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ENVIRONMENTAL PROTECTION

WATERSHED AND LAND USE MANAGEMENT

Coastal Zone Management Rules

Freshwater Wetlands Protection Act Rules

Flood Hazard Area Control Act Rules

Adopted Amendments: N.J.A.C. 7:7-1.6, 2.2, 2.4, 2.5, 3.3, 12.9, 19.2, 23.2, 23.3, 23.4, 23.5, 23.6, 24.3, 25.1, 26.2, 26.3, 26.5, 26.7, 26.10, 27.3, 27.6, and Appendix G; 7:7A-1.3, 1.4, 2.6, 5.3, 7.1, 7.24, 7.25, 16.2, 16.3, 16.4, 16.6, 16.7, 16.8, 16.9, 16.10, 17.3, 18.1, 19.2, 19.4, 19.8, 19.11, 20.4, and 20.7; and 7:13-1.2, 1.3, 2.1, 2.3, 2.5, 3.7, 6.3, 6.7, 7.24, 7.25, 9.1, 11.6, 18.2, 18.3, 18.4, 19.3, 20.1, 21.2, 21.5, 21.8, 22.3, and 22.6

Adopted New Rules: N.J.A.C. 7:13-18.5 and 18.6

Proposed: August 3, 2020, at 52 N.J.R. 1522(a).

Adopted: March 10, 2021, by Shawn M. LaTourette, Acting Commissioner, Department of Environmental Protection.

Filed: March 10, 2021, as R.2021 d.033, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3) **and with the proposed amendments to N.J.A.C. 7:13-21.3 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 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

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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: 03-20-07.

Effective Date: April 5, 2021.

Operative Date: October 5, 2021.

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.

Take notice that the New Jersey Department of Environmental Protection (Department) is adopting amendments and new rules in the Coastal Zone Management (CZM) Rules, Freshwater Wetlands Protection Act (FWPA) Rules, and Flood Hazard Area Control Act (FHACA) Rules to require electronic submission of applications for all general permit authorizations, individual permits, water quality certificates, freshwater wetland transition area waivers, and any flood hazard area verifications that are submitted in conjunction with an application for a general permit authorization, individual permit, or transition area waiver. These applications are required to be submitted through the “Apply for a Land Use Permit or Authorization” service (the electronic submission service), which can be accessed through the Department’s electronic submission system, NJDEP Online.

Other amendments have been adopted to further streamline the rules and achieve greater consistency as part of the Department’s continuing effort to align the three land use

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permitting programs to the extent possible and to clarify some existing application requirements to facilitate the submission of complete applications.

The Department is delaying the operative date for this adoption until October 5, 2021, to provide applicants with additional time to become familiar with the electronic submission service before use of the service becomes mandatory.

This notice of adoption can be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules>.

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

The Department held a public hearing on September 25, 2020. The hearing was conducted virtually through the Department's video conferencing software, Microsoft Teams, through a link provided on the Department's Division of Land Resource Protection's website. Two people provided oral comments. Ms. Kimberly Springer, Manager of the Office of Policy in Watershed and Land Management, served as hearing officer. After reviewing the comments received during the public comment period, the hearing officer has recommended that the rulemaking be adopted with the changes as described below in the Summary of Public Comments and Agency Responses. The Department accepts the hearing officer's recommendations.

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

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Department of Environmental Protection

Office of Legal Affairs

ATTN: Docket No. 03-20-07

401 East State Street, 7th Floor

Mail Code 401-04L

PO Box 402

Trenton, New Jersey 08625-0402

Summary of Public Comments and Agency Responses:

The following people submitted written comments and/or gave oral testimony on the notice of proposal:

1. Les Alpaugh
2. Steven Dalton, New Jersey Builders Association
3. Tony DiLodovico, Tony D Environmental Permitting, LLC
4. Grant Lucking, New Jersey Builders Association

A summary of the comments timely submitted, and the agency's responses follow. The number(s) in parentheses after each comment correspond to the commenter(s) listed above:

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General Comments

1. COMMENT: The Department's initiative to make electronic submission of applications mandatory is appreciated and extremely encouraging. There are many benefits to an electronic application process. The rulemaking strives to eliminate redundancy and the wasteful use of excessive paper copies. The proposed rules will also enhance the public's ability to access permit information and the ability of both the Department and the regulated community to track permit applications. Also, the opportunity to participate in the stakeholder meetings described in the notice of proposal is appreciated. These meetings were well run, informative, and productive. The Department was very gracious in accepting stakeholder feedback to ensure that the electronic submission service functions properly. The service appears to work efficiently and has very good instructions regarding the materials that must be submitted as part of an application. (3)

2. COMMENT: The Department's efforts to modernize the application process are appreciated. There are significant economic and environmental benefits to an electronic application process. (4)

3. COMMENT: The Department's effort to streamline the application process through an electronic submission service is supported as it will help improve the efficiency of the application process. (2)

RESPONSE TO COMMENTS 1, 2, AND 3: The Department acknowledges these comments in support of the rules.

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4. COMMENT: The electronic submission service should allow for the submission of additional documents that may not be required as part of the application, but that the applicant wishes to submit in support of the application. This could be achieved through the creation of an “Other” category for attachments or through clarification in the service or in the rules regarding how to submit additional documentation. (2, 3, and 4)

RESPONSE: The electronic submission service provides for the submission of supporting documents that are not required as part of the application. On the Attachment Upload page, the applicant may add a row and then select the attachment type “Other” from the dropdown menu. The applicant may then upload the document by selecting the “Choose File” button at the end of this row. In order to submit the application, the applicant must also provide a description of the document in the space provided in the new row under “Attachment Description.” The Department has updated its “Land Use Authorization or Permit Online Application Instructions” to provide further guidance on this submission option.

5. COMMENT: Why did the Department invest significant time and State financial resources preparing such a detailed notice of proposal to require the electronic submission of applications? Electronic submission is a common practice. (1)

RESPONSE: The Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq., in pertinent part, requires all State agencies to prepare a formal proposal for rulemaking for any change to the implementation or interpretation of law or policy, or to any change in organization, procedure, or practice requirements. As mandating the electronic submission of applications represents a

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change in policy and procedural requirements, the amendments to the CZM, FWPA, and FHACA Rules were proposed and prepared in compliance with the APA.

Conservation Restrictions

6. COMMENT: The proposed amendments require the submission of copies of any and all conservation restrictions affecting a property, even if only a portion of the site is subject to a conservation restriction. If a proposed regulated activity is outside of the conservation restriction area, delineating the limits of the conservation restriction area on the site plans submitted with the application should be sufficient. Further documentation regarding the conservation restriction should not be required. (3 and 4)

RESPONSE: If a project is proposed on a property that is partially encumbered by a conservation restriction, the applicant would need to obtain a copy of the conservation restriction in order to delineate the location of the protected area on the site plans, as suggested by the commenters. Therefore, the Department does not believe that submitting the conservation restriction as part of the application represents any additional burden on the applicant. The Department requires a copy of the conservation restriction to confirm that the proposed development will not occur within the protected area.

7. COMMENT: Conservation restrictions are problematic because they are inconsistent due to changes in the requirements over time. Where a conservation restriction is complex and unclear, it may not be obvious, even to Department staff reviewing the conservation restriction,

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what is, and is not, permissible under that conservation restriction. Perhaps there should be an easier process for an applicant to receive confirmation regarding what is permissible under a specific conservation restriction prior to submitting an application. (3)

RESPONSE: The process for reviewing conservation restrictions is beyond the scope of this rulemaking, the purpose of which is to adopt amendments necessary to mandate the electronic submission of applications. To review a conservation restriction with Department staff, applicants may request a pre-application conference in accordance with N.J.A.C. 7:7-22, 7:7A-15, or 7:13-17, as applicable.

