out of an index of 1, demonstrating that about one-half of the criteria were met, to indicate sites have the potential to function as natural wetlands system over time.

We recommend that instead of allowing continued loss of wetlands through general permits that allow infrastructure expansion, it is more logical for the Division of Land Use Regulation, and other Land Use Regulatory Programs, to inhibit infrastructure expansion, instead promoting growth where infrastructure already exists. This policy is part of the Water Quality Management Plan proposal and makes eminent good sense as the state tries to promote smart and more economic growth. In the wetlands program, for example, GPs for infrastructure expansion should be structured to discourage their use in the Highlands and other environmentally sensitive areas. (20, 85)

RESPONSE: With the exception of the Highlands Region and Pinelands Protection Area, the Department's wetland regulatory program is not currently structured to provide different permitting standards based upon planning areas within the State.

Currently, the Highlands Act prohibits in the Preservation Area all but linear development in Highlands open waters, which include wetlands, and the 300-foot buffer. Linear development includes utility lines. However, the statute limits the placement of linear development in these areas to cases for which there is "no feasible alternative." Consequently, applicants cannot obtain general permits but instead must obtain the equivalent of an individual permit to locate utilities in Highlands open waters and buffers.

Finally, as explained in response to comment 372, the Department has made many changes to its mitigation program since the report in 2002, and believes its mitigation program is significantly more successful than it was.

Please note that Department reports show the loss of approximately 100 acres of wetlands per year under the FWPA permitting program, and that over the past 20 years, 78 percent of the wetland impacts have occurred under general permit approvals. Please

also note that the Department is not adopting the mitigation condition for general permits as proposed and is instead proposing a different standard, similar to that in the ACOE program, elsewhere in this Register, for the reasons described in response to comments 180 through 183.

374. COMMENT: The definition of "restoration' should be revised to be consistent with the definition of restoration provided in the Corps' Regulatory Guidance Letter 02-2, December 24, 2002. (63)

RESPONSE: The Army Corps of Engineers Regulatory Guidance Letter defines restoration as: “The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural or historic functions to a former or degraded wetland. For the purpose of tracking net gains in wetland acres, restoration is divided into: a.) Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural or historic functions to a former wetland. Re-establishment results in rebuilding a former wetland and results in a gain in wetland acres. b.) Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural or historic functions of a degraded wetland. Rehabilitation results in a gain in wetland function but does not result in a gain in wetland acres.”

The Department’s definition of “restoration” is analogous to the “re-establishment” provision of the Federal definition. The Department permits “restoration” at a 2:1 ratio (two acres of wetlands restored for each acre disturbed). However, the Federal definition of “rehabilitation” is analogous to the Department’s definition of enhancement. In general, because enhancement does not result in a gain in wetland acres, the Department requires greater than 2:1 mitigation or an amount necessary to ensure that the mitigation area results in wetlands of equal functions and values to those lost. Consequently, the Department does not agree that it should adopt the Federal definition of restoration because it is too broad, and the State program already addresses each of the provisions within the definition separately as part of its own mitigation rules.

375. COMMENT: The Department proposes to add transition areas to the list of resources for which mitigation may be required. We suggest that the Department add clarification in the sequencing of mitigation options for transition area impacts that, where possible, mitigation for transition area impacts may be conducted through provision of transition area compensation between 50 and 75 feet from intermediate resource value wetlands and between 150 and 225 feet from exceptional resource value wetlands. Also the ratio for transition area mitigation using wetland mitigation should be clarified and should be for example at a 1:1 ratio of transition area impact to wetland creation. (31)

RESPONSE: As stated in previous responses, the Department is requiring mitigation for transition areas approved only in accordance with the transition area waiver based upon individual permit criteria at N.J.A.C. 7:7A-6.3(g). Although the commenter's suggested changes are consistent with the transition area averaging plan requirements, the Department does not agree that it is necessary or desirable to establish limitations on the location of the transition area mitigation. For example, the Department has required 300-foot transition areas adjacent to swamp pink populations under certain circumstances. Consequently, while the majority of onsite mitigation will be as close to the wetland as possible, there may be cases where a wider transition area is beneficial or may be required for mitigation.

It is important to note that the Department is requiring transition areas as mitigation for transition areas. It is not requiring wetland mitigation to replace lost transition areas. The Department has modified N.J.A.C. 7:7A-15.26 on adoption to make clear that it is requiring transition area mitigation for transition area impacts.

The Department will require 2:1 mitigation for all transition area impacts (that is, two acres of transition area restored or enhanced for each one acre of transition area affected) under N.J.A.C. 7:7A-6.3(g) unless the applicant can demonstrate that less mitigation is sufficient to provide protection to the adjacent wetland. An applicant can demonstrate that less mitigation is sufficient to comply with this provision if the applicant

can provide a justification, through valid site-specific data, scientific literature and/or productivity models, that a smaller mitigation area will result in a transition area sufficient to compensate for the loss of functions and values associated with the regulated activity. However, mitigation shall never be performed at less than a 1:1 ratio.

376. COMMENT: Hydrology for wetland mitigation sites can no longer be provided by stormwater runoff. One of the most successful mitigation sites I ever worked on was successful because a detention basin discharged runoff to it. Had it not been for that fact, the site would have failed. (32)

377. COMMENT: We ask the NJDEP to reconsider the proposed amendment to N.J.A.C. 7:7A-15.2(d)3 that would preclude the use of discharged stormwater to create the hydrology of a wetland mitigation area. Discharge of stormwater to a mitigation area may improve the probability of success of the mitigation area while providing for a beneficial use of stormwater. (35)

378. COMMENT: The way N.J.A.C. 7:7A-15.2(d)3 is written appears to preclude the use of discharged stormwater for wetland mitigation sites in all situations. We feel that, on a case by case basis, stormwater that is treated in accordance with NJDEP Best Management Practices should be allowed to be used for wetland hydrology. It is also suggested that the definition of “discharged stormwater” be clarified. For example, would stormwater that is discharged at some distance from a wetland mitigation site and allowed to flow overland be acceptable? (30)

379. COMMENT: The Department proposes to preclude the use of discharged stormwater to create the hydrology of a wetland mitigation area. We believe that this proposal needs clarification. In certain circumstances, it may be appropriate or ecologically beneficial to discharge treated stormwater into a wetland mitigation project or site, as opposed to discharge into natural wetlands or State Open Waters. There are also certain types of stormwater runoff, such as runoff discharging from a BMP that is pre-treated and may be perfectly suitable for discharge to a mitigation site. New Jersey is also a highly developed state and stormwater discharges may pre-exist the development

of a site for mitigation. Pre-existing stormwater discharges may not be able to be rerouted and their discharge to a constructed wetland will only serve to benefit water quality. We agree that it is not appropriate to utilize treated stormwater as the sole hydrologic source for a proposed wetland mitigation project. (31)

RESPONSE TO COMMENTS 376 THROUGH 379: In working with applicants to design successful mitigation projects, the Department has not allowed discharges of stormwater to provide the hydrology to wetland mitigation sites since the freshwater wetlands program's inception. The provision at N.J.A.C. 7:7A-15.2(d)3 makes that requirement prominent in the rules. Further, the Department's mitigation study (see response to comment 187) found that the contribution of stormwater negatively affects the success of mitigation projects. There are four reasons that stormwater discharges should not be used as the source of hydrology for a wetland mitigation site: they may contain contaminants accumulated from the sites which they serve; they may contain seeds or rhizome fragments of invasive species that would be introduced into the mitigation project; they may still contain some level of suspended sediments that would contribute to sedimentation adversely affecting the mitigation project, or may experience large sediment inputs when rapid storm events cause stormwater to discharge over the spillway without receiving any type of pre-treatment; and, most importantly for long-term success of a mitigation project, they may not be reliable sources of hydrology. Therefore, because stormwater treated in accordance with BMPs is not treated for the parameters that can potentially adversely affect a mitigation project it is not an appropriate hydrology source for a wetland mitigation site.

Regarding whether stormwater that is discharged at some distance from a wetland mitigation site and allowed to flow overland is acceptable, as for any creation project, the applicant will have to demonstrate through the development of a highly detailed water budget analysis that the proposed source of water is a reliable and viable source of water that is free from contaminants, invasive species and sediments.

380. COMMENT: The Department should clarify what the term "hydrology" is intended to mean in the context of mitigation. It seems it is intended to mean the hydrology that

the mitigation project would be dependent on. If that is the case, then excluding discharged stormwater, which is not available during dry periods, makes good sense. (20, 85)

RESPONSE: The commenter is correct that the term hydrology means the source, distribution and circulation of water sustaining the mitigation site. However, as stated in response to comments 376 through 379, the unreliability of stormwater is only one of several reasons that stormwater cannot be used as the source of hydrology for wetland mitigation sites. The other reasons are that stormwater discharges: may contain contaminants accumulated from the sites which they serve; may contain seeds or rhizome fragments of invasive species that would be introduced into the mitigation project; and may still contain some level of suspended sediments that would contribute to sedimentation adversely affecting the mitigation project, or may experience large sediment inputs when rapid storm events cause stormwater to discharge over the spillway without receiving any type of pre-treatment.

381. COMMENT: N.J.A.C. 7:7A-15.2(n) provides that one site may receive mitigation that involves wetland disturbances resulting from the same project but that spans several Watershed Management Areas. We strongly oppose this provision. Mitigation should take place in the same watershed as the disturbance, otherwise water resources and quality will be damaged. (20, 85)

382. COMMENT: Proposed N.J.A.C. 7:7A-15.2(n) states that "upon approval of the Department a permittee may aggregate onto one site the mitigation for multiple small (less than 0.5 acre in size) wetland disturbances resulting from the same project but that span several Watershed Management Areas." It is assumed that this applies to linear road or rail projects in particular. We feel that it will be important to clarify what is meant by "the same project" and that this can be included in the existing definition of "project" at N.J.A.C. 7:7A- 1.4. It will also be important to further identify within which watershed the aggregate mitigation site should be constructed. Is it the intent of the Department to allow the aggregate site to be constructed in any one of the WMA's

affected or within the WMA that is subject to the largest of the "small" wetland disturbances? (31)

RESPONSE TO COMMENTS 381 AND 382: The Department agrees that mitigation should take place in the same watershed under the vast majority of circumstances. However, when linear projects traverse more than one watershed and have several small impacts in each, it becomes more complicated and less ecologically beneficial to require several, small mitigation projects in multiple watersheds. Consequently, in these limited cases, the Department will allow the applicant to identify one project to satisfy the entire mitigation requirement in one of the watersheds that was affected by the project. The Department will require that the mitigation be located in the watershed management area with the greatest impact, when feasible.

383. COMMENT: We suggest that, on a case by case basis, a similar allowance be made for the aggregation of multiple small (less than 0.5 acre) mitigation areas onto one site for multiple projects spanning several Watershed Management Areas. This would allow for the creation of a larger wetland mitigation site that would be more successful ecologically and would be more cost effective. The mitigation site would be created in one of the Watershed Management Areas where the impacts occur. (30)

RESPONSE: The hierarchy for mitigation is most appropriate and necessary for the majority of projects since it ensures that wetlands are replaced in the same watershed where they are lost. However, the provisions for small disturbances at N.J.A.C. 7:7A-15.5 permit an applicant to mitigate offsite in the same HUC 11, in an adjacent HUC 11 or to purchase credits in an existing mitigation bank serving the appropriate watershed area. Consequently, the rules allow a single permittee to consolidate small, individual mitigation projects within the same watershed management area. In addition, the Department will work with an applicant to establish one or more strategically located consolidated mitigation projects to accommodate multiple, anticipated impacts. Unlike a mitigation bank, a permittee proposing a consolidated mitigation project may not sell credits to other permittees.

Another option would be the establishment of a mitigation bank. A mitigation bank would allow multiple permittees within the bank service area to satisfy mitigation requirements at that bank through the sale of credits. For example, a large utility company or department of transportation may anticipate several projects in a given area or may establish a mitigation bank to satisfy their mitigation requirements as well as to sell credits to others in the same area.

N.J.A.C. 7:7A-15.3 Timing of mitigation

384. COMMENT: The Department proposes to require that a mitigation proposal is approved prior to commencing the permitted activity. We support this amendment, however, in certain instances, the benefits of the proposed project that requires mitigation may outweigh the need to perform the mitigation prior to or concurrent with the wetland disturbance. Specifically, this may apply to general permits 4 and 5 for the hazardous site cleanup and landfill closures, respectively. These contaminated sites are often located within New Jersey's industrialized watersheds and suitable wetland mitigation sites may be difficult, if not impossible, to locate. Wetland enhancement adjacent to the cleanup or closure site may not be feasible due additional potential contamination issues. We feel that in certain instances, assuming that financial surety such as a bond or letter of credit required to provide for mitigation is supplied, that the cleanup or closure should be allowed to proceed prior to the performance of mitigation. (31)

RESPONSE: N.J.A.C. 7:7A-15.3(a)1 states that mitigation for a disturbance authorized by a permit, other than a temporary disturbance, shall be performed prior to, or concurrently with, the permitted activity "except that no regulated activities shall occur before the Department has approved a mitigation proposal, and shall be continued to completion according to the schedule in the approved mitigation proposal." When an applicant provides the Department with a mitigation proposal in advance of conducting regulated activities, the proposal will contain a schedule reflecting the specific circumstances relating to that property and project. Consequently, in those cases where a clean up must occur in advance of mitigation activities, that should be outlined in the

proposal and reflected in the mitigation schedule. Except in the case of temporary impacts, the Department believes it is important to have mitigation performed prior to or concurrently with the permitted activity because this is a stronger mechanism than a financial surety to ensure that mitigation is performed. Financial assurances ensure that a mitigation project is implemented, maintained and monitored as per the permit conditions.

385. COMMENT: Proposed N.J.A.C. 7:7A-15.3(a)1 provides that no regulated activities shall occur before the Department has approved a mitigation proposal. We strongly support this provision. (20, 85)

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

386. COMMENT: Proposed N.J.A.C. 7:7A-15.3(a) requires that the mitigation proposal must first be approved before DEP will issue the GP authorization for regulated activities. The basis for this amendment is not provided but simply indicates the need for consistency with the time periods for mitigation provided at N.J.A.C. 7:7A-15.11(a). The Department should re-propose and explain the necessity of prohibiting any regulated activities until the mitigation proposal is approved. (4, 27, 29)

387. COMMENT: Proposed N.J.A.C. 7:7A-15.3(a)1 requires that the mitigation proposal must first be approved before NJDEP will issue a general permit authorization for regulated activities. By requiring approval of the mitigation proposal first, NJDEP is further slowing the development process. NJDEP should provide a reasonable timeframe for the approval of mitigation proposals if they must be approved before a general permit is granted. (74)

RESPONSE TO COMMENTS 386 AND 387: N.J.A.C. 7:7A-15.3(a)1 does not require that a mitigation proposal first be approved before the Department will issue a general permit authorization for regulated activities. Rather, as stated in the summary, the additional provision at N.J.A.C. 7:7A-15.3(a)1 states that, “no regulated activities shall

occur before the Department has approved a mitigation proposal, and shall be continued to completion according to the schedule in the approved mitigation proposal." This provision is consistent with the basic requirements for all mitigation proposals at N.J.A.C. 7:7A-15.11 which requires that regulated activities not begin until the mitigation proposal is approved. The Department has the best opportunity to ensure that mitigation is performed when a mitigation proposal and the start of construction of the mitigation site are required before the applicant begins to conduct regulated activities in accordance with a permit. As stated in response to previous comments, a 2002 Department-funded study revealed that the Department's mitigation projects were generally unsuccessful, mainly because the applicants were not monitored closely enough to ensure that mitigation was attempted at all. Therefore, although the Department can use enforcement and the withholding of financial surety to compel mitigation, the Department's goal is to have successful on-the-ground mitigation performed by the applicant for each project that requires it and this can best be ensured by, at a minimum, requiring an approved mitigation proposal in advance of the conduct of regulated activities. Early submission of the mitigation proposal and close coordination with the Department through the review process will help expedite approval of the mitigation proposal.

Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register. The Department is proposing a new time frame for mitigation submittal in that concurrent proposal.

388. COMMENT: We believe that the new requirement that proposed mitigation be approved prior to undertaking regulated activities is onerous, particularly as applied to GPs. The process of approving and implementing a mitigation proposal can be lengthy and extremely complicated. Any delays due to a requirement that a mitigation plan be approved prior to implementation of a GP will severely curtail the usefulness and efficiency of general permits, which is essential for utility construction projects. Often times, utility construction projects are driven by the need to increase reliability and are subject to strict deadlines. For instance, it is frequent that we need to install upgrades to

our facilities prior to the summer peak load season for electric services, and prior to the winter peak load season for gas services. To stop construction while the parties discuss and negotiate the type of mitigation is counter-productive and could negatively effect utility reliability.

Accordingly, we request that the proposed amendments section N.J.A.C. 7:7A-15.3 be deleted, and that all references to that requirement in any permit be deleted. In the alternative, we suggest that GPs be exempt from this requirement by adding the phrase "except regulated activities authorized pursuant to a general permit" be inserted after the new proposed phrase "except that no regulated activities." In either case, proposed requirements in individual GPs that require approval of a mitigation plan should be deleted. Without limiting the foregoing, the third and fourth sentences of proposed N.J.A.C. 7:7A-5.2(f) and 5.21(e) should be deleted. (4, 24)

389. COMMENT: The Department's proposed mitigation requirements for general permits 2 and 21 will require applicants to submit mitigation proposals concurrently with their underlying general permit applications, in accordance with N.J.A.C. 7:7A-15.11(a)2. See proposed N.J.A.C. 7:7A-5.2(f) and 7:7A-5.21(e). In addition, the Department is proposing to amend N.J.A.C. 7:7A-15.3(a)1 to prevent initiation of activities under an approved permit until the Department has also approved the corresponding mitigation proposal. That approach is wrong on several counts.

First, utility infrastructure projects serve the public interest and implement the affected utilities' statutory obligations to provide safe, adequate and reliable service. Given the deficiencies of New Jersey's electric infrastructure, it is not in the public interest to delay the construction of utility lines. In that regard, the Federal Energy Regulatory Commission has recently emphasized that "New Jersey . . . faces reliability criteria violations in each of the next four years." PJM Interconnection, L.L.C., 119 FERC 61,318, at P 236 (2007). The same concern is noted in the New Jersey Energy Master Plan, which explains that the state has "[r]ising demand for electricity and an aging energy infrastructure" and concludes that "new infrastructure investments may be necessary to provide the reliable energy services required for New Jersey's well-being." Draft on Electricity for the Energy Master Plan, November 6, 2006, at 1 and 23 (available

at http://nj.gov/emp/home/docs/pdf/061013e.pdf). Delaying infrastructure improvements while an already overburdened Department staff evaluates mitigation proposals will only serve to magnify these infrastructure deficiencies and hinder electric utilities' efforts to comply with their public service obligations.

In addition, by requiring early decisions on mitigation, the Department is precluding consideration of alternatives that may be more advantageous (both environmentally and economically) and which are likely to become available later with improved availability of mitigation banks and other mitigation services. In that regard, the Department's rationale for accelerating the mitigation application and approval process (the concern that "there is little, if any, financial incentive to ensure that mitigation will occur once the regulated activities are completed,") is inapplicable to electric utilities. That is because, in contrast to the types of applicants that appear to underlie the Department's concern (due to their temporary, short-term involvement with affected sites), utilities have a permanent role with respect to their public service infrastructure projects and will not be hard to find when mitigation responsibilities require implementation.

Finally, the requirement that mitigation "shall be performed prior to or concurrently with general permit activities," see proposed N.J.A.C. 7:7A-5.2(f), appears to mean that mitigation must be completed by the time all other general permit activities are completed. The likely result of that requirement will be to delay completion of the underlying infrastructure projects while encouraging unnecessary haste in completing mitigation work, contrary to the environmental protection objectives of the FWPA regulations. (43)

RESPONSE: As stated in response to several previous comments, the Department has the best opportunity to ensure that mitigation is performed when a mitigation proposal and the start of construction of the mitigation site are required before an applicant begins to conduct regulated activities in accordance with a permit. Further, it is in the public interest to ensure that impacts to wetlands are mitigated. The Department does not agree that such a requirement is unreasonable for a general permit for utility lines. In fact, the commenters indicate that utility activities are very predictable.

Therefore, the nature and scope of mitigation should also be predictable early in the permitting process. Regardless of when a mitigation proposal is submitted, the Department will conduct its entire review and determine compliance with all permitting standards before considering mitigation. Consequently, the Department is not precluding the consideration of better alternatives since such alternatives will have been exhausted by the time the mitigation proposal is considered. Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register. The Department is proposing a new time frame for mitigation submittal in that concurrent proposal.

