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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Freshwater Wetlands Protection Act Rules

Adopted amendments: N.J.A.C. 7:7A-5.2, 5.6, 5.10A, 5.10B, 5.11, 5.21, 5.27, and 15.11

Proposed: October 6, 2008 at 40 N.J.R. 5478(a)

Adopted: October 6, 2009 by Mark N. Mauriello, Acting Commissioner, Department of Environmental Protection

Filed: October 6, 2009 as R. d. with substantive and technical changes not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3)

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

DEP Docket Number: 15-08-09/693

Effective Date: November 2, 2009

Expiration Date: September 4, 2013

The Department of Environmental Protection (Department) is adopting amendments to the Freshwater Wetlands Protection Act (FWPA) rules, N.J.A.C. 7:7A, to establish mitigation requirements for the following general permits: 2 for underground utility lines, 6 for non-surface water connected wetlands, 10A and 10B for minor road crossings, 11 for outfall structures, and 21 for above ground utility lines. The Department is also adopting a corresponding amendment to the existing requirement for mitigation under general permit 27 for redevelopment. The mitigation requirement for all of these general

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permits is that mitigation must be performed for permanent loss and/or disturbances of 0.1 acres or greater. For permanent loss and/or disturbances of less than 0.1 acres, the Department will determine on a case-by-case basis whether or not to require mitigation. The Department will make its determination based upon whether the applicant can demonstrate that all activities have been designed to avoid and minimize impacts to wetlands. The mitigation requirements are necessary to address the wetlands losses that the Department determined were occurring as a result of projects authorized under these general permits, as well as to ensure the State's permitting program continues to be as strict as the Federal 404 program administered by the Army Corps of Engineers (ACOE). As of 2007, mitigation has been a standard condition of most nationwide permits, which are the Federal equivalent of the State's general permits.

Summary of Hearing Officer's Recommendation and Agency Response

The Department held a public hearing on the proposal on November 3, 2008 at 10:00 A.M., in the DEP Public Hearing Room in Trenton. Susan Lockwood was the hearing officer. One person attended and gave brief testimony. The hearing officer recommended that the proposal be adopted with the changes described below in the Summary of Public Comments and Agency Responses and the Summary of Agency Initiated Changes. The Department accepts the recommendation.

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

Office of Legal Affairs
Attn: DEP Docket No. 15-08-09/693
Department of Environmental Protection
401 East State Street, Floor 4
P.O. Box 402
Trenton, New Jersey, 08625-0402.

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The proposal was published on October 6, 2008. The Department accepted comments on the proposal through December 5, 2008. Ten commenters provided timely written and/or oral comments. The following persons submitted comments:

1. Ceberio, Robert R.; New Jersey Meadowlands Commission
2. Fair, Abigail; Association of New Jersey Environmental Commissions (ANJEC) (on behalf of ANJEC, Delaware Riverkeeper Network, Environment New Jersey, NJ Audubon Society, NJ Conservation Foundation, NJ Highlands Coalition, NY/NJ Baykeeper, Sierra Club - New Jersey Chapter, and the South Branch Watershed Association)
3. Griber, Penelope A.; D.W. Smith Associates, LLC
4. Jacobus, Brian J.; Morris County Municipal Utilities Authority
5. Jubic, Jr., Robert J.; Atlantic City Electric Company
6. McGuinness, Michael G.; National Association of Industrial and Office Properties
7. Schvejda, Kristina; Meadowlands Conservation Trust
8. Sheehan, Captain Bill; Hackensack Riverkeeper
9. Touhey, Timothy J.; New Jersey Builders Association
10. Wildman, Kristin; Lomax Consulting Group

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

General

1. COMMENT: To the commenter's knowledge, the Department rarely if ever provides for a public hearing on issuance of a General Permit. (2)

RESPONSE: The general permits are issued as rules by promulgation in accordance with the Administrative Procedure Act. The Department does provide a comment period and a public hearing when a new general permit is proposed or when an existing general permit

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is proposed for amendment. Because the criteria for each general permit are tailored to a particular category or type of project or regulated activity, the Department believes that it is most productive to enable the public to comment when the general permit criteria are initially proposed. Under most circumstances, the Department does not believe that it is necessary to thereafter also hold an individual public hearing each time an applicant applies for authorization for a specific project or regulated activity covered by a promulgated general permit.

2. COMMENT: Mitigation does not adequately address the cumulative impacts from general permits 2, 10A, 10B, 11 and 21 which have resulted in loss of over 118 acres of wetlands from 2000 to 2006 as well as unmentioned impacts from 1988 to 2000. Impacts from general permit 11 and 21 occur, but are not documented in the proposal. (2)

RESPONSE: The Department acknowledges that there have been 118 acres of unmitigated wetland losses from the general permits cited by the commenter. Those losses were one of the factors the Department considered when determining whether it was necessary to require mitigation for the general permits in question. The Department has data specific to each general permit dating back to 1993, when the Department first began providing EPA with annual reports containing wetlands permitting statistics, as well as data showing that general permits overall resulted in the loss or disturbance of approximately 1,392 acres between 1988 and 2000. The specific number of acres affected by each general permit is not readily available before 1993 because although the Department tracked wetland losses resulting from general permits and individual permits, it did not categorize wetland losses by the respective general permits.

As stated in the proposal summary (see 40 N.J.R. 5479), the total number of acres of impacts under general permits 10A and 10B during the period from 2000 through 2006 was 58 acres. For general permit 11, there were impacts to 29.81 acres of wetlands between 2000 and 2006. The impacts for general permit 2 were 30.67 acres between 2000 and 2006. The impacts for general permit 21 were not noted in the proposal summary but they amounted to less than one acre of impacts. However, since general

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permits 2 and 21 are both for utility lines, it was determined prudent to require mitigation for permanent impacts resulting from both general permits.

3. COMMENT: Instead of requiring applicants to go off tract, we strongly recommend that the Department consider allowing on-site mitigation, where appropriate, in the form of artificial wetlands as nonstructural stormwater BMPs to mitigate small wetlands losses. (2)

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

N.J.A.C. 7:7A-15.2(d) provides that “to be approved under this subchapter, mitigation must have a high probability of long term success.” In addition, N.J.A.C. 7:7A-15.16(d) provides that “At the end of the post-planting monitoring period for a restoration, creation, or enhancement project, the mitigator shall demonstrate to the Department that the mitigation project is successful. ... At a minimum, the mitigator shall demonstrate that the post-planting monitoring period required by the approved mitigation proposal has been successfully completed and the monitoring data show that the vegetation in the mitigation area meets the requirements for the types of species, area of coverage, and survival rate, as set forth in the approved mitigation proposal.” It has been the Department’s experience that wetland mitigation sites supported by stormwater promote the introduction, and sometimes dominance of, invasive species. Mitigated wetlands which have invasive species are not considered successful, since the vegetation in the mitigation area does not meet the requirements for the types of species, area of coverage, and survival rate required by N.J.A.C. 7:7A-15.16(d). That wetland mitigation sites supported by stormwater allow introduction of invasive species is documented in the March 2002 report entitled, “Creating Indicators of Wetland Status (Quantity and Quality): Freshwater Wetland Mitigation in New Jersey,” prepared by Amy S. Greene Environmental Consultants, Inc., in conjunction with the Department. In relevant part, the report states that, “Stormwater-driven mitigation wetlands were also found to be more likely to have in excess of 50% cover of nuisance and invasive vegetation than mitigation

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wetlands driven by other sources of hydrology." Consequently, the Department does not permit the use of stormwater as the source of hydrology for wetland mitigation sites.

4. COMMENT: Historically, the Department has taken the position that development has only a negative impact on wetlands. The Department evaluation of impacts to wetlands has been one-sided and there has been no attempt to quantify the amount of net wetlands that are actually gained through development activity. For example, wetlands that are created through the construction of basins may have better value than isolated wetlands. The Department should also consider how many wetlands are from general permits not being issued when the associated regulated activity is too financially burdensome to undertake. (6, 9)

RESPONSE: As stated in the FWPA, freshwater wetlands, "protect and preserve drinking water supplies by serving to purify surface water and groundwater resources; ...provide a natural means of flood and storm damage protection, and thereby prevent the loss of life and property through the absorption and storage of water during high runoff periods and the reduction of flood crests; ...serve as a transition zone between dry land and water courses, thereby retarding soil erosion;...provide essential breeding, spawning, nesting and wintering habitats for a major portion of the State's fish and wildlife, including migrating birds, endangered species, and commercially and recreationally important wildlife; and...maintain a critical baseflow to surface waters through the gradual release of stored flood waters and groundwater particularly during drought periods." (See N.J.S.A. 13:9B-2).

Constructed stormwater management basins assist with flood and storm damage protection but provide none of the other values and functions of freshwater wetlands unless they are not maintained, which would be contrary to best management practices for such basins. Isolated wetlands may be vernal habitats, lime sink holes that provide unique ecological communities, peat bogs or a various other unique and valuable ecological systems. Consequently, the Department does not agree that basins provided for managing stormwater in developments may provide better value than natural, isolated wetlands.

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The Department agrees, however, that it might be useful to determine how many wetlands are maintained on a site that is the subject of wetland permitting. Since amendments to the FWPA rules were adopted effective October 6, 2008, applicants have been required to provide the Department with the total amount of wetlands on a site that is the subject of permitting (see N.J.A.C. 7:7A-10.4, additional application requirements for a general permit authorization; and N.J.A.C. 7:7A-10.6, additional application requirements for an individual freshwater wetlands or open water fill permit.) This will enable the Department to determine the amount of wetlands that were onsite before permitting and how many remain after permitting, and to obtain additional data for assessing the effectiveness of the wetlands program. This is the only mechanism the Department has to try to estimate the number of wetlands that are “preserved” when an applicant chooses not to conduct an activity that would have wetland impacts.

5. COMMENT: According to the proposed amendments, the Department will continue to monitor impacts from all general permits and determine if mitigation should be a standard on all general permits. This requirement should be eliminated. Allowing the Department to monitor all general permits for potential mitigation is a “slippery slope” situation. Maintaining and creating a wetland is costly and could be an unexpected expense in addition to an indeterminate expense when preparing the budget for project financial feasibility. Projects under many general permits, such as general permits 1 (maintenance), 4 (hazardous waste cleanup), 5 (landfill closures), 8 (house additions), 13 (lake dredging), 14 (water monitoring devices), 15 (mosquito control), 16 (habitat enhancement), 17 (trails and boardwalks), 17A (multiple use paths), 18 (dam repairs), 20 (bank stabilization), and 25 (malfunctioning septic systems), have the potential for improving and/or enhancing a project site. Therefore, an applicant should not be concerned about wetland compensation. Applicants should not have a potential penalty for wetland mitigation with projects that involve enhancing the quality of surrounding habitat, for example, projects under general permits 1, 4, 5, 13, 14, 25, and 26 (minor channel or stream cleaning). Also, projects that ensure public health and safety, for example, under general permits 5, 15, 16, 18, and 20 should not require mitigation.

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Applicants whose projects include trail creation for public use and enjoyment should also not be required to perform mitigation. (4)

RESPONSE: It is unclear what “slippery slope” the commenter fears. The Department stated that it intends to continue to track cumulative impacts from all general permits, as it has since 1988. If, at some point, any of the general permits for which mitigation is not required begins to have cumulative impacts, and the Department determines that it is appropriate to add a mitigation requirement, the Department will initiate the rule amendment process to make the desired change.

6. COMMENT: Various aspects of the Department’s proposal are contrary to the New Jersey Administrative Procedure Act. (5)

RESPONSE: The commenter did not explain in what way the proposal is contrary to the Administrative Procedure Act (APA) (N.J.S.A. 52:14B-1 et seq.). In accordance with the notice requirements of the APA, the proposal was published in the October 6, 2008 New Jersey Register and additional notice was published in five newspapers across the State, a public hearing was held on November 3, 2008, and a 60-day comment period was provided.

