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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

Coastal Zone Management Rules

Freshwater Wetlands Protection Act Rules

Flood Hazard Area Control Act Rules

Adopted Amendments: N.J.A.C. 7:7-1.4, 1.5, 2.2, 2.3, 2.4, 4.2, 4.13, 4.14, 4.21, 4.22, 6.2, 6.3, 6.4, 6.5, 6.17, 6.22, 6.23, 6.30, 6.32, 8.2, 9.2, 9.3, 9.5, 9.6, 9.8, 9.11, 9.12, 9.13, 9.14, 9.16 through 9.20, 9.23, 9.25, 9.28, 9.30, 9.32, 9.33, 9.38, 9.40, 9.43, 9.44, 9.45, 9.46, 9.47, 10.2, 10.3, 10.4, 10.5, 11.1, 11.2, 11.3, 11.4, 12.5, 12.9, 12.15, 12.16, 12.20, 12.21, 13.1, 13.3 through 13.19, 14.1, 14.2, 15.2, 15.3, 15.5, 15.6, 15.7, 15.9, 15.10, 15.11, 16.2, 16.3, 16.5, 16.6, 16.7, 16.8, 16.12, 16.13, 17.5, 19.2, 22.2, 23.2, 23.6, 24.1, 24.3, 25.1, 26.5, and 27.3; 7:7A-10.2; and 7:13-1.2, 12.5, 12.6, 13.12, 18.2, 18.4, and 19.3

Adopted New Rules: N.J.A.C. 7:7-4.23 and 5.3; and 7:13-7.65, 8.16, and 9.15

Proposed: July 17, 2017, at 49 N.J.R. 2122(a).

Adopted: December 14, 2017, by Bob Martin, Commissioner, Department of Environmental Protection.

Filed: December 19, 2017 as R.2018, d.040, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3) **and with proposed new N.J.A.C. 7:7-6.33, and 6.34 and 7:13-9.14; the repeal of N.J.A.C. 7:7-5.14; and the amendments to N.J.A.C. 7:7-4.16, 4.17, 4.18, 6.13, 12.2, 15.4, and 16.10, 7:7A-5.17 and 5.17A, and 7:13-9.13 not adopted.**

Authority: As to N.J.A.C. 7:7: N.J.S.A. 12:3-1 et seq., 12:5-3, 13:1D-1 et seq., 13:1D-9 et

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seq., 13:1D-29 et seq., and 13:9A-1 et seq.;

As to N.J.A.C. 7:7A: N.J.S.A. 13:9B-1 et seq., and 58:10A-1 et seq.; and

As to N.J.A.C. 7:13: N.J.S.A. 13:1D-1 et seq., 13:1D-29 et seq., 13:20-1 et seq., 58:10A et seq., 58:11A-1 et seq., and 58:16A-50 et seq.

DEP Docket Number: 11-17-06.

Effective Date: January 16, 2018.

Operative Date: July 2, 2018, as to N.J.A.C. 7:7-5.3 and 7:13-8.16

Expiration Dates: November 14, 2021, N.J.A.C. 7:7;

August 5, 2022, N.J.A.C. 7:7A; and

October 6, 2021, N.J.A.C. 7:13.

The rule adoption can also be viewed or downloaded from the Department's website at www.nj.gov/dep/rules.

The Department is adopting amendments and new rules in the Coastal Zone Management (CZM) Rules in response to issues identified through stakeholder outreach and to address other issues that have arisen since the July 6, 2015 adoption of the consolidated CZM Rules (see 47 N.J.R. 1392(a)). The adopted amendments are related to filled water's edge, dune walkovers, and other beach and dune development, CAFRA findings, V zones, permits to apply herbicide, building access in flood hazard areas, application requirements, and rule rationales. Amendments and new rules are additionally adopted in the Freshwater Wetlands Protection Act (FWPA)

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Rules, N.J.A.C. 7:7A, and Flood Hazard Area Control Act (FHACA) Rules, N.J.A.C. 7:13, as part of the Department's continuing effort to align the three-land use permitting programs to the extent possible.

This rulemaking includes the adoption of two new general permits-by-certification: N.J.A.C. 7:7-5.3, General permit-by-certification 1A – installation of an elevated timber dune walkover at a residential, commercial, or public development other than a single-family home or duplex; and N.J.A.C. 7:7-8.16, General permit-by-certification 16 - construction of a footbridge. General permits-by-certification (electronic applications) authorize a tightly circumscribed set of activities. The strict limitations on the activity or activities that can be authorized enables the automated issuance of an approval or rejection because there is no need for a case-by-case evaluation of whether the particular proposed manner of conducting the activity meets the conditions of the general permit-by-certification. Upon verification by the online permitting system that the information submitted by the applicant satisfies the limitations applicable to the general permit-by-certification, and after the applicant certifies the truth and accuracy of the information provided, the applicant has access to the authorization from their computer. This process creates a complete, enforceable record of the activity and the applicant's knowledge of the requirements applicable to that activity. The Department is delaying the operative date for these general permits-by-certification for six months to allow the Department to complete the incorporation of these permits into the Division of Land Use Regulation's online permitting system.

Proposed Amendments Not Being Adopted

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The Department is not adopting proposed amendments related to shellfish aquaculture, high-rise structures and scenic resources and design, and trails, boardwalks, and multi-use paths. As summarized below, the Department received a number of comments, which highlighted that further input from stakeholders is needed to ensure that any changes to these provisions of the CZM Rules achieve the desired environmental protection without having unintended consequences.

Shellfish Aquaculture (N.J.A.C. 7:7-4.16, 4.17, 4.18, 6.30, 12.2)

The notice of proposal included amendments requiring shellfish aquaculture activities authorized under permits-by-rule 16, 17, and 18, and general permit 30 to comply with the endangered or threatened wildlife or vegetation species habitat rule, the critical wildlife habitat rule, and/or any applicable management plan for the protection of State and Federally listed threatened and endangered species. The shellfish aquaculture rule, which is applicable to individual permits, was also proposed to be similarly amended. These amendments were strongly opposed by shellfish growers, the Delaware Bay and Atlantic Coast Shellfish Councils, and the New Jersey Department of Agriculture. Commenters opposing the amendments indicated that the proposed new requirements were burdensome and would halt the further development of the industry in New Jersey. With respect to threatened and endangered species protections, commenters indicated that, while the notice of proposal Summary focused on the need to protect the Federally threatened rufa red knot (*Calidris canutus rufa*), all of New Jersey's coastal zone is listed as habitat for one or more Federal- and/or State-listed species. As a result, it was asserted that the rule change would require an impact assessment of the proposed activity on the

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threatened and endangered species in the entire coastal zone, which would be burdensome and cost prohibitive for these small businesses. It was further asserted that the environmental survey conducted by the Department as part of its lease program for shellfish aquaculture prior to issuing the lease should be sufficient to ensure protection of these species. Commenters also indicated that the United States Army Corps of Engineers (USACE) requires consultation and compliance with a biological opinion prior to its issuance of Nationwide Permit 48, and, thus, Federal threatened and endangered species are being protected through that process. Commenters also stated that the assessments required by the endangered and threatened wildlife and plant species habitat rule would defeat the purpose of authorizing activities under permits-by-rule, which otherwise do not require submittal of application materials to the Department. The environmental community strongly supported the amendments indicating that they are necessary for the protection of threatened and endangered species, such as the red knot.

In addition to proposed amendments related to protection of threatened and endangered species, the notice of proposal included amendments designed to reduce the potential for conflicts between shellfish aquaculture operations and navigation and recreational boating. The amendments to general permit 30 for commercial shellfish aquaculture activities requiring that any floating structure be marked with lights or reflectors were also opposed by shellfish growers. They indicated that the United States Coast Guard has lighting requirements and that the proposed requirements under the CZM Rules are excessive and cost prohibitive.

In addition to issues raised by commenters during the public comment period on the notice of proposal, the Department's Division of Fish and Wildlife Endangered and NonGame Species Program, and the Bureau of Shellfisheries identified additional issues with respect to the

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existing permits-by-rule that need to be addressed. Based on the above comments and the Department's identification of the need to explore additional rulemaking on other issues related to both aquaculture, and threatened and endangered species protection, the Department has determined not to adopt the proposed amendments related to threatened and endangered species protection or the amendments designed to reduce the potential for conflicts between shellfish aquaculture operations, and navigation and recreational boating, but to instead initiate a robust stakeholder process prior to proposing any further amendments relating to shellfish aquaculture. The Department is adopting the proposed amendment to general permit 30, commercial shellfish aquaculture activities, at N.J.A.C. 7:7-6.30(a)4, that updates the link to the U.S. Coast Guard webpage providing information on the U.S. Aids to Navigation System.

Scenic Resources and High-Rise Structures (N.J.A.C. 7:7-15.14, and 16.10 and related definitions at N.J.A.C. 7:7-1.5)

The Department's notice of proposal to consolidate the existing high-rise structures rule and the scenic resource and design rule into one section with amendments at proposed N.J.A.C. 7:7-16.10 received many comments. Some commenters supported the incorporation of the high-rise provisions into the scenic resources rule as it indicates the Department will continue to regulate high-rise development along the Hudson River and coastal waterways to protect views enjoyed by the public. However, other commenters objected to the proposed amendments and asserted that they vest too much authority in the Department over local zoning and land use issues. Some commenters believe the amendments give the Department too much discretion to review projects for consistency with surrounding development, which should be under the

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purview of municipalities, and require local ordinances to comply with Department rules, a power that has not been granted by the Legislature. Furthermore, they claim the provision barring high-rise structures from blocking currently-existing views is overbroad, vague, and susceptible to constitutional challenge as it provides no qualitative or quantitative guidance for determining if a view is degraded or blocked. They further assert that such a restriction is beyond the Department's statutory authority. Some of the commenters believe the amendments will inappropriately discourage infill development and inhibit waterfront development along the Hudson River. Commenters stated that the setback requirements are inconsistent with the FHACA Rules. Some commenters believe that excluding the Hudson River Waterfront area from the setback requirements is at cross purposes with the intent of the rule change because setbacks from coastal waters are pivotal for preventing flood damage.

Past court cases have established that limiting impacts to scenic resources and providing for visual access to coastal waterways is within the Department's jurisdiction under the CZM Rules and their enabling statutes. The proposed amendments sought to clarify which resources are of most concern in different areas of the State and to consolidate similar provisions by combining and amending the high-rise structures rule and the scenic resources and design rule. However, in light of the comments received, the Department has concluded that further discussion and consideration should be pursued to determine the best way to achieve these goals. Accordingly, the Department is not adopting the proposed changes.

Trails and Paths (N.J.A.C. 7:7-6.13, 6.33, and 6.34; 7:7A-5.17 and 5.17A; and 7:13-9.13 and 9.14)

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The Department received favorable comments on its goal of amending the CZM, FHACA, and FWPA rules to eliminate inconsistencies and to standardize the treatment of trail, boardwalk, and multi-use path projects across all three regulatory programs. While the intent of the amendments was supported, commenters did not agree with the amendments proposed to achieve that goal. The commenters believe that the proposed changes that limit disturbance in freshwater wetlands and riparian zones on publicly-owned land will significantly hinder or completely eliminate a public entity's ability to create local and regional trail systems throughout the State and will also be detrimental to efforts to build regional trail networks that cross state lines for the public benefit. Commenters believed that the proposed changes will significantly impact public access opportunities to open space and, therefore, will erode future generations' environmental awareness and support. In addition, commenters believe that the proposed permits fail to recognize that, as development consumes available uplands, the land available for trail construction is more likely to be environmentally constrained.

Some commenters believe the proposed changes to the trail general permits eliminate flexibility and do not take into account project scale or purpose, which will effectively limit the type and number of trails that can be created. Many commenters recommend no disturbance limit for trails and boardwalks on public lands, which is currently provided in freshwater wetlands general permit 17, while others argue that permitting an acre of riparian vegetation disturbance in a general permit could easily double the impact of development on streams and wetlands. Further, commenters asserted that the proposed width limit of 10 feet for multiple-use paths would limit access by a number of users, including bikes, strollers, and motorized means of transport used for maintenance or to assist in responding to emergency situations. One

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commenter contended that the 10-foot width is inconsistent with New Jersey Department of Transportation Bicycle Compatible Roadways and Bikeways, which states that paths should be 18 feet wide. The commenters recommend that an applicant be allowed to demonstrate, with the support of appropriate engineering and guidance documents, that safety concerns dictate when multi-use paths, boardwalks, or bridges should be wider than 10 feet.

As indicated above, the proposed amendments were intended to harmonize and clarify provisions for trails, boardwalks, and multiple-use paths across the CZM, FWPA, and FHACA rules. It was not the Department's intention to limit the public's access to, and enjoyment of, natural areas on publicly owned land. To ensure that any amendments to the rules for trails, boardwalks, and multiple-use paths accomplish in the best way possible the goal of allowing for public access and enjoyment of natural areas while also ensuring that such facilities are constructed in an ecologically responsible manner, the Department has determined that it would be appropriate to conduct further stakeholder meetings. Accordingly, the Department is not adopting the proposed changes. Any changes to these and the above discussed provisions determined to be appropriate as a result of the stakeholder processes to be initiated will be proposed for public comment in a future rulemaking.

Summary of Hearing Officer's Recommendation and Agency's Response:

The Department held two public hearings on the notice of proposal on Thursday, August 10, 2017, at 6:00 P.M., at the City of Long Branch Municipal Building, Council Chambers, Long Branch and Thursday, August 15, 2017, at 10:00 A.M., at Stockton University, Campus Center Theater, Galloway. Ms. Virginia Kopkash, Assistant Commissioner, Land Use Management,

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was the hearing officer for the August 10th public hearing and Ms. Kimberly Springer, Manager, Office of Policy Implementation, was the hearing officer for the August 15th public hearing. Six individuals provided written and/or oral comment at the public hearings. Subsequent to the public hearings, the hearing officers have recommended that the amendments be adopted with the changes described above and the agency-initiated change described below. The Department accepts the recommendation. The hearing record is available for inspection in accordance with applicable law by contacting:

Office of Legal Affairs

Attention: DEP Docket No. 11-17-06

Department of Environmental Protection

401 East State Street, 7th floor

Mail Code 401-04L

PO Box 402

Trenton, NJ 08625-0402

Summary of Public Comments and Agency Responses:

The following persons timely submitted comments on the notice of proposal:

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1. Michael Acquafreda
2. William Avery, Bill Avery's Quality Bay Clams, LLC
3. William Avery, East Coast Shellfish Growers Association
4. Thomas Burke, Sloop Point Oyster, LLC
5. David Bushek
6. Lisa Calvo, Sweet Amalia Oyster Farm
7. Patty Cronheim, ReThink Energy New Jersey
8. Michael Darcy, New Jersey State League of Municipalities
9. Emile DeVito, New Jersey Conservation Foundation
10. Tim Dillingham, American Littoral Society
11. Dana Dobson, Tri-state Transportation Campaign, on behalf of the Circuit Coalition
12. Steve Ewing
13. Douglas H. Fisher, New Jersey Department of Agriculture
14. Elizabeth George-Cheniara, New Jersey Builders Association
15. Olivia Glenn, New Jersey Conservation Foundation, on behalf of the Circuit Coalition
16. Toni Granato, New Jersey Sierra Club
17. Matthew Gregg, Forty North Oyster Farms
18. Amy Hansen, New Jersey Conservation Foundation
19. Dennis Hart, New Jersey Chemistry Council
20. Elizabeth Haskin
21. Matthew Hender
22. Richard Hluchan, Hyland Levin

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23. Barney Hollinger, Chairman, Delaware Bay Shellfisheries Council
24. Jerome Irick, Atlantic County Board of Agriculture
25. Steven Israel, Lincoln Harbor Yacht Club Condominium Association
26. Matt Johnson, Burlington County, Resource Conservation
27. Samantha Jones, New Jersey Chemistry Council
28. Brian Kempf, New Jersey Association of Floodplain Managers, Legislative Committee
29. Linda Kenney, Evergreen Environmental, LLC
30. David Kutner, New Jersey Future
31. Scoot Lennox, Barnegat Oyster Collective, Forty North Oyster Farms
32. Deborah Mans, NY/NJ Baykeeper
33. George Mathis
34. John J. Maxwell, Chairman, Atlantic Coast Shellfisheries Council
35. Lori Mayer, Clam Daddy's
36. Michael McGuinness, NAIOP New Jersey
37. Michael L. Pisauro, Jr., Stony Brook-Millstone Watershed Association
38. Ryan Scerbo, DeCotiis, FitzPatrick, Cole, & Giblin, LLP
39. Katherine Smith, Pinelands Preservation Alliance
40. Kenneth Thoman, Monmouth County Parks
41. Jeff Tittel, New Jersey Sierra Club
42. Dennis Toft, Chiesa Shahinian & Giantomasi, representing Hartz Mountain Industries, Inc.
43. David W. Wolfe, New Jersey General Assembly District 10
44. Dawn Zimmer, Mayor, City of Hoboken

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45. Cindy Zipf, Clean Ocean Action

46. Marc Zitter, New Jersey Aquaculture Association

General Comments

1. COMMENT: The Department is commended for considering changes to the CZM Rules.

Many of the proposed changes seem positive and considerate of past actions. (12)

2. COMMENT: The Department's ongoing efforts to align the land use permitting programs are commended. (36)

RESPONSE TO COMMENTS 1 AND 2: The Department acknowledges these comments in support of the rules.

3. COMMENT: The rule changes have been proposed without adequate input from the environmental community; without scientific data, analyses, or legal justification; and without careful drafting and detail regarding the scope of proposed definitions and language changes. (18)

RESPONSE: As explained in the notice of proposal Summary, the Department conducted a robust stakeholder process involving a number of internal and external stakeholders, including representatives from the environmental community. The notice of proposal Summary details the scientific and legal reasons the Department has determined the adopted changes are necessary and appropriate. As demonstrated in the notice of proposal Summary, the Department has analyzed the probable effects of the amendments, including social impacts, economic impacts,

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environmental impacts, impacts on jobs, agricultural industry impacts, effects on small businesses, impacts on housing affordability, and impacts on the State's smart growth goals.

4. COMMENT: Rules weakening requirements for linear development and protections to precious waters should be withdrawn. (7)

RESPONSE: The adopted rules do not weaken the requirements applicable to linear development; rather, the amendments are intended to add clarity. Specifically, the Department added a rationale to the rule on the location of linear development, N.J.A.C. 7:7-14.1, and clarified what constitutes property owner consent for a gas pipeline project proposed within a municipally owned right-of-way.

With respect to the new rationale at N.J.A.C. 7:7-14.1(b), consistent with other rationales contained in the CZM Rules, the rationale to the rule on location of linear development is intended to be a brief summary of the rule and its intent. As indicated in the notice of proposal Summary, the rationales incorporated in the CZM Rules provide background information, supporting scientific literature, and justification for the provisions of the CZM Rules. The rationale does not and cannot alter the substantive standards of the rule as set forth at N.J.A.C. 7:7-14.1(a). Instead, the rationale echoes the requirements enumerated in N.J.A.C. 7:7-14.1(a) that a proposed linear development must meet in order to be considered for approval in cases where some part of the proposed alignment of the linear development conflicts with provisions of specific location rules.

With reference to the amendment that clarifies what constitutes property owner consent for a gas pipeline project proposed within a municipally owned right-of-way, in general, property

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owner consent is required both to protect property owner rights by ensuring that the applicant has consent from the property owner to undertake the proposed activities, and to ensure the Department has the authority to undertake site inspections to examine any impacted resources. Through this rulemaking, the Department is clarifying what it considers sufficient for gas pipeline companies proposing activities in municipal rights-of-way to demonstrate consent for the activity sought to be authorized.

