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ENVIRONMENTAL PROTECTION

DELAWARE AND RARITAN CANAL COMMISSION

Regulations for the Review Zone of the Delaware and Raritan Canal State Park

Adopted Repeal and New Rules: N.J.A.C. 7:45

Proposed: December 1, 2008 at 40 N.J.R. 6686(a)

Adopted: _____, 2009 by Mark N. Mauriello, Acting Commissioner, Department of Environmental Protection and

David DelVecchio, Chairman, Delaware and Raritan Canal Commission (as to N.J.A.C. 7:45-5, 6 and 13).

Filed:

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

DEP Docket Number: 19-08-10

Effective Date: June 1, 2009

Expiration Date: June 1, 2014

The Department of Environmental Protection (Department) and the Delaware and Raritan Canal Commission (Commission) are repealing N.J.A.C. 7:45, Delaware and Raritan Canal State Park Review Zone, and adopting new N.J.A.C. 7:45, Regulations for the Review Zone of the Delaware and Raritan Canal State Park.

The Delaware and Raritan Canal State Park Law of 1974, N.J.S.A. 13:13A-1 et seq. (the Act), created the Delaware and Raritan Canal State Park (Park) and established the Commission to plan for and protect the Park. The Act authorizes the Commission to

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prepare and adopt a master plan for the development and protection of the Park, and to delineate a review zone within which the Commission will review public and private projects that might adversely affect the Park, to determine their conformity with the master plan. The Act, at N.J.S.A. 13:13A-10, authorizes the Department, with the approval of the Commission, to promulgate rules and regulations for the use and protection of the Park. Accordingly, with the exception of the rules relating to fees and general permits, the Department is adopting the within repeal and new rules. In 2007, the Act was amended to give the Commission authority to establish and charge fees in accordance with a fee schedule adopted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and adopt rules and regulations that identify the types of projects eligible for a general permit and establish the criteria for the approval or rejection of a general permit. (N.J.S.A. 13:13A-12h and 14e) Accordingly, the Commission is adopting the within rules regarding fees (N.J.A.C. 7:45-13) and general permits (N.J.A.C. 7:45-5 and 6).

The adopted rules at N.J.A.C. 7:45 establish the procedures, standards, and scope of review by the Commission to implement its responsibility under the Act to review public and private projects that might have an adverse effect on the Park. As authorized by the Act, the regulations govern any private project within review Zone A that requires any permit from or determination by a municipality within which the project is proposed. Within review Zone B, the rules govern any private project that requires any permit from or determination by a municipality, and proposes the addition of more than 0.25 acres of impervious surface since January 1980, or the disturbance of more than one acre. With

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regard to governmental projects, the rules govern any governmental project within Review Zone A that includes any public improvement, disturbance, development, construction or land-use change by a State department or agency, county, municipality or any other governmental entity, except for interior alterations to an existing structure.

Within review Zone B, the Department and Commission govern any governmental project, as described above, that proposes the addition of more than 0.25 acres of impervious surface since January 1980, or the disturbance of more than one acre.

The proposal was published on December 1, 2008. The public comment period closed on January 30, 2009.

Summary of Hearing Officer's Recommendations and Agency Responses:

The Commission held public hearings on the proposal on December 17, 2008 at 1:00 PM, at the Commission's office in Stockton, and on January 5, 2009 at 10:00 AM in the Department's Public Hearing Room in Trenton. Ernest Hahn, Executive Director of the Commission, was the hearing officer at both hearings. The two hearings were attended by a total of 10 people and four offered 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 Summary of Agency-Initiated Changes. The Department and the Commission accept the Hearing Officer's recommendation. In accordance with N.J.S.A. 13:13A-10 the Commission approved and the Department and Commission hereby adopt the regulations as set forth below.

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

Office of Legal Affairs

Attn: DEP Docket No. 19-08-10

Department of Environmental Protection

401 East State Street, Fourth Floor

P.O. Box 402

Trenton, New Jersey, 08625-0402

The Department and the Commission received comments on the proposal from the following persons:

1. Barth, Robert; Canal Society of New Jersey
2. Byers, Michele; NJ Conservation Foundation
3. Currie, Bruce; C. A. Niece Co., Inc.
4. Decibus, Eric; Unlimited Renovations LLC
5. Henchek, Barbara
6. Henchek, John
7. Heinrich, Helen; NJ Farm Bureau
8. Robert, Marshall; Rowbear Consulting, PC
9. Ross, Barbara; D&R Canal Watch

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10. Touhey, Timothy; NJ Builders Association

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

General Comments

1. COMMENT: All four of the following major changes that the proposed rules implement are necessary for the proper conduct of the business of the D&R Canal Commission: 1) charging fees is reasonable and justified, 2) conforming with the Department's Stormwater Management Rules is essential, 3) regulating all streams that directly enter into the Canal and increasing their buffers, and 4) allowing staff to authorize approvals of certain types of projects is reasonable. (9)

RESPONSE: The Department and Commission acknowledge this comment in support of the rules.

2. COMMENT: The new rules will provide needed protection for the resources of the Park and its environs. The rules have clear guidelines for jurisdictional determinations. The commenter also supports the proposed application fees, the revised stormwater rules, as well as the new definition for stream corridor and accompanying stricter buffer standards. (2)

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RESPONSE: The Department and Commission acknowledge this comment in support of the rules.

3. COMMENT: The Canal is a very valuable historic, recreational and water supply resource and the commenter supports reasonable regulations for its protection. (8)

RESPONSE: The Department and Commission acknowledge this comment in support of the rules.

4. COMMENT: Since the Commission's stormwater standards were first enacted in 1983, the State has enacted other land use regulations, namely wetlands, stormwater, and flood hazard area rules. The proposed rules should provide for a way to apply these other rules, instead of maintaining an expensive independent bureaucracy. (8)

RESPONSE: The Department and the Commission are aware that some projects may require review by both the Department and the Commission. N.J.A.C. 7:45 does not address wetlands; therefore, a project subject to the Department's wetlands rules would be subject only to Department review. The Commission's rules for visual and traffic impacts are unique to their circumstance and do not have Department corollaries.

Both the Department and the Commission regulate stormwater discharges. While there may be limited overlap of reviews regarding some specific projects, most projects

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requiring Commission review (approximately 90 percent) do not require stormwater review by the Department because the site on which the project is located is entirely within the Review Zone, or because the proposed design does not trigger a Department permit. Even for those projects regulated by both agencies, the Department may have permitting jurisdiction over only part of the site, and therefore would not be able to ensure that all stormwater from the entire site meets the Commission's regulations. For example, a large site may have separate sub-drainage areas that ultimately discharge to the Canal. The Department may have permitting jurisdiction for activities in only one of those areas, because the proposed design does not trigger a Department permit for activities in the other sub-drainage areas. In these cases, the Commission's review ensures that stormwater discharges from proposed projects will not adversely impact the Park or Canal.

The Acting Commissioner of the Department of Environmental Protection has expressed his intent to explore and eliminate duplicative reviews in the Department's response to the Permit Efficiency Task Force Report. The Department's Implementation Plan may be viewed on the Department's website at <http://www.state.nj.us/dep/> under the heading of Permit Efficiency Review Task Force. For the stormwater aspects of a project in the Review Zone, the Department and Commission may embark on a pilot program whereby the Department for purposes of issuing its permit would accept an approval issued by the Commission as fulfillment of the Department's stormwater requirements. Thus, for example, a project that would require a stormwater review under the Department's Flood Hazard program and an approval under these rules from the

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Commission may be reviewed as to stormwater management standards only by the Commission.

5. COMMENT: The proposed rules do not show whether there are current problems with canal water making it unsuitable as a water supply. (8)

RESPONSE: The rules are written to prevent further impacts to the water quality of the Canal, which is part of the drinking water supply for approximately 1.5 million people. The proposal summary cited nonpoint source pollution investigations conducted by the New Jersey Water Supply Authority that documented that stormwater is a major source of pollution to the Canal. (See 40 N.J.R. at 6698.) For a detailed justification please refer to the proposal summary for stormwater requirements at N.J.A.C. 7:45-8 and for stream corridor requirements at N.J.A.C. 7:45-9 (40 N.J.R. at 6692 - 6699).

6. COMMENT: The proposed rules do not show why this water resource is so different that an independent regulatory program is needed to protect it. (8)

RESPONSE: The rules are written to fulfill the statutory mandate signed into law in 1974. The following is rationale provided in the findings and declarations of the Act. Those conclusions remain valid today.

N.J.S.A. 13:13A-2. Legislative findings and declarations.

The Legislature finds and declares that:

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- a. The Delaware and Raritan Canal is a vital source of water supply and is of historic, ecological and recreational value to the citizens of New Jersey; that the canal and the narrow band of land along the canal banks owned by the State are also an extremely attractive and lucrative asset to the State; that the quantity and quality of surface water runoff, flooding potential, esthetic surroundings, and even the structural integrity of the canal, can all be adversely affected by surrounding developments; that within the State Government, decisions which affect the canal and the State owned land appertaining thereto are often made separately by different State agencies and local governing bodies; that the surrounding properties are private and public portions of 17 municipalities in four counties, each with its own planning and zoning authority; that, in general, the decisions which are made often reflect local expediencies rather than a coherent plan.
- b. The State of New Jersey must act immediately and thereafter to preserve, locate, survey, and acquire such lands as are now available for public recreation and the conservation of natural resources, in order to promote the public health, prosperity, and general welfare, as a proper responsibility of government; that the enactment of the provisions set forth in this act would create a Delaware and Raritan Canal State Park to be maintained and operated under the jurisdiction of the Department of Environmental Protection, which shall have the power, with the approval of the Delaware and Raritan Canal Commission, as hereafter provided, to take such measures as may be necessary to preserve, maintain, improve, and enlarge the park, if funds for these purposes are made available

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from time to time; that a Delaware and Raritan Canal Commission to be established to prepare, adopt, and implement a master plan for the physical development of the park, and to review State and local actions that impact on the park to insure that these actions conform as nearly as possible to the Commission's master plan;

...

7. COMMENT: The rules do not discuss specific factors that show the Canal's being vulnerable to runoff. The statement that more regulation by the Commission will improve water quality in the Canal is arbitrary and unsupportable in these economic times. (8)

RESPONSE: The proposal summary cited nonpoint source pollution investigations conducted by the New Jersey Water Supply Authority that documented that stormwater is a major source of pollution to the Canal. For a detailed justification please refer to the proposal summary for stormwater requirements at N.J.A.C. 7:45-8 and for stream corridor requirements at N.J.A.C. 7:45-9 (40 N.J.R. at 6692 - 6699).

8. COMMENT: The rules are focused on future development, instead of development built prior to 1983, when water supplies were more threatened by runoff. The rules should instead encourage owners in developed parts of the review zone to install treatment systems that remove more pollution at a lower cost. (8)

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RESPONSE: The Act does not authorize the Commission to mandate the installation of stormwater pollution treatment systems on existing development. Private development is regulated by the Commission only when the development requires a municipal approval for a new project.