Flood Hazard Area Verifications

8. COMMENT: At proposed N.J.A.C. 7:13-18.5, Additional application requirements for a verification, paragraph (b)7 states that applications for standalone verifications must include “calculations, analyses, data, and supporting materials necessary to demonstrate that the proposed delineation meets the requirements of this chapter, and the requirements of the Department’s Stormwater Management rules at N.J.A.C. 7:8, if applicable.” It is unlikely that the Stormwater Management (SWM) rules would be applicable to a verification that is not submitted in association with a permit application. Even if there is an instance where the SWM rules are applicable to a standalone verification, the FHACA Rules, at N.J.A.C. 7:13-12.2, Requirements for stormwater management, state that “the Department shall issue an individual permit for a regulated activity associated with a major development only if the requirements of the Stormwater Management rules at N.J.A.C. 7:8 are satisfied.” Therefore, the

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Department should delete “and the requirements of the Department’s Stormwater Management rules at N.J.A.C. 7:8, if applicable” from N.J.A.C. 7:13-18.5(b)7 as it is already covered by the requirement to demonstrate that the proposed delineation meets the requirements of “this chapter.” (3)

RESPONSE: The SWM rules apply where construction activities meet the criteria for a “major development” as defined at N.J.A.C. 7:8-1.2. As the purpose of flood hazard area verifications is solely to establish the jurisdictional limits of flood hazard areas and riparian zones on a property, they do not authorize any construction activities. Therefore, the Department agrees with the commenter that it is unnecessary to require an applicant for a flood hazard area verification to demonstrate compliance with the requirements of the SWM rules when the verification is sought independent from a permit application at N.J.A.C. 7:13-18.5(b). Therefore, at N.J.A.C. 7:13-18.5(b)7, the Department is not adopting the requirement for an applicant to demonstrate as part of the verification application that the proposed delineation meets the requirements at N.J.A.C. 7:8.

9. COMMENT: The Department’s proposal to amend N.J.A.C. 7:13-21.3(c) to apply only to general permit authorizations and individual permits, thereby eliminating the 90-day timeframe for decisions on verifications, is opposed as it may lead to delays in projects. The Department has not documented why this rule change is necessary or why meeting the 90-day timeframe may be impossible. (4)

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10. COMMENT: While a 90-day timeframe on flood hazard area verification decisions is not required by law, the Department should continue to act on verification applications within 90 days as it is helpful to the regulated community. (3)

11. COMMENT: The Department should continue to act within a 90-day timeframe on applications for verifications that are submitted independently of a permit application. Those types of verification applications are typically submitted as a precursor to a subsequent application for development or for a specific permit or authorization. Given the likelihood that an application for a permit or authorization will be subsequently submitted, the Department should continue to issue decisions on independent verifications within 90 days. (2)

RESPONSE TO COMMENTS 9, 10, AND 11: The Department proposed the amendments to N.J.A.C. 7:13-21.3(c) for consistency with the Construction Permits Law, N.J.S.A. 13:1D-29 et seq., which does not require the Department to issue a decision on an application for a flood hazard area verification within 90 calendar days. The Department did not intend for these amendments to delay projects or to present a burden to the regulated community. Therefore, in response to the concerns expressed by the commenters, the Department is not adopting the proposed amendments at N.J.A.C. 7:13-21.3(c). Although not required by law, the FHACA Rules will continue to require the Department to issue decisions on applications for flood hazard area verifications within 90 calendar days.