Specifically, the adopted amendment recognizes the statutory provisions applicable to location of a gas pipeline in a municipally owned right-of-way and the role granted by the Legislature at N.J.S.A. 48:9-25.4 to the Board of Public Utilities (BPU) in the designation of gas pipeline routes in municipal rights-of-way in the limited context of a municipal refusal or failure to designate a route for such a utility. The regulatory amendment does not grant BPU new authority in the designation of gas pipeline routes. Instead, the amendment simply incorporates reference to BPU's and municipalities' legislatively determined roles in the designation of a gas pipeline route.

5. COMMENT: The proposed CZM Rules are opposed because they will pave over environmentally sensitive areas by opening all types of coastal areas for development, including coastal high hazard areas. (16 and 41)

RESPONSE: The adopted amendments include changes to the substantive standards of two special area rules, the coastal high hazard areas rule and the filled water's edge rule. In neither case will the adopted amendments allow additional paving or other impervious surface, or lead to other increases in development.

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The amendments relating to development within coastal high hazard areas or V zones are intended to align the CZM Rules with the FHACA Rules, Uniform Construction Code (UCC), and National Flood Insurance Program (NFIP) requirements and to ensure the best available data will be used to determine if a site is in a V zone. Residential, hotel, and commercial development in V zones are allowed under the UCC and Federal flood reduction standards and the adopted amendments allow for such development, provided it complies with the Federal requirements at 44 CFR 60 and the UCC.

With respect to filled water's edge areas, the prior rule permitted water dependent development, and in some cases a mix of water dependent and non-water dependent development, within this special area. The adopted amendments allow non-water dependent development on waterfront sites created through the previous use of fill where, upon the consideration of the site's circumstances based on a number of enumerated factors, the Department determines water dependent development is not feasible, and provided the development complies with all applicable rules, including special area rules restricting development in environmentally sensitive areas, such as wetlands and critical wildlife habitat.

6. COMMENT: The past eight years have seen the Department add loopholes to increase development in wetlands, stream buffers, and flood prone areas. This rulemaking, together with past rule changes, will threatened decades of environmental protections. The Department is urged to reject this notice of proposal and protect the environment. (16 and 41)

7. COMMENT: The consolidation and integration of rules is supported as it leads to consistency, transparency, and understanding. However, the notice of proposal goes beyond these actions and

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will have deep implications for floodplain management. The proposed rules will encourage wetland disturbances and conditions that weaken New Jersey's robust protection of its waters, wetlands, and coastal areas. (28)

RESPONSE TO COMMENTS 6 AND 7: Over the past eight years, the Department's rulemaking efforts in its land use rules (the CZM Rules, FWPA Rules, and the FHACA Rules) have significantly strengthened protection of human health, safety, and the environment. Improvements include changes made in response to lessons learned as a result of Superstorm Sandy to require that development only occur based upon the most recent available flood elevation information, and to encourage the use of living shorelines and other nature-based methods to stabilize and restore shorelines and improve the resiliency of coastal communities to storms and flooding. Other changes included increased protections for riparian zones and alignment of the building standards in the FHACA Rules with those in the Uniform Construction Code (UCC) to ensure buildings in V zones and coastal A zones are properly elevated. In addition to these amendments that address specific health, safety, and environmental protection issues, the Department has made changes that align the rules governing the permitting processes of all three programs administered by the Division of Land Use Regulation to the extent the respective enabling statutes allow in a uniform order and format.

Through its rulemakings, the Department recognized that development and redevelopment in the State must adapt to changing conditions, such as projected increases in storms and sea level. The 2013 emergency amendments to the FHACA Rules ensure that the best available flood elevation data is used to determine the flood hazard area design flood elevation for a given site, including the Federal Emergency Management Agency's advisory flood maps

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and subsequently released preliminary maps for New Jersey's coast, which include revised A- and V-zone limits (see 45 N.J.R. 360(a); 1104(a)), while amendments to the CZM Rules adopted herein incorporate these changes into the CZM Rules through the new definition of "FEMA flood mapping" and clarify the definition in the FHACA Rules to directly refer to V zone and coastal A zone limits. Recent amendments to definitions and building standards in the FHACA Rules to address discrepancies in elevation requirements, flood-proofing standards, and standards for construction in V zones and coastal A zones between the FHACA Rules and the UCC ensure that the building requirements under the FHACA Rules (which are also applied to permit decisions under the CZM Rules) are at least as stringent as the UCC standards in all circumstances (see 48 N.J.R. 1014(a) and 49 N.J.R. 2246(a)).

The amendments adopted in the 2013 coastal emergency rulemaking promote coastal smart practices by removing regulatory obstacles to build living shorelines (see 45 N.J.R. 1141(a); 1696(a)). Living shorelines are a shoreline management practice that addresses the loss of vegetated shorelines and habitat in the littoral zone by providing for the protection, restoration, or enhancement of these habitats. This is accomplished through the strategic placement of vegetation, sand, or other structural and organic materials. By encouraging living shorelines, the Department is both protecting the State's citizens from storm events and flooding while enhancing its ecological systems by creating more wetland and shallow habitat.

The 2016 and 2017 amendments to the FHACA Rules (see 47 N.J.R. 1041(a); June 1, 2015 and 48 N.J.R. 1067(a), June 20, 2016; and 48 N.J.R. 1014(a); June 20, 2016 and 49 N.J.R. 2246(a), July 17, 2017) reduced unnecessary and unintentional regulatory burdens, added appropriate flexibility, provided better consistency with Federal, State, and local standards, and

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addressed implementation issues that have arisen since the adoption of the 2007 rules. The amended rules recognize the substantial hazards posed by persistent flooding, increasingly severe weather events, and impaired water quality in New Jersey, which threaten public health and safety, property and property values, economic sustainability, and the environment and remain the most stringent Statewide flood mitigation and stream corridor protection standards in the nation and meet all State and Federal requirements for water quality. The amendments adopted in that rulemaking promote smarter development, habitat and riparian zone restoration, and environmental enhancement activities, such as daylighting streams and the construction of terrestrial passages within bridges and culverts to address habitat fragmentation. In cases where development within a flood hazard area or riparian zone is unavoidable, the FHACA Rules ensure that public health, safety, and welfare, and the environment, are safeguarded while improved regulatory processes allow the Department to concentrate its resources on projects and activities that represent significant potential risks to these regulated areas.

The amendments adopted herein do not significantly change the Department's regulation of activities in wetlands, including mapped coastal wetlands regulated under the CZM Rules or freshwater wetlands regulated under the FWPA Rules. The recently adopted amendments to the FWPA Rules similarly do not encourage wetlands disturbance, but rather maintain the stringent protections for freshwater wetlands, transition areas, and State open waters while making administrative and procedural changes to improve the Department's freshwater wetlands permitting program. Some amendments, such as amendments to freshwater wetlands general permit 16, serve to encourage the creation, restoration, or enhancement of water quality and habitat functions and values. While in some cases adopted amendments provide more flexibility,

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increasing flexibility is not equivalent to creating loopholes to avoid the protective requirements of the FWPA Rules. For example, the previously adopted amendments add flexibility for determining a mitigation alternative by simplifying the mitigation hierarchy while also continuing to ensure that mitigation fully compensates for lost wetlands functions and values. The FWPA Rules continue to provide for minimization of impacts to the State's freshwater wetlands and State open water resources, and continue to set a high bar for development in and around wetlands. The amendments to the CZM Rules and FWPA Rules adopted herein include relatively minor changes to clarify requirements and achieve the alignment of the Department's land use rules where the enabling statutes allow, continuing the transformation effort from the adoption of comprehensive changes to the FWPA Rules at 49 N.J.R. 3849(a).

8. COMMENT: Proper permitting processes are essential to the preservation of natural resources and the safety of New Jersey's residents. Thoughtful coastal permitting allows development to occur without significant adverse impacts to the State's watersheds. Recently, storm surges and rising sea levels have wreaked havoc across New Jersey, including coastal areas of the Pinelands National Reserve. Certain aspects of the rule proposal, including amendments concerning development in coastal high hazard areas, disturbance limits for riparian zone vegetation, dune creation and maintenance, and the application of herbicide, are short sighted and fail to capture the gravity of impending situations. (39)

RESPONSE: The coastal land and water areas of New Jersey are diverse. The CZM Rules follow the statutory requirements to address a wide variety of land and water types, current and potential land and water uses, and natural, cultural, social, and economic resources in the coastal

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zone. The CZM Rules and amendments adopted herein strike a balance among various conflicting, competing, and contradictory local, State, and national interests in coastal resources and in uses of coastal locations. This approach reflects the reality that coastal management involves consideration of a broad range of concerns.

While the adopted rules allow for the construction of certain development within coastal high hazard areas in Atlantic City and within special urban areas in the Hudson River Waterfront area if the development meets the requirements of the UCC and Federal flood reduction standards, these amendments are not anticipated to cause a major increase in development in these already intensively-developed areas. In addition, the adopted rules add a new definition of “FEMA mapping,” which replaces the previous definition of the term “FIRM.” The new definition requires the use of the best available data in determining if a site is located within a V zone. The definition of “FEMA mapping” in the FHACA Rules is amended to more clearly reference V zones and to match the CZM definition. The use of the best available data is protective of public health, safety, and welfare and will better protect people and property from the negative impacts of flooding and coastal storms.

With reference to the commenter’s concerns about riparian zone disturbance, as explained in introductory sections above, the Department has determined not to adopt the proposed amendments relating to trails and multi-use paths and to re-engage stakeholders to obtain their input regarding the construction of trails and boardwalks and multi-use paths within the coastal zone, in riparian zones and flood hazard areas, and in freshwater wetlands and transition areas.

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The CZM rules have specifically addressed beach and dune maintenance since 1994, and contain a general permit for certain activities on a beach or dune. As explained in the Response to Comment 35, the Department has amended the title of the general permit to reflect the types of activities authorized under the general permit. In addition, new N.J.A.C. 7:7-6.2(d) is intended to ensure that beach and dune maintenance activities conducted on an engineered beach and/or dune do not adversely affect the beach and/or dune template. As explained in the rationale to the dunes rule, N.J.A.C. 7:7-9.16, engineered dunes are designed to a specific height, width, slope, and length, in accordance with a dune design template in order to provide shore protection and/or storm damage reduction benefits. The new subsection helps ensure that the dune template, and accordingly, the protective functions provided by the dune are maintained including through compliance with the Operation and Maintenance Manual if the dune or beach is part of a Federal or State project. Engineered beaches and dunes are specifically designed for shore protection; activities that would negatively affect the design template are not authorized under this permit. Additionally, the Department has added protections for State- and/or Federally listed threatened or endangered species through the addition of new N.J.A.C. 7:7-6.2(e). This provision requires that the activity comply with any applicable management plan for protection of State-listed and Federally listed threatened or endangered species and/or the endangered or threatened wildlife or vegetation species habitat rule, N.J.A.C. 7:7-9.36.

Because controlling invasive species is important to maintaining the health of various ecosystems, the Department has adopted a new freshwater wetlands general permit, a new flood hazard permit-by-rule, and a new flood hazard general permit to authorize the limited application of herbicides in freshwater wetlands and riparian zones for invasive species control. The permits

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require that the activity cannot destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species; and cannot jeopardize the continued existence of any local population of a threatened or endangered species. The permits also require the activities be conducted pursuant to an aquatic use permit issued by the Department's Bureau of Licensing and Pesticide Operations.

Pesticides (a broad category that includes herbicides) approved for use in the aquatic environment have been designed and tested to minimize impacts on that environment. As a condition of an aquatic pesticide permit, all applicators are required to contact appropriate Department programs, including the Bureau of Surface Water Permitting, concerning discharges. Also, the signature and certification by the applicant on an application for an aquatic pesticide permit holds them responsible for being knowledgeable of all aspects of the site, before, during, and after any aquatic pesticide application. Accordingly, the requirement that the activities conducted under the adopted permit-by-rule and general permits be conducted pursuant to an aquatic pesticide permit ensure that adverse impacts to riparian zones and freshwater are minimized. Additionally, any herbicide application adjacent to Category One waters must be reviewed by the Department via an individual permit application to ensure that the activities under the permit-by-rule and general permits will not adversely affect water quality or aquatic life as these are the most pristine waters in the State.

In summary, the adopted amendments are part of the Department's continuing effort to ensure that the Department's land use rules are protective of human health, safety, and the environment. Other parts of this effort are highlighted in the Response to Comments 6 and 7. The amendments that have been made to the rules, including those referenced above, reflect

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incorporation of the best available information into decision making in addressing environmental concerns, including those created by changing climate conditions. They also address various environmental concerns, including control of invasive species and protection of threatened and endangered species. The rules, as amended, help to preserve the State's natural resources while also protecting the health and safety of New Jersey's residents.

Stakeholder Process

9. COMMENT: The Department's utilization of the stakeholder process in the development of the proposed amendments, particularly in developing the filled water's edge and scenic resources and design amendments, is appreciated. (14)

10. COMMENT: The Department's stakeholder engagement efforts associated with revisions to the CZM Rules are appreciated. (42)

11. COMMENT: The Department's ongoing efforts to align the land use permitting programs and respond to stakeholder input are commended. (36)

RESPONSE TO COMMENTS 9 THROUGH 11: The Department acknowledges these comments in support of the rules.

12. COMMENT: The New Jersey Association of Floodplain Managers (NJAFM) was not an invited stakeholder for the proposed amendments, but has a considerable stake in the outcome of the rulemaking due to its repercussions on floodplain management in New Jersey. (28)

RESPONSE: A representative from NJAFM attended meetings of the Adaptation and V Zone stakeholder subcommittee held on October 28, 2015 and February 22, 2016. Other stakeholder

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meetings borne out of the September 8, 2014, coastal stakeholder meeting and the comments submitted on the 2014-2015 rulemaking consolidating the coastal rules into a single chapter with amendments were focused on: coordination with the State Plan, filled water's edge, threatened and endangered species habitat, critical wildlife habitat, the dredging technical manual, the Long Branch Redevelopment Zone Permit, and docks. Stakeholders were also convened to discuss high rise structures and scenic resources. As the stakeholder process is intended to foster a thorough exchange of ideas on the particular topic addressed by each subcommittee to inform potential rulemaking on that topic, the Department attempted to hold stakeholder subcommittee meetings that included those interests most likely to be impacted by the issue or issues discussed and participants with unique perspectives on each topic. The Department believes that the appropriate interests were invited to participate in the various subcommittee meetings. For those interested in the discussions at a subcommittee to which they weren't invited, recordings of all stakeholder meetings and the attendance sheets are available from the Department's website at <http://www.nj.gov/dep/workgroups/past.html>.

V zones (Coastal High Hazard Areas)

Coastal High Hazard Areas (N.J.A.C. 7:7-9.18)

13. COMMENT: The proposed amendments to N.J.A.C. 7:7-9.18 will allow more fill and building in flood hazard and environmentally sensitive areas. The Department has proposed these changes to benefit private developers over what is best for the people of New Jersey. Facing overdevelopment and sea level rise, the Department should be moving people away from

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flood-prone areas. New Jersey needs to develop a comprehensive approach for resiliency and coastal planning including buyouts, elevating homes, and mitigation. (16 and 41)

14. COMMENT: Risk analyses demonstrate that coastal communities will be increasingly inundated or damaged by chronic flooding as sea levels rises. If efforts are not made to respond to these increasing impacts, many areas will no longer be viable, and property values and tax revenues will decline dramatically. Projections indicate that Atlantic City will experience increased flooding in the future from sea-level rise. Under the highest projections, over 25 percent of Atlantic City's land area will be chronically inundated by 2045, while even the lowest risk scenario shows a third of the city's land area experiencing disruptive flooding by 2100. Municipalities along the Hudson River face similar risks. However, the rule amendments proposed do not account for projected sea level rise or climate change. Failing to take these factors into account will continue to put people and property at risk. Recent storms in Florida and Texas had such intense impacts to a large extent because development was permitted in areas at imminent risk. The proposed amendments will enable the continuation of risk-prone development patterns in New Jersey. (30)

15. COMMENT: Proposed amendments to N.J.A.C. 7:7-9.18 allow residential and commercial development in coastal high hazard areas over existing piers or pilings in the Hudson River Waterfront Area and Atlantic City. Based on the research of a number of organizations and institutions working to characterize and communicate growing coastal risks of sea level rise and coastline subsidence, the Department should reverse its determination that development in coastal high hazard areas is acceptable and should be permitted. (30)

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16. COMMENT: Based on past experiences with Superstorm Sandy, current sea level rise, and the increase in severe weather events, the Department should not adopt amendments based upon the idea that development in high-hazard areas is acceptable and should be permitted. (44)

17. COMMENT: Existing N.J.A.C. 7:7-9.18(c) states, “In general, commercial development is discouraged in coastal high hazard areas.” In the proposed rules, this statement is replaced with language allowing water-dependent development and amusements, as well as development throughout special urban areas. As the existing rules state, “Coastal high hazard areas are flood prone areas subject to high velocity waters ... and areas within 25 feet of oceanfront shore protection structures.” It seems prudent to discourage development in such high-risk areas, and to do otherwise is to permit dangerous practices. (39)

18. COMMENT: The expiration date of the NFIP has been extended in response to recent hurricanes. This extension allows more time for Congress to debate reforms to the program. One acknowledged shortcoming of the NFIP is that it has not proactively addressed the problem of continuing to insure repetitive-loss properties, which in turn inadvertently encourages rebuilding and development in flood-prone areas. Some proposed NFIP legislation before Congress seeks to address this deficiency. However, the proposed amendments to N.J.A.C. 7:7-9.18 take New Jersey in the opposite direction and perpetuate this problem. (30)

19. COMMENT: The Department is urged to provide guidance and assistance to coastal municipalities to encourage land use practices that respond to sea level rise risks by shifting development and redevelopment out of harm’s way by limiting or prohibiting it in high risk areas. Proposed N.J.A.C. 7:7-9.18 will, in contrast, encourage local officials to permit development in at-risk areas to maximize economic return. While generating tax revenue is

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necessary to pay for essential services, the short-term return from tax-generating development in high risk flood zones will not compensate for the recurring and future costs of recovery and rebuilding after storms, nor for the threat to public health and safety posed by such development. (30 and 44)

RESPONSE TO COMMENTS 13 THROUGH 19: The amendments are intended to facilitate consistency between the CZM Rules and the FHACA Rules, the UCC, and Federal flood reduction requirements at 44 CFR Part 60. N.J.A.C. 7:7-9.18(b) prohibits residential and commercial development in coastal high hazard areas unless it is provided for under N.J.A.C. 7:7-9.18(c), (d), (e), or (f). These narrow exceptions to the prohibition on development in coastal high hazard areas seek to limit such development to areas that are already densely developed and ensure any such development is consistent with other State and Federal requirements. The requirements in the UCC and in the Federal flood reduction standards ensure appropriate development occurring in these areas is designed and constructed to withstand the force of waves and is properly elevated to alleviate flooding impacts. These requirements also contain provisions for the location of habitable rooms within structures to keep people safe from flood impacts, which are echoed in the FHACA Rules.