9. COMMENT: The Department should refrain from using the sunset provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., to arbitrarily expand environmental regulation. (8)

RESPONSE: The sunset provision of the Administrative Procedure Act is not being used arbitrarily to expand the regulations. In order to work more efficiently, regulatory deficiencies that compromised environmental protection had been noted and collected during the years since the last re adoption. Rather than re adopting the existing rules, the Commission and the Department are repealing the existing rules and adopting new rules that include provisions addressing the identified deficiencies. The new rules include provisions extending protection to all water courses that enter the Park and Canal and changing the stormwater standards to match the currently accepted standard to provide better protection to the Canal as a drinking water supply.

10. COMMENT: The rules do not recognize existing acres of existing agricultural use in the expanded review area. The Commission did not work with the NJ Department of

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Agriculture on these rules. Agriculture is not being treated differently from other land uses, as it is with other State regulations. (7)

11. COMMENT: The rules have not been evaluated to determine the nature and extent of their impacts on the agricultural industry. They are not in conformance with the provisions for agricultural land use in other new Department rules. (7)

RESPONSE TO COMMENTS 10 AND 11: Legally existing, ongoing uses, including manufacturing, commercial, residential, agricultural and forestry uses, are not subject to the within regulations. The Commission's regulations do not apply to ongoing activities. This is similar to the State's other land use regulations, which generally apply only to new or expanded development, and not to ongoing activities. Only proposed projects that require local municipal approval and reach the applicable regulatory threshold of a major or minor project as defined at N.J.A.C. 7:45-1.3 are regulated. As set forth in the Agriculture Industry Impact, 40 N.J.R. at 6705, the rules are not anticipated to have an impact on agricultural activities.

12. COMMENT: Although projects not requiring municipal approvals are exempt, small projects such as additions to supply water or electricity on a farm would require a fee, an application, and time necessary to obtain both municipal and Commission approvals. (7)

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RESPONSE: The examples in the comment would require Commission approval only in Zone A (1000 feet from the center line of the Canal), and would qualify for a General Permit Authorization, requiring a minimal fee and a limited review time (30 days or less). There are few farms within Review Zone A.

13. COMMENT: The Commission should become part of the NJ Water Supply Authority, functioning as an advisory board to the Authority, the State, and the municipalities in their planning process. (5, 6)

RESPONSE: The Commission serves a much different function than the Water Supply Authority. The Commission not only regulates both governmental and non-governmental projects to ensure that they will not adversely impact the Canal as a water supply system, it also regulates these projects for their visual and traffic impacts on the Park. The New Jersey Water Supply Authority was created in 1981 (P.L. 1981, c 293) to operate, on a self-supporting basis, the existing State water supply facilities, and to develop future State water supply projects as recommended in the State Water Supply Master Plan. Therefore, the Water Supply Authority's operation and development of its water supplies may potentially have adverse impacts on the Canal and Park.

This suggestion by the commenter would also result in an inherent conflict, inasmuch as the Legislature established the Commission to review and regulate private and public projects, including any projects proposed by the NJ Water Supply Authority.

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14. COMMENT: For projects in Lambertville, review for historic preservation impacts and review by the Canal Commission are duplicative and serve no value. (5, 6)

RESPONSE: The Lambertville Historic Preservation Commission and the Canal Commission serve different purposes and have different (although some overlapping) areas of jurisdiction. The Commission reviews and protects the Delaware and Raritan Canal National and State Historic Districts and the Delaware and Raritan Canal State Park Review Zone, as mandated by the Act. The Lambertville Historic Preservation Commission reviews a limited historic district within the City of Lambertville. The Commission strives to coordinate reviews with the Lambertville Historic Preservation Commission, should a project require review by both bodies. (5, 6)

15. COMMENT: The citizens of Lambertville, through fundraisers and donations purchased a pedestrian bridge and donated it to the D&R Canal Commission to complete the biking/hiking path in the City of Lambertville. That bridge cost \$15,000.00. Other pedestrian bridges constructed by the DRCC cost \$200,000.00 of taxpayer dollars to construct. (5, 6)

RESPONSE: Based on the provided information it is unclear how this comment relates to the adopted rules. The Commission is not responsible for construction projects within the Park. Construction and maintenance of recreation related projects are the responsibility of the Division of Parks and Forestry within the Department. Construction

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and maintenance of projects related to the water transmission complex are the responsibility of the New Jersey Water Supply Authority. There are no provisions within the new rules that would increase the cost of improvements within the Park.

16. COMMENT: The public notice for the April 10, 2007 meeting regarding the proposed rules was vague at best. (5, 6)

RESPONSE: The notice was posted on the Commission's website on March 11, 2007, and announced that a special Commission meeting would be held at the D&R Canal Park headquarters in Kingston, NJ at 10:00 AM on April 10, 2007 to discuss potential changes to the Commission's regulations. The notice was not more specific because the Commission was seeking input on all facets of the existing regulations; specific changes had not been drafted at that time.

17. COMMENT: The proposed rule changes do no more than pay salaries, benefits and expenses. The Commission merely intends to review other municipal reviews and not address any real problems. (5, 6)

RESPONSE: The Legislature established the Commission and charged it with developing a Master Plan for the Park and a regulatory program to review State and local actions that impact on the Park to insure that these actions conform as nearly as possible to the Commission's master plan. The regulations provide specific protection to the Park

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and the Canal, and have no equivalents at the municipal level. In particular, there are no adopted ordinances in any of the municipalities through which the Canal travels that provide regulation or protection to the D&R Canal Historic District.

The regulations also provide for stream corridor buffers to protect ecological and water resources and to help mitigate stormwater impacts. The Commission is aware of only three municipalities through which the Canal travels that have stream corridor buffer ordinances. Additionally, the rules provide the Canal with protection from new sources of non-point pollution that is not provided at the municipal level.

18. COMMENT: There could be a conflict of interest regarding the December 17, 2008 public hearing in Stockton, because salaried staff members of the Commission conducted the hearing have economic interest in the outcome of the rule proposal and adoption. (5, 6)

RESPONSE: The public hearing was held to take comments from the public. No regulatory action was taken by the hearing officer, and no conflict existed. All regulatory action is taken by the Commissioners of the Commission and the Department's Commissioner. To the extent that the commenter alleges that the hearing officer had a conflict because the rules provide for collection of fees through which his salary would be paid, under the Administrative Procedure Act (APA), N.J.S.A. 52:14B-4(g), the hearing officer at a public hearing may be an official of the agency or a member of the

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agency's staff, among others. Therefore, it was appropriate under the APA for members of the Commission staff to conduct the hearing.

19. COMMENT: The hearing officer interrupted my testimony to give his choice of speakers part of my time. (5, 6)

RESPONSE: There was no set time for any individual commenter. The commenter spoke for 25 minutes and, as a courtesy to the other members of the public present, the hearing officer interrupted the commenter to allow the other attendees an opportunity to speak. At that time it was made clear to the commenter that he could continue his comments once the others present had a chance to speak. Only one other person chose to speak and was finished in less than five minutes. The commenter thereafter declined to continue his testimony.

20. COMMENT: No certified court reporter took testimony; there was only a tape recorder under the control of Commission staff. (5, 6)

RESPONSE: In accordance with the Administrative Procedure Act (APA), N.J.S.A. 52:14B-4(g), a verbatim record of each hearing shall be maintained. However, the APA does not require the record be made by a court reporter.

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21. COMMENT: The regulations are not user-friendly and will require a lot of additional money for homeowners. (3)

RESPONSE: The Commission and the Department believe that the new regulations are more “user-friendly” than the prior regulations, because they enable the Commission to authorize the Executive Director to approve applications for certain types of minor projects (please refer to N.J.A.C. 7:45-6 for a detailed description of General Permits) without the need for the applicant to appear before the Commission. Under the prior regulations these minor projects would require approval from the Commission, which would result in a potential delay of up to 45 days, depending on when the application was submitted.

As in the past, applicants are welcome to meet with Commission staff if there are questions regarding particular projects. These pre-application meetings are available at no cost to the applicant. There will be no need for homeowners pursuing small scale minor projects to hire a consultant or engineer, because Commission staff will continue to work with the homeowner or their builder to work through the application process. Therefore, the additional cost for small scale minor projects that qualify for general permits will be the application fee, which is \$50.00 for General Permit 1 (authorizing maintenance and repair of existing features) and \$100.00 for General Permit 2 (authorizing additions to residential developments with a footprint of up to 800 square feet).

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For those projects that do not qualify for general permits but still qualify as minor projects, the following example is provided to compare the required Commission review fee with the cost of construction and cost of a local building permit: the maximum fee for the largest possible residential project still classified as a minor project in Zone A (footprint of 0.2499 acres, approximately 10,000 square feet) requiring visual impact review, stormwater review and a waiver for stream corridor impacts, would be \$3,350.00. The estimated cost to construct a two-story addition with a 10,000 square-foot footprint would be \$4,000,000. This estimate is based on an average construction cost in the Review Zone of \$200 per square foot, using average-cost building materials. The cost of a local building permit in Lambertville for this project would range from \$10,000.00 to \$15,000.00, depending on the extent that fire, electrical and plumbing inspections are required. In balance, the cost of the Commission review fee is minor.

22. COMMENT: The processes for getting permits in Lambertville to build or renovate are too involved. (4)

RESPONSE: The Commission worked closely with municipal construction officials in Lambertville and elsewhere in the Review Zone to simplify the project approval process where feasible under the new regulations. As stated above, the general permits are intended to reduce time and complexity of the review process. If an applicant's project fits within the scope of a general permit, the applicant need only apply for authorization under that general permit, rather than undertake the individual approval process.

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23. COMMENT: The State should not dictate people's personal quality of life standards.

(4)

RESPONSE: The Legislature established the Commission and charged it with developing a Master Plan for the Park and a regulatory program to review State and local actions that impact on the Park to insure that these actions conform as nearly as possible to the Commission's master plan. The regulations provide specific protection to the Park and the Canal, which are treasured public resources. The focus of the regulations, then, is to protect the Park and the Canal, rather than to dictate an individual's quality of life.

24. COMMENT: The hearings were held at inconvenient times for average working people. (4)

RESPONSE: There is no requirement that a hearing be held as part of the promulgation of the Commission's rules. Under the APA, N.J.S.A. 52:14B-4(g), if a hearing is held, it must be at a time and location to afford interested parties the opportunity to attend. There is no requirement that the hearings be held on evenings or weekends. As part of this rulemaking, hearings were held in two locations and in the morning and afternoon (Trenton at 10:00 A.M., and Stockton at 1:00 P.M.). The Department and Commission believe that they provided sufficient opportunity for the public to participate in the rulemaking process.

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The purpose of the hearing is to allow the public to make comments, and for the promulgating agency to respond to questions posed by interested parties. The public had 60 days to read and present written comment on the proposed rules. During that time, Commission staff were available at the Commission's headquarters to respond informally in person or by telephone to questions about the rulemaking, had an interested party chosen to contact the Commission.

25. COMMENT: It was not apparent from the Commission's public meeting agendas that the rules were being discussed, or that the changes were major. (6)

RESPONSE: The discussions of the proposed regulations at Commission public meetings were specifically itemized on public meeting notices as well as on the agendas for the meetings. The agenda lists matters to be considered or acted on at a meeting; it does not provide details regarding those matters.

A public notice that explained the nature of the proposed rules, and set forth the dates, places, and times of the public hearings, was published on the Department's and the Commission's websites, in the New Jersey Register, and in the Trenton Times and the Newark Star Ledger, which are newspapers with regional circulations.