The provision at N.J.A.C. 7:7A-15.3(a)1 states that mitigation shall be continued to completion according to the schedule in the approved mitigation proposal. When an applicant provides the Department with a mitigation proposal in advance of conducting regulated activities, the proposal will contain a schedule reflecting the specific circumstances relating to that property and project. Consequently, if there are circumstances that would require that regulated activities occur in advance of mitigation activities, they should be outlined in the proposal and reflected in the mitigation schedule.

Finally, the commenters should note that for utility projects that result in temporary disturbances only, the only mitigation requirement is restoration of the temporary disturbance within 6 months of completion of the regulated activities (see N.J.A.C. 7:7A-5.2(c)1, underground utility lines, and N.J.A.C. 7:7A-5.21, above ground utility lines).

N.J.A.C. 7:7A-15.4 Property suitable for mitigation and the criteria for addressing contaminated sites

390. COMMENT: We welcome the addition of a criterion that will permit mitigation on public land, when the land obtained or held by the government agency is, or was formerly, a wetland and the government agency is proposing to restore or enhance it. This will make much-needed new sources of funding available to restore degraded publicly

owned wetlands. Consideration should also be given to allowing mitigation that satisfies this criterion to occur on Green Acres funded land, and to be funded by private monies provided directly by a developer or through the State-managed Mitigation Bank. Such projects would enhance, not divert, public land through a mitigation technique that has a higher degree of success than wetlands creation, and does not consume important non-wetlands habitat. (82)

391. COMMENT: Most streams in the heavily urbanized areas of the state are unstable. Numerous streams traversing public lands have serious distress. The proposed rules prohibit using mitigation money for stream restoration on Green Acres property or other public property unless purchased for that purpose. Please explain what public interest is served by not allowing owners of streams damaged by upstream, offsite development especially since the Green Acres rules do not consider restoration to be a diversion. (41, 64)

RESPONSE TO COMMENTS 390 AND 391: In accordance with 1993 amendments to the Freshwater Wetlands Protection Act governing the Mitigation Council, the Council can use mitigation moneys collected in the wetlands mitigation bank for projects to enhance or restore wetlands on public property but only in the following circumstances: for mitigation to be conducted by public entities; for the conduct of mitigation for a project funded with public money; for projects for which the land is specifically obtained for mitigation or by default (for example, by way of a tax lien); or if the land is or was formerly a wetland and the government agency is proposing to restore and enhance the wetland.

However, the Department does not believe it is appropriate to provide State funding, including Green Acres grant money, to purchase land to mitigate for permitted impacts to wetlands. The Green Acres Program Rules, N.J.A.C. 7:36, specify that mitigation required by other laws, regulations, codes, or ordinances in connection with non-parkland uses constitute a diversion of funded or unfunded parkland from recreation and conservation purposes (see N.J.A.C. 7:36-25.2(c)). These provisions serve to protect

public lands from becoming targets for private projects, including mitigation, that are inconsistent with the original public purpose for which the public lands were intended.

392. COMMENT: The Department proposes to allow mitigation on public land when the land obtained is, or was formerly, a wetland and the public entity is proposing to enhance or restore the wetland. We support this change as it provides opportunities for habitat restoration where public funding sources may not otherwise be available. We recommend that this option be further clarified to include a statement that the public entity may pursue this option only for a specific public project. If NJDEP determines that this should be allowed for private projects, the permittee should also be required to compensate the public owner for land costs as well as providing funding for the restoration. (31)

RESPONSE: The amendment at N.J.A.C. 7:7A-15.4(a)3 allows mitigation on public land if the government agency performing the mitigation owns the public land and is proposing to enhance and/or restore wetlands. Further, N.J.A.C. 7:7A-15.4(a)1 through 3 apply only to government agencies providing mitigation on public lands. N.J.A.C. 7:7A-15.4 states that all mitigation shall be conducted on private lands, except that a government agency may mitigate on public land for a project funded solely with public monies. This precludes a private entity from mitigating on public land, and a public entity from mitigating for a private project on public land.

393. COMMENT: The Department proposes to delete the provision that would allow the acceptance of mitigation on land containing an encumbrance that has not been extinguished. We support this proposed change and recommend the Department specify the mechanism by which the applicant must demonstrate that the property is free from encumbrances. For example, the applicant must provide a title opinion or title insurance obtained from a firm licensed to provide such services in New Jersey. (31)

RESPONSE: The Department acknowledges this comment in support of the rules. There are several mechanisms that may be used to demonstrate that a property is free from

encumbrances: the old easement can be extinguished and a new easement can be placed on the property; another easement may be placed upon the property which supersedes and nullifies the existing easement; and another easement may be placed on the property that supplements the existing easement by adding additional protection or more specific types of protection to the existing easement. Consequently, the applicant can demonstrate to the Department that an easement or encumbrance has been extinguished by providing a copy of a renewed or revised easement or encumbrance showing that the property is available for mitigation.

394. COMMENT: The DEP Division of Land Use Regulation has proposed a zero residual contaminant cleanup standard for mitigation sites. This is more restrictive than residential standards. Why does the DEP propose such high cleanup standards for mitigation sites? Many of the State's parent soils contain trace contamination. The DEP Land Use-proposed cleanup standards are well below this threshold. Please describe the reasons that man-made systems have to be cleaner than natural systems? (41, 64)

RESPONSE: The rules require an applicant with a proposed mitigation bank to identify potential contamination on a site, and to enter into an agreement to clean up the site in accordance with the Department Oversight of the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C. . The technical requirements for cleanup, including residential or non-residential standards, continue to be addressed between the applicant and the Department's Site Remediation Program, in accordance with the Remediation Standards at N.J.A.C. 7:26D and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

395. COMMENT: The DEP requires an owner to certify that no new source of contamination could ever impact the mitigation site. Please explain how a developer of a streamside mitigation site can provide this assurance given that under peak floods wastewater treatment plants are submerged and can introduce many contaminants into the streams. (41, 64)

RESPONSE: N.J.A.C. 7:7A-15.4(h) states that the Department will not approve mitigation in an area that contains contamination until all potential contaminated areas have been identified, and all remediation of the area(s) is completed so that there is no potential for the mitigation activities to result in the reintroduction of contamination to ecological communities or exposure of humans to contamination, and there is no potential for the mitigation site to be contaminated by the belated discovery of new areas of contamination requiring remediation. There is no requirement that a mitigator must guarantee that catastrophic flooding will not occur and introduce various contaminants to a mitigation site. The provision is intended to address known sources of contamination both onsite and in the immediate vicinity of a mitigation site under normal conditions.

396. COMMENT: The proposed rules provide complete discretion to the Division of Land Use Regulation to determine exceptions to the zero residual contamination rule. Does the Division of Land Use Regulation have the in-house expertise to make objective decisions regarding acceptable residual contamination exceptions? (41, 64)

RESPONSE: As explained in response to comment 394, the freshwater wetlands rules do not establish cleanup standards for a contaminated site. Therefore, it is unclear why the commenter believes that the proposed rules provide complete discretion to the Division of Land Use Regulation to determine exceptions to the zero residual contamination rule. Because, the freshwater wetland rules do not establish cleanup standards, the Division of Land Use Regulation does not have, nor does it need, in-house expertise to examine contaminant levels on a site. The Department's Site Remediation Program makes these determinations. Further, as stated in response to comment 394, the technical requirements for cleanup, including residential or non-residential standards, continue to be addressed between the applicant and the Site Remediation Program, in accordance with the Remediation Standards, N.J.A.C. 7:26D, and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

397. COMMENT: Information for a proposed mitigation bank containing known or suspected contamination should also be submitted to the County Health Officer and municipality for review and comment. (86)

RESPONSE: In accordance with N.J.A.C. 7:7A-10.8, public notice requirements for applications, specifically N.J.A.C. 7:7A-10.8(j), an applicant proposing to create, enhance or restore wetlands to satisfy a mitigation requirement is required to give notice to municipal and county officials and to all owners within 200 feet of the proposed mitigation project site. Consequently, if information indicating that there is suspected contamination is contained in the proposed bank application, the county and municipality will be receiving notice which can be transmitted to interested parties within those organizations.

398. COMMENT: Proposed N.J.A.C. 7:7A-15.4 places formidable requirements on the use of contaminated sites for mitigation purposes. While caution is in order when evaluating a formerly contaminated site for re-use as a mitigation site, it is also important to recognize that New Jersey is the nation's most densely populated state and has many contaminated sites. Reuse of contaminated land is in the state's best interest, and the Department should provide a means to encourage such re-use without jeopardizing human health or the environment. (43)

399. COMMENT: Frequently, there is no economic incentive to use green technologies to naturally treat low-level contaminations since natural attenuation processes can take several years. It is more plausible that an owner would choose one of these sustainable methods if after the clean up was complete he could then sell wetland mitigation credits. Why would the DEP include unreasonably strict cleanup standards that would discourage this kind of progressive approach by landowners? (41, 64)

RESPONSE TO 398 AND 399: N.J.A.C. 7:7A-15.4 precludes use of a contaminated site for mitigation. N.J.A.C. 7:7A-15.4(h) states that the Department shall not approve mitigation in an area that contains contamination until all potential contaminated areas

have been identified, and all remediation of the areas is completed. Consequently, a site that has not yet been remediated but that continues to undergo remediation does not meet the qualifications for a wetland mitigation site. The method for cleaning up the contamination is beyond the scope of these rules. The Department's rules do not preclude reuse of a site once it is remediated.

400. COMMENT: The rules should be redrafted to eliminate restrictions that mitigation can only be performed on sites on land acquired in fee simple. Mitigation sites should be selected based upon their ability to maximize ecosystem function. Sometimes this could mean that a mitigation site be located along a damaged urban streams that contains a utility easement or on an urban site that retains a reverter clause if the site is converted to a particular use. DEP convenience for having fee simple sites should not be the bar to using an otherwise effective site. This requirement discourages mitigation in the urban zones where titles frequently include easements or other restrictions. (41, 64)

RESPONSE: The rules do not limit mitigation to lands owned in fee simple. N.J.A.C. 7:7A-15.4(e) states that the Department shall approve mitigation through creation, restoration, or enhancement only on property that is owned in fee simple and under the full legal control of the person responsible for performing the mitigation, "or the person responsible for performing the mitigation shall demonstrate that the person has legal rights to the property sufficient to enable compliance with all requirements of his chapter."

N.J.A.C. 7:7A-15.5 Mitigation for smaller disturbances

401. COMMENT: The Department proposes to amend the hierarchy for mitigation of a smaller disturbance. We concur with the proposal to move upland preservation from N.J.A.C. 7:7A-15.5(e)2 to 7:7A-15.5(f). However, we believe that the option for a monetary contribution should be the last possible option after upland preservation. The use of funds resulting from monetary contributions have not typically resulted in the replacement of lost functions and values within the same Watershed Management Area as

the permitted impacts and in many instances have not resulted in the replacement of any wetland functions and values. Therefore monetary contributions should be the last possible option behind upland preservation in accordance with N.J.A.C. 7:7A-15.9. In order to promote the replacement of lost wetland functions and values as close to the impact site as possible, we recommend elimination of the option at N.J.A.C. 7:7A-15.5(d)1ii. The latter option should be moved lower in the hierarchy and is encompassed by an existing option at N.J.A.C. 7:7A-15.5(d)4. We also recommend that an additional option is added at N.J.A.C. 7:7A-15.5(d) between existing option 3 and 4 to state that "if no credits are available from a bank listed in (d)1, 2 or 3 above, through the purchase of credits from a mitigation bank which is located in an adjacent Watershed Management Area and in the same drainage basin" (that is, Delaware River or Atlantic Ocean). If credits are not available from an adjacent Watershed Management Area in the same drainage basin, the purchase of credits from a bank located elsewhere in the drainage basin should be allowed. We believe that these proposed changes represent a logical geographic hierarchy to facilitate replacement of lost wetland functions and values close to the impact site within the same overall drainage basin. (31)

RESPONSE: The Department does not agree that a monetary contribution should be the last option for wetland compensation after upland preservation. If the Department proceeded to protect uplands before collecting funding to create, enhance or restore wetlands, the State would continuously lose wetlands, which is contrary to the purpose and intent of the FWPA. As explained in previous responses, the Department revised its mitigation program in response to the 2002 study, which revealed the failure of mitigation at that time. Further, although it may be most difficult to create new, functional wetlands, it is easier to enhance and restore wetland areas if they have wetland hydrology remaining. Mitigation contributions can be, and are, used for these projects as well.

Although the provision at N.J.A.C. 7:7A-15.5(d)1ii appears somewhat redundant with the provision at N.J.A.C. 7:7A-15.5(d)4, mitigation banks that were formed before 1999 had wider ranging service areas encompassing several watershed management areas because, at that time, there were so few banks in existence that it was deemed appropriate

to maximize the service area. Since then, service areas have been narrowed, usually to one watershed management area. However, because the banks predating 1999 have not sold all of their credits, it is important that they remain viable options within the mitigation hierarchy.

Finally, the Department does not agree that an additional option should be included in the rules to permit mitigation to occur anywhere in the same drainage basin. As the commenter noted, there are two drainage basins in the State: the Delaware River and the Atlantic Ocean. The areas encompassed by these drainage basins are vast. The Department cannot reasonably make the argument that a project affecting wetlands that occurs, for example, in Frenchtown, Hunterdon County, can be mitigated by a project in Burlington County although both are in the drainage basin of the Delaware River.

402. COMMENT: N.J.A.C. 7:7A-15.5(c) provides that mitigation for smaller wetland disturbances must be performed through credit purchase, in a hierarchy of decision points. We strongly oppose this provision because it is damaging to water resources since there are few mitigation banks which results in mitigation frequently taking place in unrelated watersheds. With the new Stormwater Management rules, it seems more logical to consider allowing wetland mitigation on site for smaller disturbances. Creating artificial wetlands, where possible, is an effective water quality tool for managing stormwater and would help mitigate loss of wetlands on site so that little, if any, damage would occur to water resources in that watershed. (20, 85)

RESPONSE: The Department strongly disagrees that it should permit the creation of small onsite wetlands to satisfy both a stormwater management and wetland mitigation requirement. Wetlands provide many values and functions above and beyond retaining stormwater, including fish and wildlife habitat, protection from erosion and the maintenance of critical baseflows to surface waters. Stormwater detention facilities hold stormwater and may, if designed appropriately, provide some water quality protection by holding water long enough for the settlement of solid contaminants. However, there are likely no habitat, erosion protection, or baseflow functions provided by a stormwater detention facility. Further, a properly constructed and functioning stormwater facility

should be periodically maintained. A wetland mitigation site, if properly constructed is self-supporting and should function without additional maintenance. The Department does not oppose the creation of wetlands to be used for stormwater detention but does not agree that such wetlands provide the additional values and functions of a productive wetland system.

Mitigation per the hierarchy requires an applicant to search for an offsite mitigation project within the same Watershed Management Area as the impact, thereby ensuring that the majority of off-site wetland mitigation projects occur within the same watershed management area as the impact. Only a small portion of wetland mitigation is satisfied through a monetary contribution to the Wetland Mitigation Fund that may then be used to provide mitigation within a Watershed Management Area different from the one where the impact occurred.

403. COMMENT: The Department is proposing to amend the standards that pertain to specific general permits to require mitigation. Currently, mitigation is required for a GP 4, hazardous waste clean up activities, GP 5, landfill closures, GP 23, expansion of existing cranberry growing operations in the Pinelands and GP 27 for redevelopment activities exceeding 0.5 acres. The Department is proposing to require mitigation for the following additional GPs: GP 2, underground utility lines, GP 6, non-surface water connected wetlands, GP 11, outfall structures, GP 18, dam repair, and GP 21, above ground utility lines. In addition, the Department is proposing to change the existing mitigation requirements for a GP 23 and GP 27.

We have a concern regarding the mitigation hierarchy that is going to be established at amended N.J.A.C. 7:7A-15.5 for mitigation for these GPs. The Department is proposing that the mitigation requirement for general permits be satisfied through compliance with the standard mitigation hierarchy as it relates to smaller disturbances. Creation, restoration and enhancement of wetlands requires activities which constitute development under the Pinelands Comprehensive Management Plan (CMP) and cannot be conducted in the Pinelands Area unless such activities are consistent with the requirements of the Pinelands CMP. See N.J.A.C. 7:50-5.1. Furthermore, with regard to restoration and enhancement of wetlands, these activities likely would not meet the

wetlands requirements of the CMP. Currently, there are no wetland mitigation banks established in the Pinelands Area. Given that the only wetland mitigation bank that likely could be developed in the Pinelands Area would involve creation of wetlands from uplands, it does not seem likely that mitigation banks will be developed in the Pinelands Area in the near future. The same restrictions would hold true for the ability to conduct on-site or offsite mitigation projects utilizing restoration or enhancement. Thus, it appears that mitigation in the Pinelands Area likely would be limited to a monetary contribution in accordance with N.J.A.C. 7:7A-15.21 or upland preservation. A monetary contribution, however, would likely be insufficient to mitigate for impacts to wetlands located within the Pinelands, given that use of this money would be limited to creation projects in the Pinelands Area. Thus, although the Pinelands Area will experience the loss of wetlands within its area through activities conducted under the various statewide general permits, it is unlikely to see much, if any, of the benefits resulting from such monetary contribution. It is our opinion that acquisition and preservation of wetlands in the Pinelands Area is the best means to preserve wetland resources in the Pinelands. At a minimum, N.J.A.C. 7:7A-15.5 and also 15.6 should be amended to make clear that monetary contributions for impacts to wetlands conducted in the Pinelands Area will be utilized for projects located in the Pinelands Area and that are consistent with the Pinelands CMP. (66)

RESPONSE: The mitigation hierarchy has not been modified from the hierarchy in the previous rules, which was already being used to perform mitigation for individual permits in the Pinelands Area. Further, in order to conduct mitigation, the rules require not only approval of a proposed mitigation site, but any other necessary approvals, including those that may be required by the Pinelands Commission.

Since monetary contributions and upland preservation are the last alternatives within the mitigation hierarchy for all mitigation projects, the applicant must demonstrate to the Department and Pinelands Commission that there are no feasible mitigation alternatives within the Watershed Management Area in order to be permitted to make a contribution or preserve uplands. Based upon the commenter's concerns regarding the

limitations of the CMP, it appears that applicants may be able to make this demonstration.

In addition, the Pinelands National Reserve is comprised of multiple Watershed Management Areas, some of which are not subject to the limitations of the CMP. Therefore, there may be opportunities to establish banks in these watersheds. Further, although the commenter does not see a great potential for the establishment of mitigation banks, the opportunity does remain to establish banks if done in compliance with the Pinelands CMP. Finally, preservation banks are an option, under the Department's mitigation rules, and may also be consistent with the Pinelands CMP.

The Department will coordinate with the Pinelands Commission during the review process to evaluate mitigation projects and mitigation bank applications. If, through this process, the Pinelands Commission determines that certain proposed activities such as creation, restoration and/or enhancement on a certain property are not consistent with the Pinelands CMP, the proposal may have to be modified or denied as proposed. Alternatively, the Department and the Commission can work with an applicant to propose an upland (creation) mitigation bank or preservation bank that is consistent with the Pinelands CMP. Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

404. COMMENT: We feel that the intent stated in the rationale discussion regarding Subchapter 5 (Adopted General Permits) is to allow an applicant to go directly to the option of a monetary contribution for compensation for small impacts if a wetland mitigation bank is not available. However, the hierarchy under (f) in the actual regulations at N.J.A.C. 7:7A-15.5 appear to require that if a bank is not available, then wetland creation, restoration, or enhancement would need to be considered before going to the option of a monetary contribution. However, higher in the hierarchy at 15.5(c), it is stated that pursuing wetland creation, restoration, or enhancement would be at the applicant's discretion. We support the idea of being able to go directly to a monetary contribution if a bank is not available for smaller wetland disturbances. Since it is the

regulation's presumption that the creation of a small wetland mitigation site is not feasible, the expenditure of public funds is not prudent to search for potential mitigation sites that would not be as ecologically valuable or cost effective. (30)

RESPONSE: The commenter is correct that the intent of the rule provisions regarding small disturbances at N.J.A.C. 7:7A-15.5 is to allow an applicant to assume that onsite and offsite mitigation for a smaller disturbance is not feasible. However, because of the costs associated with purchase of credits from a mitigation bank or a monetary contribution, the Department has retained the option for the applicant who wants to mitigate onsite or offsite to demonstrate that such mitigation would be environmentally beneficial in accordance with the standards at N.J.A.C. 7:7A-15.5(e). The provision at N.J.A.C. 7:7A-15.5(f) states that if credit purchase is not feasible, and the options to conduct onsite or offsite mitigation have already been rejected as not feasible, the applicant can make a monetary contribution.