The Department recognizes that development and redevelopment in the State must adapt to changing conditions, such as projected increases in storms and sea level. The 2013 emergency amendments to the FHACA Rules ensure that the best available flood elevation data is used to determine the flood hazard area design flood elevation for a given site, including the Federal Emergency Management Agency's advisory flood maps and subsequently released preliminary maps for New Jersey's coast, which include revised A- and V-zone limits (see 45 N.J.R. 360(a);

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1104(a)). Amendments to the CZM Rules adopted at this time incorporate these changes into the CZM Rules through the new definition of “FEMA flood mapping” and clarify the definition in the FHACA Rules to directly refer to V-zone and coastal A-zone limits. Recent amendments to definitions and building standards in the FHACA Rules to address discrepancies in elevation requirements, flood-proofing standards, and standards for construction in V zones and coastal A zones between the FHACA Rules and the UCC ensure that the building requirements under the FHACA Rules (which are also applied to permit decisions under the CZM Rules) are at least as stringent as the UCC standards in all circumstances (see 48 N.J.R. 1014(a); 49 N.J.R. 2246(a)).

The Department has ongoing efforts to assist communities in planning for long-term resilience in the face of coastal hazards. Since 2011, the New Jersey Coastal Management Program (NJCMP) has developed two assessment tools to ensure that coastal communities have consistent and comprehensive guidance to assess their vulnerability and capacity for resilience. The Department, through the NJCMP, has also developed the Resilient Coastal Communities Initiative to further develop these tools into a community-based planning program and has administered a Sustainable and Resilient Communities Grant Program (see 47 N.J.R. 299(b)) to fund a comprehensive planning approach at the municipal level. These initiatives provide the necessary tools, guidance, and technical assistance for coastal resilience planning. Additional outreach efforts by the Department’s Office of Coastal and Land Use Planning to inform coastal communities of their risks from coastal hazards and to facilitate the development of natural and nature-based responses to those hazards have been awarded the Excellence Award for Community Engagement/Education by the New Jersey Chapter of the American Planning

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Association. (see http://www.state.nj.us/dep/newsrel/2017/17_0102.htm). For more information on these and other coastal resiliency efforts, see <http://www.nj.gov/dep/cmp/>.

Following Superstorm Sandy, the Department, working with its partners and with funding from the National Oceanic and Atmospheric Administration, has developed the Resilient Coastal Communities Initiative to further implement a community-based planning program that will identify and expand the use of existing management tools while continuing to explore and apply new approaches to coastal hazards. These efforts are intended to inform more effective Department policies, regulations, and planning. In addition to planning assistance, the State also implements other techniques, such as the use of dredged material to nourish beaches and the establishment of living shorelines, to make communities more resistant to future severe weather events.

The Department also recognizes that some previously approved developments are in areas that are too vulnerable to storms and flooding and may never be adequately protected. Following Superstorm Sandy, the State, through its Blue Acres program allocated approximately \$365 million in recovery funding toward purchasing homes from willing sellers in repetitive flood loss and flood-prone areas, and converting the land to open space. The program removes families from harm's way, while also creating natural buffers against future severe weather events. August 14, 2017, marked the Blue Acres program's 600th acquisition. To date, the Blue Acres Program has been active in 14 municipalities: Sayreville, South River, Woodbridge, Old Bridge, and East Brunswick in Middlesex County; Manville in Somerset County; Pompton Lakes in Passaic County; Newark in Essex County; Rahway and Linden in Union County; Lawrence and Downe in Cumberland County; New Milford in Bergen County; and Ocean in

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Monmouth County. Over the past five years, the Blue Acres Program and its acquisition practices have earned national recognition, including awards from FEMA and the Department of Housing and Urban Development (HUD). Of the nearly 900 offers made by the Blue Acres Program, 678 have already been accepted. More than 460 homes have been demolished, creating open space that will mitigate flooding and protect communities. The program has also successfully facilitated short sales or payoff approvals with lenders for 64 properties for which owners owed more on their mortgages than the appraised value of the home. This resulted in debt forgiveness of more than \$4.5 million, enabling more families to move out of harm's way.

The Department is also currently engaged in a comprehensive study with the USACE to evaluate strategies to reduce flooding from back bays and other coastal waterways.

20. COMMENT: Technical guidance referenced in the New Jersey Building Subcode (Section 1612) references ASCE 24 (Flood Resistant Design and Construction), which states that new construction and substantial improvements within Coastal High Hazards Area and Coastal A Zones shall be located landward of the reach of mean high tide. The proposed amendments to N.J.A.C. 7:7-9.18 open the door for new construction on piers by allowing the possibility for new or existing piers with buildings (a non-water dependent use) to be regulated as "landward of the reach of the mean high tide" even if they are within a coastal high hazard area. (28)

RESPONSE: In general, both residential and commercial development is prohibited in coastal high hazard areas with limited exceptions.

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In accordance with N.J.A.C. 7:7-9.18(b) and (c), residential development in coastal high hazard areas is prohibited unless it is located landward of the mean high water line and satisfies other requirements specified in N.J.A.C. 7:7-9.18(c).

Hotel and commercial development in coastal high hazard areas is limited to Atlantic City and special urban areas within the Hudson River Waterfront Area. Development in these areas must comply the Atlantic City rule, and the special urban area and Hudson River Waterfront rules, as applicable, which include standards designed to ensure public safety (see, for example, the requirement in the Atlantic City rule at N.J.A.C. 7:7-9.47(c)3 that development on piers include an evacuation plan approved by the Atlantic City Office of Emergency Management). The protections contained in the Atlantic City rule, N.J.A.C. 7:7-9.47, and those provided by the special urban area and Hudson River Waterfront rules, N.J.A.C. 7:7-9.41 and 9.46, respectively, remain unchanged by this rulemaking.

In all cases, including water dependent development and amusements, N.J.A.C. 7:7-9.18 requires development in coastal high hazard areas to comply with the Federal flood reduction standards at 44 CFR Part 60 and the UCC.

Finally, even if all requirements of N.J.A.C. 7:7-9.18 are met, any proposed development in a coastal high hazard area would continue to need to comply with all other applicable provisions of the CZM Rules and the FHACA Rules (in accordance with N.J.A.C. 7:7-9.25, development in flood hazard areas, which include areas defined or delineated as a V zone by FEMA, must meet the design and construction standards of the FHACA Rules at N.J.A.C. 7:13 in order to be approved under the CZM Rules; see N.J.A.C. 7:7-9.25(f)).

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The Department will not approve development that does not satisfy the above referenced standards.

21. COMMENT: The report *Flood Hazard Risk and Compliance Concerning Development on Piers and Platform, City of Hoboken*, Hudson County, NJ, October 2013, which evaluated development on piers and platforms within coastal high hazard areas along the Hudson River in the City of Hoboken determined that “these areas are especially dangerous to public safety.” The report also stated that sea level rise projections demonstrate that the risk of building on piers in coastal high hazard areas will only increase with time. The report emphasized the threat to public health and safety that such development poses, including the difficulty of evacuation of buildings surrounded by water and the safety of first responders exposed to polluted floodwaters. For these reasons, amendments to allow development on piers in V and VE zones should not be adopted. (30 and 44)

22. COMMENT: Building on piers in coastal high hazard areas endangers the lives of emergency services personnel obligated to respond to disaster events. Such development also increases costs for recovery and rebuilding when damaged by storms, which have increasing probability of both occurrence and intensity as sea levels continue to rise along the New Jersey coast. The proposed amendments to N.J.A.C. 7:7-9.18 are, therefore, opposed. (30)

RESPONSE TO COMMENTS 21 AND 22: The adopted amendments are intended to promote consistency between the CZM Rules and other State and Federal standards and do not allow development on piers that would violate the UCC or Federal flood reduction standards. As indicated in the Response to Comment 20, residential development in coastal high hazard areas,

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including any development on piers in these areas, is precluded by the rules, unless it is located landward of the mean high water line. While hotel and commercial development in coastal high hazard areas could potentially occur on piers, as indicated in the Response to Comment 20, such development in coastal high hazard areas, including any development on piers, is limited to Atlantic City and special urban areas within the Hudson River Waterfront Area and will only be allowed if it complies with the UCC or the Federal flood reduction standards at 44 CFR Part 60, the Atlantic City rule at N.J.A.C. 7:7-9.47, the special urban area rule at N.J.A.C. 7:7-9.41 and the Hudson River waterfront area rule at N.J.A.C. 7:7-9.46, or any other requirement of the CZM or FHACA Rules.

The adopted rules encourage the concentration of development in areas with current high-density development rather than allowing scattered or sprawled new development in coastal high hazard areas everywhere in the State in recognition of the strain such development could put on local emergency response personnel. In addition to the coastal high hazard area rule, other rule provisions ensure such development does not result in elevated risk to public health, safety, and welfare. For example, N.J.A.C. 7:7-9.47(c)3 requires development proposed on piers in Atlantic City to have an evacuation plan approved by the Atlantic City Office of Emergency Management. The FHACA Rules, which must be met for an applicant to be issued a coastal permit to construct a building, additionally contain building standards and access requirements that facilitate emergency personnel's access to buildings in the event of a flood. The UCC and Federal standards, as well as the FHACA Rules, contain numerous requirements to ensure the safety of people and property in flood prone areas.

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23. COMMENT: Amendments to N.J.A.C. 7:7-9.18, in the context of the State's prior approvals process, put an undue burden on a local floodplain administrator or municipal construction code enforcement official in reviewing an application and assessing the adequacy to issue a permit for a project that has a Department permit for development in a coastal high hazard area, but would jeopardize a municipality's standing in the NFIP and/or subject additional people and property to flood risk. The Department should be consistent with Federal and State regulations that prohibit construction on piers or platforms in V zones and take a firmer stand against permitting high rises landward of the coastal A zone and on piers or platforms, rather than facilitating these developments. (28)

24. COMMENT: The notice of proposal summary asserts that any development permitted in accordance with N.J.A.C. 7:7-9.18, as proposed to be amended, must comply with the UCC and Federal flood reduction standards. However, the proposed amendments to N.J.A.C. 7:7-9.18 are inconsistent with General Rule 6 of the NFIP and UCC. This provision places local building or elected officials in the difficult, and possibly untenable, position of deciding whether to allow a proposed development that has received a State permit but might not conform to the stated standards. (30 and 44)

25. COMMENT: Proposed amendments at N.J.A.C. 7:7-9.18 that would allow for construction of residential development in coastal high hazard areas on piers or platforms in the Hudson River Waterfront Area are strongly opposed. A bill proposing similar conditions was vetoed by Governor Christie in 2013, who cited possible ramifications of suspension of National Flood Insurance Program (NFIP) participation and the loss of Federal flood insurance policy coverage in Hudson River municipalities. Allowing this type of construction, even subject to Federal flood

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reduction standards promulgated in local ordinance and the New Jersey Uniform Construction Code administered at the municipal level, subjects people and property to flooding. (28)

26. COMMENT: General Rule 6 of the NFIP and UCC includes major restrictions on building over water in V zone-designated areas. The proposed amendments to N.J.A.C. 7:7-9.18 are inconsistent with current Federal rules and State building codes. If a municipality approved development in these areas, it would risk ineligibility to participate in the NFIP, which would jeopardize its ability to insure assets against future flood damage. This was the reason for the Governor's veto in August 2013, of a very similar rule amendment. Furthermore, if a town were to allow development in risk-prone areas it will likely be eliminated from FEMA's Community Rating System program, a voluntary program that encourages communities to exceed the minimum NFIP requirements incentivized by discounted flood insurance premium rates. (30)

RESPONSE TO COMMENTS 23 THROUGH 26: The adopted amendments are not inconsistent with General Rule 6 or any other provision of the NFIP requirements. General Rule 6, as of the April 2017 version of the NFIP Flood Insurance Manual, states at section C that "Buildings newly constructed or substantially improved on or after October 1, 1982, and located entirely in, on, or over water or seaward of mean high tide are ineligible for coverage." However, the adopted rules do not permit such development. N.J.A.C. 7:7-9.18(c) specifies that residential development is conditionally acceptable in coastal high hazard areas when it is landward of the mean high water line and additionally meets the requirements of N.J.A.C. 7:7-9.18(c)1 or 2, which both require compliance with the Federal flood reduction standards at 44 CFR Part 60 and the UCC. N.J.A.C. 7:7-9.18(d) establishes that hotel and commercial development is conditionally acceptable only in Atlantic City or in special urban areas within the Hudson River

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Waterfront Area, provided the applicable special area rules are met and the proposed development complies with 44 CFR Part 60 and the UCC. Finally, N.J.A.C. 7:7-9.18(e) provides for water dependent development and amusements in coastal high hazard areas provided the proposed development complies with 44 CFR Part 60 and the UCC. The adopted rules do not imply that the Department would approve any development that would violate a general rule of the NFIP, the Federal flood reduction standards at 44 CFR Part 60, or in any way jeopardize a community's participation in the NFIP. General Rule 6 of the NFIP reflects the requirements of 44 CFR Part 60; compliance with these Federal flood reduction standards will ensure compliance with General Rule 6 and other NFIP rules.

The bill vetoed by Governor Christie in 2013, directed the Department to permit development on existing piers over large rivers in qualifying municipalities, provided that the municipality has adopted an ordinance that allows for such development. The adopted rules do not contain such a blanket approval; the limitations on the type and location of development and requirements to comply with 44 CFR Part 60 and the UCC ensure that development that would jeopardize a community's participation in the NFIP is not approved under the CZM Rules.

27. COMMENT: The proposed changes to allow certain development in coastal high hazard areas, especially in the Hudson Riverfront area, that meets the UCC and Federal flood reduction standards are supported. This provision should apply to both V zones and coastal A zones. The rule should be clarified on adoption to state that an applicant may demonstrate compliance with the UCC and Federal flood reduction standards by submitting a certification from a professional engineer that the project as designed is in compliance with these requirements. Alternatively, the

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Department could require that State permits for work in coastal high hazard areas be issued subject to the issuance of an approval from the local construction code official. The Department should not be the agency to determine whether a project design meets the UCC; this is the responsibility of local code officials under the oversight of the Department of Community Affairs. (42)

RESPONSE: It is the responsibility of the applicant to demonstrate that the proposed development complies with the UCC and Federal flood reduction standards. Both means suggested by the commenter could be submitted by the applicant to the Department for its evaluation as part of the applicants demonstration that the proposed development complies with the UCC and Federal Flood Reduction standards.

“FEMA Flood Mapping” Definition (N.J.A.C. 7:7-1.5 and 7:13-1.2)

28. COMMENT: It is believed that the Department’s intention in amending the definition of “FEMA Mapping” in the CZM Rules is to use the most updated yet conservative mapping. However, the proposed language suggests that the most conservative map must be used even when this has been superseded by more recent mapping. This idea is opposed. For example, the New Jersey advisory maps issued post-Sandy have been superseded by FEMA’s proposed preliminary maps; FEMA no longer supports the advisory maps because they were found to be overly conservative in many cases. In some areas of Monmouth County, the currently proposed preliminary FIRMs have removed areas from the VE zone and lowered the base flood elevation from the adopted maps. The proposed rule should be clarified to indicate that “FEMA Flood

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Mapping” refers to the most conservative of the currently supported, most recently proposed version of FEMA mapping versus the adopted maps, but not older advisory maps that were superseded. (14)

29. COMMENT: The proposed definition for “FEMA Flood Mapping” suggests that the most conservative map must be used. The definition should be clarified to indicate that this refers to the most conservative of the adopted maps and the currently supported, most recently proposed FEMA maps, but not to older advisory maps that were superseded by the proposed maps. For instance, if the advisory maps have been superseded by preliminary maps, then the more conservative of the preliminary map or the previously adopted FIRM should be used, and the advisory maps should not be considered. (19 and 36)

RESPONSE TO COMMENTS 28 AND 29: In accordance with the definition of “FEMA flood mapping” in the CZM Rules at N.J.A.C. 7:7-1.5 and in the FHACA Rules at N.J.A.C. 7:13-1.2, the information to be utilized is that adopted as part of the most recently effective FEMA Flood Insurance Study (dated on or after January 31, 1980), “or any more recent advisory or proposed (preliminary) flood mapping, if the more recent advisory or proposed (preliminary) mapping results in higher flood elevations, wider floodway limits, or greater flow rates than depicted in the most recent effective FEMA Flood Insurance Study, or indicates a change from an A zone to a V zone or coastal A zone.”

As indicated, when amendments were first made to the FHACA Rules by emergency adoption and concurrent proposal of amendments in 2013 after Superstorm Sandy to bring consideration of FEMA advisory and preliminary mapping into the process of determining appropriate flood elevations and related requirements, the Department’s intent is that the best

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available flood elevation data be used to determine the flood hazard area design flood elevation for a given site to ensure that the requirements specified in the Department's rules remain protective of human health, safety, and welfare, as well as the environment (see 45 N.J.R. 1104(a)). Accordingly, while advisory base flood elevation (ABFE) mapping and preliminary mapping has not reached the final "effective" stage in the FEMA mapping process, the definition of "FEMA flood mapping" reflects that, if such mapping exists and results in a higher, more protective flood elevation than that reflected in the effective Flood Insurance Study, the information from the advisory mapping or preliminary mapping will be utilized.

Where advisory mapping has been released by FEMA, the next step toward establishing or updating an effective Flood Insurance Study and publishing a FIRM is the release of information to the public in the form of preliminary mapping for public comment. Accordingly, where both advisory and preliminary mapping is outstanding for the area that is the subject of an application, the preliminary mapping would be the data the Department relied upon if it results in higher flood elevations, wider floodway limits, or greater flow rates than depicted in the most recent effective FEMA Flood Insurance Study. Where a preliminary map is published, the ABFE mapping is superseded and will not be considered in the Department's review of permit applications. Accordingly, where a preliminary map has superseded ABFE mapping, the Department will compare the flood elevations, floodway limits, flow rates, and V zone and coastal A zone boundaries between the preliminary map and the effective FIRM and then apply the most conservative mapping to the permit decision. This intent was reflected in the adoption of the concurrent proposal to the FHACA Rules emergency adoption. Particularly, in response to comments about the advisory ABFE mapping, it was indicated that "the Department has found

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that the ABFEs represent the best available and most accurate flood data. As such, the Department determined that it is the most protective of public health, safety, and welfare to allow for the use of the current ABFEs for the construction of new or elevated buildings, and for substantially damaged buildings that are being repaired, *unless and until better flood data is made available*. The purpose of this rulemaking is to ensure that the best available flood mapping is used by New Jersey residents and it contains provisions that provide for the use of FEMA's updated flood mapping as it becomes available.” (Response to Comments 2 through 5, 45 N.J.R. 1106, emphasis added).

30. COMMENT: Efforts by the Department to promote safe and responsible development along the Hudson River Waterfront area are supported. However, in light of the proposed definition of “FEMA flood mapping,” clarification is needed. The proposed definition reflects the Department’s determination that, considering the detailed analysis conducted by FEMA, FEMA advisory or preliminary mapping constitutes the best available flood data. The effort to apply the best available data to Department determinations is supported, but FEMA’s initial advisory or preliminary mapping is not always the best available or most accurate flood data, and the application of initial preliminary mapping to Department determinations is not always appropriate, evidenced by the status of the preliminary FIRMs for Region II.

