ENVIRONMENTAL PROTECTION
COMPLIANCE AND ENFORCEMENT
Freshwater Wetlands Protection Act
Freshwater Wetlands Protection Act Rules; Environmental Enforcement Enhancement Act

Adopted Amendments: N.J.A.C. 7:7A-16
Adopted New Rule: N.J.A.C. 7:7A-16.9

Proposed:	August 18, 2008 at 40 N.J.R. 4657(a)
Adopted:	_____by Mark N. Mauriello, Acting Commissioner, Department of Environmental Protection.
Filed:	_____as R.200_ d._____, **with technical and substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3.)
Authority:	N.J.S.A. 13:9B-1 et seq., and 13:1D-1 et seq.,
DEP Docket Number:	12-08-07/691
Proposal Number:	PRN 2008-289
Effective Date:	_____
Expiration Date:	_____

The Department of Environmental Protection (Department) is adopting amendments and a new rule at N.J.A.C. 7:7A-16 to incorporate and implement changes to the Freshwater Wetlands Protection Act (FWPA) made by P.L. 2007, c. 246, commonly known as the Environmental Enforcement Enhancement Act (EEEA). The EEEA was enacted effective January 4, 2008, and modified and enhanced the Department's enforcement powers under various environmental protection statutes, including the FWPA at N.J.S.A. 13:9B-21. Among the changes effected in the FWPA by the EEEA are an increase in the maximum penalty from $10,000 to $25,000, a lengthened time of 35 days (as compared to the prior 20 days) in which a

person may request a hearing to challenge an administrative enforcement action, and the explicit inclusion of the alleged violator's conduct as a basis for assessing a penalty (in addition to violation type, seriousness, and duration). In addition to the amendments implementing the EEEA changes, the Department is adopting amendments that reorganize, clarify, and correct the rules at N.J.A.C. 7:7A-16.

The Department published the proposed amendments and new rule in the New Jersey Register at 40 N.J.R. 4657(a) on August 18, 2008. The comment period for the proposal closed on October 17, 2008.

Summary of Public Comments and Agency Responses:

The following persons submitted written comments on the proposal.

1. Marshall Robert

2. Timothy J. Touhey, New Jersey Builders Association

The submitted comments and the agency's responses are summarized below. The number in parentheses after each comment identifies the respective commenters listed above.

1. COMMENT: These rules propose to enforce the readopted FWPA rules published on October 6, 2008. That date is fewer than 30 days from the October 17, 2008, close of comment period on this proposal. There has been insufficient notice of these proposed amendments and new rule. (1)

RESPONSE: In the summary of the August 18, 2008, proposal of the enforcement-related amendments and new rule adopted herein, the Department explained that, because the EEEA was enacted in January 2008, subsequent to the September 2007 publication of the proposal to readopt the entire chapter at N.J.A.C. 7:7A, it was necessary to publish a separate, superseding proposal of amendments to subchapter 16 in order to implement the changes mandated by the EEEA. In the readoption of the FWPA rules published on October 6, 2008, the Department readopted without change the then-existing enforcement-related rules in Subchapter 16 and directed readers' attention to the then-pending August 18, 2008 proposal, noting that the 60-day comment period on that proposal was still open and would close October 17, 2008 (see 40 N.J.R. 5667). Therefore, the Department did provide adequate notice of opportunity to comment on the amendments and new rule adopted herein.

2. COMMENT: This proposal is designed to increase the power of the Department to bring enforcement actions against residents and business owners of this state who violate provisions of the Freshwater Wetlands Protection Act rules. Fair and effective enforcement of the rules to help protect wetlands is encouraged. However, the Department is cautioned to only sparingly, and after critical analysis, impose any penalties at the maximum. The Department should carefully evaluate the nature and extent of violations prior to assessing any penalties or taking any actions prescribed at N.J.A.C. 7:7A-16. (1, 2)

RESPONSE: The adopted rules are intended to reduce the frequency and seriousness of violations of the FWPA and rules by increasing the deterrent effect of the penalty assessments. The FWPA as amended by the EEEA requires that the Department establish by regulation the

range of penalty amounts to be assessed based on violation type, the seriousness of impacts to the protected resources, the duration of the violation, and the conduct of the violator. The rule text, matrix and tables at N.J.A.C. 7:7A-16.8 through 16.13 establish points and/ or penalty amounts reflecting these factors for purposes of assessing penalties as required by the statute. The adopted rules increase the number of possible assessment amounts, or steps, between the lowest and highest penalty amounts, more clearly distinguishing between different violations so that the penalties assessed are consistent, appropriate and fair. The assessment procedure ensures that no single factor drives the assessed penalty amount. Therefore, the Department believes that these rules will facilitate, as the commenters suggest, the Department's careful application of the relevant factors in determining appropriate penalty assessments. The maximum penalty would be assessed only when all factors considered in the assessment procedure are at their particular maximum levels. Pursuant to N.J.A.C. 7:7A-16.8, an unauthorized regulated activity which results in the maximum point value would involve intentional, deliberate, purposeful, knowing or willful conduct, and impacts to greater than seven acres of exceptional resource value wetlands and/or transition areas. For penalties assessed under N.J.A.C. 7:7A-16.9, the maximum penalty amount would be assessed for intentional, deliberate, purposeful, knowing or willful conduct and major seriousness, as defined therein.

3. COMMENT: New N.J.A.C. 7:7A includes a new change to the definition of a “person” to include “corporate officer or official.” The definition is in conflict with the definition of “person” in the Administrative Procedure Act (APA) at N.J.A.C. 1:30-1.2. Since this proposal is intended to increase penalties against persons who violate, it increases the number of persons to more than are covered under the APA. The proposal does not explain why it needs to separate

out corporate officer or official. These individuals are persons by virtue of them being natural individuals. The only plausible reason for changing the definition is to extend the ability to assess fines against government officials and corporate officers for actions of their employees or to pierce the liability protections in other state corporate law and the government immunity laws. Since the proposal does not include an explanation of why it intends to expand the definition of persons for legitimate environmental protection, it should be redrafted and republished. (1)

RESPONSE: The definition of "person" in the FWPA is "an individual, corporation, partnership, association, the State, municipality, commission or political subdivision of the State or any interstate body." See N.J.S.A. 13:9B-3. The phrase “corporate officer or official” was added to the definition of “person” in the FWPA rules at N.J.A.C. 7:7A-1.4 as part of the recent readoption of the entire chapter of FWPA rules. The reason for the amendment to the definition was explained in the summary of that proposal (see 39 N.J.R. 3588), and in the response to comment 28 in the adoption (see 40 N.J.R. 5589). Addition of “corporate officer or official” clarified the definition by explicitly including a category of persons who have historically been responsible for and who do submit applications for permits to the Department. This change in the definition of person did not, however, change the universe of persons subject to the regulations who therefore could be held responsible for violations of the regulations.