N.J.A.C. 7:7A-15.6 Mitigation for a larger disturbance

405. COMMENT: N.J.A.C. 7:7A-15.6 provides different options for mitigation for larger wetland disturbances. We recommend the following option. If mitigation cannot be undertaken in the same HUC 14, the permit should be denied or the project modified. It is clear that New Jersey is suffering a net loss rather than a net increase in wetland acreage. New Jersey should not continue to rely on mitigation as a substitute for wetland preservation, unless and until mitigation projects are strictly monitored so as to prove effectiveness and successful mitigation acreage. (20, 85)

RESPONSE: The hierarchy for mitigation for a large disturbance is as follows: (1) restoration, creation, or enhancement carried out on the same site as the disturbance; (2) purchase of credits from a mitigation bank located in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area; or the purchase of credits from a mitigation bank approved before 1999 which includes the disturbance in the bank service area; or offsite restoration, creation, or enhancement in the same HUC

11 as the disturbance or an adjacent HUC 11 within the same watershed management area; (3) purchase of credits from a mitigation bank in the same watershed management area as the disturbance; or restoration, creation, or enhancement in the same watershed management area as the disturbance; (4) The purchase of credits from a mitigation bank which includes the disturbance site in its bank service area; or restoration, creation, enhancement in the same drainage basin; and (5) a monetary contribution, upland preservation, or a land donation.

The Department believes that each of these mechanisms, including purchasing credits from a mitigation bank and making a monetary contribution can be used to successfully mitigate for wetland impacts.

The Department does not use mitigation as a basis upon which to approve a wetland permit. The criteria for determining whether an application satisfies the requirement for a general permit are contained within each permit and at N.J.A.C. 7:7A-4.3, conditions that apply to all general permit authorizations. The requirements for an individual permit are contained at N.J.A.C. 7:7A-7, individual freshwater wetlands and open water fill permits and 13, contents of permits and waivers. None of these requirements enable approval of a permit because mitigation is being offered, nor denial of a permit based upon the lack of a mitigation option in the same HUC 14. Finally, as explained in response to comment 362, the Department revised its mitigation program in response to a 2002 study, to provide a greater level of oversight on mitigation projects at all stages of design and construction to achieve successfully constructed mitigation sites rather than trying to fix sites that were not fully successful.

406. COMMENT: The Department proposes to amend the hierarchy for mitigation of a larger disturbance. We concur with the proposal to delete upland preservation from N.J.A.C. 7:7A-15.6(d)3, but suggest moving it to N.J.A.C. 7:7A-15.6(f) and moving the option for a monetary contribution to N.J.A.C. 7:7A-15.6(g). In order to promote the replacement of lost wetland functions and values as close to the impact site as possible, we recommend elimination of the option at N.J.A.C. 7:7A-15.6(d)2. The latter option should be moved lower in the hierarchy and is encompassed by an existing option at N.J.A.C. 7:7A-15.6(e)1. We also recommend that an additional option is added at

N.J.A.C. 7:7A-15.6(e)1 and that the existing option at N.J.A.C. 7:7A-15.6(e)1 be moved to N.J.A.C. 7:7A-15.6(e)2. The new option at N.J.A.C. 7:7A-15.6(e)1 would state "the purchase of credits from a mitigation bank which is located in an adjacent Watershed Management Area and in the same drainage basin" (that is, Delaware River or Atlantic Ocean). A further option should state "the purchase of credits from a mitigation bank which is not in an adjacent watershed management area but which is located in the same drainage basin." We believe that these proposed changes represent a logical geographic hierarchy to facilitate replacement of lost wetland functions and values close to the impact site within the same overall drainage basin. (31)

RESPONSE: As explained in response to comment 401, the Department does not agree that a monetary contribution should be the last option for wetland compensation after upland preservation because protecting uplands before collecting funding to create, enhance or restore wetlands, would be contrary to the purpose and intent of the FWPA. As explained in previous responses, the Department revised its mitigation program in response to the 2002 study, which revealed the failure of mitigation at that time. Further, although it may be difficult to create new, functional wetlands, it is easier to enhance and restore wetland areas if they have wetland hydrology remaining. Mitigation contributions can be, and are, used for these projects as well.

Although the provision at N.J.A.C. 7:7A-15.6(d)2 appears somewhat redundant with the provision at N.J.A.C. 7:7A-15.6(e)1, mitigation banks that were formed before 1999 had wider ranging service areas encompassing several watershed management areas because, at that time, there were so few banks in existence that it was deemed appropriate to maximize the service area. Since then, service areas have been narrowed, usually to one watershed management area. However, because the banks predating 1999 have not sold all of their credits, it is important that they remain viable options within the mitigation hierarchy.

Finally, the Department also does not agree that an additional option should be included in the rules to permit mitigation to occur anywhere in the same drainage basin. As the commenter noted, there are two drainage basins in the State: the Delaware River and the Atlantic Ocean. The areas encompassed by these drainage basins are vast. The

Department cannot reasonably make the argument that a project affecting wetlands that occurs, for example, in Frenchtown, Hunterdon County, can be mitigated by a project in Burlington County although both are in the drainage basin of the Delaware River.

N.J.A.C. 7:7A-15.12 Contents of a mitigation proposal

407. COMMENT: The Department has engaged in a process to create a "Water Budget Manual" for aid in the preparation of water budgets associated with wetland mitigation projects. We recommend that the Department include "a hydrologic budget prepared in accordance with the NJDEP Water Budget Manual" as a mandatory component of a wetland mitigation proposal. (31)

RESPONSE: The mitigation proposal checklist, referenced at N.J.A.C. 7:7A-15.11 already contains the requirement to prepare a water budget for creation proposals or sites that are hydrologically complex. However, it does not currently reference the Department's Water Budget Manual because that manual is not yet complete. Once completed, the checklist will be amended to reference the most current manual for guidance. The Department anticipates that the manual may be completed this year.

408. COMMENT: While the Department did not propose a revision to N.J.A.C. 7:7A-15.12, this section should be modified to identify that for general permits where mitigation is required, if the permittee chooses to meet the mitigation requirement through monetary contribution, the mitigation proposal is exempt from all of the requirements of subsection (b). N.J.A.C. 7:7A-15.12(a) should be modified as follows: "(a) The application checklist for every mitigation proposal, except mitigation proposals for general permits proposing monetary contribution, shall require the information listed at b(1)…." If a permittee is proposing to meet any mitigation requirement for a general permit by making a monetary contribution, then verification that the amount of that monetary contribution is consistent with the requirements of N.J.A.C. 7:7A-15.21(d) should be sufficient to justify the mitigation proposal. (48)

RESPONSE: The way the section is structured, all applicants for mitigation are required to submit the basic information contained at N.J.A.C. 7:7A-15.12(b). This was applicable before the adopted amendments regardless of whether an applicant obtaining an individual permit was using the option of making a monetary contribution at N.J.A.C. 7:7A-15.12(f). Consequently, regardless of whether mitigation is associated with a general or an individual permit, the information requested for all mitigation proposals remains valid.

Please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and is instead proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

409. COMMENT: The DEP is proposing N.J.A.C. 7:7A-15.12 to address potential exposure of Land Use staff to contaminated sites. However, the DEP is proposing the applicant provide information that is inconsistent with Site Remediation rules regarding clean up of contaminated sites. Even if the applicant could provide the information requested by the proposals, does the Land Use Regulation staff reviewing the submittal have the training needed to interpret the information and make reasoned judgment that the site is safe to enter? (41)

410. COMMENT: DEP is proposing N.J.A.C. 7:7A-15.12 to address potential exposure of Land Use staff to sites that have contamination on them. However, the DEP is proposing the applicant provide information that is inconsistent with Site Remediation rules regarding clean up of contaminated sites. Even if the applicant could provide the information requested by the proposals, does the Land Use Regulation staff reviewing the submittal have the training needed to interpret the information and make reasoned judgment that the site is safe to enter? The only reason a Land Use employee would be on a contaminated site is to consider the potential for a suitable site after cleanup. Therefore, the DEP should change this section to require an Occupational Safety and Health Act (OSHA) trained professional accompany the Land Use Regulation reviewer.

Access to the site should be in accordance with the approved Health and Safety Work Plan for the site. (41, 64)

RESPONSE TO COMMENTS 409 AND 410: The Department is requiring that an applicant with a proposed mitigation bank identify potential contamination on a site and enter into an agreement to clean up the site in accordance with N.J.A.C. 7:26C (see N.J.A.C. 7:7A-15.4(h)1). The standards for cleanup, including residential or non-residential standards, continue to be addressed between the applicant and the Department's Site Remediation Program..

The only reason Division of Land Use Regulation staff may be on a contaminated site is if the applicant fails to inform the Department that such contamination exists. The purpose of requiring the applicant to provide information regarding contamination is to avoid situations that endanger the health and safety of the Division of Land Use Regulation staff. The Division of Land Use Regulation is requiring that basic information regarding the potential for contamination be communicated in simple terms that allow staff to make an informed decision regarding their personal health and safety.

Finally, in order to provide some level of protection, staff involved in mitigation activities do receive OSHA training to prepare them if they encounter unexpected contamination on a potential mitigation site.

N.J.A.C. 7:7A-15.13 Financial assurance for a proposal to restore, create, or enhance wetlands

411. COMMENT: The Department proposed to change the amount of financial assurance required for a proposed mitigation project. We support this proposal and believe it will result in more realistic maintenance cost estimates. We also recommend that the Department specify that all cost proposals be based upon itemized estimates provided by a third-party contractor. This will provide assurance that the amount of financial assurance is adequate to allow the Department to hire a third party contractor to complete and maintain the mitigation project as specified in N.J.A.C. 7:7A-15.13(c). We also suggest the Department specify all mechanisms allowable as financial assurance, such as

letters of credit, bonds, etc. This would provide assurance of securing only reliable mechanisms to fund completion and maintenance of the mitigation project by the Department. The Department could also consider developing standard financial assurance forms similar in concept to the standard conservation restriction/easement forms that are now available. This would increase predictability and timeliness of reviews of financial assurance mechanisms. (31)

RESPONSE: The Department agrees that developing standard financial assurance forms would be beneficial and has begun to identify forms upon which to base its standard. Rather than specify all the types of mechanisms for financial assurance, the rule refers to "a letter of credit or other financial assurance" to provide flexibility for the individual posting the assurance. For example, some individuals may use self guarantees, while the majority uses bonds. If an applicant is posting an assurance for a remediation project, the Department may agree to allow the use of that assurance so long as a sufficient amount of money is clearly designated for mitigation. Finally, the Department agrees that all cost proposals should be based upon itemized estimates provided by third-party contractors and has clarified the rule accordingly since this will provide more accurate assessments for both the applicant and the Department of what is necessary and reasonable for the financial assurance.

412. COMMENT: N.J.A.C. 7:7A-15.13(c)2 increases the amount of the maintenance assurance from 30 to 115 percent of the estimated cost for monitoring and maintaining the site. We support this requirement as it should enable the Department to better track mitigation effectiveness. (20, 85)

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

N.J.A.C. 7:7A-15.18 Requirements that apply after the Department approves mitigation through a monetary contribution

413. COMMENT: There appears to be a typographical error in N.J.A.C. 7:7A-15.18(b)2. The reference in that section to N.J.A.C. 7:7A-5.21(d) should be amended to refer to proposed section N.J.A.C. 7:7A-15:21(d). (4, 24, 30)

RESPONSE: The Department acknowledges this error and the rules have been corrected upon adoption to reference N.J.A.C. 7:7A-15.21(d).

N.J.A.C. 7:7A-15.19 Requirements that apply after the Department approves mitigation through a land donation

414. COMMENT: N.J.A.C. 7:7A- 15.19(c)2 includes demonstration of "adequate" funding. However, this agreement is to be determined by the mitigator and the recipient agency or conservancy. Department involvement in this process is contradictory and inserts the Department in an agreement between a mitigator and an agency or conservancy, by definition qualified experts in determining costs associated with maintaining land holdings. The Department is not involved with the process between the mitigator and the recipient. The determination of adequacy should not be included in the regulation as the Department is not in a position to make this determination. Maintenance fund adequacy is determined by the mitigator and recipient and may take into consideration financial factors the Department is not party to such as land value, exchange of services, value of technical studies and data, and designs provided to the recipient. (63)

RESPONSE: While the Department agrees that the mitigator and the agency that takes possession of the mitigation site should work to determine what amount of funding is necessary for maintenance, it remains the Department’s responsibility to ensure that mitigation is successful, and this requires adequate funding for maintenance and supervision of the mitigation site. Consequently, it is necessary to to require that the transfer of a mitigation site to a government agency or a charitable conservancy be accompanied by an adequate maintenance fund. This provision is consistent with Federal program requirements.

N.J.A.C. 7:7A-15.20 Wetlands Mitigation Council

415. COMMENT: Regarding N.J.A.C. 7:7A-15, Wetland Mitigation Council decisions are not properly relayed to the public. The public has no access whatsoever to what this Council does. They need to prepare a report and they need to have a section on the DEP website with current information on what they approve. The Council operates far too secretly and in a corrupt state like New Jersey it is clear we need full public disclosure of the actions of any Council. (67)

416. COMMENT: Information on Wetlands Mitigation Council meetings should be available on the NJDEP web site. (86)

RESPONSE TO COMMENTS 415 AND 416: The Wetland Mitigation Council's activities and meetings are conducted in accordance with the Open Public Meetings Act, P.L. 1975, Chapter 231, also known as the "Sunshine Law." Notice of all meetings is mailed and faxed to the Secretary of State and to the: Newark Star Ledger, The Press (Atlantic City), The Times (of Trenton), and The Courier Post. The notice contains the location of the meeting, agenda, and a phone number and contact name for additional information. The Department also uses an e-mail notification list and a mailing list to provide notice of Council meetings. Further, all council meeting dates and locations are posted on the Division of Land Use Regulation webpage at:
http://www.state.nj.us/dep/landuse/fww/mitigate/upcoming.html
Anyone who would like to receive such notification can use the name and/or contact phone number located in the section of the webpage titled "Use of the Mitigation Fund."

N.J.A.C. 7:7A- 15.21 Council review of a proposed monetary contribution

417. COMMENT: The $38,000 fee per acre of impact is not realistic. By the Departments own assessment for all other property owners, $300,000 is proposed, indicating that the Department recognizes that this value is roughly one-tenth the value of

mitigation for wetland impacts. This fee should be increased to the same value as that applied to other land owners. The discount to single family land owners is a noble gesture, but it does not protect wetlands and single family projects, by their very nature, will have minimal impacts, thereby making the actual gross payment for mitigation a proportionally lower dollar amount. (63)

RESPONSE: The Wetlands Mitigation Council had several concerns when they determined that a separate, lower contribution amount is appropriate when mitigating for impacts associated with a single family homeowner. Single family homeowners frequently have owned the property in question since before the 1988 date of enactment of the FWPA. They are seeking approval for one home and not a development. They are more likely to have limited resources and to have the potential to claim a taking without just compensation if they are unable to obtain approvals to develop a lot. Consequently, requiring a full mitigation monetary contribution may prove counterproductive if it makes development cost prohibitive and the Department is sued for a taking without just compensation. Therefore, the Council and the Department continue to believe that it is appropriate to provide a lower contribution amount for single family homeowners.

418. COMMENT: Projects conducted by a public utility under general permits, related to the construction, use, maintenance, or upgrade of the utility's infrastructure, should be exempt from the monetary mitigation requirement, or any other form of mitigation requirement. This can be accomplished by revising section N.J.A.C. 7:7A-15.21(d)2 and adding section (d)3 to read as follows: "2. For all other property owners, except public utilities undertaking projects associated with their service infrastructure, the acreage of wetlands/State open water …as published by the United States Department of Labor; 3. Public utility projects undertaken under general permits to construct, use, maintain, or upgrade the utility's infrastructure system used to provide services to the citizens of New Jersey are exempt from the mitigation requirements of Chapter 7A."

The reason for this is that public utility infrastructure projects are undertaken to benefit all of the citizens of the State of New Jersey. As such, they should be exempt from mitigation contributions, as the cost of such contributions are simply passed on to

the ratepayer. While the Department should exempt utilities from mitigation costs for general permits, it should also consider that the monetary contribution is not a fee that should be established based upon a permittee's ability to pay. It is a payment to account for the mitigation of a loss of wetlands where such wetlands were taken, not for the general public good, but rather to allow a project that benefits an individual property owner. In such instances, wetlands disturbed by one type of permittee are no less valuable and no less costly to replace than those disturbed by another permittee. The Department may be more justified in imposing a sliding scale of mitigation costs based upon the classification of the wetlands disturbed, rather than the ability of the permittee to pay. This may better reflect the position that there are different classifications of wetlands, which have different value to society and the environment, with exceptional wetlands mitigation being more costly than mitigation of intermediate wetlands, which in turn would be more costly than mitigation of ordinary wetlands. Whether establishing the mitigation payment based on either the type of wetlands disturbed or the ability of the permittee to pay, the Department should still consider the overall social value of the project, and exempt utility projects associated with the construction or maintenance of their infrastructure, since such infrastructure is there for the general public good. While the Department alludes to the various components that go into calculating the all-in costs for restoring or creating wetlands (land appraisal, purchase price, engineering, environmental consulting fees, etc.), the Department fails to provide any concrete evidence that those costs in total equate to the $300,000 per acre for non-single family property owners proposed in this rule change. The Department should provide further analysis on how it derives any value proposed for monetary mitigation, and allow the public the opportunity to evaluate and comment on that analysis before any dollar value for monetary mitigation is established. (48)

RESPONSE: As stated in the Department's summary, the requirement for mitigation for several general permits is necessary to remain as stringent as the Federal 404 program. The Department does not exclude utility projects or any other public projects from the need to mitigate for Individual permits so there is no compelling reason to exclude them from mitigating for impacts resulting from general permits. Further, the protection of

wetlands is in the public interest which is why the State has a statute providing protection for this resource.

Because utility companies can clearly predict that they will have multiple and continual wetland impacts throughout the State, there is a greater ability to plan for mitigation in advance, whether by working to establish a consolidated mitigation site for their own use or developing a wetland mitigation bank that can be used for their use and to sell credits to third parties. Thus, the Department believes it is appropriate and necessary to require mitigation for utility projects. However, for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation condition for general permits as proposed and is instead proposing a different standard, similar to that in the ACOE program, elsewhere in this Register.

419. COMMENT: N.J.A.C. 7:7A- 15.21(d) set the monetary donation fee at $300,000 per acre of wetland/State open water impacts. This sets the compensation ratio for State open waters and ordinary resource value wetlands impacts on an equal basis with impacts to intermediate and exceptional resource value wetlands. The monetary donation required for State open waters and ordinary resource value wetlands should instead be $150,000 per acre of impact, which equates to a 1:1 ratio of impact to area mitigated, consistent with current policy. (31)

RESPONSE: When the Department requires applicants for individual permits to make a monetary contribution, they are required to base their contribution on a comparison between the cost of buying and enhancing degraded freshwater wetlands and/or State open waters versus the cost of buying uplands and creating freshwater wetlands, and/or State open waters. In both cases, the mitigation area is required to provide equal functions and values to that feature which was disturbed. Consequently, each monetary contribution proposal includes an evaluation of the following costs for restoring existing, degraded wetlands/waters at a 3:1 ratio (wetlands/waters to be restored to wetlands/waters lost) and for creating wetlands/waters at a 2:1 ratio (wetlands to be created to wetlands lost): land appraisal, purchase price, engineering, environmental consulting fees, obtaining a no further action letter, attorney fees, site preparation and

construction, plant purchase and planting, construction supervision, and the cost of monitoring the site. The costs are therefore based on construction requirements which do not vary greatly with the resource classification of the wetland. Consequently, the Department believes that the value of $300,000, determined by examining several contribution applications approved by the Mitigation Council in the past for various impact types throughout the State, is appropriate for both wetlands and State open waters.

420. COMMENT: The proposed calculations for determining the amount of monetary contribution at N.J.A.C. 7:7A- 15.21(d) are unjustified. Development project filings would be determined by the acreage of wetlands/ State open water impacts, multiplied by $300,000. The purpose for this proposal is based "upon an evaluation and assessment of the analyses submitted to the NJDEP and the Mitigation Council from previous monetary contributions." NJDEP is clearly aware of the impact that the proposed mitigation requirement would have on general permit applications. The drastic increase in mitigation expenses will discourage the use of the general permit, which was intended to be the primary means of balancing economic and environmental objectives. Also of a constitutional dimension, general permits were intended to allow reasonable use of private property. Under the proposals, an owner is required to pay for the reasonable use of his/her property even though they have already paid for the use of that land through its original purchase price. Furthermore, the proposed calculations raise serious equal protection concerns. Ability to pay becomes the prime determinative factor in availability of a general permit, whether that ability resides with the original applicant, or those to whom the applicant passes on this additional heavy cost. (74)

421. COMMENT: Proposed N.J.A.C. 7:7A-15.21(d) provides a new standard to calculate monetary contributions for mitigation associated with general permits. Without supporting data, the Department says it "determined that it costs approximately $300,000 to mitigate for impacts to one acre of wetlands" and lists the categories of costs that would be included. The Department's generic $300,000 per acre cost is not justified, however, because the Department has failed to provide any explanation for how that amount was determined. To simply list the general cost categories included is hardly any

more helpful than listing the categories that were not included. And aside from the Department's failure to justify its position, the $300,000 per acre figure is far higher than Atlantic Electric's own experience, which supports a much lower figure.