FEMA has acknowledged during New York City’s appeal of the preliminary FIRMs that preliminary mapping of the New York Harbor area, including the Hudson River Waterfront area, is clouded by two sources of error in mapping methodology, and has subsequently agreed to revise the 2015 preliminary FIRMs for the entire New York and New Jersey study area. FEMA

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has indicated that reductions in Base Flood Elevations and the extent of Special Flood Hazard Areas are likely in the Hudson River Waterfront area. However, the proposed definition of “FEMA flood mapping” would require the Department to rigidly apply the 2015 preliminary FIRMs in the Hudson River Waterfront area, despite the errors in mapping methodology that preclude them from being the “best available data.” Clarification as whether the proposed definition will allow the Department discretion in applying the 2015 preliminary FIRMs to the Hudson River Waterfront area and whether, during the multi-year FEMA map revision process, the Department will retain discretion to consider and apply more accurate flood data to application determinations. A strict application of the preliminary maps would result in the Department applying inaccurate flood data to Hudson River Waterfront area application decisions for at least the next two years. (25)

RESPONSE: Consistent with the intent to use the data that is most protective of people and property explained in the Response to Comments 28 and 29, the Department will utilize the best information available at the time a determination is made under its land use rules, including both the FHACA Rules and the CZM Rules in order to protect people and property from the negative impacts of flooding. The Department acknowledges the concerns expressed with reference to the unique situation present in the New York Harbor and Hudson River waterfront area. Although the final flood elevations that will ultimately be incorporated into a new effective FIRM for this area remain to be determined, as indicated in the original proposal, it has become clear that the currently effective FIRM for this area is outdated and is not the “best available data.” As a result, continued use of the outdated information would result in construction of new structures or reconstruction of substantially damaged structures using inaccurate flood elevations, creating

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a potentially significant detriment to public health, safety, and welfare during flooding events.

Pending the final determination of base flood elevations and V zone limits, the Department has determined that, where the preliminary map results in higher flood elevations, wider floodway limits, and greater flow rates, or indicates a change from an A zone to a V zone or coastal A zone, as compared to the current effective mapping, responsible floodplain management dictates the use of the preliminary mapping to determine development standards as set forth in the adopted definition of “FEMA mapping.” In accordance with the definition of “FEMA flood mapping” and as discussed above, a change in the information utilized need not await completion of the entire FEMA process resulting in an updated effective Flood Insurance Study; should FEMA issue either a new advisory map or updated preliminary mapping for this area prior to proceeding to adopting a final effective map, the Department will utilize that information when determining which standards apply to proposed development under the CZM and FHACA Rules. This approach is consistent with that taken by the City of New York where the city’s building code will continue to reflect the 2015 preliminary FIRMs to ensure that new buildings are better able to withstand flood risk from rising sea levels and coastal storm surge, and so that recovery from Hurricane Sandy can continue without interruption until new flood maps are developed that both more accurately reflect current flood risk and also provide an assessment of future climate conditions for long-term planning purposes (see <http://www1.nyc.gov/site/floodmaps/about/about-flood-maps.page>).

Dune Walkovers and Other Beach and Dune Development

Permit-By-Rule 23

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31. COMMENT: Regarding proposed N.J.A.C. 7:7-4.23, the summary stated that the rationale for using the referenced 2012 maps is that they are pre-Sandy and accurately show prior walkovers. Please clarify whether applicants can rely upon other definitive photography that clearly shows walkovers. (14 and 19)

32. COMMENT: For permit-by-rule 23 at proposed N.J.A.C. 7:7-4.23, the Department is requiring that the New Jersey 2012 High Resolution Orthophotography Maps be utilized to determine the existing number of dune walkovers since they predate Superstorm Sandy and show prior walkovers accurately. The proposed rule should be amended to allow applicants to rely upon other definitive photography that also show walkovers clearly. (36)

RESPONSE TO COMMENTS 31 AND 32: Permits-by-rule authorize only regulated activities that have minimal environmental impact both individually and cumulatively. Therefore, less regulatory oversight is needed for authorization of activities complying with the limitations applicable to each permit-by-rule. However, since there is no review by Department staff of activities authorized under permits-by-rule, there is no opportunity for an applicant to satisfy the requirements of the permit by showing that an alternate standard is met. As explained in the notice of proposal Summary, the Department has determined that construction of walkovers that existed prior to Superstorm Sandy in the number reflected on the New Jersey 2012 High Resolution Orthophotography will have minimal environmental impact, and that this imagery is sufficiently clear for applicants and the Department to determine compliance with the requirements of the permit-by-rule. Because permits-by-rule do not involve direct review by Department staff, the Department cannot accept alternative photography that clearly shows dune

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walkovers pre-Superstorm Sandy for purposes of determining qualification for authorization under permit-by-rule 23.

Under general permit 2, which authorizes at-grade walkovers that comply with N.J.A.C. 7:7-10.4(e) and (f), more than one walkover may be authorized at developments other than a single-family home or duplex if the applicant demonstrates that more than one walkover is necessary to adequately provide access from the development. Alternative imagery may be incorporated into this demonstration, because a general permit application is directly reviewed by Department staff. Accordingly, there is more flexibility in the requirements under a general permit than in permits-by-rule or general permits-by-certification; such flexibility is not appropriate for permit-by-rule 23.

General Permit 2 -- Activities on a Beach and Dune (N.J.A.C. 7:7-6.2)

33. COMMENT: The general permit for beach and dune activities authorizes “routine beach maintenance activities performed for emergency post-storm beach restoration and dune creation and maintenance activities.” This general permit allows for more beach replenishment projects that ultimately put people at risk during the next storm. (16 and 41)

RESPONSE: General permit 2 has always authorized a number of activities on a beach and dune subject to the requirements in N.J.A.C. 7:7-10, not just beach and dune maintenance activities. For the purposes of clarity, the Department, as part of this rulemaking, has amended the title of the general permit to be more reflective of the activities authorized under the general permit and specified the activities subject to the general permit. The proposed amendments by themselves do not allow for more beach replenishment projects.

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New subsection (d) was added to address beach and dune restoration and maintenance activities conducted on an engineered beach or dune to ensure that these activities do not adversely impact the beach and/or dune template. Engineered beaches and dunes are specifically designed for shore protection; activities that do not comply with the operation and maintenance procedures developed by the project engineers or that would otherwise affect the design template are not authorized under this permit. As explained in the notice of proposal Summary, the Operation and Maintenance Manual is developed as part of a Federal- or State-funded shore protection project and specifies the roles, responsibilities, and requirements for conducting and maintaining an engineered beach and/or dune project partially funded and constructed by the USACE.

Standards for Beach and Dune Maintenance (N.J.A.C. 7:7-10)

34. COMMENT: The proposed amendments to N.J.A.C. 7:7-10.4, which contains the standards applicable to dune creation and maintenance, reduce standards that encourage growth of dune grass. Specifically, the deletion of N.J.A.C. 7:7-10.4(e)4 and 5 runs counter to the goal of dune maintenance. While the notice of proposal Summary claims that frequently used walkovers do not need to support the growth of dune grass, not all walkovers are, in fact, frequently used, especially during the earlier parts of the growing season. Eliminating the preference for the use of unrolled sand fencing over planks and boards will lead to a reduction in dune grass growth. The same is true of eliminating the requirement to elevate any solid boardwalk walkovers, a standard that allows for sediment movement and moderate vegetation stabilization. Therefore, these provisions should be maintained. (39)

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RESPONSE: Typically, beach nourishment projects include the construction of engineered dunes and beach berms. These engineered dunes are designed to a specific height, width, slope, and length, in accordance with a dune design template and typically include the planting of vegetation. Preserving the correct beach and dune elevations is essential to maintain the protective functions of engineered beaches and dunes. The adopted amendments reflect that most walkovers will be located on engineered dunes. Because these dunes are designed to certain specifications, the placement of walkovers at-grade will not compromise the dune design template. In addition, many of these at-grade walkovers are seasonal and removed during the non-beach-going months, thereby allowing for the natural movement of the sand.

The preference for the use of unrolled sand fencing as a base for the at-grade walkover has been deleted because there are newer materials, such as stabilization mats, that are relatively easy to place and remove on a seasonal basis and are compliant with the Americans with Disabilities Act. As explained in the notice of proposal Summary, while the prior rule preferred the sand fencing option because it allowed growth of beach grass, it has been the Department's experience that frequently-used walkovers do not support the growth of beach grass. The dune area affected by the placement of an at-grade walkover is small and since the number of walkovers is limited under the various permits, with the limitations applicable to placement of these structures, it is not anticipated they will have a negative impact on the dune or dune vegetation.

Further, it has been the Department's experience that requiring a one-foot elevation for solid boardwalks does not aid in sand transfer, as the slight elevation above the dune allows sand to collect under the walkover, rather than pass under the walkover and allowing sand to move

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naturally across the dune. At-grade walkovers allow sand to transfer over the walkover itself rather than trapping sand underneath. Therefore, the requirement to elevate a solid boardwalk-type walkover one foot above the dune is unnecessary.

Filled Water's Edge (N.J.A.C. 7:7-9.23)

35. COMMENT: Proposed N.J.A.C. 7:7-9.23(e)5 should be modified to read “peculiar **or** exceptional.” Some of the examples provided of situations to which this provision applies meet one but not the other criteria. (14 and 19)

RESPONSE: The examples provided do not contradict this requirement. The Department intends N.J.A.C. 7:7-9.23(e)5 to address rare and unusual circumstances that would preclude the use of a filled water's edge site for a water dependent development. The Department's policy to reserve filled water's edge sites for water dependent development has not changed. The adopted amendments acknowledge that some specific circumstances may make water dependent development infeasible on certain sites, but are not intended to change the overall policy of encouraging the development of filled water's edge sites with water dependent development. The revision suggested by the commenters would inappropriately expand the scope of what is intended to be a narrow exception.

36. COMMENT: Proposed amendments to the filled water's edge rule to clarify factors considered in determining whether a water dependent use is feasible are supported. The Department is correct that the potential for water dependent uses is limited along the Hudson, Delaware, Raritan, and Passaic Rivers and in other urban areas. However, the Department should

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add economic viability of a water dependent use to the list of factors considered in proposed N.J.A.C. 7:7-9.23(d). (19)

RESPONSE: As explained in the Response to Comment 35, the Department does not intend to change the overall policy of encouraging the development of filled water's edge sites with water dependent development, but instead seeks to provide limited flexibility where site specific conditions make a water dependent development infeasible. The reference to the Hudson, Delaware, Raritan, and Passaic Rivers in the rationale is part of a discussion of the importance of protecting remaining future water dependent and maritime support services, which only further illustrates the Department's continued intent that such areas continue to be available for those uses unless it is clear that any such use is infeasible. The economic viability of a water dependent use is not appropriate to consider in this context. However, the adopted amendments include changes that will enhance the viability of water dependent uses at N.J.A.C. 7:7-9.23(d)3. The adopted amendment allows for the possibility of a mix of water dependent, water-oriented, and non-water dependent uses provided non-water related uses do not adversely impact either access to or use of the waterfront portion of the site; under the prior rules, this mix of uses was only acceptable on "large" filled water's edge sites of approximately 10 or more upland acres. In addition, N.J.A.C. 7:7-9.23(m) (recodified from prior N.J.A.C. 7:7-9.23(l) with no change in text) allows for the construction of a restaurant at a marina facility provided the requirements at N.J.A.C. 7:7-15.3(d)8 are met to ensure the restaurant does not interfere with marina services.

37. COMMENT: The Department should clarify that compliance with the Hudson River Waterfront Walkway requirements constitutes compliance with the filled water's edge rule. (42)

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RESPONSE: N.J.A.C. 7:7-9.23(h) (recodified without change from prior N.J.A.C. 7:7-9.23(g)) provides, “In waterfront areas located outside of the CAFRA area, the water dependent use may be a public walkway, provided the upland walkway right-of-way is at least 30 feet wide, unless there are existing onsite physical constraints which cannot be removed or altered to meet this requirement.” The Hudson River Waterfront area rule, at N.J.A.C. 7:7-9.46(e), requires all waterfront development to develop, maintain, and manage a section of the Hudson Waterfront Walkway, which complies with the Hudson Waterfront Walkway Planning and Design Guidelines (1984) and the Hudson Waterfront Walkway Design Standards (1989). The 1989 design standards require a minimum paved width of 16 feet. Therefore, strict compliance with the Hudson Waterfront guidelines does not in itself ensure compliance with the filled water’s edge rule.

38. COMMENT: The proposed amendments to N.J.A.C. 7:7-9.23, the filled water’s edge rule, are fully supported because the existing rule does not achieve its intended goals. Under the existing rule, the area within 100 feet of the bulkhead must be reserved for future water-dependent uses. However, few municipalities consider any type of development other than marinas to be water-dependent under their local zoning, and these filled water’s edge sites typically already include a marina. Therefore, why does the remaining waterfront portion of a site that already contains a marina also need to be reserved for a marina use? The 100-foot requirement also does not consider the fact that parcels come in different shapes and sizes. Mixed-use development is only permitted in this 100-foot area for sites that are 10 acres or more. However, only a few sites are this large, and they are not generally subject to this rule.

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Therefore, the existing rule essentially denies any kind of meaningful development for the remainder of most filled water's edge sites. One of the goals of the CZM Rules is to encourage marinas, but most marinas are seasonal operations and, to keep the marinas viable, the owners often need the additional income provided by other potential uses of the site, such as restaurant or residential development. The proposed rule changes, which evaluate these sites on a case-by-case basis to consider their shape and size, the necessity and viability of a water-dependent use, the neighborhood, and the local zoning, are terrific and should have been proposed a long time ago.

Please adopt the amendments to the filled water's edge rule even if the Department does not adopt other aspects of the rulemaking, such as the proposed amendments affecting shellfish aquaculture. (22)

RESPONSE: The Department agrees that the prior rules were in some cases not appropriately flexible in their treatment of certain specific filled water's edge sites, although marinas are not the only use considered water dependent. The adopted amendments seek to balance the Department's ongoing policy to preserve water's edge sites for water dependent development with the need for flexibility in those cases where the conditions of the specific site are such that water dependent use is infeasible or where water dependent uses can coexist with other uses without a negative impact on the water dependent use, while still maintaining the overall policy of reserving filled water's edge sites for water dependent and water-oriented development.

Rationales

General

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39. COMMENT: A few of the rationales do not recognize that New Jersey residents have property expectations based on local zoning and county planning. If the Department wishes to revise property-use rights, it should do so through an overall planning process. Even though such a process could be long and difficult, it is better for residents than regulatory changes, which the general public does not follow or understand, that result in changes to their property values and uses. (12)

RESPONSE: The rationale subsections of each applicable rule section provide background information, supporting scientific literature, and justification for the substantive provisions contained in that section of the CZM Rules. The rationales do not themselves establish regulatory standards. Since the Department previously published rationales for several of the rule sections within the CZM Rules, which many of those using the rules have indicated have been helpful, the Department is updating some of the previously adopted rationales and adopting new rationales for rules that previously did not contain rationales to provide uniformity, additional information and perspective on the provisions of the CZM Rules.

While the rationales themselves do not establish regulatory requirements, but instead provide background information as described above, the rationales are amended in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., to ensure that any change to a rationale, or any incorporation of a new rationale, receives the same public notice as any other rule amendment and the same opportunity for public comment. As part of the public notice of its rulemaking activities, the Department maintains a listserv through which direct notice of any proposed change is provided to anyone who wishes to receive such notice. Those interested may subscribe to the listserv at <http://www.nj.gov/dep/rules/subscribe.html>.

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Shellfish Habitat (N.J.A.C. 7:7-9.2)

40. COMMENT: Amendments to the shellfish habitat rule rationale at N.J.A.C. 7:7A-9.2(m) are opposed. It should not be assumed that replacement of a bulkhead in waters classified as prohibited for harvesting shellfish will eliminate polluting materials in shellfish habitat and correct or prevent erosion. For example, the majority of western Raritan Bay is prohibited for shellfish harvesting, but one would not assume that the majority of existing bulkheads are made of polluting materials. The same can be said for the western Navesink River. This assumption allows for the replacement or reconstruction of a bulkhead outshore of the existing bulkhead, up to two feet, which could result in significant impacts to shellfish habitat area documented by the Department. (32)

41. COMMENT: Regardless of whether waters are designated for shellfish harvesting, shellfish habitat should be protected. The western Raritan Bay and western part of the Navesink River are both prohibited waters but are directly adjacent to restricted or seasonally approved commercial or recreational shellfish harvest areas and provide important nursery habitat. Additionally, some prohibited areas have only recently been closed and may soon be reopened to shellfish harvesting. Allowing the expansion of bulkheads will have permanent impacts in these areas. (32)

RESPONSE TO COMMENTS 40 AND 41: As discussed in the Response to Comment 39, the rationale subsections in the CZM Rules, including the rationale statement to the shellfish habitat rule at N.J.A.C. 7:7-9.2(m), do not establish regulatory standards. Instead, they provide background information, supporting scientific literature, and justification for the substantive

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standards contained elsewhere in that section of the rules. In the case of the portion of the rationale referenced by the commenters, the rationale is explaining the reasoning behind existing N.J.A.C. 7:7-9.2(i). This subsection, which has been part of the CZM Rules since 2013 (when it was codified at N.J.A.C. 7:7E-3.2(i); see 45 N.J.R. 1141(a); 1696(a)), was not amended by this adoption. As it did prior to this rulemaking, N.J.A.C. 7:7-9.2(i) allows the one-time replacement or reconstruction offshore of an existing bulkhead in waters classified as prohibited for harvesting shellfish provided: the replacement or reconstructed bulkhead is made of a non-polluting material; is located within 18 to 24 inches offshore of the existing bulkhead depending on the materials used; and a conservation restriction is placed on the bulkheaded property restricting any future replacement bulkhead to the same location as the replaced or reconstructed bulkhead. The conditions that must be met to replace or reconstruct a bulkhead offshore of an existing bulkhead are protective of shellfish habitat classified as prohibited for harvesting despite possible short-term minor impact. As explained in the rationale and in response to comments when this provision was added to the rules, the subsection currently codified at N.J.A.C. 7:7-9.2(i) balances the need to replace existing bulkheads with the Department's interest in preventing future encroachments within shellfish habitat and reducing sources of pollution in shellfish habitat areas. The subsection accomplishes minimization of impacts to shellfish habitat by requiring that the bulkhead be constructed of non-polluting material; limiting the replacement to one time only; and requiring that a deed restriction be placed on the property associated with the bulkhead to ensure that future property owners are aware of the restrictions on future replacement or repair of the bulkhead. These requirements are intended to minimize any long-term impacts to shellfish habitat and shallow water habitat. As indicated in the rationale,

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allowing such a reconstruction or replacement also corrects or prevents erosion. Erosion can have a devastating impact on shellfish but choking the organisms with suspended sediment.

As indicated above, N.J.A.C. 7:7-9.2(i) was an existing subsection that has not been amended by this rulemaking. Discussion of the rationale behind this subsection at N.J.A.C. 7:7-9.2(m) was only amended to clarify that the substantive provision, N.J.A.C. 7:7-9.2(i), only allows outshore replacement or reconstruction in waters classified as prohibited for harvesting shellfish, not more generally within shellfish habitat.