26. COMMENT: The proposed rules were not discussed with decision makers. (6)

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RESPONSE: The Commission's staff discussed the proposed rules with some mayors of municipalities along the Canal.

27. COMMENT: The April 10 meeting in Kingston was at an inconvenient time of day and location. (6)

RESPONSE: The informational meeting was held in Kingston because it is at a midway point along the Canal. It is also the location of the D&R Canal State Park headquarters. The meeting was held at 10:00 AM at the request of the Commissioners, who are volunteers, because 10:00 AM is their usual meeting time for their regularly scheduled public meetings.

28. COMMENT: In accordance with P.L. 2007, c. 142, amending the Act, notice is required in four counties. (6)

RESPONSE: The Act at N.J.S.A. 13:13A-14 states, "The commission shall determine, after a public hearing, or public hearings held in Hunterdon, Somerset, Mercer, and Middlesex counties respectively, the extent and limits of the region to be designated the review zone. Any subsequent modification of the review zone shall be made by the commission only after public hearings in the county or counties in which the modification is to be made." This provision was unchanged by P.L. 2007, c. 142. The

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new rules do not change the extent or limits of the review zone; accordingly, notice was not required to be provided in each of the four counties identified in the Act.

Notices of the rule proposal and hearings were published in the New Jersey Register, placed in two newspapers of regional circulation, as well as posted on the Department's and the Commission's websites. Notice was also provided to the news media maintaining press offices to cover the State House Complex. These forms of additional notice meet the Administrative Procedure Act requirements (N.J.S.A. 52:14B-4).

29. COMMENT: There should have been informational hearings. (6)

RESPONSE: An informational meeting was held on April 10, 2007 in Kingston.

30. COMMENT: The Commission should have more interplay with towns along the Canal. (1)

RESPONSE: The Commission works very closely with the municipalities. As required by the Act, projects are not presented to the Commission for decision until, at a minimum, preliminary local approval has been obtained. Local officials are copied on all correspondence between the Commission and applicants, and are informed of all final Commission decisions. Depending on the complexity of a project, meetings are often conducted with local officials in attendance to discuss and resolve issues that may arise.

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31. COMMENT: The Commission has done a fantastic job balancing development with preservation of the Park's heritage and water supply. Although it is unfortunate that the Commission has to charge fees, it is necessary. We would all be the worse for it should the Commission have to "go out of business" for lack of funding. I support the proposal as put forth, and feel that the Commission did what was legally required regarding the open process. (1)

RESPONSE: The Department and the Commission acknowledge this comment in support of the rule.

32. COMMENT: As asserted in Department's Permit Efficiency Task Force Final Report, the Department conducts reviews that result in redundancies, as well as inconsistencies. The Commission should not adopt the proposed stormwater management rules and accompanying proposed fees, because this would exacerbate the problem of duplicative reviews. (10)

33. COMMENT: The proposed stormwater rules are duplicative and should not be adopted. All municipalities in the Review Zone except South Bound Brook have stormwater control ordinances and presumably have been implementing the standards. This approach is not consistent with the Permit Efficiency Task Force recommendations. (10)

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34. COMMENT: The cumulative financial burden of duplicative fees could inhibit projects from moving forward or lead to higher housing prices. There should not be duplicative stormwater reviews, and in particular the proposed fees. Further, the Commission should adopt different fees, if any, for those applicants that would require both a Commission and a Department Land Use stormwater review. (8, 10)

RESPONSE TO COMMENTS 32 THROUGH 34: The Commission's Executive Director was a member of the Department's Permit Efficiency Task Force, and therefore has knowledge of the process and the Final Report. The Executive Director provided information to the Task Force regarding the Commission's staff reviews of projects that required stormwater management. Under the Act, projects are required to have at least preliminary municipal approval before being presented to the Commission for review and decision. It was found that approximately 80 percent of these project applications were rejected as deficient by Commission staff because they were not in compliance with its stormwater regulations, regulations that were less stringent than those required at the local level. This information was received and acknowledged by the Task Force, but not included in the Report.

In order to protect the Park as mandated by the Act, the Department and Commission are adopting the rules, and the Commission will continue to conduct reviews of the proposed stormwater management designs for projects.

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See Response to Comment 4 for a discussion of efforts to coordinate reviews when both the Department and the Commission have jurisdiction over a project.

35. COMMENT: The Commission should provide GIS mapping on its website of the streams that are tied directly into the Canal. Otherwise it will be onerous for applicants to identify all possible discharge points of the regulated streams. (10)

RESPONSE: The following is a list of the named water courses that enter the Canal:

Lockatong Creek

Wickecheoke Creek

Duck Pond Run

Cedar Grove Brook

Lockatong and Wickecheoke Creeks are located in Hunterdon County. Duck Pond Run is located in Mercer County and Cedar Grove Brook (also known as Al's Book) is located in Somerset County. This list will be posted on the Commission's website. These streams are part of the Department's GIS mapping and can be found on I-Map at <http://www.nj.gov/dep/gis/newmapping.htm>. Those water courses that are unnamed are in close proximity to the Canal and easily identifiable by onsite field inspections. By investigating the area to be developed and determining which watercourse the site drains toward, the investigator then follows the water course downstream to its discharge point. Lastly, the New Jersey Water Supply Authority has

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been conducting studies identifying sources of nonpoint source pollution that discharge to the Canal. As these studies are completed the Commission will post the completed maps on its website to assist applicants.

36. COMMENT: It is not evident from the statement in the proposed regulations regarding the Canal as a direct water supply for 1.5 million people that the water must go through a cleaning process. (6)

RESPONSE: There is not a single surface water supply in this State that is not treated before consumption. Nevertheless, treatment of Canal water is irrelevant to the scope and purpose of the regulations. The regulations are in accordance with the mandates specifically outlined in the findings and declarations of the Act, as recited above in Response to Comment 6.

All of the State's drinking water supplies must be protected from potential sources of pollution. The regulations prohibiting future sources of stormwater from entering the Canal provide protection from future accidental spills of hazardous substances that could significantly impact this drinking water supply. The adoption of more stringent stormwater regulations will reduce the cost of treatment of the water by minimizing nonpoint source pollution normally found in stormwater.

N.J.A.C. 7:45-1.3 Definitions

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37. COMMENT: The definition of “disturbance” should not include agricultural plowing and tilling because it is a necessary action for agriculture. (7)

RESPONSE: Ongoing, legally existing agricultural activities are not regulated by the Commission. The definition of “disturbance” is provided to help define what constitutes proposed development in existing undisturbed areas. As stated in N.J.A.C. 7:45-2.2(a) the following projects are exempt from Commission review and approval:

1. Any project located outside of the Review Zone
2. Any project in Zone B that is not a major project, and
3. Any project that is not a governmental project and that does not require a municipal permit or approval.

Therefore, legally existing, ongoing farming activities, including plowing and tilling, are not regulated by the Commission because they do not require a municipal permit or approval. Only those proposed private projects that are regulated by the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., trigger review by the Commission.

38. COMMENT: The definition of “impervious surface” should not include surfaces existing on farms or development in support of farm operations. Restricting impervious cover limits could cripple farm viability. (7)

RESPONSE: The regulations restrict impervious surface only within stream corridor buffers. (See N.J.A.C. 7:45- 9.3.) Stream corridors are valuable natural resources that

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require protection. (See 40 N.J.R. at 6698 and 6699.) Outside of stream corridor buffers, the regulations require the review and approval of proposed impervious surface as it relates to stormwater management designs for the purpose of addressing impacts of runoff generated from these surfaces. See Response to Comments 10 and 11 for a discussion of the rules' impact on ongoing farming operations.

39. COMMENT: The definition of "major project" unnecessarily expands regulatory authority by now covering activities on hundreds of acres of farmland nowhere near the Park. (7)

RESPONSE: The boundaries of the Review Zone are not changed from those established in the prior rules. Moreover, the Commission does not regulate legally existing, ongoing activities; it regulates proposed development projects that require both municipal approval and meet the definition of a major project in Review Zone B and either a Major or Minor project in Review Zone A. Please see N.J.A.C. 7:45-1.3 for the definitions of major and minor projects.

The regulatory threshold for the amount of impervious surface that triggers review of a project in Review Zone B has been lowered from one acre of impervious surface cumulatively since January 1980, to 0.25 acres of impervious surface since January 1980, to be consistent with State regulation of stormwater impacts under the Department's Stormwater Management Rules, N.J.A.C. 7:8.

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40. COMMENT: By changing the definition of “major project” from a one-acre threshold of cumulative impervious coverage to 0.25 acre, the Commission will not be able to ensure applications are reviewed expeditiously, because more staff time will be required. The Commission should not broaden this jurisdiction where it would only result in duplicative reviews with those conducted at the municipal level. (10)

RESPONSE: Under the Act, if the Commission takes no action within 45 days of receiving a complete application, the project shall automatically be approved. This clause ensures the Commission’s prompt review and decision.

The new rules lower the stormwater review threshold in review Zone B to 0.25 acre of impervious surface, to be consistent with the regulatory threshold adopted by the Department in its Stormwater Management rules, N.J.A.C. 7:8. This change is necessary to protect the Park from the potential adverse impacts associated with stormwater. In addition, Commission staff have been rejecting as deficient approximately 80 percent of all applications due to stormwater design deficiencies. The deficiencies were such that the stormwater designs did not meet the requirements of the prior rules, nor did the designs meet municipal requirements.

The Commission must conduct its own review to ensure that its standards are met. The Commission cannot rely upon the municipalities to review the stormwater designs for compliance with standards that may be different from the municipalities’ standards.

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41. COMMENT: The definition of “pollutant” should not include “agricultural and construction waste or runoff” discharged directly or “indirectly to the land.” This requirement is vague and will result in extreme hardship and expense for farmers to understand and conform to the rules. (7)

RESPONSE: This definition is based on the definition of “pollutant” in the New Jersey Pollutant Discharge Elimination System (NJPDES) rules at N.J.A.C. 7:14A-1.2, and is the same as the definition of “pollutant” in the Stormwater Management rules at N.J.A.C. 7:8-1.3. The term “pollutant” is used at N.J.A.C. 7:45-8, Stormwater Runoff and Water Quality Impact Review, which is based on the Stormwater Management rules at N.J.A.C. 7:8. As such, farmers have adapted to the use and meaning of this term under prior rules.

As discussed in Responses to Comments 10 and 11 and 37, these regulations do not apply to legally existing, ongoing activities. (See also N.J.A.C. 7:45-2.2). Therefore, the new rules will not have an impact on ongoing activities at existing farms. If, however, a farmer is proposing a change in land use that will require municipal approval, and meets the definition of a major or minor project in Zone A or a major project in Zone B (N.J.A.C. 7:45-1.3), then the proposed development would be regulated by the Commission. Further, if the new regulated development yields agriculture and construction waste runoff, such runoff is then considered a type of pollutant that must comply with the new rules’ standards for runoff.

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42. COMMENT: The definition of “preserved land” should include land preserved through the Farmland Preservation Program. (7)

RESPONSE: The term “preserved land” is used in the regulations regarding visual impacts, in the context of vegetated screening. (See N.J.A.C. 7:45-9.4 and 12.4.) Vegetated screening on preserved land is likely to remain in the future, since the preserved land by definition is land that will not be developed.