The Department also errs in proposing a monetary contribution for single family home owners of $38,000 per acre. In that regard, the Department does not claim, nor could it, that mitigation costs vary based on who is paying the corresponding costs. Nor does the Department offer any explanation or legal authority to support the $300,000 vs. $38,000 disparity. The relevant statute, N.J.S.A. 13:9B-13(c), makes clear, however, that "the contribution shall be equivalent to the lesser of the following costs: (1) purchasing, and enhancing or restoring, existing degraded freshwater wetlands, resulting in preservation of freshwater wetlands of equal ecological value to those which are being lost; or (2) purchase of property and the cost of creation of freshwater wetlands of equal ecological value to those which are being lost." Simply put, the Department has no authority to vary monetary contributions based on the identity of the applicant. (43)

RESPONSE TO COMMENTS 420 AND 421: Providing general permits in the rules is not related to economics or providing a use for property. Rather, the FWPA at N.J.S.A. 13:9B-23c states that the Department shall issue general permits provided that the activities for which they are provided "will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, will cause only minor impacts on freshwater wetlands, will be in conformance with the purposes of this Act, and will not violate any provision of the Federal Act." After 19 years of program implementation, it became apparent that general permits are having cumulative adverse impacts and more than minor impacts on freshwater wetlands.

The Department's contribution formula is based upon an evaluation and assessment of the analyses submitted to the Department and the Mitigation Council for previous monetary contributions. Each monetary contribution proposal includes an evaluation of the following costs for restoring existing, degraded wetlands at a 3:1 ratio (wetlands to be restored to wetlands lost) and for creating wetlands at a 2:1 ratio (wetlands to be created to wetlands lost): land appraisal, purchase price, engineering,

environmental consulting fees, obtaining a no further action letter, attorney fees, site preparation and construction, plant purchase and planting, construction supervision, and the cost of monitoring the site. Based upon this assessment, the Department determined that it costs approximately $300,000 to mitigate for impacts to one acre of wetlands.

Although the Department is not adopting the mitigation condition for general permits as proposed and is instead proposing a different standard, similar to that in the ACOE program, elsewhere in this Register, for the reasons described in response to comments 180 through 183, the Department is adopting the provisions at N.J.A.C. 7:7A-15.21(d) for calculating the amount of a monetary donation if this option is chosen to satisfy the mitigation requirement for general permits. There are three general permits for which mitigation is required under the existing rules to which this formula will be applied. Also, this provision will be applicable in the context of the concurrently proposed general permit mitigation requirements. At N.J.A.C. 7:7A-15.21(d)1, the Department is adopting the provision that a monetary contribution for a single family property owner be determined by multiplying the acreage of wetland/waters impacts by $38,000. This calculation is currently being used by the Mitigation Council to determine single family monetary contributions for Individual permit impacts and is adjusted annually using the Consumer Price Index for Urban Consumers as published by the United States Department of Labor.

422. COMMENT: The rules assess a value of $300,000 to mitigate for one acre of impacts. This value is too low to compensate for lost wetlands. Mitigation may require two acres of creation, or 27 acres of preservation, or in many cases three acres of enhancement. This value does not recognize market-based land costs, design, permitting, construction, planting monitoring, maintenance and other requirements imposed on mitigation sites by the Department such as bonding. Please provide the Departments' basis for this value. A more realistic value would be derived from case studies of recent mitigation projects. Many in the public and private sector could provide mitigation costs, inclusive of land costs. Additionally, mitigation banks in the state are also a barometer of realistic wetland mitigation costs in New Jersey. An informal survey of several banks

indicates that a wetlands credit (the amount required to mitigate for an acre of impact) is much higher than $300,000.

Additionally, the Department also regulates impacts to tidal wetlands and mitigation of tidal wetlands is often more expensive than freshwater and should be addressed separately. (63)

RESPONSE: As stated in the summary and in several previous responses, the Department's factor of $300,000 per acre is based upon an evaluation and assessment of the analyses submitted to the Department and the Mitigation Council for previous monetary contributions. Each monetary contribution proposal includes an evaluation of the following costs for restoring existing, degraded wetlands at a 3:1 ratio (wetlands to be restored to wetlands lost) and for creating wetlands at a 2:1 ratio (wetlands to be created to wetlands lost): land appraisal, purchase price, engineering, environmental consulting fees, obtaining a no further action letter, attorney fees, site preparation and construction, plant purchase and planting, construction supervision, and the cost of monitoring the site. In addition to reviewing the mitigation proposals, the Department is also aware of the costs for credits in existing mitigation banks. Based upon both assessments, the Department determined that on average it costs approximately $300,000 to mitigate for impacts to one acre of wetlands. The Department acknowledges that the costs vary, mainly depending upon the cost of purchasing land in the region where the mitigation bank is constructed, with higher costs associated with projects north of Trenton. However, the Department does not agree that it is more expensive to mitigate for tidal wetlands since it is usually much easier to provide hydrology by providing access to tidal waterbodies then it is to provide hydrology dependent upon ground or surface waters.

423. COMMENT: Since it is the regulation's presumption that the creation of a small wetland mitigation site is not feasible, it should be irrelevant whether a small disturbance is permitted under a general permit or an individual permit. We suggest that if a bank is not available, that an option to go directly to a monetary contribution for smaller disturbances under an Individual Permit without going through the Wetlands Mitigation Council should be allowed. (30)

RESPONSE: The Department does not agree that it is irrelevant whether a wetland impact occurs by way of a general or individual permit. The burden of proof for approving an individual permit is much greater than for a general permit regardless of the final impacts. Consequently, the Department believes that it remains appropriate for applicants seeking to make a contribution to mitigate for impacts from an individual permit to continue to make the required demonstrations supporting their contribution to the Mitigation Council for review and approval. The Council is required to review and approve all contributions to the Wetland Mitigation Fund as per the FWPA.

N.J.A.C. 7:7A-15.23 Mitigation banks

424. COMMENT: The proposal changes responsibility for review and approval of mitigation banks from the Mitigation Council to the Department. Review of mitigation banks before the Council provides the public with an opportunity to learn of, and to comment on, proposals. Review by the Department will not provide this opportunity. The Council itself was able to provide valuable comment, especially from professionals on the Council. Since mitigation banking may become an important aspect of preventing a net loss of wetlands, it is important that the public have the opportunity to be informed about, and to comment on, wetland bank proposals. We recommend that the Department provide for a courtesy conceptual review of mitigation bank proposals by the Mitigation Council. (20, 85)

RESPONSE: As stated in the summary (see 39 N.J.R. 3604), the new Federal regulations for mitigation place the responsibility for mitigation banking on State entities. In addition, because the FWPA does not require review and approval of banks by the Mitigation Council, the Department believes it is necessary to undertake that responsibility. Further, it is important to note that the Department is not only involved in mitigation banking proposals, but must also review and approve wetland permits that may result from conceptual bank approval. Consequently, it is more efficient for the Department to maintain the responsibility for bank review. While the FWPA does not

require specifically that the Mitigation Council be notified of Mitigation Bank proposals submitted to the Department, the bank sponsor proposing the mitigation bank must provide notice to the public as part of the mitigation bank review process. Further, the bank sponsor must respond to any comments received through this process. If permits are required as part of the bank proposal, public notice is also required for such permits.

Finally, the Department hopes to continue to consult with the Council, when it believes that a proposed mitigation bank requires the Council's expertise. This process as adopted, is similar to the Mitigation Banking Review Team in the Federal mitigation bank approval process.

425. COMMENT: We support the idea of eliminating the review of proposed mitigation bank proposals from the list of Wetlands Mitigation Council duties and functions. (30)

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

426. COMMENT: The Department is proposing to amend N.J.A.C. 7:7A-15.23 and 15.25 to change the authority to review wetland mitigation banks from the Wetlands Mitigation Council to the Department. In addition, N.J.A.C. 7:7A-15.25 is being amended to require that a prospective banker obtain conceptual review of a proposed mitigation bank before investing in buying the land or preparing a detailed proposal. The activities required to develop a mitigation bank whether by creation, restoration or enhancement constitute development activities under the Pinelands CMP. The Pinelands Protection Act at N.J.S.A. 13:18A-10c prohibits the issuance of any State approval, certificate, license, consent, permit or financial for the construction of any structure or the disturbance of any land within the Pinelands Area unless such approval or grant conforms to the provisions of the Pinelands Comprehensive Management Plan. See also N.J.A.C. 7:50-4.81(b), that provides that "[n]o state department, board, bureau, official or other agency shall deem an application for development complete unless it is accompanied by a Certificate of Filing, a Notice of Filing, a Certificate of Completeness, or a resolution of the Commission approving … an application for public development." The Department, therefore, may not issue a conceptual or final approval for the construction of a wetlands

mitigation bank in the Pinelands Area until the Commission has determined that such development is consistent with the requirements of the Pinelands CMP. The rules should be further amended on adoption to make clear that the Department will not deem an application for a mitigation bank complete, absent submission of one of the consistency determinations delineated in N.J.A.C. 7:50-4.81. (66)

RESPONSE: To be consistent with Federal Regulations, the Department is shifting the approval authority of a wetland mitigation bank from the Wetland Mitigation Council to the Department. As stated in response to comment 404, the Department will not only require its approval of a proposed mitigation bank, but any other necessary approvals, including those required by the Pinelands Commission. Consequently, wetland banks will only be established in the Pinelands Area if they are consistent with the Pinelands CMP. The Department further acknowledges that it will not approve a mitigation bank without ensuring that it is feasible. The Department has the authority to establish a mitigation banking review team as necessary to review a bank proposal. If the Department deems it necessary to establish a banking review team for a project within the Pinelands, the Department will include a representative from the Pinelands Commission in order to help ensure that an approved bank will satisfy all requirements.

427. COMMENT: DEP plans on giving Conceptual Review approval of Mitigation Banks site but then to be able to void the approval every time it chooses to change the rules. Banking sites require construction financing just like other proposals and these proposals require a certain level of certainty. The DEP should be willing to abide by its commitments based upon good faith negotiations during the approval process. This is unfair to the developer and will increase wetland mitigation financing costs. The DEP should remove provisions allowing it to avoid commitments simply by changing the rules. (41, 64)

RESPONSE: The Department's rules do not say that it will confer conceptual review "approval" of a mitigation bank site. Rather, the Department requires a bank operator to subject a proposed bank to conceptual review by the Department. Conceptual review

affords the Department the opportunity to discuss with the prospective bank owner the strengths and weaknesses of a proposed bank. It is not binding, does not confer any approval of the project, grant any property or other rights, authorize mitigation activities, or the sale of credits. Consequently, the Department does not agree that it is giving any commitment during a conceptual review by which it must abide. If the mitigator wants a commitment from the Department, he or she must obtain final Department approval of a proposed mitigation bank in accordance with N.J.A.C. 7:7A-15.25(b).

428. COMMENT: Please provide statistics on existing mitigation banks approved by the DEP and provide information on how many of these treat surface water and reduce flooding. (41, 64)

RESPONSE: The purpose of a mitigation bank is not to treat surface water or reduce flooding. Facilities designed for that purpose are more commonly known as stormwater retention or detention facilities. However, all wetlands to some degree provide these functions since if properly functioning they retain water in hydric soils, and hydrophytic vegetation binds some contaminants contained in surface water runoff. To date, the Mitigation Council has approved 11 mitigation banks. With the exception of one bank which failed, and one which is not yet constructed, the Department believes that the remaining nine banks are providing some treatment to surface waters and some level of protection from local flooding.

429. COMMENT: The Department's direction on service areas has been clear for freshwater wetland mitigation banks. However, the Department claims jurisdiction over tidal mitigation banks where service area delineations are less clear. Please provide guidance on tidal mitigation bank service areas.

The Department and the Council accept in lieu fee money for wetland impacts as well as other environmental impacts such as enforcement actions. Please provide a process whereby wetland banks could be used to mitigate for Natural Resource Damages provided, of course, the NRD injury has a nexus with the wetland bank habitat's services and functions.

Mitigation lands are required to be protected by a Conservation Easement/Conservation Deed Restriction. Please provide a CE/CDR that meets requirements across New Jersey subject to two separate U.S. Army Corps Districts. (63)

RESPONSE: In accordance with the rules on Coastal Zone Management at N.J.A.C. 7:7E-3.27, tidal wetland mitigation must be implemented in the same watershed or estuary. The service area of a tidal wetland mitigation bank is similar to a freshwater wetland mitigation bank. That is, the service area and the bank site must be ecologically similar so that impacts within the service area will be fully mitigated for at the bank site.

The Department and the Council accept in lieu fee money for wetland impacts associated with permit requirement or wetland violations. The Department and the Council do not accept Natural Resource Damages claims through the wetland mitigation fund. The Department does not have a process whereby wetland mitigation banks are used to mitigate for Natural Resource Damages. The Office of Natural Resource Damages has a separate and distinct process for determining impacts to all types of natural resources as well as determining the appropriate remedy for those impacts that is necessarily distinct from the process of approving a mitigation bank proposal.

Finally, the Department has finalized a joint conservation restriction for applicants that require both an ACOE permit and a Department permit. This conservation restriction can be found on the Departments web-site at www.state.nj.us/dep/landuse/forms/index.html.

N.J.A.C. 7:7A-15.24 Application for Wetlands Mitigation Council approval of a monetary contribution or land donation

430. COMMENT: We support the idea of being able to submit a monetary contribution to mitigate for general permit activities directly to the NJDEP, without having to go through the Wetlands Mitigation Council. (30)

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

N.J.A.C. 7:7A-15.25 Application for approval of a mitigation bank

431. COMMENT: Applications, maps, delineations, and other information submitted as part of a mitigation bank proposal should also be submitted to the County for review and comment. (86)

RESPONSE: In accordance with public notice requirements at N.J.A.C. 7:7A-10.8(j), an applicant proposing to create, enhance or restore wetlands to satisfy a mitigation requirement is required to give notice to municipal and county officials and to all owners within 200 feet of the proposed mitigation project site.

432. COMMENT: If a goal is to encourage the construction of mitigation banks, we suggest that the service area of the banks should encompass a larger geographic area (for example, a Watershed Management Area). This would be particularly useful to public entities, since the expenditure of public funds has to be justified. It would not be feasible to create numerous banks for public transportation projects if the service areas of the banks were too small. (30)

RESPONSE: The purpose of the Department's hierarchy for mitigation is to ensure that mitigation occurs as close to the site of wetland impact as possible since the farther the mitigation is from the original impact, the more difficult it is to demonstrate that the mitigation is replacing the lost values and functions of the affected wetland. The Department draws the service area for banks with the same goal. Consequently, although the Department acknowledges that there are costs associated with the creation of mitigation banks, it must ensure that each bank is appropriately mitigating for local impacts. Therefore, the Department does not agree that bank service areas should be more broadly drawn.

433. COMMENT: It appears that there may be words missing from N.J.A.C. 7:7A-15.25(b)4v(2). Should this read: "Adjacent to the same HUC-11 and within the same watershed management area as the proposed bank; and"? (30)

RESPONSE: The Department acknowledges that the commenter is correct and the rule at N.J.A.C. 7:7A-15.25(b)4v(2) has been corrected on adoption to read, "In an adjacent HUC 11within the same watershed management area as the proposed bank."

N.J.A.C. 7:7A-15.26 Mitigation for transition area impacts

434. COMMENT: It would be helpful to reiterate that this section applies only to transition area impacts resulting from a special activity waiver based upon individual permit criteria as per N.J.A.C. 7:7A-6.3(g). (30)

RESPONSE: The rule at N.J.A.C. 7:7A-15.26(a) already states, "this section governs the mitigation alternative required and the location of mitigation in relation to the disturbance for a transition area impact in accordance with N.J.A.C. 7:7A-6.3(g)." The Department will add a clarifying statement upon adoption to specify that N.J.A.C. 7:7A-6.3(g) is a special activity waiver based upon individual permit criteria.

435. COMMENT: At N.J.A.C. 7:7A-15.26, mitigation is now being required for transition area impacts. Finding suitable mitigation areas can be a problem under optimal conditions. Since the requirements will make providing on the ground mitigation for transition areas difficult to comply with, this has the effect of increasing the money collected by DEP for mitigation, without really providing any environmental benefit. (32)

RESPONSE: N.J.A.C. 7:7A-15.26 does not require mitigation for all transition area impacts. N.J.A.C. 7:7A-15.26(a) states, "this section governs the mitigation alternative required and the location of mitigation in relation to the disturbance for a transition area impact in accordance with N.J.A.C. 7:7A-6.3(g)." As stated in the summary, the Department is providing a section to address mitigation for this one type of waiver because an approval of this waiver is based upon the applicant's ability to comply with individual freshwater wetland permit criteria. Transition area waivers based upon individual permit criteria are only applicable when none of the other transition area

waiver options apply. Consequently, this provision is used infrequently. However, when it is used, because the approval is based upon the same criteria as an individual wetland permit, it is appropriate and consistent to require mitigation for this type of waiver. The Department believes that there is adequate opportunity to perform onsite mitigation and in fact prefers that option in accordance with N.J.A.C. 7:7A-15.26(a) which states, "Mitigation for a transition area disturbance shall be performed through restoration or enhancement carried out on the site of the disturbance to the maximum extent feasible."

436. COMMENT: A new paragraph (f) should be added establishing that utility projects related to the construction, use, maintenance, or upgrade of the utility's infrastructure, are exempt from mitigation of transition area impacts. Suggested wording for the new paragraph is as follows: "(f) Paragraphs (a) through (e) above notwithstanding, utility projects related to the construction, use, maintenance, or upgrade or of the utility's infrastructure are exempt from mitigation of transition area impacts."

The reason for this is that many utility projects are infrastructure related projects that are being undertaken for the overall public good, and as such should not be subject to the same mitigation requirements imposed on a project undertaken for individual benefit. Additionally, these projects are often linear in nature and may traverse long distances. While strong efforts are undertaken during the project siting process to avoid sensitive areas, including wetlands and transition areas, the nature of these linear projects make total avoidance of these areas impractical. Once constructed, utilities must maintain this infrastructure which requires periodic revisits to conduct vegetation maintenance as well as structural maintenance of the facilities. Additionally, in making efforts to reduce impacts of new infrastructure necessary to meet growing consumer demands, utilities try to the extent possible to use existing rights-of-way for the location of new or additional infrastructure. This may result in needing to re-disturb wetlands or transition areas located along the existing rights-of-way. Being required to mitigate such disturbances each time they occur is impractical given the re-curing potential of the disturbance, particularly along linear development projects such as those associated with utility infrastructure. Again, the Department should be encouraging and supporting utilities to make maximum use of their existing rights-of-way for the construction of additional

infrastructure to meet the needs of the citizens of New Jersey, and not proposing regulations that would impede such prudent use of our land. (48)

RESPONSE: As stated in response to comment 436, N.J.A.C. 7:7A-15.26 does not require mitigation for all transition area impacts. It only requires mitigation for the one type of transition area waiver approval at N.J.A.C. 7:7A-6.3(g), which approval is based upon the applicant's ability to comply with individual freshwater wetland permit criteria. Transition area waivers based upon individual permit criteria are only applicable when none of the other transition area waiver options apply. Consequently, this provision is used infrequently. However, when it is used, because the approval is based upon the same criteria as an individual wetland permit, it is appropriate and consistent to require mitigation for this type of waiver regardless of who the applicant is.

The Department does not agree that this provision should be waived for utilities, because of their public purpose. The protection of freshwater wetlands provides a public purpose as well, since the protection of wetlands contributes to the protection of the State's water supply, helps diminish flooding and provides many other publicly important functions and values.