The rules promulgated by the Office of Administrative Law (OAL) to implement the APA to which the commenter cites, N.J.A.C. 1:30-1.2, define "person" as "any natural individual, association, board, venture, partnership, corporation, organization, institution and governmental instrumentality recognized by law for any purpose whatsoever.” This OAL definition is equivalent to and not inconsistent with the definition of "person" in the FWPA and

in the FWPA rules at N.J.A.C. 7:7A-1.4 since it includes both individuals and corporations recognized by law for any purpose. Individuals and corporations, and therefore corporate officers or officials, are recognized by the FWPA and rules for the purpose of implementation, including, as necessary, enforcement.

4. COMMENT: Review of the various impact statements shows the Department is not following the APA requirements. The Department demonstrates an understanding that the increased risk of fines and civil penalties will have a deterrent effect on persons who may violate the rules by claiming a positive impact in the Social and Environmental Impact statements. However, the Department ignored that the deterrent effect also leads to increased costs for all projects, not just for projects whose builders violate the rules. By ignoring the well known and well documented effect that increased compliance risk leads to increased project costs, the Department declared that the proposal will not have any detrimental impact when it prepared the impact statements on the economy, jobs, affordable housing, and small business. Specifically, the Social Impact statement did not address with particularity the impact the change in the definition of "person" would have. The Economic Impact statement told the public that there is zero economic impact except to those who violate the rules when the Department was fully aware that increased penalty programs increase the cost of all projects regardless of whether a developer or their agent violates the rules. The Jobs Impact statement indicated that increased development costs will have zero impact on jobs despite making it more likely [sic] a business owner will expand employment because building a new facility is too expensive. The Regulatory Flexibility statement did not explain that increased risks of compliance adversely affect small business or how this enforcement procedure is designed to minimize impact to small

businesses. The Housing Affordability Impact statement claimed there would be no compliance costs and concluded that there was an extreme unlikelihood that the proposed rules would evoke a change in the average costs of housing even though the Department made it clear in the proposal that developers' behavior would be affected by the increased penalties and by expanding the range of persons subject to enforcement under the FWPA. (1)

RESPONSE: The impact statements in the proposal summary reflect the experience of the Department and its determination regarding the anticipated effect of the proposed amendments and new rule on the public. As explained in response to comment 3 above, the amendments and new rules adopted herein did not modify the definition of "person" and consequently there was no reason for the Social Impact statement to address that topic.

Compliance costs for development in or near freshwater wetlands include the costs to obtain permits and the cost of meeting rule and permit requirements during construction. These costs should be part of the cost of doing business. However, the payment of penalties due to the violation of the FWPA and/or FWPA rules is not considered by the Department to be an appropriate “compliance cost.” The Department believes that the “risk” the commenter refers to is a result of the attitude of the regulated entity and not the result of regulation. The situation is similar to owning an automobile for which gasoline and oil, licenses, and repairs are ordinary and necessary costs to maintain and operate the vehicle. A violation of a speed limit, however, with the potential for a costly speeding ticket, is not a maintenance or operational cost. It is a cost attributable to the risk taken by the automobile owner in violating the law.

The adopted amendments and new rule do not change the requirements for permits and compliance. If approvals are sought prior to undertaking regulated activities and the conditions

of those approvals are met, the Department does not believe there is a "compliance risk." Therefore, the costs attributable to such risk, that is, to potential violations of the FWPA and rules, were not considered for purposes of developing the Economic Impact, Jobs Impact, Regulatory Flexibility Statement, and Housing Affordability Impact for the proposal of these amendments and new rule.

5. COMMENT: None of the impact statements analyze the additional departmental staffing required to implement the proposed enforcement measures. Adequate staffing is essential to all aspects of the permit review and enforcement processes, so that processing of wetlands permits is not delayed. (2)

RESPONSE: Since the amendments and new rule do not require any additional regulatory tasks or expand the scope of regulation, the Department does not anticipate the need for any additional staff to implement the enforcement provisions. The Department also notes that the land use permitting program and the land use enforcement program do not share staff. Consequently, enforcement actions do not affect or slow the permitting process.

6. COMMENT: In the "Federal Standards Statement," the Department states that the "USEPA has the ability to assess at least $11,000 per violation per day." Under the proposed rules, the Department would be able to assess penalties to a maximum of $25,000 per violation per day. The Department also recognizes that, unlike the Federal program, upland transition areas around each wetland are protected in New Jersey. Therefore, the state program is more stringent, particularly as the Department may assess penalties for impacts to transition areas, Planning

Areas 1, 2 or within designated centers. The regulatory system in New Jersey is complex, and administrative mistakes may occur by the regulated community and their consultants. The Department is therefore encouraged to only sparingly and after critical analysis impose any penalty at the maximum rate, and to carefully evaluate the nature and extent of violations prior to assessing any penalties or taking any of the actions prescribed at N.J.A.C. 7:7A-16.1. (2)

RESPONSE: As explained in the response to Comment 2 above, the adopted rules incorporate and reflect the penalty assessment requirements of the FWPA as amended and enhanced by the EEEA. The Department acknowledges that the State's wetlands compliance requirements can be complex and that administrative mistakes by permit applicants and their consultants can happen. However, the assessment process established under the rules is designed to ensure that the nature and extent of violations are thoroughly considered before a penalty is assessed. Also as noted in the response to Comment 2, a maximum penalty is imposed only when all factors considered in the assessment procedure are at their particular maximum levels.

7. COMMENT: Proposed N.J.A.C. 7:7A-16.1(g) requires the applicant and/or permittee to "provide, upon the request of the Department, any information the Department requires to determine compliance with any applicable law and/or condition." Although this provision is consistent with the EEEA and the FWPA, the Department should provide a time frame for providing the information. Such an amendment is necessary as failure to provide the requested information is classified as being of "major" seriousness at N.J.A.C. 7:7A-16.9(c)and can result in assessment of a penalty pursuant to proposed N.J.A. C. 7:7A-16.9. (2)

RESPONSE: The Department would assess penalties for a failure to submit information requested for purposes of determining compliance in accordance with the grace period provisions in the rules at N.J.A.C. 7:7A-16.20. As provided under N.J.A.C. 7:7A-16.20, Table F, the failure to submit documentation as required by a permit condition under N.J.A.C. 7:7A-4.3 (conditions that apply to all general permit authorizations) or N.J.A.C. 7:7A-13.1 (standard conditions for all permits including waivers) is designated minor for grace period purposes. For example, if the information requested is documentation of an action already taken, such as proof of recording of a Conservation Easement/Restriction required under a transition area waiver, then the failure to submit the requested information would be subject to a penalty only after the allowed 30-day grace period established under N.J.A.C. 7:7A-16.20(e). If the requested information is not provided to the Department within the 30 day grace period, or extension thereof pursuant to N.J.A.C. 7:7A-16.20(e)4, then the violation would be considered of major seriousness under N.J.A.C. 7:7A-16.9(c)1 for purposes of assessing the penalty.