In contrast, the Farmland Preservation program may allow the conversion of existing vegetated areas to either agricultural operations or forestry practices. Therefore, vegetated screening on property subject to the Farmland Preservation program could be removed as part of a future use of the property, which could result in visual impacts to the Canal’s historic district. Therefore, the inclusion of land subject to the Farmland Preservation program in the definition of “preserved land” is inappropriate for purposes of these rules.

43. COMMENT: The definition of “Review Zone” lists many of the most productive agricultural municipalities and counties in the State as now being required to apply to the Commission, pay fees, and await decisions for just about any actions that they may need to take. The list makes the omission of agriculture even more dramatic given the agricultural nature of these communities and the thousands of dollars spent to ensure agricultural land use forever. (7)

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RESPONSE: The definition of “Review Zone” has not changed from the previous rule; accordingly, no additional parcels of property are subject to the jurisdiction of the Commission under the new rules.

The second part of the comment is interpreted to be a request for a specific exemption for agricultural operations. As explained in the Response to Comment 37, legally existing, ongoing agricultural activities are not regulated by the Commission. Very few applications have been submitted for projects associated with farming activities, and it is not anticipated that that will change under the new rules. The majority of projects regulated under the prior regulations and that will be regulated under the new regulations are for the conversion of undeveloped areas and farms to other uses (residential, commercial or industrial).

44. COMMENT: The impositions of the zones have been changed. The maps are not easily accessible. (5, 6)

RESPONSE: The Commission and the Department interpret this to be a comment on the definition of Review Zone. The boundaries of the Review Zones have not changed. The maps are available for review in hard copy at the Commission’s office and are available online at the Department’s website, which is linked to the Commission’s website, www.dandrcanal.com. The online mapping enables any person to locate a site or address electronically.

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45. COMMENT: The 1,000 foot threshold is too big for visual impact review within the definition of “Review Zone.” (3)

RESPONSE: The 1,000 foot threshold as the geographical limit for Zone A has been in place since 1980. The threshold is appropriate because, depending on the vegetation and/or topography, some projects proposed within this distance may have a significant adverse visual impact on the Park. Further, the Commission may waive a project from visual review if the Commission determines a project is screened from the view of a person in the Park, and that screening will continue to exist in the future. (See N.J.A.C. 7:45-12.7.)

46. COMMENT: The definition of “stream corridor” should not be adopted to require a minimum buffer of 300 feet for streams that discharge into the Canal, if the Commission is not pursuing Category One (C1) designation of the Canal. The Commission should not impose restrictions that result in the same net effect as would the C1 designation. The stream corridor width should be consistent to avoid confusion. (10)

RESPONSE: As stated in the proposal summary (40 N.J.R. at 6699), the Department and the Commission have determined that because the Canal is a drinking water supply, it is appropriate to provide protection equivalent to that applicable to a C1 waterbody; further, such protection is appropriate for those watercourses that drain into the Canal. The Canal travels through large areas of land that do not drain into the Canal. Therefore, it is not

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necessary to provide buffers along the Canal's entire length. Instead, the 300-foot minimum buffer requirement applies only to those water bodies and areas that drain directly into the Canal. The prior regulations on stream corridors were put in place in 1989 and were based on the 100-year floodplain plus 100 feet. As such, the corridors' widths under the prior rules as well as under the new rules do vary from site to site and often within a site, because the floodplain width varies along each stream.

47. COMMENT: The purpose of the new buffers within the definition of "stream corridor" is unclear. Pollution problems affecting the Canal are from existing development and old outfalls, not new development. Requiring buffers on new development does not achieve any measurable change in water quality standards. (10)

RESPONSE: The Canal is impacted not only by outfalls and existing development, but also by new development. The impacts of nonpoint source pollution are cumulative, and the buffer requirements will help ensure that no further degradation is caused by future development.

48. COMMENT: The rules will have a direct impact on affordable housing by expanding stream corridor buffers, which thereby reduce development potential and the number of affordable housing units. (8)

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RESPONSE: The Commission and the Department interpret this to be a comment on the definition of “stream corridor.” Stream corridors are sensitive environmental resources and are inappropriate for development. Most of a stream corridor’s area is within the 100 year floodplain and directly adjacent to the stream itself. These are sensitive environmental resources and should not be considered developable land. See the proposal summary, 40 N.J.R. at 6698 and 6699, for a discussion of the importance of these areas as sensitive natural resources, and for a justification of why they should be protected from the impacts normally associated with development.

If proposed affordable housing is clustered on the upland portion of sites outside the stream corridor, the protection of stream corridors is not likely to have a significant impact on the number of housing units. Depending on available alternatives within the municipality, the site specific design and the extent of potential impacts to the stream corridor, a proposed project for affordable housing may qualify for a waiver of strict adherence to review standards, based on extreme economic hardship or compelling public need. See N.J.A.C. 7:45-12.3 for the provisions of a hardship waiver.

49. COMMENT: Synthetic turf should be excluded from the definition of “impervious surface,” because it is not considered impervious by the engineering community. (10)

RESPONSE: An athletic field with synthetic turf is normally constructed over compacted substrate, which makes the ground highly resistant to infiltration and results in a much greater rate of runoff. In addition, synthetic fields usually have a pipe underdrain

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system, which draws water away from the field and this runoff has much greater volume and rate of flow compared to predevelopment conditions (usually an existing natural turf playing field or other undeveloped land). Therefore, the combination of compaction and piped underdrains results in a land use with the characteristics of impervious surface.

50. COMMENT: The rules should continue the definitions for “net fill” and “flood hazard area.” (10)

RESPONSE: As stated in the proposal summary (40 N.J.R. at 6688), these terms are not used within the rules, and therefore definitions are not needed.

N.J.A.C. 7:45-2.2 Jurisdictional determinations

51. COMMENT: The commenter appreciates the Commission’s inclusion of issuing exemption letters. (10)

RESPONSE: The Commission and the Department acknowledge this comment in support of this section of the rules. See Response to Comment 52 for a discussion of the redesignation of “exemption letters” as “jurisdictional determinations.”

52. COMMENT: The Commission should include a time frame for review and issuance of exemption letters and, if not met, then the project should be deemed exempt. (10)

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RESPONSE: As discussed below, the Department is modifying the rules to refer to “jurisdictional determinations,” rather than “exemption letters.”

The Act does not mandate that a project be deemed outside the Commission’s jurisdiction if the Commission does not respond to a request for a determination whether a project requires Commission approval within a specified time frame. Requests for jurisdictional determinations are often complex and require considerable research. Since the Commission is unable to determine how complicated a request will be or how extensive a review is required, an automatic exemption is not possible. Therefore, the requested change will not be made upon adoption. However, the Commission will make every effort to respond to applications for jurisdictional determinations within 45 days of its receipt of a completed application, which is the same time frame for responding to applications for individual approvals.

Proposed N.J.A.C. 7:45-2.2 provided an applicant with the ability to apply to the Commission for a certification that a particular project is exempt from Commission review and approval. N.J.A.C. 7:45-13.2(a) identifies the fee as being for a “jurisdictional determination,” rather than an “exemption letter.” The term “jurisdictional determination” is more accurate. When an applicant inquires whether a project requires Commission review, the Commission responds with one of three possible answers: the project is not within the Commission’s jurisdiction; the project is regulated and falls within review zone A; or the project is regulated and falls within review zone B.

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Accordingly, N.J.A.C. 7:45-2.2 and 2.3 are modified on adoption to refer to a “jurisdictional determination,” rather than an “exemption letter.”

N.J.A.C. 7:45-2.2 is further modified on adoption to identify the information that an applicant must submit to the Commission for a jurisdictional determination. In order for the Commission to make an informed determination, it must have sufficient information about the proposed project and the applicant.

N.J.A.C. 7:45-2.2(b) identifies the projects that are exempt from Commission review and approval; therefore, these are the types of projects that would be outside the jurisdiction of the Commission. The information required under adopted N.J.A.C. 7:45-2.2(a) is the information that the Commission must have in order to determine whether the project falls within the categories of N.J.A.C. 7:45-2.2(b)1 through 3, and to communicate with the applicant.

N.J.A.C. 7:45-2.1 is also modified on adoption to substitute jurisdiction and jurisdictional determination for exemption and exemption letter.

N.J.A.C. 7:45-2.3 Scope of review for approvals, authorizations and waivers

53. COMMENT: The Commission should not have jurisdiction over a homeowner’s ability to install windows in his home. The history of the Canal is industrial, and it should not be turned into Disneyland. (3)

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RESPONSE: The history of the Canal is industrial; however, it is now a protected historic district. In order to preserve the historic industrial character of the Canal, the Department and Commission have been charged by the Act to protect the D&R Canal Historic District from impacts of development. For example, the replacement of historically accurate multi-pane windows with a contemporary large-scale picture window on a 19th century building within the Canal Historic District may adversely impact the context and setting of the Canal. The Act specifically mandates Commission review and approval of private projects within the Review Zone. Visual impact review of projects in Zone A is intended to ensure that proposed developments are not harmful to the character of the Park and its adjoining corridor (a State and National Historic District); the rules for this aspect are in accord with the goals for the Park as defined by the Park's Master Plan.

54. COMMENT: The requirement of stormwater review for minor projects in Zone A is unduly burdensome and unjustified given the scope of these projects. (10)

RESPONSE: Stormwater review for minor projects in Zone A has been in place since January 11, 1980; the prior rules addressed the cumulative impact of these projects. There is a cost associated with designing and implementing stormwater management practices that minimize harmful impacts of stormwater generated by a proposed project. The stormwater management design standards are therefore graduated in scope and scale according to the scope and scale of the proposed project. Since the extent of Zone A is

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1,000 feet from the Canal (a source of public drinking water), it is appropriate that potential harmful impacts of stormwater are closely scrutinized within this zone. It is also appropriate that the cost of implementing stormwater management be borne by the applicant, the beneficiary of the constructed project.

Under the prior rules the Commission could require stormwater management for any amount of additional impervious surface proposed. As set forth at Table 1 at N.J.A.C. 7:45-2.3, and in N.J.A.C. 7:45-2.3(c)1iii, the Commission reviews a minor project in Zone A for stormwater impact only if the project results in impervious surface of 800 square feet cumulatively since January 11, 1980. Therefore, the requirement is now less burdensome and more predictable for the regulated public.

In order that N.J.A.C. 7:45-8.1(a) is consistent with N.J.A.C. 7:45-2.3(c)1iii, and with the proposal summary, both of which state that the Commission will limit its stormwater review of minor projects in Zone A to those with impervious surface of 800 square feet since January 11, 1980 (40 N.J.R. at 6689), the Department and the Commission are modifying N.J.A.C. 7:45-8.1(a) on adoption to expressly identify these as types of projects subject to Commission review. The rule is also modified on adoption to specify that in Zone B, the Commission will undertake a review for stormwater runoff and water quality impact only for major projects. This, too, is consistent with the proposal summary, as well as N.J.A.C. 7:45-3.2(c)2i and Table 1. The rule is restructured on adoption to make it easier to read.