437. COMMENT: N.J.A.C. 7:7A-15.26 is being proposed to force applicants to provide offsite mitigation for impacts to transition areas under N.J.A.C. 7:7A-6.3(g). The purpose of N.J.A.C. 7:7A-6.3(g) is to encourage applicants with the legal right to fill wetlands to avoid the wetlands and impact transition areas instead. This minimizes overall environmental impact since the DEP has determined tiers of increasing impact that determines wetland disturbance to have a greater environmental impact than disturbance to transition areas. The DEP now proposes to require that applicant who chooses to reduce overall impact to pay to mitigate for impacts to the transition area. This approach will make it more expensive than it would be if the applicant actually filled wetlands and encourages owners to increase impact. This N.J.A.C. 7:7A-15.26 should be removed from the rules. Furthermore the DEP has not provided scientific data to determine if transition areas can be severed from the adjacent wetland and still have independent value that can be effectively mitigated off-site. The entire definition of a transition area is

dependent on the adjacent wetland. Without the wetland, a transition area is just another cover type that is not regulated by the Freshwater Wetlands Act. Without this scientific finding, this approach could be viewed as an arbitrary taking and be discounted by the courts if challenged. Please provide the scientific data that substantiates the independent value of a wetland transition area severed from the adjacent wetland. (41, 64)

RESPONSE: As stated in the rule summary, N.J.A.C. 7:7A-15.26 is only to be used for transition area impacts resulting from a special activity waiver based upon individual permit criteria at N.J.A.C. 7:7A-6.3(g). Without N.J.A.C. 7:7-15.26, while the special activity waiver implies that mitigation is required because it is a condition of all individual permit approvals, there would be no criteria to mitigate for transition areas. The hierarchy provided at proposed N.J.A.C. 7:7A-15.26 parallels that for wetland mitigation and prioritizes mitigation to keep it as close to the disturbance site as possible and to replace the disturbance using the most successful types of mitigation possible. It is important to note that each hierarchy provided for wetland mitigation contains a final option allowing mitigation through a monetary contribution, upland preservation or a land donation approved by the Mitigation Council.

The FWPA at N.J.S.A. 13:9B-13 allows the Wetlands Mitigation Council to accept the donation of upland areas to satisfy mitigation requirements provided that the upland "has potential to be a valuable component of the freshwater wetlands ecosystem." The definition of "transition area" contained within the FWPA at N.J.S.A. 13:9B-16a(1) is, "an ecological transition zone from uplands to freshwater wetlands which is an integral portion of the freshwater wetlands ecosystem." Clearly, it is consistent with the FWPA and the other mitigation provisions within the rules, to accept transition areas as mitigation since they are a part of, and integral to, the protection of freshwater wetlands.

438. COMMENT: We support the use of bank credits to mitigate for transition area impacts. Please provide a description of the ratios that would be applied or a description of how many credits will be required to mitigate for an acre of transition area impact. Developers of wetland banks will require such an assessment in order to evaluate potential credit demand in a watershed. (63)

RESPONSE: The Department acknowledges this comment in support of the rules. The Department will require 2:1 mitigation for all transition area impacts under N.J.A.C. 7:7A-6.3 unless the applicant can demonstrate that less mitigation is sufficient to provide protection to the adjacent wetland.

439. COMMENT: The proposal should include a definition for the term "maximum extent feasible." (86)

RESPONSE: Since the Department is using the dictionary definition of "feasible," (capable of being done or accomplished), and for the word "maximum" (the greatest quantity possible) there is no need to provide a definition in the rules. The term "maximum extent feasible" means that restoration or enhancement must be carried out on the site of the disturbance to the greatest extent that the activity can be accomplished onsite.

440. COMMENT: The application checklist should be available on the NJDEP web site. (86)

RESPONSE: All checklists associated with permitting and with various mitigation options are already available on the Department's website at: www.nj.gov/dep/landuse/forms/index.html

Subchapter 16 Enforcement

441. COMMENT: Information obtained or used in the enforcement of the Freshwater Wetlands Protection Act, or other Acts, should be made available to the County. (86)

RESPONSE: The Department generally notifies the governing body and/or the construction official, of the municipality in which the alleged violation occurs, of a violation. In cases where there is a serious erosion problem, the Soil Conservation

District would also be notified. However, because the collected information relates only to the Department's freshwater wetlands permitting requirements, and may or may not involve activities regulated by a County, the Department does not believe it is necessary for other agencies to be formally or routinely notified. Additionally, the Department's web sites contain much real time information about violations, which can be sorted by location, so that a County can access enforcement actions within their jurisdiction.
N.J.A.C. 7:7A-16.9 Civil administrative penalty amounts for violations other than failure to obtain a permit for regulated activities.

442. COMMENT: The DEP plans to re-label the entire existing penalty structure to apply only to actions without a permit and then create an entirely new enforcement program for everything else. The DEP has restructured the enforcement program to create two tiers of enforcement: one for actions without a permit under N.J.A.C. 7:7A-16.8 and another for all other violations under a new section, N.J.A.C. 7:7A-16.9. The primary purpose of this new section is to create an administrative penalty system that will let the DEP enforce the Freshwater Wetlands Act unequally for applicants and permittees who choose to seek a permit. The DEP has provided these provisions to modify the standard of care for professionals preparing plans, added presumptions that make it easier to bring enforcement actions, and introduced joint and several strict liability violations of the permit. Enforcement is an essential part of an effective permitting rule, but it has to be done in a fair manner. It seems that DEP plans to implement an enforcement structure that is unbalanced and has heavier fines applied to a person who follows the rules than to one who does not. I believe that the rules as written, can determine that there has been a permit violation and can decide to enforce on that violation. However the rules appear to let the DEP pick and choose to fine regardless of fault. Therefore, an enforcement agent could choose to fine a surveyor who delineated the wetlands if a contractor fills a wetland. Furthermore, the rules seem to give the options of DEP not to fine the contractor of the violation. This seems implausible unless you consider that the agent might have had a disagreement with that surveyor in the past. (41, 64)

443. COMMENT: N.J.A.C. 7:7A-16.9(d) outlines conduct that would be classified as "major, moderate, or minor." N.J.A.C. 7:7A-16.9(d)1 states: "major" conduct shall include any intentional, deliberate, purposeful, knowing, or willful act or omission by the violator." N.J.A.C. 7:7A-16.9(d)1 also states that "the Department presumes all violations of Department permits or authorizations to be knowing violations as well as violations by persons who have previously applied for or received Freshwater Wetlands Protection Act permits or waivers." DEP's proposal to presume that any violation of the provisions of a permit is a "knowing" violation effectively eliminates the categorization of "conduct" in the penalty assessment context making the rule creating categories of conduct meaningless. Standards should be established to define DEP's burden of establishing what constitutes "intentional," "deliberate," "purposeful," "knowing," or "willful" violations. The absence of such standards invites abuse. In light of the significant penalty assessments that would accrue daily as proposed at N.J.A.C. 7:7A-16.9(b), the Department should ensure that heightened due process protections are afforded. (4, 27)

444. COMMENT: In the definition for “major” seriousness, it appears that the word “serious” should be inserted before the word “harm.” (30)

445. COMMENT: The DEP proposes new N.J.A.C. 7:7A-16.9 which creates a penalty structure to be used only against permittees who have obtained a permit. The DEP proposes a presumption that all permittees' violations will be knowing violations. By making this presumption, the DEP can impose higher fines without making any attempt to prove if the permittee deliberately violated the permit. The permittee is forced to request an expensive and time consuming hearing in front of an Administrative Law judge to rebut this presumption. The DEP is keenly aware that the party who has the burden of proving anything in court usually loses. By shifting this burden, the government knows that it is going to make much more money by collecting bigger fines, from more owners, for more violations.

The summary talks about how it is fair to punish knowing or deliberate acts more heavily. However, how is it fair to presume all violations of a permit are knowing violations? How fair is it to presume that once a particular person applied to the DEP for

a permit that all future violations by the person will be knowing violations? How fair is it to believe a member of the public is presumed to have a complete comprehension of rules so complex that most if not all DEP reviewers misstate them on occasion? This presumption effectively defeats the reason for having a graduated penalty structure and should be removed from the proposal. (64)

446. COMMENT: N.J.A.C. 7:7A-16.9 proposes to create a fine structure that equates actions that only have the potential to harm the environment to actions that cause actual harm to human health, safety or the environment. With this change the DEP vastly expands the range of activities that qualify for the harshest penalties. This approach effectively makes all deviations from a permit a violation upon which the DEP can impose fines even if these deviations do not result in any environmental harm. This provision significantly confuses the general understanding that the greater the harm the greater the punishment.

Furthermore, this enhanced punishment scheme can only be enforced against owners who voluntarily seek a permit. Everybody else will be prosecuted under N.J.A.C. 7:7A-16.8. This enforcement program is unbalanced. It can be used to fine a person who chooses to use the rules more harshly than to one who does not. For instance, under N.J.A.C. 7:7A-16.9, the DEP will apply the highest possible fine, $10,000 a day, to a permittee that does not timely file a deed restriction on her property in a timely manner despite there being no harm to the environment. At the same time under N.J.A.C. 7:7A-16.8, the Department could only fine a man $1,500 a day, if, without a permit, he unintentionally filled 3 acres of wetlands resulting in actual harm to the environment. Another example: under N.J.A.C. 7:7A-16.9, the DEP could fine a farmer $10,000 a day for painting his 75 year old barn without SHPO approval. This violation does not even involve a wetland; while under N.J.A.C. 7:7A-16.8, the DEP could only fine a bank president who cut down three acres of trees in a transition area $1,500 if he was unaware that an exceptional resource value wetland happened to be located within 150 feet on someone else's property.

Since N.J.A.C. 7:7A-16.8 does not have joint and several liability, lacks presumptions of knowing intent, has lower fines and does not trigger liability created by

the permit, more property owners will consider filling wetlands without a permit since they are less likely to be fined if they did apply for a permit. If they are fined, it will cost them less than the cost of applying for the permit in the first place. In these circumstances the DEP has a much harder time proving that a violation occurred since the pre-fill condition is not always apparent. (41, 64)

447. COMMENT: The Department's proposed new mechanism to determine fines and penalties greatly increases penalties without any legal or public policy reason, violates due process, and is ultra vires the FWPA.

The Department has proposed to limit the penalty calculation formula established in existing N.J.A.C. 7:7A-16.8 to penalties for the failure to obtain a permit. The Department then proposes a new section N.J.A.C. 7:7A-16.9, which purports to establish a penalty matrix, similar to that authorized under the Clean Water Enforcement Act, for violations other than a failure to obtain a permit, based upon the seriousness of the violation and conduct of the violator, similar to that authorized under the Clean Water Enforcement Act amendments to the Water Pollution Control Act. We believe that there is no authority under the FWPA to establish such a penalty matrix and, therefore, the proposed section is ultra vires the Act.

Without limiting the foregoing, the matrix that has been proposed skews essentially all penalties towards the upper end of the penalty matrix without any legal or policy basis, and therefore should be stricken or re-proposed. Focusing first on the factor of conduct, the proposed rule improperly presumes that all violations of permits or authorizations, or violations by persons who have previously applied for or received a permit or waiver, to be "knowing" violations. We strongly object to such a presumption, and believe that any presumption of knowledge in calculating a civil penalty is violative of due process protections provided under both the Federal and New Jersey Constitutions. The Department simply cannot presume knowledge of a violation based upon the fact that a person has a permit, or that a person has applied for a permit in the past. It should be noted that the Water Pollution Control Act regulations establishing a similar conduct matrix for penalties contain no such presumption. See N.J.A.C. 7:148.5(h)(1). Accordingly, any such presumption should be deleted from this rule.

Second, the matrix establishing the seriousness of offenses has effectively broadened the seriousness of offenses without any public policy reason, and has rendered minor conduct offenses a null set. Specifically, the "list" of offenses that are of "major" seriousness include almost any activity, including activities that are ministerial in nature, which could remotely be considered a violation under the FWPA. For example, recording a conservation restriction or easement a day later than the time period required under the proposed rule could be considered an offense of major seriousness under this proposal. Violations that may be considered moderate are a limited set; minor violations are undefined and appear to be a null set. Thus, the matrix essentially devolves into one category of seriousness under this proposal, namely, all violations are considered serious, notwithstanding their environmental impact. Such a presumption is beyond the FWPA and should be deleted.

Further, there are acts that are not related to the FWPA which are proposed to be penalized under the FWPA. For example, the failure to report the presence of a historic resource is considered a major violation. The FWPA does not regulate historic resources. Consequently, the FWPA can not be used as a statutory mechanism to penalize for the construction or destruction of historic resources. Even if the USACE or the United States Environmental Protection Agency were to impose requirements related to historic resources on the State of New Jersey, or individual permit applicants, the authority to impose penalties by the State of New Jersey vests in the authority granted by the New Jersey Legislature in the FWPA. The Legislature did not vest authority to impose such penalties. Therefore, penalties associated with historic resources, as well as other areas regulated by this Proposal not related to freshwater wetlands, their transition areas or open waters, should be removed.

Accordingly, we believe that the penalty matrix as proposed under this section should be deleted. (4, 24)

448. COMMENT: The proposal would amend the penalty provisions in a number of ways, the most notable of which would be to make the submission of an incomplete application or "inaccurate" or "false" information a violation for which penalties can be assessed' against any person (including the applicant, its consultants, engineers, surveyors

or agents) associated with preparation of that application. Complying with New Jersey's regulations is an incredibly complex and protracted process, and errors will occur. What constitutes "inaccurate, incomplete or false" is often a matter of interpretation, and legitimate differences of opinion between professionals and the Department occur frequently. An applicant or consultant should only be liable for penalties when it can be proven that they knowingly submitted false information. (55)

RESPONSE TO COMMENTS 442 THROUGH 448: On January 4, 2008, the Environmental Enforcement Enhancement Act (EEEA) was enacted and amended the Freshwater Wetland Protection Act enforcement provisions at N.J.A.C. 13:9B-21. To incorporate and implement the changes resulting from the EEEA, the Department has readopted without change Subchapter 16, Enforcement, and reproposed amendments to Subchapter 16 on August 18, 2008. The proposed amendments include those necessary for implementation of the EEEA and all amendments previously proposed in the Department's September 4, 2007 readoption of Subchapter 16 with amendments. Consequently, commenters interested in commenting on proposed amendments to Subchapter 16 are invited to submit comments on the August 18, 2008 proposal.

Economic Impact Statement

449. COMMENT: In the Economic Impact Statement there is a discussion which includes cost ranges for conducting various kinds of cultural resource management services. I am concerned that the cost ranges are not accurate and cannot be accurately estimated. The cost ranges are in general too low. Numerous factors affect the cost of provided cultural resource management services. Thus it is quite difficult to make a blanket assessment regarding survey costs given the numerous variables that have to be considered such as parcel size, soil condition, degree of sensitivity for one or more historic and/or archaeological resource, the number and type of historic and/or archaeological resources on a parcel, and the complexity of each historic and/or archaeological resource identified on a parcel. As such, I would recommend that this discussion and cost ranges for services be removed from the proposed rules. (25, 84)

RESPONSE: As stated in response to 326, the Department is required, in the Economic Impact statement accompanying the rules, to provide to the public as much detail as possible regarding the costs that may result from the rule provisions and specifically from each proposed rule mendment. In the past when the Department estimated costs associated with the historic preservation provisions of the rule, it obtained informal cost estimates from consultants performing these tasks. However, the Department acknowledges that there may be significant variation in these costs depending upon the factors noted by the commenter. The Economic Impact statement is informational and does not require that actual historic or archaeological surveys stay within the identified ranges. Consultants should perform as thorough a survey as necessary for the site in question.

450. COMMENT: DEP failed to account for the economic impact proposed N.J.A.C. 7:7A-2.6(b), N.J.A.C. 7:7A-2.6(b)1i(1), N.J.A.C. 7:7A-2.6(b)1i(2), and N.J.A.C. 7:7A-2.6(b)1i(8) will have on homeowners. Individually and collectively, these proposed rules will serve to curtail the use and enjoyment of property, and will, therefore, reduce property values. These proposed rules will also substantially, and disproportionately impact homeowners who purchased homes with a conservation restriction recorded prior to the adoption of these proposed rules. As set forth above, those homeowners thought that they could perform normal property maintenance, including mowing, landscaping and gardening in transition areas subject to a conservation easement. Thus, those activities were included in the bundle of property rights the homeowner bargained for when she or he purchased their property. If these rules are adopted, the homeowner will not be able to reap the benefit of the bargain for those property rights in two ways: 1) he or she will not be able to perform those activities; and 2) he or she will not be able to include those activities in the property rights he or she will be selling to a future buyer. In addition, there is no evidence in the proposed rules that DEP considered the economic impact on homeowners, or municipalities. The further restriction of use on a homeowners property will allow tax appeals, and reduce revenue to municipalities, which

was never discussed by DEP. The proposed rules, therefore, must be rescinded, so that DEP can perform this economic analysis. (2)

RESPONSE: The Department does not agree that it failed to address the economic impact of the rules on property owners since the rules do not expand the scope of permit requirements but rather provide clarification. Although the clarifications regarding property contained within conservation restrictions may appear to further limit the use of property, in reality such property has been limited in this manner since 1989.

When the Department enables applicants to change the shape of a transition area by obtaining a transition area waiver, it becomes critical that the remaining transition area be maintained in its natural condition. Without the ability to ensure that such conditions remain, the Department is unable to make the finding that the transition area is providing the important values and functions for the protection of the adjacent wetland. If the Department cannot ensure that such protections are afforded, it cannot allow any alteration to the transition area without violating the FWPA. Consequently, since 1989, the Department has been requiring the placement of a conservation easement or restriction upon approval of a transition area waiver (see former N.J.A.C. 7:7A-6.1(h)). By bringing this requirement forward into N.J.A.C. 7:7A-2.12, the Department did not change it but rather made it more prominent and standardized the language. There is no change in its effect. The conservation restrictions and easements themselves already limited the activities to be conducted in a restricted area but that information was contained within the easement document and not described at length in the rules. It is also important to have such language in the rules specifically because transition areas do affect single family properties. Developers design projects maximizing the use of land and leaving future property owners little if any non-regulated areas upon which to conduct future activities. Consequently, it is of critical importance that the limits on such properties be clearly outlined in a conservation restriction or easement so that unsuspecting purchasers will not buy a property that is not entirely suited for their needs. Property owners that have properly recorded conservation restriction or easements on their property are bound by the terms and conditions contained in that restriction or

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easement and not subject to language contained within the conservation restrictions or easements required under the newly adopted rules.

With regard to N.J.A.C. 7:7A-2.6(b)1i(8), the Department proposed the reduction from one quarter acre to 2,500 square feet because many lots in the State are themselves less than one quarter acre, and allowing such impacts for a garden could result in the complete elimination of a transition area. Two thousand, five hundred square feet provides a sufficiently large area for vegetable or flower gardening while limiting the impact to transition areas and wetlands. It is important to note that the adopted 2,500 square foot area limit is for new gardens in transition areas, and that existing gardens, no matter what size, can continue to be cultivated. In addition, the Department's rule to prohibit entirely the creation of gardens in forested transition areas is consistent with the fact that at N.J.A.C. 7:7A- 2.6(a)5 "destruction of plant life which would alter the existing pattern of vegetation," is a regulated activity. Clearly, cutting of a forest to create a new garden has adverse effects on adjacent wetlands, and would be classified as "destruction of plant life which would alter the existing pattern of vegetation." Therefore, N.J.A.C. 7:7A- 2.6(b)1i(8)(B) clarifies and codifies what has always been prohibited by N.J.A.C. 7:7A- 2.6(a)5.

Freshwater wetlands have been shown to protect public health by helping to purify groundwater, to protect public safety and property by mitigating the impact of floodwaters, and to the environment by providing valuable wildlife habitat and open space. Hence, wetlands and their adjacent transition areas are deserving of the protections afforded by N.J.A.C. 7:7A-2.6(b), N.J.A.C. 7:7A-2.6(b)1i(1), N.J.A.C. 7:7A-2.6(b)1i(2), and N.J.A.C. 7:7A-2.6(b)1i(8).

Finally, since the limitation on converting a field to a lawn at N.J.A.C. 7:7A-2.6(b)1i(1), maintaining existing fields at N.J.A.C. 7:7A-2.6(b)1i(2), and placing limits on new gardens in the transition area at N.J.A.C. 7:7A-2.6(b)1i(8) do not for the most part change, but rather clarify, the requirements regarding normal property maintenance activities in transition areas outside of conservation restrictions, the Department continues to believe the amendments to these sections will have little or no negative economic impact.

451. COMMENT: The economic impact statement states that the rules proposed for readoption with amendments will continue the overall positive economic impact of the existing rules. Later, the statement acknowledges that the proposed mitigation requirement will have a negative economic impact for applicants and that generally all costs are high.

Beyond the apparent high costs for purchasing land to conduct mitigation, the Department foresees that applicants will likely have to go to an approved mitigation bank or make a donation. The proposal then suggests that consultants, developers, and large property owners may find it economically beneficial to establish mitigation banks to serve this demand. Despite the caveat "if they do so successfully", the statement notes that the proposed mitigation requirements may provide those individuals with a positive economic impact.