N.J.A.C. 7:7A-16.20(c) describes how a violation not listed in Table F is determined to be minor or non-minor based on a comparison to the violations that are listed in Table F. In cases in which the documentation requested is not required through permit conditions or mitigation conditions and therefore not specifically covered by the violations designated as minor in Table F, the failure to provide that documentation would be reviewed for grace period applicability under N.J.A.C. 7:7A-16.20(c). For example, during investigation of a violation where freshwater wetlands have been filled without the required permit, the Department might request proof that the fill material is free of toxic pollutants. Documentation such as receipts for the fill material or bills of lading for the material used would constitute such proof. The failure to provide the documentation would be considered a minor violation for grace period purposes

because it is comparable to the violation of failure to provide documentation required by a permit. However, if the violator does not submit the required documentation within the provided grace period, the violation would be considered of major seriousness for purposes of assessing the penalty.

8. COMMENT: The proposed amendment at N.J.A.C. 7:7A-16.2 deletes "implementation" and replaces it with "enforcement." The Department explains that the basis for the proposed amendment is to "make it clear that the Department will share information used in the 'enforcement' of the FWPA with the USEPA, since Subchapter 16 relates to enforcement." However, the EEEA states that "[t]he department shall make available without restriction any information obtained or used in the implementation of P.L. 1987, c 156 to the United States Environmental Protection Agency upon a request therefore." (N.J.S.A. 13:9B-21(k)) (emphasis supplied.) The EEEA does not contemplate and therefore does not require information related to enforcement actions to be provided to the USEPA. The Department should not adopt the proposed amendment as it is beyond the statutory mandate. (2)

RESPONSE: Enforcement is a component of implementation of the Freshwater Wetlands Program and is among the responsibilities under Section 404 of the Clean Water Act (33 U.S.C. 1251 et seq.) (Federal 404 Program) that the Department assumed to meet the mandate of the FWPA.

The 1993 Memorandum of Agreement (MOA) between the Department and USEPA provides for oversight by USEPA of the State's enforcement of the 404 program. In order to fulfill the MOA requirements, the Department must provide any information requested by the

USEPA regarding enforcement of the program. As discussed in the summary of the proposal at 40 N.J.R. 4658, because Subchapter 16 is the subchapter of the FWPA rules detailing enforcement authority and responsibilities, it is appropriate in this context to refer to the Department's providing enforcement information to USEPA. The requirement to provide other implementation materials, for example, certain permit applications, is contained elsewhere in the FWPA rules.

9. COMMENT: Proposed N.J.A.C. 7:7A-16.4(a) 5 states in part that relief may include "[a] requirement that the violator restore or rehabilitate the site of the violation to the maximum extent practicable, as defined in N.J.A.C. 7:7A-1.4…" Subsection (a) 5 must be revised as the current language is not consistent with subsection 21c(5) of the EEEA. The EEEA and FWPA permit issuance of an order to restore a site "to the maximum extent practicable and feasible." The proposed regulation failed to include the term "and feasible". Additionally, the EEEA and the FWPA do not require the site to be rehabilitated, only restored. The EEEA and the FWPA, and in fact a latter part of this subsection, also recognize that there may be instances where on-site restoration is neither practicable nor feasible, in which case offsite restoration is permitted (emphasis supplied). In order to be consistent with the EEEA and the FWPA, subsection (a) 4 of the rules should be revised to read: "A requirement that the violator restore [or rehabilitate] the site of the violation to the maximum extent practicable and feasible."(2)

RESPONSE: The commenter is correct that the EEEA amendments to the FWPA reference "practicable and feasible" with regard to restoration of the site of a violation (see N.J.S.A. 13:9B-21c(5)), whereas the unamended part of N.J.A.C. 7:7A-16.4(a)5 references only

"practicable." In proposing to amend N.J.A.C. 7:7A-16.4(a)5 to incorporate the statutory allowance for offsite restoration from the EEEA amendments, the Department drew the phrasing directly from the statute.

As used in the FWPA rules, the terms "practicable," "feasible," and "practicable and feasible" are essentially synonyms. They are used interchangeably throughout the rules with little if any distinction. For example, at N.J.A.C. 7:7A-7.2(c), the Department describes a “practicable” alternative as one that is "available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” Similarly, in the provisions for the consideration of “feasible” alternatives as they relate to special activity transition area waivers, at N.J.A.C. 7:7A-6.3(c), the Department will consider an alternative feasible if it is "available and capable of being used after taking into consideration cost, existing technology, and logistics in light of the overall project purpose.” Consequently, because the Department uses the terms interchangeably, the Department does not believe it is necessary to add the additional reference to “feasible” at N.J.A.C. 7:7A-16.4(a)5.

The term “rehabilitate” is not used in the cited provision of the EEEA. However, the rule provision regarding restoration of the site of a violation has included the phrase "restore or rehabilitate" since the FWPA rules were promulgated in 1988. "Rehabilitate" has a similar meaning to "restore," and, as it relates to buildings, means to restore to good condition. The Department will order the restoration of a site to its former state, but may sometimes order the rehabilitation of structures, such as stormwater outfalls or detention basins, improperly maintained or constructed. Therefore, “rehabilitate” is a suitable descriptive term for some of the actions required to remedy a violation and is appropriately used in the rule.

10. COMMENT: Proposed N.J.A.C. 7:7A-16.5(a) increases the administrative penalty that the Department may assess to be no more than $25,000.00. While this provision is consistent with the EEEA and the FWPA, this penalty amount is excessive, particularly as the Department may also assess additional penalties for economic benefits from the violation. (2)

RESPONSE: The EEEA brings consistency to the penalty provisions applicable under various environmental protection statutes and increased maximum penalties in order to create an effective deterrent. This is the first increase in penalties for freshwater wetlands violations in more than 20 years. The highest penalties are assessed in accordance with the rules only for the most egregious violations. For the majority of violations, penalties are assessed at substantially less than the maximum $25,000.

The Department believes the option to assess an administrative penalty pursuant to N.J.A.C. 7:7A-16.5(a), an economic benefit penalty, or both, is necessary to protect the State's freshwater wetlands resources and public health and safety. The EEEA amendments to the FWPA specifically authorize assessment of economic benefit amounts notwithstanding, and therefore in addition to, the $25,000 maximum penalty per violation per day. The Department does not assess economic benefit for every penalty because in many cases a violator has not realized a significant economic benefit from a violation. However, in an instance where a violator has profited greatly by conducting activities prior to permitting or by conducting activities that would not receive Department approvals, the Department will determine and assess an additional amount for economic benefit.