7. COMMENT: In proposing mitigation for various general permits the Department attempts to document the loss of wetlands over the seven years from 2000 through 2006. However, documentation is not provided for the amount of wetlands that have been created during the same timeframe. (6)

RESPONSE: To date, the Department can only document the creation of wetlands from mitigation required as a result of individual permit approvals. When individual permits are approved, wetland mitigation is required at various ratios, depending upon the type of mitigation proposed. However, the ratios do not result in a net increase in wetlands; they result in replacement of the wetlands that were lost because of projects approved under the individual permits. The impacts to wetlands from projects authorized under general

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permits are also documented in a database containing specific information about numbers of wetland permit applications, approvals, and impacts to wetlands. These impacts represent real wetland losses. To date, without mitigation for general permits, there has been no creation of wetlands to replace those lost due to general permit approvals.

8. COMMENT: The proposed rules differ from the Department's previous proposal by only requiring mitigation for permanent impacts of 0.1 acres or greater, whereas the previous proposal required mitigation for all impacts. While the commenters appreciate the revised threshold for mitigation, the Department should consider requiring mitigation only where more negative impacts have occurred. (6, 9)

RESPONSE: The Department is requiring mitigation for impacts that result in a permanent loss of wetlands of 0.1 acres or more. For impacts of less than 0.1 acres, the Department will not require mitigation if the applicant can demonstrate that all impacts have been minimized. This is consistent with the Federal wetland regulations and is necessary in order for the State wetland program to be as stringent as the Federal program. It is unclear what the commenters are suggesting would constitute a "more negative" impact that should require mitigation as an alternative to the 0.1 acre threshold.

9. COMMENT: General Permit 6 for isolated wetlands is required by the FWPA. It applies, according to the law, to a freshwater wetland "which is not a surface water tributary system discharging into an inland lake or pond, or a river or stream. . . ". Nothing in the law prevents the Department from protecting wetlands which have a groundwater link to surface water. Ralph Tiner, renowned wetland expert, has established the importance and interconnectedness of the groundwater to surface water of so-called "isolated wetlands." Source: Geographically Isolated Wetlands to be found at: library.fws.gov/Wetlands/isolated.pdf

Until the Department acknowledges the groundwater connection wetlands have to surface water and since general permit 6 causes the most wetlands losses, mitigation appears to be the only way to try to address these losses. (2)

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RESPONSE: The Department acknowledges that the source of hydrology for a wetland may be either surface or ground water. As the commenter also notes, the FWPA establishes the criteria for the general permit that the Department has promulgated as general permit 6. The statutory criterion for general permit 6 is that the permit applies to wetlands which are “not a surface water tributary system...” Since wetlands without surface water hydrology must then contain groundwater hydrology, general permit 6 necessarily applies to wetlands that are connected to ground water. The language in the FWPA was likely borrowed from language associated with the Federal 404 program. The Federal program emphasizes protection for wetlands that are connected in some manner to navigable waters. Consequently, the Federal program emphasized the importance of surface water systems. By borrowing from the Federal language, the FWPA also emphasizes the importance that wetlands have for surface waters. Although the FWPA provides protection for all wetlands, it provides less protection for non-surface water connected wetlands by making them candidates for filling under general permit 6. As the commenter concludes, the Department believes that requiring mitigation is the most viable option to minimize impacts from the filling of non-surface water connected wetlands. As stated in response to comment 10, for general permit 6, the mitigation requirement applies to wetlands meeting the definition of a water of the United States.

10. COMMENT: The Department relies on the court decision, *In the Matter of Freshwater Wetlands Protection Act rules*, 180 N.J.478 (2004) for the proposed requirements of mitigation for general permit 6. However, there is no statutory authority for the proposed requirements of mitigation for general permit 6 and therefore the Department should not exceed its authority by adopting proposed N.J.A.C. 7:7A-5.6(b)2. Further, general permit 6 wetlands are isolated wetlands and not near navigable waterways. Therefore, the Army Corps of Engineers would not require mitigation and neither should the Department. (6, 9)

RESPONSE: As stated in response to comment 61 below, the State’s program is required to be as stringent in all ways as the Federal program. Consequently, general permit 6 was bifurcated in 2001 (when the Federal program narrowed the definition of waters of the

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United States), to ensure the same level of protection as provided by the Federal 404 program for non-surface water connected wetlands that also meet the Federal definition of waters of the United States. Impacts to the remaining non-surface water connected wetlands are governed solely by the standards of the FWPA. The mitigation requirement is being applied only to those wetlands meeting the definition of waters of the United States, to maintain consistency with the Federal program. Contrary to what the commenter states, the majority of wetlands designated as “non-surface water connected” remain classified by the EPA and ACOE as waters of the United States, thereby subjecting them to permitting and mitigation under the Federal 404 program.

11. COMMENT: The Department has not provided any documentation on the amount of wetlands lost between 2000 and 2006 to justify amending general permit 27 to require mitigation. Without doing so, the Department should not adopt the proposed requirements. (6, 9)

RESPONSE: In the period from 2000 through 2006 for which the Department analyzed cumulative impacts, the Department issued eight authorizations under general permit 27 for a total of 2.02 acres of impacts. However, like general permit 6 for impacts to non-surface water connected wetlands, general permit 27 for redevelopment activities authorizes wetland fill and potential impacts to waters of the United States. As such, the activities regulated by general permit 27 are also Federally regulated. Because the general permit has the potential to authorize impacts to wetlands that are also waters of the United States, the general permit must be as stringent in all ways as the equivalent Federal permit. As previously explained, in March 2007, the Army Corps of Engineers adopted new regulations as part of the Federal 404 program making mitigation a standard condition of most Nationwide Permits, which are the Federal equivalent of the Department’s general permits. Therefore, to maintain equivalent stringency with the Federal program, the Department is required to make mitigation a condition of general permit 27 regardless of the cumulative impacts.

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Mitigation banks

12. COMMENT: Under the proposal, mitigation for the general permits will have to meet the requirement that small wetland impacts be mitigated at wetland mitigation banks in a hierarchy that starts with the one closest to the site and ends up with anywhere in the State. There are not many mitigation banks in the state so most mitigation will take place beyond the immediate sub-watershed of the impact. Allowing many small mitigation projects to move beyond the sub-watershed where they occur will impact water quality significantly. (2)

RESPONSE: The Department acknowledges that there are not many mitigation banks in New Jersey. However, the Department believes that the reason more banks do not exist is the lack of enough business, to date, to support them. In order to be successful, a mitigation bank must contain, and be able to sell, a sufficient numbers of credits to make it profitable after considering the costs of creating the bank. The costs of creating the bank include purchasing an appropriate piece of property and performing wetland mitigation. To date, mitigation has been required only under individual permits. In Fiscal Year 2008, the Department approved a total of nine individual permits for projects located throughout the State. Even if the applicants for these individual permits were all located within one watershed management area and all were required to buy credits from the same bank, the amount spent to purchase the credits may not have been sufficient to support the bank, depending upon bank start-up costs. However, the Department believes that mitigation banks will likely become a more attractive and profitable investment when more mitigation is required. The Department believes that as a consequence of requiring mitigation for the general permits, mitigation will be conducted in all areas of the State (except for the Pinelands where stricter criteria apply and mitigation banks may not be permitted) and so more banks will be initiated statewide which should enhance protection of water quality.

13. COMMENT: The Department has anticipated that the majority of applicants will not provide mitigation on the property site and will instead purchase mitigation credits from

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approved banks. However, of the ten existing approved banks, only three can sell mitigation credits. These banks can be used by only a limited number of applicants. No mitigation banks are listed that can sell credits from Monmouth and Ocean Counties. The rules should not be adopted until mitigation bank opportunities exist for more areas of the state than Cumberland, Salem and Burlington Counties. Limiting wetlands mitigation banking to only those areas will have a chilling affect on development in the rest of the state that is not in the Pinelands or Highlands. (3)

14. COMMENT: The Department should examine the variable operations of mitigation banks to better understand how banks affect mitigation compliance. Permitted projects must be located in particular service areas in order to use credits purchased from wetland mitigation banks to comply with mitigation requirements. As the Department should be aware, several mitigation banks have ceased the sale of credits for varying reasons which reduces the pool of operating banks from which credits may be purchased. The Department should increase the pool of banks since, as the Department acknowledges, the majority of applicants receiving general permits will not have suitable conditions available onsite to perform mitigation and will likely have to purchase credits from an approved mitigation bank or make a donation. The Department should make available on its website a current list of approved mitigation banks, as the former list is no longer posted. (6, 9)

RESPONSE TO COMMENTS 13 AND 14: As stated in response to comment 12, the Department acknowledges that there not many mitigation banks in New Jersey. However, the Department believes that the reason more banks do not exist is the lack of enough business, to date, to support them. In order to be successful, a mitigation bank must contain, and be able to sell, sufficient numbers of credits to make it profitable after considering the costs of creating the bank. The costs of creating the bank include purchasing an appropriate piece of property and performing wetland mitigation. To date, only individual permits have required mitigation. In Fiscal Year 2008, the Department approved a total of nine individual permits. The projects approved under these nine permits were located in various parts of the State. Even if the applicants for these

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individual permits were all located within one watershed management area and all were required to buy credits from the same bank, the amount spent to purchase the credits might not have been sufficient to support the bank, depending upon bank start-up costs. Consequently, the Department believes that mitigation banks will become a more attractive and profitable investment statewide after the amendments requiring mitigation for additional activities are implemented. Finally, the Department does keep a list of all approved wetland mitigation banks and their status on its website at:

http://www.nj.gov/dep/landuse/forms/wmcbank_list.pdf

15. COMMENT: Requiring mitigation for 0.1 acres of wetland disturbance will be burdensome upon applicants and their consultants because it will be almost impossible to find adequate mitigation opportunities in approved banks, and creation of such small mitigation areas on sites will probably fail, requiring additional money and effort to comply. (3)

RESPONSE: As previously stated, as the demand for mitigation banks increases, the Department believes that mitigation banks will become a more attractive and profitable investment across the State. The Department also acknowledges that small mitigation sites may be less successful, which is why the amendments adopted effective October 6, 2008 at N.J.A.C. 7:7A-15.5(c) state, "The Department presumes that onsite mitigation for a smaller disturbance is not feasible. Therefore, mitigation for a smaller disturbance shall be performed through credit purchase..., unless the applicant demonstrates ...that one of the following will be more environmentally beneficial: 1. Onsite restoration, creation or enhancement; or 2. Offsite restoration, creation, or enhancement, which is performed in the same HUC 11, as defined at N.J.A.C. 7:7A-1.4, as the disturbance, or performed in an adjacent HUC 11 within the same watershed management area as the disturbance."

Consequently, the applicant may undertake onsite restoration, creation or enhancement if he or she can demonstrate its environmental benefit, and is confident about the potential success of the project. Otherwise, the applicant is permitted to make a monetary contribution.

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16. COMMENT: The limited availability of mitigation banks is further complicated by how banks vary in credit valuation. For example, the Nature Conservancy's Willow Grove Lake Wetlands Mitigation Bank (Cumberland County) requires one credit for each acre of wetlands disturbance. In contrast, two credits would be required from other banks for the same amount of disturbance. Willow Grove bank also charges \$400,000 per credit for one acre filled. Such high rates would be cost prohibitive for development projects requiring mitigation. (6, 9)

RESPONSE: The mitigation credit ratio is established at the time the bank is established in accordance with the rules at N.J.A.C. 7:7A-15.23(d). For newer wetland mitigation banks, the ratio is now typically one credit for one acre of impact. However, the cost of the credits is determined by the banker and not by the Department. Purchasing credits from a mitigation bank is often more cost-effective than undertaking a stand-alone project, if the permittee considers all the costs associated with the mitigation. These costs may include purchasing a site, conducting an ecological risk assessment, mitigation plan development, construction, planting, monitoring, posting financial assurance and fixing any problems that arise throughout the monitoring period.