Not only is the economic statement itself contradictory, it fails to address the variable operations of mitigation banks. Permitted projects must be located in particular service areas in order to use credits purchased from wetland mitigation banks to comply with mitigation requirements. Several approved mitigation banks have ceased the sale of credits for varying reasons, including Woodbury Creek Phase I and II Wetland Mitigation Bank, Pio Costa Wetland Mitigation Bank, and Rancocas Wetland Mitigation Bank Phase II. This reduces the pool of operating banks from which credits may be purchased. (4, 27, 29)

RESPONSE: The Department’s economic impact statement does not conflict with itself. The Department made the statement that the rules will continue the “overall” positive economic impacts of the previous rules. That does not mean that one section of the rules cannot have a negative impact while other sections have a positive or neutral impact. The Department believes it has satisfied the requirement to provide an economic impact statement by acknowledging that there may be varying economic impacts from various sections in the rules.

The Department believes that mitigation banking is an effective means of replacing wetlands since banks are constructed and operational before they can be used to

mitigate for wetland impacts, mitigation can be accomplished on a larger scale resulting in more valuable wetland systems, and mitigation can be created by watershed. However, mitigation banking is for the most part conducted by private individuals and companies subject to market forces which vary, as indicated by the commenter, and this does not negate their effectiveness for providing wetland mitigation. While the commenter mentions two banks that are not selling credits, of those only one has failed. The other is awaiting the completion of financial assurance documents and can recommence credit sales when it satisfies that requirement. There are nine other banks in the state in various stages of construction and/or marketing (that is, some have successfully completed construction and sold out of credits, some are selling credits, some are undergoing construction and have not yet commenced selling credits, and some are undergoing maintenance activities to ensure that the bank is meeting performance standards). The Department believes that this represents a solid start to mitigation banking and with the mitigation requirement for certain general permits, market forces may result in the creation of new banks to fulfill the additional need.

452. COMMENT: The economic statement regarding "Subchapter 12 Department Review of Applications" contains cost estimates for preparing applications to the Historic Preservation Office. These estimates are based on other estimates provided for the "economic statement" in the 2002 Freshwater Wetlands Protection Act rules. For the current rule proposal, the Department has merely adjusted the 2002 estimates to account for inflation. As with the 2002 economic analysis, reliance on such estimations without substantiation only allows for the very broad range in anticipated costs as provided (that is, cost for a structural assessment for a building proposed for demolition might cost between $3,675 and $8,400). (4, 27, 29)

RESPONSE : As stated by previous commenters (see comment 336), the Department is required to provide to the public as much detail as possible regarding the costs associated with the rules and specifically with each proposed amendment in the Economic Impact statement accompanying the rules. In the past when the Department estimated costs associated with the historic preservation provisions of the rule, it obtained informal cost

estimates from consultants performing these tasks. However, because there may be significant variation in these costs depending upon various factors including for example, existing conditions, environmental/topographic setting, tract size, proximity to the office, presence of hazardous materials, the Department is best able to only provide a broad range of costs.

453. COMMENT: The Department should seriously undertake the obligation to evaluate within the impact statements (that is, social, economic and smart growth) the measurable costs and consequences associated with proposed regulations. If comprehensive analysis is completed, the Department and the public would be able to better assess upfront the extent of impacts to be anticipated. The proposal also does not analyze the additional departmental staffing required to address the proposed requirements, including for mitigation and cultural resources. Adequate staffing is essential to the permit review process, particularly as wetlands permits currently are not processed in a timely fashion. (4, 27, 29)

RESPONSE: The Department does take seriously its obligation to provide impact statements that accurately reflect the impact of the rules on the public and the Department. The commenter is implying that the rules will result in the need for additional staffing. The Department does not agree. The potential affects on staffing of rule amendments is one element of consideration when determining whether or not to propose a rule.

In regard to the requirement for historic and archaeological surveys, the Department does not agree that the amendments to the rules result in the need for additional staffing. Based upon the criteria contained at N.J.A.C. 7:7A-12.2(l)1 through 5, the Department has only changed the timing for when a survey is required from after the application is accepted for review and sent to the State Historic Preservation Office, to before. In regard to the proposal for mitigation for certain general permits, please note that for the reasons described in response to comments 180 through 183, the Department is not adopting the mitigation requirement for general permits as proposed and instead is

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proposing a different requirement, similar to that in the Federal ACOE regulations, elsewhere in this Register.

Smart Growth Statement

454. COMMENT: I believe that had the DEP drafted these rules in accordance with Smart Growth principles it could have been a model rule that prevents further degradation of the State's ecosystems while working with the community to clean up the State's already polluted streams. The rules would have been concise and predictable. However, as evidenced in its own Smart Growth Statement attached to the proposal, the DEP has disregarded its smart growth obligations as required by Executive Orders 4, 38, 114 and did not consider the provisions of state law P.L. 2004 Chapter 89 that were not suspended by Executive Order 45. (64)

RESPONSE: Executive Order (EO) 4 from 2002, is entitled "Smart Growth Policy Council," since it deals almost exclusively with the establishment of a Smart Growth Policy Council in the Office of the Governor. However, Directive number 6 in the Order requires state agencies to include a Smart Growth Impact Statement with any rule proposal. The Department included such a statement with the freshwater wetlands rules proposal (see 39 N.J.R. 3618).

EO 38, also issued in 2002, is entitled, "Actions by and Coordination among State Agencies to Ensure Smart Growth." EO 38, Directive 8 required the Department to coordinate with the Department of Community Affairs, Office of Smart Growth (OSG) to facilitate, among other things, smart growth principles. The Department responded by establishing the Office of Planning and Sustainable Communities, within the Office of Policy, Planning and Science. The Office of Planning and Sustainable Communities works with OSG on sustainability and environmental capacity-based planning issues, and on Plan Endorsement in accordance with the State Development and Redevelopment Plan. EO 38, Directive 9 required the establishment of a mechanism to allow for pre-qualified consultants to expedite project review. This was also established via statute in 2004, specifically P.L. 2004, c.89 (Smart Growth Act). However, this statute was later

suspended in 2005 via EO 45 by Governor Codey, effectively suspending the requirement for establishing a program for pre-qualified consultants. EO 38, Directive 10 required the Department to develop and implement a program using mitigation fees, accounts and other market approaches to expedite the restoration of environmentally impacted properties, facilitate regulatory review, reduce uncertainty and promote cost-effective and environmentally sound approaches to smart growth. The Department implements this directive through the rules governing wetland mitigation at N.J.A.C. 7:7A-15. This subchapter of the rules deals directly with establishment of monetary contributions for mitigation, and mitigation banking, which is the Department's mechanism to provide certainty and to ensure the restoration of environmentally impacted properties.

The Department is unaware of an EO 114.

EO 45 is entitled, "Rulemaking in Implementation of P.L. 2004, c.89." This EO, from 2005, suspended implementation of the Smart Growth Act (SGA) until such time that the Department could alleviate federal government concerns that implementation of the SGA would negatively effect assumption and delegation of federal programs to the State. This suspension remains in effect.

Finally, it is important to note that the FWPA was adopted as a regulatory statute, not a planning tool, to systematically review activities in and around freshwater wetland areas. Consequently, the rules govern the conduct of specific actions (regulated activities) when proposed by an applicant. Unlike the State Development and Redevelopment Plan, the rules and statute are not designed to guide patterns of development, other than to indirectly discourage development in regulated areas by requiring a permit. As such, the State Development and Redevelopment Plan may guide development into appropriate areas of the State, while the FWPA and implementing regulations will establish criteria for impacts to wetlands if located within the chosen areas of development.

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Agency Initiated Changes

N.J.A.C. 7:7A-5.27(e) incorrectly makes reference to N.J.A.C. 7:7A-1.4 when stating that a disturbance authorized under general permit 27 does not count toward the one acre of disturbance allowed under multiple general permits. The correct reference for the section addressing the use of multiple general permits is N.J.A.C. 7:7A-4.4. The rule has been corrected upon adoption.

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Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995 c. 65) require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards analysis. Such a comparison is appropriate in the case of the freshwater wetlands program rules, because the Department is also obligated under Federal law to ensure that its program is at least as stringent as the Federal 404 program.

New Jersey's FWPA program replaces the Federal Clean Water Act Section 404 program (33 U.S.C. 1344) throughout most of the State. Consequently, the State's implementing rules replace the Army Corps of Engineers (ACOE) regulations for implementation of the Section 404 program. The basic structure of the Department's freshwater wetlands permitting program, and much of its substance, are essentially the same as the Federal 404 program. Both provide for individual and general permits. Both use similar key concepts and definitions, and apply similar standards in approving both general and individual permits.

While the New Jersey Legislature used the Federal 404 program as the basis for the FWPA, it also tailored the FWPA to meet the needs of New Jersey and to more strictly limit activities in and around wetlands in order to avoid excessive wetland losses in New Jersey. As a result, the New Jersey program regulates more types of activities in freshwater wetlands than the Federal 404 program does, regulates an upland "transition area" around each wetland, and, in some cases, requires a more involved process to obtain approval from the Department for regulated activities. Overall, because the Department regulates more activities in wetlands than the Federal program, including the drainage or disturbance of the water table, the driving of pilings, and the destruction of plant life which would alter the character of a freshwater wetlands, and protects a transition area adjacent to most wetlands, the Department’s rules are more stringent than the Federal 404 program. In addition, several recent court cases at the Federal level have made the Federal jurisdiction less clear. Consequently, there may now be wetlands identified under the State and Federal programs which only receive protection in New Jersey because they have lost the protection of the Federal Clean Water Act.

However, the additional protections are appropriate and necessary because New Jersey is the most densely populated State in the nation and continues to face development pressures that will impact the remaining wetland resources unless strictly protected.

The Department provides the following additional comparison between the Department's adopted rule amendments and the Federal 404 program.

Subchapter 1 General Information

The addition of the terms "architectural survey," "historic preservation restriction or easement," and "Phase IA historical and archaeological survey" for the protection of historic resources, and the addition of stump removal as part of the definition of "discharge of fill material" are both consistent with, and no more stringent than, the equivalent definitions contained within the Federal 404 program. The remaining new, and amended definitions all are necessary to the proper function of the State's program but are outside the jurisdiction of the Federal program. For example, the definition of "fair market value" is intended to clarify the term as it is used in the Department's hardship waiver provision for impacts to transition areas-- areas not regulated under the Federal 404 program.

Subchapter 2 Applicability

The adopted amendments to the ongoing farming activities exempt from permitting at N.J.A.C. 7:7A-2.8(b)3 and (c)2 and 3 are consistent with the same Federal program farming exemptions.

Adopted N.J.A.C. 7:7A-2.11 that makes compliance with the Department's stormwater management rules more prominent in this chapter, has no current, analogous Federal requirement. However, there are several Federal programs concerning stormwater runoff and nonpoint source pollution control. The Federal Clean Water Act (33 U.S.C. §1251 et seq.) requires permits under Section 402 of that Act for certain

stormwater discharges. The Department's requirements to obtain such permits are set forth in the New Jersey Pollutant Discharge Elimination System Rules, N.J.A.C. 7:14A. Since impervious surface generally increases non-point source pollution, requiring a stormwater review for the placement of impervious surface above a certain threshold reduces the potential for non-point source pollution and is consistent with Federal requirements.

Adopted new N.J.A.C. 7:7A-2.12, that standardizes the requirements for conservation restrictions or easements, draws its authority from State and not Federal law (see the "New Jersey Conservation Restriction and Historic Preservation Restriction Act," N.J.S.A. 13:9B-1 et seq.). However, for mitigation sites, the ACOE does require permanent protection by way of a real estate instrument, such as a conservation easement, deed restriction, and transfer of title to Federal or state resource agencies or non-profit conservation organizations.

Subchapter 4 General provisions for general permits

The Department's process for adopting new general permits is almost identical to the Federal process. However, because the Department is a State agency with an assumed wetlands program, the Department is also required to provide its general permits to EPA for review. The Department has the authority under the FWPA to adopt its own general permits and to review the Federal nationwide permits and adopt those it deems appropriate.

The process for obtaining authorization to use a general permit is also similar to that required for a nationwide permit. The Department requires submittal of an application that undergoes review by Department staff. Most of the Federal nationwide permits as of 2007 also require a preconstruction notification to allow the Army Corps of Engineers the opportunity to review a project for which a nationwide permit is requested.

Adopted amendments to N.J.A.C 7:7A-4.2 address the relationship between transition areas adjacent to wetlands for which the Department approves a general permit. There is no comparable Federal standard because the Federal 404 program does not

provide protection for transition areas. Although the Department is not adopting the amendment to N.J.A.C. 7:7A-4.3(b)1 that explicitly requires that all activities to be performed under a general permit be "minimized," the requirement to minimize impacts is consistent with federal requirements. The ACOE has a standard condition in its nationwide permits (which are equivalent to the State's general permits) that states, "the activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site)." (See 72 FR 11193, March 12, 2007).

The adopted amendment to N.J.A.C. 7:7A-4.4(a)1 regarding the use of multiple general permits is a clarification and not a substantive change. However, the Federal program also contains an equivalent mechanism for combining nationwide permits. The adopted change to N.J.A.C. 7:7A-4.4(a)2 relating to the combination of specific general permits, is necessary for the implementation of the State's FWPA and has no federal equivalent.

Subchapter 5 Adopted general permits

The Department has 27 adopted permits and 2 adopted new general permits. With the exception of the adopted general permit for activities in transition areas adjacent to non-surface water connected wetlands, there are federal nationwide permits for all of the Department's general permit activities, although the terms and conditions are not identical. For example, the Army Corps permit for linear transportation projects only requires an application if an impact would exceed 0.l acres, while the Department requires an application for all impacts. In addition, the total impacts permitted by the Army Corps permit are 0.5 acres. The Department's general permit limit for road crossings is 0.25 acres. The Department believes this is appropriately more stringent for the reasons previously stated. Finally, the Army Corps of Engineers has a total of 50 nationwide permits. The Department has reviewed the nationwide permits and adapted those that it deems appropriate as part of its rules. In general, the nationwide permits that are not part of the State program are those that would not apply in New Jersey. For

example, the Army Corps has recently adopted a nationwide permit for coal mining activities that is not appropriate for New Jersey.

As previously discussed, in March 2007, the Army Corps of Engineers as part of the Federal 404 program, adopted new regulations making mitigation a standard condition of most Nationwide Permits, the federal equivalent of general permits. The ACOE also follows the same hierarchy for performing mitigation, although the Federal government tends to discourage in lieu fee programs (monetary contributions) mainly because such programs do not exist nationwide. The Department is not adopting the mitigation condition for general permits and is instead proposing a different standard, more similar to the adopted ACOE program, in a proposal document contained elsewhere in this Register.

Adopted N.J.A.C. 7:7A-5.6A relates exclusively to transition areas and consequently has no federal equivalent.

The adopted amendments to N.J.A.C. 7:7A-5.8 for house additions, has no exact federal equivalent. The ACOE has a nationwide permit for “minor discharges” which allows up to 0.1 acre of wetland/waters fill. The Department’s permit is limited to additions to single family houses and to 750 square feet. The permit limitations were provided by the FWPA. The adopted amendments which allow reconstruction of a dwelling with a 750-foot addition within five years of the destruction of the original structure are also unique to the State’s program.

The addition of the requirement to protect an area of habitat enhancement from future development, at N.J.A.C. 7:7A-5.16(c)6 is more stringent than the Federal permit for aquatic habitat enhancement and restoration activities (NP 27). The Federal government allows such activities to “revert” back to the pre-enhanced condition after the permit expires, and permits the discharge of fill to facilitate reversion because it believes that most people will not take advantage of this option. The Department believes that once a permit has been approved and habitat created, there should be no option for reversion. Due to the development pressures unique to New Jersey, it may be more likely that New Jersey owners would take advantage of this provision and this would be detrimental to the State’s fish and wildlife resources. Because the State is more stringent than the Federal government in this provision, the residents of New Jersey will benefit

from the permanent protection of wetlands and all of the functions and values they provide, but will especially benefit from the protection of valuable fish and wildlife resources. The costs will be the same as those incurred by any individual seeking to develop wetlands in the State of New Jersey.

There is no NP specifically to allow non-motorized multiple use paths. However, NP 42, recreational facilities, includes things like bike and horse paths, which would be covered by adopted new N.J.A.C. 7:7A-5.17A. However, the Department's adopted general permit is narrower in scope and more stringent than the NP because it is limited to 0.25 acres of impacts and does not permit support facilities, while the NP permits up to 0.5 acres of impacts with some "small support facilities" ("small" is not defined). The Department believes that it is reasonable to have more stringent standards in New Jersey, to encourage more environmentally-sensitive designs in a state that is experiencing heavy development pressure. Because the State is more stringent than the Federal government in this provision, the residents of New Jersey will benefit from the more stringent protection of wetlands and all of the functions and values they provide. By limiting the impacts that non-motorized multiple use paths can have on wetlands, the Department encourages designing such paths outside of environmentally sensitive wetlands. While there may be greater costs for construction if the path has to be extended in order to avoid wetland areas, a path constructed in uplands does not have to be designed to protect hydrology of the wetland, which should lessen the expense of construction. Thus, the difference in cost, if any, is difficult to estimate.

Subchapter 6 Transition area waivers

As previously stated, New Jersey's program regulates an upland "transition area" adjacent to most wetlands. The Federal program does not contain similar protections. Consequently, the State's program is more stringent than the Federal program as it relates to the protection of transition areas. However, the protection for transition areas emanates from the FWPA, because a transition area is an important ecological transition zone from uplands to wetlands, providing several values and functions for the protection of the adjacent freshwater wetland.

Subchapter 10 Application contents and procedures

Subchapter 10 provides the application contents and procedures necessary for the Department's implementation of its program. Consequently, where the Department's program differs from the Federal program, the application contents and procedures reflect that difference. For example, adopted N.J.A.C. 7:7A-10.1(q), which requires that the survey standards contained in the Department's Green Acres standards be followed, and the requirement at N.J.A.C. 7:7A-10.2(b)8 to provide documentation regarding compliance with the State stormwater rules have no Federal equivalent since they require compliance with other State rules and standards applied in New Jersey and not nationwide.

The requirement at N.J.A.C. 7:7A-10.4(a)2 and 10.6(a)2, requiring that an applicant provide the total area in acres of wetlands and State open waters on a site before the regulated activity is performed is also unique to the State regulations. The Federal program tracks the total acres of impact resulting from the approval of a permit and the location of the impact but does not assess the total wetland acreage as part of the regulatory program.

The requirement to provide the subdivision history of a lot at N.J.A.C. 7:7A-10.4 is also a State and not Federal requirement. It is the State's mechanism to track total impacts permitted on a given lot to ensure that the Department requires an individual permit to assess cumulative impacts, when the total impacts on the site have exceeded those for general permits.

None of the requirements in N.J.A.C. 7:7A-10.5 have Federal equivalents since these requirements apply to transition area waiver applications which are not part of the Federal program.

The requirement to provide a written request to transfer an approval does have a Federal equivalent. The ACOE provides a form to be completed for transferring a property that contains the same information as that contained in the Department's adopted rule.

The adopted requirement to notify neighbors adjacent to a proposed mitigation site, at recodified N.J.A.C. 7:7A-10.8 does not have a Federal equivalent. However, a court found in Rinaldo v. RLR Investment and DEP, Docket No. A-1447-04T3, that this was necessary for proposed mitigation sites in New Jersey.

To the extent that the majority of the adopted changes in Subchapter 10 do not have Federal equivalents they may be viewed as exceeding Federal standards since the Department is imposing requirements that are not required by the Federal program. However, the requirements are necessary and appropriate because they provide the information and documentation necessary to implement the Department's more stringent program.

Subchapter 11 Fees

The Department's wetlands regulatory program is a fee-supported program, assessing fees for each type of review activity including letters of interpretation, general and individual permits and transition area waivers. Although all money is deposited in the State Treasury, it is allocated back to the program in an amount based upon the fee money that was collected. The Federal government operates the ACOE program using an annual appropriation instead of assessing permit fees sufficient to support its operations. Consequently, the ACOE charges nominal fees for a minor subset of its review activities with the actual operating costs supported by Federal taxes. There are no fees for Nationwide permit authorizations, for jurisdictional determinations, or for transition area waivers (since transition areas are not regulated features pursuant to the Federal program). The ACOE charges individual homeowners $10 for the review of an individual permit application. For commercial entities, the individual permit review fee is $100.

The State of New Jersey is required to balance its budget each year, while there is no obligation for an annually balanced Federal budget. Consequently, the State assesses fees to assist in paying for its programs. The State has opted to charge fees to those who will receive the major benefit from developing environmentally sensitive lands, while the Federal government has determined to spread the cost of its environmental programs among all taxpayers. Therefore, the Department has concluded that the freshwater wetland permit fee amendments do not exceed any Federal Standards or requirements.