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55. COMMENT: The threshold of 800 square feet or more of impervious surface, cumulatively since January 11, 1980, is inconsistent with the Department's Stormwater Management regulations and would result in duplicative review. It would inhibit redevelopment projects because stormwater management review would be newly required for projects dating back 30 years. This time frame should be justified. (10)

RESPONSE: The rules will not retroactively regulate existing impervious surface, but rather will address the areas of new impervious surface proposed for construction. The impact of stormwater runoff is cumulative. The Commission has been regulating the cumulative impact of stormwater since the stormwater requirements became effective on January 11, 1980. The prior regulations authorized the review of the addition of any amount of new impervious surface, with no lower limit. For minor projects in Zone A, the new rules set a threshold that is more generous for property owners, more supportive of redevelopment and more predictable than the prior rule.

N.J.A.C. 7:45-3.1 General provisions

56. COMMENT: Subsection 3.1 should be amended to include grandfathering protection of sites that are not within the Commission's jurisdiction under the prior rules but will fall within its jurisdiction upon rule adoption. This class of sites is not covered as drafted. (10)

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RESPONSE: The geographic extent of the Commission's review zones has not been changed by the new rules. Therefore, there are no properties that were subject to the prior rules that are not also subject to the new rules.

With regard to specific projects subject to the rules, in Zone A the threshold for major projects has been reduced from 0.25 acres of new impervious surface in the proposed project to 0.25 acres of impervious surface cumulatively since January 11, 1980. The regulatory threshold for major projects in Zone B has been lowered from one acre of impervious surface cumulatively since January 11, 1980 to 0.25 acre of impervious surface since January 11, 1980. These changes have been made to address the cumulative negative impacts of additional impervious cover on stream corridor buffers and the cumulative negative impacts resulting from increased stormwater.

Because the geographic limits of Zone B are the same as in the prior rules, if the rule were amended to provide grandfathering for properties in Zone B in order that they are not subject to the new impervious surface threshold, then no property within Zone B would be subject to the more restrictive requirement. The intent of the rule to minimize the associated impacts of these projects would be negated.

N.J.A.C. 7:45-3.7 Notice of decision

57. COMMENT: The subsection regarding the enforcement of the Notice of decision, N.J.A.C. 7:45-3.7(d), should be relocated to a subchapter on enforcement. (10)

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RESPONSE: The Act limits the Commission's enforcement to civil actions. See N.J.S.A. 13:13A-14c. Because the Commission does not have authority to impose civil administrative penalties, there is no need for a separate subchapter relating to enforcement. However, the rule is modified on adoption to recodify N.J.A.C. 7:45-3.7(d) as N.J.A.C. 7:45-3.8, Enforcement of notice of decision. The text of the rule is unchanged.

58. COMMENT: The Commission's authority to institute civil action for non-compliance is heavy-handed. (6)

RESPONSE: The Act gives the Commission authority to institute a civil action under certain circumstances. See N.J.S.A. 13:13A-14c. Adopted N.J.A.C. 7:45-3.8, which is verbatim from the Act, is unchanged from the prior rule at N.J.A.C. 7:45-2.9(c). The Commission uses its authority as a last resort, only if it is unable to reach a resolution with the individual or entity that is not in compliance with the Commission's rules.

N.J.A.C. 7:45-4.1 Issuance of an individual approval

59. COMMENT: Regarding N.J.A.C. 7:45-4.1(c) and deviations to approved projects, the commenter objects to the language "measurably alters the character of the project or impairs the intent of either the Master Plan or this chapter." The rule should be amended to include the methodology that the Commission will use to make this determination and

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provide a pre-determination that approval remains valid, so the permittee is not forced to proceed at risk. (10)

RESPONSE: An Individual Approval issued by the Commission references a specific set of plans for the proposed project. If the applicant decides to alter the proposed project and deviate from the approved plans, the applicant must apply to the Commission for a modification of the Individual Approval under N.J.A.C. 7:45-4.2. Since there are many ways in which a project could be altered, it would be impracticable to list all of the possible changes and how they would be addressed by the regulations. The rule at N.J.A.C. 7:45-4.2 provides the standards for a request for a modification of an individual approval. If after review of the submission the Commission determines that the project has not been altered to the extent that a modification is required, the Commission will provide a written response so the applicant will not need to proceed at risk.

60. COMMENT: The five-year approval period is not adequate in this economic climate and should be 10 years. (10)

RESPONSE: The Legislature has recognized the difficulties that may result from the current economic climate and addressed them through the enactment of the Permit Extension Act of 2008, N.J.S.A. 40:55D-136.1 et seq. The Permit Extension Act of 2008 extends permits that are otherwise set to expire during the period of January 1, 2007 through July 1, 2010, and provides up to an additional six month phase in extension

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period until December 31, 2010 for those permits whose duration had not expired on January 1, 2007.

The rules will not be modified upon adoption to increase the duration of permits from five years to 10 years because of the sensitive nature of the environmental resources protected by the Act and rules, and because ongoing research and improved technology may further protect those resources from the impacts of development. The five year duration of an approval will allow for the review of unbuilt projects after five years, and allow for the incorporation of new technology to further protect these sensitive resources.

61. COMMENT: The Commission should retain the extension provision and increase it to five years. The extension should continue to not require compliance with amendments to rules adopted during the extension period. (10)

RESPONSE: As discussed in the proposal summary (40 N.J.R. at 6690), the provision for a three-year extension in the prior rules was removed because the term for an approval has been expanded from three to five years, and because the requirement to demonstrate continued construction has been removed. This change was specifically made to allow the applicant a total of five years to construct a project without the need to document continued construction, as well as to ensure that should future amendments to the rules be needed to ensure greater protection of the Park, any project not built within that period must comply with those regulations.

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The Legislature has recognized the difficulties that may result from the current economic climate and addressed them through the enactment of the Permit Extension Act, N.J.S.A. 40:55D-130 et seq. The new regulations will not be applied to prior approvals tolled by the Permit Extension Act. Any modification of the approvals would, however, be subject to the new rules.

62. COMMENT: Proposed N.J.A.C. 7:45-4.1(j) and (k) should be revised to refer to “the permanent or temporary Certificate of Occupancy, rather than “a permanent or temporary Certificate of Occupancy.” (10)

RESPONSE: As proposed, the rules could have been interpreted incorrectly as allowing the holder of an approval to show any certificate of occupancy. As modified on adoption, N.J.A.C. 7:45-4.1(j) and (k) refer specifically to the permanent or temporary certificate of occupancy for the project.

N.J.A.C. 7:45-4.2 Modification of an individual approval

63. COMMENT: N.J.A.C. 7:45-4.2 should allow for the continued applicability of the rules that were in effect when the original approval was issued. (10)

RESPONSE: The Permit Extension Act has tolled the expiration of the majority of approvals until at least July 31, 2010. The Permit Extension Act contains limitations on

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the extension of approval in “Sensitive Environmental Areas,” as described in N.J.S.A. 40:55D-136. For those projects to which tolling applies, the Permit Extension Act extends prior approvals through December 31, 2010. If the applicant decides not to build the project as approved, the new rules will apply to any modification.

As discussed in the proposal summary of N.J.A.C. 7:45-3.1(c) (40 N.J.R. at 6689), an application that is deemed to be complete for review before [the effective date of the adopted rules] will be reviewed under the prior rules.

N.J.A.C. 7:45-6 General Permits

64. COMMENT: The Commission should look into additional types of projects that could receive general permit authorizations. The two proposed activities are so innocuous that they should not require a permit. (10)

RESPONSE: The Commission will explore additional possible classes of projects in the future. Although the adopted general permits are for projects that will not result in significant impacts both individually and cumulatively, the projects may nevertheless result in adverse impacts, such as increased stormwater runoff, vegetation disturbance within stream corridors, and increased siltation. The Act requires that these projects be regulated to address these and other potential adverse impacts. See N.J.S.A. 13:13A-14c.

N.J.A.C. 7:45-6.2 General Permit 2 – Single Family Residential Additions

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65. COMMENT: Farms should not be limited to the 800 square foot threshold for authorizations at N.J.A.C. 7:45-6.2. Many existing farms probably passed the limit decades ago, which means that any addition would be considered a major project with full review requirements. The Commission should defer to the New Jersey Department of Agriculture's Agricultural Development rules requiring a farm conservation plan if impervious surface exceeds three percent, or a Natural Resources Conservation Plan if it exceeds nine percent. (7)

RESPONSE: The 800 square foot threshold contained in General Permit 2 is an upper limit placed on proposed additions to single family residential dwellings in Zone A. General permits are proposed and adopted for limited types of projects that would result in no significant individual or cumulative adverse impacts on the Park. Due to the cumulative impacts of stormwater runoff, development that results in impervious surface above this threshold in Zone A requires full review and compliance with the Commission's regulations for stormwater management. Further, residential additions larger than 800 square feet require full Commission review and approval because of their potential adverse visual impact on the Park.

66. COMMENT: The 800 square foot rule at N.J.A.C. 7:45-6.2 is unconstitutional because it sets fixed coverage as a blanket rule in all cases. (5, 6)

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RESPONSE: N.J.A.C. 7:45-6.2 is not a blanket rule for all cases. Rather, it sets the applicability requirements for approval under General Permit 2. The rule does not prohibit impervious surface in an amount greater than or equal to 800 square feet.

Rather, it limits the applicability of General Permit 2 to construction of additions or appurtenant improvements to certain single family residential dwellings that results in less than 800 square feet of impervious cover cumulatively since January 11, 1980.

Projects at or above that limit would not qualify for general permit authorization, but would be subject to review under the rules for individual approvals.

N.J.A.C. 7:45-8.3 Specific standards for outfalls

67. COMMENT: Regarding the prohibition of new sources of stormwater that tie into drainage systems discharging into the Canal, the Commission should clarify whether tying into existing municipal and roadway drainage systems would also be regulated. It would be difficult to identify ultimate discharge points of these systems. (10)

RESPONSE: Tying into existing municipal and roadway drainage systems is regulated under N.J.A.C. 7:45-8.3(a)2. Under the previous rules applicants were required to document where the stormwater from their site was ultimately discharged. They accomplished this determination by a combination of field investigation, examining storm sewer maps at municipal offices and in a limited number of cases, dye tests. Similar measures can be undertaken to comply with the new rules.

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68. COMMENT: Regarding the standards for projects that discharge to existing outfalls in the Canal, the engineering community feels that the design standards are unclear and not achievable. It is impossible to treat all the stormwater to achieve 95 percent total suspended solids (TSS) removal, either for all stormwater pursuant to N.J.A.C. 7:45-8.3(a)5ii, or for stormwater from offsite areas pursuant to N.J.A.C. 7:45-8.3(a)5iii. The 95 percent removal should apply to certain storm events. (10)

RESPONSE: The TSS removal criteria apply only to the water quality design storm. This storm is described in detail under N.J.A.C. 7:45-8.7, Specific water quality standards. The rules at N.J.A.C. 7:45-8.3(a)5ii are being modified on adoption to require treatment of the water quality design storm, rather than all stormwater events. It would be inappropriate to require treatment that would obtain 95 percent total suspended solids removal for storm events larger than the water quality storm. Large storm events generate a volume of stormwater that is too great to treat to a 95 percent TSS standard. It would be economically and in some cases physically (due to small parcel size) impracticable to treat that quantity of stormwater. A corresponding modification is being made at N.J.A.C. 7:45-8.3(a)5iii. The rule is also being modified to correct the incorrect cross reference to N.J.A.C. 7:45-8.8. The correct reference is to section 8.7, where the water quality design storm is discussed.