17. COMMENT: The Economic Impact Statement states that the Department believes that private property owners may find it economically beneficial to establish mitigation banks to serve the perceived mitigation bank demand. Unfortunately, this is a poorly thought out proposal to offset the effects of an additional \$300,000 per acre cost to New Jersey's public and private development projects. Private landowners will not venture into such risky business endeavors as mitigation banking because capital is at a premium and banks are not lending it, and capital must be spent where the success of projects is more predictable than in the creation of wetland mitigation banks. If wetland banks were so easy to create and get approved and so economically profitable, there would be more than 10 banks created to date. The Economic Impact Statement is a poor substitute for a meaningful economic analysis that objectively researches the real-world impacts of environmental policy on New Jersey's economy. (3, 6, 9)

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18. COMMENT: The Department has been suggesting for some time that amending the rules will reinforce the need for mitigation banks and encourage the creation of new banks in various watersheds throughout the State (see 40 N.J.R. 5479 and 39 N.J.R. 3587(a)). Nevertheless, the availability of mitigation banks continues to be quite restricted. Nothing in this rule proposal indicates that the situation has changed. Therefore, the proposed regulation's presumption in favor of mitigation banks and in lieu fee payments is no longer valid. Continued failure to recognize these facts effectively consigns permittees to an administrative "never never land" in which the responsible agency recognizes the difficulty of its requirement but fails to afford full relief that is sufficient to right the wrong. (5)

RESPONSE TO COMMENTS 17 AND 18: The Department believes its economic impact statement is accurate and does reflect the real world. While the Department agrees that currently there are not many mitigation banks in New Jersey, the reason is not the difficulty in obtaining approval for such banks, but the lack of enough business, to date, to support them. In order to be successful, a mitigation bank must contain, and be able to sell, a sufficient numbers of credits to make it profitable after considering the costs of creating the bank. The costs of creating the bank include purchasing an appropriate piece of property and performing wetland mitigation. To date, only individual permits have required mitigation. In Fiscal Year 2008, the Department approved a total of nine individual permits. The projects under these nine permits were located throughout the State. Even if the projects for these individual permits were all located within one watershed management area and the applicants all were required to buy credits from the same bank, the amount spent to purchase the credits might not have been sufficient to support the bank, depending upon bank start-up costs. Consequently, the Department continues to believe that mitigation banks will become a more attractive and profitable investment when more mitigation is required. Further, since mitigation will be required in all areas of the State (except in the Pinelands where criteria are stricter and mitigation banks may not be permitted), the Department believes that more mitigation banks will be initiated statewide.

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The Department does not expect every small property owner to create a mitigation bank. As stated in the Economic Impact Statement, “consultants, developers, and *large* property owners may find it economically beneficial to establish mitigation banks to serve this demand” (emphasis added). Large property owners may already own land suitable for mitigation banking and the Department and Mitigation Council have already spoken with consultants who are searching for such properties and working with owners to explore the feasibility of creating banks, so the Department continues to believe this is a realistic opportunity.

As previously stated, with only individual permits requiring mitigation to date, there has not been sufficient demand for new mitigation banks. If after these amendments to the general permits are implemented, no significant increase in the availability of mitigation banks occurs over a reasonable period of time, then the Department will reassess the requirements.

19. COMMENT: In many cases, because of the scarcity of mitigation banks, applicants will be required to make a cash contribution to the Mitigation Council. Such cash payment is not tied to mitigating in the same sub-watershed in which the damage to wetlands occurred, so the goal of protecting water quality by mitigating losses specific to a watershed cannot be met. (2)

RESPONSE: As stated in response to comment 12 above, the Department believes that the demand for and supply of mitigation banks will increase once mitigation is required for general permits under these amendments. Although the Mitigation Council does not require a strict one-to-one correlation between the money deposited in the Mitigation Fund and the location of each approved project, if the State as a whole is examined, the mitigation projects overall compensate for impacts overall. In addition, a cash contribution to the Mitigation Council is one of the final options in the mitigation hierarchy. An applicant must show the Department that no other options are available within the watershed management area to conduct mitigation before being allowed to make a contribution to the Council, thereby ensuring to the greatest extent possible that losses will be mitigated in the same watershed.

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Infrastructure Concerns

20. COMMENT: Instead of allowing continued loss of wetlands through general permits that allow infrastructure and linear expansion, it is more reasonable and consistent with other programs for the wetlands regulatory program to inhibit infrastructure expansion in environmentally sensitive areas and use the utility general permits to promote growth where infrastructure already exists. This policy is an important element of the State Plan, the Highlands Plan and the Water Quality Management Planning rules. It makes eminent good sense as the state tries to promote smart and more economic growth. In the wetlands program, for example, general permits for infrastructure expansion should also be structured to discourage their use in public lands and environmentally sensitive areas – including the Landscape Project areas 3, 4 and 5. (2)

RESPONSE: The FWPA and rules apply to development based only on whether a proposed activity in a wetland, State open water or transition area meets the criteria for regulation and the criteria for permit approval. Unlike the Highlands Water Protection and Planning Act rules (N.J.A.C. 7:38), the Water Quality Management Planning rules (N.J.A.C. 7:15), and the State Plan, the FWPA does not reference a plan or regulate development based on a plan. The FWPA does not act as a planning tool to control development by denying wetland permits but rather seeks to provide a “systematic review of activities in and around freshwater wetland areas” (see N.J.S.A. 13:9B-2). However, general permits, for example, can be limited by region if necessary to ensure the regulated activities authorized under them result in minimal adverse environmental impacts when performed separately and cumulatively. Thus, if another statute requires differential protection of natural resources such as wetlands, the FWPA rules can be amended to provide the necessary protection. For example, the Highlands Regional Master Plan identifies certain natural resources for protection. If necessary to ensure that the permits issued under the FWPA rules are consistent with the Highlands Regional Master Plan, the Department could undertake rulemaking to regulate wetlands in the Highlands more strictly than in other parts of New Jersey.

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21. COMMENT: With the exception of general permit 21 (for above ground utility lines) and 27 (redevelopment), the general permits proposed for amendment are the ones that are the most used in development projects. All of these permits are necessary for new development to take place, for new roads to be built and existing roads widened, and for existing businesses to expand their operations and increase employment opportunities in New Jersey. (3)

RESPONSE: The Department concurs that the general permits for which mitigation is required are those most frequently used since that frequent usage has resulted in the cumulative impacts to freshwater wetlands over time. By requiring mitigation for these activities, the Department encourages applicants to reconsider designs for projects that may propose to use wetlands unnecessarily, since sometimes the existence of a general permit makes it appear inconsequential to impact the wetlands. In those cases where such use is deemed necessary, the mitigation requirement ensures that the wetland resource will be replaced.

22. COMMENT: Two of the general permits for which mitigation will be required, general permit 2 and 21 are specific to utility projects. Both of these general permits are used quite frequently for construction of linear development and for critical infrastructure. In addition, general permits 10A and B are also used on a recurring basis in connection with such infrastructure. The proposed regulations will hinder development of such infrastructure due to the increased regulatory obstacles an electric utility will have to overcome. (5)

RESPONSE: Companies that frequently use the general permits for utilities and/or roads, should consider establishing consolidated wetland mitigation sites around the State to accommodate their current and future mitigation needs. In addition, in reviewing previous impacts from the general permits specifically mentioned by the commenter, the Department finds that only 20 percent of authorizations issued under general permits 10A and 10B (road crossings), 5 percent of authorizations issued under general permit 2

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(underground utility lines), and 12 percent of authorizations issued under general permit 21 (above-ground utility lines) resulted in impacts to wetlands that were 0.1 acres or greater.

23. COMMENT: The cost of acquiring mitigation bank credits will cause an exponential increase in the environmental costs associated with small linear development projects. The commenter is planning a project that will disturb 0.89 acres of wetlands under general permit 21, none of which is subject to Federal jurisdiction. The anticipated overall cost for the project is \$395,733. Adding the cost of mitigation credits will increase the overall project cost by more than \$800,000 based on the current mitigation bank rate of \$450,000 per acre and the 2:1 mitigation acreage/disturbed acreage ratio at N.J.A.C. 7:7A-15.8. As a consequence of requiring mitigation for the project, overall costs will triple. (5)

RESPONSE: As of October 6, 2008, general permit 21 for above ground utility lines is limited to 0.5 acres, so the project the commenter is describing, unless reduced in scope, will require an individual wetland permit. All individual permits require mitigation regardless of scope, and those requirements are not affected by these amendments. It is also important to note, as explained in response to comment 47 above, that the described project, even as all projects nationwide in waters of the United States (which are defined as including wetlands and State open waters), is subject to the requirements of the Federal Clean Water Act. In New Jersey, the Department's program implements the Federal 404 program.

Finally, as stated in response to comment 13 and 14, mitigation banking is market-driven. Those who have the mitigation banks with credits available in a given area have the ability to charge what they deem appropriate to recoup the costs of establishing their bank and to make a profit. Consequently, the Department believes that it may be cost effective for entities that repeatedly obtain wetland permits to establish their own consolidated wetland mitigation sites. By establishing consolidated wetland mitigation sites for its own use, an entity will know that mitigation is available when needed and have better control of its mitigation costs.

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24. COMMENT: Severe cost increases can have a serious debilitating effect on the ability to site new linear development public infrastructure. For example, the commenter has a project that will consist of 16 poles, each of which will have a two-foot diameter area of disturbance, and result in a permanent impact of 32 square feet of wetlands. Nevertheless, the project will be treated as permanently affecting 0.89 acres of wetlands because it will convert wetlands to scrub-shrub habitat that will not cause any loss of normal wetland functions, as the Department is aware. The de minimis nature of this project does not justify an expenditure of more than \$800,000 which will be borne by New Jersey ratepayers who already face ever increasing energy costs. (5)

RESPONSE: The Department's rules require mitigation under certain general permits for permanent impacts exceeding 0.1 acres. As stated in response to comment 23, the impact limit on the general permits for utility lines is 0.5 acres. Therefore, permanent impacts exceeding 0.5 acre will require an individual permit with mitigation.

The commenter states that 0.89 acres of wetlands, presumably forested wetlands, will be permanently converted to scrub-shrub wetlands. The Department strongly disagrees that removing forest is a de minimis activity that will not result in a loss of normal wetland functions, and therefore does not warrant mitigation.

Removing forest cover has several adverse effects on water quantity and quality. Deforestation results in diminished recharge (that is, a reduction in the amount of water entering the aquifer), increased runoff, and increased turbidity in streams. Forests enhance recharge by lowering ground temperatures, which helps to keep water in the soil instead of allowing it to evaporate, and provide roughness to the ground that traps runoff. Higher recharge results in more abundant and steady ground-water discharge to streams (known as base flow), which is water of high quality.

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

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

Finally, as stated in response to comment 23, entities that repeatedly need to perform mitigation may be able to control mitigation costs if they establish their own mitigation banks.

25. COMMENT: The proposed regulations will hinder development of infrastructure due to the increased regulatory obstacles an electric utility will have to overcome to site public service facilities and there will be little corresponding environmental benefit because the Department’s proposed rule restricts on-the-ground mitigation in favor of monetary payments. (5)

RESPONSE: The Department does not agree that the amendments will hinder development of infrastructure. Electric utilities that disturb scrub shrub or emergent wetlands are not required to provide mitigation because the Department assumes that the utility line, if properly installed, will allow the wetlands to re-establish. See N.J.A.C. 7:7A-5.2(c)1 and 5.21(b)2. However, if a proposed underground utility line will pass through forested wetlands and the forest is not allowed to re-establish over the lines, then mitigation is required to mitigate for the loss of the trees. Further, the Department notes that of the authorizations issued under general permit 2, for underground utility lines, only five percent exceeded 0.1 acres of impacts. For general permit 21, for above ground utility lines, 12 percent exceeded 0.1 acres of impacts. Consequently, if past activity is a good predictor of future activity, the majority of general permit authorizations for utility lines will not require mitigation.

