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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

LAND USE REGULATION

Highlands Water Protection and Planning Act Rules

Readoption with amendments: N.J.A.C. 7:38

Proposed: December 19, 2005 37 N.J.R. 4767(a)

Adopted: , 2006 by Lisa P. Jackson,
Commissioner, Department of Environmental
Protection

Filed: , 2006 as R. d. with substantive
and technical change not requiring additional public
notice and comment (see N.J.A.C. 1:30-6.3)

Authority: N.J.S.A. 13:20-1 et seq.; 13:1D-1 et seq.; 13:1B-15.128 et seq.; 13:9B-1 et
seq.; 23:2A-1 et seq.; 58:1A-1 et seq.; 58:10A-1 et seq.; 58:11-23 et seq.; 58:11A-1 et
seq.; 58:12A-1 et seq.; and 58:16A-50 et seq.

DEP Docket Number: 39-05-11/578

Effective Date:

Expiration Date:

The Department of Environmental Protection is readopting with amendments the Highlands Water Protection and Planning Act rules, N.J.A.C. 7:38. The proposal was published on December 19, 2005. The comment period closed on February 17, 2006.

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Summary of Hearing Officer's Recommendation and Agency Response:

The Department held a public hearing on the proposal on January 25, 2006, at 4:00 P.M., at the Highlands Council offices in Chester, New Jersey. Susan Lockwood and Mark Mauriello were the hearing officers. Thirty-three people attended and 28 gave testimony. The hearing officers recommended that the proposal be adopted as proposed with the changes described below in the summary of responses to comments. The Department accepts the recommendation.

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

Office of Legal Affairs
Attn: DEP Docket No. 39-05-11/578
Department of Environmental Protection
P.O. Box 402
Trenton, New Jersey, 08625-0402.

Summary of Public Comments and Agency Responses

The Department accepted comments on the proposal through February 17, 2006. One-hundred fifteen people provided individual written and/or oral comments. Four-hundred sixty-five people submitted form letters. The following individuals provided individual comments:

1. Anderson, Joanne
2. Anderson, John W.
3. Anderson, Wayne
4. Baker, Michael J.
5. Bartel, Constance
6. Best, Robert, E.
7. Best, Ruth M.
8. Bowman, Cynthia M.
9. Broadhurst, Ellen
10. Broadhurst, Hope
11. Broadhurst, Jeff

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12. Broadhurst, Tom
13. Buck, Susan
14. Canright, Mark
15. Christensen, Nancy
16. Collins, Jr., Thomas F. Vogel, Chait, Collins, and Schneider
17. Constantine, Diane M.; Sprint Spectrum and Nextel Corporation
18. Costa, Rosalind Pio
19. Davenport, Robert
20. Dilodovico, Anthony; Schoor Depalma
21. Donaldson, Lewis A.
22. Drysdale, Andrew
23. Drysdale, Lois
24. Dunn, Thomas W. Beattie Padovano representing Borough of Ringwood Planning Board
25. Farber, Joy; Association of New Jersey Environmental Commissions
26. Feller, Caroline E.
27. Filippone, Ella F.; Passaic River Coalition
28. Finke, Jean M.
29. Finke, Michael
30. Finke, Robert
31. Finke, Robert A.
32. Frey, Gertrude
33. Frey, Robert
34. Frey, Robert J.
35. Frey, Wilma; New Jersey Conservation Foundation
36. Gagne, Ed
37. Gagne, Penny
38. Gerish, Jay
39. Goger, Nicole
40. Gracie, Heather; Gracie & Harrigan Consulting Foresters, Inc.

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41. Harrigan, Christina; Gracie & Harrigan Consulting Foresters, Inc.
42. Kallessen, Steven; Gracie & Harrigan Consulting Foresters, Inc.
43. Kelsey, James; Planning Board, Independence Township
44. Kern, Jerry and Sandi
45. Kessler, James C.
46. Kessler, James E.
47. Klumpp, Hank
48. Kraham, Susan J.; NJ Audubon Society
49. Kruger, Anne L.; Passaic River Coalition
50. Kushner, Ross. Pequannock River Coalition
51. LaHue, Michael P.
52. LaHue, Robin; The Freedom Group, L.P.
53. Leavens, III, William B.
54. Lee, Art
55. Longo, Richard A.
56. Mackey, Devlen
57. Mackey, Holly
58. Mackey, Robert
59. Maidens, Melinda B.; Jeffer, Hopkinson and Vogel
60. McGroarty, Chuck; Planning consultant for Mount Olive Township
61. McGuinness, Michael G.; National Association of Industrial and Office Properties
62. Michalenko, Thomas
63. Minervini, William P.
64. Morawski, Stephen H.; Tennessee Gas Pipeline Company
65. Motyka, Richard J.
66. Myers, Aimee Ashley; Morris County Board of Agriculture
67. Newhouse, Dave
68. Newton, Damien
69. Nieuwenhuis, Richard; President, NJ Farm Bureau
70. O'Hearn, William; Highlands Coalition

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71. O'Neil, Elaine T.

72. Orcutt, Jon, Nancy Christensen, Damien Newton; Tri-State Transportation Campaign

73. Peifer, David

74. Post, Deborah A.

75. Purcell, Monique; NJ Department of Agriculture

76. Quinn, Deborah

77. Quinn, William

78. Race, Jean

79. Race, Sam

80. Richardi, Allen

81. Rinehart, John Y.

82. Rohrbacher, Peter J.

83. Sachau, Barb

84. Scrivo, Thomas P.; McElroy, Deutsch, Mulvaney & Carpenter, LLP

85. Shaw, Steven H.; Special Counsel to Warren County for the Board of Chosen Freeholders, Hunterdon and Warren Counties

86. Shepherd, David J.

87. Shope, David

88. Sigler, Carl

89. Simone, Erin E.; 91st State Agricultural Convention

90. Skowronsky, Kenneth

91. Skowronsky, Linda K.

92. Somers, Julia; Executive Director, Great Swamp Watershed Association

93. Sternman, Walter S.

94. Strassle, Edward

95. Stryeski, Nancy Baxter

96. Stumpp, Ilona

97. Sussek, Claire

98. Sussek, Greg

99. Tavella, Doug; Appalachian Forestry Service.

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100. Taylor, Joseph

101. Tittel, Jeff; New Jersey Chapter, Sierra Club

102. Treible, Nancy A.

103. Trematore, Brian

104. Tullo, David

105. Tullo, Susan

106. Verkade, Jan

107. Vohden, Jr., Richard A.

108. Warren, James

109. Willever, Wendy

110. Williams, Douglas

111. Wilson, Walter N.

112. Wittenberg, Nancy; N.J. Builders Association

113. Wright, Jesse

114. Zabihach, Raymond

115. Zwier, Roberta J.; ENSR Consulting

116. The following commenters submitted form letters opposing the Highlands rules in their entirety. There were an additional 76 form letters submitted by individuals whose signatures were illegible. The form letter specifically opposed several definitions and preservation area standards contained at N.J.A.C. 7:38-1.4 and 3, respectively:

Acheson, Raymond

Aikey, Charles

Baldwin, Mary C.

Barton, Cheryl

Beatty, Bernard S.

Belise, Minnie L.

Bellous, Ann O.

Bellous, John D.

Bellous, Veronica

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Billow, Elizabeth

Billow, Mary L.

Bilyh, Jarod

Bilyh, John

Bilyh, John Jr.

Bocchino, Sam

Bojak, Stanley

Bortz-Graham, Mary Frances

Bray, Margaret

Brink, Inge

Buick, Jacob

Cassidy, Barbara J.

Cassidy, Dennis

Castaneda, Alex

Caute, Maria

Cavanaugh, Christine

Ceppersmilt, Ralph

Cerami, Charles

Collins, Janet

Connolly, Valerie

Connor, Martin

Copallo, Russell

Copallo, Shirley

Creveling, Eric

Creveling, Mollie

Cronce, Charles F.

Cronce, Jay E.

Csordas, Charles J.

Daniel, Kimberly

Davis, John A.

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Demeter, Frank

DeVito, Mike

Di Risio, Ray

Di Risio, Sue

Doherty, Michael J.

Drysdale, Andrew

Duryea, Steven

Eggers, Roland

Egrat, Cheryl

Egrat, Brian

Ehasz, Karen

Ehasz, Stephen

Elder, Yvonne

Elken, Tom

Engle, Kim

English, Joseph

Erb, Joanne C.

Erb, Paul S.

Erhardt, Beverly

Erhardt, Vernon

Ervey, Thomas

Feller, Dalton

Ferrara, Mr. Albert

Ferrara, Mrs. Albert

Ferrara, Mr. David

Ferrara, Mrs. David

Finke, Michael L.

Frey, Abraham

Frey, Bruce

Frey, Caleb

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Frey, G.G.

Frey, Robert S.

Fucili, Thomas

Fucili, Sheri

Gilbert, Ann

Gilmore, Matt

Goodrich, Daryl W.

Goodrich, Frieda

Grabovetz, Dana

Grabovetz, Greg

Gunner, Lois

Gunner, William, J.

Haffner, Fred A.

Haggerty, Dave

Haggerty, Deanne

Haggerty, Marilyn

Haggerty, Sharon

Haggerty, Jr., William

Haggerty, Sr., William

Hamlen, Agnes O.

Hanula, Joseph D.

Hartung, Adrian

Hartung, Gary C.

Hartung, Michell

Haverstick, John

Haydu, Joseph D.

Heiser, Gregory, J.

Henning, Gunnar M.

Hodge, Mr. Wm. J.

Hodge, Mrs. Wm. J.

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Hoser, Kenneth J.

Hyde, Cyrus

Illing, Cecelia

Jayne, Bill

Jimenez, Ralph

Johnson, Elizabeth

Kallessen, Steven

Karpin, Susan

Kelly, Kay

Kelsey, Bonnie

Kenney, Susan

Kern, Jerry

Kern, Jerry W.

Kern, Sandra J.

Kern, Sandi

Kesler, Carol

Kesley, James C.

Klein, Donna M.

Klump, Hawk

Klumpp, Gena

Klumpp, H.

Klumpp, Hank

Klumpp, Joan

Koerner, Karen, R.

Konya, Carol

Krigger, Pamela J.

Kuezek, James

Kuezek, Candace

Lagomarsino, Victor

Lawrence, Delores

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Lawrence, J.S.

Learn, James

Lee, Art

Lee, Arthur

Lee, William, R.

Leopold, Judith

Lombardo, Frank

Longo Gretchen

Lunghi, John

Mabey, Joseph

MacConnell, Kim

MacConnell, Terrence

Mackey, Devlen

Mackey, Holly

Mackey, Robert

Mackey, Virginia H.

Mallin, Frank

Mannon, Joan

Mannon, William, J.

Martin, Alice

Martin, Anne

Martin, Carl

Martin, Donald

Martin, Helen

Martin, Helen

Martin, Kenneth

Matava, Helena

Matheu, Elizabeth

Mattheros, Dimitri

Maudle Jr., Frank

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Maurer, Wayne

McCrea, Letitia

McDermott, Ralph

McGray, Patricia J.

McMekin, James

McNemar, Dennis

Melick, John V.

Moore, Richard

Mueller, Larry

Naccarate, Gene

Neish, R.J.

Newhouse, Betty

Newhouse, Dave

Newhouse, David

Oliver, Joann

Oliver, Tom

Ort, William R.

Ott, Howard W.

Peccia, Simeon

Penkeski, Thomas R.

Periera, Gabriel

Pereira, Mario

Perrault, Rachel

Pesaniello, D.J.

Pesaniello, Robert A.

Peters, Lisa J.

Petersen, K.

Petriw, John

Petriw, Theresa

Pfeifer, Wendel H.

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Phillips, D.S.

Piazza, Marsha

Piazza, Samuel A.

Postna, William

Povilaitis, Cathy

Prell, Elizabeth

Purcell, Charlotte

Quin, Renee

Quin, Shaun

Quinn, Brandon

Quinn, Deborah

Quinn, William

Rannou, Chris

Read Bonnie

Read, William

Redfern, Jill J.

Redfern, Thomas H.

Reed, James D.

Reichart, Elaine T.

Reiner, Chris

Richardi, Allen

Richardi, Amy

Richardi, Denise

Richardi, Kerry

Rinehart, John Y.

Roan, Nicholas

Roan, Susan

Rossi, Sherri

Rowland, Jonathan

Rutilff, Thomas C.

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Sams, Brenda

Sams Bryan

Sams, Kelley

Sams, Terry

Santini, Chris

Schleimer, Pamella

Schleimer, Jr., Frank

Schleimer, Sr., Frank

Schmidt, Anita

Schwenk, Kurt

Shoop, Charles W.

Simone, Pascal

Simone, Sandra

Skowronsky, Kenneth

Skowronsky, Linda K.

Smith, Earl C.

Smith, Elizabeth

Smith, Greg

Smith, James

Smith, Peter

Smith, Wendy

Snyder, David

Snyder, Mary L.

Snyder, William R.

Soan, Charles

Spongler, Rodney M.

Stalder-Frey, Sandra

Stecker, Kathleen

Stickel, Victoria

Stone, Patrick

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Stout, Dale D.

Stout, William

Strassle, Edward

Struble, Glenn A.

Stryeski, Nancy Baxter

Stumpp, Ilona

Summitt, Jeremy

Summitt, Rebecca

Supp, Shirley

Surca, Gordana

Surca, Gordane

Surca, Josip

Sussek, Claire

Taylor, Joseph

Terhune, Gregory E.

Thiele, Barbara

Thompson, Mary K.

Thorpe, Eileen

Tino, Kelly

Tishuk, William F.

Tishuk, William R.

Tolentino, F.H.

Totten, Charles C.

Tozzi, Jean

Tozzi, Scott

Treible, Nancy A.

Trono, Amalia

Tullo, Daniel

Tullo, David

Tullo, Diane

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Tullo, Susan

Tutten, Dr. James

Vanderhoof, Joy

Verkade, Jan

Verkade, Kathryn

Verona, Val

Volkers, Clyde J.

Volkers, Joan Nancy

Wagner, Tom

Walz, Dayne C.

Ware, Michael A.

Warren, James

Warren, Linda

Westbrook, Jacob

Willever, Wayne

Willever, Wendy

Williams, Deborah

Williams, Douglas

Wilson, Dan

Wilson, Joan

Witkowski, Allison

Witkowski, James

Witte, Christine R.

Witte, Kirk

Woodruff, Barbara M.

Wright, Jesse

Wyatt, Heather

Wyckoff, Jeffrey W.

Wyckoff, Lisa C.

Yuhes, Daniel

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117. The following commenters submitted form letters opposing the Highlands rules in their entirety. The form letter specifically opposed several definitions and preservation area standards contained at N.J.A.C. 7:38-1.4 and 3, respectively. In addition, the form letter opposed the wording of the exemption at N.J.A.C. 7:38-2.3(a)6 relating to non-residential improvements to a place of worship:

Alpaugh, Cassandra

Balboa, Michael

Balboa, Santina

Blodgett, Alan

Blodgett, Marian

Bond, Ronald J.

Corzullo, Angelina

Durnan, Dorothy

Eckel, Donald A.

Eckel, Phyllis, A.

Foley, David

Foley, Gretchen

Garza, Carol

Garza, Michael

Godshalk, Sandra L.

Herrman, Donna G.

Herrman, Edward W.

Holland, Anthony

Jarrell, Debra Ann

Jarrell, Kenton G.

Keady, Kris

Keady, Peter

Kievning, Chris

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Kumma, Rosemary

Kumma, Victor

Lacey, Diane

Lacey, Jr., Joe

Lane, Mary

Lane, Thomas

Lubbe, Susan

Lubbe, Ted

Minorics, Deb

Minorics, Les

Mosher, Duane E.

Mosher, Marianne E.

Nauta, Cathleen D.

Nauta, Dale K.

Nelson, Carol

Nelson, Laurie L.

Nelson, Paul

Nelson, Rev. Randall

Oldford, Jaime

Oldford, W. Blaine

Powell, Allen

Powell, Carol

Robinson, Doug

Robinson, Verna

Rodriquez, Jesus

Rodriquez, Sherri

Romaine, Jack

Romaine, Leilani

Romaine, Lor

Romaine, Sara

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Rowlands, Clement

Rowlands, Dawn

Sciascia, Greg

Spiller, Donna

Spiller, Douglas

Spiller, Robert

Surca, Gordane

Surca, Josip

Swisher, Albert

Swisher, Doris

Thorpe, Eileen

Thorpe, Fred

Tucker, Jean

Tucker, Joseph

Turner, Diane R.

Wilson, Dan

Wilson, Joan

Wilson, Lelia

Wineberg, Donna

Wineberg, William

Witner, Dorothy

Witner, Wallace

Yanavok, Loretta

Yount, Michelle

Yount, Rev. Mike

Yount, Rebekah S.

Yount, Susan

Zacharias, Bonnie

Zacharias, Joe

ZeRuth, Amanda M.

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ZeRuth, Jennifer I.

ZeRuth, Nancy

ZeRuth, Jr., William H.

Zeigafuse, Dot

Zeigafuse, Frank

General

Wireless telecommunications facilities

1. COMMENT: It must be recognized that the particular design constraints of a wireless telecommunications network make it unlike any other land use. Sprint Nextel Corporation is obliged pursuant to law to rapidly facilitate the deployment of reliable seamless wireless telecommunication services. The wireless provider is constrained to ascertain the needs of its network by identifying a gap in its network service coverage and then locating properties that will allow it to fill those service gaps. The location of a wireless facility is constricted by the demands of the provider's existing web of network base stations and antennas, as well as the existing topography of natural and manmade obstacles such as hills or buildings. Suitable properties, especially in rural, hilly areas, are limited. Sprint Nextel Corporation has relied upon the development blueprint set forth in their siting plans, and it would be fundamentally unfair and legally improper for the Highlands Commission and DEP to vitiate those plans by retroactively and prospectively requiring facilities that have been mapped out as a part of siting plan and included as part of a provider's network build-out to redesign the location of their facilities. See, *State Department of Environmental Protection v. Stavola*, 103 N.J. 425, 436 (1986) (DEP was precluded from applying CAFRA regulations to beach club cabanas because the clubs had relied in good faith on the absence of any previous attempt by DEP to regulate beach club cabanas.) (17)

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2. COMMENT: Wireless telecommunications providers, as well as state and local governments, are subject to the requirements of the Telecommunications Act (TCA).

Section 704 of the TCA, codified at 47 U.S.C. 332, was enacted to regulate, in part, this process. Section 332(c)(7) of the TCA expressly preserves the traditional authority enjoyed by state and local governments to regulate land use and zoning, but places several substantive and procedural limits upon that authority when it is exercised in relation to personal wireless service facilities. Specifically, Section 332(c)(7)(a) provides:

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

Section 332(c)(7)(B)(i)(11) [Limitations] provides:

- (i) The regulation of the placement, construction, and modification of personal wireless facilities by any State or local government or instrumentality thereof-
- (ii) Shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Thus, although state and local governments are authorized to make siting decisions with regard to personal wireless service facilities, the "prohibition of services" clause in the TCA, acts as an overlay restriction, or Congressional safeguard, to make sure that siting decisions will not thwart Congress' intent to rapidly provide advanced telecommunications services to all Americans.

It is well-settled that local or state laws may not stand as an obstacle to the accomplishment of a federal objective. *R.F. v. Abbott Laboratories*, 162 N.J. 596, 618-19 (2000). Although the TCA does not completely preempt the authority of state and local governments to make decisions regarding the placement of wireless communications facilities, it quite clearly preempts any state regulations which conflict with its provisions. *Sprint Spectrum L.P. v. Town of Easton*, 982 F.Supp. 47, 50 (D. Mass. 1997). Plainly, the "prohibition of services" clause of the TCA was implemented to break down the barriers to development of a telecommunications infrastructure and reflects the TCA's antiregulatory and antibureaucratic philosophy. Cong. Rec. H1 151 (Feb. 1, 1996)

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(Statement of Rep. Markey); Cong. Rec. HI 161 (Statement of Rep. Oxley). This provision reflects Congress' intent to stop state and local authorities from keeping wireless providers tied up in the hearing/permitting process through complicated and lengthy state processing procedures. *Id.*, 957 F.Supp. at 50 (quoting *Westel- Milwaukee Co. v. Walworth County Park and Planning Comm.*, 205 Wis.2d 244, 556 N.W.2d 107 (App.1996)). Further, Section 253 (a) of the TCA, entitled, "Removal of Barriers to Entry" provides:

No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate telecommunications service. 47 U.S.C. 3 253 (a).

As written, the proposed Highlands Water Protection and Planning Act amended regulations are unduly overbroad, burdensome and restrictive to achieve the State's goals of protecting the State's drinking water and preserving land from development when viewed in light of the Federal goals to reduce barriers to entry, and encourage the creation of an expanding and seamless communications network. As such, the regulations may be invalid pursuant to the Supremacy Clause of the U.S. Constitution. See, U.S. Const. Art. VI, cl. 2. Here, the State's interests may not trump Federal interests and goals. To the contrary, the legislative statement attendant to the TCA provides that states are to be encouraged to make property, rights-of-way, and easements under their jurisdiction available for siting of telecommunications facilities. Moreover, enactment of Section 615 of the Wireless Communications and Public Safety Act of 1999 (WCPSA) reaffirmed our nation's commitment to facilitate the rapid deployment of a comprehensive end-to-end emergency communication infrastructure including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced 9-1-1 service. 47 U.S.C.A. Section 615. Clearly, the development of a seamless, ubiquitous and reliable wireless telecommunications system is particularly critical in the rural Highlands region to provide communication coverage necessary to emergency services providers and the public in this largely expansive, undeveloped and recreational area. (17)

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RESPONSE TO COMMENTS 1 AND 2: Of the 17 categories of exempt activities described in N.J.S.A. 13:20-28a, subsection 11 exempts “the routine maintenance, operation, rehabilitation, preservation, reconstruction repair or upgrade” of “public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of th[e] act.” The term “public utility” under the Highlands Act is the same as that term is defined in N.J.S.A. 48:2-13. Although telecommunications providers are not “public utilities” under New Jersey law as electric or telephone companies are, the Department recognizes that the majority of telecommunications service providers operate within rights-of-way owned or controlled by public utilities. Since the New Jersey Legislature has exempted from Highlands permitting requirements a very broad range of activity within utility rights-of-way, the Department proposed at N.J.A.C. 7:38-2.3(a)11 to exempt from Highlands Act permitting requirements cellular equipment installation on legally existing overhead towers owned by public utilities and to exempt construction of a 10-by-20 foot pad within the right-of-way owned or controlled by that public utility, subject to the utility’s approval.

The Department believes that exempting telecommunication activity as described in the proposed rule is consistent with the Legislative intention articulated in N.J.S.A. 13:20-28a(11). Provisions in N.J.S.A. 13:20-32a and -32j affecting activities in utility rights-of-way that are also stream buffers or over 20 percent grade would still apply. Telecommunications development may also be exempt if associated with reconstruction of a building pursuant to N.J.S.A. 13:20-28a(4). Attaching telecommunications equipment to the roof of existing buildings in the preservation area does not require a Highlands permit.

With the foregoing exceptions, a Highlands Act approval or waiver will continue to be required for construction of pads larger than 10-by-20 feet or construction of any freestanding telecommunications tower, pad or utility cabinet in the preservation area but outside a lawful public utility right-of-way. The Department does not consider this permit requirement an obstruction or prohibition of telecommunication service under federal law. The rules not only establish criteria by which a permit may be issued for such activities, but also allow telecommunications companies to apply for a waiver of permit

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requirements in the event that no alternative location exists to address critical communications needs affecting public health and safety.

3. COMMENT: The proposed readoption with amendments to the Highlands Water Protection and Planning Act rules should not be promulgated until the Highlands Council meets with the telecommunication carriers to discuss the impact of these rules on wireless siting. Both the proposed and existing rules trample the Federal goals and interests as well as the State's goals and interests to provide for the rapid build out of reliable seamless telecommunication services and to maintain the public health and safety. These rules effectively create a barrier to entry in the Highlands, and discriminate against functionally equivalent services. The rules lack clarity, do not provide for explicit exemptions for telecommunications facilities and are unduly burdensome. (17)

4. COMMENT: The proposed amendments to the Highlands Water Protection and Planning Act rules will directly impact the facility siting and future network development of wireless telecommunications facilities in the Highlands region. It is our position that the amendments, as drafted, should not be promulgated. Further discussion, review and analysis is clearly warranted to develop regulations that will be consistent with critical federal goals and interests as set forth in the Telecommunications Act of 1996 (TCN) and the Wireless Communications and Public Safety Act of 1999 (WCPSA). (17)

RESPONSE TO COMMENTS 3 AND 4: The Department is required by the Highlands Act to establish rules to implement environmental standards for the preservation area (see N.J.S.A. 13:20-32). As explained in response to comments 2 and 3 above, the Department recognizes the need to make some accommodation for wireless facilities. This is reflected in the exemption for the routine maintenance and operations of public utility lines at N.J.A.C. 7:38-2.3(a)11. The Department does not believe that any additional rule changes are warranted at this time. However, the Department will review and consider future changes if deemed consistent with the purpose and intent of the Highlands Act.

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Land Preservation

5. COMMENT: I actively farmed property when I was younger and have maintained it by leasing it out as a productive farm ever since. I have continued to hold the property in anticipation of eventually selling the agricultural development rights and seeing the land permanently preserved. That dream of preservation died hard with passage of the Highlands legislation. I support the laudable goals of open space preservation. However, the draconian rules offer but one solution and that was available for a limited time only to planning area owners: sell your property immediately for development. My two-decade horizon for continuing to hold my farm was reduced to a few short weeks. No existing program or course of action beyond selling out provided much more than a vague promise of financial recovery. (53)

6. COMMENT: There are no preservation programs available that pay pre-Highlands fair market value for property. There is no funding in place to compensate the majority of landowners for lost equity. Most land doesn't qualify for either Green Acres or Farm preservation funding or wouldn't bring in enough money for the owners to survive due to small acreage. The only remedy is to go through the arduous process of applying for development getting turned down, going to court, losing the case and then applying for a waiver. (19, 28)

7. COMMENT: The chat about the theoretical price of a wolf and the theoretical price of a snail darter and the theoretical price of property is not what motivates us to be so opposed to this. It's not theory. We have two young children. We plan to preserve our land and use the money to educate our children. You took our education fund from our children for water going to the Delaware River. (10, 87)

RESPONSE TO COMMENTS 5 THROUGH 7: The implementation of the Department's regulations has not negatively affected the commenter's opportunity to preserve his land.

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In fact, the Highlands Act specifically requires that when the State Green Acres program, State Agriculture Development Committee, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land for recreation, conservation or farmland, that agency must conduct two appraisals of the value of the land: one using current regulations, and the other the regulations before the Highlands Act was enacted. The higher of those two values is to be used as the basis for negotiation with the landowner. Both agencies were provided funding by the State Legislature to purchase land and development rights in the Highlands: \$20 million was appropriated for Green Acres land acquisition and \$15 million for the State farmland preservation program. Therefore, if preservation of the land is the commenter's goal, funding is available and the State is required to negotiate using pre-or post Highlands fair market value, whichever is higher.

Finally, the commenters should note that seven percent of the Delaware River watershed is in the Highlands Region so it is reasonable to protect water that flows to the Delaware River.

8. COMMENT: I farm in Franklin Township, Warren County. I have been there since my father bought the farm in the early 1930s and we have tried to be good stewards to the land. The land value is depleted. I have five children, nine grandchildren, three great grandchildren and thought at some point in time that I would be able to help them in their life. In September, two years ago, Hurricane Ivan came through. I have Millbrook Stream that runs through my property, which is a Category One stream and Ivan really tore it up, made islands out of the stream bed, water runs over acres where it should not be. I went to the Soil Conservation in Warren County. They sent me to DEP. DEP came out and looked at the property. They in turn told me that I had to get an engineer. So I employed an engineer. Then they told me I had to get land surveyors. I got land surveyors. We surveyed the property four times and yet today that stream is still running all over the place. When we get an extra heavy rain, then it spreads out more yet. Probably 10 or 15 acres gets covered with water where it normally would not be. Then I found out that my property is divided by the core area and the planning area and the core

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area is where the major part of it is. Then they said I had to go to DEP -- or the Highlands Commission and they told me I had to come up with \$100 fee for a permit from the Highlands to give to the DEP, when I already paid them \$1200 for a permit that I did not get. (88)

RESPONSE: The Highlands Act establishes many environmental standards for development in the preservation area, but does not regulate agricultural or horticultural uses. Therefore, there is no requirement, under the Highlands Act for the commenter to apply for a Department approval. The Department has investigated the commenter's permitting issues and has determined that the commenter withdrew his permit application before completing it.

9. COMMENT: I am four years old. Why are you stealing my farm? (31)

10. COMMENT: I am three years old. You are stealing my college money. I hope that makes you happy. (29)

RESPONSE TO COMMENTS 9 AND 10: The Department is not stealing anyone's farm or college money. In fact, by implementing the Highlands rules, as required by the Highlands Act, the Department is enabling farming to continue unregulated, making it more difficult for farms to be converted to development, and ensuring a safe a plentiful quantity and quality of water for farming activities now and in the future. The Highlands Act also promotes the preservation of farm land. It requires that when the State Green Acres program, State Agriculture Development Committee, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land for recreation, conservation or farmland, that agency must conduct two appraisals of the value of the land: one using reflecting current regulations, and the other reflecting the regulations in place before the Highlands Act was enacted. The higher of those two values is to be used as the basis for negotiation with the landowner.

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Regional Master Plan

11. COMMENT: The State Master plan should provide for higher density in the planning area including: Planned Unit Development - Mixed use; Town Centers; Inclusion of Affordable housing. All development rights taken from the preservation area should be transferable to the planning area, and be based on economic value, not solely on number of units. Town Master Plans should reflect higher densities with mixed uses in the planning area and consistency with the State Master Plan. (18, 51, 52, 84)

RESPONSE: The Department's rules relate to the implementation of the Highlands Water Protection and Planning Act (Highlands Act) in the Highlands preservation area. The Highlands Water Protection and Planning Council (Highlands Council), is responsible for developing the Highlands Regional Master Plan and transfer of development rights program. Consequently, these comments are beyond the scope of the Department's rules and should more appropriately be directed to the Highlands Council.

12. COMMENT: I know and work closely with public officials and act as an active participant in and funder of environmental groups. I was invited to serve as a volunteer on one of the Highlands Technical Advisory Committees. That group was tasked to review the 'work product' of the Highlands Council's administrative staff. That committee met once in July, 2005. To my understanding there has been no second formal meeting of my advisory group. I was never notified that the staff 'work product' was available for my review, but it is now being implemented with limited opposing public input. (53)

RESPONSE: The Department's rules do not address the development of the Regional Master Plan by the Highlands Council. However, it is important to note that the Highlands Council's development of the Regional Master Plan has included input from the public, local officials, and technical experts. In January of 2006, the Highlands Council published a detailed scoping document describing the initial input on the Regional Master Plan. In June of 2006, the Highlands Council initiated the release of a

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series of technical reports on fundamental aspects of the Regional Master Plan and has invited public input and comment. For additional information on these issues, see the Highlands Council's website at <http://www.highlands.state.nj.us>.

13. COMMENT: There will be an inevitable adverse and economic impact on the towns in the Highlands. High-density projects in other areas that are going to be allowed and are going to be subsidized by the State as a result of these regulations will put an enormous economic and environmental strain on the communities where they are built. (13)

RESPONSE: The Highlands Act divides the Highlands Region into two parts: planning and preservation areas. The Department's rules only apply in the preservation area. There is no evidence that enactment of the Department's rules in the preservation area will result in adverse economic impacts to towns in the Highlands. Rather, the Department's economic impact statement predicts positive impacts resulting from implementation of the Department's rules. The commenter may be referring to the planning area when expressing concerns about high-density projects. The Department's rules do not apply to the planning area and do not provide subsidies for any projects in the Highlands Region. The Highlands Council is preparing a Regional Master Plan (RMP) that will address planning issues in the Highlands Region. As part of the RMP, towns in the planning area will have the choice to opt in to the plan. They will retain the right to decide whether or not they will accept increased development and to evaluate for themselves whether there are economic benefits to be obtained or environmental features to be protected by opting-in to the RMP.

14. COMMENT: The Highlands Act is poor legislation because it increases building density in the planning area. Local planning boards have planned well for the future and know their area and what is best for it. (102)

RESPONSE: As stated in response to comment 13, the Department's rules apply only to the preservation area. The Highlands Council is responsible for developing the Highlands

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Regional Master Plan that will address both the planning and preservation areas.

Consequently, this comment is beyond the scope of the Department's rules and should more appropriately be directed to the Highlands Council.

Funding and Compensation

15. COMMENT: Please explain why there were no funds in place when this legislation was passed to compensate landowners for their loss of value. (23)

16. COMMENT: Until and unless a mechanism is created to fairly compensate property owners for the loss of value of their land, the Highlands Legislation is really nothing more than what its more vocal detractors have decried as a land grab. In order to make property owners whole for their loss of equity, a vast pool of wealth must be created along with a mechanism for distributing fund to landowners to compensate them for the property rights obliterated by the Highlands Act. (53)

17. COMMENT: The agriculture impact statement in the rule states that the implementation of the rule will have no impact on agricultural or horticultural use or development because they are excluded from the definition of "major highlands development." This statement does not address the impact of the rule on equity or agricultural viability. Land is so important to the farmer, as it is their key financial asset. Because of this, development value is critical. The septic density rule severely impacts the value of the land. Reduced net worth affects many things for a farmer such as being able to obtain loans. Without a dedicated funding source, farmers and other landowners face serious financial implications. (45, 66)

18. COMMENT: I'm an eighth generation farmer. I have a hundred acres. I would like to have seen my kids be the ninth generation. I am going to tell my kids if they have any brains they won't have anything to do with the place. If I am lucky, I will be able to keep my farm and stay there, but it will not be by going to the bank and borrowing any money

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because I was told that I would not get any money because my land is worthless. I put my greenhouse up before I had to deal with the rules and regulations that the Department is proposing. I am now paying 18 percent on most of my credit cards to be able to afford my greenhouse. If I did not build the greenhouse when I did, I would not be able to do it. (56, 57)

19. COMMENT: My family has farmed in Pohatcong Township, Warren County, for over 240 years. Our farm and our neighbors' properties are in the heart of the Pohatcong grasslands. We have been responsible stewards of our lands and have practiced Best Management Procedures always. The 25 and 88-acre septic density proposals affect only farmers. Nobody else owns that much land. Modern agriculture is capital intensive. Such large lot zoning drastically reduce the farmers net worth and borrowing ability. The only other alternative is to sell of a couple of lots and the farm is gone. The Highlands Act has adversely affected agriculture in the core areas, and has failed to recognize this and provide a stable funding source. (33)

20. COMMENT: I believe that my equity is gone. I could have sold my farm years and years ago, and I have kept it. Millbrook Stream is a Class C1 stream. That took a lot of land that was developable away from me, and now the Highlands have come along and taken the rest. (88)

RESPONSE TO COMMENTS 15 THROUGH 20: The Department's rules do not govern funding and the Department supports efforts to provide additional and continuing sources of funding to fulfill the goals of the Highlands Act.

The Highlands Act contains several provisions to reduce its impact on property owners. One provision is the exclusion of agricultural and horticultural uses from the definition of "major Highlands development." Thus agricultural and horticultural uses can continue without the need to obtain a Highlands preservation area approval (HPAA). A second provision is the requirement that when the State Green Acres program, State Agriculture Development Committee, a local government unit, or a qualifying tax exempt

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nonprofit organization seeks to acquire land for recreation, conservation or farmland, that agency must conduct two appraisals of the value of the land: one using current regulations, and the other the regulations before the Highlands Act was enacted. The higher of those two values is to be used as the basis for negotiation with the landowner. Therefore, the Highlands Act does not affect a landowner's property value if the landowner's intent is to preserve his or her land. Twenty-million dollars was appropriated for Green Acres land acquisition and \$15 million for the State farmland preservation program. A third provision is the extensive list of exemptions to the Act, many of which provide criteria by which the construction of single-family homes remain exempt. Another provision is the requirement that the Highlands Council establish a transfer of development rights program for the Highlands region. Such program could provide another source of revenue to landowners with land upon which development has been restricted.

The Department is required by the Highlands Act to prepare rules and regulations establishing the environmental standards for the preservation area upon which the regional master plan adopted by the Council and the Highlands permitting review program administered by the Department pursuant to this Act shall be based. See N.J.S.A. 13:20-32. The Act goes on to list the resources to be protected, in some cases the criteria for that protection, and the findings that must be made before the Department approves a permit. The Department believes that its rules, including the septic density standards (which are discussed in more detail later in this document in response to comments under N.J.A.C. 7:38-3.4), successfully implement the spirit and intent of the Highlands Act.

Finally, the Department understands that five factors are considered by a loan agency when evaluating a loan application. These are character (the owner's credit score), capital (the owner's net worth), collateral (security pledged for the payment of a loan), capacity (earnings and cash flow) and conditions (the terms of the loan). The Department's rules have the potential to affect capital and collateral but would not affect the remaining factors. Consequently, the Department cannot make generic conclusions regarding whether loans will be denied to agricultural operations in the Highlands.

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21. COMMENT: A bill is being considered in Trenton to levy 4 cents per 1000 gallons of water used. This will not be a dedicated fund and will go into the State's General Fund. Where are the dedicated funds to compensate our Highland's landowners? (107)

RESPONSE: The bill in question did not pass out of the Legislature. However, the Legislature has provided \$20 million to the Green Acres Program and \$15 million to the Farmland Preservation program for land preservation in the Highlands.

22. COMMENT: Our water goes down to the Delaware River benefiting no one in northern New Jersey so why restrict us? More people in the rest of the State need to pay more for water to reimburse us for our lost land values. Since no reimbursement or method to give us our land values are included in this bill, the bill is clearly flawed. (32)

RESPONSE: The boundary of the Highlands preservation area was prescribed by the Highlands Act in order to delineate an area of exceptional value that includes watershed protection and other environmentally sensitive lands. The preservation area designation was based upon a recommendation from the March 2004 Action Plan of the Highlands Task Force, which was based upon natural resource data assembled by the United States Forest Service, Rutgers-The State University, and the New Jersey Water Supply Authority. The specific boundaries of the data were translated to the appropriate, and nearest practicable, on-the-ground, and easily identified reference points, such as, but not limited to road descriptions, survey lines, and municipal boundaries. The specific area designated as the preservation area was then described in the Highlands Act at N.J.S.A. 13:20-7.

Because the Highlands preservation and planning area boundaries are designated by the Highlands Act, the Department has no authority to move, alter or otherwise make changes to that boundary. The Department is required to apply its rules to proposed major Highlands developments in the preservation area as designated by the Highlands Act.

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23. COMMENT: A logical solution would be for the New Jersey Legislature to create a development right purchase plan funded by usage fees for water consumed in those cities that are served by public water supplies. (53)

24. COMMENT: The State should institute a program where homeowners and landowners can obtain market value loans when institutions turn them down due to the loss of equity. (19, 28)

25. COMMENT: I believe that we need a water tax. Only I would suggest that it be dedicated to compensate the landowners who are contributing the value of their land for the benefit of others who are not paying for it. (19, 43)

26. COMMENT: The State should establish a new funding program to compensate landowners for ongoing stewardship of the land. In some states this is being done with a "conservation credit" where water companies, for instance, pay landowners to keep up good forest management practices since this will save on water treatment costs. Industries that pollute also buy conservation credits when immediate remediation is not possible. The money goes to landowners who practice good conservation. Companies or towns that cannot account for water in their system pay landowners for wasted water as an incentive to fix the problem. (19)

27. COMMENT: The Governor and the New Jersey Legislature should establish a dedicated funding source to provide compensation to property owners who have and still will suffer irreparable losses from the Act. (89)

28. COMMENT: The State should float a revenue bond to fund reverse mortgages for landowners who do not wish to sell now but agree to at a later date. Monthly payments

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would go to the owner for not developing the land and the deed or deed restriction would transfer over to the state once the full value was paid. (19)

29. COMMENT: The State should allow landowners to sell two kinds of deed restrictions: development rights and conservation rights. They would have different values. The State or environmental lobbyists could purchase the deed restrictions. They can be structured as annual, 5-year or 10-year agreements renewed with the mutual agreement of both parties and run with the land for the duration of the contract. Owners agree to do certain activities or, in the case of development rights, nothing at all. (19)

30. COMMENT: In terms of a water tax, I don't support what's proposed because that water tax goes to things like fixing leaky pipes and hardly any, if any at all, comes back to land preservation. The New Jersey Water Supply Authority has proposed an \$8 per million gallon fee on the water that they sell dedicated exclusively for land preservation. So they are one agency who's doing a good job. In terms of other water taxes, there's franchise and excise tax, or whatever the right words for it are, that charge about 13 and-a-half percent of your water and sewer bill because somehow water turns into sewage and I can describe that for you if you want. And that goes to the State Treasury and it goes back to the municipalities to pay for the right-of-way for the water mains in their street. We who supply the water get none of that money. There's plenty of money around, but it's going to the wrong places. (87)

RESPONSE TO COMMENTS 23 THROUGH 30: The Department's rules do not govern funding. Consequently, these comments are beyond the scope of the Department's rules. However, the Department notes that to date the Legislature has dedicated \$35 million to preserve land through the Green Acres Program and the State Agricultural Development Committee.

31. COMMENT: While real estate is generally considered a secured investment, it is subject to government regulations. Assuming a government can justify a regulation for a

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sufficient public purpose, it can take the value provided it leaves some “minimum economically viable use.” Although takings of 80 percent of property value have been sustained by our courts, the minimal economic feasible use which would be left here will not be farming. Bereft of its equity component in land, active farming will not be viable. Currently the only way for a property owner to recover a portion of their lost equity is to sell the property or development rights either through the farmland preservation or Green Acres programs. Authorized funding will soon be exhausted. A program to establish a fund financed by private developers through the transfer of development rights remains to be implemented. This theoretical funding source took 20 years to develop before it became an effective tool in the Pinelands. A permanent dedicated funding source for Highlands acquisitions is needed. (85, 87)

32. COMMENT: The Department plans on compensating landowners to the loss of their land with a transfer of development rights (TDR) program. TDRs have no monetary value and cannot be used for practical purposes such as paying for groceries or paying taxes. (54)

RESPONSE: The Department’s rules do not govern the transfer of development rights (TDR) program or funding of the Highlands regulatory program. However, the Department supports all efforts to establish a source of funding to support the goals of the Highlands Act.

The TDR program is the responsibility of the Highlands Council. A TDR program establishes credits for land that have a monetary value that can be sold, much like selling the development rights from a parcel of land to be preserved. Very simply, a TDR program establishes sending and receiving districts. In order to build in the receiving area, a prospective builder will have to buy a certain number of credits from an owner. Therefore, those owning credits will indeed have a commodity with a monetary value.

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33. COMMENT: The statutory structures to protect the equity interests of large lot owners are inadequate and ephemeral. Funding for acquisition through Green Acres (P.L.2004, Ch. 120, 3) and Farmland Preservation (P.L.2004, Ch. 120, 44), programs will soon be exhausted and the period for payment of pre-Act values lapses in 2009. The Transfer of Development Rights (TDR) program (P.L.2004, Ch. 120, 46) is ephemeral. The TDR program in the Pinelands took twenty years to develop and incorporated mandatory receiving zones in a finite area. The Highlands TDR program provides for voluntary receiving zones and has been described by staff of the Highlands Council as the largest such program ever undertaken in the United States. (85, 87)

RESPONSE: The Department has no authority through rulemaking to change the statutory structure of the Highlands Act. Further, the Department's rules do not govern funding, or the transfer of development rights (TDR) program, which is under the authority of the Highlands Council. However, the Department notes that the Highlands Act provides several mechanisms to reduce its impact on landowners, in addition to the TDR program. These include an extensive list of exempt activities, the exclusion of agricultural and horticultural uses from the definition of "major Highlands development" thus keeping these activities unregulated by the Department, the requirement that agencies seeking to acquire land for open space and farmland preservation obtain pre- and post Highlands appraisals and negotiate using the higher value, and the provision of a waiver for the taking of property without just compensation if a Highlands approval has been denied and the owner can recognize no alternative use for the property.

Fees and Fines

34. COMMENT: Amendment VIII - "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." A justification for the excessive fines in the Act and rules should be provided. (107)

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RESPONSE: The Department's penalties were developed in accordance with the requirements of the Highlands Act. The Highlands Act states that the commissioner is authorized to assess a civil administrative penalty of up to \$25,000 for each violation of a Highlands permitting review approval or any rule or regulation that the Department adopts, and that each day during which each violation continues shall constitute an additional, separate, and distinct offense." (See N.J.S.A. 13:20-35d) The Highlands Act also provides the Department with the authority to assess a civil penalty, not to exceed \$10,000 per day to a person who violates an administrative order or a court order, or who fails to pay a civil administrative penalty in full and that each day during which the violation continues shall constitute an additional, separate, and distinct offense. (See N.J.S.A. 13:20-35e) Consequently, the Department is consistent with the Highlands Act in establishing its fines.

35. COMMENT: The prohibitions and penalties in the Highlands Act appear random, disproportionate and capricious. (5)

RESPONSE: In enacting the Highlands Act, the State Legislature found that the Highlands region contains many resources worthy of protection. Specifically cited are water resources, clean air, contiguous forest, wetlands, pristine watersheds, habitat for fauna and flora, historic sites, recreational opportunities and agriculture. (See N.J.S.A. 13:20-2). In addition, the Highlands Act requires the Department to establish a permitting program for the protection of these resources and in many cases provides the Department with the standard to be applied to achieve this protection. The Highlands Act specifies 11 different resources to be protected (see N.J.S.A. 13:20-32) and also provides the findings that the Department is required to make in all cases before approving a Highlands preservation area approval (see N.J.S.A. 13:20-35). The Department's regulations include all of the provisions required by the Highlands Act for protection of the resources in the Highlands.

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Additionally, as described in response to comment 34 above, the Highlands Act establishes the fines associated with violations and the Department has adopted these fines consistent with the Highlands Act.

36. COMMENT: One of my many problems with this is you have an agency that is funded almost entirely by fines and fees, trying to come up with rules and regulations; \$10,000, \$25,000 dollar fines for basically cutting firewood or something that you normally would be able to do. It is utterly ridiculous the fines that you have that could be imposed for something that is basically a small infraction compared to the many hundreds of other things that happen in this state. (28, 37, 56, 57, 82)

RESPONSE: As stated in response to comment 35, the Department is authorized by the Highlands Act, and has established reasonable fees necessary to meet the administrative costs of the Department associated with the processing, review, and enforcement of any application for a Highlands permit review. In addition, as described in the response to comment 34 above, the Highlands Act establishes the fines associated with violations and the Department has adopted these fines in the rules.

However, the Highlands Act and regulations do not regulate, and therefore would not impose a fine, for the cutting of firewood or for normal household activities. "Major Highlands development" defines those activities regulated by the Highlands Act. Cutting firewood does not meet the definition of major Highlands development contained in the Highlands Act or these regulations and is therefore not a regulated activity. In order to be regulated, an activity must be: 1. Any non-residential (that is, commercial) ***development*** ; 2. Any residential ***development*** requiring an environmental land use or water permit or resulting in ultimate disturbance or one acre or more of land or a cumulative increase of 0.25 acre or more impervious surface; 3. Any activity that is not a development but results in the ***ultimate disturbance of one-quarter acre or more of forested land*** or a cumulative increase of 0.25 acre or more impervious surface; or 4. Any capital or other project of a State entity or local government unit that requires a land use or water permit or that results in the ultimate disturbance or one acre or more of land or a cumulative

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increase of 0.25 acre or more impervious surface. Therefore, cutting firewood is not a regulated activity unless it results in clearing 0.25 acres of forest.

37. COMMENT: Six hundred and thirteen pages of DEP regulations targeted mainly at homeowners are excessive and unnecessary. I looked at the regulations for the handling and transportation of hazardous waste. There are only 181 pages for the handling of hazardous waste and the majority of those pages are dedicated to the listing of fines for various violation which were a fraction of the fines for the violations for the homeowners in the Highlands. Cutting firewood without a Woodland Management Plan would subject somebody to a \$10,000 a day fine which happens to be the maximum possible fine in the hazardous waste regulations. You can -- if you are handling hazardous waste income and it was an incoming truck and you failed to make sure that what's in that truck matches what's on the manifest, you'll get a \$10,000 fine. So you could dispose of nuclear waste without even bothering to find out that it's something really totally different than what was on the manifest, \$10,000 a day. And yet the same guy that gets the \$10,000 a day for cutting firewood, it goes up to \$25,000 if he knew these laws existed. That doesn't even happen with the hazardous waste regulations. (13)

RESPONSE: As described in response to comments 117 through 120, the Highlands Act and these rules consolidates aspects of several other Department programs. The Department was charged with combining these regulations, and those requirements specific to the Highlands Act, into one comprehensive set of regulations, being mindful of the fact that these regulations must work in concert with the regional master plan to be development by the Highlands Council. Consequently, the Highlands rules are by necessity longer than rules that address one individual program area such as the hauling of hazardous waste. In addition, the Highlands Act required the Department to create its regulations in two stages: the first stage as a Special Adoption, and the second stage after consultation with various State agencies, and the Highlands Council. The majority of the readoption with amendments was already contained within the Special Adoption.

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As described in response to comment 34 above, the Highlands Act establishes the fines associated with violations. Consequently, the Department's rules are consistent with the Highlands Act in establishing its fines.