69. COMMENT: If waterways are not formally designated C1, the Commission should not impose the highly restrictive and costly 95 percent TSS removal criteria. The

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Commission should reevaluate all of the proposed standards in this section to ensure they are achievable and practical. (10)

RESPONSE: The 95 percent TSS removal criteria is applicable for discharges to waterways that feed the Canal. The Canal is a source of drinking water for 1.5 million residents. Applying 95 percent TSS removal criteria preserves of water quality for the benefit of the Canal water users. Thus, discharges that eventually end up in the Canal must be treated to the 95 percent TSS removal standard. See Response to Comment 86 for a discussion of how the TSS removal criteria can be achieved.

These standards are the same as the Department's standards in the Stormwater Management Rules, N.J.A.C. 7:8, which have been in effect since February 2004. See Response to Comment 46 for a discussion of the need for protection of the Canal equivalent to protection of a C1 water body.

N.J.A.C. 7:45-8.4 Specific nonstructural stormwater management strategies

70. COMMENT: The proposed rules provide that an applicant may submit the Department's Nonstructural Stormwater Strategies Point System worksheet to show compliance. The Point System is an anti-smart growth tool and is not in line with current State policy because the measures only discourage compact design and increase greenhouse gases. The more clustered the development, the more difficult it is to meet this point system; this provision should not be adopted. (10)

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RESPONSE: The Nonstructural Stormwater Management Strategies Point System (NSPS) is consistent with the State's goals to encourage compact design and to decrease greenhouse gases. The NSPS addresses and encourages cluster development in Step 3E - Residential Lot Clustering. Residential development that complies with the definition of cluster development in the NSPS would receive credit for a clustered design. The ability to receive such credit is contingent on maintaining the same number of units, reducing the lot sizes, and placing the area not slated for construction into a permanent easement to be maintained in a vegetated condition. Therefore, by clustering development, it will be easier to permanently preserve areas in order to meet the nonstructural best management practices goals. Further, even when development is clustered on lots that are 0.25 acres or smaller, other nonstructural measures (such as best management practices) can still be implemented on each lot to receive NSPS credit.

N.J.A.C. 7:45-9 Stream Corridor Impact

71. COMMENT: The Commission should use its funding to improve the Park instead of regulating streams that do not impact the Canal. (6)

RESPONSE: The Commission's stream corridor impact program directly improves the Park and its environs by regulating development that may adversely impact both the Canal and the Park. As set forth in the Legislative findings and declarations at N.J.S.A.

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13:13A-2, “The Delaware and Raritan Canal is a vital sources of water supply and is of historic, ecological and recreational value to the citizens of New Jersey; that the canal and the narrow band of land along the canal banks owned by the State are also an extremely attractive and lucrative asset to the State; [and] the quantity and quality of surface water runoff, flooding potential, esthetic surroundings, and even the structural integrity of the canal, can all be adversely affected by surrounding developments.”

Each of the streams that is within the definition of “stream corridor” at N.J.A.C. 7:45-1.3 has an impact on the Canal or the Park. Accordingly, the rules governing the stream corridor have a direct bearing on the Park.

N.J.A.C. 7:45-9.2 Submission requirements

72. COMMENT: Proposed N.J.A.C. 7:45-9.2(a)1 requires that the 100-year flood line must be verified by the Department’s Division of Land Use Regulation. The Department does not establish or approve of the 100-year flood line, but rather the flood hazard line. The subsection should be amended to allow the 100-year flood line to be established via FEMA mapping, State Delineations, or calculation/approximation method. (10)

RESPONSE: N.J.A.C. 7:45-9.2(a)1 requires the applicant to submit to the Commission a map showing the 100-year flood line for the property, as verified by the Department’s Division of Land Use Regulation. The applicant may use any method acceptable to the Department to establish the line; however, the Commission requires that

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the line be verified by the Department. With regard to the Department's verification of the flood hazard line, since the hydrology for the flood hazard line is based on the 100-year flood line hydrology, the hydrology and the hydraulic calculation models are the same. Thus, the Department's verification of the flood hazard line allows the Commission to confirm the 100-year flood line.

73. COMMENT: Proposed N.J.A.C. 7:45-9.2(a)5 requires a metes and bounds description of the project site boundary and stream corridor boundary. This requirement is unjustified and should not be adopted, because it is costly to obtain this description for the entire site. Metes and bounds for only the stream corridor should be required. (10)

RESPONSE: Allowing a metes and bounds description of only the stream corridor would make it extremely difficult, if not impossible, for the Commission to monitor an easement or deed restriction and ensure that encroachments or violations do not occur during construction or in the future. The Commission needs to be able to identify the stream corridor in the context of the property as a whole, which is not possible without a metes and bounds description of the entire parcel on which the project is located. In the Commission's experience, applicants usually have a metes and bounds description for an entire parcel, since the description is needed for site plan or subdivision approval at the municipal level.

N.J.A.C. 7:45-9.3 Prohibited uses within stream corridors

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74. COMMENT: N.J.A.C. 7:45-9.3, Prohibited uses within stream corridors, should be amended to delete the prohibitions on the removal of native vegetation and the installation of non-native vegetation. These rules will prohibit crops in stream corridors. Cropping should be allowed to continue to provide continuous agricultural production.
(7)

RESPONSE: The continuation of legally existing, ongoing activities is not regulated. (See Response to Comments 10 and 11.) A “private project” is defined at N.J.A.C. 7:45-1.3 as “any proposed development, structure or land use change requiring any municipal approval or permit, except interior alterations to an existing structure.” The Commission reviews such projects to determine, in part, whether they include activities that are prohibited in stream corridors in accordance with N.J.A.C. 7:45-9.3.

If an applicant proposes a change in land use that requires municipal approval, then the Commission’s rules require that onsite stream corridors be preserved. Only proposed projects that require local municipal approval and reach the applicable regulatory threshold of a major or minor project as defined at N.J.A.C. 7:45- 1.3 are subject to Commission review.

As set forth in the Agriculture Industry Impact, 40 N.J.R. at 6705, the rules are not anticipated to have an impact on agricultural activities. The prohibitions of uses listed at N.J.A.C. 7:45-9.3(a)8 and 9 will not impact existing agricultural production.

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75. COMMENT: N.J.A.C. 7:45-9.3(b) requires a minimum of 25 feet of usable yard between the stream corridor and dwellings. This requirement should be left to the municipality, the builder and buyer. (10)

RESPONSE: This provision is continued from the prior regulations at N.J.A.C. 7:45-6.3(b). The rule ensures that future homeowners will have a usable yard and avoids potential violations resulting from encroachments into the deed-restricted stream corridor. Under the prior rules at N.J.A.C. 7:45-9.4(a)1, the Commission could waive this requirement where the applicant demonstrated that the proposed design would not adversely impact the stream corridor. The new rules also allow for waiver of strict compliance. (See N.J.A.C. 7:45-12.4.)

N.J.A.C. 7:45-9.4 Conditional uses within stream corridors

76. COMMENT: Proposed N.J.A.C. 7:45-9.4(a)7 no longer contains sanitary or storm sewers, but separately lists these at paragraph (a)5. The Commission should justify why this change has been made. (10)

RESPONSE: The adopted rule at N.J.A.C. 7:45-9.4(a)5, conditionally permitting sanitary or storm sewers within stream corridors, is continued from the prior rule at N.J.A.C. 7:45-6.4(a)6, and uses the identical wording. The conditional use is renumbered because prior N.J.A.C. 7:45-6.4(a)4 is not included in the adopted rule.

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N.J.A.C. 7:45-9.5 Preservation of stream corridor

77. COMMENT: Proposed N.J.A.C. 7:45-9.5 should be revised as follows: “and to prevent future unpermitted encroachments in the stream corridor.” (10)

RESPONSE: The purpose of N.J.A.C. 7:45-9.4, which provides for stream corridor conservation easements, deed restrictions and other measures, is to protect the natural resource values of the stream corridors against all future encroachments, once the Commission issues an approval for a particular development. Therefore the suggested change will not be made upon adoption.

N.J.A.C. 7:45-9.6 Local stream corridor ordinance

78. COMMENT: Proposed N.J.A.C. 7:45-9.6 indicates that the local stream corridor ordinance will apply instead of the Commission’s rules, if that ordinance is more stringent. Further, the applicant is required to grant to the Commission an easement or conservation restriction. If the local ordinance is more stringent, the Commission should not require an easement or conservation restriction. This responsibility should be fully delegated to the municipality. Otherwise, the Commission is not efficiently allocating its resources as recommended by the Permit Efficiency Task Force report. (10)

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RESPONSE: Governments and ordinances can and do change often at the municipal level. Under the Act it is the Commission's obligation to protect the Canal and Park, which is done through the regulations. The conservation easement or deed restriction ensures that no future violations or encroachments will take place in the stream corridor, thereby protecting sensitive natural resources of the Canal and Park. The Act does not contain provisions that would allow the Commission to delegate to municipalities the obligation to protect the Canal and Park. Therefore, the Commission is including the conservation easement and deed restriction in its rules.

N.J.A.C. 7:45-10.1 Submission requirements

79. COMMENT: The Commission should not adopt the requirement of a copy of a lease agreement application to the New Jersey Water Supply Authority for private projects within the Park. The Water Supply Authority does not have regulatory authority or ownership rights to the land. (10)

RESPONSE: The Department, the New Jersey Water Supply Authority and the Commission executed a lease in June of 1986 under which the Department and Commission leased the Delaware and Raritan Canal Transmission Complex (the Canal and lands adjacent to the Canal that are necessary to maintain the water supply) to the Water Supply Authority. Under this document the Water Supply Authority has the authority to enter into leases with the approval of the Department and the Commission.

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N.J.A.C. 7:45-10.4 Design standards for review of visual, historic and natural quality impact

80. COMMENT: Regarding sign height limits in various environments, the Commission should further define or identify the areas that are considered urban or suburban. (10)

RESPONSE: All of the environment types of the Park identified at N.J.A.C. 7:45-10.2(a), including those designated as Urban and Suburban, are described as well as depicted on maps in the Delaware and Raritan Canal State Park Master Plan. Copies of the Master Plan are available at public libraries throughout the review zone. The plan is also available for review at the Commission's office in Stockton, and is on the Commission's website (www.dandrcanal.com). In addition, an applicant may request information about an area's designation from the Commission. Finally, determination of environment types as described in the Master Plan is provided in every staff report that is produced in response to every application submitted (N.J.A.C. 7:45-3.4(c)), and in each jurisdictional determination in accordance with N.J.A.C. 7:45-2.2.

81. COMMENT: Proposed N.J.A.C. 7:45-10.4(d)6 requires that recommendations to avoid, minimize and/or mitigate the impacts of a project on a listed property shall be made in consultation with the State Historic Preservation Office. This requirement will

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burden the State Historic Preservation Office with its limited staffing resources. The Commission should further clarify the type of consultation that would be required. (10)

RESPONSE: The Commission works closely with the State Historic Preservation Office and often consults with it on projects requiring Commission review.