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The Department does not agree that the amendments favor monetary payments over on-the-ground mitigation. As stated in response to comment 55, the applicant has the option of providing onsite and offsite restoration, creation, or enhancement when the applicant can demonstrate, in accordance with N.J.A.C. 7:7A-15.5(e), that it will be more environmentally beneficial than providing another type of mitigation. The applicant may also purchase credits from an approved mitigation bank or make a monetary contribution to the Mitigation Council.

26. COMMENT: The Department has long recognized that public utility infrastructure does not present a significant environmental concern.

For example, the February 2006 readoption of the Flood Hazard Control Act regulations reaffirmed the Department's previous conclusion that placement of utility poles, jacking of utility lines, etc., "are of an insignificant nature and do not exacerbate flooding or adversely impact the environment," and "accordingly, should remain exempt from requiring a permit." 38 N.J.R. 949 (Feb. 6, 2006). Along the same lines, the Department emphasized that activities such as "the placement of utility poles, jacking of utility lines beneath channels," etc., "when done properly, do not contribute to . . . environmental degradation." The Department's conditional exemption of linear development projects from various stormwater management requirements at N.J.A.C. 7:8-5.2(d) is very similar. Thus, as the Department explained, "[t]he impact of the change in land uses for utility lines and permeable areas are minimal, and the majority of the impact will be mitigated by the dispersed nature of the impact." 35 N.J.R. 131 (Jan. 6, 2003). (5)

RESPONSE: When the FWPA was enacted in 1987, the intent was to take vigorous action to protect the State's inland waterways and freshwater wetlands and not to allow permitting to incrementally eliminate the wetlands remaining in the State. Consequently, the FWPA regulates, in a freshwater wetland, all of the following activities: removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind; the drainage or disturbance of the water level or water table; the dumping, discharging or filling with any materials; the driving of pilings; the placing of

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obstructions; and the destruction of plant life. The activities undertaken by utility companies usually involve excavation, placement of obstructions, and clearing.

Therefore, if proposed in a wetland, the installation of utility infrastructure is regulated by the FWPA. However, jacking or directional drilling of a utility line underground, with no surface disturbance in a regulated wetland, water or transition area, does not require a wetland approval (see N.J.A.C. 7:7A-5.2(c)1).

Further, the FWPA provides that general permits are to be issued only if the Department can make a finding that the permits will have only minimal cumulative adverse impacts on the environment. After almost 20 years of implementation, the Department can no longer make that finding without requiring mitigation for those general permits resulting in cumulative impacts.

The FWPA at N.J.S.A. 13:9B-2 states that it is the policy of the State to preserve the purity and integrity of freshwater wetlands from random, *unnecessary* or undesirable alteration or disturbance (emphasis added). Therefore, it is consistent with the FWPA to determine whether an impact proposed in a wetland is necessary or if it can be conducted outside of the wetlands on the site. Thus, because the Department can demonstrate that impacts to freshwater wetlands have been more than minimal cumulatively because of impacts from authorizations under general permits 2 and 21, mitigation is warranted when impacts to wetlands are 0.1 acres or more.

The Flood Hazard Control Area Rules establish a permit-by-rule for the placement of utility structures. See N.J.A.C. 7:13-7.2(c). While a permit-by-rule implies minimal environmental concern for these activities, the activities are not exempt from regulation and must meet the conditions in the permit-by-rule. The main focus of the Stormwater Management rules is to regulate placement of impervious cover; above and below ground utility line construction results in little or no impervious cover. Because the activities undertaken by utility companies, which usually involve excavation, placement of structures and clearing, are regulated activities when conducted in wetlands, permits are required before the activities can be undertaken. Further, those activities can result in the permanent loss of wetlands and in those cases, mitigation is required.

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27. COMMENT: Neither general permit 10A, very minor road crossings, nor general permit 21, above ground utility lines, was among the general permits proposed to require mitigation in the 2007 rule proposal. The explanation given for requiring mitigation for general permit 21 is that it is consistent with the requirement for general permit 2 (underground utility lines). The Department should provide a more sound rationale for its change in position with this rule proposal. (6, 9)

RESPONSE: The Department did propose a mitigation requirement for both general permits in the 2007 proposal (see 39 N.J.R. 3595 regarding general permit 10A, and 39 N.J.R. 3596 regarding general permit 21). Consequently, the Department has not changed its position and continues to believe that it is appropriate to require mitigation for impacts to wetlands and waters resulting from these two general permits.

28. COMMENT: The Department's annual assessment should be restructured to value the wetlands and also to record the overall net wetlands loss or gain. The Department also should recognize that wetlands are impacted from activity by the Department of Transportation and county roads, and should account for those impacts, rather than simply attributing all impacts to development. (6, 9)

RESPONSE: The Department provides EPA an annual assessment of the State's wetland program that includes both impacts resulting from permitting, and an accounting of mitigation projects. However, as previously stated, the mitigation projects are required as a result of approved permits, so there is no net wetland increase to accommodate the impacts of general permits that have no mitigation requirement.

The Department does not agree that its annual assessment provided to EPA should address wetland valuation. The FWPA assigns a wetland resource value by definition and provides protection for all wetlands regardless of classification. The resource value of each wetland affected by a permit approval can be obtained from the Department's database but is irrelevant to the mitigation requirement because mitigation requirements are based on the type of permit and not on the wetland resource value. In addition, the Federal wetland program to which EPA compares the State's program does not classify

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wetlands by resource value. Therefore, EPA has not requested that this information be included in the annual assessment.

Road projects sponsored by State, County or local governments can impact wetlands, and they require permits from the Department. Government agencies are aware of this requirement and obtain permits as necessary. General permits 10A and 10B, individual permits, and transition area waivers are used for road projects, as appropriate. Therefore, the impacts associated with these projects are accounted for as part of the Department's permitting data.

Hackensack Meadowlands District

29. COMMENT: The proposal to add a mitigation requirement to certain general permits violates the clear exemption of activities within the Hackensack Meadowlands District from the FWPA permitting requirements, creates redundant regulation, and may significantly affect the ability to perform mitigation in the Meadowlands District. (1, 7, 8)

30. COMMENT: The FWPA at N.J.S.A. 13:9B-6a reads, "Activities in areas under the jurisdiction of the Hackensack Meadowlands Development Commission pursuant to P.L. 1968, c. 404 (C. 13:17-1 et seq.) shall not require a freshwater wetlands permit, or be subject to transition area requirements, except that the discharge of dredged or fill material shall require a permit issued under the provisions of the Federal Act, or under an individual and general permit program administered by the State under the provisions of the Federal Act and applicable State laws." Over the commenters' objection, changes were made to other regulations, linking several permits to freshwater wetlands mitigation requirements in violation of the FWPA. Specifically the April 7, 2008 changes to the Coastal Zone Management rules (N.J.A.C. 7:7E) represents the first step toward inappropriate regulation and the rules currently proposed will cause regulatory redundancy in an area of wetlands that is clearly under the jurisdiction of the U.S. Army Corps of Engineers. (1, 7, 8)

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RESPONSE TO COMMENTS 29 AND 30: It is not clear why the commenters believe that the amendments to the FWPA rules affect the Hackensack Meadowlands. As the commenters point out, activities under the jurisdiction of the Hackensack Meadowlands Commission do not require a FWPA permit (see N.J.S.A. 13:9B-6). The FWPA rules repeat that exemption at N.J.A.C. 7:7A-2.9(a) and state: “Regulated activities in areas under the jurisdiction of the Hackensack Meadowlands Development Commission under N.J.S.A. 13:17-1 et seq. do not require a permit under this chapter, but may require other State and/or Federal wetlands approvals, such as a Federal 404 permit from the ACOE, and/or a Water Quality Certificate issued by the Department, and/or a Federal Consistency Determination issued under the Federal Coastal Zone Management Act, 16 U.S.C. 1451 et seq.”

The amendments requiring mitigation for certain general permits are very similar to the rules the Army Corps of Engineers (ACOE) adopted in 2007. Thus, the ACOE may require mitigation for activities in the Meadowlands that are within Federal jurisdiction. In addition, before a Federal agency can issue a Federal permit for an activity within New Jersey waters, a Water Quality Certificate pursuant to Section 401 of the Clean Water Act, 33 U.S.C. sect. 1341 and/or a Federal Consistency Determination issued under the Federal Coastal Zone Management Act, 16 U.S.C. 1451 et seq., must be obtained from the Department. The Department uses specific provisions of State rules, such as the Coastal Zone Management (CZM) rules, N.J.A.C. 7:7E, which govern Waterfront Development permits, and, in some cases, the FWPA rules to satisfy the Water Quality Certification requirement.

As the commenters note, certain activities in the Meadowlands are subject to the Waterfront Development Law (N.J.S.A. 12:5-3), and the implementing CZM rules. In the CZM rules, N.J.A.C. 7:7E-3.27 (wetlands) refers to the use of the FWPA rules for review of wetland impacts, but excludes the mitigation requirements. The effect of this reference to the FWPA rules is to allow the Department to process applications for water quality certificates using the standards in the FWPA rules (general permit standards or individual permit standards), but the authority for issuing the permits is the Waterfront Development law and the CZM rules. By referring to these standards, the permitting of wetland impacts in the District is more predictable and efficient. With regard to mitigation for these

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permits N.J.A.C. 7:7E-3.27(b)1i states: “The mitigation requirements at (h) below shall apply to any coastal activity or development reviewed under this subsection, unless, where the coastal activity or development is reviewed under the conditions, limits, and requirements at N.J.A.C. 7:7A-4 and 5, *those conditions, limits, and requirements do not require mitigation.*” (emphasis added) This provision establishes that mitigation is not required for projects in freshwater wetlands reviewed under the authority of the CZM rules using the provisions of the general permit standards at N.J.A.C. 7:7A-5.

Consequently, neither these adopted amendments to the FWPA rules nor the recent amendments to the CZM rules affect wetlands regulation and mitigation in the Hackensack Meadowlands under the jurisdiction of the New Jersey Meadowlands Commission.

31. COMMENT: Mitigation is a central element in reducing wetland impacts. The rules at N.J.A.C. 7:7A-15.4 that prohibit use of a site for mitigation until all potential contaminated areas have been identified and all remediation is completed, so there is no potential for the mitigation activities to result in the reintroduction of contamination and there is no potential for the mitigation site to be contaminated by newly discovered areas of contamination, would not allow mitigation enhancement in the District. (1, 7, 8)

RESPONSE: The FWPA mitigation rules to which the commenters are referring were adopted effective October 6, 2008. As previously stated, projects in the Hackensack Meadowlands are not subject to the permitting requirements of the FWPA or its implementing regulations. Even so, it is unlikely that any regulatory entity would encourage mitigation in such a way that contamination would spread into a newly mitigated site, which is what the provision at issue seeks to prevent.