The Highlands Act and these rules are not targeted at homeowners, do not regulate, and therefore would not impose a fine, for the cutting of firewood. As stated in response to comment 36, the rules regulate major Highlands development. Cutting firewood does not meet the definition of major Highlands development contained in the Highlands Act or these rules and is therefore not a regulated activity unless it results in clearing 0.25 acres of forest. If an applicant anticipates cutting firewood to the extent that it would result in the clearing of 0.25 acres of forest, then a Woodland Management Plan is required in order to remain exempt from the Highlands Act.

Impact on Property

38. COMMENT: Had I continued to hold title to my land, I estimated that the property value would diminish 75 to 90 percent as nine potential building lots dwindled to one under the 'Preservation' rules that will surely be adopted by Highlands municipalities. Elected local officials will make rational responses to the financial incentives and administrative urging from the State. Any property in the planning area will wind up in preservation either through opt-in zoning or because DEP regulations will restrict what development a municipality can approve. (53)

RESPONSE: The Department's regulations apply only to the preservation area in accordance with the requirements of the Highlands Act. The Highlands Council is charged with developing a Regional Master Plan (RMP). As part of the RMP, towns in the planning area will have the choice to opt in to the plan. They will decide whether or not they will accept increased development and evaluate economic benefits to be obtained or environmental features to be protected by opting-in to the RMP.

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39. COMMENT: There must be a way to provide for the protection of clean water, which is certainly important and desirable, without putting such large and undue hardship on the landowners and farmers who have put much time, money and energy into saving the land.

(1)

RESPONSE: While there are other mechanisms to protect water quality, the New Jersey Legislature has enacted the Highlands Act for that purpose. The Department is mandated to implement environmental protection standards in the preservation area. The Act contains several provisions intended to ameliorate hardships for landowners and farmers. First, the Highlands Act specifically excludes agricultural and horticultural uses from the definition of “major Highlands development” so a Highlands preservation area approval from the Department is not necessary for these activities in the preservation area. Second, if the Green Acres program, State Agricultural Development Committee (SADC), local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land to be preserved in the Highlands, the agency must obtain two appraisals (one representing pre-Highlands Act value and the other representing current value). The agency seeking to purchase the land must inform the landowner of both values and negotiate using the higher of the two. Third, the Highlands Council is to establish a transfer of development rights program for the Highlands Region. Such program could provide relief for landowners with land upon which development has been restricted.

40. COMMENT: In order to make the Highlands dream come true, changes must be made in the Act and in the rules to achieve a more favorable overall balance between protecting the water, reversing the taking of the farmers land by providing compensation at pre-Highlands Act value, and rethinking the rules that drive the residential and business community from the Highlands. This is all achievable without deterring from the intent of the Act, that is, protecting the drinking water. (45, 46)

RESPONSE: The Department is required to adopt regulations to implement the Highlands Act as passed by the New Jersey Legislature. The Department believes that its

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rules are consistent with the intent and requirements of the Act. The commenter should note, however, that the Highlands Act does provide for compensation at pre-Highlands Act values to those wishing to preserve their land. The Highlands Act specifically requires that commencing on the date of enactment of the Highlands Water Protection and Planning Act (August 10, 2004), and through June 30, 2009, when the State Green Acres program, State Agriculture Development Committee, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire a development easement or the fee simple title using constitutionally dedicated moneys in whole or in part, to land for recreation, conservation or farmland, the agency must conduct or cause to be conducted an appraisal or appraisals of the value of the lands using current regulations, and the regulations in effect on January 1, 2004. The higher of those two values is to be used by the Green Acres program, State Agriculture Development Committee, a local government unit or a qualifying tax-exempt nonprofit organization as the basis for negotiation with the landowner with respect to the acquisition price for the lands.

Finally, the Department does not believe that the Highlands Act or regulations will drive residents and businesses out of the region. The Highlands Act provides many exemptions for existing residential and commercial development within the Highlands preservation area. For example, proposed improvements to single family dwellings in existence before August 10, 2004 are exempt from the permitting requirements of the Highlands Act and the Department's regulations. In addition, if a business is proposing an expansion and can keep the expansion within 125 percent of the existing building and limit the increase in impervious surface to no more than 0.25 acres, the business and its expansion are exempt from the Highlands Act and the Department's regulations. Further, an existing business can be sold and a new owner can continue that business or any other without being regulated by the Highlands Act unless a major Highlands development is proposed.

41. COMMENT: People will not let this be. We will fight for our land. (77)

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42. COMMENT: The Highlands rules are more disturbing then George Orwell's book 1984 since the book is fiction and these rules will soon be reality if the public sits back and accepts them like sheep. (54)

43. COMMENT: In a word, the proposed bill is obscene. (95)

44. COMMENT: You need to stop any support of this Bill. It is the worst land grab in history. Before you pass a Bill you should know how to fully fund it. You cannot fund existing projects, how can you fund this one! Repeal this entire Bill and get it right. (110)

RESPONSE TO COMMENTS 41 THROUGH 44: The Highlands Act was adopted by the New Jersey Legislature and signed by the Governor on August 10, 2004. The Department is required by the Highlands Act to "prepare rules and regulations establishing the environmental standards for the preservation area upon which the regional master plan adopted by the Council and the Highlands permitting review program administered by the Department pursuant to this Act shall be based." (See N.J.S.A. 13:20-32). Therefore, the Department has no authority to repeal any or all of the law.

In developing the Highlands rules, the Department consulted with the Highlands Council, the State Planning Commission, and the Departments of Agriculture, Community Affairs, and Transportation. Upon publication, the public had the opportunity to participate in the public hearing and to submit comments. Before final adoption, the Department's rules and its response to comments again undergo extensive review. The Department is confident that its rules are consistent with the intent and requirements of the Act.

It is unclear which existing projects the commenter believes are not currently funded. The Highlands Act provides \$20 million dollars for Green Acres land acquisition and \$15 million for the State farmland preservation program in the Highlands. In

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addition, funds were included by the Legislature to establish the Highlands Council and the permit review process.

45. COMMENT: I own a building lot which I bought years ago as an investment rather than investing in the stock market. This was to be retirement income funds. I would expect to lose money in stocks as part of risk, but to lose my rights to my property as a result of government intervention without compensation is unheard of. (100)

RESPONSE: If the building lot described by the commenter was legally existing on August 10, 2004, the development of that lot with a single family home may not be affected by the Highlands Act or these regulations. The Highlands Act provides an exemption for the development of a legally existing single family lot without any limitations for the individual's own use. Further, the Act provides that a lot, legally existing on August 10, 2004, can be developed with a single family house for anyone's use, and remain exempt from the Highlands Act if construction of a single family house results in less than 0.25 acres of impervious surface and one total acre of disturbance. Therefore, the commenter may have the ability to develop and/or sell the lot if it is intended for a single-family dwelling.

46. COMMENT: Building a home outside the Highlands requires a simple permitting process and scientific data already exists on various municipal and state maps. Yet in the Highlands, where a home will be built on 25 to 99 acres or more, scientific data at the level of detail normally required only at the university level for research or a PhD thesis is required before submitting an application for a permit. I can conceive of nothing that the construction of a single family home on so much property can possibly harm in the water supply or the environment in any permanent way. However, paving over a city block for "smart growth" homes hurts the environment until the day they are torn down. Nothing will grow there. No water will go back to the water supply except in the form of treated sewage and contaminated stormwater, likely dumped straight into a river or

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ocean, and concentrated with unregulated substances that are causing endocrine system disorders, hermaphrodites or immune compromised fish and mammals. (19, 28)

47. COMMENT: This entire process is an example of democracy run amok. The perceived needs of the many have been used at the expense of the few. The New Jersey Legislature and DEP are complicit in the greatest theft of property rights in New Jersey history. (82)

48. COMMENT: Normally citizens have the opportunity to vote for representatives who then vote on new laws. Laws of this magnitude issued by a regulatory agency instead of a legislative body have never been thrust upon ordinary citizens before and more latitude must be given. DEP rules usually regulate businesses and municipalities who have better understanding of the process and staff and legal advisors to interpret them. Normal citizens do not have those resources or the financial resources to hire experts. None of these regulations should apply to average citizens and farmers until such time as compensation is available for the loss in equity that has occurred. (19, 28, 107)

49. COMMENT: Taxation without Representation is an American birthright. We should be able to exercise our right to vote at a lower level than the State's Governor to show our displeasure with the actions of the Act which directly impacts our lives. (107)

50. COMMENT: Never in the history of the State of New Jersey have average citizens been subject to such numerous, cumbersome, and severe restrictions on property that they own. Never in my wildest dreams did I think that as a citizen of the United States I could have so many rights taken from me. The DEP and the Highlands Council have a legal responsibility to implement the law and an ethical responsibility to recommend changes so that the spirit of those who signed it without reading details can be honored. The Act clearly states that its number one goal is to "protect, restore and enhance the quality of surface and ground water" as well as other natural resources and gave authority to DEP to issue "reasonable" rules to accomplish this. The opportunity to seize power was taken

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and abused. The rules go beyond what the signers of the Highlands Act intended, will destroy thousands of lives, and will cost the state billions for enforcement. People will be forced into cities against their will, insufficient infrastructure exists in urban areas to accommodate them, and people will go to Pennsylvania putting an enormous strain on municipal needs. We are suffering the consequences of environmental rulemaking done exclusively in an academic environment based on short term studies and theories, not on how nature actually works. We will destroy NJ if we continue to meddle with the forces of nature. The goal of the Highlands Act to “ensure the economic viability of communities through the New Jersey Highlands” cannot be achieved with these regulations. (19, 28)

51. COMMENT: I am a property owner in the Highlands preservation area. I strongly object to the rules proposed for readoption. As a civil engineer it is apparent to me that this mass of rules was crafted under the premise that any restriction could be imposed as long as some attorney believed it was legally defensible. The affected taxpayers of the State will pay for both sides of any resulting legal argument. I believe the DEP has a responsibility to the citizens of New Jersey to apply proven scientific principles to achieve the objectives of the New Jersey and to not become a tool of environmental activists. (28, 82)

RESPONSE TO COMMENTS 46 THROUGH 51: The Highlands Water Protection and Planning Act was enacted by duly elected legislators and the Governor. The Act charged the Department to create rules implementing the provisions included therein.

In fact, most of the Department’s regulations for the Highlands preservation area are a consolidation of the permitting requirements and programs applied outside the Highlands region. These include the Freshwater Wetlands Protection Act, N.J.S.A.13:9B-1 et seq.; Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.; Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.; Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq.; Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.; Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq.; and Flood Hazard Area Control Act,

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N.J.S.A. 58:16A-50 et seq. The Act establishes the resources to be protected, in some cases the criteria for that protection, and the findings that must be made before the Department approves a permit. The Department's regulations are not based upon short-term studies or theories but on data and experience from implementing similar regulations in other parts of the State. For example, the impervious surface and scenic resource provisions exist in other State regulations that predate the Highlands Act. Impervious surface is part of the Department's stormwater regulations, and scenic and forest resources are regulated under the Department's Coastal Zone Management regulations. Consequently, the building community is well aware of how to submit an application that complies with the Department's regulations. The Department is providing guidance to applicants, consultants and others when requested.

Regarding the commenter's contention that the Department has taken private property without just compensation, the establishment of a regulation does not automatically result in a "taking." Rather a property owner has to demonstrate that he or she has been denied all reasonable use of the property. If an owner believes that this has occurred as a result of a denial under the Highlands regulations, the regulations at N.J.A.C. 7:38-6.8 provide a waiver process under which it is possible for the Department to waive a requirement of the rules in order to avoid a taking.

There are no provisions of the Department's regulations that force people to leave their property, and move to cities or Pennsylvania. To the contrary, the Act establishes many exemptions relating to single family dwellings as well as exemptions that would allow limited expansion of commercial development. In addition, the Highlands Act and regulations apply to "major Highlands development." A "major Highlands development is defined as: 1. Any non-residential (that is, commercial) **development** ; 2. Any residential **development** requiring an environmental land use or water permit or resulting in ultimate disturbance or one acre or more of land or a cumulative increase of 0.25 acre or more impervious surface; 3. Any activity that is not a development but results in the **ultimate disturbance of one-quarter acre or more of forested land** or a cumulative increase of 0.25 acre or more impervious surface; or 4. Any capital or other project of a State entity or local government unit that requires a land use or water permit or that

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results in the ultimate disturbance or one acre or more of land or a cumulative increase of 0.25 acre or more impervious surface.

The Highlands Act states, “The New Jersey Legislature further finds and declares that the New Jersey Highlands provides a desirable quality of life and place where people live and work; that it is important to ensure the economic viability of communities throughout the New Jersey Highlands; and that residential, commercial, and industrial development, redevelopment, and economic growth *in certain appropriate areas* of the New Jersey Highlands are also in the best interests of all the citizens of the State, providing innumerable social, cultural, and economic benefits and opportunities.”

(emphasis added). Because much of the Highlands Act addresses the strict standards to be developed and applied by the Department in the preservation area to limit development (based upon the definition of “major development”), the Department concludes that the New Jersey Legislature’s objective is to direct development out of the preservation area and into the planning area, as appropriate.

Finally, regarding the contention that a single family home would have no impact on water quality or the environment, according to the U.S. Census Bureau, New Jersey has a population of 8,717,925 people living in 2,000 square miles, or 1,134.4 people per square mile (compared to a density of 79.6 people per square mile nationwide), making it the most densely populated state in the nation. It also has 3,414,739 housing units, of which 63.9 percent are single family. Consequently, there are cumulative impacts from single family homes on water quality and the environment. Single family homes use resources, like water, and contribute pollutants to the to water resources and the environment. For example, regardless of the size of the property, septic tank effluent contains nutrients, comparable to those that make up fertilizers, as well as bacteria, viruses, dissolved solids, and household products.

52. COMMENT: Because of the onerous nature of the rules, property values in the Highlands have plummeted. It is most severe when the property could formerly have been subdivided, but even single family homes are difficult to sell at this time due to the ever increasing regulations. I am confident that with the huge amount of data available

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along with modern communications, the rules could be rewritten in a way that minimizes harm to property rights while still protecting the watershed. (19, 28)

53. COMMENT: When 90 percent of one's assets are tied up in the value of their land, to deny them access to that equity will destroy their quality of life, not enhance it. In the case of our farmers, these regulations are destroying most of what is left of a farmer's ability to earn a living. Land equity has always been used to finance farms as well as provide housing for family members, and often a lot or two is sold in order to keep the business alive since so many farms operate at a loss. Without this equity, farming in the Highlands will cease to exist. Certainly, these regulations violate the clearly stated intent of the Highlands Act to support the agriculture industry. When the farms are lost, the additional pollution from trucking in all that the farmers produced will be far more harmful to the environment than building a retirement cottage on a farm so the adult children can raise their family in the main house, something forbidden by these regulations. (28)

54. COMMENT: When the matter of potential loss of property value is addressed in the economic impact statement, you insert the words "if any" like to suggest that really there will not be any loss of value. You've concluded that there will be no loss of value. You go to great lengths to show that property near preserved areas do increase in value, and it is probably true. But what about those properties which are not developed which become the places where these homes are near? What happens to the value of that property because they cannot develop? There will never be an increase in value for those folks while you anticipate there will be an increase for somebody who lives near that preserved area. (79)

55. COMMENT: You have stolen away my family's land value, which computes to lost dollars for my three children's needs, as well as for my dreams of putting my six grandchildren through college. I work very hard to keep the farm active with beef cattle, farming hay and woodland managing. When you condemn and devalue a person's land,

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you also strip away the land owners sense of pride and accomplishment he finds in maintaining and working with the land. The Act of taking from someone is very inconsiderate and demeaning. It is not right for landowners to be singled out to take all the responsibility for open land and freshwater conservation. We are required by the DEP and Highlands law to pay out of our pockets dollars needed to supply freshwater, clean air and open space to local people and people throughout New Jersey. The people who benefit from this should be charged a monthly tax to compensate 100 percent of my development property value. (104, 105)

56. COMMENT: I am self-employed and have been since 1969. I am 70-years old. Our land was our retirement fund. You have taken at least 75 percent of it away from us. Would you like to share your pension with us? (22)

57. COMMENT: I live in Chester Township in the preservation area. My wife and I own 60 and-a-half acres which was part of my grandfather's farm of approximately 120 acres which he purchased back in 1924. And early in 2003 we decided to develop our 16 and-a-half acres. That was our retirement plan. We finally got a full set of plans approved by the town in June 2004, never knowing that on March 29th a law had been passed that made it impossible for us to do that. This was one of the reasons the planning board used to deny us. The other was they found fault with the engineering. If we had been approved in June, we would have been eligible for an exemption. It cost us \$60,000 between engineering fees, application fees, and lawyers' fees to present these plans to the town. We are out \$60,000. Our property was originally worth about two and a quarter million dollars. It is now worth, I do not know what, maybe three or four hundred thousand at the most. People in the DEP make these rules, and have no idea what is real. I have been walking through the fields and woods for many years. I have yet to see an endangered species. As far as drainage goes, you could put dry wells and put the water back in the ground and recharge the groundwater. This could be done in all existing developments all over the place. But you get no credit. You got three percent impervious coverage, no credit for putting the water back in the ground. (22)

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RESPONSE TO COMMENTS 52 THROUGH 57: As stated in response to comments 15 through 20, there are several provisions in the Highlands Act to reduce the impact of on property owners including the exclusion of agricultural and horticultural uses from the definition of “major Highlands development;” the requirement that when the State Green Acres program, State Agriculture Development Committee, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land for recreation, conservation or farmland, that agency must conduct two appraisals of the value of the land (a pre-and post-Highlands Act value) and use the higher of those two values as the basis for negotiation with the landowner; 17 exemptions to the Act, many of which provide criteria by which the construction of single-family homes remain exempt; and the requirement that the Highlands Council establish a transfer of development rights program for the Highlands region. Such program could provide another source of revenue to landowners with land upon which development has been restricted.

The Department is required by the Highlands Act to prepare rules and regulations establishing the environmental standards for the preservation area. See N.J.S.A. 13:20-32. Further, the Act lists the resources to be protected, in some cases the criteria for that protection, and the findings that must be made before the Department issues an HPAA. The Department believes that its regulations successfully implement the spirit and intent of the Highlands Act.

While the Department acknowledges that land subjected to changing development potential may experience a diminution in value immediately after the change, that value may increase again over time. In addition, land that is restricted either in part or entirely from development, for example, land that has been stripped of development rights and placed in permanent preservation retains value. The value appreciates over time in a manner similar to unpreserved land. For example, according to the State Department of Agriculture website (www.state.nj.us/agriculture/sadc), a farm preserved in Washington Township, Morris County in 2004 at a cost of \$11,000 per acre was resold without development rights at the end of 2005 for \$15,000 per acre. In another example, in

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Boonton Township, Morris County a farm was preserved in 1997 at a cost of \$12,300 per acre. It was resold without development rights in 2004 for \$42,105 per acre.

While the Highlands Act may in some cases reduce the amount of development allowed on larger properties prior to its enactment, the “development potential” of all property is inherently unpredictable since each parcel is unique in character and land development is fundamentally speculative in nature. Future events affecting sewerage capacity, traffic flow, air quality, or water quality can dramatically affect property value. Studies have shown also that the value of regulated development that preserves the integrity of nearby environment is positively influenced (increased) by its relatively limited supply. In comparison, other studies illustrate that high volumes of unplanned development drop in value as recreational opportunities vanish, traffic congestion mounts and initial demand is satisfied.

The Department’s rules do not govern funding and the Department does not have the authority to enact a tax.

58. COMMENT: The proposed DEP rules and Highlands Act have no positive economic or social value to the farmers and landowners, or businesses in the Highlands.

Landowners in the preservation area have lost 70 percent of their land values. They are subject to Draconian rules and regulations that demoralize their families, especially the young farmers who have no land equity to look forward to. They don’t see any light at the end of tunnel. They don’t see a good balance of risk/reward and are fearful of either being harassed and/or fined by the DEP for some unknown minor infraction, or possibly be in conflict with some environmental aspect of the proposed rules that becomes incompatible with production agriculture. (45, 46)

RESPONSE: The Department does not agree that the Highlands Act or regulations will have a negative impact on the farmers, landowners and businesses in the Highlands. The Highlands Act specifically excludes agricultural and horticultural uses from the definition of “major Highlands development” thus keeping these activities unregulated by the Department’s regulations for the preservation area. In addition, the Highlands Act

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provides many exemptions for existing residential and commercial development within the Highlands preservation area. For example, proposed improvements to single family dwellings in existence before August 10, 2004 are exempt from the Highlands Act and the Department's regulations. In addition, if a business is proposing an expansion and can keep the expansion within 125 percent of the existing building and limit the increase in impervious surface to no more than 0.25 acres, the business and its expansion are exempt from the Highlands Act and the Department's regulations. Further, an existing business can be sold and a new owner can continue that business or any other without being regulated by the Highlands Act unless a major Highlands development is proposed.

There are additional provisions in the Highlands Act that reduce the impact of the Act on property owners. Those provisions are described in response to comments 52 through 57 above.

59. COMMENT: The rules are onerous and discriminate against a minority- the farmers who own or thought they owned land in the preservation area. (30, 34, 93)

60. COMMENT: Why do you feel so comfortable completely destroying a weak minority group (farmers), but you do not have the courage to impact the majority in the slightest? (30)

61. COMMENT: The proposed rules are extreme. They take away property rights given to us by the U.S. Constitution and punish landowners in the Highlands to the benefit of those who use the water of the Highlands with no compensation to those in the Highlands. While there are extreme measures mandated to conserve water in the Highlands, none are required for the rest of N.J., which discriminates against those N.J. residents in the Highlands. The regulations target landowners resulting in discrimination against the farming community. (30, 45, 46, 95)

62. COMMENT: I agree with the basic premise of the Highlands act. We must protect the environment; the water, endangered species, etc. I don't agree that this should be

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accomplished through regulation that ignores basic constitutional concepts. I believe that many of the proposed rules are and should be considered unconstitutional. It is obvious that in the Act and Rules attempts are made to evade the intent of the Constitution. The individuals responsible for writing the unconstitutional rules should be removed from their positions. (107)

63. COMMENT: The Act and implementing DEP regulations discriminate against large lot owners by radically depreciating the development potential of such properties, estimated to be up to 90 percent. The result is to transfer this value to other private property owners in preservation and planning areas. This violates the Fifth Amendment of the U.S. Constitution and Article I, paragraph 20 of the New Jersey Constitution, which prohibit the State from taking private property for the benefit of other private property owners. (85, 87)

64. COMMENT: My wife and I lost probably about a million and-a-half dollars. My wife and I have land that's been in her family since 1949. We have not developed that land since 1949. It was once zoned for an acre and-a-half development. We could have had ten development lots up there, now we cannot do anything with the land up the road. I mean, it's dead. We'd like to be in the country. We want Bambi around us. We want clean air, fresh water. (36, 87)

65. COMMENT: I object to the Highlands Act in its entirety. I object to the proposed rules in their entirety. I don't think that they've been well thought through. I think they'll be harmful to the state, particularly to me and my family. I'd like to state that I would like to prohibit any state employees direct or indirect from entering our property in Holland Township, Block 1, Lot 4. (10, 87)

66. COMMENT: In 2002 we purchased land that still had its development rights attached. In 2004, that bundle of rights was taken away by the Highlands Act. I know

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there's a plan to compensate landowners for those rights being taken. I think it's irresponsible to take something in promise to pay for it later. (10, 87)

67. COMMENT: Prior to these regulations Highland property owners were entitled to the "full bundle of property rights" when they first acquired their land. Representing a de facto taking of private property, these regulations deprive those landowners of, among other things, their right to develop their property as well as use and enjoy their homes in security, all without due process of law. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 45, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

68. COMMENT: If we take a look at the regulations, there's extensive data on the effect on a residential house of living next to a preserved farm versus a non-preserved farm. There's nothing in the regulations that address the value of a farm itself going down by forced preservation, which is what the Act does. (10, 87)

69. COMMENT: The agricultural and industry impact statement says that the consequences of these regulations will have no impact on agriculture or horticultural use or development in New Jersey. These regulations will have an indirect positive impact on agriculture by reducing the amount of land taken out of agriculture. I don't agree. How hard is it to find a farmer that hurt by this regulation or will be crippled by the proposed regulations? I have heard in this very room farmer after farmer get up and tell the Highlands Council how they've been destroyed financially, their credit cut off. In fact, in today's paper there was a quote that says, "I have been financially devastated," said Bob Fink of Bethlehem. (10, 87)

70. COMMENT: It seems like the purpose of these regulations are to provide high quality, high quantity of water to people to the east of the Highlands. Those people are not impacted by this. There is no limits on their growth. There's no limits on their water use. We're paying for the full brunt of those regulations. We ought to get equal treatment. (10, 87)

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71. COMMENT: I'm a farmer in Hunterdon County. I have 150 acres in the preservation area. What life has in store for me and my family no one knows, but our safety net is gone. Our life savings is in our land. The Highlands Act has taken away the value of my land. We have a forest management program and every part of the farm is cared for. We could have sold the land so many times over the years. Now we are being punished for keeping, caring for and farming the land. My land has real estate value. And if Trenton wants my land, that is what they should pay me for it. Instead, they are stealing the value. The Highlands Act was passed with no funding in place. Political bureaucrats are telling me what to do on my farm. DEP is putting unrealistic demands and restrictions on my beautiful property. (47)

72. COMMENT: This Act will definitely reduce land value in the preservation area. As a result of this Act, municipal real estate taxes will be thrown into chaos. The result will be a significant increase in property taxes for those in the planning area. I, myself, will definitely appeal whatever property tax is levied on my property as will numerous other property owners in the preservation area. The Highlands Act and the proposed DEP regulations are discriminatory and basically unfair. They should be repealed. We live in the United States of America and the taking of land is un-American. (55)

73. COMMENT: If there will be tens or hundreds of billions of dollars as you've stated in the economic impact statements of benefits, then why is there such a problem in finding a way to provide for compensation to those who have provided those billions of dollars of benefit by giving up their constitutionally protected private property right for the benefit of others. (79)

74. COMMENT: We are being forced to give up our assets to protect the water supply of New Jersey. I think that it is only fair that former Governor McGreevey, Senator Robert Smith, and the rest of the New Jersey Legislature that voted for this Act, and the DEP donate 80 percent of their assets to the State of New Jersey. (23)

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75. COMMENT: In terms of equity, the last Highlands Council meeting, we spoke with Vince Minelli who's mayor of Chester and who sits on the Highlands Council. He told us that the evaluations coming in pre-Highlands and post-Highlands represent a 75 percent decline in value. Quite frankly, I think you will see declines in value of up to 90 percent. The rest of New Jersey, is the colonial power. The colonial power, as history has proven, saps the resources of the colonized area to their own benefit by proposing regulations that exist nowhere in the state. I don't like these regulations. (87)

76. COMMENT: The proposed rules are extreme. They take away property rights inherent in the U.S. Constitution and punish landowners in the Highlands to the benefit of those who use the water of the Highlands with no compensation to those in the Highlands. They impose extreme measures to conserve water in the Highlands but require none for the rest of New Jersey which is discrimination against those who live in the Highlands. (32, 116)

77. COMMENT: The Highlands bill is a poorly written law which impoverishes the people and families in the protected area. (32)

78. COMMENT: As a Vietnam era Veteran and member of the VFW and NRA, I am appalled at the constant erosion of my personal rights by my government. Please exhibit common sense and act accordingly as regards this issue. (90)

79. COMMENT: This law is outrageous. It appears any hopes of building on our land in order to retire in this state are gone. But then who would want to remain in a State that governs this way? I'm ashamed to have ever loved the state of New Jersey. I never wanted to use herbicides or pesticides so as not to pollute the water. Why should I care about the state since it obviously doesn't care about me? (91)

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80. COMMENT: Even though I have been financially devastated by the impacts of Highlands Act and the DEP rules, I still don't understand why you are doing this to me. Are you trying to protect the quality of the water, the quantity of water, both, or something else? Why is almost the entire burden of the act being placed on farmers and other landowners? (30)

81. COMMENT: First, I find that as a lake front home and property owner in the Highlands I may be severely limited with what I can and cannot do on my property. Second, as a Director on the Board of Directors of the Lake Lackawanna Investment Corporation which manages Lake Lackawanna (100+acres) and the LLIC property (300 acres) and 9 hole golf course I find shocking that the State would consider imposing such severe restrictions on private land use. This pending act, with the rules and regulations, would severely restrict our lifestyles, recreational opportunities, and financial resources. (86)

RESPONSE TO COMMENTS 61 THROUGH 81: Government is authorized to impose reasonable limitations on the use of property, such as requiring a permit for certain activities, in order to achieve important public purposes like those articulated in the Highlands Act. In addition, neither federal or state law guarantees a property owner the maximum "development potential" of property or payment if that maximum use is not achieved. If a zoning or land use regulation deprives a land owner of all beneficial uses of property, the law requires "just" compensation, not compensation for the maximum "development potential." What is just compensation for a single lot owner will likely be less than just compensation for an owner of a larger property. Compensation under the Highlands Act may take the form of cash or comparable development opportunity in other, less environmentally sensitive areas. In either event, all property owners in the preservation area are entitled to just compensation if their property is left with no beneficial use following completion of the permit application process. There is no discrimination among property owners.

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Seventeen categories of activity and projects are exempt from the permitting requirements of the Act, including projects for which development approvals were in place by March 29, 2004 and most agricultural and horticultural uses. For development regulated by the Highlands Act, the proposed rules provide a process by which a landowner can achieve a beneficial use for property either by obtaining a permit to develop property or, when necessary, applying for a waiver of those permit requirements pursuant to N.J.S.A. 13:20-32b. Disputes concerning the beneficial uses for a specific property can be resolved on case-by-case basis during the waiver application process. The process is identical, regardless of the size of the property.

While the Highlands Act may in some cases reduce the amount of development allowed on larger properties prior to its enactment, the “development potential” of all property is inherently unpredictable since each parcel is unique in character and land development is fundamentally speculative in nature. Future events affecting sewerage capacity, traffic flow, air quality, or water quality can dramatically affect property value. Studies have shown also that the value of regulated development that preserves the integrity of nearby environment is positively influenced (increased) by its relatively limited supply. In comparison, other studies illustrate that high volumes of unplanned development drop in value as recreational opportunities vanish, traffic congestion mounts and initial demand is satisfied. For these reasons, the Department disagrees with the commenter that the proposed rules discriminate against any group of property owners or diminish future land value by any specific percentage.

Regarding the commenter who is concerned about State employees entering his property, at N.J.S.A.13:20-5k, the Highlands Act, the Highlands Act explicitly gives DEP the right to enter any property, facility, premises or site, for the purpose of conducting inspections or sampling of soil or water, and the otherwise determining compliance with the provisions of the environmental requirements of the Highlands Act. A right of entry provision in an environmental statute is not new or unique to the Highlands Act. The courts have upheld DEP’s right of entry, under appropriate circumstances and reasonably exercised, because of the need to investigate and monitor acts potentially affecting the health and well-being of the general population. Prior to entry, DEP always attempts to

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announce its presence and inform the property owner of its intention to perform an inspection and the purpose of that inspection. If DEP is denied entrance to a property, an administrative warrant can be obtained in Superior Court and the Department will enter the property under this authority.

82. COMMENT: The Act was advertised to protect the drinking water for a large segment of the NJ Population, and no one objected. However, the Act went beyond protecting the drinking water to being a very broad set of draconian environmental regulations with centralized land planning beyond “protecting the water”. The boundaries were not scientifically based, did not reflect in all cases the underlying hydrology, and created two unequal classes of landowners. The Act discriminated against farmers and landowners of the Highlands preservation area and subsequently their land values have been eroded by an amount as high as 70 percent leaving this class of citizens and their families in financial stress and uncertainty. The underlying Act should be amended to reverse the takings of their property without compensation in agreement with private property rights inherent in the US constitution. (46)

RESPONSE: The Highlands Act was passed by the New Jersey Legislature and signed by the Governor. The Department has no authority to amend the Act. Rather, the Department is required by the Highlands Act to “prepare rules and regulations establishing the environmental standards for the preservation area upon which the regional master plan adopted by the Council and the Highlands permitting review program administered by the Department pursuant to this Act shall be based.” (See N.J.S.A. 13:20-32). The Act goes on to list the resources to be protected, in some cases the criteria for that protection, and the findings that must be made before the Department approves a permit. The Department believes that its regulations successfully implement the intent of the Highlands Act.

83. COMMENT: It is likely that businesses and residential communities in the Highlands preservation area will be adversely affected. I know of one specific company

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in Mansfield Township at which the line that divides the preservation and planning area divides their manufacturing operation. They have not been allowed to increase their parking lot for a few more employees. It is conceivable that private sector business will exit the community and take their jobs with them to other states. New businesses will elect not to locate here if they are going to be subject to costly unreasonable DEP restrictions. The loss of ratables will increase the taxes on those remaining and they too will exit as many of them are already moving to southern states, and to neighboring Pennsylvania. This is not a good economic scenario to contemplate for the Highlands. (45, 46)

RESPONSE: As stated in the Department's Jobs Impact, existing businesses will not be affected until or unless they propose to conduct a "major Highlands development" at any time in the future. In addition, if a business is proposing an expansion and can keep the expansion within 125 percent of the existing building and limit the increase in impervious surface to no more than 0.25 acres, the business will remain exempt. In the case of the business described by the commenter, if part of the business exists in the planning area, it is unclear why parking expansion cannot be sited there since the Department's Highlands regulations do not apply in the planning area. Finally, an existing business can be sold and a new owner can continue that business or any other without being regulated by the Highlands Act unless a major Highlands development is proposed. Therefore, the Department does not agree that there will be a loss of business or ratables as a result of the Highlands regulations.

84. COMMENT: The Highlands Act is effectively confiscating the value of private property and I strenuously object. People find it impossible to believe that they have lost the rights to their private property. The Act clearly discriminates against landowners and many of its rules are so extreme as to be ludicrous (5, 54)

RESPONSE: People have not lost rights to their private property. There are no provisions of the Department's regulations that force people to leave their property. To the contrary,

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the Act establishes many exemptions relating to single family dwellings as well as exemptions that would allow limited expansion of commercial development. The Department's rules do not discriminate against any group. Rather all property owners are required to comply with the regulations when they propose a "major Highlands development" as defined in the Highlands Act. A "major Highlands development is defined as: 1. Any non-residential (that is, commercial) *development* ; 2. Any residential *development* requiring an environmental land use or water permit or resulting in ultimate disturbance or one acre or more of land or a cumulative increase of 0.25 acre or more impervious surface; 3. Any activity that is not a development but results in the *ultimate disturbance of one-quarter acre or more of forested land* or a cumulative increase of 0.25 acre or more impervious surface; or 4. Any capital or other project of a State entity or local government unit that requires a land use or water permit or that results in the ultimate disturbance or one acre or more of land or a cumulative increase of 0.25 acre or more impervious surface. Consequently, unless someone is proposing to conduct a "major Highlands development" they are not affected by the Highlands Act.

85. COMMENT: The DEP has exceeded the authority provided by the New Jersey Legislature in the Highlands Act. The Highlands Act calls for the preservation of the Highlands area "while also providing every conceivable opportunity for appropriate economic growth and development to advance the quality of life of the residents of the region and the entire state." The restrictive regulations run counter to this objective by making any future development in the preservation area virtually impossible, while imposing severe restrictions, hardships, penalties and fees on preservation area residents that will surely have a negative impact on their quality of life. (6, 7, 9, 10, 13, 22, 23, 28, 30, 34, 35, 43, 44, 45, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE: The Highlands Region consists of both the planning and preservation areas. The Highlands Act states that the Highlands provide a desirable quality of life and place where people live and work; that it is important to ensure the economic viability of communities throughout the Highlands; and that residential, commercial, and industrial

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development, redevelopment, and economic growth *in certain appropriate areas* of the Highlands are also in the best interests of all the citizens of the State, providing innumerable social, cultural, and economic benefits and opportunities. See N.J.S.A. 13:20-2. However, much of the Highlands Act addresses the strict standards to be developed and applied by the Department in the preservation area to limit development (based upon the definition of “major development”). Consequently, the Department concludes that the objective of the Highlands Act is to direct development out of the preservation area and into the planning area, as appropriate. The Department’s rules provide the standards for protection of the preservation area. .

86. COMMENT: I live in New Jersey and outside the Highlands. I resent you taking property rights from my fellow citizens in my name to provide water for me. There are better ways of providing water without imposing such draconian restrictions on the people of the Highlands. (93)

RESPONSE: While there are other mechanisms to protect water quality, the Highlands Act was enacted for that purpose and mandates that the Department implement standards to protect the various resources, including water quality, in the preservation area. As stated in the response to comments 52 through 57, the Highlands Act contains several provisions to reduce its impact on landowners. The rules do not take property rights away. However, if an owner believes that this has occurred as a result of a denial under the Highlands regulations, the regulations at N.J.A.C. 7:38-6.8 provide a waiver process under which it is possible for the Department to waive a requirement of the rules in order to avoid a taking.

87. COMMENT: I'm a food farmer in Mansfield Township in Warren County, and I also have a small farm in Tewksbury Township. All the crops are in the preservation area. We have owned the Tewksbury Farm since 1977, and we have owned the Mansfield property since 1984. We never dreamed that Article V in the United States Constitution would be so blatantly ignored. We are concerned that these rules may prevent us from

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operating the farm. Just this past week at the Highlands hearing or last week, there was an environmental engineer and he spoke about DEP issuing a rule that the farmers could not use phosphorous fertilizer. They had to control something like 80 percent of the runoff. We are worried about some of these rules like endangered species. We would like to see the rules made such that the farmers would be exempt as much as possible. My greatest concern is not for me because my time is limited. But I have a son who is 40 years old and has given 15 of the best years of his life on the farm and sometimes I feel very sad for him because he has no pension benefits or health care. And when I'm not here, maybe he could salvage that land and get some money so that he does not have to end up destitute and in poverty. (45, 46)

RESPONSE: The Highlands Act state that one of its goals is the maintenance of agricultural production and a positive agricultural business climate. See N.J.S.A. 13:20-2. To this end, the Highlands Act does not require farmers to comply with the Department's rules in the preservation area by excluding agricultural and horticultural uses from the definition of major Highlands development. Therefore, no permits are required to conduct agricultural or horticultural uses under the Highlands Act. The Highlands Act and the Department's regulations do not impose stormwater runoff, or threatened or endangered species habitat protection requirements on agricultural or horticultural uses. Agricultural and horticulture uses are allowed significantly greater amounts of new impervious surface free from regulation than other uses in the preservation area: up to 9 percent of the total land area under N.J.S.A. 13:20-29. Agriculture or horticulture uses that intend new impervious cover totaling more than three percent of total land area need to obtain approval of a farm conservation plan from the local soil conservation district. New impervious cover of nine percent or more of total land area requires approval of a resource management systems plan by both DEP and the local soil conservation district. N.J.S.A. 13:20-29a(2).

88. COMMENT: I own 52 acres of mostly gently sloped woodland in Mansfield Township, Warren County. Eight years ago, the original 104-acre parcel was subdivided

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and half of the parcel, 52 acres was sold for \$180,000 in 1999. Since that time, the valuation of property in Mansfield has escalated substantially. The value of the remaining 52 acres have a saleable value of over \$300,000. Now with this Act, I am left with a 52-acre parcel of land that is worthless. My family's nest egg has been taken from us. Though much of the concentration is on farmland and the loss to the farmer, which I support, my inheritance from my parents has been destroyed. This land is family legacy and our children and grandchildren are being denied. Had I sold the property and banked the money, I would be ahead and this part of New Jersey would have one more development instead of the woodland that we work to keep intact. (26)

89. COMMENT: We have 74 acres in Lebanon Township with one house plus a couple of outbuildings. It has been in the family since 1941. It has been under the Woodland Management Act Plan for 12 years. We have been approached by a number of realtors over the past years, but tried to protect the land as long as possible always thinking that if and when it became necessary, we would have the equity in the land. Now we have had a sudden change in health conditions, as well as change in family circumstances. The long-term investment of time and energy and money is now worthless. Our value has plummeted. Our hands are tied. We object in entirety to the complexity and hardships of this Highlands Act. (1)

90. COMMENT: Our 38 acre farm is located in Washington Township, Morris County. I had hopes of subdividing my land to give lots to my children. This law is unfair. (80)

91. COMMENT: My family has farmed in Pohatcong Township, Warren County for 240 years. We have been reasonable stewards of the land for generations. I consider the Highlands Water Protection and Planning Act to be a deliberate vendetta directed toward farmers in northwestern New Jersey. (34)

92. COMMENT: I have a year 2005 contract for the sale of a 30 acre tract of my land, which is to have 13 lots on it. The lots are 2 acres in size, which conforms to the Lebanon

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Township adopted master plan for the open land and cluster building concept. This provides 90 plus acres to be preserved with my home, with woods, fields, and streams and a 6-acre lake on it. I think this is a great conservative approach to land use. The sale price is \$260,000 per lot x 13 lots equals a purchase price of \$3,360,000. There was a closing date of Dec.23, 2005. This closing could not happen because of current rules and regulations. (104, 105)

93. COMMENT: On my 125-acre tract of land, I farm it for woodland management, as well as farm use. I manage trees. I have beef cattle. I grow and bail hay and plant different types of plants and flowers for our floral shop we have in Lebanon Township. I bought this property with my hard earned money, and enjoyed the property. I had plans to run it as a farm as well as future plans to possibly sell off parcels for my family. I have six grand kids and thought I could pay for their education later on in the future. Several years ago in 2001, I got caught up in the up zoning or down zoning of my property from five acres to seven and-a-half acres. At that time I thought I could get a subdivision and get some money back that I had put out before the zoning was changed. The township pushed all my paperwork back. I then thought major development was the way to go since the township had adopted an open lands concept and cluster building which would allow for two-acre lots. I tried doing that and was in the process in 2002 or 2003, and the Highlands Act came in. At that time I had spent quite a bit of money and time. We had about 16 lots on about 30 acres we were going to develop and the other 90 were to be preserved. We changed the lots around to satisfy the three percent lot coverage requirement of the Highlands rules and regulations. The final thing was seven months ago when you came out with the 88 and 25 acre zoning. That killed my subdivision. I spent thousands of dollars and that money is down the tube. By devaluation of my property I have lost my dream of supporting the future of my grandchildren. My land values have gone down. And I just feel that this came at my expense and other farmers' expense of preserving land and fresh water for people downstream. Water is very important. Quality water, I believe is very important. And I believe that people in these other areas that use water, as we all do, should pay a tax. (104)

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94. COMMENT: I do not know if a lot of people know what it is to farm. I only started nine years ago. Right away I plowed the field myself. I bought the equipment, which I found was very expensive, very hard work. Every day I work. I have a full-time job as well. I just think that compensation should be a big, big part of this for the average person, the average farmer that works this property. (104)

95. COMMENT: One of the things that has been very distressing to me about all this is that many of people who support the Act unquestioningly are not the people who are losing by this. And they have created a public enemy of the people who are losing by this. As though those people who have been the stewards of the land and open space all this time are somehow now greedy landowners dying to leap into the arms of developers. When people stand up and say, "Oh, we believe in clean air and clean water and we support the Highlands Act," the implication is that those of us who are losing so much, who are having our life savings stolen do not agree with those things, as though we do not need clean air, clean water and open space. We are the very people who preserve them. So I really get upset on behalf of all of us from the supercilious people on the other side who do not understand that maybe we hold both positions. Maybe we support preservation, and clean water, but we're the ones who are losing our savings. It is as though if you had a savings account or an investment portfolio you could not go to the ATM machine, write a check, take a small bit out of it, or you could not sell a hundred shares of something. You would have to close out your entire account in order to make any withdrawal at all. That is the effect of this on people who can no longer subdivide or break off one small lot of their farm to sell for that year at Cornell for their child. (37)

96. COMMENT: I object to the rules in their entirety for several reasons. The rules strip property owners of almost all of rights except for the right to live in our house. Almost all other uses of our land are prohibited. Market values have already plummeted proving beyond a shadow of a doubt that an unconstitutional taking has occurred of our property. Landowners will sue for compensation costing taxpayers hundreds of millions of dollars

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to defend the State of New Jersey who has unjustly passed laws and regulations without any funding. (13)

97. COMMENT: The Highlands Act and the DEP regulations impose a staggering financial burden on the minority Highland preservation area landowners, which is unmitigated by any sharing of the burden by those who may benefit from the resulting water supply. The New Jersey Legislature and DEP have exceeded the limits of due process and equal protection by creating rules that bear no legitimate relation to the purpose asserted by the statute. Many of the DEP regulations are capricious, arbitrary, irrational and unsubstantiated by good science. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 45, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE TO COMMENTS 88 THROUGH 97: Government is authorized to impose reasonable limitations on the use of property, such as requiring a permit for certain activities, in order to achieve important public purposes like those articulated in the Highlands Act. In addition, neither federal or state law guarantees a property owner the maximum “development potential” of property or payment if that maximum use is not achieved. If a zoning or land use regulation deprives a land owner of all beneficial uses of property, the law requires “just” compensation, not compensation for the maximum “development potential.” What is just compensation for a single lot owner will likely be less than just compensation for an owner of a larger property. Compensation under the Highlands Act may take the form of cash or comparable development opportunity in other, less environmentally sensitive areas. In either event, all property owners in the preservation area are entitled to just compensation if their property is left with no beneficial use following completion of the permit application process. There is no discrimination among property owners.

Seventeen categories of activity and projects are exempt from the permitting requirements of the Act, including projects for which development approvals were in place by March 29, 2004 and most agricultural and horticultural uses. For development regulated by the Highlands Act, the proposed rules provide a process by which a

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landowner can achieve a beneficial use for property either by obtaining a permit to develop property or, when necessary, applying for a waiver of those permit requirements pursuant to N.J.S.A. 13:20-32b. Disputes concerning the beneficial uses for a specific property can be resolved on case-by-case basis during the waiver application process. The process is identical, regardless of the size of the property.

While the Highlands Act may in some cases reduce the amount of development allowed on larger properties prior to its enactment, the “development potential” of all property is inherently unpredictable since each parcel is unique in character and land development is fundamentally speculative in nature. Future events affecting sewerage capacity, traffic flow, air quality, or water quality can dramatically affect property value. Studies have shown also that the value of regulated development that preserves the integrity of nearby environment is positively influenced (increased) by its relatively limited supply. In comparison, other studies illustrate that high volumes of unplanned development drop in value as recreational opportunities vanish, traffic congestion mounts and initial demand is satisfied. For these reasons, the Department disagrees with the commenter that the proposed rules discriminate against any group of property owners or diminish future land value by any specific percentage. The Department does not have the authority to tax the public. That is the purview of the New Jersey Legislature and the Governor.

Finally, the Department has provided detailed responses to comments regarding the septic density at N.J.A.C. 7:38-3.4.

98. COMMENT: The average person has no idea what the rule does until they wake up on June 7th and realize, “Wow, my house is totally and completely, worthless, unmarketable. I cannot do anything with it. How did this ever happen?” (56, 57)

RESPONSE: Existing homes in the Highlands preservation area are not affected by the Highlands Act or these rules. Rather, the Highlands Act regulates “major Highlands development,” as described in detail in response to comments 15 through 20. Further, the Highlands Act exempts additions to single family housing legally existing prior to the

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Act. Consequently, while the Highlands Act regulates new development that reaches the threshold of major Highlands development, the day to day activities that occur at existing houses are not regulated and therefore homes in the Highlands have not lost value as a result of the Highlands Act or these rules.

99. COMMENT: The Highlands Act and regulations have taken from me the fundamental freedom to own, improve and enjoy my home. When I die I cannot leave my house to more than one child because it cannot be subdivided. I cannot build a cottage for my aging parents. I must send them to a nursing home because building another house on my land is now illegal. I cannot sell my home because it has no value. It has no marketability. I could never realize enough money to payoff the mortgage. (13)

RESPONSE: The Highlands Act and these rules do not affect an individual's freedom to own, improve or enjoy one's home. As stated in response to comments 15 through 20 above, the Highlands Act and these rules do not regulate daily activities undertaken by homeowners. Further, the Highlands Act and regulations exempt any improvement to a single family dwelling in existence on August 10, 2004 so long as that improvement maintains the use of the dwelling as single family.

As described in response to comments 15 through 20, the Highlands Act and the Department's rule apply only to activities defined as major Highlands development. The definition of major Highlands development was provided in the Highlands Act and is in the Department's rules at N.J.A.C 7:38-1.4.

The Highlands rules require 88 acres for a septic system on a forested lot and 25 acres per septic system on a non-forested lot. If the commenter's lot is sufficiently sized to support an additional septic system and does not contain extensive environmental constraints such as Highlands open waters and steep slopes, a subdivision could occur and a new lot could be developed in compliance with the Highlands regulations. The same would apply to building a cottage on the property.

Finally, the Department strongly disagrees that an existing home has no marketability in the Highlands. To the contrary, because the Highlands Act limits the

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number of new homes that will be constructed in the preservation area, existing homes will likely increase in value over time since people seeking to live in the region will have to either purchase an existing home or comply with the Highlands regulations. Since purchasing an existing home enables the purchaser to make improvements and remain exempt from the Highlands Act, the Department believes existing homes will remain highly marketable.