Steep Slopes (N.J.A.C. 7:7-9.32)

42. COMMENT: Amendments to the rationale of the steep slopes rule at N.J.A.C. 7:7-9.32 are supported. (32)

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

Public Open Space (N.J.A.C. 7:7-9.38)

43. COMMENT: Amendments to the rationale of the public open space rule at N.J.A.C. 7:7-9.38 are supported. (32)

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

Submerged Pipelines (N.J.A.C. 7:7-12.15)

44. COMMENT: The proposed provision that identifies horizontal directional drilling (HDD) as the preferred method for installing submerged pipelines should be withdrawn. (9 and 18)

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45. COMMENT: Contrary to assertions in current pipeline proposals, HDD is not a surefire way to avoid damages to streams and wetlands during pipeline installation. Scientific evidence demonstrates that HDD has inherent risks that include hole collapse, water supply collapse, and broken or lodged drilling equipment. HDD also can cause the leaching of contaminants. In order to avoid unacceptable impacts to streams, wetlands, endangered or threatened species habitat, shellfish beds, and other sensitive special areas, and rule revisions should include specific provisions, including, but not limited to, requiring the applicants' submission of thorough geologic evaluations to determine the suitability of the route for HDD and a contingency plan in case of an inadvertent release, in N.J.A.C. 7:7-12, General Water Areas Rules; the Energy use rule, N.J.A.C. 7:7-15.4(i); or N.J.A.C. 7:7-15.11, Coastal engineering. The current and proposed rules do not provide any mechanism for the Department to request this information from an applicant contemplating HDD and in some cases, such as N.J.A.C. 7:7-9.6, encourage directional drilling as a less-destructive alternative for installing submerged cables. Based on the current understanding of HDD implementation, it is apparent that this technique may not work at every location and thus may jeopardize the functions and values of special areas. The above-suggested additions are necessary in light of the potential impacts to special areas. (7, 9, and 18)

46. COMMENT: HDD requires careful planning to prevent failures, such as "inadvertent returns," or bentonite drilling fluid spills, which can suffocate all life in a wetland and can damage a wetland such that it will not recover for decades. In coastal waters, shellfish and fisheries would be harmed by such a spill. Pipeline construction accidents, which permanently damage waterways, are increasingly common; a list of nine recent spills was provided to the Department. It is clear that HDD does not protect waterways from pipeline construction and

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should, therefore, be more robustly addressed by the CZM Rules to avoid the same mistakes in New Jersey that are being played out in nearby states. (7)

RESPONSE TO COMMENT 44 THROUGH 46: The Department did not propose amendments to the CZM Rules regarding the use of directional drilling. Rather, the Department proposed a minor grammatical change to the CZM Rules' submerged pipelines rule rationale at N.J.A.C. 7:7-12.15(c), which discusses directional drilling.

The rule rationales provide background information, supporting scientific literature, and justification for the provisions of the CZM Rules. The submerged pipeline rule was amended in 2003, to separate the standards for submerged pipelines from submerged cables and to encourage the use of directional drilling (see 34 N.J.R. 74(a); 35 N.J.R. 632(a)). Because the installation of submerged pipelines has the potential to disrupt the ecosystem in which it is placed, it is discouraged in environmentally sensitive areas. Directional drilling is the preferred method for installing submerged pipelines because it often results in minimization of disturbance as compared to other methods.

With the exception of the minor grammatical error, the adopted rule rationale is the same as the rationale adopted in 2003, and is reflective of the current CZM Rules' regarding submerged pipelines. The current rulemaking does not alter the substantive provisions of N.J.A.C. 7:7-9.6, nor has the Department's policy changed. Regarding the claim that the rules do not provide a mechanism to request information from applicants concerning the suitability of directional drilling at a given site, the application requirements at N.J.A.C. 7:7-23.4(a)9 require applications to include "any information necessary to ensure compliance with State and/or Federal law, and/or to determine whether an application for authorization under a general permit

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or for an individual permit meets State and/or Federal standards,” which could include information necessary to demonstrate that directional drilling complies with all applicable requirements of the CZM Rules.

Requirements for Impervious Cover and Vegetative Cover for General Land Areas and Certain Special Areas

47. COMMENT: Mining operations are proposed to be exempt from the requirements of N.J.A.C. 7:7-13, dealing with requirements for impervious cover and vegetative cover for general land areas and special areas. The rationale for exempting mining operations from this requirement is that these operations, alongside sanitary landfills, wastewater treatment plants, and water treatment plants, are presumed to serve a public need. The rationale for the exemption of mining operations from N.J.A.C. 7:7-13 is not further elaborated; it is not clear why mining, which often involves vegetation removal and potential changes to surface and subsurface hydrology, should not be subject to requirements for impervious and vegetative cover that could help to mitigate flood risk. (28)

RESPONSE: The exemption of mining operations from the impervious cover limits and vegetative cover requirements of the CZM Rules has been part of the rules for many years; the Department is not proposing that exemption change as a result of this rulemaking. Instead, the Department is proposing to incorporate into existing N.J.A.C. 7:7-13.1, a new rationale at N.J.A.C. 7:7-13.1(k). Consistent with all other rationales in the CZM Rules, the rationale at N.J.A.C. 7:7-13.1(k) does not change or amend in any way the regulatory provisions contained elsewhere as part of this section of the rules.

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The portion of the rationale referenced by the commenter is discussing the substantive rule at N.J.A.C. 7:7-13.1(d), which, in accordance with New Jersey Register publishing protocol, was not reproduced in full in the notice of proposal as it is not being amended as part of this rulemaking. This subsection identifies various activities that are not subject to the impervious cover requirements specified in N.J.A.C. 7:7-13. While this subsection was added to the rules in 2000 (then codified as N.J.A.C. 7:7E-5.1(d); see 31 N.J.R. 2042(a); 32 N.J.R. 503(a)), mining activities were previously exempt from the requirements of this subchapter in accordance with what was then codified in the mining use rule at N.J.A.C. 7:7E-7.8(a) (currently codified at N.J.A.C. 7:7-15.8(a)). Particularly, that subsection of the mining rule provided then, and continues to provide, that mining activities are exempted from the general land areas rules. “General land area rules” previously referred to N.J.A.C. 7:7E-5, General Land Areas, which contained impervious cover and vegetative cover requirements for activities on land that did not take place within special water’s edge areas. N.J.A.C. 7:7E-5 was expanded and trifurcated to N.J.A.C. 7:7E-5, Requirements for Impervious Cover and Vegetative Cover for General Land Areas and Certain Special Areas, 5A, Impervious Cover Limits and Vegetative Cover Percentages in the Upland Waterfront Development Area, and 5B, Impervious Cover Limits and Vegetative Cover Percentages in the CAFRA Area (see 31 N.J.R. 2042(a); 32 N.J.R. 503(a)). The term “general land area rules” was retained in the mining rule to refer to the relevant provisions of those three subchapters. “General land area rules” now refers to the relevant provisions of N.J.A.C. 7:7-13, Requirements for Impervious Cover and Vegetative Cover for General Land Areas and Certain Special Areas, which is the consolidation of prior N.J.A.C. 7:7E-5, 5A, and 5B (see 46 N.J.R. 1051(a); 47 N.J.R. 1392(a)). Therefore, mining uses under the

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mining rules historically were, and continue to be, exempt from the impervious cover and vegetative cover requirements contained in that subchapter.

As explained in the rationale of the mining use rule at N.J.A.C. 7:7-15.8(c), New Jersey's coastal zone includes important deposits and minerals, with mining of these non-renewable resources being vital to certain sectors of the economy of selected regions of the coastal zone, the entire State and in some cases the nation. For example, the high-quality silica sands of Cumberland County supply an essential raw material for New Jersey's glass industry. However, the mining rule recognizes the potential short- and long-term adverse impacts that can occur if mining is not appropriately regulated. Accordingly, that rule contains restrictions on where mining operations may be located, vegetated buffer area requirements, requirements related to the period of operation and the requirement that the area of mineral extraction be reclaimed, contoured, and replanted in a manner that is environmentally appropriate and increases the recreation potential of the restored area.

Rule on Location of Linear Development (N.J.A.C. 7:7-14.1)

48. COMMENT: The proposed rationale at N.J.A.C. 7:7-14.1 does not provide clarification on how to apply the proposed rule, but rather leaves more questions than answers. The term "linear development" is not specifically defined; instead some, but not all, examples of such development are provided. The notice of proposal Summary also states that flexibility is provided in certain cases only where a suite of requirements are met to protect the coastal environment, while allowing development that serves a public need, but "public need" and "a suite of requirements" are not defined in the notice of proposal Summary nor is "public need"

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defined in the rules. No explanation is given for what is meant by “appropriate flexibility” and “circumscribed cases.” The absence of definitions for terms in the rationale creates confusion and will allow for abuse of, and negative impacts to, the coastal zone and its natural resources. The encouragement of flexibility similarly lends itself to abuse. (7, 9, and 32)

RESPONSE: The adopted rule rationale at N.J.A.C. 7:7-14.1 is intended to serve as a brief summary of the Department’s intention in adopting the rule on location of linear development, the substantive content of which is has not been amended. The meaning of the terms in the rationale is made clear by the preceding rule language, which is not reproduced as part of the notice of proposal, as it was not proposed to be amended. The “appropriate flexibility” for “circumscribed cases” referenced in the rationale refers to the statement at N.J.A.C. 7:7-14.1(a) that a linear development may be approved despite not meeting all specific location rules if certain conditions are met. These conditions (the “suite of requirements” referred to in the notice of proposal Summary) are listed at N.J.A.C. 7:7-14.1(a)1 through 4. The term “linear development” is defined at N.J.A.C. 7:7-1.5 as “a development with the basic function of connecting two points, such as a road, drive, public walkway, railroad, sewerage pipe, stormwater management pipe, gas pipeline, water pipeline, or electric, telephone or other transmission lines.” While two common examples of linear development are provided in the rationale at N.J.A.C. 7:7-14.1(b), they are not intended to represent the entirety of what is considered linear development.

The rule and the amended rationale do not automatically assume that linear development is acceptable in all cases; the rule is meant to be applied on a case-by-case basis where the requirements at N.J.A.C. 7:7-14.1(a)1 through 4 are met, and the development is consistent with

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the intent of the CZM Rules and its enabling statutes. Further, the basic location rule at N.J.A.C. 7:7-14.2 provides that, even if a location is deemed acceptable under N.J.A.C. 7:7-9, 12, 13, and 14 (that is, the requirements at N.J.A.C. 7:7-14.1(a)1 through 4, as well as the rules on secondary impacts at N.J.A.C. 7:7-14.3), the Department may reject or conditionally approve the proposed development of the location as reasonably necessary to promote the public health, safety, and welfare; protect public and private property, wildlife and marine fisheries; and preserve, protect, and enhance the natural environment. Therefore, the adopted rationale accurately reflects the intent of the rule (the substantive content of which has not been amended) and will not allow for abuse of, or negative impacts to, the coastal zone and New Jersey's coastal resources.

49. COMMENT: The proposed rationale at N.J.A.C. 7:7-14.1 could allow linear developers, such as utilities, to state that their commercial projects meet a public need with no additional justification and no environmental impact assessment. There are also no findings of fact, analyses, or studies to support the statement that linear developments serve a public need. (9 and 18)

50. COMMENT: It is not clear if the adjective "public" in the rationale at N.J.A.C. 7:7-14.1 refers to both "roads" and "utilities," or whether private parties may be considered a "utility" under this new vague label. (9 and 18)

51. COMMENT: The rationale at N.J.A.C. 7:7-14.1 makes the broad assumption that all linear development serves a public need, without offering any evidence to support this assumption. For example, would a private pipeline crossing through New Jersey and Raritan Bay to only serve New York City customers serve a public need for New Jersey's residents? (32)

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52. COMMENT: The proposed rationale at N.J.A.C. 7:7-14.1 concludes by stating, “This common-sense approach appropriately balances linear development needs with the protection of the coastal environment.” “Common sense” in the context of this rule means that special areas can be impacted if, based on someone’s judgement, a project provides a “public need.” This rule change will allow linear developers, such as utilities, to more easily justify the need to impact the natural resources of New Jersey’s coastal zone. (7)

53. COMMENT: CAFRA, in its findings, states, “The Legislature finds and declares that ... it is in the interest of the people of the State that all of the coastal area should be dedicated to those kinds of land uses which promote the public health, safety and welfare,” while the Wetlands Act states, “in order to promote the public safety, health and welfare, and to protect public and private property, wildlife, marine fisheries and the natural environment, it is necessary to preserve the ecological balance of this area,” in its findings. However, the proposed regulations that define all linear projects as “serving the public need” run afoul of these enabling statutes. (9, 18, and 32)

RESPONSE TO COMMENTS 49 THROUGH 53: Linear development, which is defined in the rules at N.J.A.C. 7:7-1.5, includes development such as roadways, utilities, and public trails that provide essential services to the public by connecting two points, for transportation, energy transmission, or recreation purposes, as compared to the construction of discrete structures, such as homes, hotels, or commercial buildings, which tend to serve much narrower interests. The term “public need” in the rationale is intended to generally convey the distinct purposes of linear development compared to other types of development to explain why the substantive requirements of the rule provide limited flexibility for the location of linear developments while

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still maintaining protection of invaluable coastal resources. N.J.A.C. 7:7-14.1 does not require an applicant to make any demonstration of the public need for a linear development project or that the applicant be a public entity in order for a proposed development to be evaluated under N.J.A.C. 7:7-14.1.

As indicated in prior responses to comments in this rulemaking, including the Response to Comment 39, the rationale subsections contained in the CZM Rules provide background information, supporting scientific literature, and justification for the substantive provisions contained in that section of the CZM Rules; they do not themselves establish regulatory standards. As the substantive requirements discussed in the rationale to N.J.A.C. 7:7-14.1 have not changed in any way, the rationale does not result in a change in the siting of linear development, which continues to be subject to the requirements specified in N.J.A.C. 7:7-14.1(a).

The adopted rationale at N.J.A.C. 7:7-14.1(b) does not suggest that a linear development would be approved without justification or environmental impact assessment, despite the general statement that linear developments serve a public need. In most cases, if a project does not meet the specific location rules, the Department will not issue a permit authorizing the project. In the limited cases where the specific location rules are not met but the activity may nonetheless be acceptable, an applicant continues to be required to demonstrate compliance with N.J.A.C. 7:7-14.1(a)1 through 4, which have not been amended in any way as a result of this rulemaking. As explained in the Response to Comment 48, even if these requirements are met, the Department may still reject or conditionally approve the proposed development as reasonably necessary to promote the public health, safety, and welfare; protect public and private property, wildlife, and

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marine fisheries; and preserve, protect, and enhance the natural environment under N.J.A.C. 7:7-14.2. Linear development must also comply with any applicable use rules at N.J.A.C. 7:7-15 and resource rules at N.J.A.C. 7:7-16, regardless of whether flexibility in the location of the development is afforded in accordance with N.J.A.C. 7:7-14.1. Accordingly, the CZM Rules as adopted continue to set a high bar for development in the coastal zone, while balancing the diverse users of New Jersey's coasts in accordance with CAFRA, the Waterfront Development Law, and the Wetlands Act of 1970.

Any application to the Department must be prepared in accordance with N.J.A.C. 7:7-23. Under N.J.A.C. 7:7-23.6, all individual permit applications must contain an Environmental Impact Statement (EIS) describing the proposed development, discussing the applicability of the CZM Rules to the proposed development and providing a statement of compliance with each applicable rule or an explanation of why the rule is not applicable to the development, and, for CAFRA individual permits, a demonstration that the findings at N.J.S.A. 13:19-10 and N.J.A.C. 7:7-1.4 are met. The EIS must include, as necessary depending on the activity and project, support by relevant experts for the assessments, discussions, and statements made in the EIS, the qualifications of the persons who prepared each part of the EIS, and references and citations to all information, reports, or treatises that are mentioned in the EIS, but not contained in the EIS.

54. COMMENT: The last sentence of the proposed rationale for N.J.A.C. 7:7-14.1 is especially troubling because it allows for impacts to unique or irreplaceable areas, as long as the project does not permanently destroy those areas. Many unique and irreplaceable areas cannot be mitigated and recovery of these areas from temporary disturbance is not realistic. (7, 9, and 18)

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RESPONSE: The rationale at N.J.A.C. 7:7-14.1(b) echoes the requirements enumerated in N.J.A.C. 7:7-14.1(a) that a proposed linear development must meet for the Department to consider approving the development despite conflicts with provisions of specific location rules, and is not itself a regulatory requirement or provision. N.J.A.C. 7:7-14.1(a)2 requires that “there will be no permanent or long-term loss of unique or irreplaceable areas.” This requirement continues to be applicable, unchanged, to siting of linear development. Additionally, this is not the sole requirement that linear development must meet; as explained in the Response to Comments 49 through 53, there are numerous standards that apply to linear development in the coastal zone that protect coastal resources from the impacts of improperly sited development.

55. COMMENT: There are widely documented public health, safety, and welfare concerns associated with pipelines. These concerns, the Department’s charge under the CZM Rules’ enabling statutes, and the proposed rationale language at N.J.A.C. 7:7-14.1 cannot be reconciled.

(32)

RESPONSE: As explained in the Response to Comments 49 through 53 and the Response to Comment 54, the adopted rationale does not change the Department’s regulation of linear development projects and does not provide for the approval of activities with unacceptable impacts on coastal resources. Instead, the rationale simply provides background information for the regulatory requirements contained in this section of the rules. Those requirements specified in N.J.A.C. 7:7-14.1(a) remain unchanged. Further, as discussed in the Response to Comment 48, the CZM Rules continue to provide in the basic location rule at N.J.A.C. 7:7-14.2 that, even if a location is acceptable under N.J.A.C. 7:7-14.1 or any other specific location rule, the

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Department may reject or conditionally approve the proposed development of the location as reasonably necessary to promote the public health, safety, and welfare; protect public and private property, wildlife and marine fisheries; and preserve, protect and enhance the natural environment. The substantive requirements of N.J.A.C. 7:7-14.2 are also unchanged by this rulemaking. Activities that threaten public health, safety, and welfare are not acceptable under the CZM Rules.

56. COMMENT: The language in the rationale at N.J.A.C. 7:7-14.1 appears to conflict with proposed language under N.J.A.C. 7:7-15.4, which states that new energy facility construction has the potential to cause significant impacts to coastal ecosystems, natural resources, public access, and scenic and visual qualities in coastal areas. This rationale is intended to apply to standards relevant to siting of new energy facilities, including all associated development activities. It would be fair to assume the same potential for impacts would apply to associated developments, such as compressors and pipelines. Therefore, the rationale at N.J.A.C. 7:7-14.1 should not be adopted. (32)

RESPONSE: Energy facility development, which includes facilities, plants, or operations for the production, conversion, exploration, development, distribution, extraction, processing, or storage of energy or fossil fuels, entail operations that are generally more likely to pose the potential for significant impacts than linear development, which is defined as development connecting two points. Accordingly, the rationale for the energy facility rule explicitly recognizes this potential as reason for the substantive requirements contained in that section. Linear development may include energy transmission or transmission of energy-related products,

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in which case it would be subject to the applicable rules at N.J.A.C. 7:7-15.4, depending on the type of development, and to N.J.A.C. 7:7-12.15 if it is a submerged pipeline, in addition to N.J.A.C. 7:7-14.1 and any other applicable rules. However, because linear development can include a wide variety of uses, the rationale at N.J.A.C. 7:7-14.1(b) is written broadly to explain the overall policy and rationale behind locating any linear development. Additional standards for specific uses that are also considered linear development, such as pipelines and roadways, are included in N.J.A.C. 7:7-15, with rationales to explain the standards specific to each use.

N.J.A.C. 7:7-12.15, 14.1, and 15.4 recognize that improper development can have adverse impacts. In no case are the substantive requirements and limits applicable to submerged pipelines, the location of linear development, or energy facilities, under N.J.A.C. 7:7-12.15, 14.1, or 15.4, respectively, amended through this rulemaking.