11. COMMENT: Proposed N.J.A.C. 7:7A-16.6(a) requires the Department to notify only the "violator" of the assessment of a civil administrative penalty. Subsection (a) is not consistent with the EEEA and the FWPA. The EEEA and the FWPA require that the "property owner or person committing the violation" be notified of the assessment of a civil administrative penalty (emphasis supplied.) Subsection (a) should also be amended to specifically add the property owner and clarify notification must be provided before assessing a civil administrative penalty, as subsection 21(d) of the FWPA states "Prior to the assessment of a penalty…" Subsection (a) should be revised as follows: "(a) Prior to the assessment of [To assess] a civil administrative penalty, the Department shall notify the property owner or violator by certified mail (return receipt requested) or by personal service." (2)

RESPONSE: In the Department's experience, the violator almost invariably is the property owner. However, as used in the rule, the term "violator" would encompass any of the individuals and entities included in the definition of "person" at N.J.A.C. 7:7A-1.4. Whether the Department is required by N.J.A.C. 7:7A-16.6(a) to notify a property owner of a civil administrative penalty assessment depends on whether the property owner is also the violator. In most cases they are one and the same. In cases that involve multiple violators including the property owner, the Department will also include the property owner in the notice of enforcement action.

The substitution of the phrase "prior to assessment of" instead of "to assess" is not necessary. Under the rules, the violator is notified of the assessment in a Notice of Civil Administrative Penalty Assessment (NOCAPA). The violator then has 35 days to respond to the NOCAPA by submitting a request for hearing. As set forth in N.J.A.C. 7:7A-16.6(b), the penalty

assessment is not effective or final until the 36th day after receipt by the violator; or, if a hearing is requested and denied, on receipt of that denial; or, if a hearing is requested and granted, on receipt of a final order in the contested case. Consequently, the statutory requirement for prior notice is met.

In addition, in most cases, when the violation is discovered the Department routinely issues a notice of violation that describes the violation and warns that penalties may be assessed, and that actions taken by the violator may be taken into account should the Department subsequently assess a penalty. Thus there is usually written notice provided even before the NOCAPA is issued pursuant to N.J.A.C. 7:7A-16.6(a).

12. COMMENT: Proposed N.J.A.C. 7:7A-16.7(b)1 is consistent with the EEEA in that it extends the time frame for submission of a hearing request to the Department, thereby extending when the notice becomes a final order (specifically, on the 36th day after receipt of notice). The amendment should be made. (2)

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

13. COMMENT: Proposed N.J.A.C. 7:7A-16.8(c) includes two factors: conduct and seriousness. Proposed N.J.A.C. 7:7A-16.8(c)1i states conduct would continue to be classified as major, moderate or minor, where major conduct includes “an intentional, deliberate, purposeful, knowing or willful act or omission by the violator.” Proposed N.J.A.C. 7:7A-16.8(d) revises Table D, Base penalty points table, by adding new point totals, specifically total points of ten through seventeen as well as increasing the penalty amount for each category of base points up to

$25,000.00. The Department should justify the basis of the assigned point values, particularly as these differ from the proposed values in the 2007 readoption proposal and from the values in the prior rules. For example, a violation impacting greater than seven acres of wetlands and/or transition areas is proposed to be assigned seven points, as compared to the prior three points and as compared to the five points in the 2007 proposal. Similarly, a violation impacting greater than four acres up to and including seven acres of wetlands and/or transition areas is proposed to be assigned six points, as compared to the prior two points. Further, the point assignment for an assessed penalty involving alleged exceptional resource value wetlands should be reduced where it is established that wetlands and/or transition areas are something less than exceptional resource value. This should take into account errors that occur in DEP classification of wetlands based on DEP reliance upon inaccurate mapping. (2)

RESPONSE: As noted in prior responses, the changes to subchapter 16 included in the September 2007 proposal to readopt the entire chapter were not adopted. However, as explained in the summary of the 2007 proposal, the Department had determined to increase the number of points assigned for violations of major seriousness in exceptional resource value wetlands for impacts exceeding three acres. The proposed point values in the August 2007 proposal were intended to more accurately reflect the impacts to the resource of such violations. The Department determined that there was an inequity at the upper range of penalties, which allowed a large range of violation severity or scope of violation and thus the impact to be assessed at the same maximum penalty of $10,000 per violation per day. Under the 2007 proposal, violations incurring the highest proposed range of 10 to 15 points would be assessed the same maximum penalty amount even though the proposed point system was intended to reflect that the

Department was observing varying impacts among the violations assessed at the highest penalty range. However, the 2007 proposal was superseded by the proposal of the amendments and new rule adopted herein, in order to accommodate the EEEA changes to the FWPA.

In these adopted rules, there are seven different levels of wetlands acreage impacts, ranging from 0.25 acres and less to more than seven acres. The number of resource value categories is increased from three to five, which allows a lower point value to be used in cases where transition area only is impacted by a violation.

Under the new point system, the least severe of the violations that would have been assessed a $10,000 penalty under the prior rules will be assessed 11 to 14 points, resulting in a base penalty of between $13,000 and $19,000. Violations with major conduct affecting greater than seven acres of exceptional resource value wetlands will be assigned 17 points for a base penalty of $25,000. The point system allows the Department to differentiate between violations with greater impacts and does not as severely penalize violations with smaller impacts to lesser resource value wetlands. There are 15 steps in the point values to assess base penalties from $3,000 to the $25,000 maximum, as opposed to the prior eight steps to assess base penalties from $1,500 to $10,000. The Department believes the increased range of point steps will enable the assessed penalty to better fit the scope of the violation.

Finally, before an exceptional resource value wetlands classification is used for purposes of a penalty assessment, the Department verifies the accuracy of the mapping with on-site inspections to confirm the exceptional resource value of the wetlands.

14. COMMENT: Proposed N.J.A.C. 7:7A-16.8(e)1 and 2 and proposed N.J.A.C. 7:7A-16.9(e)1 and 2 establish penalty mitigating factor multipliers of 0.25 and 0.50 for corrective actions taken

by the applicant or permittee to rectify a notice of violation which would in effect reduce the civil administrative penalty. A penalty mitigation factor should be applied as often as appropriate, particularly as penalties accrue per day. The commenter appreciates that the Department has newly elected to take such actions into account to reduce civil administrative penalties, as provided for under the EEEA. Additional language should be added to clarify and confirm that any mandatory base penalty reduction implemented pursuant to subsection (e) shall not preclude a further penalty reduction by the Department pursuant to its discretionary settlement authority under N.J.A.C. 7:7A-16.6(c). (2)

RESPONSE: The Department has historically taken the circumstances and conduct of the violator described at N.J.A.C. 16.8 (e)1 and 2 and 16.9(e)1 and 2 into account in assessing penalties using its discretionary authority to adjust penalties formerly provided in the FWPA at N.J.S.A. 13:9B-21(d): "Any civil administrative penalty assessed under this section may be compromised by the commissioner upon the posting of a performance bond by the violator, or upon such terms and conditions as the commissioner may establish by regulation." As amended by the EEEA, the FWPA now provides: "The department may compromise any civil administrative penalty assessed under this section in an amount and with conditions the department determines appropriate." The provisions for applying a penalty mitigation factor will help standardize this aspect of the penalty assessment process.