100. COMMENT: The freeholders of Warren and Hunterdon County were going to put on a forum on February 10th at the Warren Hills Regional High School. The commenter invites the DEP take the initiative to get some press to allow people in the communities that are being affected by the Highlands Act to attend the meeting and inform them what is going on. The commenter also extends the invitation to the DEP to come and explain from the Department's viewpoint, what is going to happen, how it is going to happen, and what the goals and intent are so there is nothing misconstrued. The meeting is not set up as a meeting to be anti-Highlands or anti-regulation. It is simply to inform the public, which the commenter believes is DEP's job and which the commenter believes has not been done. (56)(57)

RESPONSE: The Department sent a representative to the Freeholders' forum on February 10, 2005. The Department continues to provide information and speakers, when available, to conference, meetings and other forums intended to better inform residents about the Highlands Act and the Department's implementing rules.

101. COMMENT: The proposed regulations prevent most building of new homes in the Highlands. It permits affordable housing and houses on 25 to 88 acres lots. How will this increase in the lower and higher ends of the economic spectrum impact the Highlands? Will this not result in a discrimination against the middle class in the Highlands? What is the cost of this shift and what is the benefit? (9-12)

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RESPONSE: The Department's regulations provide a permit with a waiver for projects that are 100 percent affordable housing only for the five communities that are wholly contained within the preservation area. All other affordable housing projects are subject to the same regulations that govern other development projects in the preservation area. In addition, the Highlands Act establishes many exemptions relating to single family dwellings. Consequently, single family housing will not be eliminated. Further, the Department does not agree with the commenters' contention that housing will increase at the higher ends of the economic spectrum to the exclusion of the middle class. If a house can be built on a lot, the size of the house will likely be dictated by lot size and marketability.

102. COMMENT: Drafted using a system of exemptions, the Act and implementing regulations impose preservation restrictions and the financial losses exclusively on owners of large undeveloped properties whose development is classified as major Highlands development. The development standards have a direct and disproportionate impact on farming as an economic activity and destroy active farming and forest management as viable economic activities. The Act and regulations discriminate against farmers creating a suspect classification. The result is that the Act and implementing DEP regulations violate the equal protection provisions of the Fourteenth Amendment of the United States Constitution and Article 1, paragraph 1 of the New Jersey Constitution. (85, 87)

103. COMMENT: The proposed regulations do not promote agriculture or the proper management of forests both of which increase the quantity of water flowing into aquifers. Agriculture and farmers should be supported. It is obvious that landowners and farmers did not have an opportunity for input while special interests did. (30, 93, 116)

RESPONSE TO COMMENTS 102 AND 103: The Highlands rules do not affect agricultural or horticultural uses or forest management activities. Far from discriminating against farmers, the proposed regulations allow farming to continue unregulated. Because

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agriculture and horticulture are uses consistent with protection of water quality and water supply, the Highlands Act exempts agriculture and horticulture uses from the permitting requirements of the Act by excluding them from the definition of “major highlands development” thereby not requiring a Highlands approval to conduct such activities. In addition, activities conducted in accordance with an approved woodland management plan or normal harvesting of forest products in accordance with a forest management plan approved by the State Forester are exempt from the permitting requirements of the Highlands Act and the Department’s rules at N.J.A.C. 7:38-2.3(a)7.

Agricultural and horticulture uses are allowed significantly greater amounts of new impervious surface free from regulation than other uses in the preservation area: up to 9 percent of the total land area under N.J.S.A. 13:20-29. Agriculture or horticulture uses that intend new impervious cover totaling more than three percent of total land area need to obtain approval of a farm conservation plan from the local soil conservation district. New impervious cover of nine percent or more of total land area requires approval of a resource management systems plan by both DEP and the local soil conservation district. N.J.S.A. 13:20-29a(2). In comparison, persons proposing all other development in the preservation area that is not specifically exempted must obtain a Highlands permit or waiver from DEP to proceed. Finally, the Highlands Act promotes the protection of farm land for farming by requiring the Department of Agriculture and the DEP Green Acres Program to obtain pre-Act and post-Act appraisal values and to negotiate using the higher of the two values if the owner desires to protect a farm through the Farmland Preservation or Green Acres Programs.

The Highlands Act and rules directly benefit farming and forest management activities. First, the Act protects the ground water supply upon which agriculture and forestry depend. Second, preservation of farmland and, therefore, farming, is a major goal of the regional master plan. See N.J.S.A. 13:20-10b(4). Third, the New Jersey Legislature stated that the Highlands Act was not intended to alter or compromise the goals, purposes, policies and provisions of the Right To Farm Act, N.J.S.A. 4:1C-1 et seq.

The Highlands regulations were developed by the Department with consultation from the Highlands Council, the State Planning Commission and the Departments of

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Agriculture, Community Affairs and Transportation. The Highlands Council included the public in its discussions of the regulations, while they were being developed, as did the Department of Agriculture. In addition, the comment process, of which the commenters have availed themselves, provided the opportunity for participation from all members of the public in the rulemaking process.

104. COMMENT: The Highlands are a very stable and safe place to live. After experiencing the impacts of Hurricane Katrina, and Asian Tsunami, shouldn't we be welcoming people (with reasonable limits) to move into this area? The Highlands are tsunami-proof, hurricane resistant, and low in tornado, earthquake, and volcano risk. This state and country continue to encourage people to live in high-risk coastal areas.
(30)

RESPONSE: The Highlands Act states that the Highlands Region has many positive attributes which merit an added level of environmental protection. However, this does not suggest that the State encourages people to live in high-risk coastal areas instead of in the Highlands. In fact, New Jersey has some of the strictest and oldest laws and regulations in the nation to discourage development of the coastal zone in its Coastal Area Facility Review Act (CAFRA, N.J.S.A. 13:19-1 et seq.), and Waterfront Development Law, N.J.S.A 12:5-1 et seq. New Jersey also has one of the nation's strictest laws against development in freshwater wetlands areas which are prone to flooding, (the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.), and has proposed the strictest rules in the nation to discourage development of flood plains (See the Flood Hazard Area Control Act rules, N.J.A.C. 7:13).

105. COMMENT: Why is not a suburban community, located in the preservation area, which is serviced by public water and sewer allowed to subdivide and develop residential and commercial sites at levels determined by local zoning? (65)

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RESPONSE: It is unclear what the commenter defines as “serviced by public water and sewer.” While public water and sewer may be available in a municipality, the infrastructure is usually not extended to a specific development until after it is subdivided and has received all approvals. Consequently, the Department is doubtful that such a community exists. Although the extension of sewer or water lines to lots in the preservation area is prohibited under the Highlands Act and these rules, if a sewer line and water line were previously installed, all units that can reach the lines without extension or without extending the lines over one property to reach another can use the existing sewer and water and do not have to comply with the septic density requirements. Lots that can directly connect to sewer and water lines, are still required to comply with the remaining preservation area standards contained at N.J.A.C. 7:38-3 and the preservation area approval requirements at N.J.A.C. 7:38-6.

106. COMMENT: The rules do not coordinate with the New Jersey Clean Air Program which provides financial incentives for wind and solar generation of power. Solar electricity generation would constitute impervious cover and thus be banned for practical purposes from the Highlands. This would force residents of the Highlands to continue to pay money to people who wish to fly planes into our buildings in violation of our political freedom and all common sense. Why are residents of the Highlands being discriminated against? Why cannot we continue to take advantage of an existing New Jersey program that the rest of the state can take advantage of? Is solar hot water heating "open Highlands water?" (9-12)

RESPONSE: It is unclear what the commenter would be using for wind power. If that means a wind mill, it is highly unlikely that the establishment of solar panels or a wind mill for electrical generation would meet the definition of “major Highlands development.” In order to be regulated by these rules, an activity must meet the definition of a major Highlands development. The definition of “major Highlands development” is discussed in response to comments 15 through 20.

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Unless conducted on an industrial scale, most windmills and solar panels for private use would not exceed 0.25 acres of impervious surface, or result in the disturbance or one acre or more of land. It is also unlikely that the commenters intend to clear 0.25 acres of forest, which triggers the requirements to obtain an approval for a major Highlands development since it would be unproductive to place solar or wind equipment in a forested location. Finally, unless the equipment is proposed to be located in a wetland or flood plain, solar panels and wind mills would not require environmental land use or water permits.

Regarding whether solar hot water heating meets the definition of Highlands open waters, unless the water that is being heated is located in a stream, river, pond, or any other water body (but not swimming pools), it would not be a Highlands open water. Presumably, the water to be heated will be in a tank and not in any of the natural water bodies described as part of the definition of Highlands open waters.

Rule Making Process

107. COMMENT: How was the public hearing publicized? (1)

108. COMMENT: I find it outrageous that State Agencies would adopt such an Act without officially notifying each and every property owner in the affected area to advise them of the rules and regulations and the meetings where public comment could be made. I read two newspapers per day the Star Ledger and the Daily Record. I have never seen any public notices to inform me of meetings and have only seen reporter's stories after the meetings. (86)

RESPONSE TO COMMENTS 107 AND 108: The Department is required by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and its implementing regulations, N.J.A.C. 17:27 to provide notice of its rulemaking to the public in addition to publication in the NJ Register. The additional notice describes the nature of the rulemaking and provides the time and location of the public hearing. The Department

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accomplishes this requirement by providing a legal advertisement to newspapers in the area to be affected by a particular rule, by faxing the same notice to media outlets at the State House, and by posting the notice on the Department's official rule-making website. The Department provided notice to The (Bergen) Record, and The Times (Trenton). In addition, the notice was faxed to the State House media offices of the following: Atlantic City Press, Associated Press, Bergen Record, Asbury Park Press, Courier Post, Gloucester County Times, New Jersey Network, New Jersey Law Journal, New York Times, News 12, Philadelphia Inquirer, Newark Star Ledger, The Trenton Times, and to radio reporter Kevin McArdle. The notice and the proposal itself were posted at www.nj.gov/dep/rules/notices . The Department is not required to provide personal notice to every person who could be affected by a rule. However, by the above-described means, it does provide widespread notice to those most likely to be affected by or interested in the rulemaking.

109. COMMENT: I am totally appalled that press did not attend the public hearing. The press has been coming to the Highlands Council meetings regularly and reporting very regularly. Somehow they either were not notified properly or they were turned off. They should have been at the hearing because this is a major thing. The rules that you are proposing are a crisis for many people that own land. I do not understand what has happened. Your Press office can do better than that. (19, 28, 35, 79)

RESPONSE: As described in the response to comments 107 and 108, the Department provided full legal notice regarding the proposed rule amendments and the public hearing on the rule. The Department was informed by Highlands Council staff that newspaper reporters called the Highlands Council office to inquire about the nature of the public hearing. Evidently, they decided not to attend the hearing based upon the information they received. The Department does not involve its Press Office in public hearings on rules. Rule hearings are intended to be "feedback sessions" when the Department hears directly from the public how to improve proposed rules to better accomplish the purpose

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for which they are intended. Rule hearings are not intended to be press events, although the press receives notice and is always welcome to attend.

110. COMMENT: One public hearing for a rule affecting 800,000 acres is not enough. I used to work for the Department of Agriculture in Trenton. I used to write rules related to the soil and water conservation regulations. One of the things we were told to do when we wrote those rules and after they were published in the Register, was to contact by other means the impacted parties throughout the State. Maybe there should be some additional hearings. Maybe you should put off the adoption date to allow yourself to have more hearings. (47, 79)

RESPONSE: As stated in response to comment 109, rule hearings are intended to be “feedback sessions” when the Department hears from the public how to improve proposed rules to better accomplish the purpose for which they are intended. The Department assumes that comments made by one commenter reflect the understanding and feelings of that commenter and other like-minded individuals. In order to determine whether or not additional hearings are needed, the Department evaluates the variety and scope of the public comments. When the Department begins to hear the same comments repeatedly, it concludes that it has heard the full range of comments and concerns. Also, the comments provided at a public hearing have no greater weight than those provided during the public comment period. The Department received more than 700 comments through the public hearing process and in writing from almost 600 people. This is a robust public response to a rule proposal and indicates that there was sufficient notice and opportunity for comment and that there is no need for additional hearings.

111. COMMENT: I am requesting a 60-day extension of time of the comment period for the proposed readoption with amendments. The proposed 60-day comment period is an insufficient amount of time for the public, particularly members of the commercial real estate industry to comment on the regulations since this is the first time the regulated

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community has had a chance to review them since the special adoption last year. Our request is important given that the magnitude and reach of the rules is extensive. (61)

112. COMMENT: I would ask that you have more time for the public to comment. Just because the state of New Jersey's rules and regulations state that you may only have one public comment and then everything else has to be written, does not make it right. The fact that the law says that you do not have to do anything besides put an obscure notice in some paper or some media outlet that is never read or listened to by any normal person does not constitute letting the public know what is going on and the devastating effects of the regulations that you are proposing. These regulations will affect approximately 1.2 million people. That is the people who live in the Highlands area, the 800,000 acres. And that is the number that came from the legislative hearings on the Act. The average person in the state of New Jersey is totally incapable of reading through the 377 pages that are put forth here and having any idea of what it actually says. Also, the average person is not going to go out and spend five or ten thousand dollars to get an attorney to review a regulation and explain to them what is going to happen to them, what they may or may not be able to do. The DEP should come up with a five to ten or fifteen-page layman's view of what you will and will not be able to do. With this regulation and any other regulation that the DEP or any other government agency proposes, it should be put in layman's terms so that the average person can pick it up, read through it and make some kind of judgment on whether it is for or against their interest. (28, 37, 56, 57, 82)

113. COMMENT: Due to the extreme technical and extensive nature of the proposed rules, a 60-day comment period is not adequate to evaluate the impact of the rules. There was only one public hearing and fewer than 40 persons testified suggesting that the effort to inform the public about the hearing was insufficient. In addition, DEP's final rules will be adopted prior to the development, public review and adoption of the Regional Master Plan which may require DEP to amend its final rule. Therefore, the Department should delay action on the final rules to provide further opportunity for public review and comment. (89)

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114. COMMENT: The commenter finds it ridiculous that the State is imposing such deadlines on the public comment process when considering the magnitude of such as Act. (86)

115. COMMENT: There has been insufficient time to review these regulations and the commenter requests that the period be extended. The Department should hold one more public comment period later on after it is publicized, because it has not been publicized at all. If you haven't been one of the people that have been involved in the whole thing from the beginning, you would have no way of knowing that this is happening. The commenter feels that it is horrendously unfair to the hundreds of thousands of people that are going to be affected by it. (13, 19)

RESPONSE TO 111 THROUGH 115: The Department believes that its public notice regarding the rules and public hearing , and the provision of a 60-day comment period was sufficient. For the Highlands regulations, the Department provided notice to The (Bergen) Record, and The Times (Trenton). In addition, the notice was faxed to the State House media offices of the following: Atlantic City Press, Associated Press, Bergen Record, Asbury Park Press, Courier Post, Gloucester County Times, New Jersey Network, New Jersey Law Journal, New York Times, News 12, Philadelphia Inquirer, Newark Star Ledger, The Trenton Times, and to radio reporter Kevin McArdle. The notice and proposed regulations were also posted at www.nj.gov/dep/rules/notices Further, the Department received comments through the public hearing process and in writing from almost 600 people. This is a good indication that the public hearing and 60-day comment period provided sufficient notice and opportunity for comment.

Regarding potential effects to commercial real estate, while there were changes proposed to the special adoption, the definition of activities that are regulated (“major Highlands development”), the criteria for exemption, and the regulatory standards that would affect commercial real estate have not changed substantially from the special adoption published in 2005. Consequently, the Department believes there was adequate

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opportunity to familiarize oneself with the regulations and to subsequently provide comments during the 60-day comment period.

The Department has created short brochures containing simplified, targeted information about the Highlands Act and regulations. These include "Highlands Myths and Facts," and "A Municipal Role to Implementing the Highlands Water Protection and Planning Act." The Department will continue to create similar publications as it identifies a specific area of need. While these publications are helpful, they supplement but do not replace the Department's official regulations.

Finally, the Highlands Act at N.J.S.A. 13:20-32 requires the Department to prepare rules and regulations for the preservation area, "upon which the regional master plan adopted by the Council...shall be based." Therefore, the Department's rules are required to be adopted before the Regional Master Plan (RMP) is adopted. If the RMP results in the need to further amend the Department's rules, the Department will address those issues at that time.

116. COMMENT: The DEP used the absolute barest notification legally possible. A legal notice was allegedly published in the Star Ledger and the Trenton Times. The notification was so bad that no newspapers were there even though they are present for minor matters involving the Highlands Act. In questioning several reporters regarding their absence, none had known of the "public" hearing including reporters from the Star Ledger. If the DEP believes in the spirit of the Open Public Meeting Act or even a semblance of open public input on these complex proposed regulations, they will stop this charade and start a public process of educating those affected by these proposed regulations and have real public meetings. The irony and hypocrisy is extreme when viewed in light of the notification requirements within the proposed regulations. This creates the worst case of the DEP regulating based on a "do what we say, not as we do." The audacity of an agency that sees itself above the very laws they create is extreme. I request a stop in the process, public education, real public hearings and a properly crafted set of regulations. (9-12, 28)

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RESPONSE: As described in response to comment 39 and 40, the Department provided in accordance with law, full legal notice of the proposed regulations and the rule hearing. Rule hearings are intended to be “feedback sessions” when the Department hears from the public how to improve proposed rules to better accomplish the purpose for which they are intended. Rule hearings are not intended to be press events, although the press receives notice and is always welcomed to attend. A rule hearing is not used for training. The Department gives a very brief introduction to the rule in question, and then provides the hearing time for the public to provide the comment. A rule hearing is not an outreach or education session on the rules in question, especially since the rules that are the subject of the hearing are “proposed” and subject to change depending upon the nature of the public comment. The rule-making process is governed by the Administrative Procedure Act and the Department’s records are all accessible in accordance with the Open Public Records Act. There is no conflict between the notice the Department is requiring of applicants submitting applications under the Highlands rules and the legal procedure the Department has followed to propose its regulations. Both are intended to provide appropriate notice for the appropriate circumstance. When an applicant is proposing an activity on a particular property, there are a limited number of neighbors who could be affected and therefore, the Department has required notification of neighbors, and various individuals within the township in which the activity will take place. However, when the Department proposes a regulation, it could conceivably affect people statewide. Therefore, the notification process is accomplished using newspapers since the circulation of those papers can reach the people who need to be informed.

Finally, the Department has provided outreach to the public through several forums. The Department provided staff to the consulting period at the New Jersey League of Municipalities convention in November 2004 and again in 2005, provided speakers to a Highlands session at the New Jersey Conservation Foundation’s Land Conservation Rally in March 2005 and 2006, participated in a meeting of farmers on February 10, 2006 in Warren County, provided speakers to a Department of Community Affairs permit overview session in New Brunswick in 2005 and 2006, spoke to the Warren County Municipal Officials in June 2006 at the Wayne Dumont Administration Building in

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Warren County; and to an Association of New Jersey Environmental Commission seminar on June 22, 2006. The Department will continue with its education and outreach as the opportunity arises.

117. COMMENT: The 500-plus pages of interim and final DEP regulations, requiring excessive cross-referencing, and containing duplication and contradictions, are confusing, misleading, burdensome and unclear. A fundamental objective of public policy is for laws to be clear, consistent, and unambiguous. The proposed DEP regulations fail miserably at furthering a legislative goal in a way that comports with sound public policy. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 45, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

118. COMMENT: The DEP is proposing 372 pages of new draconian regulation covering about 880,000 acres of the so-called Highlands. In order to read these new regulations, one needs to also read the original Act (132 pages) and the original regulations (241 pages). One cannot understand the totality of these proposed regulations without reading all 745 pages since they are interrelated. There are no indexes, summaries or anything what so ever to help the non-lawyer make it through this mess. The quantity and complexity of the information appears to be an attempt to make it difficult for an average person to understand and would be an enormous burden on the residents of the Highlands. (9-12, 28)

119. COMMENT: The Highlands Act was passed before legislators had time to read it. There are too many pages of rules for anyone to read. Homeowners are subject to fines of \$10,000 to \$25,000 per day for violation of rules they don't know have been proposed. (13, 28)

120. COMMENT: The law is so big, so undefined, so unenforceable that it becomes useless and it becomes a detriment to our society like Prohibition did. (10, 87)

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RESPONSE TO COMMENTS 117 THROUGH 120: The Highlands Act and these rules consolidates aspects of several other Department programs. The Department was charged with combining these regulations, and those requirements specific to the Highlands Act, into one comprehensive set of regulations, being mindful of the fact that these regulations must work in concert with the regional master plan to be development by the Highlands Council. In addition, the Highlands Act required the Department to create its regulations in two stages: the first stage as a Special Adoption, and the second stage after consultation with various State agencies, and the Highlands Council. The majority of the readoption with amendments was already contained within the Special Adoption.

The use of cross-referencing in a rule helps to keep the rule shorter. That is, instead of repeating all of the information contained in another rule or at another location in the same rule, a cross-reference is used. In addition, when the Department proposes to “readopt with amendments” a regulation, the document only details the provisions proposed for amendment. This is standard rule-writing protocol for all State regulations.

The majority of the document to which the commenters refer, is the legally required, summary of the rules. The Department is required to describe the purpose and intent of the rules. The result is a longer rule document. The rule is not indexed because it is organized by subchapters, sections, subsections and paragraphs. This is standard rule-writing protocol for all State regulations.

The purpose of a public comment period on a rule, is for the commenters to specifically identify areas that they believe may be contradicting, burdensome or unclear so that the Department has the opportunity to correct such problems as appropriate. Without a specific reference, the Department cannot attempt to make such corrections.

The Department does not agree that it has failed to further the legislative goal of the Highlands Act. The law was clearly intended to protect the resources of the preservation area from impacts resulting from excessive development. The Department’s regulations address each requirement established by the Highlands Act to accomplish this goal.

Finally, the Department’s penalties were developed in accordance with the requirements of the Highlands Act, as described in response to comment 34.

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121. COMMENT: The lack of a huge number of comments on these regulations cannot be construed as a majority agreement with the proposal. Instead, it demonstrates only a lack of understanding by the affected communities. Is it plausible for the average citizen or local official to wade through over 600 pages of regulations and comment? Do they even know they are impacted? The DEP should be required to notify every affected landowner and inform them where they can find the pending regulations and how they can comment. Only then could the comments be considered representative. (28, 45, 82, 28)

RESPONSE: As stated in response to comments 48 through 53, the Highlands Act and these rules consolidates aspects of several other Department programs. The Department was charged with combining these regulations, and those requirements specific to the Highlands Act, into one comprehensive set of regulations, being mindful of the fact that these regulations must work in concert with the regional master plan to be development by the Highlands Council.

The purpose of the public comment period is not to poll the public regarding their agreement or disagreement with the premise of the rules or the law upon which the rules are based. Rather, the purpose of a public comment period on a rule, is for the public to specifically identify areas that they believe may be inconsistent, contradicting, or unclear. The Department received more than 600 comments on its regulations. Consequently, the Department concludes that average citizens and local officials were able to read through the portions of the regulation that might affect them. However, the Department disagrees with the commenter's implication that all citizens in the Highlands are affected by the rules. The Highlands rules only affect those who are planning a "major Highlands development," in the preservation area, as described in greater detail below. Consequently, many residents of the Region, who do not plan on subdividing or developing property, are not affected by the regulations.

As explained in response to comments 107 and 108, the Department is not required to provide individual notice to every person who could be affected by a rule. The

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notification provided conforms to the requirements of the Administrative Procedure Act.

It was accomplished using the NJ Register, the Department's website, the media outlets having a press office in the State House, and newspapers, and was intended to reach persons most likely to be affected by or be interested in the rulemaking.

122. COMMENT: The rule proposal was difficult to find on the DEP website and was not connected in any way to other information in the special Highlands section. This can only be construed as an effort to evade notice and comments. (19, 28)

RESPONSE: The Department's Highlands information website does not contain regulations that are open for public comment or undergoing amendment. Rather, it contains information about the program currently in place and operational. All rules that are undergoing amendment or open for public comment are located at one site:

www.nj.gov/dep/rules/notices. The Department intentionally separates rule proposals from its general information sites so the public does not confuse proposed rules with the rules that are currently in effect. Because proposed rules cannot be used to regulate the public, it is inappropriate to post them on the same site with other information that is currently in use. Once the Department adopts its regulations they will either appear on or be linked to its informational website.

123. COMMENT: For those who are not computer literate, the Department should provide a written reply back. (47)

RESPONSE: In addition to providing its documents on a website, the Department publishes all rule making, including rule adoptions containing the response to comments, in the New Jersey Register. The New Jersey Register is printed and can be reviewed at a County library. In addition, the Department will provide hard copies of its document to the Highlands Council to make it more easily accessible.

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124. COMMENT: The tone of the rule proposal is disrespectful to the people who have preserved the land, oppressive, and often antagonistic with frightening totalitarian aspects that do not sound democratic. (19)

RESPONSE: When the Department or other State agency writes a rule it is required to use certain words and phrasing since only certain phrasing is deemed to be legally binding. For example, if a requirement is mandatory, the Department is required to say that the applicant “shall” do this or that. Softer wording like “may,” or “can” are not legally binding and therefore are not used. The tone is not intended to be antagonistic or frightening but rather to comply with standard rule writing requirements.

125. COMMENT: In addition to Constitutional violations, the DEP rule proposal violates the requirements of the Administrative Procedure Act. An Agency is required to publish with proposed rules a clear and concise explanation of the effect of the proposed rule, a description of the expected socio-economic impact of the rule, a regulatory flexibility analysis of the effects on small municipalities and businesses, a jobs impact statement and agriculture industry impact statement. (N.J.S.A. 52:14B-4(a)(2); N.J.S.A. 52:14B-19; N.J.S.A. 52-14B-25; N.J.S.A. 14:1C-10.3). The comments by the Counties' appraisal expert establish that the extensive analysis published by the DEP to satisfy the foregoing statutory requirements is based on conjecture and fundamentally flawed analyses. By example, the DEP commentary justifying the Highlands rules does not adequately address the devastating financial equity loss to property values of farms in the continued viability of farming in the preservation area. It does not address the social impacts on families who have relied on the equity to fund retirements, college educations and their estates for future generations. While devaluation must be determined for each property, it has been estimated that the lost value may be 90 percent. The regulations fail to quantify or address the cumulative impact of this loss. (85, 87)

126. COMMENT: The statistics and findings used to address the economic and social impacts are conjectural and unsupportable. No analysis was conducted on the reduction

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in land value of farmland. The regulations will destroy farming as a viable economic activity. (30)

127. COMMENT: The proposed regulations discriminate against the farming community. The statistics and findings in the economic and social impact statements are conjectural and unsupportable. No analysis was conducted on the reduction in land value of farmland. The regulations will destroy farming as a viable economic activity. (93, 116)

128. COMMENT: The DEP should amend its Economic and Agricultural Impact Statement to address the current and additional anticipated negative economic impact of the rules on the land values in the Highlands preservation area, where virtually all development potential has been removed. (89)

RESPONSE TO COMMENTS 123 THROUGH 128: The Department's rules do not affect the ability of farmers to continue farming or to continue forestry practices because these activities are clearly exempt from compliance with the Department's rules. The Department's regulations apply only to major Highlands developments, and agricultural and horticultural uses are excluded from the definition. The Highlands Act contains additional provisions intended to ameliorate hardships for landowners and farmers. These are described in response to comments 15 through 20, and 54 through 59 above. While the Department acknowledges that land subjected to changing development potential may experience a diminution in value immediately after the change, that value may increase again over time. Land that is restricted either in part or entirely from development, for example land that has been stripped of development rights and placed in permanent preservation, retains value and will appreciate over time in a manner similar to land that retains development potential. For example, according to the State Department of Agriculture website (www.state.nj.us/agriculture/sadc), a farm preserved in Washington Township, Morris County in 2004 at a cost of \$11,000 per acre was resold without development rights at the end of 2005 for \$15,000 per acre. In another example, in Boonton Township, Morris County a farm was preserved in 1997 at a cost of \$12,300 per

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acre. It was resold without development rights in 2004 for \$42,105 per acre. While this rate of return is certainly not guaranteed, takes time, and will vary by location it demonstrates that land retains value in New Jersey with or without development potential.

In providing an economic impact statement, all agencies are required to provide an explanation of: who the proposal will affect economically; statistical information whenever possible; how the proposal may affect funding sources; the economic effect on the public, if any; and any social or monetary savings. The Department included all of this information in its economic impact statement. As stated in response to comments 746 and 747 below, the Department used the best available published information to provide its analyses. In assessing agricultural impact, the Department projected what effect its regulations would have on the ability of farmers to continue to farm the land. The Department determined that because agricultural and horticultural activities are exempt in their entirety from the rules, there would be no new restrictions and no changes to the way farming would be conducted in the preservation area. Further, because the Highlands Act and these rules discourage development in the preservation area, the development pressure which results in the loss of farms Statewide would be reduced and agricultural uses promoted in the preservation area. The Department did not consider the development potential of property as a function of agricultural use since all property owners have an interest in this topic regardless of their occupation. Consequently, the impact of the Department's rules on property values was assessed overall as part of the economic impact assessment. The Department also did not consider the commenters' concerns regarding the effect of its rules on the ability of farmers to get loans, because as stated in response to comment 745, capital and collateral are only two of several factors considered by loan institutions. The remaining factors relate to personal financial circumstances and the Department did not speculate about the number of farmers who might be affected if the loan institutions perceive a reduction in collateral or capital. The Department has provided detailed responses to these concerns and those of other commenters, regarding the Department's impact statements, in this document under subheadings for the social impact and economic impact statement.

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129. COMMENT: We have had between 20 and 30 acres. I have diligently looked at your regulations for three years or so, both the Highlands, the 241 initial pages that you sent out, and the 272 pages of this document. I tabbed everything that I thought was important and serious. I made a full-page outline, which I wished the DEP had done for us so I could find what was in this 372-page document. I read things like the high constraints scenario. The high constraint scenario of the Highlands would save \$5 billion if they did what is in this 372-page document. Is it a coincidence that the Highlands landowners are calculating they are losing about \$4 billion? There is a curious comment in the 273-page document, which says impervious surfaces interfere with aquifer recharge. There is a comment about lost revenue in times of drought for landscaping firms, athletic fields, and golf courses. The implication was, if we do not save water, we cannot continue to get revenue from golf courses, landscape firms, and athletic fields, without any comprehension of the fact that those are three things that are totally depletive of the water that is used for them. When you put water on a golf course, it is gone. It evaporates into the air and you have lost it. If a person takes that same amount of water, they put 80 percent of that water back in the ground and it recharges the aquifer. Your 372-page report explains how wonderful the Highlands are for ecotourism. Ecotourism? We live here. This is not Yosemite. We bought this park. If you want the park, buy it from us. Make a real offer, you can have it, and we'll go away. The 372-page report says it is worth 80 million annually to avoid drinking water costs. Well, then what is worth to buy the land on honest prices? Pay it and the opposition will disappear. The document says waterbodies appear to be the only environmental feature whose proximity has a consistently positive effect on home prices. I live right on Spruce Run, not at the reservoir, but the creek. We are not able now to do anything on that property. We cannot expand the size of any of the dwellings or barns partly through the 300-foot buffer regulation, but also regulations from our township. We have suffered under a huge stormwater setback regulation. All of the buildings on our property are right along Spruce Run. If we wanted to put a garage, we could not. If we wanted a swimming pool,

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we could not. These regulations keep getting more and more onerous, more and more objectionable, more and more nitpicky. I disagree with this entire document. (36, 87)

RESPONSE: When proposing regulations, the Department is required by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., to provide a detailed description of the proposed rules and their potential impacts. Consequently, an outline would not satisfy the legal requirements. The Department's economic impact statement to which the commenter refers, including the high constraint scenario, was based upon the extensive list of literature cited at the end of the document. The Department has responded to all comments specifically about the economic impact statement later in this document (see responses to comments 669 through 737). It is unclear upon what basis the commenter believes that Highlands landowners are losing \$4 billion. While the Highlands Act may in some cases reduce the amount of development allowed on larger properties prior to its enactment, the "development potential" of all property is inherently unpredictable since each parcel is unique in character and land development is fundamentally speculative in nature. Future events affecting sewerage capacity, traffic flow, air quality, or water quality can dramatically affect property value. Studies have shown also that the value of regulated development that preserves the integrity of nearby environment is positively influenced (increased) by its relatively limited supply. In comparison, other studies illustrate that high volumes of unplanned development drop in value as recreational opportunities vanish, traffic congestion mounts and initial demand is satisfied. For these reasons, the Department disagrees that the commenter could identify a specific loss in future land value.

Further, the discussion regarding the potential effects of impervious coverage on the loss of ground water was intended to highlight local businesses that rely more heavily on water than other businesses. These are legitimate businesses whose water use must be considered when assessing overall water availability, which use is already regulated Statewide.

Ecotourism does not imply that land must be set aside as a State or National Park. Rather, because New Jersey is densely populated, and bordered by New York City and

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Philadelphia, residents and people from neighboring States are interested in viewing and exploring natural amenities located close to home. Consequently, township parks, farm stands, corn mazes, pick-your-own, small roads with light traffic and scenic views good for bicycling, local historic sites, walking trails, creeks suitable for canoeing, and other attractions bring visitors and their money from in and around New Jersey. Therefore, it is realistic to consider the value of such amenities when evaluating the potential economic effect of the Highlands rules and not necessary for the State to purchase the land providing such amenities in order to consider such benefits to the economy.

Finally, the Highlands Act establishes a 300-foot buffer adjacent to all Highlands open waters. While adjacency to water is evaluated as a positive effect on home values, it is not necessary to be within 300-feet to realize this effect. Further, development within stream corridors leads to flooding and water quality degradation that would eventually negate the positive values of living in close proximity to a waterbody.

Scientific Basis

130. COMMENT: It appears that rather than a valid scientific basis for drafting regulations for the protection of water quality a wish list from environmental activists was used. The result is a set of regulations that are arbitrary and capricious. These rules should be scrapped in their entirety and resubmitted based on a carefully evaluated scientific analysis of the relative merits of each proposed rule. (82)

131. COMMENT: The majority of these rules have nothing to do whatsoever with the protection of water resources. They are clearly targeted at roping off swabs of private property in a misguided attempt to preserve what is left of rural New Jersey. (13)

132. COMMENT: The development standards set forth in the Act and in Sections N.J.A.C. 7:38-3.1 et.seq. of the regulations are not scientifically based on protection of water resources and are arbitrary, capricious and unreasonable. (85, 87)

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133. COMMENT: As stated by the DEP, the Act is intended to "protect" water resources, yet also references clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, and the inclusion of many sites of historic significance and provision of abundant recreational opportunities for the citizens of the State, as bases for the measures of the rule without providing a technical basis for the relationship between the former and the latter. (85, 87)

RESPONSE TO COMMENTS 130 THROUGH 133: The Highlands Act states, "The New Jersey Legislature further finds and declares that the New Jersey Highlands is an essential source of drinking water, providing clean and plentiful drinking water for one-half of the State's population, including communities beyond the New Jersey Highlands, from only 13 percent of the State's land area; that *the New Jersey Highlands contains other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, includes many sites of historic significance*, and provides abundant recreational opportunities for the citizens of the State" (emphasis added). See N.J.S.A. 13:20-2. Consequently, while many of the provisions contained in the Highlands Act and these rules result in scientifically based water quality protections, the goals of the Highlands Act include protection for rare, threatened and endangered species and their habitats, historic, scenic and other unique resources. The Department was charged by the Highlands Act at N.J.S.A. 13:20-32 and 34 to provide standards to protect all of these resources. Therefore, although the majority of the Department's rules, such as limitations on water supply withdrawals, impervious surface, and septic densities; protections for Highlands open waters, limitations on development of steep slopes, and protection of flood plains and forests, are designed to protect water quality and quantity, the Highlands Act also provides the basis for, and the Department's rules include, the protection of the additional exceptional natural resources such as habitats for fauna and flora, and sites of historical significance.

No interest group was given greater consideration than any other in the development of the rules. However, the Highlands Act mandates protection from development for the preservation area and the rules reflect that protection mandate.

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134. COMMENT: Homeowners in the Highlands are not the ones threatening water supply. Overpopulation, contamination downstream from the Highlands and reckless waste of water by consumers and by water companies are the real threats to the water supply. This kind of regulating is simply an unabashed effort to grab out land and strip us of our rights. (13)

RESPONSE: The Highlands Act and these rules do not imply that existing homeowners in the Highlands are threatening water supply. Rather the Act states that without limitations on future development, the water supply will be in jeopardy for a large portion of the population of the State dependent for upon the Highlands region for its water supply. According to the U.S. Census Bureau, New Jersey has a population of 8,717,925 people living in 2,000 square miles, or 1,134.4 people per square mile (compared to a density of 79.6 people per square mile nationwide), making it the most densely populated state in the nation. It also has 3,414,739 housing units, of which 63.9 percent are single family. It is apparent that the biggest impact to the State's physical environment including water supply is population and development.

135. COMMENT: The sections that address the protection of water resources in the regulations are based on inappropriate science. Much of the science is based on data outside the Highlands area which has absolutely nothing to do with what occurs within the Highlands area. I do not need to be a geologist to know that the methods for calculating nitrates in the sandy soil of the Pinelands are inappropriate for the loamy soil of the Highlands. I do not need to be a biologist to know the habitat requirements for species in places like Hawaii and the Philippines is going to be quite a bit different from what is happening here in rural New Jersey, yet it is clearly stated that those are the things that were used as the basis of these rules. (13)

RESPONSE: The recharge model (GSR-32) that provides the dilution component for the NJ Geological Survey nitrate model used in the Department's septic standard was

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calibrated for conditions throughout New Jersey and is based entirely upon Highlands soils and data. (For a more thorough discussion regarding the Department's septic density standard and its development, see response to comments 365-429).

The Department's regulations for the protection of rare, threatened and endangered plant and animal species were designed specifically for the Highlands region and based on existing New Jersey State regulations with similar protections already in use under other Department programs. For example, the Department references existing lists of State and Federal threatened, endangered and rare plant and animal species, and incorporated the Landscape mapping as the method to identify the habitats for species to be protected by the Highlands rules. This same mapping is used to identify species' habitats under the Department's Coastal Area Facility Review Act (CAFRA) regulations (N.J.A.C. 7:7E), Freshwater Wetland Protection Act regulations (N.J.A.C. 7:7A) and by many municipalities and counties statewide for planning purposes.

136. COMMENT: If you want to preserve the water in the Delaware River, you would do something totally different. This Act and these regulations do not preserve the Delaware River. So there is a total disjoint in the purpose of this law. (10, 87)

RESPONSE: The goal of the Highlands Act was not to preserve the Delaware River. Rather the goal of the Highlands Act is to protect the Highlands because it is an essential source of drinking water, providing clean and plentiful drinking water for one-half of the State's population, including communities beyond the New Jersey Highlands. See N.J.S.A. 13:20-2. To the extent that seven percent of the area of the Highlands region contributes via tributaries and ground water to the water of the Delaware River, the Highlands Act contributes to preserving those waters. However, the Highlands Act was intended to protect all ground and surface water bodies throughout the Highlands region and many parts of that region are distant from and do not contribute to the viability of the Delaware River.

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137. COMMENT: The regulations which imply that protecting trees in the Highlands will result in clear and abundant water for our children are based upon popular science and popular junk science. Water for our children is a desirable goal but science says that trees actually suck up more water than agriculture. In fact, there is a study in England that concludes that if they kept eroding away their agricultural base, they were going to lose 11 percent of the water that was recharging their aquifer. One study that the commenter found had forests using 400 percent more water than crops. Another had double. So therefore, trees are actually the worst thing. Forested areas provide poorer drainage than open areas. Yet there are many prohibitions to cutting down trees. Since many of the forested areas are old fields where farmers have died or given up farming, should not the regulations encourage cutting trees down to increase the drainage and increase the water yield? Trees intercept about 40 percent of the water before it can get to the aquifer. What research was done to support this proposed regulation? Why is tree growth promoted over vegetative growth that uses less water? This is contrary to the purpose of the Highlands Act. If you are talking about the natural condition, not using water for a golf course, trees are the worst, agriculture is better, raw gravel is the best. Raw gravel sprayed to keep any herbaceous matter from growing on it is the best way to manage your aquifer if you are looking at the pure science. (9-12)

RESPONSE: The Highlands Act requires the protection of forests to protect water quality in several different ways. These include defining a regulated activity (major Highlands development) as an activity that results in the loss of 0.25 acres or more of forest, by prohibiting development that disturbs upland forest, and by directing the Department to adopt standards to protect upland forested areas. The Department believes these requirements are fully consistent with the goal of protecting water quality and quantity water and that protection for upland forests is fully consistent with legitimate scientific studies in this regard. The effect of deforestation on hydrology depends on the setting in which it occurs. In general, though, removing forest cover has several adverse effects on water quantity and quality. Deforestation results in diminished recharge (that is, a reduction in the amount of water entering the aquifer), increased runoff, and increased

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turbidity in streams. Although trees transpire large volumes of water individually, forests enhance recharge by lowering ground temperatures which helps to keep water in the soil instead of allowing it to evaporate, providing roughness to the ground that traps runoff, and by having a relatively short growing season. The New Jersey Geological Survey ground-water-recharge model, which relies on a soil-moisture budget, demonstrates that for the same soils, ground-water recharge is highest in forests and shrub areas. Higher recharge results in more abundant and steady ground-water discharge to streams (known as base flow), which is water of high quality.

From a water-quality perspective, a United States Geological Survey (USGS) study of the quality of streams in the Upper Delaware River Basin in New Jersey (USGS Fact Sheet FS-090-02) concluded that the, “concentrations of most chemical constituents studied and levels of fecal coliform bacteria were lowest, and concentrations of dissolved oxygen were highest, in streams who's watersheds contain the most forested or undeveloped land.” Other USGS studies, both nationally and in New Jersey, have concluded that levels of nutrients are lowest in forested areas as well. Where nutrients are present, water quality is poorer. These three constituents - dissolved oxygen, coliform bacteria, and nutrients – are good indicators of general water quality. Forest cover also lowers water temperatures, which is beneficial to in-stream organisms because cold water can hold greater amounts of oxygen than warm water.

Forests prevent contaminants from reaching surface water by stabilizing the land surface to prevent fine particulates containing contaminants from entering streams. A very good and relevant example of the beneficial effect of forested land on water resources is New York City's watershed around its Catskill surface-water reservoirs. The acquisition of the predominantly forested watersheds around these reservoirs has minimized the need for large expenditures on water treatment facilities. (See the New York Times article “New York has work to do to keep its tap water pure” by Anthony DePalma on page A1 of the July 20, 2006 issue for a good explanation of the efforts New York State is taking in this regard.)

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Forest cover can co-exist symbiotically with agriculture. It is well known in the agricultural community that treed buffers help hold up the water table by capillary action, and that forests help prevent soil erosion.

Raw gravel would provide no protection for the quality or quantity of surface or groundwater. Water would evaporate from the surface of the gravel and there would be no removal of contaminants flowing through the gravel since it would not take in water, hold it, and bind chemical contaminants.

138. COMMENT: If the purpose of the Act is to increase water quality and quantity, one of the things it should be doing is addressing the decrease in agriculture, not putting another nail in the coffin of a farmer. (9-12)

RESPONSE: The Department agrees that the loss of agricultural and forest land to development is clearly the greatest threat to water quality and quantity in the Highlands region and throughout the State. However, the Department also believes that the greatest threat to the loss of agricultural and forest land is development. Consequently, it is appropriate for the Highlands Act to require strict standards for proposed major Highlands development in the preservation area. The Highlands Act protects agricultural and horticultural operations by excluding them from the definition of major Highlands development, thereby not requiring an HPAA for agricultural or horticultural uses. In addition, as stated in response to comments 15 through 20, the Highlands Act contains several provisions to protect landowners, including protecting the value of land to be set aside for open space preservation, by requiring the State Green Acres program, State Agriculture Development Committee, a local government unit, or a qualifying tax exempt nonprofit organization seeking to acquire land to conduct two appraisals of the value of the land: one using current regulations, and the other the regulations before the Highlands Act was enacted. The higher of those two values is to be used as the basis for negotiation with the landowner.

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139. COMMENT: Given that the DEP's Division of Parks and Forestry uses gasoline powered boats in the Monksville Reservoir which is connected to the Wanaque Reservoir, (both located in the Highlands preservation area) would not a spill of gasoline into the reservoirs be more harmful to the water supply then ten new homes on one acre parcels as far as 30 miles from the reservoirs? (65)

140. COMMENT: Why do you allow gasoline-powered motorboats on the lakes and reservoirs? Are you not aware of the contamination to the water supply that results from these pleasure craft? (30)

RESPONSE: There are lesser impacts to water quality and quantity from gasoline-powered motorboat engines than from development. The engines on gasoline-powered motorboats have to meet Federal standards to control emissions and new 2007 EPA standards have further reduced acceptable boat engine emissions. Development has permanent, negative, direct and indirect impacts on neighboring ground and surface water. Impervious surface resulting from development permanently decreases the amount of water that reaches and replenishes the aquifers: flowing rivers of ground water from which most people obtain their water supply. Septic systems permanently contribute nitrates and other contaminants to the ground water supply. Consequently, development is a much greater continuous threat to water supply and quality than the use of gasoline-powered motorboats on a lake or reservoir.

141. COMMENT: Some of the things that are not looked at in the regulations are alternatives such as limiting use in the area that is using this water and why are we suffering from all this; encouraging agriculture in water-producing areas, taxing people who benefit and paying people that are being hurt; creation of new reservoirs, encouragement of activities which increase water to the aquifer such as active forest management instead of unmanaged forest land and the purchase of water from other areas. (10, 87)

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RESPONSE: While there may be other mechanisms and suggestions to protect water quality and quantity, the Highlands Act has been enacted for that purpose because so many people depend upon water from the Highlands Region. However, as described in response to comments 350 through 355, other existing Department programs throughout the State address water supply uses. For example, purveyors throughout the state are required pursuant to the Water Supply Allocation Permit Regulations at N.J.A.C. 7:19-2.14(a)10 to implement conservation measures to ensure water is conserved to the maximum extent practicable. In addition, Statewide building codes requiring water saving devices be installed in new and modified structures have resulted in significant savings of water. The Department also reviews reports by purveyors in accordance with N.J.A.C. 7:19-6.4 for unaccounted water-- water that may have been lost due to distribution system leaks. If such unaccounted water exceeds 15 percent, the Department often requires as a permit condition that the purveyor assess the loss and provide a remedy. To conserve water for potable uses, the Department requires that the lowest quality water be employed for the intended use. For non-potable uses this requires an assessment of the feasibility of using reclaimed water for beneficial reuse.

Further, the Highlands Act requires the Department to establish specific standards relating to septic density, impervious surface, upland forest protection, and for several other resources for which the Department has created rules in Subchapter 3. While the Department's regulations do not preclude active forest management, and in fact exempt such activities from the need to comply with the Highlands rules, such management is not a substitution for the requirement to protect upland forest areas.

142. COMMENT: The development standards contained in the proposed rules should be primarily addressed to the protection of water resources. Lacking such standards and with politically drawn preservation boundaries, the regulations violate constitutional equal protection and due process guarantees. Regulatory provisions governing hardship and takings claims should be simplified. They should not be intentionally onerous. The cost of submitting an application should not exceed the value of the property. The regulatory

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framework should not be futile. Finally, the economic and benefits analysis purports to quantify financial benefits from preservation. These benefits, many of which are highly speculative, are in reality justifications for public acquisition rather than adopting confiscatory regulations. (44, 85, 87)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-32 establishes 11 different resources for which the Department is required to adopt standards for the preservation area. In addition, N.J.S.A. 13:20-34 lists seven findings that the Department is required to make before approving a Highlands preservation area approval (HPAA). The Department's adopted regulations are necessary to ensure compliance with each and every requirement of the Highlands Act.

The Department is unclear what "hardship" provision the commenters believe are intentionally onerous. The Department has provided waivers for three scenarios dictated by the Highlands Act: health and safety, brownfield redevelopment and taking without just compensation. In addition, the Department has provided a fourth waiver for the provision of 100 percent affordable housing, in order to facilitate compliance with the State Constitution. However, consistent with the Highlands Act, the Department cannot approve any of these waivers without first making the same findings which apply to all Highlands permits detailed at N.J.A.C. 13:20-34, "to the maximum extent possible." See N.J.S.A. 13:20-33b. Consequently, by necessity the Department must require all of the same detail in an application with a waiver, as for an application without.

Finally, in providing an economic impact statement, all agencies are required to provide an explanation of: who the proposal will affect economically; statistical information whenever possible; how the proposal may affect funding sources; the economic effect on the public, if any; and any social or monetary savings. The Department included all of these requirements in its economic impact statement. For additional responses to comments regarding the economic impact statement, please see responses to comments 669 through 737.

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143. COMMENT: Our 1980s development was designed and built with very little curbing and the drainage system of catch basins connected to nearby underground seepage pits. The 1990s development was designed and built with curbing and a drainage system connected to each other and then to a large detention pond. The drainage from the large detention pond is then piped to a stream and eventually gets to the Raritan River. When you walk by the catch basins in the 1990s development, there is a loud roar as thousands of gallons of water rushes through on the way to the Raritan River. The detention pond does partially fill and takes several hours to drain. When you walk by the catch basins of the 1980s development, there is a much softer trickling sound as a much smaller amount of water finds its way into the ground. We have never seen any of these basins fill or overflow. The commenter believes that if seepage pits were installed along existing and future residential development roads, those drainage systems would be substantially improved, thus eliminating the need for creating the financially condemned preservation area. There are those that would say that the groundwater is and would be polluted by a system of seepage pits. If so then let us correct that problem instead of sending it down the river. (22)

RESPONSE: In providing protection for the water of the Highlands Region, the Highlands Act requires the establishment of standards designed to avoid impacts to the existing water resources, instead of allowing an impact and requiring mitigation. For example, by providing a three-percent limit on impervious surface, the Highlands Act and these rules avoid the creation of significant quantities of stormwater, that would have to be collected, stored, treated and discharged, as described by the commenter. As another example, the Highlands Act requires the establishment of a septic density standard to prevent degradation of groundwater, rather than permitting some level of degradation that might have to be remediated in the future. Consequently, the Highlands Act recognizes that it is almost always less costly to avoid environmental impacts than to allow them and try to correct them at a later time.