12. COMMENT: The proposed amendments at N.J.A.C. 7:13-21.3(d), under which the Department will no longer be required to publish notice of flood hazard area verification

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decisions in the DEP Bulletin, is opposed. The Department is not proposing to amend the adjudicatory hearing request provision at N.J.A.C. 7:13-23.1(b), which provides that an adjudicatory hearing request to contest a Department decision on any application must be submitted within 30 calendar days after publication of the notice of the decision in the DEP Bulletin. Therefore, the proposed elimination of publication of decisions on verification applications in the DEP Bulletin would effectively result in elimination of the deadline for submission of adjudicatory hearing requests as publication in the DEP Bulletin will never occur. Consequently, the Department should continue to publish notice of verification decisions in the DEP Bulletin due to the likely minimal administrative burden and, more importantly, to provide certainty with respect to the timeframe within which an adjudicatory hearing request may be made. (2, 3, and 4)

RESPONSE: The Department agrees with the commenters. In order to preserve an applicant's right to a 30-calendar-day timeframe for an appeal on a decision for a flood hazard area verification application, the Department is not adopting the proposed changes at N.J.A.C. 7:13-21.3(d) and will continue to publish notice of decisions on all verification applications in the DEP Bulletin.

Adjudicatory Hearings

13. COMMENT: Under the FHACA Rules, existing N.J.A.C. 7:13-23.1(a) and (b) provide that an adjudicatory hearing request to contest a Department decision on an application must be submitted within 30 calendar days after publication of the notice of the decision in the DEP

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Bulletin. As per N.J.A.C. 7:13-2.5(c)1, applicability determinations require the submission of an application and could, therefore, be subject to an adjudicatory hearing under this section.

However, applicability determinations are not published in the DEP Bulletin.

It should also be noted that the FWPA Rules at N.J.A.C. 7:7A-21.1(a) and (b) utilize the same language as the FHACA Rules with respect to “the process by which a person may request an adjudicatory hearing to contest a Department decision to approve or deny an application under this chapter.” However, the language used under the CZM Rules at N.J.A.C. 7:7-28.1(a) and (b) is “the process by which a person may request an adjudicatory hearing to contest a Department decision to approve or deny a coastal permit under this chapter.” Since the Department is proposing to add definitions for “flood hazard area permit” and “freshwater wetlands permit” to the FHACA Rules and the FWPA Rules, respectively, N.J.A.C. 7:13-23.1(a) and (b) and 7:7A-21.1(a) and (b) should be amended to match the language in the CZM Rules to state “the process by which a person may request an adjudicatory hearing to contest a Department decision to approve or deny a permit under this chapter.”

If the Department does not amend N.J.A.C. 7:13-23.1(a) and (b) and 7:7A-21.1(a) and (b), the Department should provide a detailed explanation of which flood hazard area and freshwater wetland application decisions are eligible for an adjudicatory hearing request and should explain whether third parties may contest all application decisions under these chapters.

(3)

RESPONSE: Publishing notice of applicability determinations and exemption letters in the DEP Bulletin is not required under the 90-Day Construction Permit Law, N.J.S.A. 13:1D-34, and is,

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therefore, not currently required pursuant to the CZM, FWPA, or FHACA Rules. However, applicability determinations pursuant to the CZM and FHACA Rules and exemption letters pursuant to the CZM and FWPA Rules are subject to adjudicatory hearing requests by both applicants and third parties, with a third party only qualifying to challenge these and other Department determinations in an adjudicatory hearing in very limited circumstances.

Therefore, as applicability determinations and exemption letters are subject to challenge, the Department will publish notice of these applications in the DEP Bulletin for the purposes of transparency. The Department will also amend the language in the CZM, FWPA, and FHACA Rules in a future rulemaking to clarify and align the requirements for adjudicatory hearings for these applications.

Impact Statements

14. COMMENT: Please add the exemption for silviculture to the Agricultural Industry Impact Statement. (1)

RESPONSE: The commenter is correct that the FWPA Rules include exemptions for many silviculture activities, as well as farming and ranching activities, at N.J.A.C. 7:7A-2.4. Therefore, the amendments mandating the electronic submission of applications are not expected to have a significant impact on most of these activities. However, not all silviculture activities are exempt under the rules. For example, N.J.A.C. 7:7A-2.4(b)4 provides an exemption from the FWPA Rules for normal silviculture activities, when they are part of a forest management plan that conforms to best management practices (BMPs) and is reviewed and approved by the

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State Forester before the activities are undertaken. When an agricultural operation, including a silviculture operation, does not meet N.J.A.C. 7:7-2.4 and, therefore, is required to submit an application for a permit or authorization under the FWPA Rules, the applicant should receive the same benefits shared by all applicants as discussed in the Economic Impact Statement included in the August 3, 2020 notice of proposal.