The penalty mitigation factor multipliers at N.J.A.C. 7:7A-16.8(e)1 and 2 and N.J.A.C. 7:7A-16.9(e)1 and 2 reflect actions taken by the violator within 30 or 60 days, as applicable, from the violator's receipt of a notice of violation from the Department. Under these provisions, the Department applies the applicable mitigation factor multiplier to the base penalty to reduce it

for purposes of determining the penalty that is assessed and issued in the notice of civil administrative penalty assessment (NOCAPA).

N.J.A.C. 7:7A-16.6(d) provides for the reduction of an assessed penalty, that is, the penalty contained in the issued NOCAPA, when the Department and violator enter into a settlement agreement resolving the violation. The penalty reduction under N.J.A.C. 7:7A-16.6(d) is based on circumstances and/or conduct of the violator not previously considered when the penalty was being calculated for purposes of issuing the NOCAPA.

The application of the mitigating factor multipliers at N.J.A.C. 7:7A-16.8 and 16.9 during the calculation of the penalty to be assessed does not preclude a reduction in the assessed penalty in the course of settling the violation in accordance with N.J.A.C. 7:7A-16.6, provided the circumstances and conduct of the violator considered in reducing the assessed penalty are not the same as those used to reduce the base penalty assessed initially. To allow the same penalty mitigating factors to be counted twice would undermine the deterrent value of the penalty scheme.

The Department notes that on adoption N.J.A.C. 7:7A-16.5(c) is modified to correctly cross-reference N.J.A.C. 7:7A-16.6(d).

15. COMMENT: Proposed N.J.A.C. 7:7A-16.9 (b) lists two factors (”seriousness” and “conduct”) to be applied in determining the base civil administrative penalty. Proposed Table E, “Base daily penalty matrix” has significantly increased the base penalty amounts from the proposed amounts in the 2007 Freshwater Wetlands rule proposal. Although the Department may assess a civil administrative penalty up to $25,000.00 pursuant to the EEEA and the FWPA, the statute does not mandate that the Department must increase the penalty amounts to

$25,000.00. The proposed 2007 penalty amounts were more than adequate to address the goals of deterrence and redress for violations. The Department should only adopt the increased penalties where either the seriousness or conduct factor is "major." The Department should not adopt the proposed increases for all other categories, particularly where either the seriousness or conduct factor is "minor" or "moderate." (2)

RESPONSE: As explained in prior responses, the EEEA changes to the FWPA and other environmental protection statutes were intended to enhance the Department's enforcement powers, including increasing penalties that can be assessed under the various laws. The amendments to the enforcement subchapter of the FWPA rules in the 2007 proposal established a graduated range of penalty amounts in the matrix at N.J.A.C. 7:7A-16.9 up to the then-existing maximum penalty amount of $10,000. The EEEA amendments to the FWPA increased the maximum penalty to $25,000. Accordingly, the Department is implementing under these adopted rules a graduated range of penalty amounts in the matrix at N.J.A.C. 7:7A-16.9 up to the new maximum penalty of $25,000. The penalties for violations of lesser seriousness and conduct in the matrix are similarly increased over those proposed in 2007 consistent with the intent of the EEEA. The maximum penalty of $25,000 will be assessed only where the particular violation meets the criteria for both major seriousness and major conduct.

16. COMMENT: According to proposed N.J.A.C. 7:7A-16.9(c)1, a violation would be deemed as "major" when it "has caused or has the <u>potential</u> to cause harm to human health, safety, the Freshwater Wetlands Protection FWPA regulatory program…" (emphasis supplied). Contrary to the proposed definition, a violation that has only the "potential" to cause harm should not be

categorized as "major" seriousness. Similarly, at N.J.A.C. 7:7A-16.9(c)2, the proposed definition for a violation of "moderate" seriousness indicates that the violation "has caused or has the potential to cause substantial harm to human health, safety, the Freshwater Wetland Protection Act regulatory program…" A violation that would cause "substantial" harm clearly should not be categorized as "moderate" seriousness. The definitions should be revised. The Department should distinguish more clearly what is of "moderate" seriousness. Further, subsection N.J.A.C. 7:7A-16.9(c) 2 should be amended to specify the violations that "substantially" deviate from the applicable law and/or condition should be classified as "moderate" seriousness. As proposed, any deviation would require classification as "moderate" seriousness. (2)

17. COMMENT: The Department classifies the "failure to timely record a conservation restriction or easement" as either "major" seriousness at N.J.A.C. 7:7A-16.9(c)1v or "moderate" seriousness at (c)2iii, based on whether the "property has been sold or transferred." The Department should classify this violation as "moderate" seriousness irrespective of whether the property is sold or transferred as this may occur due to an administrative oversight. For example, a permittee may fail through inadvertence to record a conservation restriction instrument in the county clerk's office, but the restriction may be established on record by other means such as the filing of a subdivision plat. Such oversight would have no impact on natural resources and could easily be remedied by the permittee when noticed. (2)

18. COMMENT: At N.J.A.C. 7:7A-16.9(c)1viii, the "failure of an applicant or permittee to provide information upon request to determine compliance with any applicable law and/or

condition" is classified as "major" seriousness. Although the EEEA and the FWPA require information to be provided by the applicant or permittee, they do not specify that this violation is of such grave nature as to be characterized as "major" seriousness. This violation should fall within the class of "minor" seriousness.

Proposed N.J.A.C. 7:7A-16.9(d) outlines conduct that would be classified as "major, moderate, or minor." Subsection (d)1 states: "'Major' conduct shall include any intentional, deliberate, purposeful, knowing, or willful act or omission by the violator." Subsection (d)1 also states that "the Department presumes a violation of any provision of a permit, transition area waiver, letter of interpretation, agreement, order, settlement, exemption letter, or mitigation proposal, as well as any violation by a person who has previously applied for or received any such instrument pursuant to the Freshwater Wetlands Protection Act and/or this chapter, to be a knowing violation." The Department's proposal to presume that any violation of the provisions of a permit is a "knowing" violation effectively eliminates the categorization of "conduct" in the penalty assessment context, making the rule that creates categories of conduct meaningless, and is contrary to long held assumptions of innocence until proven guilty.