Outer Continental Shelf (OCS) Oil and Gas Exploration and Development (N.J.A.C. 7:7-15.4(d))

57. COMMENT: The proposed rules retain existing standards for OCS development, when these provisions should be removed to block offshore drilling. Retaining these provisions puts New Jersey at risk to Federal offshore drilling plans. (16 and 41)

58. COMMENT: The CZM Rules should be revised to include enforceable regulatory measures that prevent any kind of offshore oil and gas development. Such regulations and protections should be incorporated into the rules now to ensure that New Jersey is not included in the recent Federal five-year plan for offshore oil and gas development. (45)

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RESPONSE TO COMMENT 57 AND 58: The Department's notice of proposal was limited solely to inserting the existing rationale for the OCS oil and gas exploration and development rule into the Administrative Code version of the rules with minor updates to, among other things, reflect that the 1978 exploration previously referenced in the rationale did not result in well production. The rationale was previously referenced by a note in the Administrative Code, but not reproduced there. As with other rationales, the changes proposed to the rationale did not in any way change the substantive provisions of N.J.A.C. 7:7-15.4(d).

The OCS standards referenced in the rationale were last substantively amended in 1993, to reflect the Comprehensive National Energy Policy Act (P.L. 102-486), enacted on October 24, 1992. (See 25 N.J.R. 5(a); 5146(b)). The Comprehensive National Energy Policy Act stressed the importance of a concerted nationwide energy conservation policy, by establishing new guidelines and standards for energy efficiency improvements, providing incentives to encourage energy efficiency improvements, and encouraging development and production of energy from renewable resources. Prior to 1993, the rule encouraged rapid exploration of the OCS for oil and gas reserves, as long as no long-term adverse impacts resulted. The 1993 amendments to the rule discouraged such exploration, as long as other viable alternative measures existed that could meet national energy needs without posing environmental threats. The rules continue to discourage such development.

Recent action on the Federal level has culminated in issuance by the Secretary of the Department of the Interior of Secretary's Order 3350, America-First Offshore Energy Strategy, which directed the Bureau of Ocean Energy Management (BOEM) to "immediately initiate the development of a new 'Five-Year Outer Continental Shelf Oil and Gas Leasing Program,' with

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full consideration given to leasing the OCS offshore Alaska, Mid-Atlantic, South Atlantic, and the Gulf of Mexico.” On July 3, 2017, BOEM published a Request for Information (RFI) soliciting information and comments on the development of a new 2019-2024 National OCS oil and gas leasing program (National OCS Program) (see Federal Register Vol. 82, No. 122, p. 30886). Commissioner Martin responded to the RFI reiterating New Jersey’s strong opposition to the inclusion of its offshore waters in the National OSC Program due, among other things, to potential negative impacts such exploration and drilling could have on New Jersey’s coastal resources and vibrant coastal communities and the potential risk to New Jersey’s coastal economy, as well as a significant portion of New Jersey’s Statewide economy.

While the proposal to incorporate an updated rationale into the Code would not in any way change the substantive standards in the rules, as the OCS rule needs to be revisited to reflect the State’s strong opposition to OCS oil and gas activities, the Department is not adopting the proposed rationale as an addition to the Administrative Code at this time and will instead reconsider the rationale along with the rest of the rule.

Electric Generating Stations (N.J.A.C. 7:7-15.4(r))

59. COMMENT: Proposed N.J.A.C. 7:7-15.4(r)4 amends the rationale for the section of the CZM Rules that “directs fossil fuel stations towards extensively developed areas.” New Jersey has articulated this policy with a conscious recognition of the State’s progress in attaining and maintaining high air quality. However, the rationale seems to imply that, given the use of appropriate control technology, coal-fired generating stations would be feasible at various coastal

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locations. The rationale states, “The siting of coal-fired power plants in urban areas also promotes efficient energy use due to the proximity of power plants to load centers.”

The Department’s claim to be conscious of attaining high air quality while promoting the siting of coal power plants (in urban areas no less, where the air quality is the worst in the State) is absurd. The rest of the world is moving on from coal power plants while the Department is encouraging them in environmental justice communities where cumulative impacts from multiple sources of pollution are most acute. This rationale should be deleted. (32)

RESPONSE: As explained in the notice of proposal Summary, the rationales provide background information, supporting scientific literature, and justification for the provisions of the CZM Rules. Under this rulemaking, the Department proposed minor changes to the existing rationale for the electric generating station rule that correct grammar. In 2010, the Department amended the standards for electric generating stations to address wind energy (see 41 N.J.R. 3168(a); 4168(a); and 42 N.J.R. 642(a); 2066(b)). Specifically, the Department separated the standards applicable to cogeneration facilities and facilities that use renewable forms of energy and added provisions specific to wind energy facilities. The standards for cogeneration of electricity and process steam were reviewed and no changes in substance were proposed.

The State has made clear its opposition to facilities that are unable to satisfy applicable air quality standards or are otherwise damaging to the environment, including taking action to reduce emissions from out-of-State facilities (see, for example, http://www.state.nj.us/dep/newsrel/2013/13_0054.htm). The grammatical changes to the rationale adopted at this time do not change in any way the State’s commitment to ensuring that

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any energy generating facility strictly adhere to air quality and all other applicable environmental standards.

CAFRA Findings (N.J.A.C. 7:7-1.4)

60. COMMENT: Proposed N.J.A.C. 7:7A-1.4(b)8, which incorporates legislation recently signed by Governor Christie confirming that the Department has the authority to issue permits pursuant to CAFRA only upon a finding that the development provides onsite public access to the waterfront and adjacent shoreline, or offsite public access to the waterfront and adjacent shoreline if on-site public access is not feasible, as determined by the Department, is supported. (9, 18, and 32)

61. COMMENT: The inclusion of references to the public access requirements in various general permits and permits-by-rule is supported. As noted by the Department in the notice of proposal Summary, P.L. 2015, c. 260, confirmed the Department's authority to require public access as a condition of a permit. Accordingly, these references are both appropriate and necessary as is the proposed public access standard at N.J.A.C. 7:7-1.4. (10)

RESPONSE TO COMMENTS 60 AND 61: The Department acknowledges these comments in support of the rules.

62. COMMENT: The New Jersey Builders Association's comments on the 2016 Public Access rule proposal are reiterated. The requirement to provide public access must be implemented consistent with the Public Trust Doctrine as developed and implemented under well-established case law and account for private property rights and due process interests protected under both

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the State and Federal Constitutions. There is concern that proposed N.J.A.C. 7:7-1.8(b)8 could be interpreted, in a manner inconsistent with the Public Trust Doctrine, to require on-site or off-site public access to be provided as a mandatory condition for the approval of all Coastal applications, regardless of whether public trust interests are implicated, or whether public access is necessary based on the specific factual circumstances involving the property that is the subject of the application. Such an interpretation of the rule would contravene the Public Trust Doctrine. The Department should clarify when and in what circumstances it will require public access to be provided when reviewing development applications submitted under the CZM Rules. The Department should also clarify whether it intends to require the provision of public access as a mandatory condition in connection with approval of all coastal applications, which would directly contravene the principles of the Public Trust Doctrine established by the courts. (14, 19, and 36)

RESPONSE: The adopted amendment at N.J.A.C. 7:7-1.4(b)8 merely codifies the statutory amendments to CAFRA made by P.L. 2015, c. 260. This legislative amendment requires the Department to make a finding that a proposed activity in the CAFRA area:

“Provides, pursuant to standards established by rule or regulation adopted pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), on-site public access to the waterfront and adjacent shoreline, or off-site public access to the waterfront and adjacent shoreline if on-site public access is not feasible as determined by the department.”

The Department applies its public access requirements on a case-by-case and fact-sensitive basis, taking into account the particular activity and site. The specific factors the

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Department is to consider are incorporated in N.J.A.C. 7:7-16.9. The Department will continue to apply these public access provisions in accordance with the Public Trust Doctrine and all applicable constitutional requirements to balance the public's right to use and access coastal waters with the individual rights of property owners.

See 49 N.J.R. 3145(a) for the Department's responses to the New Jersey Builders Association's comments on the recent amendments to the public access rule, N.J.A.C. 7:7-16.9.

Flood Hazard Area General Permit-By-Certification 16 (N.J.A.C. 7:13-8.16)

63. COMMENT: Please clarify whether an applicant can satisfy the requirements of proposed N.J.A.C. 7:13-8.16 by alternatively showing that onsite elevations within the property boundaries would be sufficient to contain flood waters. (14 and 19)

RESPONSE: General permits-by-certification are adopted as part of the FHACA Rules for a tightly circumscribed set of regulated activities. In order to obtain an authorization under an adopted general permit-by-certification, an applicant must log on to the Department's website and certify that each requirement of a particular general permit-by-certification is met. Upon such certification, the Department's computer system automatically prepares an authorization to undertake the activities, which can be printed and retained by the permittee. Since there is no review by Department staff of activities authorized under general permits-by-certification, there is no opportunity for an applicant to satisfy the requirements of a general permit-by-certification by showing that an alternate standard is met.

Herbicide Application to Control Invasive Species

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General/Multiple Rules

64. COMMENT: The Department's notice of proposal for a new freshwater wetlands general permit, a new flood hazard permit-by-rule, and a new flood hazard general permit to authorize application of herbicide in freshwater wetlands and riparian zones for invasive species control is fully supported. (19)

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

65. COMMENT: N.J.A.C. 7:7-2.3(b) and 6.32 prohibit the application of pesticide on areas containing significant stands of high vigor cattail (*Typha sp.*). Please clarify if the Department considers all *Typha* species to be non-invasive/non-noxious plant species not to be controlled by herbicide treatment. In both the Mitigation Project Monitoring Reports Checklist for Completeness (dated 1/2/13) for palustrine systems, and the Mitigation Project Monitoring Reports For Coastal Wetlands Checklist For Completeness (dated 1/2/13); *Typha angustifolia* and *Typha latifolia* are listed as invasive or noxious species, which must occupy less than 10 percent of a mitigation project area. The language at N.J.A.C. 7:7-2.3(b) is supported; cattail is an important wetland plant and wildlife food source that should not be classified as invasive. (29)

RESPONSE: In accordance with N.J.A.C. 7:7-2.3(b) and 6.32, pesticides (herbicides) cannot be sprayed on significant stands of high vigor *Typha sp.* (Cattail). The Department agrees that cattail is an important food source and component of tidal wetlands ecosystems. At mitigation sites, however, it is sometimes necessary to control the proliferation of *Typha* to prevent the establishment of a monoculture, which may inhibit the achievement of success criteria for a diverse plant community at a mitigation site. The Department recognizes that there is a

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discrepancy in its guidance contained within mitigation project checklists concerning the management of cattails and the CZM Rules and is in the process of revising its mitigation checklists to reflect the role that cattail can play in wetland ecosystems.

66. COMMENT: The one-quarter acre of herbicide treatment proposed to be authorized under coastal permit-by-rule 21, coastal general permit 32, and flood hazard area permit-by-rule 63 (proposed as permit-by-rule 64), and the one-acre limit under flood hazard area general permit 15 and freshwater wetlands general permit 28 is too restrictive for wetland and riparian mitigation projects. The Department requires that invasive species occupy less than 10 percent of a mitigation project area each monitoring year until closure. However, most mitigation projects, and mitigation banks in particular, are large and would require an individual permit to control invasive species under the rule as proposed. These permits should be allowed for mitigation projects because invasive species control is a permit or mitigation banking instrument condition for such projects.

Additionally, many wetland and riparian mitigation projects are located along streams having a 300-foot riparian zone to provide enhanced ecological benefits or as a requirement of a permit condition due to the location of the approved impact. The requirement that invasive species occupy less than 10 percent of a mitigation area applies regardless of riparian zone width. Permit-by-rule 63 and general permit 15 in the FHACA Rules should be allowed for mitigation projects in recognition of the fact that invasive species control is a permit or mitigation banking instrument condition. (29)

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RESPONSE: The application of herbicide on mitigation sites to control invasive species is authorized, for land use purposes, in one of two ways. If the permittee is required to undertake the mitigation directly as a condition of a permit, any mitigation activities are authorized under that permit and through the Department's approval of the mitigation proposal. If the project is a mitigation bank, the application of herbicide is authorized via the permit the bank is authorized under. A separate approval for the application of herbicide is not required in either of those circumstances; therefore, the area restrictions applicable to the cited permits-by-rule and general permits will not impact invasive species control for mitigation projects. The permits-by-rule and general permits will likely to be used by other entities, such as local parks departments, or private landowners, seeking to control invasive species for purposes other than mitigation.

67. COMMENT: The effort to align provisions for the control of invasive species is positive, except that the scale of some public projects would be greatly limited by a one-acre cap. The Department should instead establish a ratio of disturbance based on the acreage of lands proposed for treatment. (40)

RESPONSE: In adopting permits-by-rule and general permits, the CZM, FHACA, and FWPA Rules require that the proposed activity cause only minimal adverse environmental impacts when performed separately, and will have only minimal cumulative adverse impacts on the environment. Accordingly, the Department has determined that the 0.25-acre limitation under coastal permit-by-rule 22 and flood hazard area permit-by-rule 63 (proposed as permit-by-rule 64) and the one-acre limit under coastal general permit 32, flood hazard general permit 15, and freshwater wetlands general permit 28 are appropriate and that the use of herbicides on areas

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greater than those sizes should be reviewed as part of an individual permit. Further as explained in the Response to Comment 66, with respect to the management of invasive species on mitigation sites, such activity is subject to the permit under which the mitigation was authorized and a separate approval for the application of herbicide is not required.

68. COMMENT: If an individual permit is required for pesticide application, would the permit be valid for five years? Would there be a consideration given to a mitigation project in terms of permit review time? Often, the presence of an invasive species is seasonally dependent. If a specific species is present at a percentage close to or greater than a permit threshold, immediate control may be required to comply with the permit or banking instrument. However, the need to obtain an individual permit would preclude immediate control of the invasive species. (29)

RESPONSE: As with any individual permit, an individual permit for herbicide application would be valid for five years from the date of issuance. However, as explained in the Response to Comment 66, with respect to mitigation projects, the management of invasive species is subject to the terms of the permit under which the mitigation was authorized and a separate permit for the management of invasive species is not required. Where the area of invasive species coverage exceeds that specified in the permit, the permittee would be required to employ a corrective action to reduce the coverage to comply with the originally-issued mitigation project permit.

69. COMMENT: Proposed new freshwater wetlands general permit 28 for the application of herbicide within freshwater wetlands and transition areas and proposed new flood hazard general

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permit 15 and permit-by-rule 63 (proposed as permit-by-rule 64), for the application of herbicide within riparian zones are inappropriate. The application of herbicide directly impacts water quality. In shallow aquifers, such as the Kirkwood-Cohansey, herbicide application directly impacts drinking water quality. Such impacts demand a vigorous review that does not take place under a permit-by-rule or general permit. These projects must continue to be subject to individual permit review. (39)

RESPONSE: In order to qualify for the adopted permit-by-rule and general permits, the person seeking to apply herbicide under any of the adopted permits-by-rule or general permits must have already obtained an aquatic pesticide permit issued by the Department's Bureau of Licensing and Pesticide Operations. Under the Pesticide Control Code, herbicides are included within the definition of "pesticide" and a "restricted use pesticide" is any pesticide or pesticide use classified as such under the provisions of N.J.A.C. 7:30-2, or by the Administrator of the United States Environmental Protection Agency (see N.J.A.C. 7:30-1.2). With limited exceptions, all pesticides labeled for aquatic use are classified as restricted use pesticides in New Jersey (see N.J.A.C. 7:30-2.10(a)3). The purchase and application of a restricted use pesticide requires certification and licensing as a pesticide applicator.

N.J.A.C. 7:30-1.2 further defines an aquatic pesticide as any pesticide that contains labeling instructions indicating that the pesticide is intended for use on aquatic sites, except for the following, which are exempt: pesticides labeled for use in controlling tree roots inside water or sewer pipes; pesticides labeled only for use in cooling towers; pesticides labeled only as algaecides for use in swimming pools, hot tubs, ornamental ponds, fountains, fish tanks, or water beds; and algaecides labeled only for use in water treatment plants, wastewater treatment plants,

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or sewerage treatment plants. If a pesticide label contains both exempted and nonexempted aquatic uses, the pesticide shall still be considered an aquatic pesticide. An aquatic site means those areas meeting the definition of “waters of the State” or wetland.

In accordance with N.J.A.C. 7:30-9.3, the application of aquatic pesticides to an aquatic site requires an aquatic pesticide permit from the Department’s Bureau of Licensing and Pesticide Operations, unless: the pesticides are applied to waters of the State that are not used as a source of potable water, that have no outlet, and that are bounded by land wholly owned or rented, and controlled, by one person; the pesticides are applied on non-potable water to control mosquitoes or flies, which then falls under the Bureau's Mosquito/Fly Control Permit Program; or the pesticides are applied to drainage ditches with no water flow, which are not used for potable water or any other purpose besides drainage.

Pesticides approved for use in the aquatic environment have been designed and tested to minimize impacts on that environment. As a condition of an aquatic pesticide permit, all applicators are required to contact appropriate Department programs, including the Bureau of Surface Water Permitting, concerning discharges. Also, the signature and certification by the applicant on an application for an aquatic pesticide permit holds them responsible for being knowledgeable of all aspects of the site, before, during, and after any aquatic pesticide application. Accordingly, the requirement that the activities conducted under the adopted permit-by-rule and general permits be conducted pursuant to an aquatic pesticide permit addresses the issue raised by the commenter through the requirements applicable to application under that permit pursuant to the Pesticide Control Code.

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Further, as explained in the notice of proposal Summary, any herbicide application adjacent to Category One waters must be reviewed by the Department via an individual permit application to ensure that the activities under the permit-by-rule and general permits will not adversely affect water quality or aquatic life as these are the most pristine waters in the State.

70. COMMENT: Proposed freshwater wetlands general permit 28 authorizes the application of herbicide within freshwater wetlands and transition areas, while proposed flood hazard general permit 64 allows the application of herbicide within riparian zones. Making it easier to spray herbicides will destroy sensitive vegetation and important habitat. (16 and 41)

RESPONSE: The management of invasive plant species includes the application of herbicides. Invasive plant species may replace native species, clog waterways, degrade water quality, and impede recreation and navigation. Flood hazard area permit-by-rule 63 (proposed as permit-by-rule 64) is limited to 0.25 acres of riparian zone provided the conditions at N.J.A.C. 7:13-6.7 are met, the activities are conducted pursuant to an aquatic use permit issued by the Department's Bureau of Licensing and Pesticide Operations, and the activities do not occur within a 300-foot riparian zone. Similarly, flood hazard area general permit 15 has identical requirements to flood hazard permit-by-rule 63, but allows up to an acre of herbicide application. Consistent with flood hazard area general permit 15, freshwater wetlands general permit 28 limits the herbicide application to up to one acre, provided the conditions at N.J.A.C. 7:7A-13-6.7 are met, and the activities are conducted pursuant to an aquatic use permit issued by the Department's Bureau of Licensing and Pesticide Operations.

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In accordance with N.J.A.C. 7:13-6.7 and 7:7A-4.3, the proposed activity cannot destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species and cannot jeopardize the continued existence of any local population of a threatened or endangered species. As explained in the Response to Comment 69, pesticides approved for use in the aquatic environment have been designed and tested to minimize impacts on that environment. The application of pesticides in accordance with an aquatic use permit issued by the Department's Bureau of Licensing and Pesticide Operations should not adversely impact threatened and endangered species. As a condition of an aquatic pesticide permit, all applicators are required to contact appropriate Department programs, including the Natural Heritage Program, to obtain information regarding threatened and endangered species, and the Bureau of Surface Water Permitting concerning discharges. Also, the signature and certification by the applicant on an application for an aquatic pesticide permit holds them responsible for being knowledgeable of all aspects of the site, before, during, and after any aquatic pesticide application. Accordingly, the requirement that the activities conducted under the adopted permit-by-rule and general permits be conducted pursuant to an aquatic pesticide permit addresses the issue raised by the commenter through the requirements applicable to application under that permit pursuant to the Pesticide Control Code.