Economic concerns

32. COMMENT: The Department is anticipating that developers will lower costs by minimizing activities involving general permits. While it may now be necessary to avoid or minimize impacts to isolated wetlands, it will be hard to further minimize impacts for

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road crossings, detention basin outfalls, and utility crossings since these activities have already been minimized to comply with the low general permit thresholds. (3)

33. COMMENT: The current economic climate has slowed the development industry. These new rules, if adopted, will further lower development activity, adding to the loss of jobs and revenues already experienced by the State, and will help to enlarge the budget deficit at a time when the Governor is encouraging infrastructure and school construction as a way to put people back to work and ease the economic distress being felt by New Jersey's economy. (3)

34. COMMENT: In these challenging and often desperate economic times in which the State could benefit from smart development which can comply with the intent of the standards enforced by the Department, the enactment of onerous requirements only encumbers the ability of the State to recover. (10)

RESPONSE TO COMMENTS 32 THROUGH 34: The Department does not believe the mitigation requirements are onerous. The rules require mitigation for certain general permits for permanent loss and/or disturbances of 0.1 acres or greater. For permanent loss and/or disturbances of less than 0.1 acres, the Department will determine on a case-by-case basis whether or not to require mitigation. The Department will make its determination based upon whether the applicant can demonstrate that all activities have been designed to avoid and minimize impacts to wetlands. "Minimize" means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

In reviewing previous impacts from the general permits specifically mentioned by the commenter, the Department finds that only 20 percent of authorizations issued under general permits 10A and 10B (road crossings), 7 percent of authorizations issued under general permit 11 (stormwater outfall structures), 5 percent of authorizations issued

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general permit 2 (underground utility lines), and 12 percent of authorizations issued under general permit 21 (above-ground utility lines) resulted in impacts to wetlands of 0.1 acres or greater. Under the adopted amendments, mitigation will have to be provided for those projects having impacts to 0.1 acres or more. If impacts will be less than 0.1 acres, the applicant will have the opportunity to demonstrate that impacts to wetlands have been minimized and avoided, such that no mitigation is required. Therefore, impact on infrastructure construction should be minimal.

It is not clear why anyone would purposely seek to build a school in the wetlands, since wetland soils are unstable, resulting in settling and cracking of foundations, and the potential for mold and mildew infiltration. If not seeking a permit for infrastructure, the only other general permit that might be used to facilitate construction would be general permit 6, for fill in non-surface water connected wetlands. General permit 6 is already limited to 0.5 acres in waters of the United States. In the past, 0.1 acre or more has been filled in 57 percent of the authorizations issued under general permit 6. These are the projects for which mitigation will have to be provided under the amended rules. Applicants whose projects impact less than 0.1 acres will have the opportunity to demonstrate that they have minimized impacts and avoided impacts to wetlands, such that no mitigation is required.

35. COMMENT: In the proposed amendments the Department references standards at N.J.A.C. 7:7A-15.21(d) for monetary contributions, and N.J.A.C. 7:7A-15.22 for donations of land. These standards are necessary and particularly important because there are not sufficient mitigation banks from which to purchase mitigation credits. In many cases, the applicant would have no option but to contribute monies or donate land. The Department should not adopt the proposed mitigation requirements for general permits until the referenced standards for monetary contributions and land donations are proposed. If the Department intends to later propose standards for monetary contributions or land donations, a timeframe for such a proposal should be specified in the rule adoption. (6, 9)

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RESPONSE: The referenced standards for monetary contributions and land donations are in the existing FWPA rules at N.J.A.C. 7:7A-15.21(d) and 15.22. They were part of the FWPA readoption proposed September 4, 2007, open for comment through January 2, 2008, and adopted effective October 6, 2008 (see 40 N.J.R. 5581-5696).

36. COMMENT: Each of the mitigation options preferred by the Department (credit purchase, monetary contribution or land donation) requires considerable financial expenditures and is onerous for applicants. The proposed mitigation requirements will discourage regulated activities associated with the seven general permits requiring mitigation. (6, 9)

RESPONSE: As previously stated, land donation is one of the last options to be considered when all other types of mitigation are deemed infeasible by the applicant for a small disturbance and is not preferred by the Department.

As to discouraging the use of the seven general permits for which mitigation is required, as stated in the summary, according to the FWPA at N.J.S.A. 13:9B-23, the State must make a finding that each adopted general permit will cause only minimal adverse environmental impact when performed separately and cumulatively. The Department's annual analyses of the impacts of its permitting program have revealed that the greatest ongoing source of wetland loss in the State is the authorization of impacts under general permits that do not require mitigation. Therefore, it is necessary at this time for the State to impose a mitigation requirement for those general permits.

Further, in March 2007, the Army Corps of Engineers (ACOE) as part of the Federal 404 program, adopted new regulations making mitigation a standard condition of most Nationwide Permits, which are the Federal equivalent of general permits in these rules. In order for the State program to remain as stringent as the Federal program in all ways, imposition of a mitigation requirement has been determined necessary.

37. COMMENT: The rules require a monetary contribution of \$300,000 per acre for other than single family homes, and the proposal states that this amount was based on an evaluation and assessment of analyses submitted to the Department and the Mitigation

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Council for previous monetary contributions. The commenters do not believe there is a basis for using \$300,000 and therefore the Department should reevaluate applying this figure in calculating monetary contributions. This reexamination is particularly important when market conditions are at such a marked low point and will be for the immediate coming years. The Department should manage environmental regulations and programs while taking into account statewide economic conditions. (5, 6, 9)

RESPONSE: The provision at N.J.A.C. 7:7A-15.21 to which this comment relates was not the subject of this rulemaking. It was proposed September 4, 2007 and adopted effective October 6, 2008. The Department's explanation of the \$300,000 per acre monetary contribution can be found in that proposal at 39 N.J.R. 3604, and in the adoption beginning at 40 N.J.R. 5661. In general, the contribution amount is based upon an evaluation and assessment of the analyses submitted to the Department and the Mitigation Council for previous monetary contributions. It is not out of line with the costs assessed by existing banks. For example, commenters note that one bank is assessing \$400,000 per credit (see comment 16 above).

38. COMMENT: The Department should reconsider the proposal to require mitigation for general permits 2, 6, 10A, 10B, 11, 12 and 27. By enforcing the proposed standards, the Department is overburdening the efficiency of the general permit process, thus creating an application process akin to individual permits. A permitting process that requires the applicant to comply with the mitigation standards will eliminate the practicality and foundation of the general permit process. The project review will be significantly extended by the process which is required to comply with the mitigation rules proposal. Not only will an applicant be responsible for finding a suitable mitigation option and preparation of the required mitigation proposal, but it will also be required to ensure survivability of the mitigation subsequent to the completion of the permitted activity. Given the limited scope of disturbance for which the general permits are designed, these requirements seem counterproductive to the efficiencies of the permit approval process. (10)

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39. COMMENT: While it is understood that large-scale developments make use of the General Permitting process, it is the smaller scale activities typical of single family and small businesses that rely on the efficiencies of the process. These smaller scale activities cannot sustain the commitment of resources, both time and money, in a permitting process that becomes ever more complex and arduous. (10)

RESPONSE TO COMMENTS 38 AND 39: The general permit program was established to provide a simpler permitting process for those projects that would not result in more than minimal cumulative impacts. The FWPA at N.J.S.A. 13:9B-23 states that the Department shall only issue general permits if it determines “that the activities will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, will cause only minor impacts on freshwater wetlands, will be in conformance with the purposes of this act, and will not violate any provision of the Federal Act.” However, the Department has determined that, contrary to this requirement, the general permits for which mitigation will be required have resulted in adverse cumulative impacts that are more than minimal, and that those impacts will continue unless mitigation also is required. Consequently, it is necessary to adopt a mitigation requirement that avoids these cumulative impacts and that is consistent with the Federal mitigation requirement, which is what the Department has undertaken with these amendments. While general permits provide a “simpler” permitting process as compared to the requirements for individual permits, the FWPA does not allow the Department to provide general permits that have more than minimal cumulative, adverse impacts to the State’s freshwater wetlands resource.

The Department’s rules already provide a simplified process for mitigating for smaller impacts at N.J.A.C. 7:7A-15.5 by presuming that onsite mitigation is not feasible and allowing an applicant to purchase credits from an existing bank according to the following hierarchy: (1) in the same HUC 11 as the disturbance; (2) in a bank approved prior to January 1, 1999 which includes the disturbance site in its bank service area; (3) in a bank in an adjacent HUC 11; (4) from a bank anywhere in the same watershed management area; or (5) through the purchase of credits from a bank containing the disturbance site in its service area. The Department has also simplified the process for

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making a monetary contribution at N.J.A.C. 7:7A-15.21(d) if none of the mitigation banking options is available.

40. COMMENT: It is the commenter's experience that mitigation options available to applicants are severely lacking. An appropriate site which satisfies the requirements of both the NJDEP and the United States Army Corps of Engineers (USACE) is rarely attainable. The commenter also has been advised that the monetary contributions or in-lieu of fees which can resolve the Department's requirements cannot be approved by the USACE as an acceptable mitigation option, as the in-lieu of fee process never went through Federal cross-acceptance. Therefore, by requiring mitigation for small projects which can otherwise comply with a General Permit, the Department is adding an unnecessary regulatory burden. (10)

RESPONSE: The FWPA, with its in lieu fee program has been in effect since 1988, and predates the Federal mitigation guidance. The Department's program, including all mitigation requirements, was approved by the Federal government in 1993 when the EPA granted the State assumption of the Federal permitting program. Consequently, with the exception of waters for which the Federal program has not been delegated to the State and which are referred to as "non-delegable" (that is, interstate waters and wetlands, the wetlands of the Hackensack Meadowlands, tidal wetlands, and wetlands within 1000 feet of the ordinary high water mark; see definition of "delegable waters" at N.J.A.C. 7:7A-1.4), the Department establishes the mitigation requirements, and there is no need for compliance with ACOE standards. For non-delegable waters, where the Department shares jurisdiction with the ACOE, the Department is working on an agreement to combine the approval process for both agencies' mitigation requirements so that applicants are not forced to try to negotiate an acceptable mitigation project separately with each agency. The commenter's concern that it is difficult to find a suitable mitigation site is true for all mitigation projects, regardless of whether they result from individual or general permit approval. The Department places wetland mitigation banking at the top of its hierarchy preference, as does the ACOE. Therefore it is the intention and goal of the Department to encourage the development and subsequent use of wetland mitigation banks as a mitigation alternative.

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41. COMMENT: Adoption of the proposed rules will add to New Jersey's deficit and slow the economy. Before any new rules are adopted, it is time for someone in state government to provide genuine oversight of the rulemaking process and answer the question of how New Jersey's environmental rules are really impacting the economy. (3)

42. COMMENT: The Department is assuming that development and redevelopment opportunities exist that necessitate the establishment of banks for the purchase of mitigation credits, making them worthwhile to pursue. It is apparent that the Department has not accounted for the negative impact that its environmental regulations have on the development industry. The proposed FWPA rules place significant restrictions on property owners and will undoubtedly increase costs and further deter investment in New Jersey. (6, 9)

RESPONSE TO COMMENTS 41 AND 42: The Department does not agree that its wetland regulations have or are contributing to the downturn in the economy. Current economic conditions indicate that development does not occur when lending is not available from financial institutions, or in the case of residential development, potential purchasers have been laid off from jobs. The FWPA and rules have been in place since 1988. Since then, the Department has processed more than 20,000 permits for impacts to wetlands (plus the same or a greater number of approvals for impacts to transition areas). Clearly, when the overall economy is robust, development occurs despite the State's wetlands rules.

Further, protecting the environment (through environmental rules), provides the public with a wide variety of economically valuable benefits. For example, a 2007 study estimates that freshwater wetlands provide \$9.4 billion per year in ecosystem services to the public, including the buffering of floods and storm surges, water filtration and water supply (DEP. 2007. Valuing New Jersey's Natural Capital: An Assessment of the Economic Value of the State's Natural Resources. www.nj.gov/dep/dsr/economics/). In other words, if wetlands were eliminated and not protected, residents would spend \$9.4 billion dollars per year to protect against flooding, and/or to repair damages or replace

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lost property due to flooding, and to obtain safe and adequate drinking water supplies.

Consequently, the Department concludes that protection of environmental resources contributes in a significant and positive manner to the economy of the State.