Because seepage pits permit the introduction of stormwater directly to the groundwater, there is a great potential for groundwater contamination. Consequently, the

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Department only permits the use of seepage pits for "clean" runoff (for example, rooftop runoff).

144. COMMENT: Allowing more people in the state than water can sustain will kill us all. We cannot live without water. (102)

RESPONSE: It appears that the Legislature agrees with the commenter when it enacted the Highlands Act because one of its goals is to protect the water of the Highlands Region because it is shared by half of the State's population.

Implementation Cost

145. COMMENT: Without more feedback from "the soldiers in the trenches," how can such explicit, contradictory, ill-informed, draconian, and extensive regulations work to the benefit of New Jersey's citizens? It will be a horrendous mess, to say nothing of dictatorial and environmental madness. These regulations need to be reconsidered in a thorough and painstaking review so that a truly workable document which achieves the desired goals results. (37)

RESPONSE: Many of the standards contained within the Department's regulations are contained within the Highlands Act. The Department was charged with developing rules to implement those provisions. Further, due to the mandate of the Highlands Act, the Department has been implementing some pieces of the Highlands Act since August 10, 2004, and the majority of these rules since the Special Adoption was published on May 9, 2005. Therefore, there is already feedback from those implementing the rules and contrary to the commenter's prediction, the Program has been working smoothly.

146. COMMENT: If adopted, the rules are unenforceable. The state cannot afford to police hundreds of thousands of acres of privately-owned land. The cost to taxpayers if

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the rules are adopted will be in the billions of dollars. This is not anywhere in the economic impact. The cost to administer and monitor and manage so much land would enormous. (13)

RESPONSE: The Department does not agree that the rules are unenforceable or too costly to enforce since they do not require administering, monitoring or managing all land in the Highlands preservation area.

As described in response to comment 36, the Highlands rules regulate “major Highlands development” as defined by the Highlands Act. Therefore, unless someone is proposing to undertake a “major Highlands development” their activities are not regulated, no HPAA is required and the Department is not involved. The Department has been enforcing the Highlands Act since August 10, 2004. The cost is not extreme since the majority of people are not engaged in regulated activities.

Boundary between Preservation and Planning Areas

147. COMMENT: I am a contract purchaser of property located in the Highlands preservation area. I strongly object to the inclusion of this property in the Highland preservation area for the following reasons. The property is located at the intersection of two County roads Route 517 and Old Allamuchy Road surrounded by existing commercial development and development under construction. The property consists of 8.95 (the Department assumes this is acres) within the Highlands preservation area. The property is bounded to the south by Commercial Shopping Center, and to the east by a church and gas station currently under construction (which are not within the Highlands preservation area), major multi family residential housing and apartments and the corporate center for M&M Mars. To the north there is another church. The gas station property under construction is located 20 feet from the property line. The property adjacent to the gas station and directly across from the subject property has a pending application before the Independence Planning Board for 189 single family townhomes. The subject site received a prior approval for commercial development in 1989 for

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construction of a 53,800 sq. foot commercial retail center. A pending site plan application was submitted in November 2004, was deemed complete March 2005. Final site plan approval was tabled as a result of the passage of the Highlands Act. The subject site received its LOI, June 27, 2002. This subject site includes work that will correct a dangerous road condition by constructing a new signalized intersection and road realignment at the intersection of County Road 517, Old Allamuchy Road and Bilby Road. The subject site is fully serviced by public sanitary sewer and public water supply. The subject site has no wetlands, streams or waterways and will have little or no value to water quality. The stormwater management plan retains water all on site and an outfall structure connects to an existing stormwater system. The loss in value would be significant from the proposed commercial retail center \$8.08 million in comparison to one single family home valued at approximately \$700,000. It is difficult to comprehend how the Department could determine that the subject site is within the Highlands preservation area when the adjacent properties are commercial and residential developments. We respectfully request this subject site be excluded as part of the Highlands preservation area. (103)

148. COMMENT: The New Jersey Legislature directed and authorized the DEP to ostensibly protect the water supply of the area by regulating activities within the Highlands region as defined by a political map that clearly has no relationship to the watershed geography. This arbitrary boundary condition is clearly a discrimination against those citizens who happen to own property within the boundary as defined by the Act. In any rational view the defined area is scientifically indefensible, water simply will not recognize these arbitrary boundaries and water on both sides of the boundary must have the same intrinsic value. (82)

149. COMMENT: Water bodies behave hydrologically different depending on whether they are standing (for example, ponds) or moving (for example, streams). As such, measures intended to protect standing bodies of water in the Highlands can be justified to extend beyond the scientifically based Highlands boundaries since the majority of the

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runoff within the comprising subwatershed can be anticipated to route towards the respective bodies of water. However, streams and rivers which originate in or traverse a portion of the Highlands are influenced by watershed areas not within the Highlands. Without providing for such differentiation, the regulatory powers that accompany the boundaries of the Highlands could be further extended without scientific bases. (85, 87)

150. COMMENT: The boundaries of the Highlands preservation area (N.J.A.C. 7:3 8-2.1 (b)) were adjusted by incorporating revisions sought by local elected officials without providing an opportunity for a hearing by affected property owners. This violates the procedural due process requirements of the Fourteenth Amendment of the U.S. Constitution and Article 1, paragraph 1 of the New Jersey Constitution. It also violates the civil rights of affected property owners under U.S.C.A. 1983. (85, 87)

151. COMMENT: The Highlands of New Jersey are part of a physiographic region established between late 1800's and early 1900's and refined by the NJDEP Geological Survey in 2002. A physiographic region is a scientifically based characterization of a portion of the earth's surface based on geology and related geomorphology (topography and related landforms). The U.S. Forest Service (USFS) defined this area initially in 1992 and subsequently in 2002. The USFS definition is reportedly founded on the corresponding areal extent of the physiographic-related features of geology and topography. However, the USFS extended its delineation to include the entirety of those municipalities which partially occur within the physiographic-based region for the purpose of evaluating the overall dependence on water resources originating in the Highlands and not as a revision of the comprising physiography. As defined by the NJDEP, "the national Highlands Region is an area that extends from northwestern Connecticut across the lower Hudson River Valley and northern New Jersey into east central Pennsylvania; that the national Highlands Region has been recognized as a landscape of special significance by the United States Forest Service; that the New Jersey portion of the national Highlands region is nearly 800,000 acres, or about 1,250 square miles, covering portions of 88 municipalities in seven counties. Based on this description,

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the Highlands area in New Jersey as defined in the rules is dependent on the definition established by the U.S. Forest Service and incorporates further non-physiographic based modifications. As such, the boundaries established by these three sources are not correspondent, and in several instances include or exclude municipalities encompassed by the remaining delineations. By definition, the physiographic delineation presents the purely scientifically based Highlands area, independent of the influence of municipal boundaries. Based on available Geological Information System databases, the physiographic-based delineation of the NJGS (about 625,000 acres) is expanded in area by the USFS and the NJDEP to about 789,000 acres and 859,000 acres, respectively. (85, 87)

152. COMMENT: The boundary lines of the overall Highlands Region, as well as the subdivisions of preservation and planning areas, are arbitrary and that many have been formed more based on political pressures than actual environmental concerns. Many areas originally designated as highly sensitive so as to necessitate preservation area zoning have, due only to political and economic lobbying, become re-designated as planning area ("buildable") locations. This leaves many less wealthy, less powerful, and less well-connected landowners at a distinct and unfair disadvantage. (6, 7, 9, 10, 13, 23, 23, 30, 36, 37, 43, 44, 45, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

153. COMMENT: Why are not Round Valley Reservoir (Hunterdon County) and Boonton Reservoir (Morris County) included in the Highlands preservation area? (65)

154. COMMENT: Our farm is located on the border of the preservation area. The property on the other side on the road from us is in the planning area. It's my understanding that our farm was not originally in the preservation area, but the line was moved for political reasons, not scientific reasons. If you look at the boundary lines of the planning area and the preservation area, it's political, not scientific. (10, 87)

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155. COMMENT: Our Township Committee, out of fear of being forced to develop by the State, requested that our municipality be placed in the preservation area. Our municipality did not meet the criteria to be placed in the preservation area but when the State received the request they agreed to place the municipality in the preservation area, unbeknownst to the residents of the township. (109)

156. COMMENT: Geologically, our farm has soils that sit on top of crystal and bedrock or granite. That granite is fractured. We have regular springs that run year round through our property. When it rains, we have more springs. We have springs popping up all over the place. Common sense geology says that the rain is being pushed up and the aquifer is pushing up the water, spitting it out onto our property. We're in the Musconetcong Watershed. That means that all rain that falls on our property goes down the stream. It goes through the turbines of a papermill in Warren Glen, down the Musconetcong to the Delaware River. If for some unlikely statistical chance some molecule of water made it into the aquifer and fought its way upstream against those pressures, it's about 50 miles to the closest place that would draw water that was a purpose of the Highlands Act. So you are talking about a statistical impossibility of water coming from our property and making it into this aquifer and providing water for the state of New Jersey. (10, 87)

157. COMMENT: I am a farmer and a landowner with land in each of the designated areas, that is, preservation and planning. There's no difference between those two areas with both having very similar natural resource characteristics. It seems like a county highway has apparently provided a "scientific" method for dividing the land between the preservation area and the planning area. (79)

158. COMMENT: The readoption with amendments and the statute which they implement are unconstitutional. The boundaries of the preservation area are not scientifically based on preservation and protection of water resources in the Highlands region. Unlike the New Jersey Pinelands there are no common hydrogeological characteristics which justify distinguishing the preservation and planning areas.

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Therefore, there are insufficient compelling state interests to justify the distinction between property owners in the preservation and planning areas. (85, 87)

RESPONSE TO COMMENTS 147 THROUGH 158: The boundary of the Highlands preservation area was prescribed by the Highlands Act in order to delineate an area of exceptional value that includes watershed protection and other environmentally sensitive lands. The preservation area designation was based upon a recommendation from the March 2004 Action Plan of the Highlands Task Force, which was based upon natural resource data assembled by the United States Forest Service (as noted by one of the commenters), Rutgers-The State University, and the New Jersey Water Supply Authority. The specific boundaries of the data were translated to the appropriate, and nearest practicable, on-the-ground, and easily identified reference points, such as, but not limited to road descriptions, survey lines, and municipal boundaries. The specific area designated as the preservation area was then described in the Highlands Act at N.J.S.A. 13:20-7.

Because the Highlands preservation and planning area boundaries are designated by the Highlands Act, the Department has no authority to move, alter or otherwise make changes to that boundary. The Department is required to apply its rules to proposed major Highlands developments in the preservation area as designated by the Highlands Act.

Other

159. COMMENT: Laws and regulations have not and will never prevent the acts they were proposed to prevent. We can see the improvement in the State's environment over the past several decades. I believe this was accomplished through education and determination not legislation. (107)

RESPONSE: While the Department agrees that education is a valuable component of environmental protection, it does not agree that laws and regulations are ineffective or that New Jersey's environment has improved without the benefit of strict regulation. For

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example, at least since passage of the Federal Clean Water Act's wetland provisions in 1977, people have been educated about the importance of preserving wetlands for protection against flooding, and for contributions to the protection of water quality. However, until passage of the State Freshwater Wetlands Protection Act, (N.J.S.A. 13:9B-1 et seq.) in 1988, New Jersey was losing hundreds of acres of wetlands on an annual basis to development. Also, while people have been continuously educated about the dangers of building in floodplains, and the dangers of building too close to the shore, the Department reviews hundreds of applications on an annual basis for permits to construct in the floodplain and on the shore. Fortunately, the State Flood Hazard Area Control Act and the Coastal Zone Management Act and their implementing rules compel applicants to build in a manner to protect lives and property when flooding occurs. These are just a few examples of the legislation that has been necessary to protect the health and environment of New Jersey's citizens.

160. COMMENT: The commenter is a group of more than 110 environmental groups spread across the four states of Pennsylvania, New Jersey, New York, and Connecticut. We have supported the Highlands Act from its inception. The commenter helped form the task force that brought the law to light, and we continue to support the Highlands Council and the DEP regulations. The commenter supports the following changes to the rules: the DEP has changed its method of defining upland forest to the methodology that was suggested by the Highlands Council in a June letter from the Natural Resources Council. The commenter appreciates the amendment that states that the Department shall give "great consideration and weight to the RMP, the Regional Master Plan, in all decisions affecting the preservation and planning areas, including decisions on permits," because it means that DEP will consult actively with the Council on some of these permitting decisions. The commenter supports DEP's rules that state that it "shall approve a water quality management plan amendment only after receiving from the Highlands Council a determination of consistency with the Regional Master Plan," because the commenter wants to see that WQMP's are done in a consistent manner with the principles and dictates of the Regional Master Plan. Lastly, one of our concerns has

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been linear development. The commenter supports the amendment to the linear development driveway section that requires the applicant to make a good faith effort to transfer development rights for the land in question and to offer the land for sale to land conservancies in the area before satisfying the "no feasible alternative requirement," so that they have some things that they need to do before they get their approval. (70)

RESPONSE: The Department acknowledges these comments in support of the rules.

161. COMMENT: The commenter would like to emphasize the considerable improvements in standards for septic density, forest and habitat protections, and vernal ponds. The commenter is pleased by the Department's commitments to consider including additional scientific aspects of groundwater quality, biodiversity, and landscape ecology in the regulatory framework. (101)

RESPONSE: The Department acknowledges these comments in support of the rules. The Department believes it has created regulations that implement the substance and intent of all aspects of the Highlands Act.

162. COMMENT: Seven of the ten communities of the Great Swamp Watershed lie within the planning area of the Highlands and are the headwaters of the Passaic River, a drinking water source for well over a million of New Jersey's residents. There is a lot of interest in the rules on the part of those communities, and there is a lot of interest also in these rules on the part of communities on the eastern edge and southeastern edge of the Highlands planning area. A number of them are anticipating what they call the "Highlands effect," and they would welcome the opportunity for grants for planning on how to deal with that Highlands effect. The commenter strongly supports the Water Quality Management Plan. The requirements of the Water Quality Management Plan, amendments in the planning area must only be granted after determination of consistency with the regional management plan. The commenter also supports the application of antidegradation analyses for wastewater treatment facilities, for individual subsurface

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disposal systems, and for Category One waters both in the preservation and planning areas. The commenter supports impervious coverage limits, steep slope protections, and threatened and endangered species habitat protections. The commenter strongly supports the DEP's consultation with, and placing weight, on the Highlands Council's Regional Management Plan when making regulatory and permit decisions in the Highlands area. The commenter also would support strongly a water tax for the use of Highlands water to encourage conservation of that water to reflect the real value of that water. Water is far too cheap, and those taxes should only be used in the Highlands area for conservation purposes and not be used in South Jersey. (92)

RESPONSE: The Department acknowledges these comments in support of the rules. However, the Department's rules regarding antidegradation analyses for waste water treatment facilities and individual subsurface disposal systems applies only to the preservation area, as dictated by the Highlands Act. Towns in the planning area may have the opportunity to adopt these or other standards as part of the Highlands Council's Regional Master Plan.

The Department's proposed rules do not govern funding and the Department does not have the authority to enact a tax.

163. COMMENT: The commenter appreciates the intense effort that has gone into the creation of these rules and the good faith effort of the agency to provide essential protections to the critical natural resources of the Highlands preservation area. These protections are vital to protect the health, quality of life and economic opportunity of not only Highlands residents, but also the millions of people who live outside the region but rely upon it for their water supply. The well-being of over half the state of New Jersey depends on an adequate supply of clean water from the Highlands. These rules have been crafted to make sure that that supply will be available in perpetuity. The residents of the Highlands region, including the commenter, depend on the water beneath the ground we inhabit. The commenter also expects the Highlands to continue to provide a home for the wildlife, the forests that clean the air and cool in summer, recreational opportunities close to home and the beauty that sustains us in our fast-paced world. The rules address these

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concerns. The amended proposed rules appear to address most of the concerns expressed earlier by the commenter and other environmental organizations. (35)

RESPONSE: The Department acknowledges these comments in support of the rules.

164. COMMENT: Regional land use planning, which is what is being proposed via the Highlands regulations, avoids what is known as death by a thousand cuts, and the inevitable degradation of drinking water and other resources, including farms, the destruction of which ultimately costs much in tax dollars and in loss of quality of life. The commenter believes regional planning allows for real planning, whereas, piecemeal planning does not. So in theory, we agree with the Highlands Act and regulations to implement it. The commenter feels that the farmers have been maligned. The commenter feels the sense of loss and frustration of the farmers. It is palpable and important to recognize. If a farmer was planning to wait for a long time but chose to subdivide later and if he expected the land market to remain strong, which is a reasonable expectation, then his choice to remain to farm and to sell land later for subdivision and development is indeed no longer available under these rules. The commenter is concerned, though, that the farmers may have been maligned by people who have been advising them for their own reasons, not necessarily in the best interest of the farmers. The farmers need to trace back where they are getting their information. Their source may be suspect. They may be focusing on this issue to the exclusion of all others and to their detriment. To the farmers that want to preserve and not farm their land, which someone mentioned here earlier, there is the option to sell the land for top dollar to land trusts. And they should know they have this option. If the farmer's intention is to remain on the land and farm it, but he would like to get equity back out of their land, then he can sell the development rights in the TDR program, which option is part of these rules. People can add additions to their single-family houses unimpeded. The commenter is not sure what the concerns about cutting firewood are, but thinks it is a misunderstanding. The Farm Bureau seems to understand the farmer equity issues and I think he would be a good resource to more fully understand the regulations. The commenter is concerned that the farmers may miss the

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opportunity to comment on the rules timely because of spending so much time on the Act. They may be exempt from the Act and not comment on the rules. But they may want to comment on the rules and have for whatever reason not been able to, and that is of concern. The commenter would like to let the farmers know that the organization the commenter represent is developing workshops on TDR, including a discussion of the state TDR program and hopefully by then the Highlands TDR program will be out so it can be discussed as well. The commenter encourages the farmers to use her organization and related resources to understand what they need to know to protect their equity under the Highlands Act. The commenter also encourages the DEP and the Highlands Council to work together to compile in one place a readable, accessible short document on what regulations apply to farmers and how they can protect their equity and comply with the regulations. (25)

RESPONSE: The Department appreciates all public education efforts relating to understanding the Highlands Act and will continue to participate as much as possible in programs on this topic sponsored by various groups. Shortly after the public hearing, the Department prepared a document entitled, "Highlands Myths and Facts." This document is available on the Department's website at www.state.nj.us/dep/highlands.

165. COMMENT: The commenter thanks the DEP for including some of the forest management community's suggestions in the proposed rules. The commenter is particularly pleased to see that it appears as though the rules will continue to exempt forest landowners with approved forest management plans from future permitting processes, thereby eliminating an additional level of regulation of management activities on these lands. These lands are already subject to periodic on-site review by the New Jersey Forest Service as required by the New Jersey Farmland Assessment Act. (40, 41, 42, 99)

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

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166. COMMENT: I am a farmer who lives in the Highlands planning area in Asbury, New Jersey. I fully support the Highlands Water Protection and Planning Act. I am writing to urge the Department of Environmental Protection to uphold strong mandatory natural resource protections within the Act. I approve of strong restrictions on building in the Highlands region that are upheld by the Act. If we don't protect this precious region now, it will be lost forever. Not only the water, land and wildlife will suffer, but so will future generations of New Jersey residents who depend on natural resources for a high quality of life. (14)

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

167. COMMENT: The Department is to be commended for refining and augmenting the Special Adoption. Overall, the commenter believes that the proposal contains workable provisions that will advance the goals of the Act and provide a framework for implementation as well as a basis for future revisions. The Department is also to be commended for preparing an excellent series of Impact Analyses to accompany the rule proposal. In particular, the Economic Impact Analysis breaks new ground in quantifying the public benefits associated with the preservation of trust resources and the costs saved by proper planning. The Federal Standards Analysis provides important guidance concerning not only the relationships between the rule proposal and the Federal regulatory framework but also clearly explains many of the relationships existing between the rule proposal and other state regulatory programs and legislative mandates. The Environmental Impact Analysis provides a clear representation of the significant environmental protection improvements contained in the rule proposal. Taken together, these analyses form the basis for both a rational explanation of the actions of the Department and an important source of information for decision makers at the local level and also for private interests. The commenter strongly urges the Department to utilize the research used to prepare these analyses to create an educational document for broad distribution within the Highlands region. (73)

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RESPONSE: The Department acknowledges this comment in support of the rules. The Department has been producing smaller, targeted educational documents for presentations on its regulations and will continue to do so as the need arises.

Subchapter 1. General Provisions

7:38-1.1 Scope and Authority

168. COMMENT: The Act designates the NJ Dept of Agriculture to be the “entity to work with for those with farming and horticultural interests”. The Act was specially crafted to exempt farming as a Highlands activity. All other restrictions placed on agricultural activity by N.J.A.C. 7:38-1.1, Scope and Authority, to broaden the DEP’s authority in this section of the regulations should be removed. (45, 46)

RESPONSE: N.J.A.C. 7:38-1.1(b) simply states that information about the standards for agricultural and horticultural development can be obtained from the State Department of Agriculture. The Highlands Act exempts agricultural and horticultural development from regulation as a major Highlands development by DEP. DEP cannot broaden its authority through these rules.

169. COMMENT: The State should postpone all zoning decisions until the Highlands Council has completed the Regional master plan. At that time, scientific data down to block and lot will be available. Septic densities and environmental sensitivity will be known instead of estimated. Instead of limiting the number of septic systems per acre, the plan can call for limiting the degradation of the aquifer. In the meantime, maintain a freeze on new development. (19)

170. COMMENT: The establishment of lot sizes for septic density should be deferred to the Highlands Council while it develops the Regional Master Plan, which would allow them the most flexibility to balance the equity of landowners with protection of

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environmental resources. The Council has the most up-to-date information available to make these determinations. (62)

RESPONSE TO 169 AND 170: The Highlands Act at N.J.S.A. 13:20-32e requires the Department to establish “a septic density standard established on a level to prevent degradation of water quality, or to require the restoration of water quality, and to protect ecological uses from individual, secondary, and cumulative impacts, in consideration of deep aquifer recharge available for dilution.” Therefore, using existing scientific data, the Department complied with the requirements of the Act in proposing its standards for septic density at N.J.A.C. 7:38-3.4. The Department acknowledges that the Highlands Council is completing a Regional Master Plan that may provide additional information. If and when that occurs, the Department will work with the Highlands Council to address any differences. The Department does not have the authority to establish a freeze on new development.

171. COMMENT: For the Department to basically be “blind to the line” between the preservation and planning area with many of the regulations and what the Council is going to do in its Master Plan is absurd. The New Jersey Legislature, right, wrong or indifferent, drew the line. For the Council to be blind to that line is ridiculous. DEP should make it clear whether its rules apply to the preservation area or to both the preservation and planning areas so that if the rules do not apply to the planning area people in the planning area will not have to be concerned about the rules. (56, 57)

RESPONSE: The Highlands Council is required to develop a Master Plan for the entire Highlands Region. Consequently, it makes sense to say that in developing the “Regional Master Plan” (RMP) the Council will be “blind to the line.” However, the Department’s regulation in the Highlands Region is limited to the preservation area. The only exception is in the case where the Highlands Council identifies resources in the planning area worthy of added protection, and the municipality where the resource is identified opts-in to the RMP to provide additional protection for the resource. Consequently, before

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anyone in the planning area is subjected to regulation under the Highlands Act, the municipality will have gone through extensive public discussion regarding the desire to participate in the RMP and the ramifications of that decision.

172. COMMENT: Based on the NJDEP/NJGS GIS database and related analyses, the preservation area as defined by the Act comprises approximately 48 percent of the DEP-delineated Highlands. It should be noted that the U.S. Forest Service Conservation Value analysis for its delineation, ranked only 38 percent of the Highlands areas as "exceptional" value, and that the existing ground-water recharge characteristics (as indicated by comprising stream baseflow characteristics) for the majority of the Highlands' watersheds were currently positive (that is, above a value of 50 percent of streamflow). The GIS-based analyses indicates that the preservation area contributes the majority of ground-water recharge (about 62 percent) to the Highlands geologic formation. This percentage is based on an overall area that extends beyond the physiographic and USFS delineated areas (approximately 95 percent and 100 percent of the Act-defined preservation area occurs within these respective areas). As such, the percentage would be greater for this area under these other delineations, which lessens further the contribution provided by the planning area. Given the consistency of these percentages, we do not see a scientific basis for the inclusion of non-Highlands areas and municipalities relative to the goals of the rules. (85, 87)

173. COMMENT: The preservation and planning areas of the Highlands can be viewed relative to three fundamental water-resource related features as defined by respective NJDEP GIS databases: Category-1 streams; ground-water recharge potential; and major aquifers. Given the stated primary goal and foundation of the NJDEP-based Highlands delineation relative to the preservation and protection of the comprising water resources, it should be safe to assume that the locations of C-1 streams, areas of high-potential ground-water recharge, and areas underlain by major aquifers would correspond to the preservation area delineated by the NJDEP. Though C-1 streams are considered by the Act relative to defining linear buffers which border the respective waterbody, a more

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conservative approach would be to consider them relative to the respective watersheds, The extent of these watershed in the Highlands is about 335,469 acres. Of this total area, only about 217,046 acres (or 65 percent) occurs in the NJDEP defined preservation area. Therefore, the protection of C-1 streams does not appear to be the basis for the delineation of the preservation area. (85, 87)

174. COMMENT: The Act references the importance of preserving ground-water recharge, recognizing its importance to local water supplies and streamflow, as well as a source of nitrate dilution. As such, relative ground-water recharge rates have been quantified by the NJGS for the municipalities comprising the Highlands, based on and annual average precipitation rate in the region of about 44 inches per year. Based on studies and planning assumptions made elsewhere in the northeast, including New Jersey, a recharge rate equivalent to at least 30 percent of the annual average precipitation amount can be conservatively assumed under optimal conditions. The extent of those areas in the Highlands where the NJGS-determined ground-water recharge rate is equal to or greater than 30 percent (about 13-inches per year) of the annual average precipitation amount is about 537,990 acres. Of this total area, only about 285,735 acres (or 53 percent) occurs in the NJDEP defined preservation area. As such, the protection and preservation of current optimal ground-water recharge areas may not be appropriately addressed and the use of lower average recharge values may lead to conflicts with the goals of the Act. (85, 87)

175. COMMENT: The geological formations which comprise the Highlands vary in characteristics relative to the ability to store and transmit ground water. Those that are considered capable of meeting public community and industrial water supply demands are considered to be major aquifers, and typically consist locally of unconsolidated stratified glacial drift and fractured carbonate bedrock units (for example, limestone). The extent of these major aquifers as determined by the NJGS in the Highlands is about 274,722-acres. Of this total area, only about 48,298 acres (or 18 percent) occurs in the

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NJDEP defined preservation area. As such, the importance of major aquifers does not appear to be accounted for in the delineation of the preservation area. (85, 87)

RESPONSE TO COMMENTS 172 THROUGH 175: The boundaries of the Highlands preservation and planning areas are established in Highlands Act. See N.J.S.A. 13:20-7 and these rules at N.J.A.C. 7:38-2.1. The preservation area designation reflects the recommendation in the March 2004 Action Plan of the Highlands Task Force, which was based upon natural resource data assembled by the United States Forest Service (as noted by one of the commenters), Rutgers-The State University, and the New Jersey Water Supply Authority. The specific boundaries of the data were translated to the appropriate, and nearest practicable, on-the-ground, and easily identified reference points, such as, but not limited to road descriptions, survey lines, and municipal boundaries.

Because the Highlands preservation and planning area boundaries are designated by the Highlands Act, the Department cannot move, alter or otherwise make changes to that boundary.

176. COMMENT: The rules state that “The Department anticipates that the Regional Master Plan will address the components necessary to protect the natural, scenic, and other Highlands resources, including but not limited to, forests, wetlands, stream corridors, steep slopes, and critical habitat for fauna and flora.” Therefore, these rules should not contain standards for those things but should cover the area of water protection, diversion, allocation and septic densities needed to preserve the quality of the aquifer. The DEP was directed to provide rules to prohibit development on slopes over 20 percent, within the 300 foot open waters buffer and in upland forest. When the Act directed the Department to provide for “at least” these, it did not intend the DEP to go so far beyond those guidelines to jeopardize the well being of residents, particularly farmers. (19, 28).

RESPONSE: The Highlands Act at N.J.S.A. 13:20-32 and 34 requires the Department to adopt rules that prohibit major Highlands development within 300 feet of any Highlands

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open waters; establish a septic system density to prevent the degradation of water quality; establish zero net fill for flood hazard areas; limit impervious surface to 3 percent; prohibit development on slopes exceeding 20 percent and establish standards to protect slopes between 10 and 20 percent; prohibit development that disturbs upland forest; protect endangered, threatened or rare animal or plant species; and prevent degradation of unique and irreplaceable land types, historical or archaeological resources, and public scenic attributes. Consequently, the Department did not go beyond the requirements of the Act.

Further, as described in response to comments 15-20, the Act provides several provisions to reduce its impact on property owners.

177. COMMENT: The New Jersey Department of Agriculture and the agricultural community will continue to be engaged in the Highlands Regional Master Planning process that we hope will ultimately become the basis for a balanced and coordinated preservation and land use management strategy that includes the protection and enhancement of a viable agricultural industry. (75)

RESPONSE: The Department will also continue to work with the Highlands Council and the New Jersey Department of Agriculture to do what it can, within the bounds of its responsibilities and authority under the Highlands Act, to support the agricultural industry.

178. COMMENT: Mount Olive Township in Morris County finds that 82 percent of the township is now in the preservation area of the Highlands. The township needs to have some sense of predictability about what it can and cannot do in the planning area, the 18 percent left in the township. That 18 percent includes the International Trade Center, which encompasses the Foreign Trade Zone, and it also includes the commercial corridors along both Route 46 and Route 206. The planning area is seen as providing an opportunity for the town to address some of the losses that it has incurred over the years with some corporate changes and the impact of the tax rate of the township. Where the

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specific application of the DEP rules had been limited to just the Highlands preservation area, the rules have now been changed and include the Highlands planning area as well.

The rules are being written to enforce the Regional Master Plan, but the Regional Master Plan is not yet adopted. So it is difficult to understand the implications of the rules in the planning area. At the local level, as planners, we do the plan first, then we do the ordinance to implement the plan. One is supposed to set the guidelines for policy and then figure out how to implement it. This seems to be the reverse. (60)

179. COMMENT: The Highlands Council policy papers have been issued on a frequent basis and, starting with the Act itself, all seem to sound the same theme, which is there will be stringent regulations for resource protection in the preservation area. As far as the planning area goes, that is voluntary. But it seems that under the amendments, DEP has jurisdiction over any activity that takes place in the planning area, and can withhold or deny a permit if it finds the activity is not consistent with the Regional Master Plan. (60)

180. COMMENT: These rules will take effect before the Regional Master Plan. We would like to see reference to the planning area removed until the master plan is done so that DEP, and the members of the Highlands Council can get feedback from the public. (60)

181. COMMENT: The rules indicate that the DEP will give great consideration and weight to the resource protection measures in the master plan when it evaluates anything that takes place in the planning area. What does that mean? I think what is going to happen is that anything that takes place in the planning area will be subject to the same stringent standards that apply in the preservation area. Then it will be a judgment call on the part of person or persons at DEP as to whether a permit gets approved. In a Highlands Council report it cites the DEP regarding whether the DEP enhanced environmental standards apply outside the preservation area and the answer is “no.” The Highlands Council has used the phrase “blind to the line.” That is, the Regional Master Plan would be drawn without consideration as to where the preservation area and the

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planning area are. From a regional planning perspective, perhaps it recognizes that the lines were not drawn according to any objective basis in the first place. The concern is that when DEP's regulatory controls are blind to the line, the Department is acting beyond the scope of the Act. (60)

182. COMMENT: The term "great consideration and weight" at N.J.A.C. 7:38-1.1(g) and (j) is not defined in the Act. The term establishes a standard that is not identified. It is unconstitutionally vague and without meaning. It is subjective and not objective. (44, 87, 111)

183. COMMENT: The rules state that the DEP will give regulatory weight to the Regional Master Plan (RMP) when making decisions in or affecting the Highlands including activities in the planning area. This can be interpreted as saying that DEP will not issue any approval if a project is incompatible with the RMP. It does not matter whether a municipality decides to opt into the RMP. This provision negates any "voluntary" opt-in as purported by the Highlands Act because in effect, the municipality would be "penalized" by the DEP's withholding of permits if the project or plan is not compatible with the RMP. (85, 87)

184. COMMENT: The New Jersey Legislature distinguished the preservation and planning areas to balance the water quality protection and economic and housing needs of the region. Thus the development restrictions in the Act apply to the planning area only. The Department cannot through rulemaking alter this overarching framework of the legislation. The Highlands Water Protection and Planning Act (Act) defines the responsibilities of both the Department and the Council. In both cases the area of mandatory regulatory applicability is the Highlands preservation area. Highland specific standards to be developed by the Department are to apply to the preservation area only. Municipalities in the planning area are given the option of conforming with the Regional Master Plan prepared by the Council, but in no instance is conformance mandatory. The Act requires that the Department adopt rules that regulate major Highlands development

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in the preservation area. The existing regulatory framework at N.J.A.C. 7:38-2.1 makes clear that the rules apply to the preservation area only. The proposal includes language that expands the regulatory applicability to the Highlands planning area. New language proposed at N.J.A.C. 7:38-1.1(g) references decisions made by the Department regarding the planning area. The language notes that the Department will consider the Regional Master Plan in making such decisions. The Act is clear that the Regional Master Plan applies to the preservation area only, unless a municipality chooses to conform. This distinction needs to be made clear in the rule to ensure there is no confusion. (112)

185. COMMENT: The proposed language further expands the scope of the Department to the planning area. Application of the environmental standards established in the Act is to be limited to the preservation area. Conformance with the RMP is required for preservation area municipalities only. Any requirements that alter this framework are inconsistent with the Act and should not be adopted. (20, 112)

186. COMMENT: The proposed rules go beyond the scope of the Act in several provisions in Subchapter 1. In this section the rules make clear the intent to impose the requirements of the RMP on projects in the Highlands planning area (N.J.A.C. 7:38-1.1(g)). Going further at N.J.A.C. 7:38-1.1(h), the proposed language states that the Department will not issue any approval, authorization or permit that the Department determines is incompatible with the goals of the RMP. At N.J.A.C. 7:38-1.1(k) the proposed language states that in the planning area the Department will give great consideration and weight to the RMP when making certain permit decisions. This is clearly beyond the scope and intent of the Act. (20)

187. COMMENT: N.J.A.C. 7:38-1.1(h) states that the Department will not issue any approvals, authorizations or permits for activities in the planning area that are inconsistent with the goals of the Regional Master Plan. This should only apply where a municipality has opted to conform with the Regional Master Plan or for application of other regulations imposed by the Department. If this language is intended to address other

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regulatory programs implemented by the Department, that should be made clear. The same distinction is required for N.J.A.C. 7:38-1.1(j) which references consideration being given to the Regional Master Plan when making permit decisions regarding the planning area. (112)

188. COMMENT: We are deeply concerned at implications made by DEP and Highlands staff at public meetings that if a resource should have been protected by the delineation of the preservation area, but was left outside of said area, then under the Regional Master Plan it will be protected whether or not the municipality that the resource is located within "opts in." The method of protection will not be local zoning ordinances or other ordinances in accordance with a municipal master plan, but rather as result of internal DEP procedures affecting decisions on individual permits, authorizations, or approvals. Those implications seem to derive from proposed NJAC 7:38-1.1(h). The authorizing legislation specifically protects landowners within the planning area from excessive regulation by Section 11b of the Highlands Water Protection and Planning Act, specifically: "The resource assessment, transportation component, and smart growth component prepared pursuant to subsection a. of this section shall be used only for advisory purposes in the planning area and shall have no binding or regulatory effect therein." While municipalities may choose to "opt in" to the Regional Master Plan and more stringent regulation, the governing body of the municipality, by law, must make that decision, not DEP. Please clarify. (40, 41, 42, 99)

189. COMMENT: Newly added N.J.A.C. 7:38-1.1(h) indicates that the DEP may deny permits, authorizations and approvals on the basis of as yet unknown resource protection goals to be proposed in the Regional Master Plan. Although language is added purportedly limiting such actions to those consistent with the DEP's statutory and regulatory authority, the DEP has already indicated that it may amend the Highlands rules in the future as necessary to make them consistent with the RMP. The net effect of these statements is to suggest that the voluntary aspects of planning area conformance may be

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made mandatory by the DEP. This would be clearly inconsistent with the Highlands Act.
(114)

190. COMMENT: As to resource protection standards, which are anticipated to make up the bulk of the Regional Master Plan, N.J.A.C. 7:38-1.1(h) and 7:38-1.1(k) will alter the voluntary nature of planning area compliance as envisioned in the Act. These two sections should, therefore, be eliminated from the rules. Assuming that DEP intends to make permitting decisions based on its statutory and regulatory authority, this authority need not be restated. (114)

RESPONSE TO COMMENTS 178 THROUGH 190: None of the amendments to N.J.A.C. 7:38 result in subjecting the Highlands planning area to the preservation area regulations. These rules apply to the Highlands preservation area.

The only time that the Regional Master Plan (RMP) may affect the Department's issuance of permits in the planning area is when the RMP identifies resources in the planning area worthy of added protection, and the municipality where the resource is identified volunteers to conform to the RMP. Consequently, before any part of the planning area is subject to additional DEP regulation, the municipality will have gone through an extensive public discussion regarding the desire to participate in the RMP and the ramifications of that decision. However, the Highlands rules will not be applied by the Department in the planning area. Rather, the Department will use other existing authorities to protect resources in the planning area for communities that voluntarily comply with the RMP. Further, the Department may consider the RMP in its regulatory decisions only when consistent with its statutory and regulatory authority.

Because the Highlands Act dictates the timing of the promulgation of the Department's rules and of the Highlands Council's development of the Regional Master Plan (RMP), the Department was unable to await completion of the RMP before promulgating the rules. Therefore, it was necessary for the Department to acknowledge the impending plan and the potential interaction between it and the Department's rules.

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191. COMMENT: We write in support of the proposal to readopt the rules with amendments and express our appreciation for the Department's careful review and consideration of issues raised by various constituencies. In particular, we believe that the commitment in the rules to give "great consideration and weight to the RMP" is an important acknowledgment of the New Jersey Legislature's intention to grant primacy to the RMP. This consistency can only advance the goals of the Highlands Act and the Regional Master Plan. (48)

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

192. COMMENT: N.J.A.C. 7:38-1.1(k) states that for both the planning and preservation areas the Department will consider amending the applicable Water Quality Management Plans (WQMP) to be consistent with the Regional Master Plan. By this action all permits issued for activities in the planning area will be subject to the requirements of the Regional Master Plan. Projects in the planning area will thus be forced to comply with the provisions of the Regional Master Plan. This provision directly contradicts the Act, which states that conformance with the Regional Master Plan for the planning area is voluntary. N.J.A.C. 7:38-1.1(k) states that no WQMP amendments will be approved until such time as the Regional Master Plan is adopted. This applies to the planning area as well as the preservation area. This is inconsistent with the Act. (112, 114)

193. COMMENT: N.J.A.C. 7:38-1.1(k) states that the Department will "consider" amending certain WQMPs. The rule is silent as to the factors to be reviewed for such "consideration" and the standard to be applied if inconsistency is determined to exist. (44, 87, 111)

194. COMMENT: N.J.A.C. 7:38-1.1(k) states that the Department will "consider" amending certain WQMPs when consistent with the Regional Master Plan (RMP). This can be interpreted as saying that DEP will not issue any approval if a project is incompatible with the RMP. It does not matter whether a municipality decides to opt into

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the RMP. This provision negates any “voluntary” opt in as purported by the Highlands Act because, in effect, the municipality would be “penalized” by the DEP through the withholding of permits if the project or plan is not compatible with the RMP. (85, 87)

195. COMMENT: Both the Department's existing Highlands Water Protection and Planning Act rules and amendments include provisions that conflict with the Act. Existing language regarding the scope and authority of the rules at N.J.A.C. 7:38-1.1(a) makes clear that the rules are applicable to major Highlands development proposed in the preservation area. This provision also confirms that the RMP is to include policies for planning and managing the development and use of land in the preservation area. This is consistent with the Act. Neither the rules nor the RMP are to be applied to the planning area. However the rules then go on to state that pending the finalization of the RMP the Department will not approve any Water Quality Management Plan amendments for projects proposed in the planning area without first obtaining a recommendation from the Highlands Council. There is no statutory basis for this expansion of the scope of the rules to the planning area. (20)

196. COMMENT: At N.J.A.C. 7:38-1.1(k) the proposed language states that the Department will consider amending Water Quality Management Plans to be consistent with the RMP and will not issue any WQMP amendment that is not consistent with the RMP. This will impact the issuance of permits and the Department will not issue a permit for a project that is inconsistent with the WQMP. Thus, any project in the planning area that the Department finds is inconsistent with any provision of the RMP will not be able to obtain any permits that the Department is responsible for issuing. The Act established and delineated planning and preservation areas with the intent that they would be subject to different requirements. This is made clear in the findings section of the Act as well as throughout the Act in the various sections dealing with the development and imposition of various protection standards. Any action by the Department to alter this statutory framework is inconsistent with the Act and thus should not be adopted into a rule. (20)

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RESPONSE TO COMMENTS 192 THROUGH 196: Throughout the State of New Jersey, the Department, in accordance with the Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.) is required, before approving any project or activity affecting water quality, to determine whether a proposed project or activity is consistent with an adopted areawide Water Quality Management Plan (WQMP). WQMPs are comprehensive, regional planning documents, which are required to be coordinated and integrated with related Federal, State, regional and local comprehensive, functional and other relevant planning activities, programs and policies. A WQMP may address portions of both the Highlands preservation and planning areas. Therefore, because the Highlands Council is the regional planning entity for the Highlands region, the Department believes it is appropriate to confer with the Highlands Council to obtain input before considering amendments to a Water Quality Management Plan with the potential to affect any part of the Highlands region including the planning area.

Also, N.J.A.C. 7:38-1.1(k) does not state that no WQMP amendments will be approved until the Highlands Regional Master Plan is adopted. This provision provides that until the Highlands Regional Master Plan is completed, a recommendation from the Highlands Council must be obtained for WQMP amendments in the Highlands Region as part of the WQMP process. The rule only prohibits the Department from adopting an amendment before obtaining a recommendation. By including the Highlands Council in the Department's plan amendment process, the Department ensures that pending WQMP amendment proposals were considered by the Highlands Council as well as by affected local government entities.

197. COMMENT: At N.J.A.C. 7:38-1.1(i)1, an emphasis seems to be made on the importance of contiguous forests. Non-contiguous forests are also very important ecologically, and should be included. In addition, silvicultural practices are recognized agricultural activities, and should be encouraged, especially since the Highlands is predominantly forested. The language should include "contiguous and non-continuous forests..." and "...and enhancement of agricultural, including horticultural and silvicultural production or activity...." (40, 41, 42)

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198. COMMENT: From the perspective of a trained forester and ecologist, the continual reference throughout the proposed rules to the protection of “contiguous forest” appears to be a bias toward climax forest types over other forest successional stages and is cause for concern. Protection of the climax stage of forest development as a part of the overall landscape is highly desirable, as it will contribute to the overall biological diversity encompassed by the mosaic landscape that constitutes the region. But a policy that promotes forest interior at the expense of all other developmental stages (that is, emerging forest, sapling stands, and pole stands) will certainly result in the long-term loss of diversity, as the habitat requirements of a wide range of plants and animals will eventually no longer be met. From an ecological standpoint, this is an unsound policy. Specifically, at N.J.A.C. 7:38-1.1(i)1, “contiguous” forest should be replaced with a the broader term “forests,” that will serve to support the perpetuation of a mosaic landscape that provides habitat for the widest range of plant and animal life. Also, forestry activities should not be separated out from agricultural and horticultural production. Farms are the source of food and fiber. Separation of silvicultural production from agricultural production in the 'rules' is counter to the historical and cultural tradition of New Jersey's farmlands. (99)

RESPONSE: The rules emphasize maintenance of contiguous forest because this is emphasized in the Highlands Act. See N.J.S.A. 13:20-2 or 13:20- 11. The loss of contiguous forest (also known as fragmentation) has a negative impact on many wildlife species and is one of the reasons species become threatened or endangered in New Jersey. For example, an analysis of 22 years of data for forest breeding bird species in three Mid-Atlantic states in relationship to forest patch size demonstrated that forest fragmentation was associated with both a reduced number of forest bird species as well as higher local extinction and turnover rates (Boulinier, T., J.D. Nichols, J.E. Hines, J.R. Sauer, C.H. Flather, and K.H. Pollock. 1998. Higher temporal variability of forest breeding bird communities in fragmented landscapes. *Proc. Nat. Acad. Sci.* 95:7497-7501). Degree of isolation and forest area size are significant predictors of relative

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abundance for bird species (Robbins, C.S., D.K. Dawson, and B.A. Dowell. 1989.

Habitat area requirements of breeding forest birds of the Middle Atlantic States. Wildlife Monographs. Number 103.). The distribution and abundance of native bird species decreases along an urban gradient (Blair, R.B. 1996. Land use and avian species diversity along an urban gradient. Ecological Applications 6(2):506-519; Cam, E., J.D. , J.R. Sauer, J.E. Hines and C.H. Flather. 2000. Relative species richness and community completeness: birds and urbanization in the mid-Atlantic states. Ecological Applications 10(4): 1196-1210). Fragmentation results in both an increase of brood parasitism as well as nest predation by species that are not dependent upon large forest patches.

However the rules also provide for protection for all upland forest, as described in the rules at N.J.A.C. 7:38-3.9, by requiring alternatives to any proposed disturbance, by limiting impacts to 20 feet directly next to an approved structure and 10 feet adjacent to a driveway, and by requiring mitigation for impacts to forest that cannot be avoided.

199. COMMENT: The definition of Regional Master Plan states that it is the "standards" established in the Highlands master plan. It appears that the Regional Master Plan is intended to be a regulatory document rather than a planning document. Traditional planning though has been to plan first then develop the regulations. The rules are contrary to this traditional planning practice. The definition also incorporates municipal and county master plans and development regulations that are normally approved by the Highlands Council. Does the approval process include "opting in?" Or is the approval some other process yet to be defined? (85, 87)

RESPONSE: The Department amended the definition of "Regional master plan" to include all of its components parts in order to make it clear that the Department may use the standards set forth in the Regional Master Plan and any municipal or county master plan or development regulations that have been formally approved by the Highlands Council. The Department believes that the approval process will be the final result of the municipal decisions regarding "opting in." The Highlands Act at N.J.S.A. 13:20-8 establishes the timeframe to prepare and adopt the Regional Master Plan (RMP) and

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N.J.S.A. 13:20-31 establishes the time frames within which the Department is required to adopt its rules. The Highlands rules had to be adopted within 270 days (about 9 months) of enactment of the law. The Highlands Council had 18 months from its first meeting to prepare and adopt the RMP. Consequently, it was necessary for the Department to establish standards in advance of the RMP. The Department has adopted, at N.J.A.C. 7:38-1.1(g) through 1.1(l), a mechanism to consider and use the Regional Master Plan in Departmental decision making on permits or other planning decisions where appropriate. The Highlands Act created a planning process that will address both master plans and development regulations. Specifically, the Highlands Council is required to include "minimum standards contained in the regional master plan" (N.J.S.A. 13:20-14.d) in order to ensure the protection of the Highlands Region. Lastly, the Highlands Act at N.J.S.A. 13:20-14 and N.J.S.A. 13:20-15 includes specific procedures for conformance with the Regional Master Plan.

7:38-1.3 Other statutes and regulations

200. COMMENT: What is the purpose of N.J.A.C. 7:38-1.3(d)? It appears to be a statement and not a regulatory requirement. (44, 87, 111)

RESPONSE: The language at N.J.A.C. 7:38-1.3(d) is from the legislative findings and declarations set forth in the Highlands Act at N.J.S.A. 13:20-2. The purpose of the provision is to establish that the rules are to be implemented and interpreted by the Department and construed by the public and by the courts not only in view of the letter of the Highlands Act (its express requirements), but also in light of its spirit (its goals, purpose and intent).