In addition, the flood hazard area permit-by-rule 63 (proposed as permit-by-rule 64) and general permit 15 do not apply to activities proposed within a 300-foot riparian zone. Any herbicide application adjacent to Category One waters must be reviewed by the Division of Land Use Regulation via an individual permit application, in addition to the review by the Bureau of

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Licensing and Pesticide Operations, to ensure that the activities will not adversely affect water quality or aquatic life.

Building Access in Flood Hazard Areas

Requirements for a Building (N.J.A.C. 7:13-12.5)

75. COMMENT: Proposed N.J.A.C. 7:13-12.5(q) should not be adopted as written. The proposed language seems to be inconsistent with the intent of the FHACA Rules to protect people from flooding and preserve the flood plain. The proposed language seems to create incentives counter to this intent. The rule as written would allow the issuance of a permit to build in a floodplain if the Department had previously denied permits to build in the flood hazard area on the remainder of the lots in the subdivision. The requirement that “none of the lots created in the subdivision contain a habitable building” does not require a demonstration that habitable buildings cannot be built on the lots. A strict reading merely requires a demonstration that there are none. This provision should be revised to require an applicant to demonstrate that the lots cannot receive approvals from the municipality or the Department to build. The applicant should also need to demonstrate that the subdivision cannot be reconfigured to avoid the “need” to build in the flood hazard area. (37)

RESPONSE: The adopted provision at N.J.A.C. 7:13-12.5(q) continues the effect of prior N.J.A.C. 7:13-12.6(c)1, which limited construction on subdivided lots by limiting the number driveways that could be constructed in a flood hazard area, in a more straightforward manner by limiting the number of homes or duplexes that can be constructed to one per lot as the lot existed on November 5, 2007 (the date the adoption of the repeal and comprehensive replacement of the

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FHACA Rules was published in the New Jersey Register). This provision is similar to N.J.A.C. 7:13-11.2(m)2, which similarly limits the construction of single-family homes in riparian zones based on the lot lines that existed on November 5, 2007.

The adopted requirement is intended to limit development in flood-prone areas while respecting property owners' rights and is not intended to imply an automatic approval of an application to construct a single-family home or duplex in a flood hazard area solely based on the absence of habitable buildings on the other lots in the subdivision. This provision is just one requirement with which an applicant proposing to construct a single-family home or duplex under an individual permit must comply. The construction of a single-family home or duplex requiring an individual permit in any area regulated under the FHACA Rules must comply with: N.J.A.C. 7:13-12.1, Requirements that apply to all regulated activities; 12.4, Requirements for a structure; and 12.5, Requirements for a building. In addition, area-specific requirements apply depending on the regulated area(s) affected by the proposed regulated activity. Regulated activities in riparian zones (which often overlap with flood hazard areas) must comply with all applicable provisions of N.J.A.C. 7:13-11.2, including requirements that apply to all activities at N.J.A.C. 7:13-11.2(b) through (f), and activity-specific riparian zone disturbance limits in Table 11.2 and, in the case of a single-family home or duplex, N.J.A.C. 7:13-11.2(m). N.J.A.C. 7:13-11.2(b) requires an applicant to demonstrate that the basic purpose of the regulated activity or project cannot be accomplished onsite without disturbing riparian zone vegetation and requires clearing, cutting, and/or removal of riparian zone vegetation to be minimized. Activities in flood hazard areas are additionally subject to N.J.A.C. 7:13-11.3 or 11.4, depending on whether the activity is proposed in a floodway or flood fringe (note that the construction of new homes is not

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permitted in a floodway). The requirements suggested by the commenter are, therefore, unnecessary to protect people and property from flooding and protect the flood hazard area.

Requirements for a Railroad, Roadway, and Parking Area

76. COMMENT: Please confirm whether proposed N.J.A.C. 7:13-12.6(d) applies to a multi-residence building in a redevelopment project. (14 and 19)

RESPONSE: N.J.A.C. 7:13-12.6(d) applies to the construction of private roadways serving developments not listed at N.J.A.C. 7:13-12.6(c). A roadway or parking area serving a multi-residence building that is part of a redevelopment project is subject to the requirements of N.J.A.C. 7:13-12.6(d).

Application Requirements

Applicants (N.J.A.C. 7:13-18.2)

77. COMMENT: Proposed N.J.A.C. 7:13-18.2(c)4 should be clarified. It should be clear in the rules that an applicant is a person that has the “legal authority to perform the activities” and does not mean the person has the legal right to the property. Specifically, the issuance of a Federal Energy Regulatory Commission Certificate of Public Convenience and Necessity alone does not provide the applicant any legal right to the property. The holder of the certificate must then file an eminent domain action in court and be awarded the easement. Without an award of access/easement from a court, the applicant still has no right to the property. Accordingly, N.J.A.C. 7:13-18.2(c)4 should be clarified on adoption. (37)

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RESPONSE: N.J.A.C. 7:13-8.2(c) is intended to more explicitly address situations not clearly included under existing N.J.A.C. 7:13-18.2(c)2, where applicants are undertaking development on their own behalf with owner consent or pursuant to a municipal or Board of Public Utilities designation of route for gas pipeline activities located within a municipally owned right-of-way. The adopted rules do not inappropriately imply property rights where none exist. N.J.A.C. 7:13-22.2(c)2 specifically states, as a condition of all permits, that issuance of a permit does not convey any property rights or any exclusive privilege. This condition is included in every permit or authorization issued by the Department. The clarification proposed by the commenter within the application requirements at N.J.A.C. 7:13-18.2(c)4 is unnecessary in light of this standard condition.

78. COMMENT: Proposed N.J.A.C. 7:7-23.2(c)4 states that an applicant can be a person that has the legal authority to perform the activities proposed in the application. It is assumed that this means a contract purchaser; please confirm. (14 and 19)

RESPONSE: A contract purchaser may submit an application for activities on a property they do not currently own provided the current property owner gives written consent on the application form or, in the case of a general permit-by-certification, by signing the property owner's certification form available on the Department's website and submitting a scan of that certification through the permitting portal.

Consent for Activities in a Municipally Owned Right-Of-Way (N.J.A.C. 7:7-23.3, 7:7A-10.2, and 7:13-18.2)

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79. COMMENT: N.J.A.C. 7:7-23.2, 7:7A-10.2, and 7:13-18.2(g)1 address gas pipelines located within a municipally owned right-of-way and would allow the New Jersey Board of Public Utilities (BPU) to override any municipality's objection to such a pipeline. These amendments should be withdrawn, as a municipality should have the right to govern its property and could have significant environmental reasons that a pipeline should be rejected. The BPU should not be able to override a municipality. (9 and 18)

80. COMMENT: While the Department has respected and appreciated the importance of local municipal designation of pipeline routes in the past, the rulemaking does not reflect this. The Department has not provided any explanation or justification for the change. The Department's previous practice of accepting local municipal designations of gas pipeline routes should not be abandoned.

Proposed N.J.A.C. 7:7A-10.2(e)1, 7:7-23.2(g)1, and 7:13-18.2(g)1 are opposed because the proposed amendments allow the Department to rely upon a designation of a gas pipeline route by the Board of Public Utilities (BPU) where the municipality has not designated a gas pipeline route as proof of municipal consent for the purposes of CZM, FHACA, and FWPA permitting. There are substantial local environmental and land use issues that can arise in the siting of gas pipeline routes, which vary by municipality. The municipality is in the best position to evaluate those issues and designate a route, not BPU. When BPU designates a route over a municipality's objection, that should signal to the Department that a heightened review of a permit application may be required. Instead, the proposed rules allow the Department to ignore the municipal concerns that led to BPU involvement in the first place and seem to pass a part of the permitting review process to the BPU, whose goals and expertise are divergent from the

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Department's. Allowing a BPU designation to override municipal objections to satisfy a Department permitting requirement removes any incentive for gas pipeline companies to work amicably with municipal governments when developing reasonable gas pipeline routes. A harmonious working relationship between local governments and gas pipeline companies is paramount to the safe, efficient, and environmentally responsible planning of gas pipeline routes.

(8)

RESPONSE TO COMMENTS 79 AND 80: The purpose for requiring owner consent is both to protect property owner rights by ensuring that the applicant has consent from the property owner to undertake the proposed activities, and to ensure the Department has the authority to undertake site inspections to examine any impacted resources. Through this rulemaking, the Department is clarifying what it considers sufficient for gas pipeline companies proposing activities in municipal rights-of-way to demonstrate consent for the activity sought to be authorized. Under N.J.S.A. 48:9-25.4, the Legislature authorized the BPU to designate a route where a municipality fails or refuses to designate a practicable route. Where the BPU has made such designation, the Department views that designation as overriding any municipal objection to the pipelines location and is, therefore, sufficient for the Department to undertake review of the permit application. Accordingly, the adopted amendments recognize BPU's authority to designate a route as authorized by the Legislature under N.J.S.A. 48:9-25.4. As explained in the notice of proposal Summary, any permits issued will remain subject to any other required approvals, including, but not limited to, municipal road opening permits.

Recognition of the authority granted by the Legislature to the BPU with reference to utility location in this limited context does not in any way defer any part of the permitting review

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process to BPU or any other entity; all applications will continue to be reviewed in all aspects by the Department with the application required to comply with all applicable regulatory requirements.

Cleanup/Consistency

Permit-By-Rule 22 (N.J.A.C. 7:7-4.22)

81. COMMENT: The proposed change to permit-by-rule 22, which will prohibit swimming pools, spas, hot tubs, and associated decking on a coastal bluff, is supported. Given bluffs' exposure to erosive forces, this change represents sound floodplain management policy. (28)

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

Mitigation and Green Acres (N.J.A.C. 7:7-17.5)

82. COMMENT: The amendment to N.J.A.C. 7:7-17.5(c)3 is supported, with two suggestions. First, creation of wetlands should not be allowed on Green Acres encumbered property, unless the applicant preserves additional uplands of equivalent monetary and habitat value elsewhere. Valuable public uplands should not be offered free of charge to be converted into wetlands, as private owners of uplands suitable for wetlands mitigation will not be able to market their lands for such a purpose in a competitive manner. Second, enhancement of degraded wetlands on Green Acres encumbered property should be required at a higher ratio than on private lands, since there are no land acquisition costs on the part of the applicant when conducting mitigation on Green Acres property. The ratio should "level the playing field" between acquiring private lands and utilizing public lands. (9 and 18)

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RESPONSE: The Department acknowledges the commenters' support of the rule; however, the Department does not agree with the additional changes suggested by the commenters. The Department does not consider the cost of mitigation when reviewing a mitigation proposal, but instead focuses on ensuring that the mitigation fully compensates for values and functions lost, regardless of whether the land is publicly or privately owned. The Department has found that many public entities that are required to provide some form of mitigation as a result of a permitted activity often own property that is suitable for mitigation purposes. These entities should not be precluded from using property they own for mitigation as the creation of wetlands on public lands may provide significant public benefit by providing community benefits, such as coastal storm protection and wildlife habitat. Further, if a private entity wishes to use public land for mitigation, the private entity would have to receive approval from the public entity in order to conduct mitigation on the public land. Where the land was acquired using Green Acres funding or is otherwise encumbered with Green Acres funding, the Department's Green Acres program must also approve the mitigation (See N.J.A.C. 7:7-17.5(c)). The mitigation conducted on public land by a private developer may also provide significant public benefits. In consideration of the probable public benefit of mitigation on public land and the requirement of mitigation to compensate for lost functions and values, the Department does not concur with the suggestion to require a higher ratio for private mitigation conducted on public lands or that creation on public lands require preservation of equivalent upland elsewhere.

Federal Standards Statement

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Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq., require State agencies that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq., (Federal CZMA) does not set specific regulatory standards or requirements for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. The general requirements for what a state coastal management program must include are found at 15 CFR Part 923. The requirements do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. The guidelines simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the adopted new rules and amendments do not exceed any Federal standards or requirements of the Federal CZMA.

Regarding the adopted amendments to the FHACA Rules, the Department's authority for regulating development within flood hazard areas and riparian zones comes solely from State statutes, specifically N.J.S.A. 58:16A-50 et seq., 58:10A-1 et seq., 58:11A-1 et seq., and 13:1D-1 et seq. The FHACA Rules are not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal laws, Federal standards, or Federal requirements. The Federal Emergency Management Agency (FEMA) delineates flood hazard areas in the State for the purposes of the National Flood Insurance Program (NFIP). However, there is no Federal agency or program that directly regulates activities in flood prone areas based on their potential

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flooding impacts. The Code of Federal Regulations, at 44 CFR Part 60, enables FEMA to require municipalities who participate in the NFIP to adopt certain flood hazard reduction standards for construction and development in 100-year flood plains. However, a community's participation in the NFIP is voluntary, and FEMA does not otherwise regulate land uses in flood hazard areas. Furthermore, the Federal flood reduction standards at 44 CFR Part 60 are administered by local governments. The adopted amendments and new rules do not derive authority from any Federal law or under any State statute that incorporates or refers to Federal laws, standards, or requirements, but the rules do serve to ensure consistency with Federal and other State requirements.

Regarding the adopted amendments to the FWPA Rules, the Department's authority for regulating development within freshwater wetlands and State open waters is derived from Federal and State law. The Freshwater Wetlands Protect Act, N.J.S.A. 13:9B-1 et seq., requires rules to be promulgated to govern the removal, excavation, dredging, drainage, or disturbance of water level or water table, dumping, discharging or filling with any materials, driving of pilings, and placing obstructions in a freshwater wetland, and the destruction of vegetation that would alter the character of a freshwater wetland. The FWPA Rules, N.J.AC. 7:7A, fulfill this purpose and also regulate the discharge of dredge and fill material in State open waters, as well as govern activities in transition areas. New Jersey's freshwater wetlands program operates in place of the Federal 404 program (Section 404 of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq.). The Department, under Section 404(g), has assumed the Federal permitting authority. The EPA oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and the EPA. The requirement

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imposed by the Federal Clean Water Act on a state assuming the Federal permitting authority is that the state implements regulatory standards at least equally stringent as those currently in place for the Federal 404 Program for the protection of waters of the United States, including wetlands. The adopted changes retain the appropriate level of stringency to ensure compliance with Federal law.

Summary of Agency-Initiated Changes:

In addition to modifications on adoption discussed in responses to comments above, the Department is modifying the rules on adoption to make the below changes:

1. N.J.A.C. 7:7-23.2(g)1i identifies written consent from the municipality as an option that constitutes consent for gas pipelines proposed to be located within a municipally owned right-of-way. In the notice of proposal Summary, the Department indicated that the provisions relating to written consent for gas pipelines are identical across the CZM, FHACA, and FWPA Rules. However, upon further review, the Department found that the language at N.J.A.C. 7:7-23.2(g)1i was not identical to the same provisions in the FWPA and FHACA Rules. Accordingly, N.J.A.C. 7:7-23.2(g)1i is modified on adoption to clarify that the municipal written consent shall be in the form of a resolution of the governing body or an ordinance, thereby making the language of this provision identical across the three rules.

2. On December 18, 2017, at 49 N.J.R. 3849(a), the Department adopted comprehensive amendments, repeals, and new rules to the FWPA Rules, which involved recodifying and

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renumbering a number of general permits. On adoption, proposed freshwater wetlands general permit 28 is renamed general permit 27 and recodified at N.J.A.C. 7:7A-7.27 in light of those changes.

3. The permit-by-rule for the application of herbicide to control invasive species in riparian zones was erroneously proposed to be codified at N.J.A.C. 7:13-7.64. This permit-by-rule is recodified on adoption as permit-by-rule 63 at N.J.A.C. 7:13-7.63 with no substantive changes.

4. The proposed rule rationale for N.J.A.C. 7:7-13.13 at N.J.A.C. 7:7-13.13(d) inadvertently included two copies of the final paragraph. The repetitive paragraph is deleted on adoption.

5. In accordance with adopted N.J.A.C. 7:7-25.1(b)4, there is no application fee applicable to an authorization under adopted general permit-by-certification 1A for the installation of an elevated timber dune walkover at N.J.A.C. 7:7-5.3. The Department has changed Table A at N.J.A.C. 7:7-25.1(g) to reflect that there is no fee for this general permit-by-certification.

6. N.J.A.C. 7:13-12.5(o) sets forth the requirement that applicants constructing critical buildings and multi-residence buildings must provide vehicular access to and from these buildings during a flood event. As noted in the October 2, 2006, FHACA Rule notice of proposal at 38 N.J.R. 4011, this provision is intended to ensure that occupants of multi-residence buildings, who would otherwise be trapped by floodwaters, can access and/or escape the building and the surrounding floodplain in times of flooding and thereby seek shelter or medical attention, and to allow for continued access to and from critical buildings (including hospitals, police stations, and other emergency services). Such access is crucial for people in need of medical care and for emergency response personnel who are tasked with evacuating people to a safe location outside

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of the flood hazard area. Adopted N.J.A.C. 7:13-12.6(c) sets forth similar standards for private roadways and parking areas constructed to serve critical buildings in fluvial flood hazard areas and those serving multi-residence buildings that are not part of a redevelopment project.

Adopted N.J.A.C. 7:13-12.6(d) sets forth standards for private roadways and parking areas constructed to serve buildings not addressed at N.J.A.C. 7:13-12.6(c).

As noted in the notice of proposal at 49 N.J.R. 2137, the Department intends to provide flexibility in the type of vehicular access that is suitable for multi-residence buildings that are constructed as part of a redevelopment project. To effectuate this flexibility and reduce redundancy between N.J.A.C. 7:13-12.5 and 12.6, the Department proposed to link N.J.A.C. 7:13-12.5(o)1 to proposed N.J.A.C. 7:13-12.6(c) and (d), such that an applicant who is unable to elevate an access roadway one foot above the design flood elevation, as is required at N.J.A.C. 7:13-12.5(o), could instead construct a roadway serving the development that meets the standards at N.J.A.C. 7:13-12.6(c) or (d), as applicable. However, the proposed references to N.J.A.C. 7:13-12.6(c) and (d) could be interpreted to unintentionally circumvent the standards at N.J.A.C. 7:13-12.5(o), which would expose building occupants and emergency personnel to increased risk, contrary to the Department's longstanding policy and objective to ensure that occupants and emergency response personnel are able to not only enter and exit the site of improvement, but are also able to escape the surrounding floodplain during times of flooding.

Particularly, as proposed, applicants unable to provide access through floodwaters to critical or multi-residence buildings as required at N.J.A.C. 7:13-12.5(o) through an existing or proposed roadway that is elevated at least one foot above the flood hazard design flood elevation can instead construct or reconstruct a private roadway meeting the requirements of N.J.A.C.

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7:13-12.6(c) or (d). While the Department intended to allow N.J.A.C. 7:7-12.5(o) to be satisfied where the access elevations required at N.J.A.C. 7:13-12.6(c) and (d), as applicable, are satisfied, those two subsections refer only to private roadways and parking areas. The proposed cross-reference to these subsections in proposed N.J.A.C. 7:13-12.5(o) and (o)1 could, therefore, be interpreted to allow applicants to either create a suitable access route or instead to construct internal, on-site roadways that meet N.J.A.C. 7:13-12.6(c) or (d). While the creation of elevated roadways and parking areas on-site is necessary and helpful to occupants of the building, by themselves such elevated internal roadways and parking areas do not satisfy the requirement that a suitable access route to critical services be provided, as it would leave prospective occupants trapped on the site in the event of a flood, unable to safely evacuate or seek medical attention or other essential services. It is not the Department's intention to circumvent the longstanding requirement at N.J.A.C. 7:13-12.5(o) to provide safe access to and from critical buildings and multi-residence developments, and thereby subject occupants of these building to increased risk, but rather to provide additional flexibility for multi-residence buildings that are part of a redevelopment project.