Standards should be established to define the Department's burden of establishing what constitutes "intentional" "deliberate", "purposeful", "knowing", or "willful" violations. The absence of such standards invites abuse. In light of the significant penalty assessments that would accrue daily, the Department should ensure that heightened due process protections are afforded. (2)

RESPONSE TO COMMENTS 16 THROUGH 18: N.J.A.C. 7:7A-16.9 provides standards for major and moderate seriousness, and captures all remaining violations in the minor seriousness

category. The Department describes and provides examples of the violations that are most frequently encountered in the categories of major and moderate seriousness. Major seriousness applies where there is a “serious” deviation from the applicable law or condition, that is, a violation that completely contravenes a rule, requirement or standard. Moderate seriousness applies where there is a “substantial” deviation from the applicable rule or condition, that is, a violation that partially or incompletely contravenes a rule, requirement or standard. The distinction, for penalty assessment purposes, is between a situation in which there was no compliance with a rule, requirement, or standard and a situation in which there was partial compliance.

As the commenter points out, the modifier "substantially" should appear in the first sentence of N.J.A.C. 7:7A-16.9(c)2 with regard to seriousness being applicable to any violation that "deviates" from an applicable law or condition. This would conform the rule text to the summary description at 40 N.J.R. 4660. The Department also notes that this modifier was included in the same provision in the prior 2007 proposal, on which this version of 16.9(c)2 is based. Accordingly, the Department is modifying N.J.A.C. 7:7A-16.9(c)2 on adoption to include the modifier "substantially."

The Department does not agree that “potential” harm should not be considered in the penalty assessment process. Often a violation is noticed by the Department and subsequently halted by the violator. The consideration of potential harm is a measure of the harm that the violation would cause to public health and safety, the environment or the regulatory program if it were not halted. The Department does not use “potential” to refer to the possibility of additional impacts. It is not possible, reasonable, or practical for the Department to prove that actual harm has occurred before assessing every penalty because many violations do not cause actual harm

individually or immediately. The harm may manifest itself at a future time, or be realized only through the cumulative effect of additional violations.

The Department does not believe that failure to properly record a conservation restriction should be characterized as "an administrative oversight." Although there may not be an immediate direct impact to health, safety, or the wetlands resource from the failure to record a conservation restriction, there is a significant potential impact. If the restriction is not recorded, construction and other unauthorized impacts may be incurred in areas that were to be set aside to provide protection for the adjacent wetland. It is more environmentally protective to assess a penalty for the failure to record a conservation restriction than it is to wait until the point at which potentially irreversible damage has been done to the wetlands resource. Failure to record the conservation restriction but not having sold the property at the time the violation is recognized or discovered is of lesser seriousness than failing to do so but having sold the property by the time the violation is recognized or discovered. This is because selling property without the protective restriction puts the wetlands resource at risk. The prior owner cannot legally file the conservation restriction subsequent to the property having been sold. Without the conservation restriction recorded in the chain of title, the new property owner will not have notice of the legal restrictions on the property and may unknowingly adversely impact the resource. This creates the potential for serious consequences to the resource and therefore major seriousness is appropriate for the violation. In contrast, before the property is sold, the responsible entity, that is, the owner or permittee, is aware of the restrictions on the property pursuant to permitting and it is relatively easy for the owner or permittee to accomplish correction of the violation by promptly recording the conservation restriction and thereby accomplishing the intended protection of the resource.

The filing of a subdivision plat does not establish on record that a restriction exists. Even if a conservation restriction line appears on the plat plan, the filing of a subdivision plat is not a conservation restriction, it does not place restrictive covenants on the property and, therefore, does not fulfill the permit requirement. The plat plan does not carry with it the restrictive provisions, the metes and bounds description, the identification of the protected resource, or the identification of the agency in whose favor the restriction is made.

Failure to provide information on request to determine compliance is a violation of major seriousness because the Department depends on that information to make enforcement and permitting decisions that have impacts on wetlands resources, public health, and safety.

A violation of a permit is presumed to be a knowing violation because the permittee will have invested considerable time and effort to obtain a permit and therefore is expected to be knowledgeable of all the conditions of the permit, including limits and prohibitions. It is thereafter unreasonable for the permittee to claim ignorance of the permit's requirements and restrictions. The violator has the opportunity to dispute the basis for the penalty assessment through the adjudicatory hearing and appeal process.

The penalty matrix at N.J.A.C. 7:7A-16.9 reflects the Department's intent that someone who violates the law and/or rules after having worked through the permitting process should be held to a stricter standard, and consequently a higher penalty, than someone who has not. In order to ensure that penalties are a deterrent to violations, it is also reasonable that those who have working knowledge of the FWPA because of the permitting process or a previous violation should be subject to a greater penalty that reflects a knowing disregard of the law. Someone who has worked with the Department through the permitting process knows where and from whom to obtain information if he or she is unsure regarding a particular provision of the rules or condition

of an approved permit. It is entirely reasonable and routine for such individuals or their agents to call the Department to seek clarification if needed. It is not appropriate to violate the FWPA and claim ignorance or uncertainty regarding a provision in the rules or permit.

Further, although the matrix at N.J.A.C. 7:7A-16.9 is used primarily for assessment of penalties for permit condition violations, which are "major conduct" violations, the matrix is also used for other violations not specifically identified at N.J.A.C. 7:7A-16.8 through 16.13. The minor and moderate conduct factors and corresponding penalty assessment amounts in the matrix allow for fair and consistent assessment for such violations.

The terms at N.J.A.C. 7:7A-16.9(d) describing "major" conduct have their commonly understood meanings in this context: “Intentional” means deliberately done; “deliberate” means thought out or planned in advance; “purposeful” means having a purpose, a desired or intended effect; “knowing” means possessing knowledge and comprehension; and “willful” means being in accord with one’s will. The Department does not believe it is necessary to define these terms in the rules. Due process protections are afforded through the adjudicatory hearing and appeals process, should a violator dispute the basis for the Department's penalty assessment.