201. COMMENT: We strongly support the addition of the language at (d) (liberal construction) as taken from the Act. As the Highlands process is implemented, questions about interpretation not yet anticipated will arise. Addition of this language will provide

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guidance for resolving these challenges in favor of protecting the public trust resources in the Highlands Region. (73)

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

202. COMMENT: Ninety-day law applications do not apply to HPAAAs. This is treating citizens in the Highlands differently than those in the rest of the state without a justified purpose. (9-12)

RESPONSE: By its terms, the Ninety-day law (N.J.S.A. 13:1D-29 et seq.) applies only to permit applications governed by the Flood Hazard Area Control Act (N.J.S.A. 58:16A-50 et seq.), the treatment works approval provisions of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., the Waterfront development law (N.J.S.A. 12:5-3), and the Coastal Area Facility Review Act (N.J.S.A. 13:19-1 et seq.) Other Department permitting programs, for example, the Freshwater Wetlands Protection Act program (N.J.S.A. 13:9B-1 et seq.), Water Quality Planning program (N.J.S.A. 58:11A-1 et seq.), and The Safe Drinking Water Act program (N.J.S.A. 58:12A-1 et seq.) are not subject to the Ninety-day law. In addition, the Highlands Act specifically exempts applications for Highlands approvals that incorporate reviews under the Flood Hazard Area Control Act from the otherwise applicable Ninety Day law.

7:38-1.4 Definitions

203. COMMENT: The definition of "Agricultural or horticultural use" should include forest products. (40-42)

RESPONSE: The definition of "agricultural or horticultural use" is that set forth in the Highlands Act at N.J.S.A. 13:20-3. The term is used at N.J.A.C. 7:38-2.2 to describe a category of uses that are not regulated as major Highlands development under the rules. If the "forest products" the commenter is referring to are Christmas trees or nursery

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stock, such production is included in the definition of "agricultural or horticultural use."

If the "forest products" to which the commenter is referring is lumber production, such activities are considered "forestry" and not agricultural activities. Therefore, the Department would consider lumber production as an appropriate part of woodland management activities. Woodland management activities in accordance with an approved plan are exempt from the Department's regulations in accordance with N.J.A.C. 7:38-2.3(b)7.

204. COMMENT: The definition of "conservation restriction" includes the grant of seemingly unlimited rights to government officials to enter private property via the language, "that grants the Department and Highland Council and their staff access to the property for the purpose of determining compliance with the Highlands Act and/or terms of any HPAA, HRAD, order, decision, agreement or settlement entered pursuant to the Highlands Act. . . ." The wording contained in this provision puts no requirements on the government officials to either request entry to private property or even to provide notice of such entry to the landowners. This is a violation of United States citizens' right to be secure in their property against governmental intrusion pursuant to the Fourth Amendment of the U.S. Constitution. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 45, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE: At N.J.S.A.13:20-35k, the Highlands Act explicitly gives DEP the right to enter any property, facility, premises or site, for the purpose of conducting inspections or sampling of soil or water, and the otherwise determining compliance with the provisions of the environmental requirements of the Highlands Act. A right of entry provision in an environmental statute is not new or unique to the Highlands Act.

The courts have upheld DEP's right of entry, under appropriate circumstances and reasonably exercised, because of the need to investigate and monitor acts potentially affecting the health and well-being of the general population. Prior to entry, DEP always attempts to announce its presence and inform the property owner of its intention to perform an inspection and the purpose of that inspection. If DEP is denied entrance to a

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property, an administrative warrant can be obtained in Superior Court and the Department will enter the property under this authority.

205. COMMENT: It is recommended that the Department clarify the definition of linear development to indicate whether or not high pressure natural gas transmission systems are included in the definition. (115).

206. COMMENT: If natural gas transmission were to be included in the definition of linear development, the Department should give additional consideration to the guidance on alternatives analyses presented in Subchapter 3. These standards for the alternatives analysis are written based upon the assumption that linear development in the Highlands only relates to the connection of proposed housing or commercial development to public utilities. They do not consider the potential for linear development to include interstate natural gas transmission. This is evidenced by wording of the requirements for the alternatives analysis, which state that the applicant shall demonstrate that there is no other location, design and or configuration for the proposed linear development that would provide access to an otherwise developable lot and the proposed linear development is the only point of access for roadways or utilities to an otherwise developable site. The purpose of natural gas transmission systems is not to connect utilities or infrastructure to developable lots or sites. Therefore, we suggest that alternatives analyses required for natural gas transmission projects follow guidance provided by the Federal Energy Regulatory Commission (FERC) for an alternatives analysis and that this analysis include a discussion of no-build alternative, system alternatives, route alternatives, and construction alternatives. (115)

RESPONSE TO COMMENTS 205 AND 206: The Highlands Act prohibits development in the Highlands preservation area within 300 feet of Highlands open waters and on steep slopes except for linear development for infrastructure, utilities, and the rights-of-way therefore, provided there is no feasible alternative for the linear development, as determined by the Department. See N.J.S.A. 13:20-32. The Act does not define “linear

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development,” but the definition in the Department’s rules at N.J.A.C. 7:38-1.4

contemplates various types of utility lines, including gas pipelines. In the proposal summary at 37 N.J.R. 4770, the Department explained that the definition describes the type of activities that can be conducted under certain circumstances in Highlands open waters and buffers, steep slopes, and upland forest, and referenced the rules regarding those resources.

At N.J.A.C. 7:38-3.6 (Highlands open waters) and 3.8 (Steep slopes), the Department establishes an alternatives analysis for linear development. As the commenter points out, the demonstration that an applicant is required to make under N.J.A.C. 7:38-3.6(b) and 3.8(c) assumes that the linear development is intended to provide access to a developable lot, which would not be the case for an interstate pipeline or transmission line. Consequently, the Department is reorganizing N.J.A.C. 7:38-3.6(b) and 3.8(c) on adoption so that the basic criteria for the alternatives test for linear development contemplated by the Highlands Act, that is, that there is no other location, design, and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to the Highlands open water or buffer, or steep slope, must be met for any linear development. These basic criteria align with the criteria that the commenter points out are applied by FERC in the environmental impacts review of natural gas transmission projects.

Under the rules as modified on adoption, the criteria at N.J.A.C. 7:38-3.6(b) and 3.8(c) that require the applicant to demonstrate that the linear development for access is the only point of access for roadways or utilities to an otherwise developable lot and that shared driveways are used to the maximum extent possible to access multiple lots will continue to apply, but only for linear development that is in fact intended to provide access to a developable lot.

207. COMMENT: By the definition of “major Highlands development, expansion of an existing interstate natural gas transmission line through looping or construction of a new lateral would be classified as a "major Highlands development" if the project would

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disturb more than one acre of land. A Highlands preservation area approval (HPAA) would be then required for the project. (115)

RESPONSE: The definition of “major Highlands development” includes, “any non-residential development.” Because all pipelines are “non-residential” and constitute “development” all pipelines are regulated under the Act regardless of the extent of disturbance.

208. COMMENT: The definition of a major Highland development should be a major development project that required site plan or subdivision approval as of August 10, 2004 with either 5 acres or 5 single-family lots. (18, 51, 52, 84)

RESPONSE: The definition of major Highlands development is set forth in the Highlands Act at N.J.S.A. 13:20-3. The Department cannot alter the jurisdictional threshold established in the Act by this definition.

209. COMMENT: Disturbance is defined as moving or exposing soil. By the law, if you are disturbing soil that means gardening. If you are not on a preserved farm, if you do not get farmland assessment, gardening is disturbing soil. If you have friends over and they park in your field and it is muddy, that is disturbance. (9-12)

210. COMMENT: The definition of disturbance is not useful because it includes the movement of soil and the cutting of vegetation. The definition of disturbance should be limited to construction activity using heavy equipment that required a building permit or site plan under the rules in place on August 10, 2004. (9-12, 18, 30, 51, 52, 84, 93, 116)

211. COMMENT: The definition of “major Highlands development” includes disturbance of one quarter acre or one acre depending on whether the land is forested. By this definition, mowing your lawn, if it is more than an acre, would be a major Highlands

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development. The disturbance portion of the definition should be removed because it is unenforceable, unreasonable and absurd. A cost/benefit is required to prove that the cost of enforcement both in dollars and societal costs outweigh the purported benefits. (30, 46, 47, 93, 116)

212. COMMENT: The definition of “major Highlands development” includes things that may be regulated but do not fit a reasonable person's definition of the term. A further breakdown would be appropriate so that lawn mowing (a disturbance under the proposed regulation's definition) of more than an acre would be treated differently than a shopping center. (9-12)

213. COMMENT: It appears that the definition of major Highlands development means that without an HPAA, I cannot turn over the soil in my vegetable garden, I cannot increase the size of my vegetable garden; I cannot mow my fields, or even my lawn; I cannot continue to remove pestiferous invasive species, like multiflora rose; I cannot cut or remove dead or dying trees, even if they fall across my driveway, garden, patio, or fields. (37)

214. COMMENT: The Highlands Act prevents me from disturbing the soil in any way, so I cannot have a vegetable garden without being under farmland assessment. I cannot cut firewood without a Woodland Management Plan. The Highlands Act forces me to endure regular flyovers by the State of New Jersey to take aerial photographs to be sure I have not committed any of these heinous crimes. (13, 44)

215. COMMENT: Limiting ground disturbance to 0.25 acres is almost impossible for anyone who wants to do anything. (32)

216. COMMENT: Why should removal of a tree be a punishable crime? (107)

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RESPONSE TO COMMENTS 209 THROUGH 216: The definitions of “disturbance” and “major Highlands development” are those established in the Highlands Act at N.J.S.A. 13:20-3. Planting a vegetable garden or “disturbing the soil in any way” are activities that do not meet the definition of major Highlands development contained in the Highlands Act or these regulations and are therefore NOT regulated activities. In order to be regulated, an activity must be: 1. Any non-residential (that is, commercial) **development** ; 2. Any residential **development** requiring an environmental land use or water permit or resulting in ultimate disturbance or one acre or more of land or a cumulative increase of 0.25 acre or more impervious surface; 3. Any activity that is not a development but results in the ultimate disturbance of **one-quarter acre or more of forested land** or a cumulative increase of 0.25 acre or more impervious surface; or 4. Any capital or other project of a State entity or local government unit that requires a land use or water permit or that results in the ultimate disturbance or one acre or more of land or a cumulative increase of 0.25 acre or more impervious surface. Disturbance is regulated only when it reaches the thresholds set in the definition of major Highlands development. Gardening or cutting the grass are not regulated activities because they are not associated with development. Since planting a vegetable garden or “disturbing the soil in any way” are not **developments**, nor do they involve removal of 0.25 acres of forest, placement of impervious surface, or construction of a capital project, they are not regulated activities. However, clearing 0.25 acres of forest to create a lawn or garden is a regulated activity. Clearing a 0.25-acre of forest or one acre of land to construct a parking lot or placing a 0.25 acres of gravel to create a parking lot are regulated activities. The definition does not result in the regulation of the day to day activities the commenters describe.

The Department’s reference at N.J.A.C. 7:38-3.1(b) to an “aerial overflight of the State” addresses the periodic flights for which the Department contracts to obtain current aerial photographs of the entire State. These photographs are used for many purposes including trends analyses which look at changing land use patterns over time, species habitat identification and location, identification of hazardous wastes and other research purposes which benefit the residents of the State as a whole. These photographs also form

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the basis of maps which are available to the public through its iMap online web application.

217. COMMENT: If a landowner has 175 acres of forest land (but not $176 = 2 \times 88$) he will need a HPAA (Highlands preservation area approval) to disturb one acre or more of land or $\frac{1}{4}$ acre of forest land, and create $\frac{1}{4}$ acre or more of impervious surface. This requires numerous studies including Endangered Species habitat, historic archeology, scenic attributes, unique land types, and of course the usual water studies. The costs for these studies are estimated to cost in excess of \$100,000.00. If in the future this landowner cuts down a tree or removes underbrush without additional permits he is liable for fines up to \$25,000.00 per day. Even a dead tree that is more than 20 feet from his house. In addition, the undeveloped portion of any property receiving a HPAA automatically becomes a restricted conservation easement. (107)

RESPONSE: Regardless of how many acres a property owner has, unless a project is exempt from the provisions of the Highlands Act, a HPAA is required to conduct a major Highlands development. As described in response to comments 209 through 216 above, removal of a dead tree or underbrush does not constitute a major Highlands development and therefore does not require a permit nor subject an owner to penalties if such activities are conducted without a permit.

If a property owner intends to pursue a major Highlands development, he or she is required to satisfy all HPAA requirements. This would include identifying all of the resources the commenter has cited. However, the Department does not agree with the commenter's cost estimates. In preparing its rules, the Department sought from consultants information regarding the cost for preparing an application to satisfy the Department's requirements. An applicant may need the services of environmental and engineering professionals to complete an application. If the applicant hires a professional to identify Highlands resource areas, the costs would be approximately \$1,500 per day for two people conducting onsite fieldwork. The number of days required to complete the work depends upon the size of the site and the number of resources encountered that must

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be assessed onsite. If an applicant hires a consultant to apply for an HPAA, the costs would range from \$5,000 to \$7,000 but again could be higher in the same circumstances described above. However, the Department does not anticipate that any particular circumstance would result in costs of \$100,000.

The Department has responded in detail to the commenter's concern regarding the placement of conservation restrictions in response to comments 529 and 530 below.

218. COMMENT: As to disturbance, if a residence is already far from the road and from access to utilities and they need to be upgraded or added to, what provisions exist to assure that this can be done without any studies or impact? (108)

RESPONSE: There are no special provisions in the rules for the situation described by the commenter. However, before an applicant has to comply with the Highlands regulations, he or she has to propose to conduct a "major Highlands development," as described in response to comments 209 through 216 above. Therefore, depending upon the nature of the upgrade, it is possible it may not constitute a major Highlands development. If the proposed activity is regulated, there may be an appropriate exemption. For example, depending upon the nature of the upgrade, it might be considered an improvement to a single-family house. Another exemption allows for reconstruction of any building or structure within 125 percent of the footprint of lawfully existing impervious surfaces. The Department can assist an owner in determining whether or not an activity requires a Highlands preservation area approval (HPAA) through the Highlands applicability determination process. If the activity does require an HPAA, the amount of documentation that will be required as part of an application depends upon the location of the proposed utilities and the nature of the property upon which they are proposed.

219. COMMENT: C1 water should be used as a definition of open water, instead of all the nebulous intermittent streams which are not defined. The buffers around water should be appropriate in length and width for the quality of water you are trying to

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preserve and protect. So a mud hole doesn't deserve protection but a trout stream does.

(10, 87)

220. COMMENT: The definition of Highlands open waters should be limited to include intermittent streams identified by the DEP as of August 10, 2004. (45, 46, 93, 116)

221. COMMENT: The definition of Highlands open waters should be limited to include C1 intermittent streams identified by the DEP as of August 10, 2004. Wetlands should be excluded. (19, 30, 53, 54, 84)

222. COMMENT: The definition of Highlands open waters should not include intermittent streams. Such water bodies are seasonal only and thus have difficult to define boundaries. Additionally, they are already addressed and protected by DEP regulations. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43-46, 56, 58, 67, 71, 74, 78, 79, 87, 97, 98, 99)

223. COMMENT: The definition of Highlands open waters is too broad. The average person has no way of knowing what "open water" means. In the "Riparian Buffer Conservation Zone Model Ordinance" (commenter provided a model ordinance prepared by the Passaic River Coalition and the DEP Division of Watershed Management, dated March 2005), an intermittent stream is defined, "Intermittent Stream means surface water drainage channels with definite bed and banks in which there is not a permanent flow of water. Streams shown as a dashed line on either the USGS topographic quadrangle maps or the USDA County Soil Survey Maps of the most recent edition that includes hydrography are included as intermittent streams." Since this is the definition in the rest of the state, it would be inappropriate to use a different definition inside the Highlands. By saying that a regulated stream appears on a USGS map, it makes it clear to everyone involved what is protected. A vague definition of something so critical to the regulations leads to ambiguity and litigation. (9-12)

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RESPONSE TO COMMENTS 219 THROUGH 223: The definition of “Highlands open waters” is set forth in the Highlands Act at N.J.S.A. 13:20-3. Open waters are therefore all springs, streams including intermittent streams, wetlands, and bodies of surface water, whether natural or artificial, located wholly or partially within the boundaries of the Highlands Region, excluding swimming pools. The Highlands Act at N.J.S.A. 13:20-32 requires the Department to establish regulations prohibiting major Highlands development within 300 feet of all Highlands open waters. It does not provide for variable buffer widths.

Although the Highlands Act does not define “intermittent stream,” the Department will generally use the same criteria it uses to identify intermittent streams for purposes of the Stormwater Management rule (N.J.A.C. 7:8), which is consistent with the definition in the model ordinance provided by the commenter. However, because Highlands open waters includes springs which are not routinely identified on maps, the Department will be locating and identifying springs and intermittent streams by way of onsite inspections regardless of whether they appear on any map.

224. COMMENT: We do not agree with the definition of “Highlands Region.” The delineations defined by the U.S. Forest Service (USFS) and DEP have been extended to include all municipal boundaries (locally including over 90 percent of “downgradient” non-Highlands area), and in several instances municipalities which do not occur in the physiographic-defined Highlands (for example Bedminster Township, Belvidere Township, Hanover Township). Furthermore, several municipalities that do occur partially in the Highlands are excluded by the USFS and, until recently, the DEP delineations (for example, Andover Boro, Andover Township). In reviewing the geologic and water-resource related GIS databases for the Highlands, we have found no scientific bases associated with groundwater re-charge contribution and/or water-quality protection as justification for these inclusions and exclusions, respectively. This is a significant discrepancy that results in a non-scientific based (that is, politically based) expansion of the Highlands. (85, (87)

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225. COMMENT: The Act separates the delineated Highland area into "preservation" and "planning" areas. The USFS studies identify areas in the Highlands eligible for conservation and protection based upon "conservation values." It is important to note that there is a scientific distinction between conservation and preservation: the former implying the scientifically-based wise use and management of a resource; and the latter implying the maintenance in an "as is" state of a "pristine" area. True pristine conditions in the mid-Atlantic region (for example, the Highlands) have not existed for hundreds of years. As such, goals identified by the rules to preserve pristine conditions may be based on a flawed assumption that such conditions exist. As such, areas in the preservation area that are regulated as such by the rules may not necessarily be scientifically justified for inclusion. (85, 87)

RESPONSE TO COMMENTS 224 AND 225: As explained in response to comments 172 to 175 above, the preservation area designation reflects the recommendation in the March 2004 Action Plan of the Highlands Task Force, which was based upon natural resource data assembled by various agencies state and federal agencies. The specific boundaries were then translated to coincide with easily identifiable reference points, described in detail, and adopted in the Highlands Act. Based upon this boundary, the Act requires the Department to establish a regulatory program for the preservation area. The Act also provides a list of specific resources to be protected and in many cases the standards by which this protection shall be accomplished. The Highlands Act seeks to eliminate degradation of the resources in the preservation area below conditions as they existed when the law was passed in 2004 and does not require the establishment of a program to regulate resources based upon a presumption that such resources are pristine. If fact, the Highlands Act acknowledges that some degradation has occurred when it directs the Department to adopt measures to ensure that existing water quality shall be maintained, *restored*, or *enhanced* (see N.J.S.A. 13:20-32b). Restoration and enhancement would not be necessary if the conditions were assumed to be "pristine."

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226. COMMENT: I disagree with the designation of the Highlands region. In essence, these 800,000 acres of Highlands open lands have been condemned by the State with no due process or right of redress available to landowners for a phantom public purpose based on purely political considerations and indefensible junk science. (55)

RESPONSE: The Department is charged with adopting regulations to implement the protections required by the Highlands Act in the preservation area as designated by the New Jersey Legislature. Where the Department was charged with establishing a particular standard to implement a requirement of the Act, for example the septic density standards, the Department based its standards on existing data for the State and appropriate, defensible science. See response to comments 371 to 379 regarding the septic density standards.

227. COMMENT: Gravel is porous. Gravel and porous paving material should be taken out of the definition of impervious. (9-12)

228. COMMENT: The definition of impervious surface should not include porous paving, gravel and crushed stone. (18, 30, 32, 51, 52, 84, 93, 107, 116)

229. COMMENT: According to the DEP stormwater management regulations (SMR), "impervious surface is an area that has been covered by a layer of material that is highly resistant to infiltration by water. Impervious surfaces include concrete, asphalt, driveways, basketball courts, concrete patios, swimming pools and buildings." Conversely, the SMR identify porous paving, paver blocks, gravel, and crushed stone as possible mechanisms (Best Management Practices, "BMPs") for use in preserving and enhancing ground-water recharge. Consequently, the flat out rejection of the use of such BMPs and recognition of the benefit that they may lend to a development in reducing runoff and enhancing groundwater recharge cannot be scientifically justified. (85, 87)

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230. COMMENT: The definition of impervious surface at N.J.S.A. 13:20-3 is ridiculous.

Gravel and crushed stone are only slightly more impervious than grass. Furnish all data including but not limited to meeting minutes, correspondence, e-mails, telephone conversation records and notes, personal meetings and meeting notes that DEP furnished the New Jersey Legislature or any member of the New Jersey Legislature, or their staff on this subject. Furnish resumes of all your experts, internal or external to NJDEP, involved in developing the rational basis for the inclusion of gravel and crushed stone in “impervious surfaces.” (87)

231. COMMENT: The current definition of impervious surface affords no incentive to use more porous materials and effectively penalizes those who would otherwise use these for ground cover. The NJDEP should consider giving at least partial “reduced coverage credit” for the use of specified material that increases recharge compared to standard impervious cover materials. (114)

RESPONSE TO COMMENTS 227 TO 231: The definition of “impervious surface” is that set forth in the Highlands Act at N.J.S.A. 13:20-3. The definition includes porous paving, gravel and crushed stone. Therefore, the Department has no authority to amend the definition, provide incentives for the use of porous materials deemed impervious by the Highlands Act, or give “reduced coverage credit” for the use of materials that the Act does not define as pervious.

The correspondence and other records sought by one of the commenters is beyond the scope of the explanation and information the Department can publish in response to a comment in a notice of adoption. Should the commenter still be interested in obtaining the additional information, the request would more appropriately be made as an Open Public Records Act (OPRA) request.

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232. COMMENT: The DEP is restricting activities based on rare, threatened and endangered plants and animals. This has nothing to do with water quality or quantity and should be removed. (9-12)

233. COMMENT: The Highlands Act protects endangered species. The regulations expand the definition to include rare species. The Federal endangered species list should be used. (30, 116)

234. COMMENT: The definition of “rare species” is vague and filled with undefined thoughts. If we are protecting endangered species, the federal list should be used. (9-12, 31, 32, 45, 46, 93)

RESPONSE TO COMMENTS 232 THROUGH 234: Under the Highlands Act, N.J.S.A. 13:20-34, the Department must make findings before issuing a Highlands preservation area approval (HPAA). One of the findings is that the major Highlands development “will not jeopardize the continued existence of species listed pursuant to the Endangered and Nongame Species Conservation Act (N.J.S.A. 23:2A-1 et seq.) or the Endangered Plant Species List Act (N.J.S.A. 13:1B-15.151 et seq.), or which appear on the federal endangered or threatened species list, and will not result in the likelihood of the destruction or adverse modification of habitat for *any rare, threatened, or endangered species of animal or plant*” (emphasis added). Under the Endangered and Nongame Species Conservation Act, the Department develops and promulgates a list of State endangered and threatened animal species. Under the Endangered Plant Species List Act the Department develops and promulgates a list of State endangered plants. Therefore, the Highlands Act requires protection for endangered and threatened species, including State-listed and federally listed species. “Rare” species of animals and plants are also protected under the Highlands Act. The Act does not define “rare species,” but the Department’s definition encompasses the species of “special concern” determined by experts and recognized by the DEP’s Division of Fish and Wildlife as being on the brink

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of becoming threatened or endangered. The rare wildlife species are listed in the Department's Natural Heritage Database, which is accessible to the public by request.

The rare plant species are listed in the Department's rules regarding endangered plants, at N.J.A.C. 7:5C-3.1.

235. COMMENT: While endangered species is a clear term, the definition in this section broadens the definition to mean something entirely different. To stretch as far as including "any species known or believed to be rare throughout its worldwide range" as well as the other extensions of the definition made by this update make the term defined incorrect and unambiguous. As an example, "known or believed" by whom? The original definition was more solid, understandable and enforceable and should be preserved. (9-12)

RESPONSE: The commenter appears to be referring to the rule explanation in the proposal summary of the definition of "endangered species." The definition in the rule was not proposed to be amended. As noted in the summary, endangered animal species and endangered plant species are defined under New Jersey and Federal law. The part of the summary to which the commenter refers has to do with endangered plant species. The list of endangered plant species is promulgated under the Endangered Plant Species List Act and is based upon research, investigations and scientific data maintained in the Department's Natural Heritage Database. Status rankings are according to criteria established by the Nature Conservancy that are used natural heritage programs throughout North America. "Rare throughout its worldwide range" refers to plant species critically imperiled globally because of extreme rarity (five or fewer occurrences or very few remaining individuals or acres) or because of some factor(s) making it especially vulnerable to extinction. Consequently, if such rare plants occur in the Highlands they would receive the protection afforded by the Highlands Act.

7:38-1.5 Requests for adjudicatory hearings

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236. COMMENT: At N.J.A.C. 7:38-1.5(d), our laws are based on the theory that one is innocent unless proven guilty. Our laws are also based on our right to remain silent. This section specifies that one is guilty if one does not respond, which violates both inherent rights of citizens of the United States. It also neglects the possibility that a letter was not delivered, someone got sick, a dog ate the mail, or any number of reasons for a person to remain silent. As such this section should be removed. (9-12)

RESPONSE: N.J.A.C. 7:38-1.5 sets forth the procedures to be followed by a person who wants to appeal a particular Department permitting decision made under the Highlands rules. When a person chooses to request a hearing, the requester needs to submit the information identified at N.J.A.C. 7:38-1.5(c) and also, pursuant to (d), explain why he or she disagrees with the Department's decision as specifically as possible. This information and explanation enable the Department to determine if there are facts in dispute such that an administrative fact-finding hearing should be held. It is the opportunity for the person who applied for the permit to challenge the conditions of the permit, if one is issued, or, if a permit is denied, to challenge the reasons for the denial. If circumstances such as those the commenters identify are present in a given case, the requester should bring them to the Department's attention in the correspondence requesting a hearing on the permit decision.

237. COMMENT: At N.J.A.C. 7:38-1.5(f), 30 days to respond is short by legal standards. Forty-five days would be more normal procedure. (9-12)

RESPONSE: The commenters do not identify in what context 45 days is the more typical or "normal" procedure. However, the timeframe for submitting a hearing request regarding a Department permitting decision varies depending on the statute and rules governing the particular permit program. The 30-day timeframe to request a hearing under the Highlands rules is consistent with other DEP land use permitting programs, including the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A, and the Coastal Permit Program rules, N.J.A.C. 7:7.

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238. COMMENT: At N.J.A.C. 7:38-1.5(h), a stay seems like a burden for the applicant. (9-12)

RESPONSE: The implementation of the automatic stay when a permittee requests a hearing to challenge a condition of an issued HPAA or other determination ensures that no activity will be undertaken that adversely impacts a Highlands resource because the activity does not conform to the environmental protection standards in the Highland rules. However, the rule does provide that a permittee may demonstrate to the Department that good cause exists such that the stay should not apply in a particular case.

239. COMMENT: At N.J.A.C. 7:38-1.5(j), why must the applicant notify all groups involved? Notice should be the same as the notice for the regulations. All notices for applicants should follow the same procedure. How can one application be more important than this entire regulation? Conversely, if it is determined that the notice in this regulation is appropriate, the same notice (all affected parties) should be placed before the adoption of these regulations. (9-12)

RESPONSE: An applicant for a Highlands resource area determination (HRAD), applicability determination, or preservation area approval (HPAA) must provide public notice to various individuals and agencies within the community where the regulated activity is proposed to be undertaken. See notice requirements at N.J.A.C. 7:38-9.2(b)5, applicability determinations, 9.4(b)2, HRADs and 9.5(a)3 HPAA. The notice provides an opportunity to the public to comment on an application that they determine might affect their own property or community. When the Department makes a decision on an application, the Department provides notice of that decision in the DEP Bulletin. See N.J.A.C. 7:38-11.7(d). An applicant whose HPAA was denied may choose to appeal the Department's decision. N.J.A.C. 7:38-1.5(j) addresses the circumstance where the appeal results in a settlement and the settlement will result in a Department approval of a regulated activity. Notification is required again, because as far as the public knows, the

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Department already made a decision that denied the applicant's initial application.

Consequently, it is important to inform the public through a new notification process that a settlement of the applicant's appeal is under consideration and that the Department intends to approve a modified development by that applicant. The notice and comment period on the intended settlement and final settlement parallel and serve the same purpose as the notice and comment period provided on the initial application and permit decision.

240. COMMENT: N.J.A.C. 7:38-1.5(k) - The Commissioner should not have the ability to overrule a Judge. (9-12)

RESPONSE: The administrative hearing procedures are governed by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq., and its implementing regulations, N.J.A.C. 1:1. Under the APA, the initial decision of the administrative law judge who holds the hearing is returned to the Commissioner for review and final decision. The APA requires that the Commissioner's final decision must clearly explain the basis for any modification of the initial decision, and support any new or changed findings using sufficient and credible evidence in the record of the hearing held by the administrative law judge. As an additional check, if the person who requested the administrative hearing disputes the Commissioner's final decision, he or she can file an appeal of the final decision in the Appellate Division of the Superior Court.

Subchapter 2. Jurisdiction, applicability and exemptions

7:38-2.2 Major Highlands development

241. COMMENT: N.J.A.C. 7:38-2.2(a) reflects the deficiency in the definition of a major Highlands development. Since an ATV driving around a field and mowing more than one acre is a major Highlands development (disturbance over one acre) the Act falls apart. If most people are technically in violation of the Act and its regulations, what are we really trying to accomplish? (9-12)

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242. COMMENT: What basis is there to conclude that disturbance must be limited to 0.25 acre? How can this be rationalized in comparison to farming activities such as plowing and cultivating? If farming is good why is any other disturbance bad especially when it is temporary rather than recurrent? (82)

243. COMMENT: On what basis does the DEP regulate the cutting of a single tree on private property? (82)

244. COMMENT: The definition of “major Highlands development” includes things that may be regulated but do not fit a reasonable person's definition of the term. A further breakdown would be appropriate so that lawn mowing (a disturbance under the proposed regulation's definition) of more than an acre would be treated differently than a shopping center. (9-12)

RESPONSE TO 241 THROUGH 244: Mowing the grass, driving an ATV around a field, farming activities, temporary activities, and cutting a single tree do not meet the definition of major Highlands development contained in the Highlands Act or these regulations and therefore are not regulated. As explained in response to comments 209 to 216, disturbance or development is regulated as major Highlands development only when it reaches certain specified thresholds. Riding an ATV, mowing the grass, temporary activities and cutting of a single tree are not *developments*. Nor do they involve removal of forest, placement of impervious surface, or construction of a capital project. Thus they are not major Highlands development and thus not regulated activities. Agricultural and horticultural uses and developments are specifically excluded from the definition of major Highlands development and therefore are not regulated activities under these rules.

245. COMMENT: The requirement for a permanent deed restriction after removal of impervious surfaces is over-reaching and over-regulation. Once removed, the addition of any impervious surface would require approval and permit. The additional requirement of

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a deed restriction prevents future modifications of the site, irrespective of impervious surface removal that may occur in the future. (44, 87, 111)

RESPONSE: Since impervious surface is calculated for a site, in order to determine that an activity satisfies the three percent impervious surface limit, all areas that need to have impervious surface removed or exceed the limit, must be restricted against the placement of additional impervious surface. However, the language of the conservation restriction can be tailored for the site in question. For example, if there are no additional Highlands resources on the site, the restriction can specifically state that a designated area is restricted from additional impervious surface and nothing more. In another example, if an area is within the 300-foot buffer of a Highlands open water, the restriction would be written to state that the area is restricted against all future disturbance. In another case, an area could be restricted against additional impervious surface but could be used for ongoing farming. Thus, the conservation restriction requirement does not automatically prevent future modifications of the site.

246. COMMENT: Deed restrictions last forever. Since the proposed regulations mandate an activity that will last forever, some study of the long-term effect of this activity are required. There is no such research in the document. Mandating a deed restriction is an unfair restriction of property rights and a taking of property rights without compensation. (9-12)

RESPONSE: The recording of a conservation restriction for a site, as required by the Department's regulations, is only required *after* an applicant has received approval to conduct regulated activities on the site. Further, as stated in response to comment 250, the restriction language may be tailored for a specific site and depending upon the circumstances may not limit all types of activities from all areas on the site. For example, if areas of the site are being farmed and the owner wishes to continue farming, the conservation restriction can acknowledge that farming will continue. The approval to conduct regulated activities on the site does enable use of the property, while the

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conservation restriction ensures that the statutory maximum limits on site disturbance or development are not exceeded.

247. COMMENT: Cumulative increase in impervious surface is a true mystery.

Impervious surface includes non-impervious material. Road departments use gravel to stabilize stream banks. Farms use gravel for soil conservation purposes since it stabilizes soil and provides good drainage. If you dump a bucket full of gravel, does this add up over time to a threshold point? How does anyone know when the bucket full was dumped and on which lot? Who is keeping track and who is paying for all this tracking? Where is the cost/benefit of this tracking? If gravel is spread and then the area is plowed, have you reclaimed the virginity of the impervious area? What factual basis is there for declaring all surfaces impervious? (9-12, 82)

RESPONSE: As explained in response to previous comments regarding the “impervious surface” definition, the statutory definition includes gravel and crushed stone. Gravel is porous when freshly placed but must be compacted to function as a building material for foundations, driveways and parking lots. The compaction, necessary to allow the gravel to support vehicles and buildings, renders gravel and crushed stone impervious. Gravel is used as armoring for stream bank stabilization because it deflects flowing water away from stream banks and prevents water from reaching and eroding the underlying soil. It also traps sediments which then fill the spaces between the stone making the gravel progressively less pervious.

At the time that an owner applies for a Highlands preservation area approval, the Department will assess the amount of impervious surface existing on the property. The amount of existing impervious surface will then be subtracted from the total three percent that is permitted onsite to determine how much additional impervious surface is permitted. The owner can remove existing impervious surface in order to relocate it and to obtain a full three percent on the site in the location of his or her choosing.

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248. COMMENT: N.J.A. C. 7:38-2.2(a)6 attempts to clarify how ultimate disturbance and cumulative impervious surface will be determined on lots subdivided after August 10, 2004. Under proposed new N.J.A.C. 7:38-2.2(a)6i, the calculation of ultimate disturbance includes all existing and proposed disturbance on both the newly created lot or lots and the previously existing or remainder lot. For a residential development where the existing disturbance equals one acre or more, in order to reduce the ultimate disturbance below one acre, the applicant may cease all disturbance in a given area, remove all impervious surface and permanently deed restrict that area so that there will be no continuing or future disturbance.

If there is an existing lot with existing disturbance consisting of a mowed field of greater than one acre and a person wants to build a house, does the owner have to stop mowing a portion of the lot? What if the person is using the area for crops for his own use and does not qualify for farmland assessment? Does he have to reduce his own self-sufficiency to satisfy Highlands rule requirements? In addition, according to the rules, the lot cannot be disturbed anymore and it must be deed restricted. Is not this a taking without just compensation? (85, 87)

RESPONSE: The Department believes the commenter is referring to N.J.A.C. 7:38-2.2(b) and 2.2(b)1 regarding ultimate disturbance and cumulative impervious surface.

If a landowner proposes to construct a house for his or her own use or the use of an immediate family member on a lot that existed prior to August 10, 2004, then the exemption at N.J.A.C. 7:38-2.3(a)1 applies and there are no limits on ultimate disturbance or impervious surface. Thus, a landowner who proposes to build a house for him or herself need not deed restrict any portion of his property that he is farming for his own use, regardless of whether the property being farmed.

For lots created by subdivision after August 10, 2004, or for construction of a single family house for use by someone other than the landowner or his/her immediate family members, the undisturbed portion of the property must be deed restricted against further disturbance in order to ensure that the one acre limit of disturbance is not exceeded. This may require that an applicant cease current disturbance such as mowing

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of an area in order to allow for a new disturbance, such as development, without exceeding the one-acre limit. The conservation restriction is a consequence of the owner's obtaining an approval to undertake regulated activities on the site. That approval enables the owner to realize a use of his or her property within the limits established by the Highlands Act, such that there is no taking as that concept has been interpreted by the courts.

7:38-2.3 Exemptions

249. COMMENT: What if you are in the preservation area on a single block and lot with multiple legal residences; has any consideration been given to the permeable coverage given these circumstances? (108)

RESPONSE: The Highlands Act and these rules do not apply to existing development in the preservation area if no major Highlands development is proposed. Accordingly, there would be no reason to assess the amount or location of impervious surface on the lot under these rules.

250. COMMENT: For people who have longstanding undeveloped approved lots, are we going to lose the ability to develop them in the future? Rumor has it that approved, subdivided, undeveloped lots, not a major subdivision, but single lots, are going to revert to unusable land in a period of three years. Is that true? (37)

RESPONSE: If the building lot described by the commenter existed on August 10, 2004, the development of that lot with a single family home may not be affected by the Highlands Act or these rules. Construction of a single-family dwelling for an individual's own use or use by an immediate family member on a lot owned by that individual on August 10, 2004, is exempt. See N.J.A.C. 7:38-2.3(a)1. Construction of a single-family dwelling for anyone's use on a lot existing on August 10, 2004, is exempt from the Highlands Act if the construction results in a cumulative increase of less than 0.25 acres

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of impervious surface or less than one acre of ultimate disturbance. See N.J.A.C. 7:38-2.3(a)2.

Additionally, under N.J.A.C. 7:38-2.3(a)3, construction of a major Highlands development is exempt if the development received, on or before March 29, 2004, at least one municipal approval, that is, a preliminary or final site plan approval, a final municipal building or construction permit, a minor subdivision approval where no subsequent site plan approval is required, or a preliminary or final subdivision approval where no subsequent site plan approval is required, and, in addition to the municipal approval, either a water or sewer permit from the Department, or else a Freshwater Wetlands or Flood Hazard Area Control Act permit from the Department. However, an exemption for this type of development, based on receipt of a municipal approval and DEP permit, would expire if any of the qualifying approvals expired, or if construction beyond site preparation did not commence within 3 years after August 10, 2004, or if construction, once started, were stopped for a cumulative total of one year after August 10, 2007.

251. COMMENT: Relating to single-family dwellings. Certainly we understand it and we think it is a well-meaning piece of legislation and of the regulations. Our only concern is that it might be overused to the point where it damages the resources we are trying to protect. (70)

RESPONSE: The Highlands Act is intended to strike the appropriate balance between protecting Highlands resources from sprawl and overdevelopment and ensuring the economic viability of Highlands communities. See N.J.S.A. 13:20-2. Part of that balance is achieved by the exemptions for various types of developments if they are below certain thresholds related to project size or impacts. The exemptions at N.J.A.C. 7:38-2.3 for single-family dwellings are not anticipated to result in home building of such frequency or extent that Highlands resources would be adversely affected.

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252. COMMENT: The summary states that “in order to verify that a proposed project meets a particular exemption, the Department will need to conduct an in-depth analysis of documentation regarding the project.” I do not agree. The Act exempted certain activities and someone undertaking those activities should not need to prove once again that they are exempt. Applicability of things like wastewater management occur only at the level of a large project. Agriculture and single residential activities need not be subjected to a rigorous and expensive review process. (19)

RESPONSE: The commenter is correct that if an activity is not a major Highlands development as defined in the Act and in these rules, then the activity is exempt from regulation under these rules and does not require an HPAA. In addition, certain activities that would meet the definition of major Highlands development are expressly exempted in the Act (see N.J.S.A. 13:20-28) from regulation under these rules. These exempted activities are listed in the rules at N.J.A.C. 7:38-2.3. N.J.A.C. 7:38-2.4 provides a procedure by which the Department screens activities to confirm that an activity does (or does not) meet the definition of major Highlands development and, if the activity does meet the definition, to determine if it is exempted anyway because it is one of the activities described at N.J.A.C. 7:38-2.3. The Department only needs to conduct an in-depth analysis of documentation regarding a project to see if it meets a particular exemption if the proposed project is a major Highlands development for which an applicant will be seeking another Department approval, for example a stream encroachment or freshwater wetlands permits. A Highlands applicability determination does not need to be obtained for projects and activities that are not major Highlands development, such as agricultural and horticultural uses and developments, and certain activities conducted at existing single family homes a Highlands applicability determination. However, if a person is unsure if a proposed activity is a major Highlands development or seeks confirmation that the proposed activity is exempt, or if the municipality in which the activity is proposed requires this same information, a person may apply for a Highlands applicability determination.

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253. COMMENT: Do exempt activities require an application? The regulations specify that activities are exempt yet there is an application for exempt activities. Exempt seems to mean exempt in the Highlands Act, yet exempt seems to mean \$100, paperwork and a long wait on the application for exempt activities. Does a farmer need to file for an exemption for each field? For each season? For each generation? Who is going to let someone know what is required? (9-12, 28)

RESPONSE: As explained in the response to Comment 252 above, an activity that is not a major Highlands development is exempt from the Highlands Act and these rules and therefore the person undertaking that activity is not required to apply for an HPAA. Because agricultural and horticultural activities are not major Highlands development under the Highlands Act, a farmer would not have to request a Highlands applicability determination under N.J.A.C. 7:38-2.4 to confirm that his or her activities are not a major Highlands development and therefore not regulated. However, the Highlands Act establishes separate criteria for impervious surface that apply to agricultural and horticultural developments located in the preservation area (see N.J.S.A. 13:20-29). Therefore, if a farmer is unsure about whether certain agricultural or horticultural activities, for example, activities that would result in an increase in impervious surface, are exempt, he or she can contact the Department of Agriculture for additional information.

254. COMMENT: A lot that exists before August 10, 2006 should be exempt from the additional regulations that are applied to those that are built on by their owners after that day. What's the difference? The regulations discriminate against someone who bought that same lot the next day or the next year. These regulations will also encourage people to build before they sell a lot which may be a contrary action to those intended by the Act. Existing lots should be treated the same regardless of ownership changes. (9-12)

RESPONSE: The Department believes the applicant is referring to August 10, 2004, the date on which the Highlands Act took effect and the date to which several of the

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exemptions in N.J.A.C. 7:38-2.3 are pegged. The Legislature intended the exemptions to enable property owners in the Highlands preservation area to realize some of the development potential for their land and at the same time ensure that such development would not compromise important Highlands resources that the Act aims to preserve and protect. A change in ownership would not itself affect the development potential of a particular lot under the exemptions. However, the extent and type of development on that original lot at the time of the change in ownership and any subsequent subdivision of the original lot could make a difference. After the effective date of the Act (August 10, 2004), the development undertaken on the original lot that existed as of August 10, 2004, even if subsequently subdivided, must be within the exemption limits established in the Act and these rules for impervious surface and disturbance. If the development were to exceed the thresholds, it would not be exempt and an HPAA must be obtained.

255. COMMENT: There should be exemptions for farm stands, bed and breakfast operations tied to a farm, local and regional farmers markets and other activities that will promote the activities of farming by farmers. (9-12)

256. COMMENT: Multiple dwelling units should be permitted as long as they are for family members, extended family members, and employees. In rural areas like the Highlands, extended families live on the same land and share the farm chores. To force families apart changes our culture and quality of life and will contribute to the demise of farming. Without onsite housing, farmers would be unable to hire help, who cannot afford to commute great distances. (19, 28, 45, 46)

RESPONSE TO COMMENTS 255 AND 256: As explained in previous responses, the Highlands Act prescribes the developments and activities that are exempt from regulation under these rules. The exemptions in the Act at N.J.S.A. 13:20-28 and in these rules at N.J.A.C. 7:38-2.3 do not specifically include farm stands, bed and breakfast operations tied to a farm, local or regional farmers' markets, or other activities that promote the activities of farming such as multiple dwelling units or on-site housing. However, if any

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of these developments or activities do meet the conditions of an exemption, including the exemption for developments or uses that constitute agricultural or horticultural developments or uses, as defined by the Act and these rules (see N.J.A.C. 7:38-1.4), the development or activity would not be regulated under these rules.

257. COMMENT: All dates in the exemptions should be changed to the date the Act was signed into law, August 10, 2004. If any other date is used, a method for compensating property owners for money spent toward developing their land should be developed. (19, 28, 45, 46)

RESPONSE: The dates specified in the exemption provisions at N.J.A.C. 7:38-2.3 are those established in the Highlands Act at N.J.S.A. 13:20-28. In addition, as stated in response to comments above, the New Jersey Legislature included several provisions in the Highlands Act that reduce the impact of the Act on property owners and avoid the need for compensation. One provision in the Highlands Act specifically excludes agricultural and horticultural uses from the definition of “major Highlands development” thus keeping these activities unregulated by the Department’s regulations for the preservation area. A second provision is the requirement that when the Green Acres program, State Agricultural Development Committee (SADC), local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land to be preserved in the Highlands, two appraisals must be obtained (one representing pre-Highlands values and the other representing current value). The agencies seeking to purchase the land are required to inform the landowner of both values and negotiate using the higher of the two. Therefore, the Highlands Act does not affect a landowner’s property value if the landowner’s intent is to preserve his or her land. A third provision is the extensive list of exemptions to the Act, many of which provide criteria by which the construction of single family homes remain exempt from the requirements of the Act. The Highlands Act also provides waivers in some circumstances for those seeking to comply with the requirements for a Highlands preservation area approval. Finally, another provision is the requirement that the Highlands Council establish a transfer of development rights

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program for the Highlands Region. Such program could provide another source of revenue to landowners with land upon which development has been restricted.

258. COMMENT: All residential uses for all land should be exempt. This includes construction of a separate dwelling, assuming it conforms to local setback rules. The inability to provide housing for aging and disabled family members is a huge burden on homeowners. It should also be made clear that construction of housing for agricultural employees as well as domestic help such as groundskeepers is permitted. (19, 28, 45, 46)

RESPONSE: Under the Act and these rules (see N.J.A.C. 7:38-2.3), any residential development that does not meet the definition of major Highlands development, that is, one that involves less than 0.25 of an acre increase in impervious surface and less than one acre of ultimate disturbance on the lot and that does not require an environmental or land use permit from the Department is exempt. Also, many single-family residential uses and improvements to existing structures are exempt. These exemptions do not specifically include construction of a completely separate dwellings on an existing lot, or construction of housing for agricultural employees or domestic help such as groundskeepers. However, if any of these developments or activities do meet the conditions of an exemption, including the exemption for developments or uses that constitute agricultural or horticultural developments or uses, as defined by the Act and these rules (see N.J.A.C. 7:38-1.4), the development or activity would not be regulated under these rules.

259. COMMENT: Exemptions should also be added to address development associated with government park creation in the preservation area. Required buffers, limits on disturbance, the definition of exempted linear development and the definition of impervious surface all make development of needed active and passive recreation resources in this area exceedingly difficult. This is particularly true for small local parks, where development of accessible recreation facilities and associated parking may be practically impossible due to the three percent impervious surface limitation.

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Additionally, trails are often designed to provide access to water-bodies, often a chief feature of these parks, but the existing definition of permissible linear development within open water buffers and impervious surface standards do not address installation or maintenance of these facilities. If outright exemption is not provided, then a relaxation of standards should be considered. For example, agricultural uses are allowed to exceed coverage standards and are otherwise allowed the flexibility needed to operate in the Highlands based on acceptance of a “resource management and/or conservation plan.” Public park and government and emergency facility development should be treated similarly by the DEP. (114)

RESPONSE: As explained in previous responses, the Highlands Act prescribes the developments and activities that are exempt from regulation under these rules. However, there are exemptions that may apply to the activities described by the commenter. For example, the Act and rules include an exemption for the construction or extension of trails with non-impervious surfaces on publicly owned lands or on privately owned lands where a conservation or recreational use easement has been established and filed with the deed for the lots on which the easement exists. See N.J.A.C. 7:38-2.3(a)8. Consequently, there are no limits on the location of trails constructed with non-impervious materials under the Highlands rules. If trails must be constructed of impervious materials there are other regulatory provisions that may facilitate such trails. For example, with regard to the impervious surface limit on development regulated by the Act, it should be noted that the rules at N.J.A.C. 7:38-3.5(a)2 provide for the transfer of allowable impervious surface among non-contiguous lots in existence as of August 10, 2004 provided that the lots that will not be developed are deed-restricted against future disturbance. With regard to the relaxation of standards for agricultural uses where there is an approved resource management and/or conservation plan, this is specifically provided for in the Act (see N.J.S.A. 13:20-29) and no similar provision was made for public park and government facilities. The development of emergency facilities may qualify for an HPAA with a health and safety waiver as described in N.J.A.C. 7:38-6.5.