Accordingly, N.J.A.C. 7:13-12.5(o) is changed on adoption to clarify that access both within the site of the development and to areas outside of the floodplain continues to be required. Specifically, proposed N.J.A.C. 7:13-12.5(o)1 is deleted and proposed N.J.A.C. 7:13-12.5(o)2 is adopted with changes as N.J.A.C. 7:13-12.5(o)1 and 2. As N.J.A.C. 7:13-12.6(c) requires that at least one access be provided that is at least one foot above the flood hazard area design flood elevation, as is already addressed in N.J.A.C. 7:13-12.5(o), this cross-reference is eliminated as unnecessary. Rather than referring to N.J.A.C. 7:13-12.6(d) for roadway elevation standards

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applicable to a multi-residence development that is part of a redevelopment project, the Department is changing N.J.A.C. 7:13-12.5(o) at adopted N.J.A.C. 7:13-12.5(o)1 to allow an applicant proposing a multi-residence building that is part of a redevelopment project to provide access to the building through a roadway that is less than one foot above the flood hazard area design flood elevation by demonstrating that such access is not feasible in accordance with N.J.A.C. 7:13-12.6(e), which provides the standards that must be satisfied under N.J.A.C. 7:13-12.6(d). The amendments as adopted clarify the Department's intention to provide flexibility for access to these buildings while avoiding the unintentional implication that such access is not necessary if the internal roadways and parking areas on the site of the building meet elevation requirements. The Department is additionally incorporating the qualifying phrase that roadways referenced under N.J.A.C. 7:13-12.5(o) must be "of adequate size and capacity to serve the building," as is stated at both N.J.A.C. 7:13-12.6(c) and (d), to clarify the Department's intent that such roadways must be designed to allow unencumbered vehicular ingress and egress to the building during flood events.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq., require State agencies that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq., (Federal CZMA) does not set specific regulatory standards or requirements for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. The general requirements for

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what a state coastal management program must include are found at 15 CFR Part 923. The requirements do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. The guidelines simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the adopted new rules and amendments do not exceed any Federal standards or requirements of the Federal CZMA.

In regards to the adopted amendments to the FHACA Rules, the Department's authority for regulating development within flood hazard areas and riparian zones comes solely from State statute, specifically N.J.S.A. 58:16A-50 et seq., 58:10A-1 et seq., 58:11A-1 et seq., and 13:1D-1 et seq. The FHACA Rules are not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal laws, Federal standards, or Federal requirements. The Federal Emergency Management Agency (FEMA) delineates flood hazard areas in the State for the purposes of the National Flood Insurance Program (NFIP). However, there is no Federal agency or program that directly regulates activities in flood prone areas based on their potential flooding impacts. The Code of Federal Regulations, at 44 CFR Part 60, enables FEMA to require municipalities who participate in the NFIP to adopt certain flood hazard reduction standards for construction and development in 100-year flood plains. However, a community's participation in the NFIP is voluntary, and FEMA does not otherwise regulate land uses in flood hazard areas. Furthermore, the Federal flood reduction standards at 44 CFR Part 60 are administered by local governments. The adopted amendments and new rules do not derive authority from any Federal

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law or under any State statute that incorporates or refers to Federal laws, standards, or requirements, but the adopted rules do serve to ensure consistency with Federal and other State requirements.

Regarding adopted amendments to the FWPA Rules, the Department's authority for regulating development within freshwater wetlands and State open waters is derived from Federal and State law. The Freshwater Wetlands Protect Act, N.J.S.A. 13:9B-1 et seq., requires rules to be promulgated to govern the removal, excavation, dredging, drainage, or disturbance of water level or water table, dumping, discharging or filling with any materials, driving of pilings, and placing obstructions in a freshwater wetland, and the destruction of vegetation that would alter the character of a freshwater wetland. The FWPA Rules, N.J.A.C. 7:7A, fulfill this purpose and also regulate the discharge of dredge and fill material in State open waters, as well as govern activities in transition areas. New Jersey's freshwater wetlands program operates in place of the Federal 404 program (Section 404 of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq.). The Department, under Section 404(g), has assumed the Federal permitting authority. The United States Environmental Protection Agency (EPA) oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and EPA. The requirement imposed by the Federal Clean Water Act on a state assuming the Federal permitting authority is that the state implements regulatory standards at least equally stringent as those currently in place for the Federal 404 program for the protection of waters of the United States, including wetlands. The adopted changes retain the appropriate level of stringency to ensure compliance with Federal law.

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

CHAPTER 7

COASTAL ZONE MANAGEMENT RULES

SUBCHAPTER 1. GENERAL PROVISIONS

7:7-1.5 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions specifically applicable to N.J.A.C. 7:7-13, Requirements for Impervious Cover and Vegetative Cover for General Land Areas and Certain Special Areas, are set forth at N.J.A.C. 7:7-13.2. Additional definitions specifically applicable to N.J.A.C. 7:7-17, Mitigation, are set forth at N.J.A.C. 7:7-17.1.

...

[“High-rise structure” means a structure more than six stories or more than 60 feet in height as measured from existing preconstruction ground level.]

...

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SUBCHAPTER 6. GENERAL PERMITS

7:7-6.30 General permit 30 – commercial shellfish aquaculture activities

(a) This general permit authorizes the construction and/or placement and maintenance of shellfish aquaculture equipment, including floating upwellers, shellfish rafts, racks and bags, lantern nets, and cages, provided:

1. – 3. (No change.)

4. The boundaries of the area where the structures are placed are clearly marked in accordance with US Coast Guard requirements for regulatory and informational markers (*US Coast Guard “U.S. Aids to Navigation System”* <http://uscgboating.org/regulations/navigation-rules.php>). Specifically, the corners of the footprint of the area where the structures are placed must be marked with buoys or stakes;

[5. Floating structures must be marked with lights or reflectors, such that they are visible to boaters and jet skiers at night. The lights or reflectors shall be installed and operational within 72 hours of placement of the structures;]

[6.] *5.* (No change in text.)

[7.] *6.* The structures are properly secured; ***and***

[8.] *7.* No activity undertaken pursuant to this general permit shall prevent the catching and taking of free swimming fish from the tidal waters of the State in any lawful manner, pursuant to N.J.S.A. 50:1-33*[*; and]**.*

*[9. Activities undertaken pursuant to this general permit shall comply with any applicable management plan for protection of State and Federally listed threatened and endangered species,

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as approved by the Department and the USFWS, the endangered or threatened wildlife or vegetation species habitats rule, N.J.A.C. 7:7-9.36, and/or the critical wildlife habitat rule, N.J.A.C. 7:7-9.37, as applicable.]*

(b) – (d) (No change.)

7:7-13.13 Impervious cover limits for a site in the upland waterfront development area

(a) – (c) (No change.)

(d) Rationale: The amount of impervious cover permitted is based upon the development intensity calculated under N.J.A.C. 7:7-13.12 considering growth rating, environmental sensitivity, and development potential, or on the amount of existing impervious cover on the site (for unforested sites only).

The amount of impervious cover allowed for a forested site or the forested portions of a site is calculated by multiplying the net land area on the site or portion by the impervious cover percentage that corresponds to the development intensity that applies to the site or portion. While the method for calculating the impervious cover limit for an unforested site varies based upon factors discussed below, no alternative method of calculating impervious cover for forested sites is allowed as it is the Department's intention to preserve valuable forest habitats equally in all parts of the State.

To achieve differing goals, the amount of impervious cover limit for an unforested site is calculated in two ways, with the calculation resulting in the greatest area providing the impervious cover limit for the unforested site or portion of a site. First, the net acreage is

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multiplied by the impervious cover limit specified in Table E. The amount of impervious cover allowed for unforested sites in the northern waterfront region or urban area region can alternatively be the amount of existing impervious cover on the site in order to encourage redevelopment in these regions. In other regions, the amount of impervious cover allowed on an unforested site may alternatively be the acreage covered by building and/or asphalt or concrete pavement legally existing on the site at the time the application is submitted.

Sites in the urban area region are afforded more impervious cover because these regions are already intensively developed. These impervious cover amounts serve to protect undeveloped land, prevent inappropriate development, and concentrate development in areas that are already developed and have the infrastructure to support additional development. Limiting impervious cover minimizes the negative impacts associated with impervious cover, such as an increase in polluted runoff.

[Sites in the urban area region are afforded more impervious cover because these regions are already intensively developed. These impervious cover amounts serve to protect undeveloped land, prevent inappropriate development, and concentrate development in areas that are already developed and have the infrastructure to support additional development. Limiting impervious cover minimizes the negative impacts associated with impervious cover, such as an increase in polluted runoff.]

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(Agency Note: The text of N.J.A.C. 7:7-15.2 reflects the adoption of amendments to subsection (e) and new paragraph (e)2, resulting in then existing paragraphs (e)2 through 14 being recodified as paragraphs (e)3 through 15 (thereby causing the proposed amendment to paragraph (e)3 in the instant proposal to be adopted as paragraph (e)4 with technical changes), effective July 17, 2017, 49 N.J.R. 2246(a).)

7:7-15.2 Housing

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

(e) Standards relevant to the development of one or two single-family homes or duplexes and/or accessory development (such as garages, sheds, pools, driveways, grading, excavation, filling, and clearing, excluding shore protection structures), which does not result in the development of more than two single-family homes or duplexes either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.2(b)8, and provided the single-family home(s) or duplex(es) and accessory development are located landward of the mean high water line are as follows:

1.-2. (No change.)

3. On filled water's edge sites that have included a water dependent use at any time since July of 1977, development of two single-family homes or duplexes shall comply with the filled water's edge rule, N.J.A.C. 7:7-9.23(e).

4. Development shall comply with N.J.A.C. 7:7-9.16, Dunes, except as provided under (e)4i or ii below.

i. (No change.)

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ii. Development that is located on a dune which is isolated from a beach and dune system by a paved public road, public seawall*,* or public bulkhead, existing on July 19, 1993, need not comply with the dunes rule at N.J.A.C. 7:7-9.16, if the site and the development meet all of the following criteria:

(1) The road, seawall or bulkhead is of sufficient size to be designated as the V zone boundary on the applicable FEMA flood mapping;

(2) – (3) (No change.)

(4) The area of proposed construction is designated as an A zone, B zone, or C zone on the applicable FEMA flood mapping;

(5) – (6) (No change.)

5. Development shall comply with N.J.A.C. 7:7-9.29, Coastal bluffs, if the site is located on the Atlantic Ocean, Delaware Bay, Raritan Bay, or Sandy Hook Bay. Coastal bluffs are defined at N.J.A.C. 7:7-9.29(a). If the site is not located on one of the four water bodies listed above, the development shall comply with the setback requirements at (e)13i below, unless the development meets either (e)5i or ii below:

i. The development is located in the “developed bluff area.” For the purposes of this paragraph, a “developed bluff area” is an area delineated by the limit of existing buildings, in-ground pool or tennis court that existed on July 19, 1993; or

ii. The development on the coastal bluff is located landward of the developed bluff area as defined at (e)5i above, and does not exceed the cumulative surface area of the developed bluff area on the site. If all or part of the proposed development on the coastal bluff is located

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landward of the existing developed bluff area, an equivalent area of the existing developed bluff area shall be restored through the planting of native woody vegetation species.

6. Development shall comply with N.J.A.C. 7:7-9.18, Coastal high hazard areas, and 9.19, Erosion hazard areas, except as excluded under (i) below;

i. Development that is located on a site partially or completely within a coastal high hazard area or erosion hazard area need not comply with the coastal high hazard areas rule, N.J.A.C.

7:7-9.18, or erosion hazard areas rule at N.J.A.C. 7:7-9.19 if:

(1) The lot was shown as a subdivided lot prior to July 19, 1993;

(2) The lot is served by a municipal sewer system; and

(3) A house or commercial building is located within 100 feet of each of the lot lines that run roughly perpendicular to the mean high water line. The 100 feet shall be measured outward from each lot line, along a line generally parallel to the mean high water line;

7. Public access shall be provided in accordance with the public access rule, N.J.A.C. 7:7-16.9.

8. The use of plastic under landscaped or gravel areas is prohibited. All sub-gravel liners shall be made of filter cloth or other permeable material;

9. Any driveway shall be covered with a permeable material or else shall be pitched to drain all runoff onto permeable areas of the site;

10. For a wooded site, site clearing shall be limited to an area no more than 20 feet from the footprint of the *[single family]* ***single-family*** home or duplex and the area necessary for driveway, septic, and utility line installations;

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11. The development shall comply with the requirements of the flood hazard areas rule at N.J.A.C. 7:7-9.25;

12. For a site adjacent to or including surface water bodies or wetlands, a silt fence with a 10-foot landward return shall be erected at the limit of disturbance along the waterward and wetland sides of the development before construction begins. This fence shall be maintained and remain in place until all construction and landscaping is completed;

13. Development shall comply with the following setbacks:

i.-ii. (No change.)

iii. On a non-oceanfront site with existing or proposed shore protection structures, the single-family home or duplex and/or accessory structures (except decks) shall be set back at least 15 feet from existing or proposed shore protection structures. If there is no alternative to locating the proposed development at least 15 feet landward of the shore protection structure, the Department shall reduce the required setback if an engineering certification is submitted demonstrating that, after the proposed development has been constructed, the shore protection structure can be replaced within 18 inches of the existing shore protection structure and a conservation restriction that complies with N.J.A.C. 7:7-18 is recorded for the property which states that any reconstruction of a shore protection structure shall be within 18 inches of the existing shore protection structure. A site with coastal bluffs shall instead comply with (e)12i above; and

14. The standards for the expansion or reconstruction (with or without expansion) of a *[single family]* ***single-family*** home or duplex are found at *[N.J.A.C. 7:7-15.2(f)]* ***(f) below***.

(f)-(g) (No change.)

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SUBCHAPTER 23. APPLICATION REQUIREMENTS

7:7-23.2 General application requirements

(a) – (f) (No change from proposal.)

(g) If an application includes activities within a right-of-way or easement, the application shall include written consent for the activity from the holder(s) of the right-of-way or easement.

1. For a gas pipeline located within a municipally owned right-of-way, written consent shall consist of one of the following:

i. Written consent from the municipality ***in the form of a resolution of the governing body or an ordinance***;

ii. – iii. (No change from proposal.)

(h) – (l) (No change from proposal.)

Table A

APPLICATION FEES

...

***Authorization under general permit-by-certification 1A for the installation of an elevated timber dune walkover pursuant to N.J.A.C. 7:7-5.3**

No fee*

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Authorization under *[a]* ***any other*** general permit by certification

\$ 1,000

...

7:7-25.1 Application fees

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

(g) The fees for applications under this chapter are set forth in Table A below:

CHAPTER 7A

FRESHWATER WETLANDS PROTECTION ACT RULES

SUBCHAPTER 7. GENERAL PERMITS

(Agency Note: The text of N.J.A.C. 7:7A-7.28 (proposed as 5.28) reflects the adoption of a restructure of N.J.A.C. 7:7, 7:7A, and 7:13, effective December 18, 2017, 49 N.J.R. 3849(a).)

7:7A-~~[5.28]~~***7.27*** General permit ~~[28]~~***27*** – application of herbicide within freshwater wetlands and transition areas to control invasive plant species

(a) General permit ~~[28]~~***27*** authorizes the application of herbicide within freshwater wetlands and transition areas to control invasive plant species, provided:

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

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(Agency Note: The text of N.J.A.C. 7:7A-16.2 (proposed as 10.2) reflects the adoption of a restructure of N.J.A.C. 7:7, 7:7A, and 7:13, effective December 18, 2017, 49 N.J.R. 3849(a.)

7:7A-16.2 General application requirements

(a) – (d) (No change.)

(e) An individual is a duly authorized representative of the applicant under (d) above only if the authorization is:

1. Made in writing by an individual required to certify under (d) above and is provided to the Department as part of the application; and

2. Specifies that the authorized representative is either:

i. The individual who has overall responsibility to obtain the letter of interpretation and/or operate, construct, or complete the activity, such as a contractor, construction site supervisor, or other individual of equivalent responsibility; or

ii. In a position of responsibility equivalent to that of the individual described in (e)2i above.

In this case, the individual holding the specified position is the duly authorized representative for purposes of (d) above.

(f) If the written authorization provided to the Department under (e) above is no longer accurate because a different individual or position has overall responsibility to obtain the letter of interpretation or permit and/or operate, construct, or complete the activity, a new authorization satisfying the requirements of (e) above shall be submitted to the Department prior to or concurrent with any reports, information, or applications requiring the applicant's certification.

(g) If an application includes activities within a right-of-way or easement, the application shall include written consent for the activity from the holder(s) of the right-of-way or easement.

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1. For a gas pipeline located within a municipally owned right-of-way, written consent shall consist of one of the following:

i. Written consent from the municipality in the form of a resolution of the governing body or an ordinance;

ii. A municipal designation of the route pursuant to N.J.S.A. 48:9-25.4; or

iii. A Board of Public Utilities designation of route pursuant to N.J.S.A. 48:9-25.4.

(h)-(j) (No change.)

(k) Failure to provide complete and accurate information of which the applicant or its agents are aware, or reasonably should have been aware, may result in denial of an application or termination of the authorization under the general permit-by-certification or general permit, the transition area waiver, or the individual permit under N.J.A.C. 7:7A-20.9, and may subject the applicant or its agents to enforcement action under N.J.A.C. 7:7A-22.

(l) (No change.)

CHAPTER 13

FLOOD HAZARD AREA CONTROL ACT RULES

SUBCHAPTER 7. PERMITS-BY-RULE

7:13-*[7.64]****7.63*** Permit-by-rule *[64]* ***63*** – application of herbicide within riparian zones to control invasive plant species

(a) Permit-by-rule *[64]* ***63*** authorizes the application of herbicide within riparian zones to control invasive plant species, provided the conditions at N.J.A.C. 7:13-6.7 are met and:

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

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SUBCHAPTER 9. GENERAL PERMITS

7:13-[9.15]**9.14* General permit *[15]* *14* – application of herbicide within riparian zones to control invasive plant species

- (a) General permit *[15]* *14* authorizes the application of herbicide within a riparian zone to control invasive plant species, provided the conditions at N.J.A.C. 7:13-6.7 are met and:
 - (b) 1.-3. (No change from proposal.)

7:13-12.5 Requirements for a building

- (a) – (n) (No change.)
- (o) The Department shall issue an individual permit to construct a critical building or multi-residence building, or to convert an existing building to one of these uses, only if the applicant demonstrates that the building is served by at least one existing or proposed roadway, the travel surface of which is constructed at least one foot above the flood hazard area design flood elevation, ***which is of adequate size and capacity to serve the building,*** unless:
 - *[1. The building is located in a fluvial flood hazard area and the applicant proposes to construct or reconstruct a roadway in accordance with N.J.A.C. 7:13-12.6(c) or (d), as applicable; or]*
 - *[2.]* *1.* The building is located in a tidal flood hazard area ***or is a multi-residence building that is part of a redevelopment project;*** and *[the]*

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2. The applicant demonstrates that such access is not feasible in accordance with N.J.A.C.

7:13-12.6(e).

(p) – (u) (No change from proposal.)