19. COMMENT: Proposed re-codified N.J.A.C. 7:7A-16.10(a) would assess a civil penalty for submitting inaccurate information or “false statement, representation, or certification in an application, record, or other document required to be submitted or maintained including “the presence of a historic resource…” N.J.A.C. 7:7A-16.10 is directly related to newly adopted N.J.A.C. 7:7A-10.2, “Civil administrative penalty amount for submitting inaccurate or false information.” In particular, N.J.A.C. 7:7A-10.2(e) not only allows for the possible denial or termination of the permit, the civil administrative penalty may be extended to anyone associated

with the preparation of the application, specifically the applicant, its consultants, engineers, surveyors, or agents. N.J.A.C. 7:7A-10.2 injects the subjective standard that these individuals "are or should be aware" of the required information (emphasis supplied.) As the commenter noted in its comments pertaining to N.J.A.C. 7:7A-10.2 in the 2007 proposal to readopt the FWPA rules, N.J.A.C. 7:7A-10.2 is too broad in scope and ignores the distinction between violations that are minor and non-minor. While the regulated community and its consultants are law-abiding individuals and businesses acting in good faith to comply with the Department's complex array of rules, it is foreseeable that administrative missteps may occur given the complexity of New Jersey's regulatory system. Administratively incomplete applications should not be deemed as "inaccurate or false information" and do not warrant assessment of penalties that accrue daily. (2)

RESPONSE: The adopted amendment at N.J.A.C. 7:7A-16.10(a) clarifies that an applicant can be penalized for failure to provide information or for providing inaccurate information about historic resources as well as wetlands and transition areas. As the commenter points out, the application requirements at N.J.A.C. 7:7A-10.2(e) provide that failure to provide information of which the applicant as well as the applicant's various consultants and agents are or should be aware may subject any or all of them to penalties under N.J.A.C. 7:7A-16.10. A violation under N.J.A.C. 7:7A-16.10 is non-minor and therefore not subject to a grace period. See N.J.A.C. 7:7A-16.10(g).

The Department specifies in the FWPA rules the information required as part of a permit application and, in addition, provides additional guidance and detailed direction in the wetlands permitting technical manual and in the application checklist provided for each type of

application. It is the responsibility of applicants, and their consultants, engineers, surveyors, and/or agents, to familiarize themselves with the application requirements and to ensure that the application information provided is truthful, accurate and complete.

The Department does not assess penalties for the submittal of an administratively incomplete application. An administratively incomplete application is returned to the applicant with comments regarding inadequacies and items that should be included in order for the application to be determined administratively complete.

20. COMMENT: Proposed re-codified N.J.A.C. 7:7A-16.11(a) authorizes the Department "to enter any property, facility, premises or site for the purpose of conducting inspections, sampling of soil or water, copying or photocopying documents or records, and for otherwise determining compliance with any applicable law and/or condition." This proposed subsection is consistent with the EEEA and the FWPA. However, the Department should provide additional parameters in assessing this penalty, as immediate lawful entry and inspection" are contemplated, and penalties may be assessed up to $10,000.00, and the violation is deemed to be non-minor and therefore not subject to a grace period. This penalty matrix has the potential to result in extremely harsh penalties for marginal violations that may do nothing more than cause inconvenience to the Department if "immediate" access is not feasible. (2)

RESPONSE: N.J.A.C. 7:7A-16.11(d)1 and 2 distinguish between violations of greater and lesser severity, and therefore greater and lesser penalty, for failure to allow entry and inspection based on whether the entry and/or inspection is related to an issued administrative order (that is, an enforcement action) or issued permit or approval, as opposed to any other refusal to allow

entry and/or inspection. The factors at N.J.A.C. 7:7A-16.11(e) allow for adjustment of the penalty based on the violator's compliance history and conduct, or other mitigating circumstances. The highest penalty amounts are imposed where the violator is aware, through permits or agreements, that the property is subject to inspection and has refused to give access to the Department.

In addition to the entry and inspection authority in the FWPA at N.J.S.A. 13:9B-21.m, the Department's enabling statute at N.J.S.A. 13:1D-9.d provides broad powers of access to assess compliance. These powers necessarily contemplate that access for inspections be timely. Timely access to a violation site includes immediate lawful entry and inspection in cases where public health and/or safety are at risk. The Department considers "immediate" lawful access to be access that is granted at once or without delay. The Department does not assess penalties for inconvenience.

21. COMMENT: Proposed re-codified N.J.A.C. 7:7A-16.13 (a) makes clear that the Department may assess the economic benefit in addition to a civil administrative penalty that may total $25,000.00 per day. Although this provision is consistent with the EEEA and the FWPA, the Department should assess economic benefit penalties only in the most extreme cases and upon documented evidence presented by the Department establishing the amount of the economic benefit in direct relation to the violation and confirming that the economic benefit exceeds the amount of the assessed civil administrative penalty. Absent such a showing, the rules are prone to abuse and should be revised to preclude economic benefit penalties. (2)

RESPONSE: As the commenter notes, the FWPA as amended by the EEEA authorizes assessment of economic benefit in addition to the $25,000 maximum per violation per day fine. The Department does not assess economic benefit for every penalty because in many cases a violator has not realized a significant economic benefit from a violation. However, in an instance where a violator has profited greatly by conducting activities prior to permitting or by conducting activities that would not receive Department approvals, the Department will determine and assess an additional amount for economic benefit. However, the Department is not prohibited from assessing an economic benefit penalty, as the commenter suggests, if it does not exceed the assessed civil administrative penalty. The rationales for the respective penalties are different and both may be appropriately applied in a given case.

The Department utilizes a standard process for determining economic benefit. Economic benefit resulting from a violation is the monies earned, not spent or delayed in expenditure as a result of the unauthorized regulated activities or subject violation. An example of economic benefit is the profit made by conducting a business or selling a structure that would not have been able to be permitted. As another example, economic benefit is the monies not spent on application fees or professional services or the interest collected on the monies not spent for mitigation conducted in a timely manner.

22. COMMENT: Proposed N.J.A.C. 7:7A-16.15 sets forth a broad range of monetary penalties that may be imposed (that is, up to $50,000.00 per day) in addition to imprisonment (emphasis supplied). The Department should establish graduated penalties within each category of intent based on the severity of the impacts. Proposed N.J.A.C. 7:7A-16.15(d)2 includes one who "falsifies, tampers with or purposely, recklessly or knowingly renders inaccurate any monitoring

device or method" with violations for which the Department may bring a criminal action. The Department should define the term "tampers" in this provision, as it is a broad term. (2)

RESPONSE: The provisions at N.J.A.C. 7:7A-16.15 state the maximum penalty and imprisonment allowed under the FWPA as amended by the EEEA for violations that are enforced through the criminal courts. Unlike the matrices, assessment procedures and tables at N.J.A.C. 7:7A-16.8 through 16.13 for civil administrative penalties, the Department has not promulgated penalties for criminal violations. The penalty for a criminal violation, including imprisonment if warranted, would be determined by the court in each particular case.

The term "tampers" as used at N.J.A.C. 7:7A-15(d)2, has its commonly understood meaning of to interfere in a harmful way.