43. COMMENT: Although these amendments derive from the Federal Clean Water Act 404 Program, the Department should not adopt rules that further restrict economic development without ensuring that the facilities exist to enable projects to comply with the mitigation requirements. How can the Department simply state in the rule proposal that private land owners will somehow provide the necessary mitigation banks, without presenting any evidence to back up this claim? How can the Department impose a mitigation requirement on applicants statewide when the mitigation banks only exist in three southern counties? How will projects in the rest of the state comply with the requirement when no mitigation banks presently exist to serve applicants? (3)

RESPONSE: As stated in response to comments 17 and 18, mitigation banking is market-driven. Currently there are not many mitigation banks in New Jersey, because of the lack of business, to date, to support them. In order to be successful, a mitigation bank must contain, and be able to sell, a sufficient numbers of credits to make it profitable after considering the costs of creating the bank. Consequently, the Department believes that mitigation banks will become a more attractive and profitable investment when more circumstances require mitigation. In addition, applicants maintain the full range of options for complying with the requirement for mitigation, and are not restricted to the use of mitigation banks. Applicants can perform mitigation onsite or offsite, if they can demonstrate an environmental benefit from such mitigation, in accordance with N.J.A.C. 7:7A-15.5(e); they can provide a monetary contribution, in accordance with N.J.A.C. 7:7A-15.21; or they can propose a land donation in accordance with N.J.A.C. 7:7A-15.22.

44. COMMENT: Commercial and industrial real estate development (and redevelopment) creates jobs and attracts employers to the state. When projects are not being built due to wetland regulations, construction jobs will not be created, new

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employees will not locate in New Jersey to create jobs, and more jobs will not be created.

The Department should undertake a thorough economic analysis of the impact of proposed new requirements on development costs statewide. (6)

45. COMMENT: The amount of housing built affects jobs. Thus when housing is not being built due to wetlands regulations, then more jobs will not be created, contrary to the Jobs Impact statement. (9)

RESPONSE TO COMMENTS 44 AND 45: The commenters assume that the construction of housing, and commercial and industrial projects is not occurring due to the wetland regulations. The Department does not agree. Current economic conditions indicate that development does not occur when lending is not available from financial institutions, or in the case of residential development, potential purchasers have been laid off from jobs. The FWPA and rules have been in place since 1988. Since then, the Department has processed more than 20,000 permits for impacts to wetlands (plus the same or a greater number of approvals for impacts to transition areas). Clearly, when the overall economy is healthy, development occurs and jobs are maintained, regardless of the implementation of the wetland rules.

46. COMMENT: Many of the commenters' members are involved in mixed use development. The building industry is also subject to a 2.5 percent fee to fund affordable housing. The mitigation requirements will clearly have a direct impact on housing costs (affordable and workforce housing), financial viability of projects, and overall production choices. There are clear social benefits from projects that are for housing production, hospitals, and schools and also for state, county and municipal road projects that are not evaluated within these impact statements. The Department should seriously undertake a full, economic assessment of the multitude of variables associated with the housing industry and then understand how these factors affect the financial decisions associated with development and redevelopment projects. (6, 9)

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47. COMMENT: As stated on November 10th by Senator Raymond Lesniak in *New Jersey Voices* about affordable housing, “If we do nothing, there will be no affordable housing, no workforce housing and no commercial or industrial development in our state. The consequences of that are dire. We can’t afford to stand idly by while our economy flounders under current economic conditions and counterproductive government regulation.” (3)

RESPONSE TO COMMENTS 46 AND 47: The Department does seriously consider the economic impacts of proposed rules on all sectors of the affected population and concurs that affordable housing is not only a necessity but is constitutionally mandated in the State of New Jersey. The Department’s rules reflect a balancing of the need to protect the health and welfare of current and future residents of the State, as reflected by a clean and safe environment, with the need to provide infrastructure, housing and services for those residents. Also, the Department continues to believe that infrastructure and housing needs can and will be satisfied while protecting the natural resources of the State, and that the public is better served if its housing, schools and hospitals are built in uplands and not in wetlands, floodplains, or other environmentally sensitive areas. Wetlands and floodplains are also less physically suited for development. For example, construction in wetlands requires removal and replacement of unstable wetland soils. Development in floodplains requires special elevation and waterproofing techniques.

The Department also believes that it is appropriate to consider the value of the State’s natural resources and the potential impacts to residents from not providing protection. For example, when development is placed in wetlands, surrounding property owners may experience inundation from displaced waters that would have otherwise been held in the wetlands. There are a host of other benefits to protecting environmental resources, and values that may be lost if protection is not provided. The Department believes these values are important enough that it undertook a study to evaluate and assess the State’s natural resources. See DEP. 2007. *Valuing New Jersey’s Natural Capital: An Assessment of the Economic Value of the State’s Natural Resources*. (www.nj.gov/dep/dsr/economics/).

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48. COMMENT: The Department should adopt regulations that are consistent with the 1992 “Local Redevelopment and Housing Law (N.J.S.A. 40A:12A-1 et seq.). Most of the wetlands in redevelopment areas are so degraded that it would be impossible to conduct mitigation onsite. Consequently, applicants will be forced to purchase credits from a mitigation bank, make a monetary contribution or donate land—all of which involve significant costs. Imposing additional mitigation requirements in this economic climate will only further deter investment in and pursuit of redevelopment work in the State. (6, 9)

RESPONSE: The Department must adopt regulations that implement the purpose and intent of the FWPA (N.J.S.A. 13:9B-1 et seq.), and those rules must be consistent with the Federal 404 requirements. Consequently, the Department has been obligated to undertake rulemaking in order to implement mitigation for general permits since 2007 when the Army Corps of Engineers changed its permitting requirements to make mitigation a standard condition for nationwide permits.

Mitigation is required only when applicants choose to locate their projects in wetlands. If applicants locate projects in wetlands and propose impacts of 0.1 acres or more, mitigation will be required. As stated in response to comments 46 and 47, the Department concurs that affordable housing is not only a necessity but is constitutionally mandated in the State of New Jersey. The Department’s rules reflect a balancing of the need to protect the health and welfare of current and future residents of the State, as reflected by a clean and safe environment, with the need to provide infrastructure, housing and services for those residents. Further, the Department continues to believe that infrastructure and housing needs can and will be satisfied while protecting the natural resources of the State, and that the public is better served if its housing, schools and hospitals are built in uplands and not in wetlands, floodplains, or other environmentally sensitive areas.

Minimization of impacts

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49. COMMENT: No mitigation and/or compensation should be required for impacts of less than 0.1 acres for general permits 2, 6, 10A, 10B, 11 or 21. Mitigation on a case by case basis will create a “grey area” where the DEP may make a determination if an applicant has minimized impacts to the wetlands to the greatest extent possible.

“Minimized” is subjective and ambiguous language that may result in controversy when an applicant and the Department determine when and where wetlands impacts could have been avoided or minimized. Further, such active involvement by DEP staff will delay and extend the review and processing time for applications. Additionally, the applicant may not have accounted for mitigation for the project for loss and/or disturbance under 0.1 acres and this may result in unforeseen financial problems for the project. (4, 5, 6, 9)

50. COMMENT: The reference to “minimization” is unclear and actually allows Departmental reviewers to engage in project-specific site planning and design. This should not be encouraged or permitted. DEP staff who review freshwater wetland applications are not licensed engineers and should not be making design judgments for a project. (9)

51. COMMENT: The Department’s suggestion for a “case by case” approach reflects the fact that the proposed regulation lacks clear standards. Although the Department attempts to clarify by defining the term “minimize” to mean that most or all of a given project is confined to uplands, that only adds to the lack of clarity in as much as “minimize” generally means to “reduce to the maximum extent possible,” which may not necessarily be “most or all” of the project footprint. A recent Appellate Division of the New Jersey Superior Court found that the Department’s indication that its decision would be made on a case by case basis creates a substantial risk of arbitrary decision making (*Borough of Avalon v. NJDEP*, Superior Court of New Jersey, Appellate Division, Docket No. 1-3410-07T3, slip op. at 24 (Nov. 19, 2008)). The Department should either eliminate the proposed requirement for mitigation for loss or disturbance to less than 0.1 acres or modify the proposed regulation by adding specific criteria that trigger the duty to mitigate. (5, 9)

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RESPONSE TO COMMENTS 49 THROUGH 51: The rules provide the criteria upon which the determination as to whether mitigation for impacts of less than 0.1 acres of wetlands is necessary. The applicant must demonstrate that impacts to wetlands have been avoided and minimized. "Minimize" for the purposes of this demonstration means that "the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible." The applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement. See N.J.A.C. 7:7A-5.2(f), 5.6(d), 5.10A(f), 5.10B(e), 5.11(i), 5.21(e), and 5.27(d). Thus, the Department anticipates that compliance with this provision will be ascertained quickly and easily. If a project is designed with wetland impacts, but there is upland on the site that remains undeveloped by the proposed project, the applicant will be asked to explain and justify why its project design impacts wetlands when onsite uplands are available for development. For a linear facility, or a road widening project, such as those under general permits 2, 10A, 10B, or 21, it should be easily determined whether impacts have been minimized, and easily justified that impacts cannot be further minimized because, for example, the project would be necessary to connect new utilities in a straight line to adjacent infrastructure, or a road must be widened in the vicinity of traffic congestion or new development. Under general permit 11 for outfall structures, outfall structures have to be, in general, at the low point of a site and cannot discharge too far from their destination without potentially causing erosion. Again, it should be easy to explain and justify that an outfall is located in wetlands adjacent to a stream rather than several feet away and discharging in an upland area.

Because the rules specify the criteria for minimizing the project for which authorization is sought under the respective general permits, they are consistent with applicable case law and legal standards. In addition, it should be noted that the condition adopted in the nationwide permits by the ACOE requires a case by case assessment of the need to provide mitigation for wetland losses of 0.1 acre or less (see 72 Fed. Reg. 11193) and the Department's approach is consistent with that.

Timing for submittal of a mitigation proposal

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52. COMMENT: The proposed amendments require submittal for review and approval of a mitigation plan 120 days prior to the initiation of regulated activities. In addition, mitigation activities are required to be performed prior to, or concurrent with, the general permit activities. This language should be eliminated. A 120-day review period for a mitigation plan is extremely lengthy and may result in unforeseen and costly scheduling conflicts. The language should remain unchanged from the language at N.J.A.C. 7:7A-15.11(a)2: "For mitigation required by a general permit authorization, the mitigation proposal shall be submitted concurrently with the application for a general permit authorization." This language will allow for adequate mitigation plan review and approval while avoiding any potential scheduling conflicts. (4)

53. COMMENT: The proposed amendments require submittal of a mitigation plan for review and approval 120 days prior to the initiation of regulated activities. This change in timing of approval and issuance of authorization for general permits would likely result in mitigation proposals being submitted concurrently with applications, which would directly affect the schedule of development activities. Previously, mitigation only had to be submitted after the permit was granted. The Department should reconsider this requirement as it would burden applicants upfront with evaluating and selecting a mitigation alternative, and further increase the workload on Department review staff. The proposal should have analyzed the additional Departmental staffing required to address these proposed requirements. Adequate staffing is essential to the permit review process, particularly in Program areas where permits have not been processed in a timely manner, as is the case with wetland permits. (5, 6, 9)

RESPONSE TO COMMENTS 52 AND 53: The Department does not agree that requiring a mitigation plan 120 days prior to the initiation of regulated activities will force an applicant to submit mitigation with the general permit application, or negatively affect Department review times. This requirement is intended to afford the applicant time to compile a mitigation plan after a general permit authorization is approved, and to provide sufficient time for the Department to review and approve the mitigation plan before the project is actually begun. However, if an applicant determines the type of

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mitigation he or she intends to provide sooner than 120 days prior to the initiation of regulated activities, the Department will accept the mitigation proposal earlier.