Federal Standards Statement

The adopted amendments and new rules are not mandated by Federal law, and they do not exceed any Federal standards or requirements. The Federal Coastal Zone Management Act (P.L. 92-583) provides broad planning and management process guidelines for states developing coastal management programs at 15 CFR Part 923 but does not establish any regulatory standards. Therefore, the adoption does not exceed the standards of the Federal Coastal Zone Management Act.

The Department's authority to regulate activities in freshwater wetlands comes from the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10a-1 et seq. As provided in Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1251, the State of New Jersey has assumed the administrative responsibility to enact the Federal 404 program. Since the purpose of the adopted amendments is to improve the administrative process, the adoption does not exceed the standards of the Federal Water Pollution Control Act.

The Department's authority for regulating development within flood hazard areas and

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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.

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

7:7-26.3 CAFRA individual permit application – initial completeness review

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

(h) If the Department does not take one of the actions ***[in]* ***at***** (c) or (d) above within 15 calendar days after receiving additional information submitted for an administratively or technically incomplete application, the application shall be declared complete for public comment or complete for public hearing, effective as of the date the additional information was received by the Department.

(i) (No change from proposal.)

7:7A-1.4 Forms, checklists, and information; Department address and website

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

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(e) Applications identified at (b)2 above sent or delivered to the Department at an address other than those listed **[in] *at** (b)2i and ii above shall not be deemed to have been received for the purposes of calculating application review deadlines or other time periods under this chapter.

CHAPTER 13

FLOOD HAZARD AREA CONTROL ACT RULES

SUBCHAPTER 18. APPLICATION REQUIREMENTS

7:13-18.5 Additional application requirements for a verification

(a) (No change from proposal.)

(b) Applications for verifications submitted independently from any of the applications listed at (a) above shall be submitted to the address set forth at N.J.A.C. 7:13-1.3(c)2. In addition to meeting the requirements at N.J.A.C. 7:13-18.2, they shall include the following material, in the number and format specified in the appropriate application checklist:

1. – 6. (No change from proposal.)

7. Calculations, analyses, data, and supporting materials necessary to demonstrate that the proposed delineation meets the requirements of this chapter*, and the requirements of the Department's Stormwater Management rules at N.J.A.C. 7:8, if applicable]*; and

8. (No change from proposal.)

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SUBCHAPTER 21. APPLICATION REVIEW

7:13-21.2 Completeness review

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

(g) If the Department does not take one of the actions **[in]* *at** (b) or (c) above within 15 calendar days after receiving additional information submitted for an administratively or technically incomplete application, the application shall be declared complete for review, effective as of the date the additional information was received by the Department, and the Department shall make a decision to approve or deny the application by the applicable deadline set forth at N.J.A.C. 7:13-21.3.

7:13-21.3 Department decision on an application that is complete for review

(a) – (b) (No change.)

(c) If the Department does not make a decision to approve or deny an ***application for a verification,** ** application for authorization under a general permit*,* or **[an]* application for an individual permit* by the applicable deadline set forth in (a) or (b) above, the application shall be deemed to have been approved as of that deadline. Regulated activities shall not commence unless and until all required tidelands instrument(s) to use and occupy State-owned tidelands are obtained.*

1. (No change.)

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2. *[An]* ***A verification,*** authorization*,* or individual permit issued under this subsection shall not prevent the Department from taking enforcement action pursuant to N.J.A.C. 7:13-24 for any activity undertaken in violation of this chapter.

(d) The Department shall provide notice of the decision on an application for *[an]* ***a verification, application for*** authorization under a general permit*,* or *[an]* application for an individual permit in the DEP Bulletin and to any person who specifically requested notice of the decision on a particular application.

(e) (No change.)