Consultation is made available under the New Jersey Register of Historic Places Rules, N.J.A.C. 7:4-8(a)3 through 5. N.J.A.C. 7:4-8(a)3 through 5 state that the Historic Preservation Office provides consultation for “assessing a potential project’s impact on any property eligible for inclusion in the New Jersey and National Registers of Historic places; assessing alternatives to avoid or minimize and/or mitigate the impacts of a project on a listed property or a property that is eligible for inclusion in the New Jersey and National Registers of Historic Places;” and “formulating recommendations arising from the assessments...” As set forth at N.J.A.C. 7:45-10.4(d)6, the consultation with the State Historic Preservation Office is undertaken in order to assess the project for its impact on the district or site, in order that the Commission can recommend means to avoid, minimize, and/or mitigate the impacts of a project on a listed property.

Not all applications are subject to consultation between the Commission staff and the State Historic Preservation Office. The consultation is most often carried out on projects that require compliance with the Commission’s regulations as well as approval by the State Historic Preservation Office. The consultation is usually undertaken informally, rather than by a formal written submission to the State Historic Preservation Office, thereby minimizing the burden on both the Commission staff and the State

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Historic Preservation Office. The new rule does not require State Historic Preservation Office approval of a project over which the State Historic Preservation Office does not otherwise have authority.

The Commission recognizes the limitations of staff resources. The rule at N.J.A.C. 7:45-10.4(d)6 is modified on adoption to clarify that the consultation is to be carried out by Commission staff. As proposed, the rule could be misinterpreted as requiring consultation by the applicant, or by the Commission's members, rather than by Commission staff.

N.J.A.C. 7:45-12.2 Procedure

82. COMMENT: Proposed N.J.A.C. 7:45-12.2(b) lists documentation required for a waiver based on extreme economic hardship. Subsection (b) should be revised to state that those who had been offered the subject property for sale were "not interested in purchasing the property for fair market value." (10)

RESPONSE: N.J.A.C. 7:45-12.2(b)4 and 12.3(b)3, which contain similar but not identical language regarding offering the subject property for sale, are modified on adoption to provide clarification and to provide consistent guidance on the documentation needed to demonstrate extreme economic hardship. The rules are modified to require an applicant to offer the properties for sale at market value. "Fair market value" is a term that is no longer used in the context of acquisitions by the Green Acres program or by

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other entities using Green Acres funding. Rather, “market value” is preferred. A reference to the definition of “market value” in the Green Acres rules at N.J.A.C. 7:36-2.1 is added to the rule on adoption. In those rules, the term is defined as “the most probable price for which land will sell in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by any unusual benefit to the purchaser.”

The use of market value is a logical and fair way to approach the issue of demonstrating if an applicant can secure a reasonable economically viable use of the property by selling the subject parcel for preservation or if a waiver of strict compliance with these rules is required to avoid an extreme economic hardship. As proposed, without the requirement of a market value appraisal, the applicant could offer the parcel for sale at an unrealistically high value. Conversely, an offer to buy the parcel could be made at an equally unrealistically low value. This would defeat the intent of the rules, which is to show that the property owner has suffered an extreme economic hardship. The lack of an offer to purchase at an inflated value, or the presence of an offer to purchase at an unrealistically low value is meaningless for purposes of demonstrating economic hardship.

N.J.A.C. 7:45-12.3(b)3 is also modified on adoption to be consistent with N.J.A.C. 7:45-12.2(b)4, which requires that the property be offered for sale to other interested parties. As proposed, under N.J.A.C. 7:45-12.3(b)3 the Commission would consider documentation indicating that the property has been offered for sale to the Green

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Acres Program, but the rule did not require the Commission to consider whether the property was offered to other interested parties.

N.J.A.C. 7:45-12.3 Waiver of review standards due to extreme economic hardship or compelling public need

83. COMMENT: Proposed N.J.A.C. 7:45-12.3 inappropriately includes the same application requirements for both extreme economic hardship and compelling public need. These two situations are vastly different and should be made in two separate subsections. (10)

RESPONSE: N.J.A.C. 7:45-12.2(a) outlines the documentation required for all waiver requests. N.J.A.C. 7:45-12.2(b) specifies the additional documentation needed to support a request for a waiver based on extreme economic hardship. N.J.A.C. 7:45-12.3(b) provides the standards under which a waiver based on extreme economic hardship will be granted in view of the documentation submitted, and N.J.A.C. 7:45-12.3(c) provides the standards under which a waiver will be granted based on compelling need in view of the documentation submitted. There is no overlap among the rules.

84. COMMENT: If these rules are applied to existing farming operations, farms in the Commission's Review Zone will not be able to continue. Specifically, the waiver for extreme economic hardship is too strict in requiring that farmers must offer their property

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to a land conservation entity if they can prove that the property is not capable of yielding a reasonable return if the present use is continued. It is clear that the Department and the Commission want to eliminate private ownership of as much land along the Canal and within the expanded Review Zone as possible. Publicly-owned lands are more expensive to the public than farmland. (7)

RESPONSE: The regulations concerning waiver for extreme economic hardship are included to address proposed development that cannot meet the standards in the regulations as strictly applied without resulting in economic hardship to the applicant. The regulations do not apply to legally existing ongoing activities, such as farming. (See the Response to Comments 10 and 11.) The rules require an applicant to offer a property for sale only if he or she is trying to develop a site that is so constrained by sensitive environmental resources that the development cannot be designed to avoid significant environmental impacts. The hardship waiver is designed to protect sensitive resources, while enabling some economically beneficial use to the property owner.

85. COMMENT: N.J.A.C. 7:45-12.3(b)3 should, like subsection 12.2(b), be revised to state that the Green Acres Program has stated it has no interest in acquiring the subject property for fair market value. (10)

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RESPONSE: This rule at N.J.A.C. 7:45-12.3(b)3 is being modified on adoption to provide the recommended clarification. See Response to Comment 82 for further discussion of modifications on adoption to N.J.A.C. 7:45-12.2(b)4 and 12.3(b)3.

N.J.A.C. 7:45-12.6 Waiver of stormwater runoff and water quality impact standards

86. COMMENT: Proposed N.J.A.C. 7:45-12.6(b) requires a demonstration that a waiver of stormwater runoff and water quality impact is based on extreme economic hardship or compelling public need, in order to allow installation of a new outfall or the discharge of stormwater into waters or conduits that flow into the Canal. However, subsection (c) then requires the proposed discharge to be treated to meet the water quality standards of 95 percent TSS removal. This mitigation would be near impossible and extensive without any proven environmental benefit. Similarly, requiring a cash donation to a mitigation bank administered by the New Jersey Water Supply Authority would increase the cost of workforce housing. These subsections should not be adopted. (10)

RESPONSE: The Department and the Commission intend, through the rules, to regulate discharges into the Canal in order to prevent further degradation of water quality and avoid potential catastrophic contamination by accidental hazardous substance spills. This means that new discharges into the Canal are prohibited, where feasible. Because the Canal traverses several urban areas, new discharges may be allowed as part of

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redevelopment projects where it is physically impossible to divert stormwater away from the Canal. Therefore, the standards governing when a new outfall would be allowed are intentionally rigorous.

The removal of 95 percent of total suspended solids (TSS) can be achieved by using several stormwater best management practices in series. The Department disagrees with the statement that removal of 95 percent of TSS will not assist in preventing the degradation of the water quality of the Canal. (See 40 N.J.R. 6701 and 6702.) If an applicant decides not to treat to 95 percent TSS removal onsite he or she has two options, as described at N.J.A.C. 7:45-12.6(d)1 and 2. Option one is to treat stormwater entering the Canal on another site, and option two is a contribution to a mitigation bank to fund other nonpoint source pollution control projects to reduce existing sources of pollution into the Canal.

There will be an increased cost associated with building a project that will discharge stormwater into a public drinking water supply, in part because the discharge point will create another potential avenue for an accidental spill of hazardous substances to reach that supply. Such a possibility must be anticipated in the design, in order to protect the water supply.

N.J.A.C. 7:45-13 Fees

87. COMMENT: The Commission should not be fee-based. The jurisdictional area must offer the maximum amount of opportunities for charging fees to ensure sufficient cash

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flow with a high potential of encroaching on home rule; the revenue from fees will be based on the economy, which is unpredictable; and audits will be required, adding to the costs of operations. The Commission should consider charging water users instead of the general public. (5, 6)

88. COMMENT: The Commission should charge Canal water users fees instead of the regulated community. (6)

RESPONSES TO COMMENTS 87 and 88: As discussed in the proposal summary, 40 N.J.R. at 6702, the Act authorizes the Commission to establish fees for its review of applications, and for other services it provides. The Commission is no longer funded through the Division of Parks and Forestry, and must support itself through those fees. It is not within the Commission's authority to charge a user fee, as suggested by the commenters. Any such fee would require Legislative action.

89. COMMENT: Requiring homeowners to pay both municipal and Commission fees for building projects is onerous. (6)

RESPONSE: It is fair and appropriate to charge applicants fees for review of their applications' impacts on the Canal Park. In most cases the fees are a small percentage of the cost associated with a project. (See Response to Comment 21 for a discussion of relative costs.) As discussed in the proposal summary, 40 N.J.R. at 6702, the Act

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authorizes the Commission to charge fees for review of applications and for the services that it provides. Because the Commission is to be wholly fee supported, the cost of the Commission's review of applications must be borne by the applicants. See Responses to Comments 32 through 34 regarding the need for both municipal and Commission review.

90. COMMENT: Charging people for projects within Zone A to support a State Park that serves the general public is not fair. (3)

RESPONSE: The proposed fees will not support the State Park, but are to pay for the Commission, which enforces the regulations that protect the Canal and Park. The cost of operating the Park is borne by the Department.

The Commission reviews applications to ensure that projects do not have a negative impact on the Park or the water supply function of the Canal. The fees that the Commission charges are intended to cover the cost of that review. The impact of development on public resources is the responsibility of the developer, and thus the cost of complying with regulations to protect those resources must also be borne by the developer.

For further discussion of the basis for the fees, see the proposal summary at 40 N.J.R. 6702-6603.

91. COMMENT: Charging fees will be prohibitive. (4)

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RESPONSE: The fees that the Commission is imposing for review of applications for major projects are the same or similar to those charged by the Department for review of Flood Hazard Area Control Act permits. The fees for review of applications for minor projects, which include most project applications submitted by homeowners, are considerably lower. Applications for major projects are more complex than applications for minor projects, and take more time for the Commission to review; therefore, the fees for review of applications for major projects are necessarily greater than those for minor projects. For further discussion of the basis for the fees, see the proposal summary at 40 N.J.R. 6702-6603. See Response to Comment 21 for a discussion of representative costs in Lambertville.

92. COMMENT: There should be exemptions for established farms from fees that meet certain requirements. (7)

RESPONSE: Legally existing, ongoing farming operations are not subject to regulation and associated fees. (See Response to Comments 10 and 11.) If an applicant is not proposing a regulated project, then neither a review nor a fee is required. (See the N.J.A.C. 7:45-2, Applicability, and N.J.A.C. 7:45-1.3 for the definitions of minor and major projects.)

The Act at N.J.S.A. 13:13A-14c requires the Commission to review the application for any regulated project within the Review Zone, including a regulated

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project that is proposed by the owner of a farm. The Commission must cover its costs through fees. If it does not charge farms, the cost of the review of farm applications would be placed on other applicants. The cost should be borne by the entity whose development requires Commission review.