23. COMMENT: Proposed amendments to re-codified N.J.A.C. 7:7A-16.17(b) appear to be consistent with the EEEA and the FWPA. However, the authority to record a Notice of Violation on the deed places an unnecessary stigma on real property. It is important to recognize that the NOV remains on the deed until the violation is resolved and the Commissioner of DEP orders its removal. The Commissioner may order the notice for minor infractions and regardless of whether there is a substantial nexus between the violation and the subject real property, or whether the responsibility for an alleged violation would transfer with ownership of the real property. Given this broad authority and the impact of this provision, the Department should establish more specific procedures with timeframes to ensure that the Notice be expeditiously removed. Further, it is unclear when the Enforcement staff would make a determination that compliance has been achieved and the Commissioner would be advised that appropriate actions

have been taken to rectify the violation. Specifically, no later than seven business days after a determination that a violation has been remedied, DEP should be required to give written notice that the violation has been remedied to the Commissioner, and the property owner and/or violator. The Commissioner should be required to issue a written order authorizing removal of the notice from the county register of deeds and mortgages, the property deed and the Superior Court records, as applicable no later than 5 business days after receipt of notice that a violation has been remedied. (2)

RESPONSE: The authority to place a notice of violation (NOV) on a deed is not new with the EEEA amendments. The FWPA and the rules already provided this authority. To address concerns that the Department would not act in a timely way to remove the notice placed on the deed, the Department amended the language at N.J.A.C. 7:7A-16.17(b) consistent with the EEEA amendment to the FWPA, making it clear that the NOV will be immediately removed upon resolution of the violation.

The purpose of recording an NOV on a deed is to provide notice to any prospective buyer that there is an unresolved freshwater wetlands violation on the site. The responsibility for remedying the violation will transfer with the ownership of the property. Such information should be disclosed to a potential buyer of property so that the prospective owner has full notice of limitations on the property.

The Department determines whether to record an NOV on a property deed on a case-by-case basis. Use of this enforcement tool is appropriate when the violator has been notified of the violation and has not taken any substantive steps to resolve the violation, or when the violator may soon be transferring ownership of the property. In order to protect the potential property

purchasers and to protect the Department's right to require restoration, failure to correct any violation, whether of minor, moderate, or major seriousness, may result in the attachment of an NOV to the deed of the property affected by the violation. The Department will record an NOV only on the deed of the property on which the violation occurred. The Department will not record an NOV on the deed(s) of other property owned by the violator.

The NOV remains on the deed until the violation is resolved. Upon resolution of the violation, the Department will promptly issue a compliance letter to the violator, stating that the Department is satisfied with the remedy and that the NOV which is on the deed has been satisfied. This letter is sent at the same time to the appropriate Clerk's office for recording on the property deed. It is important to note that recording the NOV on the deed does not take place immediately after the NOV is issued. The property owner or violator therefore has the opportunity to correct the violation prior to the NOV being placed on the deed. Remedying the violation promptly will ensure the NOV is not placed on the deed, and will also avoid the cost to the property owner of paying any fee charged by the county clerk or registrar of deeds for the Department's recording of the NOV.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995 c. 65) require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards analysis.

New Jersey's FWPA program replaces the Federal Clean Water Act Section 404 program (33 U.S.C. 1344) throughout most of the State. Consequently, the State's implementing rules replace the Army Corps of Engineers (ACOE) regulations for implementation of the Section 404

program. The basic structure of the Department's freshwater wetlands permitting program, and much of its substance, are essentially the same as the Federal 404 program. Both provide for individual and general permits. Both use similar key concepts and definitions, and apply similar standards in approving both general and individual permits. The Department is obligated under Federal law to ensure that its program is at least as stringent as the Federal 404 program.

While the New Jersey Legislature used the Federal 404 program as the basis for the FWPA, it also tailored the FWPA to meet the needs of New Jersey and to more strictly limit activities in and around wetlands in order to avoid excessive wetland losses in New Jersey. As a result, the New Jersey program regulates more types of activities in freshwater wetlands than the Federal 404 program does, regulates an upland "transition area" around each wetland, and, in some cases, requires a more involved process to obtain approval from the Department for regulated activities. Overall, because the Department regulates more activities in wetlands than the Federal program, including the drainage or disturbance of the water table, the driving of pilings, and the destruction of plant life which would alter the character of a freshwater wetlands, and protects a transition area adjacent to most wetlands, the Department’s rules are more stringent than the Federal 404 program. However, the additional protections are appropriate and necessary because New Jersey is the most densely populated State in the nation and continues to face development pressures that will impact the remaining wetland resources unless strictly protected.

The Federal program, as administered by the ACOE and EPA, does not distinguish between administrative penalties for failure to obtain a permit from all other administrative penalties, as the Department is doing at N.J.A.C. 7:7A-16.8 and 16.9. Consequently, the amendments do not make the Department’s program more or less stringent

than the comparable Federal enforcement standards. However, the increases in penalties, resulting from the EEEA amendments to the FWPA, make the Department's penalties more consistent with the Federal program. Before the EEEA amendments to the FWPA, the maximum penalty the Department could impose was $10,000 per day, whereas the USEPA has the ability to assess at least $11,000 per violation per day. Under the EEEA amendments and the adopted rules, the Department may assess penalties up to a maximum $25,000 per violation per day. Consequently, the Department's program is now as stringent, or, in cases where penalties exceed $11,000, more stringent than the Federal program. It is difficult to further identify when the Department's enforcement program might be more stringent than the Federal enforcement program because the FWPA and the rules at N.J.A.C. 7:7A classify wetlands according to resource value and use resource value as a factor when determining the penalty assessment. There is no equivalent Federal wetlands resource classification system. However, in the case where the Department assesses a penalty for impacts to a transition area, the Department's program is more stringent than the Federal program because the latter does not provide protection for transition areas.

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

N.J.A.C. 7:7A-16.5 Civil administrative penalty

(a) – (b) (No change from proposal.)

(c) The Department may, in its discretion, settle a civil administrative penalty assessed under this subchapter, in accordance with N.J.A.C. 7:7A-16.6*[(c)]***(d)*.** However, if the

Department settles a penalty for a violation of the Water Pollution Control Act, the settlement is subject to N.J.A.C. 7:14-8.

N.J.A.C. 7:7A-16.9 Civil administrative penalty amount for any violation other than failure to obtain a permit prior to conducting regulated activities, submittal of inaccurate or false information, failure to allow entry, or failure to pay a civil administrative penalty

(a) – (b) (No change from proposal.)

(c) The seriousness of the violation shall be classified as major, moderate, or minor as follows:

1. (No change from proposal.)

2. "Moderate" seriousness shall apply to any violation which has caused or has the potential to cause substantial harm to human health, safety, the Freshwater Wetlands Protection Act regulatory program or the environment, or ***substantially*** deviates from the applicable law and/or condition. "Substantial deviations" shall include, but not be limited to, violations which are in substantial contravention of the applicable law and/or condition, and/or which substantially impair or undermine the protection, operation, or intent of the applicable law and/or condition. The Department shall consider a violation that is limited solely to the transition area but is not associated with a permit to be of moderate seriousness. Violations of "moderate" seriousness also include, but are not limited to:

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

3. (No change from proposal.)

(d) – (f) (No change from proposal.)