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260. COMMENT: No paperwork or permits should be required for things that are exempt from the Highlands Act, including additions to homes, renovations of any kind to any kind of building, agricultural activities, any kind of property improvements for residential or agricultural purposes, or building of a single family home no matter how large or how small. These exemptions were very clearly stated in the Highlands Act and it was never intended to place such a burden on the residents and farmers of the Highlands. Such resource studies were only meant for developments in excess of one home, and commercial building. And even then, the Act did not intend for the process to be so rigorous and expensive, just for the process to include assurances that the water supply and visual aspects of the project would be in keeping with the current conditions in the Highlands. (28)

261. COMMENT: The Department has misconstrued the word "exception" within the proposed regulations. Section 30 of the Highlands Act specifically lists projects that are "exempt from the provisions of this act, the regional master plan, any rules or regulations adopted by the DEP pursuant to this act, or any amendments to a master plan, development regulations, or other regulations adopted by a local government unit. . . ." In direct contradiction of this provision, the proposed regulations require owners of exempt properties to apply for DEP review and approval of that status. At that point, an applicant is by definition subject to "rules or regulations adopted by the DEP." Therefore the exemption contemplated by the New Jersey Legislature and called for in the Highlands Act does not exist. The DEP has overreached by replacing the clear meaning of an exemption with an unauthorized application requirement. (13, 19, 43, 44, 74, 87)

262. COMMENT: The rule should be amended to exempt all locally permitted accessory residential uses and development associated with the use of a single family lot. If this is not done, there will be inevitable and unnecessary applications made to the DEP. It should not cost a homeowner \$100 in HAD fees, or potential additional costs associated with application, to put in children's play equipment, install a gazebo or engage in other customarily accessory permitted use of their property. (114)

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RESPONSE TO COMMENTS 260 THROUGH 262: Persons who undertake activities that are exempt under the Highlands Act at N.J.S.A. 13:20-28 are not required to apply to the Department for an exemption, which is known as a Highlands applicability determination. Highlands applicability determinations (HADs) are voluntary, except for those projects that require certain permits from the Department (such as a freshwater wetlands permit or water allocation permit). Those who undertake these projects are required to obtain an HAD so that the Department can determine whether the project is a major Highlands development and subject to the requirement to obtain an HPAA under the Highlands rules. If the project is not a major Highlands development, or is a major Highlands development but exempt, it will be subject to other DEP rules as applicable. Further, if the property owner is certain that his or her project is a major Highlands development that is regulated under the Highlands rules, and stipulates to that on the application for an HPAA, the property owner does need to submit an application for an HAD but can apply directly for the HPAA. In order to process an HAD application, the Department requires certain materials, documents, and fees in order to provide a full and comprehensive review. The Department has reorganized and revised the rules at N.J.A.C. 7:38-2.4(a) and (b) on adoption to clarify that a HAD is mandatory only in the circumstances described, that is, when a person is applying for a Department environmental land use or water permit for a project located in the Highlands preservation area.

263. COMMENT: The Department has proposed changes in the regulations promulgated under the Highlands Act, which if adopted in their present form, would adversely affect our client's ability to use their property despite an agreement with the NJ Department of Transportation (NJDOT) and despite the permanent change in the nature of the property that was created solely and exclusively by the NJDOT's use. To protect our client's rights under the condemnation proceeding as well as under the Highlands Act, we respectfully request that the following modification be added to the rules at N.J.A.C. 7:38-2.3(a)18: "Construction of a major Highlands development on property that was the

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subject of an eminent domain proceeding prior to August 10, 2004, and which sustained permanent alteration of its impervious surface as a consequence of State activity on or about said property.” (59)

RESPONSE: As explained in previous responses, the Highlands Act prescribes the developments and activities that are exempt from regulation under these rules, and the Act does not provide for an exemption as described by the commenter. The Department encourages the commenter or its client to contact the Department with more details about the project in question so that the Department may better evaluate the circumstances and provide guidance on how to proceed.

264. COMMENT: Enclosed is a contract I had on two lots to sell before the Highlands preservation area went into effect. The two lots would yield six three-acre lots which would give me \$600,000.00. As of today I cannot sell them. Would the State of New Jersey be interested in buying them? (21)

RESPONSE: The Highlands Act provides that property owners who wish to sell land for preservation purposes are eligible for compensation at pre-Highlands values. The Act specifically requires that, commencing on the date of enactment (August 10, 2004) and through June 30, 2009, when the Green Acres program, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land for recreation and conservation purposes, it must obtain appraisals of the value of the land using current zoning and State environmental regulations, as well as using the zoning and the State environmental regulations in effect on January 1, 2004. The higher of the two appraisal values is to serve as the basis for negotiation with the landowner with respect to the acquisition price for the lands. See N.J.S.A. 13:8C-26j. Similar provisions in the Act apply when the State Agriculture Development Committee, a local government agency, or a qualifying tax exempt nonprofit organization seeks to acquire farmland or a development easement on farmland. See N.J.S.A. 13:8C-38j. The Department

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recommends that the commenter contact the Green Acres program, or another appropriate agency, to discuss the possibility of purchase of the land.

The commenter should also note that some development activities on this land may qualify for an exemption under the Act and these rules. These exemptions include, but are not limited to, the construction of a single-family dwelling for an individual's own use or the use of an immediate family member on a lot owned by the individual on August 10, 2004, or on a lot for which the individual had, on or before May 17, 2004, entered into a binding contract of sale to purchase that lot. Also exempt would be the construction of a single-family dwelling on a lot in existence on August 10, 2004, provided that the construction does not result in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more.

265. COMMENT: The time limit at N.J.A.C. 7:38-2.3(a)3 for projects to be completed by August 10, 2007 is confusing. When does such a time limit apply? To all exemptions? Just for exemptions when a building permit is obtained? What is the purpose of the deadline since building permits already carry such rules? How is it possible to finish by 2007 when the approval process takes years? The DEP has been holding up many projects. Are they going to be shut down before they begin? (19, 28)

RESPONSE: The dates and time limits in the exemption at N.J.A.C. 7:38-2.3(a)3 are those established in the Highlands Act. The Department notes that March 29, 2004 is the date the Act was passed by the Legislature and submitted to the Governor for review; the Governor signed the Act into law on August 10, 2004; and August 10, 2007, is three years from the date the Act took effect. The dates for exemptions in the Highlands Act were likely intended to allow projects that were substantially through the municipal review process and which had obtained certain required DEP approvals to be completed without the need to obtain a Highlands approval. The August 10, 2007 expiration applies only to the exemptions for major Highlands developments that are based upon certain municipal and State approvals obtained before March 29, 2004. These projects must be under construction by August 10, 2007; they do not have to be finished by that date.

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Once started, construction on the project must not cease for more than a cumulative total of one year after August 10, 2007. If the major Highlands development is exempt and consistent with the areawide WQMP, but requires other DEP approvals, there will be sufficient time for an applicant to receive a Highlands applicability determination from the Department and to commence construction beyond site preparation before August 10, 2007.

266. COMMENT: Reconstruction should not be limited to 125 percent of the original footprint but should be unlimited as in the case when building an addition. There are many small, dilapidated and dangerous cottages in the area and people should maintain the right to replace them with a safe building of any normal size. (19, 28)

RESPONSE: The limit on reconstruction to within 125 percent of the footprint of the existing impervious surface on the site does not prohibit the replacement of a small, dilapidated or dangerous structure; it merely limits the amount of additional impervious surface that can be placed for purposes of the reconstruction and be exempt from regulation under these rules. As explained in previous responses, the Highlands Act prescribes the developments and activities that are exempt from regulation under these rules. A larger reconstruction project that would exceed the limits of the exemption at N.J.A.C. 7:38-2.3(a)4 would be subject to the requirement to obtain an HPAA.

267. COMMENT: The improvement identified as an “addition for residential purposes attached to the home” should be modified to allow or otherwise include additions for home office/home occupations permitted by local code. The maximum expansion and resulting coverage may be controlled with appropriate limitations, perhaps as a proportion of the size of the existing dwelling. (114)

RESPONSE: The exemption in the Highlands Act and in the rules at N.J.A.C. 7:38-2.3(a)5 for improvements to a lawfully existing single-family dwelling in existence on August 10, 2004 includes an allowance for “an addition” as long as the improvement

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maintains the use of the dwelling as a single-family dwelling as defined by the applicable local municipal codes or ordinances. The exemption does not limit use of the single-family dwelling or of the addition to it, other than to prohibit its use as a multiple-unit dwelling. At N.J.A.C. 7:38-2.4(b)1ii, the Department has specified that persons proposing improvements to single family dwellings for residential purposes are not required to obtain a Highlands applicability determination (HAD) before conducting these exempt activities. If the proposed improvement is not for residential purposes and requires any environmental land use or water permit from the Department, a HAD is required so that the Department can verify that the proposed improvement satisfies the Highlands exemption requirements.

268. COMMENT: Add to N.J.A.C. 7:38-2.3(a)4, “this exemption shall include the installation of wireless telecommunications facilities. Wireless applicants shall complete the Cell Tower Addendum and submit same with their application.” (17)

RESPONSE: The exemption for reconstruction of any building or structure so long as the reconstruction is within 125 percent of the footprint of the existing impervious surface or does not increase the existing impervious surface by 0.25 acres or more, would include the installation of wireless telecommunications facilities that meet these thresholds. In addition, certain installations of cellular equipment are included in the exemption at N.J.A.C. 7:38-2.3(a)1i for routine maintenance and operations, rehabilitation, preservation reconstruction, repair, or upgrade of public utility lines, rights-of-way, or systems by a public utility. Application requirements are set forth at N.J.A.C. 7:38-9.2. The cell tower addendum, which was developed as a guide for applicants proposing wireless facilities, does not replace or supersede the requirements at N.J.A.C. 7:38-9.2.

269. COMMENT: These provisions strike a reasonable balance between resource protection, equity and administrative practicality. The exemption language regarding the installation of cellular equipment at N.J.A.C. 7:38-2.3(a)1i is reasonable and addresses what could be substantial impacts to scenic resources posed by this technology. (73)

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

270. COMMENT: The term “legally existing” should be changed to “existing.” One may not be able to prove a hundred-year-old house to be “legal” although title may be clear. Newer buildings that are “illegal” are subject to other laws and need not be addressed in these regulations. (19, 28)

271. COMMENT: N.J.A.C. 7:38-2.3(a)4 and 5 conflict with each other. "Lawfully existing" is a bad choice of words. If someone bought a house in 1990 but the prior owners neglected to get a permit for a deck addition, the house is not lawfully existing. Legally existing was the right term unless the proposed regulations intend to limit more rights of more people through this change of words. (9-12)

RESPONSE TO COMMENTS 270 AND 271: The term “legally existing” was changed to “lawfully existing” because this is the phrase used in the Highlands Act with reference to impervious surface already on a site. See N.J.S.A. 13:20-28a(4). In the case of a 100-year old house, as cited by the commenter, the Department will assume that the dwelling is lawfully existing since there were no State and Federal land use and water permitting programs with which to comply at that time. Further, the exemption requires that the single-family dwelling be lawfully existing. Therefore, in the case of an existing house with a deck for which no permit was obtained, the dwelling may be “lawfully existing” although the deck is not. The Department will consult with the municipality if there is any question about whether a dwelling is “lawfully existing.”

272. COMMENT: N.J.A.C. 7:38-2.3(a)5 seems to grandfather existing homes since they are able to improve the property without a permit. However, this must be read in conjunction with 3.5(e) which limits impervious cover to three percent of the total lot size. This is incredibly restrictive to the point of making the exemption moot. This

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restriction makes the exemption portion of the regulations seem extremely misleading. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE: If the improvement is to a single-family dwelling that was in existence on August 10, 2004, the improvement is exempt from regulation under these rules. The requirement at N.J.A.C. 7:38-3.5(e) applies when a development is a major Highlands development that is regulated under the rules and requires an HPAA.

273. COMMENT: Regarding the exemption for “improvement to an existing single family dwelling,” N.J.A.C. 7:38-2.3(a)5 allows improvements only to single family dwellings “legally” existing as of August 10, 2004 and only applies as long as the improvement maintains the use as a single-family dwelling as defined by local ordinance and does not permit the use of the structure as a multiple unit dwelling. The DEP should indicate what proofs or other documentation residents will have to provide in order to satisfy that the unit and other structures on site legally exist. This section should also be amended to allow the continuation of exempt status where structures or sites are altered to promote such “smart growth” residential concepts as accessory apartments, mother-in-law suites, detached ECHO senior housing units, etc, provided these are developed in accordance with local code. Locally permitted residential accessory uses should not be considered “multi-family” within the meaning of this rule. (114)

RESPONSE: The documentation that is necessary to demonstrate compliance with the exemptions is identified at N.J.A.C. 7:38-9.2 in the application requirements for a Highlands applicability determination. N.J.A.C. 7:38-9.2(d)5 provides that proof that a single-family dwelling was lawfully existing as of August 10, 2004, can be a copy of any official documentation of that fact, which, for example, might be a certificate of occupancy or a utility bill for service before August 10, 2004, as well as certification from the town clerk that the municipality considers the dwelling lawfully constructed and occupied. N.J.A.C. 7:38-2.3(a) does provide that, for the purposes of the exemptions, a single family dwelling includes those group homes, community residences, and other

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alternative living arrangements that are specifically given equivalent treatment as a single family dwelling under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., and that are using or proposing to use a new individual subsurface disposal system or aggregate of equivalent disposal units where the sanitary wastewater design flow is 2,000 gallons per day or less.

274. COMMENT: Improvements to religious places of worship are exempt at N.J.A.C. 7:38-2.3(a)6. New structures for religious purposes should be as well. The state should not be in the position of regulating the building of new religious buildings other than those requirements dictated by safety and local zoning. These regulations make it exceedingly difficult for new religious structures to be built as the Highlands society changes and desires these additional structures. It should not be the DEP's place to make those decisions. This is a direct violation of the separation of church and state that our courts have used for generations. (9-12)

275. COMMENT: The wording of the exemption at N.J.A.C. 7:38-2.3(a)6 is nebulous at best. My church purchased a 30-acre parcel of land on December 30, 2003 with the intention of building a new church there. Shortly thereafter, we discovered that our land fell in the southern tip of the preservation area. We filed for an applicability determination assuming that our project would be exempt. We were informed that we were not exempt based on a very liberal interpretation of this section. Accordingly, our church owns a million dollar cornfield upon which we have no chance of building. This amounts to a confiscation of our property and saddles the members of the church with a million dollar bank note that we will have to pay off, knowing full well that we are paying off a worthless piece of property. The corresponding shame of the situation is the opportunity cost we will also suffer. Since our resources are tied up with this property, we have no ability to seek other land upon which to build a new church to meet our growing needs. (117)

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276. COMMENT: Twenty-two of my brothers and sisters had the opportunity to go the Waveland, Mississippi to help the people cope with the aftermath of Hurricane Katrina. Hearing about and seeing first hand what the Federal government did for these people embarrasses me as an American citizen but I felt good about the praise the Christian Church and its people got from the people there. Now I come home to find that the 30-acres of property that came with building permits that 600 of my brothers and sisters in Christ purchased to build a new church and teaching school has been denied our rights to fulfill a dream that cost us a million dollars of our hard-earned money, and that we can grow corn if we want to. (94)

277. COMMENT: The Act affects many people in New Jersey. Phillipsburg Alliance Church has over 600 members and spent millions of dollars on land that now cannot be used to build a new church. People will not let this happen. (76)

RESPONSE TO COMMENTS 274 THROUGH 277: As explained in previous responses, the Highlands Act prescribes the developments and activities that are exempt from regulation under these rules. The exemption in the Act at N.J.S.A. 13:20-28a(6) and in these rules at N.J.A.C. 7:38-2.3(a)6 applies to an improvement at a place of worship already existing as of August 10, 2004, but not to the ground-up construction of a new place of worship after that date. New construction and development that meets the definition of major Highlands development is not prohibited under the Act and these rules, but it is subject to the Highlands resource protection standards and the requirement to obtain an HPAA. The Act and the rules do provide that a property owner may seek an HPAA with a waiver in certain limited circumstances, including to avoid a taking of property without just compensation. See N.J.A.C. 7:38-6.8.

278. COMMENT: It is hard to believe that such legislation was conceived behind clean water. Nobody in their right minds want dirty water. I am, however, against dirty legislation, with no voter or property owner representation. What was done can only line the pockets of greedy politicians who reply to honest land owners that “they can always

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grow corn.” That sounds like “let them eat cake.” I demand to retain my property rights that are being stolen. (106)

RESPONSE: The Department cannot address the commenter’s concerns regarding the legislative process that led to the enactment of the Highlands Act. However, the Act is intended to strike the appropriate balance between protecting Highlands resources from sprawl and over development and ensuring the economic viability of Highlands communities. Seventeen categories of activities and developments are exempt from regulation under these rules, including projects for which certain approvals were in place by March 29, 2004, and improvements to places of worship that were in existence on August 10, 2004. See N.J.A.C. 7:38-2.3. For development that is regulated, the rules provide a process by which a landowner can achieve a beneficial use for property either by obtaining an HPAA to develop property or, when necessary and under limited circumstances, applying for an HPAA with a waiver, including to avoid a taking of property without just compensation. See N.J.A.C. 7:38-6.

279. COMMENT: At N.J.A.C. 7:38-2.3(a)6, the exemptions for places of worship, schools and hospitals should apply to firehouses and other emergency service related structures as well. (85, 87)

280. COMMENT: N.J.A.C. 7:38-2.3(a)6 exempts nonresidential improvements to places of worship, public schools and hospitals in existence as of August 10, 2004. It is recommended that government facilities (administrative, public works, public housing, transportation) and emergency responder facilities (police, fire, rescue squads) also be exempted from the provisions of the Highlands Act. Like hospitals and schools, these other types of facilities also provide essential public services and should therefore also be exempt (114)

RESPONSE TO COMMENTS 279 AND 280: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation

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under these rules. However, improvements to existing firehouses or other emergency service related structures may be permitted under a Highlands preservation area approval with a public health and safety waiver. See N.J.A.C. 7:38-6.5.

281. COMMENT: We support the framework in the revised rules to exempt forest landowners from future permitting processes and not requiring that a HPAA is needed prior to the implementation of forestry activities. (39, 41, 42)

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

282. COMMENT: It should be noted that in the narrative summary of the revised interim rules that reference was made to the Forest Stewardship program as the prototype for the Forest Management Plan requirements for Farmland Assessment. This is inaccurate. The minimum guidelines for Forest Management Plans have been previously set by a committee composed of participants from the NJ Department of Taxation, NJ Department of Agriculture, NJ Forest Service, Rutgers University, Rutgers Co-operative Extension, Soil Conservation Service, as well as leading consulting foresters. These guidelines were so well written that only very minor changes have been made over the last 20 years. In addition, these minimum guidelines are reviewed every five years, with opportunity for public comment. The current requirements for a Forest Management Plan should continue to be maintained as the standard by which forest landowners are encouraged to continue with their proper stewardship of the forest, and also to maintain the exemption within the revised rules. The minimum guidelines for Plans under the Forest Stewardship program are less desirable as a standard since they can be changed at any time, without any notice, and without public comment. For example, in May of 2005, the minimum guidelines for Forest Stewardship Plans in New Jersey were changed without notice. (39, 41, 42)

283. COMMENT: The Forest Stewardship Program is not the origin of the Forest Management Plan Requirements for Farmland Assessment. Forest Stewardship standards

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were introduced years after the management plan requirements were written as part of what is commonly known as the Woodland Amendment to the Farmland Assessment Act (N.J.A.C.18:15-2.10). In fact, these requirements, which were written as a cooperative effort between highly qualified public agencies nearly 20 years ago, have withstood the test of time so well that no major changes have been made to them despite the fact that they are subject to review and public comment every five years. Conversely, the Forest Stewardship Guidelines may be, and have been, revised without review or public comment (May, 2005). These revisions show glaring weaknesses with regard to the science behind threatened and endangered species distribution (reliance on the Landscape Project data), and shows other bias toward forest interior over other forest successional stages (that is, emerging early successional forest is defined as “non forest”). It would be a mistake to make the Forest Stewardship Program the basis for management plan requirements in the region. My firm supports a cooperative effort between qualified state and consulting foresters to rewrite the minimum plan guidelines if and when necessary (an effort at which was made as recently as around 2004 when the regulations to the Farmland Assessment Act last sunset). (99)

RESPONSE TO COMMENTS 282 AND 283: The Highlands Act and these rules provide an exemption relating to forestry based either on activities conducted in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-23.3, or on normal harvesting of forest products in accordance with a forest management plan approved by the New Jersey State Forester. The commenters apparently have misconstrued the explanation of this exemption in the proposal summary. The summary at 37 N.J.R. 4773 explains that the woodland management plans are established for purposes of the Farmland Assessment Act. Compliance with such a plan must be certified each year by the landowner and by an approved forester in order for the landowner to obtain a property tax reduction under that Act. (See the Department’s Forestry rules at N.J.A.C. 7:3 regarding approved foresters.) A forest management plan is one that must be approved by the New Jersey State Forester and is based on the Federal Forest Stewardship Program guidelines.

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284. COMMENT: N.J.A.C. 7:38-2.3(a)7 incorrectly states that a forest management plan must be approved by the State Forester and must be certified each year by an approved forester referring to the Farmland Assessment Act.. The law requires that a plan be certified by an approved forester for the first year only. There are three types of woodland to be considered in tax assessment. 1. Self-qualifying woodland or acreage composed of woodland which clearly qualifies for farmland assessment, meeting all statutory requirements in respect to income, acreage, years actively devoted to agricultural use, and compliance with an approved wood lot management plan. Self-qualifying woodland is deemed to be none appurtenant woodland, and is entered as such on the farmland assessment application form. To qualify this type of woodland, the following requirements must be met and submitted annually: (a) A wood lot management plan certified by an approved forester (first year only, until plan is renewed or changed); (b) A woodland data form; (c) A scaled map indicating location of woodland activity and soil classes; and (d) An exact copy of the information submitted to the assessor is to be submitted at the same time, to the New Jersey Department of Environmental Protection.

2. Supportive woodland is woodland acreage, which is part of a crop or livestock farm, and which does not contribute income to the farm, but does contribute benefits to the farm, such as lumber or fencing for on-farm use, protection from wind, erosion, water conservation, or buffer areas for the farm from neighbors. This woodland is deemed to be appurtenant woodland. A wooded piece of property is presumed to be supportive and subordinate woodland when its area is less than the area of cropland and pasture land qualifying for farmland assessment. An owner claiming farmland assessment for a wooded piece of property exceeding the acreage in cropland or pasture land must submit an explanation and additional profits the assessor, and may be required to support the claim that such woodland is supportive and subordinate.

3. Unmanaged woodland, which represents land in trees standing alone, or woodland which is not supportive and subordinate to otherwise qualifying farmland. There is no qualifying agricultural activity whereby the acreage might be considered

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"actively devoted" to an agricultural use. Unmanaged woodland is not eligible for qualification under the Farmland Assessment Act.

Requiring a woodlands management plan adds costs and restrictions on residents of the Highlands and will result in a negative impact to the aquifer since trees use more water than brush or grass. Currently in Holland Township for example, a farmer can cut firewood without paying a consultant to tell him which trees to cut. Under these proposed regulations, this is no longer possible. Why is tree cutting being regulated in the Highlands only? Why are owners of forests being discriminated against? Burning wood is a centuries old method of heating homes and is far superior to buying oil from people who want to fly planes into our buildings. What is the cost/benefit of regulating tree cutting in the Highlands? What will be done to replace the water recharging capacity that will be lost by a reduction in forest harvesting? (The commenter provided what appears to be a chapter from a book that appears to be entitled, Water Budget Analysis on a Watershed Basis. The author's name is not discernible.)

The proposed regulations also neglect the positive effect on the aquifer that a properly managed forest provides. Properly managed forests provide a significant increase in water flow to the aquifer compared with unmanaged forests. New York State encourages good forest management practices in their part of the Highlands. (The commenter provided a copy of a New York State Department of Environmental Conservation document entitled Procedural Guide for the Administration of the Highlands Land Owner Assistance Program (HLOAP) Landowner Forest Stewardship Planning, dated December 22, 2003, prepared by the Bureau of Private Land Services.)

Firewood cutting should also be exempt, when used by the owner upon whose property it was cut, and in fact should be encouraged to allow more water into the aquifer, except in 50-foot buffers adjacent to C1 streams. This has been done for centuries and should continue unregulated. It would cause a tremendous hardship to many farms not to be able to heat their houses or to have to pay for a forest management plan to continue doing what they have been doing for centuries. (9-12)

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RESPONSE: As explained in response to comments 282 and 283, there are two bases on which the forestry exemption can apply. One is activities conducted in accordance with an approved woodland management plan. The other is harvesting of forest products in accordance with an approved forest management plan. A woodland management plan is developed for purposes of the Farmland Assessment Act, and is, as the commenters point out, approved for a period of 10 to 15 years. While the plan itself does not have to be approved every year, an activity report showing compliance with the plan is required annually to be submitted and certified by the property owner and an approved forester (from a list of such foresters established by the Department in accordance with the Forestry rules, N.J.A.C. 7:3). The Department uses the annual activity report to schedule inspections once every three years to verify compliance. Because any activity other than agricultural or horticultural development that results in disturbance of one-quarter acre or more of forest is defined by the Highlands Act and these rules as a major Highlands development (see N.J.A.C. 7:38-2.2(a)), a property owner who intends to remove that acreage of forest but maintain exemption from having to obtain an HPAA must obtain an approved woodland management plan or forest management plan. Compliance with these plans ensures that removal of trees and forest products is undertaken in a manner that is beneficial to the forest environment and therefore is consistent with the Highlands Act.

Limited tree or firewood cutting is not considered major Highlands development and is therefore not regulated under these rules unless it results in the ultimate disturbance of one-quarter acre or more of forested land.

285. COMMENT: At N.J.A.C. 7:38-2.3(a)8, a hiking trail created with non-impervious material should be exempt from regulation. Trying to find fault with this activity when mining, swimming pools, additions to single family homes, driveways on existing lots, etc. are exempt is tough. Yet this section requires that hiking trails be on public land or private land that has a conservation or recreational easement. Hiking trails on private land that do not have a conservation or recreational easement are regulated. There is no reasonable explanation for this discrimination. Hiking trails and horse trails should be

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exempt without qualifications. The current application to create a hiking trail requires a certified N.J. Engineer to create a plan. This is contrary to the Highlands Act which says that they are exempt. Requiring an application, a fee, an expensive engineer and a long delay does not constitute exempt. What is the cost and benefit to the Highlands of these applications? (9-12)

RESPONSE: The Highlands Act only regulates major Highlands development, as defined at N.J.S.A. 13:20-3 and in the Department's rules at N.J.A.C. 7:38-1.4. It is possible that a proposed trail made of non-impervious material would not meet the definition of a major Highlands development because it would not require an environmental land use or water permit or result in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface of 0.25 acres or more. If a proposed trail meets the definition of major Highlands development, then in order for it to be exempt it must be constructed with non-impervious materials and be located on land where a conservation or recreational use easement has been established. If an individual wants a written determination regarding whether or not a proposed activity meets the definition of major Highlands development and is exempt, the individual can obtain a Highlands Applicability Determination (HAD), which requires that a site plan, depicting the trail construction in detail and certified by a licensed New Jersey Professional Engineer, be submitted. A HAD is voluntary unless an individual is required to apply for another land use or water permit such as a freshwater wetlands or stream encroachment permit to conduct the same activity. To qualify for an exemption, trails must either be constructed on public lands, or on privately owned lands with conservation or recreational use easements. There is a presumption that such trails will be used by the public and should therefore be properly constructed according to a site plan. Licensed professional engineers are the only professionals qualified in New Jersey to create site plans showing proposed development including trails. Therefore, an applicant seeking a HAD is required to submit a site plan certified by a licensed New Jersey Professional Engineer. This same site plan can also be submitted and will be required for another land use or water permit, for example a wetlands permit. The Economic Impact analysis in the

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proposal evaluated the costs and benefits relating to water quality and water supply issues and concluded that overall the rules will have a positive net economic effect.

286. COMMENT: Trails with non-impervious surfaces on private land should be exempt but should not require a conservation easement. Trails such as these are built as a matter of course by forest owners as a way to get access to the forest for harvesting, routine maintenance and woodlot improvement. (19, 28)

RESPONSE: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. If a trail will disturb one-quarter acre or more of forest, it is major Highlands development and regulated except, per N.J.A.C. 7:38-2.3(a)7, if it is incorporated as part of an approved woodland management plan or for the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester. The forester designing a woodland management plan will incorporate trails designed in accordance with best management practices that depend upon where the trail is sited. For example, different construction materials will be recommended for trails traversing wetlands than for others that are located on higher ground. Trails for forest product harvesting are often temporary and designed for removal after harvesting is completed.

287. COMMENT: If we wanted to make a trail on our property, the regulations say that they are exempt as long as we pay a hundred dollar fee, as long as we have a New Jersey professional engineer showing a proposed trail, construction detail, plats, a written description of the non-impervious materials used, which obviously cannot be gravel, and it has to show a copy of the deed that shows the property having a recreational or conservation easement. So based on that we cannot sell our easement, we cannot do a hiking trail? A swimming pool that uses 7,000 gallons of water a month is exempt. It is not open water yet a depression in a field that gets wet once a year is open water. (10, 87)

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288. COMMENT: What is the cost and benefit from regulating hiking trails? Why is there a requirement prohibiting hiking trails on private property that is not encumbered by easements? Hiking trails built with non-impervious material should not be part of these regulations. (30, 44-46, 87, 93, 116)

289. COMMENT: This section represents overreaching on the part of the DEP, in that it seems to imply that any hiking trails on private land which constitute a non-impervious surface but that are not subject to an easement or conservation restriction are then subject to regulation by the DEP. Such regulation of surfaces that are non-impervious and thus pose no environmental risks would be completely useless for the purposes of the Act. These trails, by definition would be penetrable and thus would properly absorb rainwater and run off, causing no harm to the water supplies within the preservation area. This regulation is thus arbitrary, irrational, and does not further the stated purpose of the Act. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE TO COMMENTS 287 THROUGH 289: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. A person creating a hiking trail that meets the criteria for exemption does not have to obtain a Highlands applicability determination unless the project will require an environmental land use or water permit from the Department other than an HPAA. If another environmental land use or water permit is not required, that person can still obtain a HAD to confirm that the proposed hiking trail activity meets the exemption criteria. The Economic Impact analysis in the proposal evaluated the costs and benefits relating to water quality and water supply issues and concluded that overall the rules will have a positive net economic effect.

The exemption for non-impervious hiking trails on private lands subject to a conservation or recreation easement does not prohibit hiking trails on private property. As explained in response to comment 285, it is possible that the type of trail described by the commenters would not meet the definition of major Highlands development and therefore would not be regulated under these rules. If a proposed trail meets the definition of major Highlands development but not the criteria for exemption at N.J.A.C. 7:38-

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2.3(a)8, an HPAA must be obtained. While a trail constructed with non-impervious materials does not affect water quality regardless of whether it is located on private land with or without a conservation or recreation easement, another goal of the Highlands Act is to protect recreational activities. Hiking trails on private lands containing an easement allow public access thereby providing a recreational opportunity, consistent with the goals of the Highlands Act, that is not available on private lands with trails but no easements. Consequently, it is appropriate to provide an exemption for trails constructed with non-impervious materials on private lands subject to conservation or recreation easements.

290. COMMENT: What about trails for ATVs, personal recreation, and land use that already exist? Are they to be restricted? (109)

RESPONSE: Trails that already exist are not regulated under the Highlands Act. There is an exemption for the construction or extension of trails with non-impervious surfaces on publicly owned lands or privately owned lands where a conservation or recreational use easement has been established. Otherwise, the addition of 0.25 of an acre or more of new impervious materials or the clearing of 0.25 of an acre or more of forest to build a new trail, to improve an existing trail, or to expand an existing trail would meet the definition of a major Highlands development and would thus be regulated.

291. COMMENT: N.J.A.C. 7:38-2.3(a)8 exempts the construction or extension of trails with non-impervious surfaces on publicly and privately owned land; however, the current definition of impervious surface found in the rules includes any improvement that reduces stormwater absorption. This definition requires greater flexibility as the use and construction of any trail will have the effect of reducing stormwater absorption which, when combined with the three percent impervious surface standard, will severely limit the ability of local government to implement even low impact trail systems and will reduce the ability to provide trail access to special needs individuals in conformance with Americans with Disabilities Act (ADA) requirements. (114)

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RESPONSE: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. The definition of impervious surface in the rules is that set forth in the Highlands Act. The Department believes that trails constructed with non-impervious surface, as defined in the rules, do not reduce stormwater absorption.

With regard to the impervious surface limit on development regulated by the Act, it should be noted that the rules include a provision at N.J.A.C. 7:38-3.5(a)2 that allows for the transfer of allowable impervious surface within the same HUC 14 of a watershed among non-contiguous lots in existence as of August 10, 2004, provided that the lots that will not be developed are deed-restricted such that no impervious surface may be placed on them in the future. This provision may be useful to local governments in the unlikely event that a trail constructed of impervious materials to provide access for special needs individuals exceeds the three percent impervious surface limit on a site.

292. COMMENT: At N.J.A.C. 7:38-2.3(a)9, private roads should be exempt like public roads. (9-12)

RESPONSE: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. The Highlands Act specifies that routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems by a State entity or local government unit is exempt, presumably because such projects have a public purpose, are undertaken with public money and provide benefits to the public at large. Therefore, it is appropriate to facilitate such projects by providing an exemption.

293. COMMENT: At N.J.A.C. 7:38-2.3(a)10, private transportation safety projects and bicycle and pedestrian facilities should be exempt like public facilities. (9-12)

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RESPONSE: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. The Highlands Act specifies that the construction of transportation safety projects and bicycle and pedestrian facility by a State entity or local government unit is exempt, presumably because such projects have a public purpose, are undertaken with public money and provide benefits to the public at large. Therefore, it is appropriate to facilitate such projects by providing an exemption.

294. COMMENT: At N.J.A.C. 7:38-2.3(a)11, private utility lines should be exempt like public facilities. (9-12)

RESPONSE: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. The Highlands Act specifies that routine maintenance and operations, rehabilitation, preservation, reconstruction, repair or upgrade of public utility lines, rights-of-way, or systems, by a public utility is exempt presumably because such projects have a public purpose and provide benefits to the public at large. Therefore, it is appropriate to facilitate such projects by providing an exemption.

295. COMMENT: The commenter's right-of-way traverses across the New Jersey Highlands in the towns of Mahwah, Ringwood, West Milford and Vernon. In maintaining its pipeline in compliance with the Federal Natural Gas Pipeline Safety Act 49 CFR, Part 192, the commenter occasionally undertakes necessary public safety projects, "regulated activities" within the Highlands. These activities are undertaken in full compliance with both the federal and state environmental regulations, including wetlands, endangered species, and historic preservation. Currently, N.J.A.C. 7:38-2.3(a)11 recognizes an exemption for routine maintenance for public utility lines. However, a contradiction in N.J.A.C.7:38-2.4(b) requires any project in the preservation area to obtain a Highland applicability determination. This determination process takes valuable time away from required annual maintenance schedules that must be adhered to

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per Federal law and to fully protect the pipeline, public safety and the environment. The regulation as presently written causes a significant delay for emergent public safety maintenance tasks. We request that the proposed N.J.A.C. 7:38-2.4(b)4 be explicitly applied to the maintenance of existing natural gas distribution and transmission systems.
(64)

RESPONSE: The commenter is advised to apply for a Highlands applicability determination (HAD) to cover the full spectrum of maintenance, rehabilitation, reconstruction, repair or upgrade activities that it intends to conduct in the preservation area to confirm that the activities are exempt from the Highlands Act and therefore from regulation under these rules in accordance with N.J.A.C. 7:38-2.3(a)11. Once this HAD is obtained, the applicant can submit it with any future applications for an environmental land use or water permit from the Department. The Department will not require a new HAD for every occasion of maintenance so long as the activities to be conducted are consistent with those found to be exempt in the applicability determination.

The commenter is invited to describe to the Department the full range and scope of activities that may be undertaken as part of maintenance of existing natural gas transmission and distribution lines. If some or all of the activities lend themselves to clear description and are easily and quickly discernable in an application, the Department will consider adding such activities to the provisions at N.J.A.C. 7:38-2.4(b).

296. COMMENT: When the Act was originally written it appears that the authors did not consider all the existing infrastructure aside from public utilities which are normally thought of as water lines, sewer lines, etc. Under the rules, under N.J.A.C. 7:38-2.3(a)11, the existing exemption provides for routine maintenance for public utility lines, rights-of-way or systems. To be exempt, the activity must be conducted by a public utility. We would suggest that this language be modified to include other infrastructure systems such as natural gas or electric transmission that may be not considered a public utility, but serves to deliver or provide gas and electricity to public systems. Maintenance activities for such entities take place within the limits of existing rights-of-way or footprints of

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disturbance. Therefore, such an exemption should apply to all infrastructure systems, not just so it's considered the "public utilities." (115)

RESPONSE: The Act and these rules define public utility as it appears in the Department of Public Utilities Act (N.J.S.A. 48:2-13). The definition provides that public utility includes individuals, copartnerships, associations, corporation or joint stock companies, that own, operate, manage or control within New Jersey any railroad, street railway, traction railway, autobus, charter bus operation, special bus operation, canal, express, subway, pipeline, gas, electricity distribution, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted by the State or by any political subdivision of the State. Thus, the pipelines and infrastructure that the commenter describes are considered a public utility and therefore eligible for the exemption.

297. COMMENT: N.J.A.C. 7:38-2.3(a)11 states that telecommunications equipment can be sited on existing utility structures. However, the regulations require that you must have a 10-by-20 concrete pad underneath the existing structure. Utility companies, for the most part, will not allow anything to be sited under their structures. They need that space for safety and for access for their own maintenance. Nine out of ten times they will make the site adjacent to the structure available. Whether directly underneath or next to the structure, the impervious coverage is the same. The fact that the rule restricted the equipment to a 10-by-20 foot pad is also not a very good idea only because many carriers will put installations on concrete piers which in fact are less impervious coverage than the 10-by-20 foot pad. So if the idea was to limit the impervious coverage to 10-by-20 feet, we would ask that the regulations say that you cannot create more than a 10-by-20 foot area of impervious coverage. (17)

298. COMMENT: For the purposes of the exemption at N.J.A.C. 7:38-2.3(a)11i, installation of cellular equipment on a legally existing overhead utility tower and the construction of the attendant 10-foot by 20-foot pad, when located within the four

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footings of such tower within a right-of-way owned or controlled by a public utility, constructed with the consent of the public utility is consistent with the goals and purposes of the Highlands Act. This exemption should be modified to state: "For the purposes of this exemption, the installation of cellular equipment on a legally existing overhead utility tower and the attendant equipment shelter or cabinets to be installed near the base of the tower either on concrete piers or on a 10x20 foot pad, located within a right-of-way owned or controlled by a public utility is consistent with the goals and purposes of the Highlands Act." (17)

RESPONSE TO COMMENTS 297 AND 298: The 10 foot by 20 foot pad size was established based on the Department's experience reviewing applications for cell towers under the Highlands Act to date. For the purposes of this exemption, the Department requires that these structures be located within the four posts of the utility pole because it is recognized this area is already substantially disturbed by the presence of the tower and maintenance activities, and because applicants to date have offered this location as viable. Allowing disturbance outside of the four posts of the utility pole in areas without previous disturbance, whether on a pad or piers, may result in disturbances of Highlands resource areas that the Act clearly intended to regulate.

299. COMMENT: The goal of the Highlands Act and the regulations to protect the watershed of the affected areas is very important. I think everyone would agree that the watershed should be protected. However, our concerns are how the Act and the regulations will affect the wireless telecommunication provider and in turn those people in need to make a call especially in emergency type situations. Telecommunication's provider are governed by two federal statutes. The first statute is the 1996 Telecommunications Act. The second is the Wireless Public Safety Act of 1999. These Federal statutes are in place to ensure the provisions of wireless telecommunications throughout the state and to promote safety for those people whether they are residents, commuters, hikers, or people in emergency type situations, including fire, police and First Aid. The Highlands Act and its regulations may well be in conflict with these federal

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statutes. The regulations set forth certain exemptions such as utility installation, military installations, and other types of construction. They do not exempt telecommunications.

The regulation also set forth certain waivers to protect public health and public safety.

This is one of the goals of the Public Safety Act of 1999. While the waivers are for laudable purposes, the telecommunications area has been omitted and thereby may possibly create a barrier to entry in the preservation area which would be contrary to federal law. We do not understand why utility towers may be exempted but telecommunication towers are not. The impervious coverage for some of the exemptions is a lot more than a telecommunication site would be. These regulations tend to discriminate against the carriers and may create a prohibition of services, again, in violation of Federal statutes. We request that an exemption for telecommunications be drafted to encompass all types of installation whether they're collocations or raw land build, because either type of installation does not have an impact on the watershed. (17)

RESPONSE: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. The Department interprets the exemption at N.J.A.C. 7:38-2.3(a)11 to include certain cell tower construction activities that the Department has determined are consistent with the purpose and intent of the exemption and thus the Highlands Act. For cell tower activities that do not meet these criteria, the applicants must obtain an HPAA. The Department believes that there is adequate opportunity for cell towers to be located in the preservation area, while avoiding impacts to Highlands resources. However, in the unlikely event that the construction of a cell tower cannot satisfy the HPAA requirements, and the applicant can demonstrate that the tower is necessary to protect public safety, the applicant may apply for a HPAA with a waiver for public health and safety. See N.J.A.C. 7:38-6.5.

300. COMMENT: There is a cell tower addendum; however, there is nothing in the regulations that refers to it. So we would request that in the regulations something actually refers to the addendum itself because now you have a piece of paper that's not referred to in the regulations. The cell tower addendum does state that you can collocate

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and you are exempt under certain conditions. But it also states that you can collocate to existing antennas on a building. Antennas do not co-locate to each other. You co-locate your antennas onto a building or onto a structure. You cannot put your antennas on top of somebody else's antennas. Also, if you are co-locating on a rooftop, for instance, you are not increasing any impervious coverage. Nothing is on the ground. That should be part of the exemptions. (17)

RESPONSE: The "cell tower addendum" is a guide to the application requirements for applicants proposing wireless facilities. It is intended to help streamline the application process for those applicants, but it does not replace or supersede the requirements at N.J.A.C. 7:38-9.2. The guidance in the cell tower addendum was revised in May 2006 regarding the co-location of antennae. The commenter also suggests that there should be an exemption for co-locating on a rooftop since there is no increase in impervious cover. The exemption at N.J.A.C. 7:38-2.3(a)4 allows the reconstruction of buildings and structures within 125 percent of the footprint of lawfully existing impervious surface. The co-location on an existing building would be eligible for this exemption.

301. COMMENT: The proposed regulations do not address the specialized needs and federal interests associated with telecommunications facilities. For example, although a telecommunications permit form, identified as the cell tower addendum, has been utilized by the DEP, the regulations make no reference to this particular form. For the sake of clarity and efficiency, an unmistakable telecommunications exemption should be clearly outlined in the regulations. Most importantly, however, telecommunication facilities should not be treated any differently than exemptions for purposes of the exemptions than public utilities or affordable housing, each of which meets a vital and important public health, welfare and safety need. Moreover, the Telecommunications Act of 1996 provides that governmental agencies should not discriminate among functionally equivalent services. The singling out telecommunication facilities for special regulation may well be in conflict with the Telecommunications Act. (17)

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302. COMMENT: Many of the rules that are written right now in the addendum can be changed to modify and get to the goals that are required. If the impervious coverage is not increased, then it should be an exemption like some of the other exemptions. The Highlands Council and the DEP need to weigh the benefits of providing callers with the ability to communicate whether in a residential setting or most importantly in an emergency type situation against any perceived detriment that the installation may have on the watershed. The commenter is willing to meet with the DEP and the Highlands Council to help draft a telecommunications exemption that would be clear and concise. We need to reconcile the State regulations with the Federal statutes that are already in place. (17)

RESPONSE: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. The Department interprets the exemption at N.J.A.C. 7:38-2.3(a)11 to include certain cell tower construction activities that the Department has determined are consistent with the purpose and intent of the exemption and thus the Highlands Act. For cell tower activities that do not meet these criteria, the applicant must obtain an HPAA. The Department believes that there is adequate opportunity for cell towers to be located in the preservation area, while avoiding impacts to Highlands resources. However, in the unlikely event that the construction of a cell tower cannot satisfy the HPAA requirements, and the applicant can demonstrate that the tower is necessary to protect public safety, the applicant may apply for a HPAA with a waiver for public health and safety. See N.J.A.C. 7:38-6.5.

The “cell tower addendum” is a guide to the application requirements for applicants proposing wireless facilities. It is intended to help streamline the application process for those applicants, but it does not replace or supersede the requirements at N.J.A.C. 7:38-9.2.

303. COMMENT: For a cell tower application to be considered for possible exemption, the application must meet the following criteria: The proposed project must be (1) located on a telecommunications facility that existed prior to August 10, 2004; and (2) the

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proposed project would not create an increase in impervious surface and must be within the existing fenced compound or attached to the existing antennas on a building. Delete item (1). It is irrelevant whether the proposed project will be sited in an existing facility or a new location, if the impervious surface is not increased. For example, an installation on a rooftop does not increase impervious surface, nor does the installation on an existing impervious surface such as a paved or gravel parking lot. (17)

304. COMMENT: The requirement that the proposed project be located within an existing fenced compound is without merit, as the impervious surface is not altered. The requirement that the project be attached to the existing antennas on a building is also not technically correct. Carriers do not attach their antennas to other antennas due to interference issues. A certain separation must be maintained between antennas. The argument remains the same, if there is no increase in the impervious surface, there is no detriment to the water supply and, therefore, the installation should be allowed. To simplify the exemption it is recommended that the existing language be amended as follows: For a cell tower application to be considered for an exemption: (1) The proposed project shall not increase the existing impervious surface of the property; or (2) If the impervious surface is increased, it remains within the allowable impervious surface coverage. (17)

RESPONSE TO COMMENTS 303 AND 304: The Department assumes that the commenter is referring to the language found at proposed N.J.A.C. 7:38-2.4(b)9. If an applicant wants a written determination regarding whether or not a proposed activity meets the definition of major Highlands development or is exempt, they have the option of obtaining a Highlands Applicability Determination (HAD). A HAD is voluntary unless an applicant applies to the Department for another Land Use Regulation permit such as a freshwater wetland or stream encroachment permit to conduct the same activity. A HAD is then required so that the Department can apply the appropriate rules to the proposed activity review and issue the appropriate approval (for example, a Highlands preservation area approval vs. a freshwater wetland permit). However, at proposed N.J.A.C. 7:38-

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2.4(b), the Department sets forth exceptions to the requirement to obtain a HAD if another Department permit is required. Thus, N.J.A.C. 7:38-2.4(b) does not set forth criteria for exemption but rather provides a subset of exempt activities, for which an applicant may apply directly to the Department for certain environmental and land use permits without having first obtained a Highlands Applicability Determination. The activities outlined in this section are those activities that the Department considers clearly exempt from the Highlands Act, thus requiring no additional documentation to prove exemption status. The Department established the list of activities in this section based on its experience in reviewing HAD applications.

As is the case with any project, if the applicant is confident that the proposed project is exempt from the Highlands Act and does not require an environmental or land use permit from the Department, the Department does not require that the applicant obtain a HAD. In this case, the applicant may proceed at his or her own risk, understanding that should they be wrong in their determination that they are exempt, they will be in violation of the Act.

The commenter suggests that there be an exemption for cellular towers where there is no increase in impervious cover. The exemption at N.J.A.C. 7:38-2.3(a)4 allows the reconstruction of buildings and structures within 125 percent of the footprint of lawfully existing impervious surface. The placement of a cell tower on an existing building or structure, where there is no increase in impervious cover, would be eligible for this exemption.

305. COMMENT: We would respectfully request that the Department consider revising N.J.A.C. 7:38-2.3(a)11 to include the language “For purposes of this exemption, installation of wireless communication equipment including but not limited to antenna of a licensed wireless communication provider on an existing tower, or an existing overhead utility tower within a right-of-way owned or controlled by a public utility, and the construction of an equipment shelter or cabinets, comprising not more than 360 square feet, is consistent with the goals and purposes of the Highlands Act and this exemption.” This revision to the rule proposal is intended to effectuate two purposes. The first is to

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encourage co-location of wireless communication facilities not only on legally existing overhead utility towers controlled by a public utility, but also to permit, consistent with the goals and purposes of the Highlands Act, co-location on existing towers. In addition, the revision to allow up to a 360 square foot shelter and/or cabinet is intended to reflect the size of equipment shelters and cabinets used by the wireless communication providers in conjunction with the operation of their wireless communication facilities. (16)

RESPONSE: Co-location on existing towers is an exempt activity if it meets the criteria in the exemption set forth at N.J.A.C. 7:38-2.3(a) 4 that allows the reconstruction of buildings and structures within 125 percent of the lawfully existing impervious surface.

The 10 foot by 20 foot pad size was established based on the Department's experience in reviewing cellular tower applications under the Highlands Act to date. This 10 by 20 pad is the size of pad that is commonly proposed in Department submittals and therefore the Department considers this size to be sufficient to construct a cellular tower.