Consequently, the rules at N.J.A.C. 7:7A-5.2(f)1, 5.6(d)1, 5.10A(f)1, 5.10B(e)1, 5.11(i)1, 5.21(e)1, and 5.27(d)1 are modified on adoption to provide that the mitigation shall be submitted “no later than” 120 days before the initiation of regulated activities in order to enable earlier submittal of an application for those who so desire or who are concerned about scheduling conflicts. For consistency, the Department is also making a corresponding change in the mitigation subchapter at N.J.A.C. 7:7A-15.11, Basic requirements for all mitigation proposals, to provide that the mitigation proposal is to be submitted no later than 120 days before initiation of required activities under a general permit.

The use of a formula to determine a mitigation contribution for general permits, was also specifically intended to make the review of mitigation proposals as simple and straightforward as possible, since once the acres of wetland impacts are known, and the applicant has determined that there is no mitigation bank to serve the area in question, it is quick and easy for the applicant and Department staff to determine the appropriate contribution.

54. COMMENT: The proposed amendments require submittal for review and approval of a mitigation plan 120 days prior to the initiation of regulated activities. In addition, mitigation activities are required to be performed prior to, or concurrent with, the general permit activities. A 120-day review period for a mitigation plan is extremely lengthy and may result in delays to critical public infrastructure service needs. Given the ongoing need to maintain and upgrade New Jersey’s electric power infrastructure, it is not in the public interest to delay the construction of utility lines. This point is noted in the New Jersey Energy Master Plan, which repeatedly refers to the importance of improving New Jersey’s electric power transmission and distribution grid. The proposed regulations should be revised to allow deferred submission and evaluation of mitigation plans for utility infrastructure projects. The concern regarding the lack of a meaningful financial incentive to complete mitigation once the project is complete is inapplicable to utilities due to the fact that utilities have a permanent role with respect to their public service

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infrastructure projects and will be readily available when mitigation responsibilities require implementation. (5)

RESPONSE: Entities that submit permit applications on a regular basis, for example utility companies, are more readily able to provide mitigation proposals in a timely manner because they are familiar with the processes both for obtaining a permit and for complying with mitigation requirements. Consequently, the Department does not agree that mitigation should be deferred. Rather, it should be possible, for example through use of a mitigation bank, for such entities to be prepared in advance to provide mitigation when the projects they undertake require it. The Department requires mitigation to be provided before regulated impacts occur not only to ensure that mitigation is provided, but also to ensure that mitigation replaces, in a timely manner, the lost values and functions of the wetlands to be affected by the permitted activity.

Mitigation hierarchy

55. COMMENT: The standards should account for the hierarchy of mitigation alternatives that are provided for smaller disturbances at N.J.A.C. 7:7A-15.5. In this hierarchy, donation of land is listed as the last option, after evaluating the feasibility of onsite or offsite restoration, creation, or enhancement or offsite upland preservation. However, the summary excludes onsite and offsite restoration, creation or enhancement or offsite upland preservation, as an alternative when there is no approved mitigation bank, and instead requires applicants to make a monetary contribution or donate land. The Department should adhere to its own regulatory framework rather than “presuming” that onsite or offsite restoration, creation or enhancement or offsite upland preservation are not feasible “unless an applicant...can demonstrate that such mitigation will be environmentally beneficial.” (5, 6, 9)

RESPONSE: The provisions at N.J.A.C. 7:7A-15.5, which address mitigation for a smaller disturbance, have been in place in the wetland rules since at least 2001 and were not amended as part of the readoption in 2008, nor were they proposed for amendment as

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part of this rulemaking. N.J.A.C. 7:7A-15.5(c) provides, “The Department presumes that onsite mitigation for a smaller disturbance is not feasible. Therefore, mitigation for a smaller disturbance shall be performed through credit purchase in accordance with (d) below, unless the applicant demonstrates under (e) below that one of the following will be more environmentally beneficial: 1. Onsite restoration, creation or enhancement; or 2. Offsite restoration, creation, or enhancement, which is performed in the same HUC 11, as defined at N.J.A.C. 7:7A-1.4, as the disturbance, or performed in an adjacent HUC 11 within the same watershed management area as the disturbance.”

The only change made to the rules at N.J.A.C. 7:7A-15.5 as part of the readoption in 2008 was the removal of the option to provide upland preservation at N.J.A.C. 7:7A-15.5(c), and its placement at the end of the mitigation hierarchy, at N.J.A.C. 7:7A-15.5(f), once all other mitigation options are eliminated. Note that land donation, as a last option, was at that time and still is in the rules at N.J.A.C. 7:7A-15.5(f).

Consequently, the Department is adhering to its own rules. An applicant has the option of providing onsite and offsite restoration, creation, or enhancement when the applicant can demonstrate, in accordance with the provisions at N.J.A.C. 7:7A-15.5(e), that it will be more environmentally beneficial than providing another type of mitigation. However, the applicant may instead purchase credits from an approved mitigation bank or make a monetary contribution to the Council.

56. COMMENT: There is no rationale or basis provided for the Department’s presumption against onsite mitigation except when demonstrated to be environmentally beneficial and therefore this provision is arbitrary. Further the meaning of environmentally beneficial is unclear. Regardless of the gap in the proposed regulations, where mitigation is not environmentally beneficial, the proper result is not to impose an unnecessary mitigation requirement. To require mitigation, in the form of a sizable monetary payment as a surrogate, is arbitrary where mitigation of the affected area would not be environmentally beneficial due to its minimal ecological or economic value and therefore there is no adverse impact and nothing to mitigate. (5)

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RESPONSE: As previously stated, this provision has been in the adopted rules since 2001 and was not proposed for amendment. When proposing the provision in 2000, the Department explained that for smaller projects, it was making it easier to mitigate offsite or by way of purchasing credits from a bank, because “mitigation projects tend to be more successful if performed on a larger scale. Allowing smaller mitigation projects to be performed through credit purchase aggregates the smaller projects into larger ones (a mitigation bank) and provides greater environmental benefit. In addition, it improves the Department’s efficiency in approving and monitoring mitigation projects for smaller disturbances, because the Department can work with one mitigation bank rather than multiple small mitigation projects. A final benefit of credit purchase is that the mitigation is performed prior to the disturbance in most cases, unlike mitigation performed by a permittee, which is only occasionally performed prior to the permitted disturbance.” (See 32 N.J.R. 2735.)

The definition of “environmentally beneficial” is provided at N.J.A.C. 7:7A-15.5(e). Briefly, this provision states that size, location in relation to other preserved open space, habitat value, and interaction with nearby resources are the criteria for determining the environmental benefit of a potential onsite or offsite mitigation proposal for a small disturbance.

Finally, the Department does not agree that if mitigating on or offsite for a small disturbance is not environmentally beneficial then no mitigation is needed because there is no adverse impact. Simply because small, individual mitigation projects are less successful than large ones, does not negate the fact that hundreds of acres of wetlands are being lost annually due to impacts of projects under general permits. To compensate for these losses, successful mitigation performed on a large scale is necessary and appropriate to maintain the values of functions of wetlands in a watershed and statewide.

57. COMMENT: Under N.J.A.C. 7:7A-15.5(e), permitted activity in small, localized areas of lesser ecological value may not satisfy the Department’s criteria for “environmentally beneficial” onsite or offsite mitigation, which will require far more costly mitigation through the purchase of credits from a mitigation bank or in lieu fee payment. This changes mitigation from a process for corrective action into a mechanism

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for revenue generation. Revenue generation is not one of the intended purposes of the FWPA's mitigation provisions. (5)

RESPONSE: Purchasing credits from a mitigation bank or making a monetary contribution may not be more costly than attempting to provide on or offsite mitigation. Regardless of the amount of mitigation that must be provided, the costs of performing mitigation include purchasing the land (if performing offsite mitigation), engineering and environmental consulting fees, attorney fees, costs for excavators to conduct site preparation and construction, plant purchase and planting, construction supervision, and the cost of monitoring the site. With the exception of land purchase, these costs are the same for onsite mitigation and will not vary greatly based upon the amount of mitigation that must be provided. Therefore, depending upon the amount of required mitigation, it will not necessarily be more costly to purchase credits from a bank or make a monetary contribution since the purchase costs are directly related to the amount of required mitigation, unlike the costs associated with performing an actual mitigation project.

The FWPA states at N.J.S.A. 13:9B-13c, "If the Department determines that creation or restoration of freshwater wetlands onsite is not feasible, the Department in consultation with the United States Environmental Protection Agency, may consider the option of permitting the creation of freshwater wetlands or the restoration of degraded freshwater wetlands offsite on private property...or the making of a contribution to the Wetlands Mitigation Bank." Thus the FWPA does provide for the generation of monies to be used for mitigation projects when there is no opportunity to provide on the ground mitigation projects. In no case will the requirement to provide a monetary contribution result in "revenue generation." All money collected for mitigation is dedicated for use by the Mitigation Council to provide adequate mitigation. Finally, the justification for the \$300,000 per acre monetary contribution (part of the proposal in 2007, found at 39 N.J.R. 3604, and again, in the response to comments in 2008 beginning at 40 N.J.R. 5661), is based on an evaluation and assessment of the actual costs to perform mitigation in documentation submitted to the Department and the Mitigation Council for previous monetary contributions.

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58. COMMENT: A concern with monetary contributions is that currently monies donated from one area of the State may be reallocated to another region and applied for other projects. This should not be continued because there is an inherent expectation that such contributions would be used for environmental benefits within the same geographic area as where the wetland disturbance occurred. The Department should establish a mechanism for “checks and balances” to ensure monies are reallocated where the affected disturbance takes place. (6, 9)

RESPONSE: Although the Mitigation Council does not require a strict one-to-one correlation between the money deposited in the Mitigation Fund, and the location of each approved grant project, if the State as a whole is examined, the mitigation projects overall compensate for overall impacts. In addition, based on allocation of mitigation in the State’s two watershed management areas (Delaware and Atlantic), the data show that the Council has mitigated for all wetland losses for which it has accepted monetary contributions within the corresponding watershed management area. Finally, the Mitigation Council is considered the last resort, meaning that if an applicant is approved to present a land or monetary contribution to the Council, the applicant has exhausted all other options within the watershed management area.

Federal concerns

59. COMMENT: The Memorandum of Agreement between the Department and the EPA must be reexamined so that any rule changes requiring mitigation for general permit disturbances are not adopted until an adequate number of approved mitigation banks exist throughout New Jersey. (3)

RESPONSE: The Environmental Protection Agency does not dictate the details of the Department’s freshwater wetlands regulatory program. Rather, it ensures that the Department has adequate rules in place so that the State’s program is as stringent as the Federal program in all respects. The State’s agreement with EPA states, “The Administrator will assess the administration and enforcement of the State Program on a

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continuing basis for equivalence and consistency with the CWA, this agreement, and all applicable federal requirements and policies and for adequacy of enforcement. This assessment will be accomplished by: (1) timely EPA review of information submitted by NJDEPE in accordance with this agreement; (2) permit overview; (3) compliance and enforcement overview; and (4) annual review of NJDEPE program activities.” The Department complies with these requirements and is adopting these rules, in part, so that its mitigation program will continue to be at least as stringent as the federal mitigation policy. Consequently, the Department does not believe that the MOA should be reexamined or implementation of these amendments delayed until more mitigation banks are created.

60. COMMENT: The summary cites the Memorandum of Agreement between the Department and the EPA. The Department should provide a copy of the memorandum with its rule adoption, which should be made publicly available, as it is apparently the basis for the structure of the New Jersey Freshwater Wetlands Program. (6, 9)

RESPONSE: The Memorandum of Agreement (MOA) between the Department and the EPA was approved in 1993. It is incorporated by reference in the Code of Federal Regulations at 40 CFR 233.71, and is part of the EPA decision document approving the State’s request to assume the Federal permitting authority that has been public information since 1993. The MOA is not the basis for the structure of the State’s freshwater wetlands program. The wetlands regulatory program is established pursuant to the FWPA and the implementing rules at N.J.A.C. 7:7A. The MOA formalizes the working relationship between the two agencies as the State implements its wetlands program in place of the Federal 404 program. The Department will provide a copy of the MOA upon request.