Subchapter 12 Department Review of Applications

Adopted amendments at N.J.A.C. 7:7A-12.2(k), (l), new (m) and (p) all relate to additional information necessary to demonstrate compliance with State standards for which there is a Federal equivalent. For example, N.J.A.C. 7:7A-12.2(l), new (m) and (p) relate to the protection of historic resources, while N.J.A.C. 7:7A-12.2(k) relates to the protection of Federally-listed threatened and endangered species. The adopted amendments are intended to make the Department's regulatory process more efficient and more similar to the Federal program. The remaining differences result from the fact that the Department is operating a State and not a Federal program. For example, the requirement for an applicant to provide information by which the Department can assess compliance with the requirement to avoid impacts to a historic resource is necessary and similar to that required by the ACOE when reviewing proposed wetland applications with the potential to affect historic resources. Consequently, the adopted amendments do not exceed the comparable Federal requirements.

Subchapter 13 Contents of Permits and Waivers

The adopted addition to the list of conditions at N.J.A.C. 7:7A-13.1(a), that requires an applicant to notify the Department seven-days before the commencement of site preparation or regulated activities is similar to a requirement employed by the ACOE in the implementation of the Federal program. The ACOE requires submittal of a "notification/certification of work commencement form" 10 days prior to the commencement of authorized work. Consequently, the Department's adopted requirement does not exceed the comparable Federal standard.

Subchapter 14 Changes to Issued Permits or Waivers

The adopted amendment to N.J.A.C. 7:7A-14.3, modification of a permit, that makes it mandatory to modify a permit to record a change in ownership is equivalent to

the ACOE requirements for transfer of a permit. The only difference between the two processes is that the ACOE requires submittal of a signed statement indicating that all terms and conditions of the transferred permit remain in effect, while the Department is not proposing such a requirement. Instead, the Department has adopted certain conditions on the transfer of a permit and is requiring submittal of a copy of any recorded conservation restriction or easement, if one was required as a condition of the permit to be transferred. These variations reflect the differences between the State and Federal programs. However, the State program does not exceed the Federal standard.

Subchapter 15 Mitigation

On March 28, 2006, the Environmental Protection Agency (EPA) proposed rules entitled, “Compensatory Mitigation for Losses of Aquatic Resources.” The proposed rules contained the guidelines that EPA had been using to assess mitigation projects nationwide, and also proposed some changes relating to “in lieu fee” programs. “In lieu fee” programs are designated funds set up to accept monetary contributions when other types of mitigation are not available (that is, when there is no opportunity for creating, enhancing, or restoring a wetland, or purchasing wetland credits from a bank where wetlands have already been created). The FWPA created an “in lieu fee” program when it established the Wetlands Mitigation Bank. The EPA suggested in its rule proposal that in lieu fee programs should be eliminated in favor of using existing mitigation banks. However, it invited comments on that proposal and no final rule has yet been published.

The Department’s rules relating to mitigation are consistent with the mitigation rules proposed by EPA. As described in the summary, many of the proposed changes throughout the subchapter are intended to bring the Department’s rules into closer harmony with the Federal standards by ensuring that the mitigation option hierarchy remains consistent with the equivalent Federal standards.

With one exception, the Department’s adopted rules and rule amendments relating to mitigation are no more stringent than the Federal rules. The one exception is proposed new N.J.A.C. 7:7A-15.26. Because this section requires mitigation for transition areas for

a small subset of transition area waiver impacts, and because, as previously stated, the Federal program provides no protection for transition areas, the requirement for mitigation in these cases is more stringent than the Federal mitigation requirements. However, since the FWPA requires the protection of transition areas, the Department believes the requirement for mitigation is necessary, in those limited cases when a transition area waiver is approved based upon individual permit criteria, since without mitigation, such approvals may result in unacceptable impacts to the transition area and adjacent wetland.

Subchapter 16 Enforcement

The Federal government does not distinguish between administrative penalties for failure to obtain a permit from all other administrative penalties, as the Department has proposed at N.J.A.C. 7:7A-16.8 and 9. However, the proposed change does not make the Department's regulations more or less stringent than the comparable Federal enforcement standards since both types of violation result in comparable penalty assessments. The Department has readopted without change Subchapter 16, Enforcement, and reproposed amendments to Subchapter 16 on August 18, 2008, for the reasons described in response to comments 442-448.

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Full text of the readopted rules may be found in the New Jersey Administrative Code at N.J.A.C. 7:7A.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 2 APPLICABILITY

N.J.A.C. 7:7A-2.4 Classification of freshwater wetlands by resource value

(a)-(b) (No change.)

(c) (No change from proposal.)

(d) A freshwater wetland of ordinary resource value, or an ordinary resource value wetland, is a freshwater wetland which does not exhibit any of the characteristics in (b) above, and which is:

1.-3. (No change.)

4. A detention facility created by humans in an area that was upland at the time the facility was created regardless of the wetland resource classification of the *[water body or]* wetland *under these rules, or the classification of the body of water, as FW-1 or FW-2 trout production,* to which it discharges.

N.J.A.C. 7:7A-2.8 Activities exempted from permit and/or waiver requirement

(a)-(b) (No change from proposal.)

(c) Subject to the limitations of this section, the following activities, when part of an established, ongoing farming, ranching or silviculture operation, on properties which have received or are eligible for a farmland assessment under the New Jersey Farmland

Assessment Act, N.J.S.A. 54:4-23.1 et seq., are exempt from the requirement of a freshwater wetlands or open water fill permit, or transition area waiver:

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or soil and water conservation practices. For the purposes of this paragraph, "minor drainage" means:

i. (No change.)

ii. (No change from proposal.)

iii.– v. (No change.)

2. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, provided that such facilities are for farming, ranching or silvicultural purposes and do not constitute a change in use. Any dredged material from pond construction or maintenance must be placed outside the freshwater wetlands unless it is needed for the structural or environmental integrity of the pond;

i. (No change from proposal.)

ii. To qualify for this exemption, a farm pond shall be:

* <u>(1) Part of a farm conservation plan developed in conjunction with the Natural Resources Conservation Service and approved by the Soil Conservation District, as appropriate;</u>*

(1)-(3) renumbered as (2)-(4) No change in text.

[(4)] *<u>(5)</u>* Intended exclusively for agricultural purposes. The applicant shall submit a description of the purpose of the pond with any application for an exemption letter under N.J.A.C. 7:7A-2.10; *<u>and</u>*

[(5)] *(6)* Sized appropriately for the intended use under (4) above*[; and

(6) Part of a farm conservation plan approved by the Natural Resources Conservation Service]*.

3. Construction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands and State open waters are not impaired and that any adverse effect on the aquatic environment will be minimized. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. Roads constructed for forestry and silviculture purposes shall be constructed using temporary mats whenever practicable. Once the land use changes from forestry or farming to another use, that is, once the property no longer qualifies for a farmland assessment, all roads employing the placement of fill shall be removed within 30 days;

i. Construction of a farm road shall be undertaken only in accordance with the following:

(1) The road shall be part of a farm conservation plan [approved by] *developed in conjunction with* the Natural Resources Conservation Service *and approved by the Soil Conservation District, as appropriate*;

(2)-(6) (No change from proposal.)

ii. (No change from proposal.)

N.J.A.C. 7:7A-2.10 Exemption letters

(a) (No change.)

(b) To apply for an exemption letter for a farming, silviculture or ranching exemption under N.J.A.C. 7:7A-2.8(c), an applicant shall submit the following:

1. (No change.)

2. (No change from proposal.)

3. A copy of the farm conservation plan, as *[approved by]* *developed in conjunction with* the Natural Resource Conservation Service *and approved by the Soil Conservation District, as appropriate*; and

4. (No change in text.)

N.J.A.C. 7:7A-2.11 Stormwater management

If a *[project or activity requires Department approval under these rules and the project in its entirety (that means the whole project, not just the portions within wetlands or transition area)]* *proposed regulated activity* meets the definition of "major development" at N.J.A.C. 7:8-1.2, then the project *of which the regulated activity is a part* shall comply *in its entirety* with the Stormwater Management rules at N.J.A.C. 7:8. *In accordance with N.J.A.C. 7:7A-1.6(b), the Pinelands Commission may require equal or more stringent stormwater management regulation of activities in and around freshwater wetland areas within its jurisdiction.*

N.J.A.C. 7:7A-2.12 Conservation restrictions or easements

(a) *With the exception of a waiver for access, as described at N.J.A.C. 7:7A-6.1(a)6, and for redevelopment waivers when practicable, in accordance with N.J.A.C. 7:7A-6.3(f)4,* *[A]* *a*ny transition area modified through a transition area waiver and its adjacent wetlands, and mitigation areas whether on or offsite, shall be permanently protected from any future development through the grant of a conservation restriction or easement as defined at N.J.A.C. 7:7A-1.4 in favor of the Department. A "modified" transition area is the entire transition area on a site after a transition area waiver is obtained. Wetland areas remaining on a site after the Department approves a wetland permit may be restricted in those cases where the Department determines that the restriction is necessary to protect the remaining wetland;

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(b)- (m) (No change from proposal.)

SUBCHAPTER 4 GENERAL PROVISIONS FOR GENERAL PERMITS

N.J.A.C. 7:7A-4.2 Using a general permit to authorize specific activities

(a)-(b) (No change.)

(c) Each general permit authorization shall include a limited transition area waiver to allow access to the authorized activity, in accordance with N.J.A.C. 7:7A-6.1(a)6. No fee or application is required for this waiver and the disturbance authorized under this waiver is not counted in calculating the amount of disturbance under the general permit. An access transition area waiver allows regulated activities only:

1. (No change.)

2. For an activity that the Department determines is necessary to accomplish construction, and for future use, of the activity authorized in the wetlands under the general permit. An activity not directly required in order to obtain access to the activity authorized in the wetlands under the general permit shall require a separate transition area waiver;

i. (No change from proposal.)

ii. If the activity authorized under the general permit partially eliminates *[of]* the wetland, the access shall be limited to the transition area adjacent to the location of the approved wetland filling. Any additional impacts to the transition area shall require a separate transition area waiver; and

iii. (No change from proposal.)

N.J.A.C. 7:7A-4.3 Conditions that apply to all general permit authorizations

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(a) (No change.)

(b) The following conditions apply to all activities conducted under the authority of a general permit:

1. Activities performed under a general permit shall be associated with a proposed project *[and shall be minimized in accordance with i. below]*. The Department shall not authorize activities under a general permit for the purpose of eliminating a natural resource in order to avoid regulation. For the purposes of this subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and all associated activities*. In accordance with N.J.A.C. 7:7A-1.6, the Pinelands Commission may require more stringent regulation of activities in and around freshwater wetland areas in its jurisdiction*;

[i. For the purposes of this subsection, “minimized” means that the project has been configured so that most or all of it is contained in the uplands on the site, or in the uplands and transition areas on the site, and that the wetlands have been avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement:]

2.-4. (No change.)

5. (No change from proposal.)

6.-9. (No change.)

10. If *[a project in its entirety, of which general permit]* activities *[are a part,]* *under the general permit meet* *[meets]* the definition of "major development" at N.J.A.C. 7:8-1.2, *then* the project *of which the activities are a part* shall comply in its entirety with the Stormwater Management Rules at N.J.A.C. 7:8.

11. -15. (No change.)

16. With the exception of activities associated with general permits 1, 6, *6A* and 16 activities authorized under a general permit shall not take place in a vernal habitat, as defined at N.J.A.C. 7:7A-1.4, or in a transition area adjacent to a vernal habitat.

(c)-(f) (No change.)

SUBCHAPTER 5 ADOPTED GENERAL PERMITS

N.J.A.C. 7:7A-5.2 General permit 2--Underground utility lines

(a)-(b) (No change.)

(c) Activities under general permit 2 shall comply with the following limits:

1. Permanent above-ground disturbance of wetlands, transition area, and/or State open waters shall be no greater than 0.5 acre. Anything that changes the character of the existing wetland, even if only to a different wetland type, is permanent disturbance. For example, maintained clearing over a utility line is permanent disturbance. For the purposes of this subsection, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance;

2.-6. (No change.)

(d)-(e) (No change.)

[(f) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 2 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]

[(g)] *(f)* (No change from proposal).

N.J.A.C. 7:7A-5.6 General permit 6--Non-tributary wetlands

(a) General permit 6 authorizes regulated activities in freshwater wetlands, and/or State open waters, if the freshwater wetlands and/or State open waters are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

(b) Activities under general permit 6 shall be limited as follows:

1. (No change.)

2. The activities shall disturb no more than one-half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C. 7:7A-1.4. *[Mitigation shall be required in accordance with (d) below for freshwater wetlands and/or State open waters that are waters of the United States.]*

(c) (No change.)

[(d) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters that are waters of the United States. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 6 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]

[(e)] *(d)* (No change from proposal.)

N.J.A.C. 7:7A-5.6A General permit 6A—Transition areas adjacent to non-tributary wetlands

(a) General permit 6A authorizes regulated activities in transition areas adjacent to freshwater wetlands *[and/or State open waters]* if the freshwater wetlands *[or State open waters]* are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

(b) (No change from proposal.)

(c) Activities under general permit 6A shall not take place in a transition area adjacent to the following:

1. An exceptional resource value wetland, as described at N.J.A.C. 7:7A-2.4; *or*

2. *[A State open water that is a special aquatic site, as defined at N.J.A.C. 7:7A-1.4;

3.]* USEPA priority wetlands *[; or

4. A State open water that is larger than one acre]*.

(d) (No change from proposal.)

N.J.A.C. 7:7A-5.10A General permit 10A—Very minor road crossings

(a) –(e) (No change.)

[(f) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 10A until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]

[(g)] *(f)* (No change from proposal.)

N.J.A.C. 7:7A-5.10B General permit 10B--Minor road crossings

(a) General permit 10B authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters:

1. (No change from proposal.)

2.-3. (No change.)

(b)-(d) (No change.)

[(e) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 10B until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]

*[(f)]**(e)* (No change from proposal.)

N.J.A.C. 7:7A-5.11 General permit 11--Outfalls and intake structures

(a)-(h) (No change.)

[(i) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 11 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]

[(j)] *(i)* (No change from proposal.)

N.J.A.C. 7:7A-5.18 General permit 18--Dam repair

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

(e) (No change from proposal.)

*[(f) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general

permit 18 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]*

[(g)] *(f)* (No change from proposal.)

N.J.A.C. 7:7A-5.21 General permit 21--Above ground utility lines

(a) (No change.)

(b) No change from proposal.)

(c)-(d) (No change.)

[(e) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 21 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]

[(f)] *(e)* (No change from proposal.)

N.J.A.C. 7:7A-5.23 General permit 23--Expansion of cranberry growing operations in the Pinelands

(a)-(k) (No change.)

(l) *If an applicant proposes activities that will result in the loss and/or disturbance of more than one half acre of freshwater wetlands and/or State open waters, the applicant shall transfer Pinelands Development Credits (PDCs) to the Department in accordance with the following:

1. The applicant shall transfer PDCs in the following ratios to acres of loss and/or disturbance:

i. For Atlantic white-cedar wetlands, four tenths of a PDC for every acre of loss and/or disturbance;

ii. For forested freshwater wetlands that are not Atlantic white-cedar wetlands, fifteen one hundredths of a PDC for every acre of loss and/or disturbance;

iii. For emergent or scrub/shrub wetlands, one tenth of a PDC for every acre of loss and/or disturbance; and

iv. For wetlands that are abandoned blueberry, cranberry, or agricultural fields, or State open waters, zero PDCs;

2. Each portion of the site that is one quarter acre or larger shall be assigned its own PDC requirement, and these requirements shall be summed to calculate the PDC requirement for the entire site. A portion smaller than one quarter acre will be given the ranking of the area surrounding it. For example, an applicant may have three acres of State open waters, and one eighth acre of Atlantic white-cedar wetlands surrounded by eight and seven eighths acres of scrub/shrub wetlands. The disturbance of the State open waters requires no PDCs under (l)1iv above. The one eighth acre of Atlantic white-cedar wetlands is smaller than one quarter acre and therefore is treated as part of the surrounding scrub/shrub wetlands. Under (l)1iii above, nine tenths of a PDC are required for the disturbance of the scrub/shrub wetlands. This would be the total for the site; and

3. The total PDC requirement for the site shall be rounded up to the nearest one quarter PDC. Under the example at (l)2 above, the PDC requirement for the entire site is nine tenths of a PDC, which would then be rounded up to one PDC.* *[Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 23 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]*

*(m) The applicant shall transfer any PDCs required under (l) above to the Department, or to a nonprofit or governmental agency designated by the Department, prior to

beginning activities authorized under general permit 23, and no later than 90 days after receiving the general permit authorization. The Department or its designee shall convey the PDCs to the Pinelands Development Credit Bank in accordance with the MOA established under (n) below, and shall use the resulting funds to establish and/or restore Atlantic white-cedar wetlands in the Pinelands.

(n) The Department shall enter into a memorandum of agreement (MOA) with the Pinelands Commission and the Pinelands Development Credit Bank. The MOA shall include a general plan for implementing the Atlantic white-cedar restoration program required by this section, and shall:

1. Identify at least one potential site for Atlantic white-cedar restoration;

2. Include a requirement for at least one acre of Atlantic white-cedar restoration for each acre of Atlantic white-cedar wetlands lost and/or disturbed under general permit 23;

3. Include clear success criteria for the Atlantic white-cedar restoration program; and

4. Ensure that Atlantic white-cedar restoration efforts will not adversely impact existing areas of forested wetlands.*

*[(m)]**(o)* (No change in text.)

[(n)] *(p)* The requirements of (c), (j), *[and]* (k), *(l), and (m)* above shall not apply to the proposed activities under general permit 23 if the Department determines that the activities:

1.-2. (No change.)

* (q) Each year, the Commissioner shall make a finding as to whether the pace of impacts under the general permit is proportional to the pace of Atlantic white-cedar restoration efforts. The Commissioner shall consult with the Pinelands Commission, and shall consider, among other factors, whether restoration efforts are making reasonable progress towards the goals in the Department's overall plan for Atlantic white-cedar restoration. The Department shall publish the Commissioner's finding as a public notice in the New Jersey Register by October 31 of each year:

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1. If the Commissioner finds that the pace of impacts is proportional to the pace of restoration efforts, the Department shall publish a finding of continuance of the general permit. A finding of continuance shall remain in effect until the next October 31 following the publication of the finding; or

2. If the Commissioner finds that the pace of impacts is out of proportion to the pace of Atlantic white-cedar restoration efforts, the Department shall publish a finding of temporary hold of general permit authorizations, and shall stop issuing authorizations under general permit 23. A finding of temporary hold shall remain in effect until the Commissioner determines that the pace of impacts under the general permit has again become proportional to restoration efforts, and the Department publishes a finding of continuance.*

[(o)] *(r)* (No change in text.)

[(p)] *(s)* An application for authorization under general permit 23 shall be submitted within 90 days after *the general permit becomes operative under (u) below* *[(the date this amended rule is effective)]*. Within 180 days after *general permit 23 becomes operative,* *[(the date this amended rule is effective)]*, the Department shall make a final decision on all applications submitted within the 90-day deadline. Thereafter, applications shall be submitted to the Department by January 1 of each year. The Department shall issue decisions on applications by March 1 of each year.

[(q)] *(t)* If the Department receives applications for authorization under general permit 23 which would, if approved, result in a total Statewide loss and/or disturbance of freshwater wetlands and/or State open waters that exceeds the limits at (i) above, the Department shall give priority to applications involving areas with the lowest number rankings on the list at (d) above, taking into consideration overall environmental impacts. If two or more applications involve similarly ranked land and similar environmental impacts, the Department shall give priority to the application submitted and determined complete under N.J.A.C. 7:7A-9.5(d) first.

(u) (No change in text.)

[(r)] *(v)* In order to ensure compliance with the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq., general permit 23 will be *added to the list of general permits* subject to coordination procedures with the U.S. Fish and Wildlife Service under the Department's Memorandum of Agreement regarding the Endangered Species Act and New Jersey's assumption of the Federal 404 program.

N.J.A.C. 7:7A-5.27 General permit 27--Redevelopment of previously disturbed areas

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

(d) *If activities under general permit 27 disturb more than one-half acre of freshwater wetlands or State open waters, the* *[The]* applicant shall perform mitigation under N.J.A.C. 7:7A-15 for all *of the* *[permanent loss and/or]* disturbance *[of freshwater wetlands or State open waters]* authorized under general permit 27. *[The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application**.** The Department shall not issue an authorization under general permit 27 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.]*

(e) A disturbance authorized under general permit 27 does not count toward the one acre of disturbance allowed under multiple general permits under N.J.A.C. 7:7A-*[1.4]* *4.4*.