306. COMMENT: N.J.A.C. 7:38-2.3(a)12 exempts the reactivation of rail lines and rail beds existing on August 10, 2004, the effective date of the Highlands Act. This exemption should be deleted from the rules. Allowing passenger rail service into rural areas can lead to sprawl by making it attractive for commuters who work in areas with higher density to live farther and farther from where they work. These residents then create traffic-related impacts with non-work trips. The New Jersey Department of Transportation estimates that the average New Jersey household makes 10 to 12 trips per day. Even in a double-income household that relies on transit for commuting purposes, that leaves six to eight trips per day that will not be done on the train. The Highlands Council should review all rail projects, be they ones where the lines and beds are on the ground or ones that are starting from scratch, not because of the pollution caused by trains, but because of the effects adding train stations will have on the development in the protected core. (15, 68, 72)

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307. COMMENT: At N.J.A.C. 7:38-2.3(a)14, if the proposed regulations exempt mining, all other activities should be viewed relative to this. For example, these proposed regulations exempt hiking trails on private land only if the land has certain easements yet the same land can support mining? What is the cost and benefit to the State of this regulation? (9-12)

308. COMMENT: Mines are exempt from these regulations. How can you balance the draconian regulation of private land with this and what is the cost/benefit? (30, 45, 46, 93, 115)

309. COMMENT: The exemption addressing affordable housing subject to a “Superior Court - Builders Remedy/Settlement” (N.J.A.C. 7:38-2.3(a)17) should be modified to exempt all affordable housing projects planned in the preservation area that may not have been mandated by a settlement agreement but which were approved by COAH in housing plans. In the interests of meeting affordable housing needs, and notwithstanding those rules identified at N.J.A.C. 7:38-6.4(a)4 and N.J.A.C. 7:38-6.9 concerning waivers in 100 percent preservation area communities, affordable housing projects should be exempted throughout the preservation area, provided the project is 100 percent affordable and meets all COAH and other NJDEP requirements. (114)

RESPONSE TO COMMENTS 306 THROUGH 309: As explained in previous responses, the Highlands Act prescribed the developments and activities that are exempt from regulation under these rules. As also explained previously, the Highlands Act contains several goals including encouraging appropriate patterns in certain areas of compatible residential, commercial, and industrial development, redevelopment, and economic growth consistent with the State Development and Redevelopment Plan. Providing affordable housing is a constitutional mandate and can be accommodated in portions of a township outside the preservation area, in most cases. The Department has provided a waiver at N.J.A.C. 7:38-6.9 for certain townships located entirely within the preservation area to provide 100 percent low and moderate income housing.

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Mining activities have existed in the Highlands Region since pre-colonial times. Consequently, it is appropriate to maintain existing mining operations by providing an exemption. Because people will continue to live and work in and around the Highlands Region, reactivation of rail lines to facilitate mass transit in the region is consistent with smart growth strategies and principles and therefore consistent with the Highlands Act. It should be noted that the Highlands Council is independent of the Department, and the Department's rules do not address Council obligations or ability to review projects. The Council may consider rail lines as it develops the Regional Master Plan. The Economic Impact analysis in the rule proposal evaluated the costs and benefits relating to water quality and water supply issues and determined that the rules in their entirety provide a positive economic benefit.

7:38-2.4 Applicability determination

310. COMMENT: Since the promulgation of the Highlands rules, certain of our existing facilities have been interpreted by DEP staff to be subject to N.J.A.C. 7:38-2.4(a), requiring a Highlands applicability determination, especially with regard to the routine maintenance and operation of the pipeline through wetland areas requiring a Freshwater Wetlands Protection Act permit. This interpretation of the Act, verifying a listed maintenance exemption, takes valuable time away from the required annual maintenance schedule that must be adhered to per federal law and to fully protect the pipeline, public safety, and the environment. (64)

RESPONSE: The commenter is advised to apply for an HAD to cover the full spectrum of maintenance, rehabilitation, reconstruction, repair or upgrade activities that it intends to conduct in the preservation area to confirm that the activities are exempt from the Highlands Act and therefore from regulation under these rules in accordance with N.J.A.C. 7:38-2.3(a)11. Once this HAD is obtained, the applicant can submit it with any future application for an environmental land use or water permit from the Department. The Department will not require a new HAD for every occasion of maintenance so long

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as the activities to be conducted are consistent with those found to be exempt in the applicability determination.

311. COMMENT: Regarding Highland applicability determinations, N.J.A.C. 7:38-2.3 lists 17 exemptions; however, N.J.A.C. 7:38-2.4(b) identifies only 10 exemptions that do not need a Highlands applicability determination. (114)

RESPONSE: A HAD is only required to be obtained when a project requires a Department environmental land use or water permit (for example, a freshwater wetlands permit). The purpose is to determine if the project is a major Highlands development and if so, whether it is subject to the Highlands rules and requires an HPAA or is exempt. If the project is not a major Highlands development or is exempt from the requirement to obtain an HPAA, the project will be subject to other DEP rules as applicable. N.J.A.C. 7:38-2.4(b)1 through 10 establish a subset of activities from within the 17 exemptions for which an applicant may apply directly to the Department for the environmental land use or water permit without first obtaining a Highlands applicability determination (HAD). The 10 activities listed at N.J.A.C. 7:38-2.4(b) do not require a HAD because the Department can quickly and easily identify them as exempt activities without the need for extensive documentation or analysis.

312. COMMENT: The language concerning general exemptions should be expanded so that it is clear and substantially inclusive to prevent the need for HAD determinations in all but the most unique circumstances. Local building officials should be able to make this determination. If interpretation is still needed, there should be no fee for determining if a project is exempt, or whether it is defined as a “major Highlands development.” The NJDEP should develop definitions suitable to determine this status in most instances and should not charge a fee for this interpretive activity. (114)

RESPONSE: The Highlands Act charged the Department with the development and implementation of a regulatory program for the Highlands preservation area. As such,

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the Department maintains the authority to determine whether or not a proposed project is exempt from that regulatory program. An exemption determination can involve research, documentation and analysis and as such the Department must charge a fee to cover the expense of such a review. Local building officials would likely not want to add this additional, time-consuming undertaking to their daily responsibilities, without hiring additional staff. To date, the Department has received 592 applications for HADs. In addition, the Department believes it is important, in order to satisfy the goals of the Highlands Act, to ensure that requests for exemptions are treated consistently throughout the preservation area and that there are not different interpretations from one township to the next.

Applicants proposing projects that meet the criteria set forth in N.J.A.C. 7:38-2.4(b) do not need to apply for a Highlands Applicability Determination (HAD), even in the case where the activity requires another Department permit. Furthermore, for those projects that are not listed in N.J.A.C. 7:38-2.4(b), a HAD is voluntary unless an applicant applies to the Department for another Land Use Regulation permit such as a freshwater wetland or stream encroachment permit to conduct the same activity. A HAD is then required so that the Department can apply the appropriate rules to the proposed activity review and issue the appropriate approval (for example, a Highlands preservation area approval vs. a freshwater wetland permit).

The Department is working daily to standardize the interpretation of exemption criteria to streamline the process as much as possible. If the Department is successful, it may move additional categories of activities to N.J.A.C. 7:38-2.4(b) so that applicants will not need to obtain a HAD.

313. COMMENT: Restricting HAD exemptions to the five improvements specified at N.J.A.C. 7:38-2.4(b)1 is inconsistent with N.J.A.C. 7:38-2.3(a)5 which exempts improvements to single family homes, “including, but not limited to, an addition, garage, shed, driveway, porch, deck, patio, swimming pool, or septic system.” (114)

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RESPONSE: As stated previously, the activities at N.J.A.C. 7:38-2.4(b) are a subset of the full list of exempt activities listed at N.J.A.C. 7:38-2.3. The activities listed in N.J.A.C. 7:38-2.4(b)1 through 10 are those activities that the Department has determined clearly meet the requirements for exemption from the Highlands Act and these rules, such that no additional documentation to demonstrate exemption status is necessary when the activity requires another Department land use or water permit. If an activity would likely fall under the N.J.A.C. 7:38-2.3(a)5 exemption but is not one of the specific types of improvements listed at N.J.A.C. 7:38-2.4(b)1, and if the activity would require another Department-issued land use or water permit, then the person proposing to undertake the activity would need to obtain an HAD so that the Department can determine if the project satisfies the exemption contained in the Highlands Act and these rules.

314. COMMENT: At N.J.A.C. 7:38-2.4(a)4, does a determination of agriculture exemption require an "in depth analysis" as stated in the summary? Is it the intention of these proposed regulations that a farmer must apply for exemption each time they wish to plow a field (disturbance of more than an acre)? The proposed regulation states that a Highlands applicability determination be obtained by applicants including those seeking additions and improvements to single family homes that existed on August 10, 2004. Does a home owner need to apply to the DEP each time they wish to get a building permit? Does putting a new light in the bathroom have an effect on the water supply? What is the threshold? Who is going to pay for this tremendous increase in administration? No cost/benefit on the requirement of applying for an exempt activity can be found in the supporting documents. This permit area is well covered by the existing code and enforcement personnel and does not need a new excessive layer of bureaucracy to add little value and tremendous cost and time to this one part of the State. (9-12)

RESPONSE: Determining whether agricultural and horticultural uses are part of major Highlands development and therefore regulated under the Highlands Act does not require an in-depth analysis. Consequently agricultural and horticultural uses are included on the list of activities at N.J.A.C. 7:38-2.4(b) for which no Highlands applicability

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determination is required. Since plowing a field is part of an agricultural use, the activity is not regulated under the Highlands Act and does not require an applicability determination. As stated in response to comments 209 through 216, in order to be regulated as a major Highlands development under the Highlands rules, an activity must include a development activity. Making any changes to the interior of a house are not development and are therefore not regulated. Making cosmetic changes to the exterior of a structure (for example, painting or siding) are not development and therefore are not regulated by the Highlands rules. Improvements to single family dwellings, lawfully existing on August 10, 2004, including but not limited to additions, garages, shed, driveways, porches, decks, patios, swimming pools or septic systems, are exempt activities (see N.J.A.C. 7:38-2.3(a)5) so long as the improvement maintains the single-family use of the dwelling. The Department provided an Economic Impact with the rule proposal that evaluated the costs and benefits of the rule as a whole and made the finding that the rules in their entirety provide positive benefits.

315. COMMENT: Water is a key to agricultural viability. Without it agricultural could not exist. The Farm Bureau would like to reaffirm the importance of the exemption for agriculture from a section of the rules dealing with the applicability for purpose of public water supply system, water allocations, and water use registrations. The exemption for agriculture and horticultural practices is another important aspect of this rule. The Farm Bureau has heard several reports from farmers of DEP Land Use Enforcement officials requiring agricultural operators to file applications to substantiate this exemption. Exempt should mean exempt. The DEP should inform its enforcement officials, as well as local governments, that agricultural and horticultural use are exempt from these rules and should not need a Highlands applicability determination. (66, 69, 87)

RESPONSE: The rules do not regulate water use by agricultural or horticultural operations within the preservation area any differently from the way such activities are regulated Statewide. The definition of major Highlands development in the Act exempts agricultural and horticultural development or use, so such uses are not governed by the

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50,000 gallons of water per day threshold established for other uses in the Highlands preservation area. Water diversion requests for agricultural and horticultural activities in the Highlands preservation area continue to be based on the 100,000 gallons of water per day threshold established elsewhere in the State under the Water Supply Management Act, and will be reviewed and assessed pursuant to the Agricultural, Aquacultural, and Horticultural Water Usage Certification rules at N.J.A.C. 7:20A.

The Highlands rules state at N.J.A.C. 7:38-2.4(b)6 that any activity that is part of an agricultural and horticultural use does not need a Highlands applicability determination, even when the activity requires another Department land use or water permit. The Department's enforcement program is aware of this. The Department has conducted outreach regarding the Highlands rules and continues to provide guidance regarding applicability of the rules as necessary.

316. COMMENT: The rule states "in order to verify that a proposed project meets a particular exemption the Department will need to conduct an in-depth analysis of the documentation". This is in conflict with the Act which intended to exempt farming activity from the Highlands Act. Farming and residences existing prior to the Highlands Act should not be required to perform such an expensive and rigorous review process. Future farm buildings for on-farm processing should also be exempt subject to local zoning and board of health requirements. This proposed rule is onerous, expensive, and conflicts with the intent of the Act which was to not do harm to farmers and residential owners. (45, 46)

317. COMMENT: I do not agree with the statement in the summary that says, "in order to verify that a proposed project meets a particular exemption the Department will need to conduct an in-depth analysis of documentation." The Act specifically exempted certain activities and those who undertake such activities should not need to prove once again that they are exempt. Applicability of things like wastewater management occur only at the level of a large project. Agricultural and single residential activities need not be subjected to such a rigorous and expensive review process. This is onerous and

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unnecessary and conflicts with the spirit of the act, which was to do no harm to individual residents and farmers. (28)

RESPONSE TO COMMENTS 316 AND 317: As stated in response to comment 314 above, agricultural activities do not meet the definition of major Highlands development, are exempt from the Highlands Act, and individuals performing such activities do not have to obtain a Highlands applicability determination (HAD), even in the case where the activity requires another Department permit. Also, as stated in the same response, development activities carried out at single family dwellings may either not be regulated because they do not meet the definition of major Highlands development, or may be exempt because they constitute an improvement to a single family dwelling. The Department does not require a HAD for driveway, garage or shed additions; an addition for residential purposes attached to the home; decks, patios, porches, swimming pools or septic systems since they are common, easily identifiable activities that clearly meet the exemption criteria. Other improvements to a single-family dwelling may be exempt but will require the submittal of documentation and information so that the Department can make a definitive determination. This wide range of exempt activities limits the impacts of the Highlands Act on residents and farmers.

318. COMMENT: We strongly support the language at N.J.A.C. 7:38-2.4(a)3, requiring applicability determinations to demonstrate consistency with areawide Water Quality Management Plans. The amendments at N.J.A.C. 7:38-2.4(b)2, 3i., ii, and iii, are reasonable and clarify the previous language. (73)

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

319. COMMENT: At N.J.A.C. 7:38-2.4(a)8, reliance on pre-existing memoranda of agreement or remedial action work plans does not consider the fact that many of these plans or agreements are of considerable age and did not anticipate the goals of the Act when executed. The selected options for clean-up may have been very different if the

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decision making framework was influenced by the proposed rules or the Act itself. For example, the selected options at Combe-Fill South Landfill, a superfund site located in Chester and Washington Townships, involved the destruction of considerable wetland areas and the depletive pumping of groundwater. We would suggest that the Department review these agreements or plans and issue an exemption based on their conformance with the proposed rule and the Act, rather than granting a blanket exemption. (73)

RESPONSE: The Department assumes that the commenter is referring to N.J.A.C. 7:38–2.4(b)8. Under the Highlands Act remediation of a contaminated site conducted pursuant to N.J.S.A. 58:10B-1 et seq. (the Brownfield and Contaminated Site Remediation Act) is exempt from regulation under the Highlands rules. Activities that are conducted in accordance with a memorandum of agreement or remedial action workplan for a clean-up conducted pursuant to the Brownfield Act meet the exemption since these oversight documents are issued in accordance with the Department’s rules at N.J.A.C. 7:26. Consequently, these activities do not require in-depth analysis by the Department to confirm that they are exempt so they have been included in the list of activities at N.J.A.C. 7:38-2.4(b) for which an HAD need not be obtained. The Act does not provide the Department the ability to selectively exempt remediations. It should be noted that even if an activity is exempt from the Highlands Act and these rules, it is still subject to other applicable Department regulations such as the Freshwater Wetlands Protection Act rules (N.J.A.C. 7:7A), which should ensure that concerns such as those raised by the commenter are appropriately addressed.

320. COMMENT: I understand that if you have an undeveloped approved lot, in order to do anything on it you have to apply for a Highlands exemption waiver. You are exempt, you are grandfathered because you have an approved subdivided, undeveloped lot within the Highlands preservation area. But you cannot go to your municipality and apply for a building permit without filling out a 24-page application and paying-- no longer \$100, but now \$700-- and waiting at least ten months so that the Highlands Council can grant you the exemption to which you are entitled under the Act. That's a serious problem. (37)

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RESPONSE: As stated in response to comments through 316 and 317, development activities carried out at single family dwellings may either not be regulated because they do not meet the definition of major Highlands development, or may be exempt because they constitute an improvement to a single family dwelling. The Department does not require submittal of an application for a Highlands applicability determination for the most common improvements to single family dwellings that require a building permit. Although the Department does not require an HAD be obtained for every major Highlands development, municipalities may require applicants to obtain a determination from the Department as to whether an HPAA is necessary as part of the application for, or as a condition of, municipal subdivision or site plan approvals. The application fee for individuals to obtain an HAD depends upon the cost of the proposed development. The fee for an individual to obtain an HAD for proposed development costing \$100,000 or less is \$100. For individuals proposing development exceeding \$100,000, the fee is \$750 to obtain an HAD. The Department notes that the Highlands Council is not involved in the Department's review of HPAA's or HADs and is not itself empowered to grant exemptions from the permitting requirements of the Act or these rules.

321. COMMENT: Regarding the applicability determinations, the Department is proposing to add a new N.J.A.C. 7:38-2.4(b)4 which states that maintenance operation, rehabilitation, reconstruction and repair of infrastructure would not require an applicability determination provided that the activities are confined to the existing footprint of development and do not increase conveyance capacity by increasing pipe size of sewer or water system. We suggest that the language also be modified to include natural gas and electric transmission as infrastructure since maintenance along these systems is typically limited to the existing rights-of-way or other footprints of disturbance, and does not include addition of impervious cover or changes from forested to nonforested vegetation types. (115)

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322. COMMENT: The commenter, while not strictly meeting the definition of a "public utility" proposed in N.J.A.C. 7:38-1.4, contends that activities associated with maintenance of existing natural gas transmission systems are also straightforward and should therefore also be exempt from requiring a Highlands Applicability Determination, as these activities are restricted to the limits of the existing right-of-way, involve temporary disturbance, and do not include addition of new impervious cover. Therefore, these activities meet the requirements outlined by N.J.A.C. 7:38-2.3(a)1i for the routine maintenance and operation of public utility lines, rights-of-way, or systems and should be exempt from the requirements to obtain a Highlands Applicability Determination. (64)

323. COMMENT: The proposed rule acknowledges that certain activities or projects are straightforward and as such, the Highlands applicability determination under N.J.A.C. 7:38-2.4 is not necessary. The Department lists examples of such projects to include routine maintenance and operations, rehabilitation, preservation, reconstruction and repair of transportation or infrastructure systems. Activities associated with maintenance of existing natural gas transmission systems are also straightforward and should therefore also be exempt from requiring a Highlands applicability determination. Such activities involve only temporary disturbance and do not include addition of new impervious cover. Therefore, these activities meet the requirements outlined by N.J.A.C. 7:38-2.3(a)1i for the routine maintenance and operation of public utility lines, rights-of-way, or systems. (115)

RESPONSE TO COMMENTS 321 THROUGH 323: The exemption in the Highlands Act and in the rules at N.J.A.C. 7:38-2.3(a)1i for public utilities requires that the proposed activities, in order to be exempt, must be "consistent with the goals and purposes of the Highlands Act." It was not clear at the time the Department proposed to readopt the rules what the range of public utility activities might be or how to determine in advance the sorts of activities that would be consistent with the goals and purposes of the Highlands Act. Consequently, the Department did not believe it appropriate to forgo a Highlands applicability determination for these activities at this time. Once the review of

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such activities becomes standardized, the Department will consider amending the rules to include this category of activity in the list of those for which an HAD is not required.

324. COMMENT: N.J.A.C. 7:38-2.4(b)1, which excludes certain types of activities from the requirement to obtain an applicability determination goes beyond the provisions of the Act. (9-12)

RESPONSE: The activities listed in N.J.A.C. 7:38-2.4(b) are those activities that the Department has determined clearly meet the requirements for exemption from the Highlands Act and these rules, such that no additional documentation to demonstrate exemption status is necessary when the activity requires another Department land use or water permit. Excluding certain straightforward activities from the need to obtain a HAD in the case where another Department permit is required helps streamline the permitting process for the applicant but does not affect, or “go beyond,” the substantive application of the resource protection standards in the rules.

325. COMMENT: The qualifier “provided the lot has not been further subdivided” means that if a single family lot is subdivided for any reason, all improvement exemptions are eliminated. Certain exceptions should be considered, otherwise, the owners of larger parcels will be discouraged from selling or dedicating portions of such property for such uses as local/county parks, open space, conservation or farmland preservation, due to the loss of exemption for the original existing parcel. It should also be made clear in the rule that the definition of the term “subdivision” shall be identical to that contained in the Municipal Land Use Law (C.40:55D-7) and, as such, does not include certain MLUL exempted activities, e.g., divisions of property by testamentary or intestate provisions, divisions of property upon court order, etc. (114)

RESPONSE: The Department believes the commenter has confused two provisions in the rules. N.J.A.C. 7:38-2.4(b)1 describes a subset of the activities within the category of improvements to a single family dwelling that the Department has determined clearly

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meet the requirements for exemption from the Highlands Act and these rules, such that no additional documentation to demonstrate exemption status is necessary when the activity requires another Department land use or water permit. Consequently, this category of activities is limited to improvements to houses on lots that have not been further subdivided. However, the exemption for improvements to single family dwellings at N.J.A.C. 7:38-2.3(a)6 does not contain the limitation that the lot cannot have been further subdivided. Therefore, a lot that is further subdivided in the circumstances the commenter describes remains eligible for the exemption for improvements to single-family dwellings but if a project or development requires a Department approval under another land use or water regulatory program, an HAD will be required.

326. COMMENT: N.J.A.C. 7:38-2.4(b)2, which excludes routine maintenance activities to transportation or infrastructure from the requirement to obtain an applicability determination, causes undue cost to the taxpayer with duplicate levels of government. (9-12)

RESPONSE: N.J.A.C. 7:38-2.4(b)2 enables a subset of routine transportation and infrastructure maintenance and repair activities to proceed through the DEP permitting process without having to first obtain an HAD to ensure the project is exempt from regulation under these rules. As explained in previous responses, the HAD process is necessary only for those projects that require a land use or water permit from the Department. Most transportation and infrastructure projects do require a DEP permit and so, but for the exclusion under 2.4(b)2, would also need an HAD. N.J.A.C. 7:38-2.4(b)2 is therefore a streamlining and cost-lowering provision.

327. COMMENT: The process for determining whether State, County and local projects are exempt should be streamlined and fees to public agencies should be eliminated. Any road improvement which is incorporated in the county master plan should be exempted. What is the basis for restricting the increase of a travel lane to 2,640 feet? (85, 87)

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RESPONSE: The Highlands Act at N.J.A.C. 13:20-28 establishes two exemptions for transportation systems: one for maintenance, rehabilitation, repair and reconstruction and a second for transportation safety projects and bicycle and pedestrian facilities. Both exemptions explicitly exclude those projects that would result in the construction of any new through-capacity travel lanes. The Act does not provide an exemption for any road improvement incorporated into a county master plan.

The 2,640 (one half-mile) travel lane length limitation in N.J.A.C. 7:38-2.4(b)2 and (b)5 was developed in consultation with the Department of Transportation, and together with the disturbance limit of two acres, establishes a threshold below which both agencies consider an improvement not to create a through-capacity travel lane. Transportation projects below these thresholds, that are not new roads, are presumed by the Department to not create new through-capacity travel lanes.

However, the Department believes the commenter has confused two provisions in the rules. N.J.A.C. 7:38-2.4(b)2 describes a subset of the activities within the category of “routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems” contained at N.J.A.C. 7:38-2.3(a)9 that are clearly exempt and therefore do not require a Highlands applicability determination. Consequently, this category of activities is limited to routine maintenance and operations, preservation, or repair of transportation systems that do not include new travel lanes or increase the length of an existing travel lane by more than 2,640 feet, not including tapers. A project that would increase an existing travel lane by more than 2640 feet and that requires a DEP land use or water permit might still qualify for exemption under N.J.A.C. 7:38-2.3(a)9 but would need an HAD. Because the review of a HAD requires Department staff and time, it is necessary and appropriate for the Department to charge a fee for public agencies since the majority of those maintaining public infrastructure systems are public agencies.

328. COMMENT: N.J.A.C. 7:38-2.4(b)3 should be amended to provide the flexibility to combine transportation projects that are adjoining or in the near vicinity of each other such that the effects on the area’s development and environment are cumulative. The

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DEP should have the authority to reject exemptions for projects that are altered so that they just fit under these limitations. Second, whether or not a transportation project adds through capacity to the Highlands should be determined by the entire scope of the project, not just the part of the project that is in the Highlands. For example, a project that adds two travel lanes in each direction which only goes 0.24 miles into the Highlands, but connects Route 78 to Route 206 will increase the amount of cars and trucks that enter the Highlands, even though only 0.48 miles of new lanes are being added. By limiting the DEP's ability to examine only the parts of road projects that are in the Highlands, the proposed rules ignore the potential for road projects that connect to the protected core to bring more traffic into the region. Any project that occurs within the Highlands that will add traffic to the protected area should not be allowed an exemption. Lastly, it should be clarified that the phrase "travel lanes that increase through capacity" applies to road and highway lanes and not to bicycle and pedestrian lanes. (15, 68, 72)

RESPONSE: The provision at N.J.A.C. 7:38-2.4(b)3 does not establish the criteria for an exemption. Rather it describes a subset of the activities within the category of "routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems" contained at N.J.A.C. 7:38-2.3(a)9 that are clearly exempt and therefore do not require a Highlands applicability determination before other Department land use or water permits are sought. However, the exemption at N.J.A.C. 7:38-2.3(a)9 does not contain these limitations. A project that exceeds the limits at N.J.A.C. 7:38-2.4(b)3 might still qualify for exemption under N.J.A.C. 7:38-2.3(a)9 but would need an HAD.

The Department has the ability to determine whether multiple transportation projects should be assessed as a single and complete project. For example, if a road project would not be undertaken without a second project, then the two projects may be considered a single project for purposes of assessing whether or not the activities are exempt under N.J.A.C. 7:38-2.3(a)9.

In accordance with the Highlands Act, these rules apply only in the preservation area. Consequently, the Department's review of a project is limited to the scope of the

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project proposed in the preservation area. However, the Department can refer projects that cross the boundary between the preservation and planning areas to the Highlands Council in accordance with N.J.S.A. 13:20-16 of the Highlands Act which states that the Council may provide comments and recommendations on any capital or other project undertaken by a State entity or local government in the Highlands Region.

Finally, the exemption in question refers to routine maintenance of "transportation systems." Such systems are commonly understood to be designed to accommodate motor vehicle traffic and thus the reference to and restrictions on travel lanes that increase through capacity are for travel lanes for motor vehicles not travel lanes for bicycles or pedestrians. Transportation safety projects and bicycle and pedestrian facilities, constructed by a State entity or local government unit may be exempt in accordance with N.J.A.C. 7:38-2.3(a)10.

329. COMMENT: For the most part, we find that the proposed rules follow the intent of the Highlands Act; however, there are a few areas that require clarification in order to close loopholes that can be exploited to advance transportation projects that can radically alter the character of Highlands' communities. In the proposed rules, at N.J.A.C. 7:38-2.4(b)5, exemptions are permitted for transportation safety improvements and bicycle and pedestrian facilities undertaken by a State or local government entity and do not require a formal Highlands applicability determination. There needs to be a strict definition for "safety improvement" project within the rules. To avoid projects being wrongly categorized as a "safety improvement" project, all projects that seek an exemption should have a detailed problem statement that gives the locations of the dangerous area and outlines specific plans to improve safety in those areas. Many times large road widening projects are advanced under the banner of "improving safety" when the new projects actually bring more traffic and a higher risk of traffic accidents. New travel lanes will also lead to increased speeds, meaning the accidents that do occur are more likely to be dangerous. For example, it is not uncommon for road widening projects to be classified by the NJ Department of Transportation or NJ Turnpike Authority as a safety project when the project will not make the road safer and will cause an increase in traffic in the

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area. The idea that road widening projects actually make roadways less safe in rural areas was studied in "Traffic Fatalities and Injuries: The Effect of Changes in Infrastructure and Other Trends" by Dr. Robert Noland of the Imperial College of Science, Technology and Medicine in England. Dr. Noland says, "Results actually tend to suggest the counter-intuitive hypothesis that these types of road 'safety improvements' actually lead to statistically significant, though small, increases in total fatalities and injuries." (pg. 2) Road widenings also lead to increased impervious surface coverage, more asphalt, more chemicals being added to the water supply by runoff and more soot being exhausted into the air. In Byram Township, where the Route 206 widening project is not categorized officially as a "Safety Improvement" project, proponents claim that turning the two lane road to a five lane highway will improve safety in the township. In Atlantic County's Galloway Township, a group of improvements together are classified a "safety improvement" project but the bulk of the cost will be used to increase lane capacity. (15, 68, 72)

RESPONSE: The provision at N.J.A.C. 7:38-2.4(b)5 does not establish the criteria for an exemption. Rather it describes a subset of the activities within the category of the construction of transportation safety projects and bicycle and pedestrian facilities at N.J.A.C. 7:38-2.3(a)10 that the Department has determined clearly meet the criteria for exemption and therefore do not require a Highlands applicability determination before other Department land use or water permits are sought. However, the exemption at N.J.A.C. 7:38-2.3(a)10 does not contain the limitations described in N.J.A.C. 7:38-2.4(b)5. Therefore, projects exceeding the limits at N.J.A.C. 7:38-2.4(b)5 might still qualify for exemption consideration but must obtain an HAD if other Department land use or water permits are required.

When considering an application for exemption for transportation safety projects, the Department examines the magnitude of the project, as well as other documentation provided by the applicant and the public regarding the purpose and need for the project.

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330. COMMENT: The language at N.J.A.C. 7:38-2.4(b)6 may prove troublesome in the future. Although it is understood that it was the New Jersey Legislature's intent to provide protection of the agricultural industry, we caution the Department that recent changes in the scale and character of what is termed "agricultural or horticultural development or agricultural or horticultural use" may cause projects to be proposed within the preservation area that have measurable and predictable negative impacts on Highlands resources. (73)

RESPONSE: While the Department acknowledges the commenter's concerns, the Highlands Act expressly exempts agricultural and horticultural uses and development from regulation under these rules. The Highlands Act does contain restrictions on certain agricultural activities, for example increasing impervious surface more than three percent at N.J.S.A. 13:20-29.

331. COMMENT: N.J.A.C. 7:38-2.4(b)9 which exclude certain types of telecommunication equipment from the requirement to obtain an applicability determination should give more flexibility for future technologies. (9-12)

RESPONSE: The provision at N.J.A.C. 7:38-2.4(b)9 does not establish the criteria for an exemption. Rather it describes a subset of the activities within the category of "routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines contained at N.J.A.C. 7:38-2.3(a)11 that the Department has determined clearly meet the criteria for exemption and therefore do not require a Highlands applicability determination (HAD) before other Department permits are sought. However, the exemption at N.J.A.C. 7:38-2.3(a)11 does not contain the limitations described in N.J.A.C. 7:38-2.4(b)9. Therefore, other types of projects remain eligible for exemption consideration but are required to obtain a HAD if these activities require other Department approvals. If the Department is able to identify other categories of telecommunication equipment that clearly meet the criteria for exemption, it may add to the list of activities for which an HAD is not needed at N.J.A.C. 7:38-2.4(b).

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332. COMMENT: N.J.A.C. 7:38-2.4(b)10 should require telecommunications equipment to be outside of the foot print of an electrical tower. (9-12)

RESPONSE: For the purposes of this exemption, the Department requires that these structures be located within the four footings of the utility tower because it is recognized this area is already substantially disturbed by the tower itself and maintenance activities. Allowing disturbance outside of this area for cellular telecommunications equipment is beyond the intent of the exemption since cellular companies do not own or lease the right-of-way, and may result in disturbances of Highlands resource areas that are regulated under the Act.

333. COMMENT: To eliminate conflict between N.J.A.C. 7:38-2.4(c) and the second sentence of N.J.A.C. 7:38-2.6(d), add the following sentence at the end of N.J.A.C. 7:38-2.4(c): "This subsection does not apply to NJPDES Permit No. NJ0088323 (see N.J.A.C. 7:38-2.6(d))." This is necessary because under the second sentence of 2.6(d), some requests for authorization (RFAs) under NJPDES Permit No. NJ0088323 (a general NJPDES permit) shall not be considered complete for review unless accompanied by an HPAA or a specified type of Highlands applicability determination. In contrast, at 2.4(c), notification to the applicant that an activity requires a Highlands applicability determination occurs following submission of the RFA under a general NJPDES permit. (63)

RESPONSE: The Department agrees and has modified N.J.A.C. 7:38-2.4(c) on adoption to clarify that unlike applications for other NJPDES permits, a request for authorization under NJPDES Permit No. NJ0088323 is not complete for review unless an HAD is obtained and provided with the request for authorization.

7:38-2.5 Applicability for purposes of public water supply systems, water allocations and water use registration

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334. COMMENT: N.J.A.C. 7:38-2.5(b)2 is contrary to the edicts and policy of the State of New Jersey as respects farming operations and the need to draw water for crop production and other agricultural and horticultural purposes and is not bound in reason. Existing regulations protect groundwater through requirements for recharge of the local aquifer. There is no legitimate basis in fact to prohibit the drawing of water from within the region as restricted in this and the related sections of the Act. The stated basis for the Act is to protect the groundwater of the region that is supposedly used by substantial portions of the State, yet the regulations seek to prohibit the use of the very resource the Act seeks to protect for the stated uses. (111)

RESPONSE: N.J.A.C. 7:38-2.5 as amended does not regulate water use by agricultural or horticultural operations within the preservation area any differently than such water use is regulated elsewhere in the State. The Department proposed and is adopting an amendment deleting the provision that had been at (b)2 that provided that the rule applied to any person intending to divert or proposing projects which would result in a diversion of more than 50,000 gallons of water per day for any purpose. The definition of major Highlands development exempts agricultural and horticultural development or use. As provided at N.J.A.C. 7:38-2.5(c), diversions for agricultural and horticultural purposes are not governed by the Highlands rules. Requests for diversions for agricultural and horticultural purposes in the Highlands preservation area are based on the 100,000 gallons of water per day threshold established under the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., and will be reviewed and assessed pursuant to N.J.A.C. 7:20A, the Agricultural, Aquacultural, and Horticultural Water Usage Certification Rules.

The Act and these rules do not prohibit diverting water from within the preservation area for anyone; rather there is a lower threshold for when a DEP permit is required for the diversion, 50,000 gallons of water per day versus 100,000 gallons of water per day in the remainder of the State. A rigorous assessment, at a lower water use threshold, of the impacts from a diversion or cumulative diversions on water resources, environmentally sensitive ecosystems and habitats, and existing users is necessary to

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protect the integrity of the preservation area. In addition, the lower regulatory water use threshold for diversions in the preservation area enables the Department to place conditions on withdrawals at lower quantities before adverse impacts occur.

335. COMMENT: The summary seems to imply that out of region withdrawal is acceptable if it is intended to support development outside of the Highlands Region. The summary fails to recognize that out of region withdrawal is more costly because the need to transport the water from one watershed to another requires some form of public or private infrastructure to convey the water to a central system. (85, 87)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-32i and these rules at N.J.A.C. 7:38-3.3 prohibit the construction of a new public water system or the extension of an existing public water system if it will serve development in the preservation area. This does not imply that it is acceptable to locate a water source within the preservation area so long as it is intended to serve development outside of the preservation area. A permit is required for all water withdrawals that reach the applicable threshold. However, the Act and these rules, do not prohibit movement of water to serve development outside of the preservation area, and the Department acknowledges that conveyances will be required. However, this movement would only be approved by permit when the impacts are fully assessed and conditions are placed on the diversion of the water so as to protect the integrity of the preservation area resources. The restrictions on development within the preservation area as prescribed by the Act and these rules, are intended to protect water resources to serve the long-term water supply needs throughout the region, while simultaneously protecting sensitive ecosystems within the preservation area.

336. COMMENT: When new natural gas transmission infrastructure is constructed, the integrity of the new pipeline must be tested prior to activation. This is typically done through a process known as hydrostatic testing. This entails filling the pipeline with water at a pressure comparable or equal to the proposed operating pressure. Hydrostatic testing is a one-time water use, but depending upon the length of pipeline to be tested, it can

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require a significant amount of water. The Act currently provides that any diversion of more than 50,000 gallons of water per day would require an HPAA. Therefore, hydrostatic testing could be subject to review if the water source is located within the Highlands preservation area. Since hydrostatic testing is a one-time use in water, with no permanent effect of water supply or availability, the commenter suggests that one-time water uses for the purpose of hydrostatic testing be exempt from the requirement for an HPAA. (115)

RESPONSE: Routine maintenance and operations, rehabilitation, preservation, reconstruction, repair or upgrade of public utility lines, rights-of-way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of the Highlands Act, are exempt from the requirements of this chapter pursuant to N.J.A.C. 7:38-2.3(a)11. As such, water could be diverted in accordance with the short-term water use provisions in the Department's Water Supply Allocation Permits rules at N.J.A.C. 7:19-2.17 (a) without the need for a water allocation permit. However, the construction of a new natural gas transmission line would require a Highlands preservation area approval (HPAA). When applying for an HPAA for a new natural gas transmission line, the applicant should inform the Department that the testing of the pipeline will require hydrostatic testing so that if the Department approves the permit, it can include a provision to allow the one-time water use necessary to accomplish the testing.

7:38-2.6 Applicability for purposes of wastewater discharges and treatment systems

337. COMMENT: We are concerned with the policy regarding the Department's desire to "bank" or "reserve" wastewater flows from the legislatively terminated sewer service areas in order to serve future growth. We fear this same approach is intended for the disposition of the unused portion of allocated water supply. The Highlands Act directed the Department to revise the Statewide Water Quality Management Plan and applicable areawide WQMP's to reflect terminated sewer service areas (SSAs) and wastewater flows from these areas. TWA's, to serve these areas were presumed to expire, except for exempt

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projects. The Act also prohibited extension of new water and sewer lines in the preservation area (the latter subject to a narrow public health waiver). Accordingly, the wastewater flow from those SSAs must be extinguished. Subsequently, NJPDES permits for the wastewater facilities assigned these flows should be modified to reduce the flows accordingly. If not, this capacity will spur unplanned growth and water quality degradation in the planning area. If NJPDES permits are not modified, Clean Water Act compliance issues are raised because the facility's design capacity, NJPDES permitted capacity, and user rate structure were based on wastewater flows and service areas delineated in approved Clean Water Act Section 201 or Section 208 plans. These plans included these terminated service areas and flows. Additionally, New Jersey law requires that all NJPDES permits be consistent with the applicable legislatively modified area-wide water quality management plan. (101)

RESPONSE: The Highlands Act revoked all sewer service area in the Highlands preservation area where collection systems were not installed on the date of enactment (August 10, 2004), except as necessary to serve development that was exempted by the Act. Using existing wastewater management plans, aerial photographs, treatment works approvals and other information made available to any designated wastewater management planning agencies, the Department proposed a modification of the adopted sewer service areas in the Highlands preservation area to revoke all that sewer service area in the Highlands preservation area where collection systems did not exist on August 10, 2004. The Department published a notice of the proposed modification for public comment in the September 19, 2005 New Jersey Register. Based on public comments received in response to that notice, the Department made revisions to the modified sewer service area map and published notice of the adoption of the modified sewer service areas in the November 6, 2006, NJ Register. However it should be noted that the Department began implementing the revocation immediately upon enactment of the Highlands Act through individual consistency determinations on a project-by-project basis. The revocation of sewer service area is also codified in the Highlands rules at N.J.A.C. 7:38-2.6.

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The Department has not taken formal action to modify the planned or permitted capacity at approved wastewater treatment facilities, because it is unknown at the present time whether that capacity will be needed to support the Highlands Regional Master Plan (RMP). Such a preemptive action by the Department could eliminate wastewater management alternatives essential to implementation of the RMP. Once the RMP is completed and adopted the Department may take action to reduce permitted capacity in accordance with the modified sewer service area and the RMP. Whether a municipality opts in to the RMP will be an important consideration in determining the fate of any excess capacity created by the sewer service area revocation.

The Department concurs with the commenter, that the wastewater treatment capacity made available by the revocation of sewer service area in the preservation area could be used to support additional growth in the Highlands planning area during the development of the RMP. For this reason the Highlands rules provide that Department will not adopt any proposed amendments to any areawide Water Quality Management Plan or Wastewater Management Plan in the Highlands Region without obtaining the recommendation of the Highlands Council. See N.J.A.C. 7:38-1.1(k). In this way the Highlands Council can inform the Department that a proposed amendment is potentially inconsistent with the direction of the RMP as it is being developed. This will prevent any excess wastewater treatment capacity made available by the revocation of sewer service area in the Highlands preservation area from being used for unplanned development that is inconsistent with the water quality and environmental protection objectives of the RMP.

338. COMMENT: The proposed rule at N.J.A.C. 7:38-2.4(b)8 does not recognize the scientific-based significance of the loss to ground-water recharge associated with the impacts related to contaminated soil and water, resulting from potential remedial efforts. As an example, the rule does not state that a major goal of remedial efforts in the Highlands will include the return of the treated water into the on-site or nearby geologic formations and/or aquifers. Without such direction, surface-water discharge permits and/or permission from local treatment works may be preferentially pursued.

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RESPONSE: The activities outlined in N.J.A.C. 7:38-2.4(b) are those activities that the Department has determined clearly meet the criteria for exemption and therefore require no additional documentation to demonstrate exemption status before another DEP land use or water permit is sought. The exemption for remediations at N.J.A.C. 7:38-2.3(a)15, provides that all remediations of contaminated sites activities conducted pursuant to N.J.S.A. 58:10B-1 et seq. are exempt. The Department does not believe it is appropriate to try to address specific details of site remediation as a condition of a Highlands exemption. Substantive issues regarding remediation activities including the potential return of ground-water within the Highlands region after treatment are more appropriately addressed comprehensively as part of a memorandum of agreement or remedial action workplan for a clean-up conducted pursuant to the Brownfield Act, issued in accordance with the Department's rules at N.J.A.C. 7:26C and 26E.

339. COMMENT: Revise the title of N.J.A.C. 7:38-2.6 to refer to "pollutant discharges" instead of, or in addition to, "wastewater discharges." The term "wastewater" is not defined in the Highlands Act, the NJPDES rules (N.J.A.C. 7:14A), or the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.), which is the primary statutory authority for the NJPDES permit program. The Water Pollution Control Act and NJPDES rules primarily require NJPDES permits for discharges of "pollutants," not "wastewater." (63)

RESPONSE: The Department agrees and has modified the title of N.J.A.C. 7:38-2.6 to "Applicability for purposes of NJPDES-permitted discharges and wastewater facilities" for clarification.

340. COMMENT: In the first sentence of N.J.A.C. 7:38-2.6(d), insert "(RFA)" after "request for authorization," and change "applications" to "RFA forms." In the NJPDES rules at N.J.A.C. 7:14A-1.2 and 6.13(d), the name of the document submitted to obtain

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authorization is more termed a “request for authorization” and not an “application.” The distinction is significant because of public participation requirements that apply to an “application” for a NJPDES permit but do not pertain to an RFA. (63)

RESPONSE: The Department agrees and has made the suggested change at N.J.A.C. 7:38-2.6(d) to clarify the rule.

341. COMMENT: Revise the second sentence of N.J.A.C. 7:38-2.6(d) by replacing the phrase “such a request for authorization” with “any request for authorization under this general permit for an activity in the preservation area.” This is necessary to make it clear that this provision only applies to the preservation area in light of the proposed amendment to N.J.A.C. 7:38-2.1(a) which extends the geographic applicability of this chapter to include the planning area. (63)

RESPONSE: The Department does not agree that the suggested change is necessary. The provisions at N.J.A.C. 7:38-2.1(a) do not result in an extension of the Department’s permitting authority into the planning area (see response to comments associated with N.J.A.C. 7:38-1.1).

342. COMMENT: It is not clear at N.J.A.C. 7:38-2.6(d) whether the phrase “such a request for authorization” means any RFA under general NJPDES permit NJ0088323 for an activity in the preservation area, including a project to be constructed by the NJ Department of Transportation (NJDOT) or whether this provision excludes projects being constructed by NJDOT because of the exception clause in the first sentence. Unless the activity is excluded in the provisions of N.J.A.C. 7:38-2.4(b), the fact that the activity is proposed to be constructed by NJDOT should not exempt it from the second sentence of N.J.A.C. 7:38-2.6(d). (63)

RESPONSE: In order for the Department, in the case of a DOT application, or the Soil Conservation District (District), in the case of all other applications, to know whether or

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not a request for authorization (RFA) and NJPDES Permit No. NJ0088323 can be approved, the Department or the District will need to know that the project is either exempt from the Highlands Act and consistent with a WQMP, or exempt from the Highlands Act and not addressed by a WQMP. Therefore, the phrase in question applies to all requests for authorization under the specified general permit. The Department has clarified N.J.A.C. 7:38-2.6(d) on adoption, and amended the second sentence so that it reads, "Notwithstanding N.J.A.C. 7:38-2.4(b) and (c), requests for authorization shall not be considered complete for review under N.J.A.C. 7:14A unless accompanied by a HPAA or a Highlands Applicability Determination that the proposed activity is exempt from the Highlands Act and consistent with a WQMP, or exempt from the Highlands Act and not addressed by a WQMP."

Subchapter 3 Preservation area standards

7:38-3.1 Scope and applicability

343. COMMENT: An applicant cannot be expected to provide credible proof for changes in resources between the 2002 aerial photographs and August 10, 2004. There was no legal requirement to document changes and rarely will documentation exist so verbal descriptions of the changes must suffice. In addition, numerous severe storms passed through the area during that period that have permanently altered the landscape and private citizens cannot possibly be expected to provide proof of those changes. (19, 28)

344. COMMENT: The burden of proof that removal of a resource occurred before the Highlands Act should not be on applicant. Such proof may be impossible to obtain. The burden of proof should be on the enforcement agency as it is under other New Jersey laws. Why should a different standard be inflicted on the residents of only the Highlands? (9-12)

RESPONSE TO COMMENTS 343 AND 344: Depending upon the nature of the activity that has occurred on a site, the owner will likely have some type of documentation that

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can help demonstrate when disturbance has occurred. For example, if an owner harvested trees in an area of forest, he or she may have a woodland management plan that provided the time frame for such activities or bills of sale from the wood produced from the forest. If someone began construction on a site, there would likely be building permits, or invoices from equipment rentals or contractors. Natural events (tree throws, stream flooding) would likely not result in changes that qualify as disturbance for purposes of this section since disturbance, as defined at N.J.A.C. 7:38-1.4, means the placement of impervious surface, exposure or movement of soil or bedrock, or clearing, cutting, or removing vegetation. Further, no documentation is required unless a property owner is proposing to undertake a major Highlands development. The obligation to demonstrate the presence or change in Highlands resources on a property resides with the applicant because he or she is applying to undertake a regulated activity and needs to demonstrate that the proposed project meets the criteria for approval under the rules. This is not an enforcement situation. The burden of proof would be on the Department in that context, where the agency is alleging an individual has violated the requirements of an environmental law or regulation.

345. COMMENT: The exemption language from subchapter 2 needs to be added to this section of the rules. This subchapter, which outlines the preservation area standards, continues to cause confusion as to whom it applies. (75)

RESPONSE: The Department acknowledges the commenter's concern. However, the Department believes the repetition of the exemptions listed in Subchapter 2 is unnecessary. N.J.A.C. 7:38-3.1(a) and (b) are phrased in terms of the issuance of an HPAA to an applicant. A person whose project or development meets the criteria of an exemption would not be an applicant seeking an HPAA, and so would not be subject to the requirements in Subchapter 3.

346. COMMENT: The rules regarding preservation area standards in Subchapter 3, will be extremely effective at protecting the resource values of the Highlands preservation

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areas. Departmental staff has done exceptional work at researching studies which justify the promulgation of these rules, especially the work of the authors of the report on the “Basis & Background of the Septic Density Standard.” The technical justification for the imposition of these standards is well documented, and the rules should be supported by most people who value the natural resources of the Highlands of New Jersey. (27, 49)

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

347. COMMENT: Change this section to exempt agricultural resources that existed prior to August 10, 2004 from credible proof of resources. This will eliminate utilization of a farmer’s precious time and associated expense. (45, 46)

RESPONSE: As explained in response to comment 345 above, Subchapter 3 applies only to applicants proposing to conduct a major Highlands development, which development is not exempt from the Highlands Act and therefore requires an HPAA. Agricultural and horticultural uses and development are expressly excepted from the definition of major Highlands development. Therefore, the requirements of Subchapter 3 are not applicable to agriculture.

7:38-3.2 Water supply allocation

348. COMMENT: It should not be possible to revoke an unused water supply allocation after it was approved. Demand reduction should be addressed in the areas that use the Highlands water, not just in the Highlands. Based on statistics from the water supply companies, waste in the infrastructure and waste by the end users is very high.

Allocations should not be taken away because they are not used. There are many reasons why an allocation may not be used, conservation being one of them and punishment for conservation is counterproductive. Health and livelihoods depend on water allocations and once approved, they should remain intact. Punishment for not using best management practices should be removed until such time that penalties are the same for such practices

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outside the Highlands. Withholding and reducing allocations has done serious harm to local business and farmers as has the increased costs of allocations. There is inherent injustice in a permitting process that is paid for by the owner, who then drills the well or puts in the pond at his own expense and then is forbidden to use it. (19, 28)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-32d provides that the Department may revoke unused nonpotable allocations where measures are not implemented to the maximum extent practicable to reduce demand. The Highlands rules incorporate this provision at N.J.A.C. 7:38-3.2(g). In addition, under the Act and these rules, all new or increased diversions are required to implement water conservation measures to the maximum extent practicable. See N.J.A.C. 7:38-3.2(d).