93. COMMENT: Unlike the economic climate of 2007 when the Act was amended to authorize fees, today we are in the midst of an extremely harsh economic climate. The Commission should reconsider charging any fees until the economy improves. (10)

RESPONSE: As set forth in the proposal summary, 40 N.J.R. at 6702, the Commission is no longer funded through the Department's Division of Parks and Forestry or by direct appropriation. Rather, the Commission is entirely supported by fees associated with the applications it reviews, and the other services it provides. It is necessary, therefore, for the Commission to charge the new fees. The cost should be borne by those individuals whose activities have an impact on the Review Zone, rather than by the taxpayers generally.

N.J.A.C. 7:45-13.2 Fee schedule

94. COMMENT: The proposed fee of \$250.00 at N.J.A.C. 7:45-13.2 is outrageous. (5, 6)

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RESPONSE: The \$250.00 fee for visual impact review of minor projects within review Zone A applies to projects that do not qualify for a general permit. As discussed in the proposal summary, 40 N.J.R. at 6703, the review involves at least one site inspection by Commission staff, and an analysis of the project as it impacts the D&R Canal National and State Historic Districts. The analysis that the staff presents is submitted to the Commission for review and decision. The fee is commensurate with the review required.

95. COMMENT: The \$50.00 fee for maintenance at N.J.A.C. 7:45-13.2 is for inside work. (5, 6)

RESPONSE: The fee for an authorization under General Permit 1 is \$50.00. General Permit 1 authorizes exterior maintenance projects using the same design as that of the existing structure. These regulations do not apply to interior alterations of existing buildings. (See N.J.A.C. 7:45-1.3 for the definition of "private project.")

96. COMMENT: Cumulative fees for a handicapped ramp for a private residence in Lambertville will range from \$750.00 to \$3,000 under N.J.A.C. 7:45-13.2. (5, 6)

RESPONSE: The fee for a handicapped ramp for a private residence in Lambertville, depending on circumstances, would likely range from \$50.00 (fee for General Permit 1 for maintenance of an existing structure) to \$100.00 (fee for General Permit 2, less than 800 square feet of new impervious surface since January 11, 1980).

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97. COMMENT: Proposed N.J.A.C. 7:45-13.2(j) indicates that there would not be a fee for a minor modification that is in accordance with N.J.A.C. 7:45-4.2. The commenter supports this. (10)

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

Summary of Agency-Initiated Changes

At N.J.A.C. 7:45-13.2, Fee schedule, the Department is modifying the rules to make grammatical corrections. The word “projects” was missing in proposed N.J.A.C. 7:45-13.2(f)1, and “Zone” should not be plural in subsections (f) and (g).

Federal Standards Statement

Executive Order No. 27(1994) and N.J.S.A. 52:14B-1 et seq. (as amended by P.L. 1995, c.65) require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. There are no current, analogous Federal requirements for the regulation of a State Park as a recreation area, source of potable water and as an historic district; however, there is one Federal program concerning stormwater runoff and nonpoint source pollution control. This is discussed below.

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Clean Water Act

The Federal Clean Water Act (33 U.S.C. §§ 1251 et seq.) requires permits under Section 402 of that Act (33 U.S.C. § 1342) 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, rather than in these adopted rules. Accordingly, the within rules do not conflict with, and are not more stringent than the Federal Clean Water Act.

The repeal and new rules do not contain any standards or requirements that exceed the standards or requirements imposed by Federal law. Accordingly, Executive Order 27(1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c.65) do not require any further analysis.

Full text of the repealed rules may be found in the New Jersey Administrative Code at N.J.A.C. 7:45.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 2 APPLICABILITY

7:45-2.1 *[Exemption]* **Jurisdictional determination***, approval, authorization or waiver requirements

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An applicant proposing a governmental project or private project in the Review Zone, as defined in N.J.A.C. 7:45-1.2, shall first obtain from the Commission *[an exemption letter]* **a jurisdictional determination*** as described at N.J.A.C. 7:45-2.2, an individual approval as described at N.J.A.C. 7:45-3 and 4, a general permit authorization as described at N.J.A.C. 7:45-5 and 6, and/or a waiver as described at N.J.A.C. 7:45-12.

7:45-2.2 *[Exemption letters]* **Jurisdictional determination***

- (a) An applicant *[with a project that qualifies for an exemption under this chapter may obtain a letter from the Commission certifying that the project is exempt.]* **may apply to the Commission for a written jurisdictional determination that states whether or not a project requires review and approval under this Chapter. If the proposed project requires review and approval, the jurisdictional determination shall identify the review zone in which the project is located, and whether it is a major or minor project. The jurisdictional determination shall also state whether the project requires an individual approval or may qualify for a general permit. To apply for a jurisdictional determination, the applicant shall submit the following:**

1. **A Commission application form (see N.J.A.C. 7:45-1.2)**

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2. **If the site currently contains impervious surface, the total amount of existing surface in square feet or acres and the date it was constructed.**
3. **A brief description of the proposed project and the amount of impervious surface proposed.***

SUBCHAPTER 3 APPLICATION FOR REVIEW PROCEDURES FOR
INDIVIDUAL APPROVALS

7:45-3.7 Notice of decision

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

*[(d) The Commission's decision on an application shall be binding on the applicant, the municipality, and the municipal approving agency. In the case of any violation or threat of a violation of a Commission decision by a municipality or by the appropriate municipal approving agency, the Commission may institute civil action:

1. For injunctive relief;
2. To set aside and invalidate a decision made by a municipality or appropriate municipal approving agency in violation of the Act, this chapter or the Commission's decision; or
3. To restrain, correct or abate such violation.]*

***7:45-3.8 Enforcement of notice of decision**

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(a) The Commission's decision on an application shall be binding on the applicant, the municipality, and the municipal approving agency. In the case of any violation or threat of a violation of a Commission decision by a municipality or by the appropriate municipal approving agency, the Commission may institute civil action:

1. For injunctive relief;

2. To set aside and invalidate a decision made by a municipality or appropriate municipal approving agency in violation of the Act, this chapter or the Commission's decision; or

3. To restrain, correct or abate such violation.*

SUBCHAPTER 4. INDIVIDUAL APPROVALS

7:45-4.1 Issuance of an individual approval

(a)-(i) (No change from proposal.)

(j) The holder of the approval shall notify the Commission within 10 days of the completion of the construction or issuance of *[a]* **the*** permanent or temporary Certificate of Occupancy* **for the project***.

(k) Within three months of the issuance of *[a]* **the*** permanent Certificate of Occupancy* **for the project***, the holder of the approval shall submit a certificate from a licensed engineer stating that the project was built in accordance with the plans upon which the approval was based.

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SUBCHAPTER 8. STORMWATER RUNOFF AND WATER QUALITY IMPACT REVIEW

7:45-8.1 Purpose and scope of review

- (a) *[The Commission shall review all projects within Zone A and Zone B for stormwater runoff and water quality impact except for those projects expressly exempted by this chapter or waived by the Commission.]* ***Except for those projects expressly exempted by this chapter or waived by the Commission, the Commission shall review the following for stormwater runoff and water quality impact:**

1. Major projects within Zone A;

2. Minor projects within Zone A that will result in 800 square feet or more of impervious surface, cumulatively since January 11, 1980; and

3. Major projects within Zone B.

- (b)*** The scope of review for stormwater runoff and water quality impact includes the following:

1. – 3. (No change from proposal.)

7:45-8.3 Specific standards for outfalls

- (a) For projects involving new or existing outfalls in the Review Zone, the following standards shall be required:

1. – 4. (No change from proposal.)

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5. For projects discharging to existing outfalls in the Canal, the Commission shall consider the following prioritization of types of remediation measures:

- i. (No change from proposal.)
- ii. Where the removal of existing outfalls is not possible under (a)5i above, **[all]** stormwater being discharged through the outfall shall be treated to achieve 95 percent TSS removal ***for the water quality design storm***, as described at N.J.A.C. 7:45-8.**[8]* *7**; or
- iii. Where treatment for **[all]** stormwater is not possible under (a)5ii above, stormwater from offsite areas shall be treated to achieve 95 percent total suspended solids (TSS) removal as follows:

(1) (No change from proposal.)

(b) (No change from proposal.)

SUBCHAPTER 10. VISUAL, HISTORIC AND NATURAL QUALITY IMPACT

7:45-10.4 Design standards for review of visual, historic and natural quality impact

(a) – (c) (No change from proposal.)

(d) For major and minor projects in Zone A, other visual, historic and natural quality impact standards are as follows:

1. – 5. (No change from proposal.)

6. Projects that are located in any officially designated Federal, State or local historic district or site shall be assessed for their impact upon that district

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or site. Recommendations to avoid, minimize, and/or mitigate the impacts of a project on a listed property shall be made in consultation with the New Jersey Historic Preservation Office and based upon the United States Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring and Reconstructing Historic Buildings, available at <http://www.nps.gov/history/hps/tps/standguide/>, as supplemented or amended, and incorporated herein by reference, in accordance with N.J.A.C. 7:4-8 of the New Jersey Register of Historic Places Rules.

Commission staff will consult with the New Jersey Historic Preservation Office, as needed.

SUBCHAPTER 12. WAIVER OF STRICT ADHERENCE TO REVIEW STANDARDS

7:45-12.2 Procedure

- (a) (No change from proposal.)
- (b) To support a waiver based upon extreme economic hardship, the applicant shall submit to the Commission documentation including, but not limited to, the following:
 - 1.-3. (No change from proposal.)

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4. Documentation that the subject property has been offered for sale ***for market value, as defined in the Green Acres Program rules at N.J.A.C. 7:36-2.1,*** to other interested parties including the contact persons and phone numbers (including adjacent land owners, the Department's Green Acres program, or other conservation groups) and that they are not interested in purchasing the property ***for market value***.

5. – 9. (No change from proposal.)

(c) – (g) (No change from proposal.)

7:45-12.3 Waiver of review standards due to extreme economic hardship or compelling public need

(a) (No change from proposal.)

(b) The Commission shall use the following standards in reviewing economic hardship waiver applications:

1.-2. (No change from proposal.)

3. The applicant has provided documentation showing that the subject property has been offered for sale ***for market value, as defined in the Green Acres Program rules at N.J.A.C. 7:36-2.1,*** to ***[the** Department's Green Acres Program and that the Program has stated it has

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no]* ***other interested parties (including adjacent land owners, the Department's Green Acres program, or other conservation groups), and that none of the parties has expressed an*** interest in acquiring the subject property ***for market value***.

(c)-(d) (No change from proposal.)

SUBCHAPTER 13. FEES

7:45-13.2 Fee schedule

(a) –(e) (No change from proposal.)

(f) The fee for stormwater review in accordance with N.J.A.C. 7:45-8 shall be:

1. For minor A Zone*[s]* ***projects***:

i. – ii. (No change from proposal.)

iii. All other minor A Zone*[s]* projects: \$ 500.00;

2. – 5. (No change from proposal.)

(g) The fee for stream corridor impact review in accordance with N.J.A.C. 7:45-9 shall be:

1. For a minor project in the A Zone:

i. (No change from proposal.)

ii. All other minor A Zone*[s]* projects: \$2,000, plus \$1,000 if a waiver from strict compliance of the regulation is requested, in accordance with N.J.A.C. 7:45-9; and

2. (No change from proposal.)

(h)-(m) (No change from proposal.)