(f) (No change from proposal.)

SUBCHAPTER 6 TRANSITION AREA WAIVERS

N.J.A.C. 7:7A-6.1 General transition area waiver provisions

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

(e) With the exception of a waiver for redevelopment *for which it is not practicable, in accordance with N.J.A.C. 7:7A-6.3(f)4* or access, all transition area waivers shall be

conditioned on the recording of a Department-approved conservation restriction or easement, as defined at N.J.A.C. 7:7A-1.4, and in accordance with the requirements at N.J.A.C. 7:7A-2.12, restricting future activities in the entire transition area and adjacent wetlands on the site.

1.-3. (No change from proposal.)

(f)-(h) (No change from proposal.)

N.J.A.C. 7:7A-6.2 Transition area averaging plan waiver

(a)-(b) (No change from proposal.)

(c) In addition to the presumptions at (b) above, the Department shall also presume that, for a transition area adjacent to an intermediate resource value wetland, the following will result in a substantial impact on the adjacent freshwater wetlands, and the Department shall not issue a transition area averaging plan waiver unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-6.1(d):

1. (No change.)

2. The transition area averaging plan proposes to:

i.-ii. (No change.)

iii. Reduce a transition area to 10 feet wide for a continuous distance of 100 linear feet or more along the freshwater wetlands boundary *[, resulting in an average transition area width that is less than 25 feet]*;

iv. (No change.)

v. Compensate for a decrease in a transition area by increasing the width of any portion of the transition area to more than 75 feet *[.]* *;

vi. Result in an average transition area width that is less than 25 feet.*

(d)-(e) (No change.)

N.J.A.C. 7:7A-6.3 Special activity transition area waiver

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

(f) The Department shall issue a special activity transition area waiver for redevelopment of a significantly disturbed area if all of the following conditions are met:

1. (No change from proposal.)

2.-3. (No change.)

4. Where practicable, any remaining disturbed portion of the transition area shall be planted with indigenous plants that are beneficial to the wetland, and protected from future development by a conservation restriction or easement that meets the requirements at N.J.A.C. 7:7A-*[12.2]* *2.12*.

(g) (No change from proposal.)

N.J.A.C. 7:7A-10.8 Public notice requirements for applications

(a)-(b) (No change.)

(c) Each notice or application required to be provided under this section shall be sent by certified mail, return receipt requested *or through other courier or mail delivery service that provides written proof of delivery of letters and packages*.

(d)-(l) (No change from proposal.)

SUBCHAPTER 12 DEPARTMENT REVIEW OF APPLICATIONS

N.J.A.C. 7:7A-12.3 Public comment on an application

(a) The Department shall publish notice in the DEP Bulletin of each administratively complete application in accordance with N.J.A.C. 7:7A-12.1, except for an application

for a minor modification. *The DEP Bulletin is available at www.state.nj.us/dep/bulletin/* This notice shall constitute notice of the application to all interested persons except those who must be notified by the applicant under N.J.A.C. 7:7A-10.8.

(b) (No change.)

(c) (No change from proposal).

(d)-(e) (No change.)

N.J.A.C. 7:7A-12.4 Hearings on an application for an individual permit or [individual] transition area waiver

(a) Within 30 days after a notice of an application for an individual permit or transition area waiver is published in the DEP Bulletin, interested persons may request in writing that the Department hold a public hearing on the application. Requests shall state the nature of the issues proposed to be raised at the hearing. *The DEP Bulletin is available at www.state.nj.us/dep/bulletin/*

(b) (No change from proposal.)

(c)-(d) (No change.)

(e) (No change from proposal.)

(f)-(j) (No change.)

SUBCHAPTER 15 MITIGATION

N.J.A.C. 7:7A-15.13 Financial assurance for a proposal to restore, create, or enhance wetlands

(a)-(b) (No change.)

(c) The letter of credit or other financial assurance shall be in an amount sufficient for the Department to hire an independent contractor to complete and maintain the mitigation project or mitigation bank should the mitigator default. At a minimum, the financial assurance shall be *based upon itemized estimates provided by third-party contractors and* in the following amounts:

1. (No change.)

2. (No change from proposal.)

(d) (No change.)

(e) (No change from proposal.)

N.J.A.C. 7:7A-15.18 Requirements that apply after the Department approves mitigation through a monetary contribution

(a) (No change from proposal.)

(b) The Department shall declare mitigation through a monetary contribution successful upon a demonstration that:

1. (No change from proposal.)

2. For a monetary contribution for a general permit:

i. The amount has been properly calculated in accordance with N.J.A.C. 7:7A-*[5.21(d)]* *15.21(d)*; and

ii. (No change from proposal.)

N.J.A.C. 7:7A-15.25 Application for approval of a mitigation bank

(a) (No change from proposal.)

(b) To obtain final Department approval of a proposed mitigation bank, an applicant shall submit the information required by the application checklist, available from Department staff at the address in N.J.A.C. 7:7A-15.2(f). The checklist shall require the following types of information:

1. (No change.)

2. (No change from proposal.)

3. (No change.)

4. Information on the following items, sufficient for the Department to determine if the mitigation bank is consistent with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, published jointly by EPA and other Federal agencies in the November 28, 1995 Federal Register at 60 Fed. Reg. 58605:

i.-iv. (No change.)

v. The service area within which the mitigation bank credits may be used to compensate for a disturbance. The service area shall be designated to give priority to mitigation for impacts occurring:

(1) (No change from proposal.)

(2) Adjacent to * <u>the same HUC-11</u>* and within the same watershed management area as the proposed bank;

(3) (No change from proposal.)

vi.-viii. (No change.)

ix. (No change from proposal.)

x.-xv. (No change.)

5. (No change.)

6. (No change from proposal.)

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7. (No change.)

N.J.A.C. 7:7A-15.26 Mitigation for transition area impacts *in accordance with N.J.A.C. 7:7A-6.3(g), special activity transition area waivers based upon individual permit criteria*

(a) This section governs the mitigation alternative required and the location of mitigation in relation to the disturbance for a transition area impact in accordance with N.J.A.C. 7:7A-6.3(g) *, special activity transition area waivers based upon individual permit criteria*. Mitigation for a transition area disturbance shall be performed through restoration or enhancement *of transition areas* carried out on the site of the disturbance to the maximum extent feasible.

(b) If onsite *transition area* restoration or enhancement is not feasible, mitigation shall be performed through any of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank located in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area;

2. The purchase of credits from a mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999, which includes the disturbance site in its bank service area; or

3. Offsite restoration or enhancement in the same HUC 11 or in an adjacent HUC 11 within the same watershed management area as the disturbance.

(c) If *transition area* mitigation under (b) above is not feasible, *transition area* mitigation shall be performed through either of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank in the same watershed management area as the disturbance; or

2. Restoration, enhancement, or upland preservation in the same watershed management area as the disturbance.

(d) If *transition area* mitigation is not feasible under (b), or (c) above, mitigation shall be performed through:

1. The purchase of credits from a mitigation bank which includes the disturbance site in its bank service area; or

2. Restoration or enhancement in the same drainage basin.

(e) If *transition area* mitigation is not feasible under (b), (c), or (d) above, mitigation shall be performed through:

1. A monetary contribution in accordance with N.J.A.C. 7:7A-15.21;
2. Upland preservation, in accordance with N.J.A.C. 7:7A-15.9; or
3. A land donation approved by the Wetland Mitigation Council in accordance with N.J.A.C. 7:7A-15.22.

SUBCHAPTER 16 ENFORCEMENT

N.J.A.C. 7:7A-16.1 General provisions

(a) For the purposes of this subchapter (N.J.A.C. 7:7A-16), the term "applicable law and/or condition" means one or more applicable provisions or conditions of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the New Jersey Water Pollution Control Act, N.J.S.A. 5*[8]*:10A-1 et seq.; and/or any *[letter of interpretation]*, permit, waiver, order, *[settlement agreement,]* exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

(b)-(c) (No change.)

(d) For *all**[each]* violation*s* under this *subchapter* *[chapter]*, each day during which each violation continues shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(e)-(f) (No change.)

N.J.A.C. 7:7A-16.2 USEPA review

The Department shall make available without restriction any information obtained or used in the *implementation* *[enforcement]* of the Freshwater Wetlands Protection Act, the Water Pollution Control Act, and/or this chapter, to USEPA upon request.

N.J.A.C. 7:7A-16.5 Civil administrative penalty

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Freshwater Wetlands Protection Act, or of any permit, waiver, *[letter of interpretation,]*order, *[settlement agreement,]*exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than $ 10,000 for each violation. The amount of the civil administrative penalty for *a violation of the Freshwater Wetlands Protection Act* *[each such violation]* shall be determined under N.J.A.C. 7:7A-16.8 through *16.12**[16.13]*.

(b) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Water Pollution Control Act, or of any permit, approval, waiver, order, *[settlement agreement,]*exemption, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than $ 50,000 for each violation. The amount of the civil administrative penalty for *a violation of the Water Pollution Control Act* *[each such violation]* shall be determined under the Department's rules implementing the enforcement provisions of that law at N.J.A.C. 7:14-8.

(c) (No change.)

N.J.A.C. 7:7A-16.7 Appeal of an administrative order and/or notice of civil administrative penalty

(a) (No change.)

(b) A request for an adjudicatory hearing under this subchapter shall be *addressed to* *[submitted as follows]*:

[i. Submit the original request to]:

Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection
[401 East State Street, 4th Floor]
P.O. Box 402
Trenton, New Jersey 08625-0402

*[ii. Submit a copy of the request to:

Bureau of Coastal and Land Use Compliance and Enforcement
Department of Environmental Protection
401 East State Street
P.O. Box 422
Trenton, New Jersey 08625-0422]*

(c) -(e) No change.

N.J.A.C. 7:7A-16.8 Civil administrative penalty amount *[for failure to obtain a permit prior to conducting regulated activities]*

(a) When the Department assesses a civil administrative penalty *[for the failure to obtain a permit prior to conducting regulated activities]*, the Department shall use the procedures in this section to determine the amount of the penalty if the violation pertains to *[freshwater]* wetlands and*[/or freshwater wetland]* transition areas, except if the violation is listed at N.J.A.C. 7:7A-16.9, 16.10, *or* 16.11, *[16.12, or 16.13]* in which case the penalty amount shall be determined under whichever of those sections applies.

[For the purposes of this section, a permit shall mean a permit, waiver, authorization, or other approval issued pursuant to the Freshwater Wetlands Protection Act.]

(b) (No change.)

(c) The Department shall use the three factors described below to determine the amount of a civil administrative penalty under this section. Using the standards below, the Department assigns each violation a point value for each factor. The total number of points is used in Table D at (d) below to determine the penalty amount per day for each violation. The factors, and the point values assigned to them, are as follows:

1. The conduct factor of the violation shall be classified as major, moderate or minor and assigned points as follows:

i. Major conduct shall include an intentional, deliberate, purposeful, knowing or willful act or omission by the violator and is assigned *[five]* *<u>three</u>* points;

ii.-iii. (No change.)

2. The acreage of wetlands *[and/or transition areas]* impacted factor shall be assigned points as follows:

i. A violation impacting more than three acres of wetlands *[and/or transition areas]* is assigned *[five]* *<u>three</u>* points;

ii. A violation impacting one to three acres of wetlands *[and/or transition areas]* is assigned two points; and

iii. A violation impacting less than one acre of wetlands *[and/or transition areas]* is assigned one point; and

3. The resource value classification factor shall be assigned points as follows:

i. A violation impacting exceptional resource classification wetlands is assigned *[five]* *<u>three</u>* points;

ii.-iii. (No change.)

(d) The Department shall sum the total points assigned according to the three factors in (c) above, and shall determine the penalty amount per day using the following table:

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Table D

Penalty points table

Total Points	Penalty Amount Per Day
[10-15] *9*	$ 10,000
[9] *8*	9,000
[8]	*[8,000]*
7	*[7,000]* *7,500*
6	6,000
5	*[5,000]* *4,500*
4	3,000
3	1,500

[(e) The total civil administrative penalty assessed shall be the daily penalty amount obtained from Table D above multiplied by the number of days during which the violation has continued.]

*[N.J.A.C. 7:7A-16.9 Civil administrative penalty amount for violations other than failure to obtain a permit for regulated activities

(a) For violations other than the failure to obtain a permit prior to conducting regulated activities as described in N.J.A.C. 7:7A-16.8 above or those violations addressed in N.J.A.C. 7:7A-16.10, 16.11, and 16.12, the Department shall assess a civil administrative penalty pursuant to this section of not more than $10,000 per day for each violation of the applicable law and/or condition pursuant to this chapter.

(b) The Department shall assess a civil administrative penalty for violations described in this section on the basis of the seriousness of the violation and the conduct of the violator by applying the seriousness and conduct factors to determine the appropriate daily penalty amount to the Table E matrix below.

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Table E

		SERIOUSNESS		
		MAJOR	MODERATE	MINOR
	MAJOR	$10,000	$7,500	$3,500
CONDUCT	MODERATE	$7,500	$5,000	$2,500
	MINOR	$3,500	$2,500	$500

(c) The seriousness of the violation shall be classified as major, moderate or minor as follows:

1. “Major” seriousness shall include any violation which has caused or has the potential to cause harm to human health, safety, the Freshwater Wetlands Protection Act regulatory program, or the environment, or seriously deviates from the applicable law and/or condition. “Serious” deviations include, but are not limited to those violations which are in complete contravention of the law, requirement and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement or condition. Violations of “major” seriousness include, but are not limited to, any activities that negatively affect water quality; the clearing, grading, or filling of freshwater wetlands; the clearing grading or filling of transition areas when done in conjunction with such activities in freshwater wetlands; the clearing, grading, filling or disturbance of freshwater wetlands and/or transition areas in excess of that authorized by a permit or plan; the failure to timely record a required conservation restriction or easement; the failure to report the presence of a historic resource during construction and/or the destruction of a historic resource without Department approval; and the failure to comply with a historic or mitigation requirement;

2. “Moderate” seriousness shall include any violation which has caused or has the potential to cause substantial harm to human health, safety, the Freshwater Wetlands Protection Act regulatory program or the environment, or substantially deviates from the applicable law and/or condition. “Substantial deviation” shall include, but not be limited to violations which are in substantial contravention of the law, requirement and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement and/or condition. The Department will consider a violation, if limited solely to the transition area not associated with a permit or plan, to be of moderate seriousness. Violations of “moderate” seriousness also include, but are not limited to, failure to notify the Department of commencement of construction, failure to transfer a permit as required in this chapter, and failure of an applicant or permittee to provide information upon request to determine compliance with provisions of the Act pursuant to N.J.S.A. 13:9B-21(l);

3. “Minor” seriousness shall include any violation not included in (c)1 or 2 above.

(d) The conduct of the violator shall be classified as major, moderate or minor as follows:

1. “Major” conduct shall include any intentional, deliberate, purposeful, knowing, or willful act or omission by the violator. The Department presumes all violations of Department permits or authorizations to be knowing violations as well as violations by persons who have previously applied for or received Freshwater Wetlands Protection Act permits or waivers;

2. “Moderate” conduct shall include any unintentional but foreseeable act or omission by the violator; and

3. “Minor” conduct shall include any other conduct not included in (d)1 or 2 above.

(e) The total civil administrative penalty assessed shall be the daily penalty amount obtained from the Table E matrix multiplied by the number of days during which the violation has continued.]*

N.J.A.C. 7:7A-*[16.10]* *16.9* Civil administrative penalty amount for submitting inaccurate or false information

(a) When the Department assesses a civil administrative penalty for submittal of inaccurate information or submittal of a false statement, representation, or certification in an application, record, or other document required to be submitted or maintained under the Freshwater Wetlands Protection Act or under a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, *[including, but not limited to, the presence of a historic resource and/or the presence of regulated areas such as freshwater wetlands and freshwater wetlands transition areas on the site,]* the Department shall use the procedures in this section to determine the amount of the civil administrative penalty.

(b)-(g) (No change.)

N.J.A.C. 7:7A- 16.11 through 16.19 are recodified as N.J.A.C 7:7A-16.10 through 16.18. (No change in text.)

N.J.A.C. 7:7A-*[16.20]* *16.19* Grace Period Applicability; Procedures

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

(b) Each violation identified in Table *[F]* *E* 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]**E* 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 *[F]* *E*at (f) below but is comparable to a violation designated as "M" in Table *[F]* *E*and the violation meets all of the criteria of (d)1 through 6 below, then the violation is minor. The minor violation shall be subject to a grace period of 30 days as described at (e) below.

2. If the violation is not listed in Table *[F]* *E* at (f) below and is not comparable to a violation listed in Table *[F]* *E* but the violation meets all of the criteria of (d)1 through 9 below, then the violation is minor. The minor violation shall be subject to a grace period of 30 days as described at (e) below.

3. If the violation is not listed in Table *[F]* *E*at (f) below but is comparable to a violation designated as "NM" in Table *[F]* *E*, 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 *[F]* *E*at (f) below and is not comparable to a violation listed in Table *[F]* *E*, and the violation does not meet all of the criteria at (d)1 through 9 below, the violation is non-minor and is not subject to the grace period.

Comparability of a violation to a violation in Table *[F]* *E* 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 *[F]* *E* unless the violation also meets the criteria at (d)7 through 9 below.

(d)–(e) (No change.)

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

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Table [E]F

Rule Citation	Violation Description	Type of Violation
N.J.A.C.7:7A-2.1(a), 2.2(a-b), 2.5(f), 2.6(a)	Conducting regulated or prohibited activities in a freshwater wetland, transition area and/or State open water without prior Department approval	NM
N.J.A.C. 7:7A-4.3	Failure to comply with conditions of a Department permit or authorization not related to submission of documentation to the Department.	NM
N.J.A.C. 7:7A- 4.3	Failure to submit to the Department documentation as required by a permit condition.	M
N.J.A.C. 7:7A- 6.1*(h)* *[(b) and (e)]*	Failure to execute and record the required conservation restriction prior to the beginning of activities authorized under a transition area waiver, or transfer of the site.	NM
N.J.A.C. 7:7A-10.1(f)	Failure to provide in the application all information required in this chapter of which the applicant, its consultants, engineers, surveyors, or agents is or should be aware	NM
N.J.A.C.7:7A-*10.9* *[10.8]*	Failure to provide appropriate public notice during the permit application process	NM
N.J.A.C. 7:7A-13.1	Failure to comply with conditions of a Department permit or authorization not related to submission of documentation to the Department.	NM
N.J.A.C. 7:7A-13.1	Failure to submit to the Department documentation as required by a permit condition.	M
N.J.A.C. 7:7A-14.4(a)	Failure to comply with a permit suspension order	NM
N.J.A.C. 7:7A-14.5(b)	Failure to comply with a permit termination order	NM
N.J.A.C. 7:7A-15.2(b),	Failure to conduct mitigation as required by a Department approval or administrative order	NM
N.J.A.C. 7:7A-15.3(a)	Failure to conduct mitigation as required by a Department approval or administrative order	NM
N.J.A.C. 7:7A-15.11(a),	Failure to submit a mitigation proposal to the Department as required by a Department approval or order	NM

N.J.A.C. 7:7A-15.16(a)	Failure to execute and record the conservation restriction that meets the requirements of N.J.A.C. 7:7A-15.14 prior to the start of mitigation activities	NM
N.J.A.C. 7:7A-15.16(b)	Failure to submit a construction completion report within the required timeframe of completion of construction and planting of a restoration, creation or enhancement project	M
N.J.A.C. 7:7A-15.16(c)	Failure to submit an annual post-planting report at the required intervals following the completion of the construction and planting associated with mitigation	M
N.J.A.C. 7:7A-15.16(d)	Failure to demonstrate to the Department at the end of the post-planting monitoring period that the mitigation project is successful	M
N.J.A.C. 7:7A-15.17(c) 1	Failure to transfer the mitigation area in fee simple to a government agency or charitable conservancy within 60 days after the Department declares mitigation through upland preservation successful	NM
N.J.A.C. 7:7A-15.17(c) 2	Failure to provide the government agency or charitable conservancy with a maintenance fund for the mitigation area transferred to the government agency or charitable conservancy	NM
N.J.A.C. 7:7A-15.18(a)	Failure to apply to the Wetlands Mitigation Council for approval of the amount of monetary contribution following the Department's determination that monetary contribution is an appropriate mitigation alternative	NM
N.J.A.C. 7:7A-15.19(a)	Failure to apply to the Wetlands Mitigation Council for approval of the particular parcel of land to be donated following the Department's determination that land donation is appropriate mitigation alternative	NM

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Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994), permit the public to understand accurately and plainly the purpose and expected consequences of this readoption with amendments. I hereby authorize this readoption with amendments.

_____	_____
Date	LISA P. JACKSON Commissioner