61. COMMENT: The Department maintains that the New Jersey Freshwater Wetlands Program must remain as stringent as the Federal 404 program in all ways. We question the legal basis for such “equally stringent” requirements as the federal program, and

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believe that the Department should establish the legal authority for its policy making. (6, 9)

RESPONSE: The FWPA contains a provision that requires the Department to “take all appropriate action to secure the assumption of the permit jurisdiction exercised by the United States Army Corps of Engineers pursuant to the Federal Act.” (See N.J.S.A. 13:9B-27). One purpose for requiring the State to assume the Federal permitting jurisdiction was to streamline the permitting process by eliminating the need for applicants in New Jersey to obtain two separate wetlands permits, one from the Department and the second from the Army Corps of Engineers (ACOE), to undertake regulated activities in wetlands and waters. The process for securing “assumption” of the Federal permit jurisdiction is contained within the Federal Clean Water Act (33 U.S.C. 1251 et seq.) and the 404 State Program Regulations (40 CFR Part 233). The 404 State Program Regulations state, “Any approved State Program shall, at all times, be conducted in accordance with the requirements of the (Federal Clean Water) Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.” (See 40 CFR 233.1(d)). Thus, in order for the Department to maintain its assumed program, it must continually ensure that its regulations remain as stringent as those of the Federal program as implemented by the ACOE and EPA. As explained in the proposal summary, in March 2007, the ACOE as part of the Federal 404 program, adopted new regulations making mitigation a standard condition of most Nationwide Permits, the Federal equivalent of general permits in these rules. Therefore, if the Department is to maintain its authority to issue permits that satisfy both the State and Federal wetland permitting requirements, the Department must enact similar requirements as part of its wetland rules.

62. COMMENT: Given the intent of the Department to model its Freshwater Wetlands program after the Federal program, the Department should adopt some of the more positive aspects of the Federal program like greater flexibility for mitigation. The Army Corps allows for five types of mitigation and allows reviewers to use discretion when requiring mitigation. (6, 9)

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RESPONSE: The Department does not agree that the Federal program provides more mitigation options and flexibility than the State's program. The State program provides for the following types of mitigation (listed in order of preference): creation, restoration, enhancement, mitigation banks, monetary contribution, upland preservation, and land donation. The Federal program provides for: establishment, reestablishment, rehabilitation, mitigation bank, in lieu fee, and preservation. The mitigation types are comparable except that the Department will accept land donations and this type of mitigation is not explicitly included as an option in the Federal program.

The Federal regulations apply throughout the nation and in several American islands and territories as well. As a result, the regulations must be less specific, and more "flexible," not to accommodate individual projects but to accommodate conditions that vary greatly nationwide. For example, the Federal mitigation regulations at 72 Fed. Reg. 11193 state, "Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement...."

Because the Department's rules address only projects in New Jersey, the Department has included more detail in its requirements, based upon its experience with conditions in New Jersey. For example, the rules provide that a greater than one-to-one mitigation ratio will be required when creation is the chosen mitigation option, instead of the Federal "at a minimum one-for-one ratio," because creation projects tend to be approximately 50 percent successful in New Jersey. In addition, the FWPA rules provide the full range of mitigation options so that applicants can determine the type of mitigation appropriate for their circumstances. This makes it unnecessary for the Department to determine that "some other form of mitigation would be more environmentally appropriate."

63. COMMENT: The vast majority of activity under general permits 2, 10A, 10B and 21 is in "non-delegable areas," that is locations that fall outside the scope of the Federal

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program under Section 404 of the Clean Water Act. That is because such projects are constructed more than 1000 feet from the mean high water level that is the limit of the Clean Water Act Section 404 jurisdiction. Thus the necessity for the Department's regulations to duplicate the requirements of the Section 404 Program, which the Department administers under delegated authority, presupposes that the Department's program has the same scope of the Federal program. But that rationale is not valid as applied to the majority of activity under these general permits which take place in areas that are not regulated by the Federal program. Put another way, the Department's rationale is inapposite inasmuch as the EPA has made clear that it has no interest in New Jersey's transition area requirements, since the Federal program does not regulate buffer areas. (5)

RESPONSE: The Department disagrees that the majority of activities performed under the cited general permits occur in areas falling outside the scope of the Federal program. "Non-delegable" does not mean outside the scope of the Federal program. "Non-delegable" means that the State and the Federal government share jurisdiction. In fact, the scope of the Federal program is the entire United States including New Jersey and some American islands and territories, and the scope of the State program is the entire State of New Jersey.

The process of "assuming" the Federal 404 program means that a state has equal or greater jurisdiction and authority under a state wetlands/waters program than the Army Corps of Engineers has under the Federal Clean Water Act 404 program. A state is therefore authorized by the United States Environmental Protection Agency to operate its state program in place of the Federal program and the Federal government recognizes that state approvals also constitute Federal approvals for purposes of the Federal 404 program. Thus, in order for a state to assume the Federal permitting authority, its program must have at least the same scope as the Federal program because the Federal assumption requirements do not allow a state to assume responsibilities in only certain parts of the state or for only a portion of the activities regulated under Section 404.

However, the same provision of the Federal Clean Water Act that provides the authority for a state to assume the Federal permitting authority establishes a limit on the

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wetlands and waters over which permitting jurisdiction can be assumed. Section 404(g)1 of the Federal Clean Water Act says that a state can assume sole permitting authority in all waters except, “those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto...” These waters are commonly referred to as “non-delegable” or “non-assumable” waters. Thus, non-delegable waters are not outside the scope of either the State or Federal program. They are under the authority of both permitting agencies, which means that a given project requires two permits—one from the State and one from the Federal government.

In preparation for assumption in 1992, the Department and the ACOE established the definition of delegable and non-delegable waters. The 1000 foot demarcation from the mean high water mark indicates the boundary of non-delegable waters and the extent of continued Army Corp of Engineers (ACOE) jurisdiction under New Jersey’s assumed program. However, the Federal rules governing assumption specifically state, “Note: State assumption of the section 404 program is limited to certain waters, as provided in section 404(g)1. The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill material into those waters over which the Secretary retains section 404 jurisdiction.” (See 40 CFR 233.1(c).)

Thus, projects proposed within wetlands or waters located partially or entirely within 1000 feet of the ordinary high water mark or mean high tide continue to require permits from both the Department and the ACOE because those waters are non-delegable. (See definition of “delegable waters” at N.J.A.C. 7:7A-1.4.) When projects are located more than 1000 feet from the mean high water mark, the State has the authority, under the Federal Clean Water Act, to authorize permits using State permitting authority and those State permits also satisfy the Federal 404 program.

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While the commenter is correct that transition areas are not subject to the Federal program, the Department's mitigation rules also do not apply to transition areas. They apply where there are impacts to wetlands or waters.

Finally, because the State's approvals constitute approval under the Federal 404 program as well as under the FWPA, the State is required to ensure at all times that its program continues to be as stringent as the Federal program in all ways. Therefore, it is necessary for the Department to add a requirement for mitigation to general permits since the Federal program includes mitigation as a standard requirement of nationwide permits, the equivalent of the State's general permits.

Federal Standards Analysis

(Agency note: The Federal Standards Analysis below includes an analysis of the requirement to submit a mitigation proposal prior to initiation of regulated activities, which analysis was not part of the Federal Standards Analysis published in the proposal on October 6, 2008 at 40 N.J.R. 5478(a).)

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995 c. 65) require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. Such a comparison is appropriate in the case of the freshwater wetlands program rules, because the Department is also obligated under Federal law to ensure that its program is at least as stringent as the Federal 404 program.

New Jersey's FWPA program replaces the Federal Clean Water FWPA 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.

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In March 2007, as part of its Section 404 program, the ACOE adopted new regulations making mitigation for 0.1 acres or greater a standard condition of all Nationwide Permits (NP), the federal equivalent of general permits (see March 1, 2007 Federal Register at 72 Fed. Reg. 11193). However, each District Engineer may determine on a case-by-case basis whether mitigation is required for wetland losses of 0.1 acre or less. The ACOE also follows the same hierarchy for performing mitigation as New Jersey, although the Federal government tends to discourage in lieu fee programs (monetary contributions) mainly because such programs do not exist nationwide.

The ACOE requires mitigation for each of the NPs which are the equivalent of the State's general permits for which the Department is adopting mitigation. For example, NP 12 is for utility line activities and is subject to the ACOE's standard condition for mitigation. It permits similar activities to those permitted by the Department under general permits 2 (underground utility lines) and 21 (above ground utility lines), for which mitigation is adopted. NP 7 for outfall structures and associated intake structures, and NP 14 for linear transportation projects are also subject to the standard mitigation condition under the Federal 404 program. NP 7 is equivalent to the State's general permit 11 for outfall structures, and NP 14 is equivalent to general permit 10A and 10B for minor road crossings. The Department is adopting a mitigation condition for general permits 10A, 10B, and 11. The ACOE no longer has a NP equivalent to the State's general permit 6 for impacts to non-surface water connected wetlands, nor does it have a specific permit for redevelopment like the State's general permit 27. Instead, the ACOE has three NPs that permit impacts similar to those for which New Jersey applicants tend to use general permits 6 and 27. NP 18 is for minor discharges (less than 0.1 acres), NP 29 is for residential development, and NP 30 is for commercial and institutional development. All of the NPs are subject to the ACOE's standard mitigation requirement.

The adopted amendment that allows an applicant to submit a mitigation proposal no later than 120 days prior to the initiation of regulated activities authorized by the general permit is also consistent with the ACOE's requirement for mitigation submittal. The ACOE requires an applicant proposing to impact greater than one-tenth of an acre of wetlands to "submit a statement describing how the mitigation requirement will be satisfied. As an alternative, the prospective permittee may submit a conceptual or detailed

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mitigation plan.” (See 72 Fed. Reg. 11195). Consequently, the adopted amendments that require mitigation for impacts of 0.1 acres or greater, and to mitigate for impacts of less than 0.1 acres for impacts that could have been avoided or minimized, for certain general permits are as stringent as the equivalent Federal standards.

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

Freshwater Wetlands Protection Act rules N.J.A.C. 7:7A

SUBCHAPTER 5 ADOPTED GENERAL PERMITS

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

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

(f) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for all permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval ***no later than*** 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(g) (No change from proposal.)

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

(a) – (c) (No change from proposal.)

(d) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters that are also waters of the United States. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters that are also waters of the United States unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval *no later than* 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(e) (No change from proposal.)

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

(a) –(e) (No change from proposal.)

(f) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest

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extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval *no later than* 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(g) (No change from proposal.)

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

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

(e) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval *no later than* 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(f) (No change from proposal.)

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

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

(i) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval *no later than* 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(j) (No change from proposal.)

N.J.A.C. 7:7A-5.21 General permit 21--Above ground utility lines

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

(e) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

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1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval *no later than* 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(f) (No change from proposal.)

N.J.A.C. 7:7A-5.27 General permit 27--Redevelopment of previously disturbed areas

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

(d) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval *no later than* 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

(e)-(f) (No change from proposal.)

N.J.A.C. 7:7A-15.11 Basic requirements for all mitigation proposals

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(a) A mitigation proposal shall be submitted within the applicable time period below:

1. (No change.)
2. For mitigation required by a general permit authorization, the mitigation proposal shall be submitted *[concurrently with the application for the general permit authorization]* *no later than 120 days prior to the initiation of regulated activities authorized by the general permit*; and
3. (No change.)

(b)-(e) (No change.)

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Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994), permit the public to understand accurately and plainly the purpose and expected consequences of this adoption. I hereby authorize this adoption.

Date

MARK N. MAURIELLO
Acting Commissioner