Under the Water Supply Management Act at N.J.S.A. 58:1A-7b, which applies throughout the State, the Department may, upon renewal of a permit, limit the amount of water it approves to the quantity that is currently being diverted, subject to contract, or reasonably required for a demonstrated future need. This provision enables the Department to reduce an allocation permit or agricultural water usage certification anywhere in the State, to the amount of water that is currently used or for which the applicant has demonstrated a reasonable future need. Thus, the Department is taking steps to require that water supply be conserved throughout the State. As described in more detail in response to comments 350 through 355 below, water conservation plans are a condition included in water supply application permits throughout the State. Further reductions in approved water allocations amounts are authorized in regions of the State where water supplies are severely impacted. The Department is authorized pursuant to N.J.S.A. 58:1A-7c to establish an area of critical water supply concern whereby the amount of water allocated, regardless of whether it is being currently used, may be reduced to protect the resource. An alternative source must be identified to make up for the reduction in allocation. Currently there are two such areas designated in central and southern areas of the State. The Department requires that best management practices be implemented throughout the state before making allocation decisions, in particular for

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non-potable consumptive uses such as turf irrigation. All of these measures apply to water users Statewide including those using water from the Highlands.

Also throughout the State, the Department requires agricultural operations to employ best management practices to conserve water and may reduce an allocation by the unused portion of water in the agricultural water usage certification. By incorporating water conservation technologies within their operations, water users ultimately lower costs due to energy savings resulting from reduced pumping. Therefore, while the amount of water in an allocation permit may be reduced as a result of conservation measures, the savings by conserving water will result in reduced costs for the permittee or water usage certification holder, and makes water available for another user or to protect natural resources.

349. COMMENT: The Department states that it will use passing flow assessment methods to protect the ecological integrity of the water bodies in the preservation area. While we agree with these intentions, the proposed rules do not address restoration of flows in systems where passing flows are currently insufficient or nonexistent. For example, flow levels in the Pequannock River, including segments within the preservation area are grossly inadequate and have caused extreme degradation of this waterway. Clearly, restoration of degraded flows is as important to water quality as the maintenance of existing flows. The rules should address this by reducing existing diversions in degraded watersheds and prohibiting new diversions within these watersheds. (50)

RESPONSE: Several major water supply systems located within the Highlands preservation area were in operation prior to enactment of the Highlands Act, including the City of Newark's Pequannock reservoir system. Millions of State residents and many businesses are dependent on these sources for water supply. In addition, future planned growth for those areas will depend on these systems for water supply. As such, the Department must carefully assess the impacts additional passing flows have on the systems' ability to meet current and future water supply needs in the State. In some cases

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the safe yields of these water supply systems were determined in consideration of existing passing flows. In others such as the Newark Pequannock reservoir system, the safe yield was established assuming no passing flow. Maintaining the safe yield of these water supply systems is paramount to protecting public health and safety, and ensuring there is sufficient water supply to meet the State's planned growth needs. The Department is currently undertaking an assessment of the safe yield of the northeast region of the State to determine if current supplies are adequate to meet current and future needs. Should it be determined that additional water supplies or increased withdrawals are required to meet future water supply needs, the preservation area should remain a potential source of this additional water, provided that the proposed diversions satisfy the requirements for an HPAA. Therefore the Department disagrees with the suggestion that no new water diversions be approved within these watersheds. The more rigorous impact assessments for water withdrawals required in the preservation area will enable the State to provide sufficient water supply to meet planned growth initiatives, while protecting water resources and sensitive ecosystems. Ensuring sufficient quantities of high quality water for State residents is a key objective of the Act.

The Department agrees, however, that strategies to improve passing flows to improve ecosystem viability within streams impacted by water supply system withdrawals should be assessed and implemented in a manner that minimizes impacts to system safe yields. This may require operational or structural changes to these systems. The Department has incorporated passing flows and other requirements in the water allocation permits of specific existing water supply systems in the preservation area. It continues to work with the operators of these systems to identify a balance whereby the water supply needs of the State are met, while protecting and enhancing the ecological and water resource values in the preservation area.

350. COMMENT: This section presents a problem of equal protection. Once water is part of a supply system, why should people in one part of New Jersey be treated differently than another part of New Jersey? If the purpose is to restrict the usage of water, these regulations should be Statewide. A person in the Highlands should not have their water

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usage limited while people at the other end of this water pipe have no restrictions. In essence, if the DEP wants to restrict water usage, it should be restricted equally in the state's other regions. People in the Highlands drink their water pretty much the same as people in Newark drink their water. This represents discrimination against people who live in the Highlands. (9-12)

351. COMMENT: N.J.A.C. 7:38-3.2(d) provides different rules for residents dependant on the area of the state they live in with no basis. This section violates the equal protection mandate of the U.S. constitution. (9-12, 107)

352. COMMENT: Our major water utility companies (United, Elizabethtown, etc.) are owned by other than American companies. (Thames - England/Germany, Suez - France.). Water use is to be restricted in the Highlands. Why not the entire state? Why no new water companies in the Highlands? (107)

353. COMMENT: Water usage should not be restricted to any degree greater than that of the rest of the State of New Jersey. N.J.A.C. 7:38-3.2(d) mandates that a project in the Highlands "must incorporate water conservation measures to the maximum extent practical." This discriminates against New Jersey residents in the Highlands. Water usage is equivalent in value at both ends of the water pipe. If more water is required, all residents should have an equal burden. This proposed regulation discriminates against the people of the Highlands. (9-12, 93)

354. COMMENT: Water usage in the Highlands is restricted. If water is to be restricted, why are only the people in the Highlands being discriminated by this? People who are using the water of the Highlands should take part in the pain since they use most of the water. If the DEP wants to constrict water usage, it should be only done in a non-discriminatory, Statewide basis. (30, 45, 46)

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355. COMMENT: The restriction on water usage in the Highlands, so severe at the source point, is irrational given that 80 percent of the water leaves the Highlands to be consumed elsewhere and subsequently flushed out to sea. Because there are no restrictions on the end user, this provision is arbitrary, capricious, and a violation of equal protection rights as the remedy is not rationally related to the stated objective of preserving drinking water supplies for all New Jersey residents. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67 71, 74, 78, 79, 87, 96, 98, 99)

RESPONSE TO 350 THROUGH 355: In the findings and declarations section of the Highlands Act (see N.J.S.A. 13:20-2), the Legislature stated that the Highland region is recognized as a landscape of special significance and is designated as a Special Resource Area under the State Development and Redevelopment Plan; that the Highlands is an essential source of water supply and contains exceptional resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, habitat, significant historic sites and provides abundant recreational opportunities for citizens of the State; and that large areas have been lost to development, more areas are threatened by development, and that the existing land use and environmental regulation system cannot adequately protect the water and natural resources of the region. To protect the natural resource values in the preservation area, the Act imposes more stringent environmental protections for the preservation area than are in effect in other areas of the State.

Because the extension of public water supplies in the preservation area would encourage additional sprawl development that would threaten those attributes that the Highlands Act is intended to protect, the Act at N.J.S.A. 13:20-32i includes a prohibition on the construction or expansion of existing public water systems, except in the case of a demonstrated need to protect public health and safety. The rules incorporate the prohibition.

However, as stated in response to comment 348, the Department's efforts to conserve water are not limited to the preservation area. Purveyors throughout the state, are required pursuant to the Water Supply Allocation Permit Regulations at N.J.A.C. 7:19-2.14(a)10 to implement conservation measures to ensure water is conserved to the

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maximum extent practicable. In addition, Statewide building codes requiring water saving devices be installed in new and modified structures have resulted in significant savings of water. The Department also reviews reports by purveyors in accordance with N.J.A.C. 7:19-6.4 for unaccounted water-- water that may have been lost due to distribution system leaks. If such unaccounted water exceeds 15 percent, the Department often requires as a permit condition that the purveyor assess the loss and provide a remedy. The Department may not approve a requested increase in an allocation until such time the unaccounted water is reduced to the maximum amount practicable. To conserve water for potable uses, the Department requires that the lowest quality water be employed for the intended use. For non-potable uses this requires an assessment of the feasibility of using reclaimed water for beneficial reuse. Therefore, the Department requires conservation and the proper use of water resources across the state, and not just within the preservation area.

The provisions in the Highlands Act and implemented by these rules benefit those residing or doing business within the preservation area. Placing restrictions on extending new or expanded water supply systems to serve development in the preservation area, and the additional requirements placed on diversions of water to protect water resources and dependent ecosystems protect the water supply for those living in the preservation area as well as those depending on this water who reside elsewhere.

Finally, regarding the ownership of water supply providers, water purveyors in the State may be owned by foreign companies but are required to comply with all applicable New Jersey law and regulations. There is no prohibition against water companies in the Highlands. The prohibitions are against extending or expanding water supply systems to serve new development in the preservation area.

356. COMMENT: With respect to allocated water, the Act established several new requirements in addition to the prohibition on extension of lines in the preservation area. Significant new provisions authorize the Department to: (a) rescind unused allocations; (b) reduce demand; (c) issue mandatory water conservation and depletive use standards, and (d) revoke unused allocations. We urge the Department to implement these

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provisions aggressively, and to not "bank" unused allocations for future growth, but instead retire and re-program this unused allocation capacity in accordance with the Act's preservation, water conservation, and depletive use standards, and the Council's regional Plan. (101)

RESPONSE: The Department intends to fully implement and enforce the provisions of the Highlands Act and these rules, and to support the Highland Council's Regional Master Plan. The U.S. Geological Survey (USGS) is currently performing a study assessing water availability in the Highlands preservation area. When completed the study will help decision-makers determine what areas have sufficient water to meet both the water supply and ecological flow needs of the watershed. In areas where these needs cannot be met because there is a water availability deficit, the Department will consider using any unused water rescinded from an allocation permit to help off-set the deficit in the sub-watershed. Because the rules at N.J.A.C. 7:38-3.2 establish standards that must be met before the Department can issue a Highlands approval, additional withdrawals of water from those areas determined by the Department to be in deficit may not be approved.

357. COMMENT: In addition to the "capacity banking" issues, we are concerned that the Department has not yet established, or communicated, clear policy regarding the Act's important water supply provisions. We are concerned with the Department's recharge methodology. We urge changes to the technical and regulatory bases for determining "safe and sustainable yield" and minimum stream flow requirements pursuant to the water allocation rules. Revisions and regulatory policy changes are required to address changes in law resulting from passage of the Highlands Act. We are concerned with the direction and pace of these efforts. (101)

358. COMMENT: The Highlands Council needs to focus on how the precipitation that falls on the Highlands will be managed so as to protect water supplies and the ecological systems that sustain them. The "Ground Water Availability Methodology," that was

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proposed to the Highlands Council in a document dated 30 January 2006, is inadequate for many reasons. A methodology that uses an annual recharge rate that is representative of the Highlands Region under drought conditions of 9.8 inches per year should be used. The methodology should assume that 20 percent of this recharge rate can be withdrawn from the ground and used consumptively or depletively “without unacceptable regional impacts (although localized impacts are still possible)” on people and other biota. Whether or not the method yields a “true” dependable yield depends upon one’s view of the function of natural processes. Furthermore, the methodology should regulate ground water withdrawals through water allocation permits and other means so that the average consumptive, depletive usage does not exceed 1.96 inches per year, which translates to 146 gallons per day (gpd) per acre, or 0.093 million gallons per day (mgd) per square mile. (27, 49)

RESPONSE TO COMMENTS 357 AND 358: The Department agrees it is important to establish a rational basis and background for a water budget from which water can be made available. The Council is independent of the Department so while the Department can make recommendations to the Council, it has no authority to require the Council to follow its recommendations. The Department will forward the commenter’s suggestion for calculating available water to the Highlands Council for its consideration as an alternate approach. However, the suggested method relies heavily on gross assumptions concerning recharge and ecological sensitivity to stream flow changes. A more sensitive approach may be preferable.

The Department assumes the commenter is referring to the Department’s calculated drought condition average annual recharge rate of 9.8 inches per year. This is a weighted average for the entire Highlands Region for use in establishing the septic density standard in the Highlands preservation area. The Department calculated one average recharge number for establishing the septic density in the Highlands preservation area because it accomplished both protection and regulatory predictability. It should be noted that this approach was recommended for the purposes of establishing a predictable septic density and not for the prediction of available water supply. Secondly, the

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Department presumes that the commenter's assumption that twenty percent of natural recharge is available comes from the 1996 Statewide Water Supply Plan. While this figure is based on the body of scientific study available at that time, it does not take into account the specific ecological communities present in the Highlands and the fact that some communities may be more sensitive to changes in water regime than others.

For the purposes of assessing groundwater availability in the Highlands Regional Master Plan, the Highlands Council is evaluating a more refined approach that assesses recharge rates on a sub-watershed basis taking into account soils and geologic variables that influence the rate of recharge. The Ground Water Availability Methodology, referenced by one commenter, establishes a water budget based on the difference between typical low flows, usually experienced each September and drought flows experienced once a decade for a short period of time. This approach is different from using an allowable percentage of loss of the annual average recharge rate. Instead, September flows are used because they are a critical period for fish spawning, so the method addresses some ecological factors. "Availability" would be defined as a percentage of the difference between the September median flow and the drought flow, referred to as the "margin of safety." The stream-base-flow rates used in the groundwater availability method are derived from data taken from stream gauges and by extrapolating using rigorous statistical methods to sites without gauges.

The Department is working with the Council and experimenting with the use of the recently developed hydrologic integrity flow goals method (ecological-flow goals) for application in the Highlands. This method is rigorous in examining stream flows and the impact of altering important flows through consumptive and depletive use in consideration of the sensitivity of various aquatic communities to those changes. Presumably, the results of the pilot studies being performed in the Highlands will be used to help form the basis of the policy decisions to be made by the Council in defining net available water.

Once these studies are completed and the Highlands Council adopts a water availability component in the Highlands Regional Master Plan, the Department will use

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that information to assess the impact of proposed water diversions on stream base flow, water quality and ecological uses, as a replacement for its present method.

359. COMMENT: Under the Highlands Act, the definition of “agricultural or horticultural use” is very broad and includes not only typical farming activities, but also “packaging, processing, and the wholesale and retail marketing of crops, plants, animals, and other related commodities.” The proposed rules contain a number of exemptions for this type of use. Of special concern is that water diversions for these uses are not subject to any approval under these rules. Although we understand the needs of farmers, tree growers, and similar users for irrigation water, the loose definition of the exempted activities, extending even to “retail marketing, processing or related commodities” may authorize the diversion of great quantities of potable water toward unintended uses. For this reason, we believe the Department or the Highlands Council should retain some oversight on all substantial diversions of Highlands water. (50)

360. COMMENT: Change N.J.A.C. 7:38-3.2 to exempt farmers from this section. Farming cannot exist profitably in most years without access to water for production of crops. The very hot, dry, late July-August time periods make it necessary to profitably grow fresh produce and fruits. It should not be possible to revoke an unused prior approved water supply allocation if it is not all used in any given season. Farmers for various reasons in some seasons due to lack of means may not be able to activate the necessary infrastructure or repair the infrastructure to use all of his water resources and then some years, as related to the weather, he may be able to conserve his water resources. Farmer water users should not be discriminated against by reducing their water allocations when conservation restrictions are not place on water providers and users throughout the state. There is an inherent injustice to the farmer or landowner who pays for the drilling of the wells or construction of a pond in earlier times and then is forbidden to use it. (45, 46)

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RESPONSE TO COMMENTS 359 AND 360: The Highlands Act expressly excludes agricultural and horticultural development and uses from the definition of a major Highlands development. Consequently, these activities are not regulated by the Department under these rules. However, these operations' water uses are regulated under the Water Supply Management Act (N.J.S.A. 58:1A-1 et seq.) and the Department's Agricultural, Aquacultural, and Horticultural Water Usage Certification rules at N.J.A.C. 7:20A in the same manner as agricultural and horticultural uses Statewide. In accordance with the Water Supply Management regulations, the Department regulates diversions for agricultural and horticultural operations that divert greater than 100,000 gallons of water per day and those which have the capacity to divert 100,000 gallons of water per day but do not. The Agricultural, Aquacultural, and Horticultural Water Usage Certification rules require applicants proposing such diversions to obtain a water usage certification or water usage registration prior to diverting water. Impacts to water resources and other users are assessed by the Department prior to issuing a certification. While the assessment is not as in-depth as that for other water diverters subject to the Highlands Act, it will afford protections to the integrity of the preservation area's water supply and ecological resources to the extent allowed by law.

The Department has provided a detailed response to the concern regarding revocation of unused allocation in the response to comments 350 through 355 above.

361. COMMENT: The management of water supplies is a great concern with regard to implementing the Highlands Water Protection and Planning Act, which "protects drinking water for over 5.4 million people and helps preserve New Jersey's dwindling open space." In order to meet the intended purposes of the Act, planning for the management of ground water withdrawals is the critical component. However, neither the act nor these regulations really address this issue. The standards for water supply diversion sources (N.J.A.C. 7:38-3.2) appear to be what is allowable under existing law. What is needed is a new, thoroughly updated and improved Statewide Water Supply Plan. (27, 49)

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RESPONSE: There are several provisions in the Highlands Act and these rules that make the water supply regulations more protective in the Highlands preservation area than elsewhere in the State. First, the Water Supply Management Act and the Department's Water Supply Allocation Permits rules at N.J.A.C. 7:19 which govern water withdrawals and allocations outside of the Highlands preservation area, establish the regulatory threshold at 100,000 gallons of water per day. That is, a permit is not required unless a diversion of 100,000 gallons or more of water per day is proposed. The Highlands Act establishes this threshold at 50,000 gallons per day. By establishing a lower threshold, the Act brings smaller diversions into the Department's regulatory program and requires that these small diversions in the preservation area be evaluated for adverse impacts.

Second, the Act and these rules prohibit the allocation of water for an activity that is greater than 50 percent consumptive unless there is an equal reduction of such consumptive use within the same HUC-14 (subwatershed). This offers more protection for groundwater resources than is currently afforded elsewhere in the State. Also, N.J.A.C. 7:38-3.2 establishes an ecologically-based passing flow requirements for Highlands approvals to protect natural resources.

Third, restrictions that prohibit construction of new public water systems or expansion of public water system to serve development in the preservation area provide additional protection of watersheds and exceptional natural resources.

Fourth, the Department cannot issue a Highlands approval for allocation to serve new activities in the preservation area that are 50 percent non-potable and greater than 50 percent consumptive unless there is an equal reduction of such use within the same HUC-14 (subwatershed).

Finally, the adopted rules at N.J.A.C. 7:38-3.2(f) clearly enable the Department to revoke an existing non-potable water allocation if demand reductions are not implemented to the maximum extent practicable. Therefore, while the Department currently ensures that impacts from the diversion of water are minimized in all regions of the State, the Highlands rules are more encompassing and result in greater protection of preservation area water resources.

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Under the Highlands Act, the Highlands Council was charged with developing a Regional Master Plan (RMP) to protect and enhance resources throughout the Highlands Region. The findings of the RMP are being coordinated with the Department's update to New Jersey's State Water Supply Plan. The RMP includes the analysis of the region's water resources. An in-depth analysis of water supply, including surface water supply along with ground water capacity and availability, is currently being conducted to establish sustainable thresholds to support future population growth as well as maintaining stream habitat and ecological health.

362. COMMENT: We support the use of the HUC 14 as the sub-drainage area. (73)

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

363. COMMENT: The Department should clarify whether the rules on water supply diversions from the preservation area apply to all water supply purveyors, including Newark (Oak Ridge and Charlotteburg Reservoirs), Jersey City (Splitrock Reservoir) and the Morris County MUA (Alamatong Wellfield). (114)

RESPONSE: The Department is working with existing water supply systems in the preservation area to determine if improvements to passing flow can be made without significant adverse impacts to the safe yield of the system. The Department's ongoing safe yield assessment project will improve safe yield estimates so it will better understand what impacts additional passing flow will have on the system's ability to meet water supply needs. The Department will require existing water supply systems to improve passing flows and water management practices to enhance water resources in the preservation area, where feasible and within the limits of protecting a viable safe yield. If these systems are proposed to be expanded or request additional water allocation amounts, they will have to undergo the same review and meet the same rigorous standards as applied to all regulated diversions of water in the preservation area.

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7:38-3.3 Public community water systems

364. COMMENT: N.J.A.C. 7:38-3.3 provides different rules for residents depending on the area of the State they live in with no basis. This section violates the equal protection mandate of the US constitution. Why should the regulations be applied unequally across the state? What is the cost of implementing this and the benefit to society? (9-12)

RESPONSE: In the findings and declarations section of the Highlands Act (see N.J.S.A. 13:20-2), the Legislature stated that the Highland region is recognized as a landscape of special significance and is designated as a Special Resource Area under the State Development and Redevelopment Plan; that the Highlands is an essential source of water supply and contains exceptional resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, habitat, significant historic sites and provides abundant recreational opportunities for citizens of the State; and that large areas have been lost to development, more areas are threatened by development, and that the existing land use and environmental regulation system cannot adequately protect the water and natural resources of the region. To protect the natural resource values in the preservation area, the Act imposes more stringent environmental protections for the preservation area than are in effect in other areas of the State. The Economic Impact statement, provided with the rule proposal, evaluated the costs and benefits relating to water quality and water supply issues and made the finding that the rules in their entirety provide positive benefits.

7:38-3.4 NJPDES permitted discharges and wastewater facilities

365. COMMENT: If you are trying to protect the quality of water, why are existing homeowners allowed to continue to use fertilizers, herbicides, and insecticides on their lawns just for vanity? Outlawing the use of these chemicals would do much to improve the quality of drinking water. How does putting a house on five acres harm the quality of

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drinking water? Why not be more reasonable and allow the new house on 5 acres, but outlaw the use of these lawn chemicals at the new homes? (30)

RESPONSE: The Department agrees that pollutant source reduction can be achieved by reducing applications of fertilizers and pesticides. However, the approach suggested by the commenter is not practicable, could not alone accomplish the water quality objectives in the Highlands Act, and would not be responsive to the specific directives in the Highlands Act. The Highlands Act requires the Department to establish a septic density standard “at a level to prevent the degradation of water quality, or to require the restoration of water quality, and to protect ecological uses from individual, secondary, and cumulative impacts in consideration of deep aquifer recharge available for dilution,” See N.J.S.A. 13:20-32e. Regardless of the size of the property upon which it is placed, septic tank effluent contains constituents that are nutrients, comparable to those that make up fertilizers, but it also contains bacteria, viruses, dissolved solids, and household products. The commenter may have assumed that because the Department has based the septic density standard on nitrate that it is the only parameter of concern but this is not the case. Instead, nitrate was selected as a surrogate for all of the components of septic effluent. The selection of nitrate as a surrogate was explained in the proposal summary and is described in greater detail in the Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4, available online at <http://www.state.nj.us/dep/highlands/>. The Department’s analysis has shown that a septic density of one system per five-acres is contributing to the degradation of water quality and is therefore inconsistent with the mandate of the Highlands Act.

366. COMMENT: If you are concerned about the water that leaves the septic system harming the aquifer, why not require not-yet-invented zero impact systems? The state felt comfortable doing something similar with guns. (30)

RESPONSE: It would be inappropriate for the Department to adopt septic system standards based upon technology that does not exist. The Department is obligated under

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the Administrative Procedure Act to explain the purpose and basis for the standards imposed and it would not be able to do so for technology that does not exist. Such a requirement would, in effect, make it impossible for development to comply with the rules, which is inconsistent with the Highlands Act.

367. COMMENT: Are you trying to protect the quantity of water? When a home with well and septic uses water in the house, every gallon that is used in the house is returned to the ground through the septic system. There is virtually no impact on the quantity of water. If you are concerned about people watering their lawns or washing cars, why not just outlaw those activities in the Highlands (at the very least for new development). Why do you continue to allow people in the lowlands to waste our water with their automatic sprinkler systems? Why do you allow them to water their lawns at all? When they use our water, it is lost to the ocean. At least when the Highlanders use water, it is largely returned to the water supply. And if homes are so detrimental to the water, why do you allow existing homes to remain? (30)

RESPONSE: The intent of the Highlands Act is to protect and restore both water quality and water quantity in the Highlands Region. However, establishing septic densities in the Highlands preservation area is related directly to protecting water *quality*. While the use of Individual Subsurface Sewage Disposal Systems does prevent inter-basin transfers of water, thus helping with the goal of protecting water quantity, other resource-based capacity planning practices incorporated into the rules, for example, limiting consumptive (for example lawn watering) and depletive water use, and percentage of impervious cover, more directly address conservation of water quantity by limiting withdrawals and the accumulation and loss of storm water runoff, respectively. For more information on how the Highlands Act affects water consumption, please see response to comments 350 through 355. Consequently, the Department's septic density standards were specifically designed to protect the quality of the waters of the Highlands.

As stated in response to comment 365, the Highlands Act requires the Department to establish a septic density standard at a level to prevent the degradation of water quality.

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Because the Act was passed in 2004, the Department assessed water quality at that time and used that standard of water quality as the base line for the establishment of septic system density standards. That is, the Department's standards provide a septic density that protects the water quality as it existed in 2004 with preexisting homes in place.

368. COMMENT: Why hasn't the DEP applied the same water protection measures required in the Highlands preservation area to areas, outside of the preservation area, which are located in the same planning area and watershed (such as Hope and Frelinghuysen Townships). If the permeability regulations are a good idea, why not apply them to the entire state? (65, 108)

RESPONSE: The New Jersey Legislature determined the boundaries of the Highlands preservation and planning areas in the Highlands Act. The Act delineates a "preservation area of exceptional natural resource value that includes watershed protection and other environmentally sensitive lands where stringent protection policies should be implemented." See N.J.S.A. 13:20-2. Further, the Highlands Act requires the Department to promulgate rules "establishing the environmental standards for the preservation area." See N.J.S.A. 13:20-32. Consequently, the Department's rules apply to the preservation area as identified by the Legislature and required by the Highlands Act.

Nevertheless, measures similar to those required by the Highlands rules are in force in other areas of the State. For example, in portions of the Pinelands National Reserve, mandatory conservation of 300-foot riparian buffers has been in effect since the early 1980's. Also in the Pinelands Reserve, based in part on a regionally-assessed background concentration of 2.0 mg/L nitrate, various levels of residential density were established for the protection of water quality. The Statewide Stormwater Management Rules at N.J.A.C. 7:8-5 also require protection for 300-foot buffers along all Category 1 waters and their tributaries.

With respect to activities that require Wastewater Management Plans (WMPs) or amendments to regional Water Quality Management Plans (WQMPs), the

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Department requires incorporation of measures, such as local ordinances or redesign of proposed projects, to achieve the following objectives: protection of riparian corridors; compliance with stormwater requirements; compliance with antidegradation standards for point source loading; no decrease in baseflow from consumptive uses; compliance with ground water quality standards demonstrated by a nitrate dilution analysis; and protection of threatened and endangered species habitat.

Outside the preservation area, the State applies anti-degradation limits for nitrate, as contained in the State's ground water-quality standards at N.J.A.C. 7:9C-1.8. The current anti-degradation standards for nitrate in groundwater is defined as a change that does not exceed 50 percent of the difference from the existing nitrate standard (10 mg/L) and the background concentration (default is assumed to be 0.4 mg/L). In the Highlands preservation area, the Department is required to establish standards to maintain existing water quality, so a *non*-degradation approach is necessary.

369. COMMENT: The rule states, "any new or expanded point source discharge, except discharges from water supply facilities, shall not degrade existing water quality in all Highlands open waters." Nowhere in the Highlands Act or the proposed rules have "discharges from water supply facilities" been defined. Considering the broad range of discharges potentially excepted, including wastewater and process effluent, these terms must be explained. (50)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-32(b) provides that any new or expanded point source discharge, except discharges from water supply facilities, shall not degrade existing water quality in all Highlands open waters and waters of the Highlands which include all surface and ground waters. The Department inadvertently excluded the exception for discharges from water supply facilities from its rules at N.J.A.C. 7:38-3.4(a). Therefore, the Department is modifying the rule on adoption to add the exception for discharges from water supply facilities to remain consistent with the language of the

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Highlands Act. In addition, for the purpose of this rule, the Department defines water supply discharges as those discharges resulting from the processing of water for potable supply, such as discharge of filter backwash, and that require a New Jersey Pollutant Discharge Elimination System (NJPDES) permit. The Department is also amending the rules on adoption to include this clarifying statement. The Department has not included separate provisions in the Highlands rules to address these discharges. Instead, the surface water discharge requirements and antidegradation requirements of the existing NJPDES rules, N.J.A.C. 7:14A, and the Surface Water Quality Standards, N.J.A.C. 7:9B, apply.

370. COMMENT: We have heard a lot about the 88-acre and 25-acre zoning restrictions. I think they are still pretty complicated. I encourage you to use diagrams, perhaps hold workshops and continue to educate the public about that methodology because it is one that folks are struggling to comprehend. (70)

RESPONSE: The Department acknowledges the commenter's concern. The Department has made available on its website <http://www.state.nj.us/dep/highlands/> the Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4. This document contains more detailed explanations of the analyses leading to the septic densities, including figures and tables. In addition, answers to many specific questions are contained in response to comments 371 through 379.

371. COMMENT: The septic density stuff is insane. Eighty-eight acres makes absolutely no sense. I went through some of the calculations and some of the studies that were behind it. None of the underlying assumptions makes sense. I live in an area where there are just over 300 people per square mile. Where we're sending the water has 3,000 to 10,000 people per square mile. You cannot convince me that excrement from 300 people per square mile is capable of contaminating an aquifer. You do not need to be a

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scientist to know that. You don't need 88 acres. We have not been contaminating it with five acres, let alone 88. (13)

372. COMMENT: The 25-acre and 88-acre minimum septic density sizes are excessive and cannot be supported by sound science. More realistic assumptions need to be used. All other available studies show that 3 to 12 acres is an appropriate lot size. A cost/benefit of this huge impact to landowners was not done and should be done before devaluing hundreds of thousands of acres of private property. (18, 30, 45, 46, 51, 52, 84, 93, 116)

373. COMMENT: The septic density standards (N.J.A.C. 7:38-3.4(b)) are based on incorrect modeling, erroneous assumptions, and arbitrary standards inconsistent with accepted water protection standards. As a result, they violate the substantive due process requirements of the Fourteenth Amendment of the U.S. Constitution and Article 1, paragraph 1 of the New Jersey Constitution. (85, 87)

374. COMMENT: Your model for septic systems needs to be based on scientific needs and common sense. (32, 104, 105)

375. COMMENT: Your model for N.J.A.C. 7:38-3.4 septic density standards is unsupportable by scientific data. Every other study commissioned by the towns and counties within the Highlands to support zoning, down sized zoning, shows drastically different results. One can reason that the DEP is right and everyone else in the state is wrong or that the DEP is trying to justify their conclusions by fabricating their study. Data leads one to believe that the second option is the case. To impose such draconian restrictions on the landowners of the Highlands based on such disputed and disreputable studies is totally unreasonable. If the DEP data could stand up to scrutiny, let it, before causing irrefutable and irreparable harm on a class of citizens of the state of New Jersey. (9-12)

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376. COMMENT: Because the regulations allow no new public sewers or sewer extensions, septic systems are necessary. The allowable density of one disposal system for 88 acres of forested land or 25 acres for non-forested is not supported by scientific evidence. There is data to suggest that a lot as small as one-half acre can adequately support and dilute even a large private septic system for a single family home. Further, landowners that maintained forest on their lots are penalized. (44, 87)

377. COMMENT: The factors in your septic density formula are wrong, for example, four people per household, and recharge value of 9.8 inches per year. Redo your calculations using accepted, and already completed calculations and factors. I question the other factors as well. Furnish all data, including but not limited to meeting minutes, correspondence, e-mails, telephone conversation records and notes, personal meetings, and meeting notes used to develop the rationale for the septic density formula. Furnish resumes for all your experts, internal or external to DEP, involved in developing the rational basis for the standards at N.J.A.C. 7:7A-3.4. (87)

378. COMMENT: The justification behind the new proposed density is poor. It seems more like an answer was created and then the dots picked that would get the answer. Average people per house is easily calculated. It is not 4 people. All research available for New Jersey and average lot sizes comes to the conclusion that three to 10 acres is the correct number. The calculations used in the proposed regulations are way outside mainstream scientific thinking. Where did these numbers come from? The social effect of 88 acre zoning is to either prohibit all but the most wealthy from affording a new home or the poorest since affordable housing is exempt. This will turn back the hands of time to the time when there were vast estates and the small houses grouped together for people to live who worked on the estates. There is no cost/benefit of this change to the society in the Highlands or any discussion regarding the desirability of this effect. (9-12)

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379. COMMENT: The “Basis and Background” document utilized assumptions or conditions that are unrealistic to achieve conservative estimates. Therefore, the resulting septic field densities of 25 and 88 acres per unit are, on face value, unreasonable. (75)

RESPONSE TO COMMENTS 371 THROUGH 379: As explained in the proposal summary (see 37 N.J.R. 4779-4780), the Department’s septic density standards are based on a scientific model with valid assumptions designed specifically for the Highlands preservation area. The Highlands Act requires the Department to establish regulations to “ensure that existing water quality shall be maintained, restored, or enhanced.” See N.J.S.A. 13:20-32b. The Highlands Act directs establishment of a septic density consistent with this goal. In order to accomplish this mandate, water quality throughout the Highlands Region was assessed in order to establish a baseline, and a method was selected to relate septic density to ground water quality.

The following steps were taken to determine the septic density standard: 1. Nitrate was selected as a quantifiable and representative surrogate for the effects of septic tanks on water quality. 2. A baseline of existing water quality in the Highlands Region was established to serve as the standard. 3. An appropriate tool or model was selected that can relate nitrate loading from septic systems to ground water quality. 4. An appropriate loading rate for nitrate was selected to be attributed to septic systems. 5. A recharge rate applicable to the region was determined. 6. The Department determined the number of persons that should be assumed per household in the Highlands.

Using a dilution analysis to determine a density that will comport with antidegradation goals articulated in the Highlands Act requires consideration of the pollutants that are contained in septic effluent. Individual Subsurface Sewage Disposal Systems (ISSDS) discharge constituents including nutrients, bacteria, dissolved solids and organic compounds (USEPA, 2002). Some constituents are present in significant and predictable amounts while others are present in minute and/or variable amounts based on user behavior. Some constituents are significantly attenuated by the action of microorganisms and chemical reactions in the soil through which the effluent travels. Others, such as nitrate and dissolved solids like sodium and chloride, are attenuated

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primarily by dilution. Nitrate, phosphorus and total dissolved solids (TDS) were selected as parameters of concern to test for use in the model because they are present in septic effluent in relatively large and predictable amounts.

The Department performed an initial screening to determine how the above effluent components behaved with regard to ground water quality impact. Simplistic versions of *A Recharge-based Nitrate-dilution Model for New Jersey* dilution-model were developed for each parameter in order to assess and compare them. These models only provide the acreage required to dilute a proposed loading of nitrate, phosphorus, and TDS—they do not account for fluctuations in climate, soil type, and impervious cover. The results of this exercise clearly indicate that by requiring an area adequate to dilute nitrate, the Department ensures that all other effluent components will have adequate area to generate enough recharge to dilute to the target level. (For complete details, please refer to pp.11-17 of the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4” available online at <http://www.state.nj.us/dep/highlands/>). Based on this assessment, the Department selected nitrate as a conservative surrogate for parameters of concern in septic effluent.

Background levels of nitrate in undeveloped landscapes are normally very minimal—on the order of ≤ 0.1 mg/L in many cases. To establish the standard as required by the Highlands Act, the background level of nitrate in the Highlands Region was assessed. Establishing a standard based on a regional background was selected as an approach rather than assessing a site-specific nitrate target for each development application because: 1) site-specific analyses significantly increase the financial burden and involve a lengthy review process for every application, 2) “piecemeal” permitting for development proposals has proven ineffective at protecting water resources against the secondary and cumulative impacts of human encroachment; 3) the available tools for assessing the effects of septic system development on ground water are most accurate on a regional basis; and 4) the regional standard provides regulatory predictability.

In consideration of the fact that ground water quality differs in areas with human influence compared to areas with little or no human influence, the analysis differentiates between two distinct types of land cover: areas that have already been substantially

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impacted (mixed land uses) and undeveloped, forested areas. Distinguishing between undeveloped, forested areas and other “mixed use” land cover is justified based on the large bulk of supporting literature that strongly correlates human land uses with increased levels of nitrate and other nonpoint source pollutant loadings in both surface and ground water. Establishing a nitrate target for each area was a matter of assessing the available nitrate concentration data for that type of land cover and mathematically deriving a representative value. Thus, both nitrate targets are based on regionally assessed background levels for each land use type. The available USGS water quality data for pristine (forested) conditions in the Highlands of New Jersey resulted in a representative background concentration of 0.21 mg/L nitrate. Corroboration for this finding is found in both NJDEP data for 2002 and USEPA (2001) data for nitrate concentrations in pristine Highlands’ surface water at 0.17 and 0.16 mg/L, respectively. Levels observed in surface water can underestimate ground water concentrations due to chemical and instream processes that can help reduce nitrate by as much as 40 percent (Ayers *et al.*, 2000). The Department is confident that the 0.21 mg/L nitrate target is both warranted and scientifically sound.

The nitrate target of 0.76 mg/L for areas of mixed land use was also selected from the comparable results of several published studies as well as the Department’s own assessment of available nitrate concentration data for all types of land cover throughout the Highlands Region. As detailed in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” several publications regarding water quality in the Highlands Region were cited that document the comparable regional averages of 1.15, <1.0, and 0.76 mg/L nitrate (Hoffman and Canace, 2004, Nicholson, 1996, and Serfes, 2004, respectively). The Department’s own analysis of available data for mixed land uses yielded another comparable background concentration of 0.8 mg/L nitrate (NJDEP, 2005).

The Department’s nitrate-dilution model: *A Model of Residential Carrying Capacity for New Jersey, Based on Water Quality*, has been peer-reviewed and the premise has withstood scrutiny for over 20 years. The nitrate model that served as the basic premise was a thesis project undertaken by Trela and Douglas, which was

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developed based on conditions in the Pinelands. It was first applied in the Pinelands in response to the need for a planning tool to establish appropriate residential density based on water quality for the Pinelands Comprehensive Management Plan. The recharge model (GSR-32) that provides the dilution component for the NJ Geological Survey nitrate-dilution model takes the basic premise and enhanced it to account for variable soil and rainfall conditions so that it can be applied throughout New Jersey.

The model allows the user to input variables for nitrate-loading (persons/home, nitrate generated per person in pounds per year), ground water recharge (soil, land use, climate differences by municipality) and a nitrate concentration standard or *target*, to determine the land area needed per septic tank to meet that target. The model is based on average annual recharge estimates and assumes complete mixing. In fact, septic effluent loads may remain incompletely mixed over a considerable distance. As a result, during the wet spring season nitrate may be diluted to less than the standard, while during dry summers or times of drought there will be less dilution and the standard may be locally exceeded. These effects generally balance out over time and over the flow path of a regional area. Therefore, it is important to specify a nitrate target sufficiently protective of ground water to account for these naturally recurring precipitation shifts, and to choose a regional basis for the standard. To account for these factors, the Department consistently selected the more conservative value or range of values when selecting model parameters since selecting conservative values ensures that the targets will not be routinely exceeded. Once the values for these parameters were determined through sound and deliberate science, they were entered into the established model.

The nitrate load attributed to each person (10 lbs/year) is based on USEPA guidelines and has been used by State permitting programs for decades (e.g., the Division of Water Quality, Bureau of Nonpoint Pollution Control). It is not flow dependent and relates only to the number of persons per dwelling unit, as discussed below.

In selecting the annual recharge rate of 9.8 inches, the Department determined to assess recharge based on a stress-condition rather than an average of 30 or more years of precipitation data—such a long-term average can effectively mask the effects of stress conditions when they do occur. Using this approach, water quality in the Highlands will

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be protected even under drought conditions. During periods of dry weather, shallow ground water makes up much of a stream's base flow, and since many contaminants tend to occur at higher concentrations in this shallow ground water (MacLeod, 1995), the potential for increased concentrations during times of drought had to be incorporated into the determination of septic density. The New Jersey Drought of Record is recognized as an extended period of dry conditions that occurred between 1961-1965/66. The analyses performed to estimate the representative recharge value for the Highlands Region are detailed fully in the "Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4."

The average household size of 4 persons was based on a substantial subset of Highlands households and the most recent census data available. The regional average household size in the Highlands is 2.7 persons. However, there are areas within the Highlands where household densities are higher than the regional average. Based on U.S. Census data, the Department found that as many as 40.1 percent of households contain 4-or-more residents (the weighted average over the entire Highlands preservation area is that 30.6 percent of households contain four or more persons) (see pages 9-11 of the "Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4." Selecting a household density of 2.7 (or 3) persons, would mean that approximately one out of every three septic systems would be contributing in excess of the assumed load of nitrate. Therefore, the Department assumed a 4-person household to ensure that the actual discharge of nitrates would not exceed the target values resulting from the Department's model calculations.

An impervious surface value of 3 percent was assumed since this is the limit established by the Highlands Act.

Once the values for each of the variables was established based upon research, they were entered into an equation, where the units are as defined below and 4.56 is a conversion factor for acres per lot:

$$A_{97\%} = 4.56 \frac{PN}{RT}$$

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$A_{97\%}$ = size of the lot (with three percent impervious cover) in acres

P = number of people per home: 4

N = nitrate loading rate (pounds per person per year): 10

R = recharge rate (inches/year): 9.8

T = nitrate standard (mg/L): 0.76 mg/L nonforested and 0.21 mg/L forest

Using the selected nitrate targets of 0.21 mg/L for forested areas and 0.76 mg/L for all other nonforested areas, the resultant septic densities are 88 and 25 acres per septic system, respectively.

The Economic Impact analysis in the proposal evaluated the costs and benefits relating to water quality and wastewater issues and concluded the rules will have a positive net economic effect.

The correspondence and other records sought by one of the commenters is beyond the scope of the explanation and information the Department can publish in response to a comment in a notice of adoption. Should the commenter still be interested in obtaining the additional information, the request would more appropriately be made as an Open Public Records Act (OPRA) request.

When the Department states that it is using “conservative estimates” it means it is taking the most environmentally protective options if a choice is required between two standards.

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USEPA. 2002. Onsite Wastewater Treatment Systems Manual. Office of Water. Office of Research and Development. EPA/625/R-00/008.

USGS Fact Sheet FS-090-02. 2002. Quality of Water in Tributaries to the Upper Delaware River, New Jersey, Water Years 1985-2001. U.S. Department of the Interior.

380. COMMENT: I am writing to you as the owner of 130 acres of farmland in Lebanon Township. I have worked this farm for 25 years plus worked at another job to afford a decent living. The rules that the DEP has established have adversely affected me by 70 to 80 percent of the value of my land. The thing that is especially damaging is the requirement for 25 acres per septic tank. I have fully complied with the Township of Lebanon and Hunterdon County for 10 building lots, leaving 88 acres for permanent farmland. I hereby request that serious changes be made in consideration for landowners who are being so adversely affected. (38)

RESPONSE: The Act requires that the Department establish a standard for septic density that would “prevent the degradation of water quality, or to require the restoration of water quality and to protect ecological uses from individual, secondary, and cumulative impacts in consideration of deep aquifer recharge available for dilution.” The Department’s

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method for satisfying this requirement and establishing the 25 and 88-acre septic densities is explained in response to comments 371 through 379.

However, the Highlands Act provides several mechanisms to reduce its impact on landowners. These include an extensive list of exempt activities, the exclusion of agricultural and horticultural uses from the definition of “major Highlands development” thus keeping these activities unregulated by the Department, the requirement that agencies seeking to acquire land for open space and farmland preservation obtain pre- and post Highlands appraisals and negotiate using the higher value, the provision of a waiver for the taking of property without just compensation if a Highlands approval has been denied and the owner can recognize no alternative use for the property, and the establishment of a Transfer of Development Rights program.

381. COMMENT: The 25/88-acre minimum lot size is an arbitrary, unreasonable and unnecessary measure to effectuate the HPPAA. There is data utilized by other states to suggest that a lot as small as one-half acre can adequately support and dilute a large private septic system for a single family home. This regulation, more than any other, effectively takes away from small landowners the right to develop their property in any advantageous way. It is also important to note that landowners who have maintained forested areas on their lots are penalized by the greater minimum lot size of 88 acres per septic. Landowners who may have clear cut their land prior to 2004 are "rewarded" with a smaller minimum lot size. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98, 107)

RESPONSE: As explained in the response to comments 371 through 379 above, the technical approach established to determine septic densities in the Highlands preservation area was a lengthy, comprehensive and deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration throughout the Highlands Region.

The Department notes that the rules at N.J.A.C. 7:38-3.1(b) require that the resources existing on a lot on August 10, 2004 be used as the basis for all of the

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Department's Highlands rules, since that is the date of enactment of the Highlands Act.

The Department cannot retroactively apply the standards for septic density. Therefore, the lower density requirements would apply to someone who cleared forest before that date.

382. COMMENT: This septic density proposal is absolutely ridiculous. We live in an area zoned 7 acres lots and the township cannot prove that this is necessary. (81)

RESPONSE: The Department has no knowledge of the information used in the commenter's area to establish seven-acre lots. However, as detailed fully in the response to comment 371 through 379 above, the Department used a technical approach established to determine septic densities in the Highlands preservation area. The Department's technical approach was comprehensive and relied heavily on peer-reviewed methodologies and research publications, as well as actual data on contemporary levels of nitrate concentration throughout the Highlands Region.

383. COMMENT: The requirement of 88 acres of forested area and 25 acres in non-forested area are unreasonable and should be revised especially since all my neighbors have a septic system on 5 acres or less. The cost to the landowner would be unreasonable and would limit construction of any kind. The landowner should be able to recoup some of his equity in the property. (3)

384. COMMENT: When we last reviewed our Independence Township master plan, we commissioned hydrogeologic studies to be sure that our lot sizes weren't over taxing our lands with septic systems and wells and that our lot requirements would stand up to developers' challenges in court. We have done our work as I think most of the municipalities in the Highlands have. We have had critical area of ordinances and open space ordinances, and ridge restrictions for years. We have preserved our environment while respecting property rights, which are after all the foundation of all of our freedoms in America. I am one of two farmers on our board. We both voted to increase lot sizes based on our

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hydrogeological studies. My land went from three acre lots to four and five acre lots.

And I remember being loudly criticized at one of our public hearings and explaining to those critics that based on our hydrogeological studies that this was the right thing to do for our community as a whole. I can understand where you are coming from, but 88 acres for forested land and 25 for farmland? I would like to know the scientific basis for that. Is the countryside of New Jersey to now be only for billionaire's mansions? What about the rest of us? (43)

RESPONSE TO COMMENTS 383 AND 384: The technical basis for establishing the septic density standards is outlined in detail in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available online at <http://www.state.nj.us/dep/highlands/> and explained in the response to comments 371 through 379 above. Each determination was based on a comprehensive and deliberative process that relied heavily on area specific data, peer-reviewed protocols, and research publications.

Regarding the concern that the proposed septic densities would “limit construction of any kind,” the Highlands Act establishes exemptions such that no parcel of land in existence prior to the passage of the Act is rendered non-developable, and provides for the construction of at least one single-family dwelling, regardless of lot size.

In addition, the Highlands Act contemplates that some property owners will be interested in selling their land or development rights for preservation purposes. To that end, the Act requires that the Green Acres program, State Agricultural Development Committee (SADC), local government unit, or a qualifying tax exempt nonprofit organization seeking to acquire land to be preserved in the Highlands, obtain two appraisals (one representing pre-Highlands values and the other representing current value). The agencies seeking to purchase the land are required to inform the landowner of both values and negotiate using the higher of the two.

A third provision intended to alleviate hardship for landowners in the Highlands is the requirement that the Highlands Council establish a transfer of development rights

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program for the Highlands Region. This program could provide another source of revenue to landowners with land upon which development has been restricted.

385. COMMENT: We appreciate significant revisions to the nitrate based septic density standard, and inclusion of new septic location and design standards to restrict engineering practices that attempt to overcome natural soil and groundwater constraints. We strongly support the downward revision of target natural background nitrate concentrations to 0.20 mg/l in forested areas and the resulting 80-acre septic density standard. However, we remain concerned that this density is derived based on surrogate "deep aquifer recharge" values predicted by the GSR 32 method. We believe that GSR 32 is not based upon and over-estimates actual "deep aquifer recharge" and therefore tends to increase septic density. We also are concerned that the non-forested areas derived "regional average" background concentration of 0.75 mg/l and the resulting 25 acre density does not reflect actual natural background concentrations. We urge the Department to revise the septic density standard and methodology for non-forested areas to achieve a nitrate target level based on actual natural existing water quality, as mandated by the Act. Natural background concentrations for these areas should be derived similar to the method for deriving the 0.2 mg/l forested area concentration, for example from actual field data in the preservation area, literature values for similar land use/land cover, or a combination of both. (101)

RESPONSE: The Department evaluated available methodologies (for example, GSR-32 (Charles, 1993), Posten, 1982, East Amwell Evaluation of Groundwater Resources in the Sourland Mountains, 2002) to assess "recharge" and "infiltration" of precipitation over broad areas, and how best to separate the volume that discharges to streams and lakes (baseflow) from that which percolates further down into a surficial aquifer or fracture network ("deep aquifer recharge"). The Department found that there was no readily available method to estimate deep aquifer recharge. Determining the actual volume of deep aquifer recharge would require costly and time-consuming field testing on a site-specific basis. Further, there is no agreement among hydrogeologists on which available

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method best approximates deep aquifer recharge. One publication recommended that “multiple, alternative methods” be used due to the “uncertainty associated with any one technique” (Halford and Mayer, 2000).

The Department concluded that the peer reviewed and published GSR-32 method (Charles, 1993) was the best approach for the purpose of assessing recharge in the Highlands. In addition to GSR-32, the Posten method was also applied for comparison. Posten’s research was based within the Highlands (West Brook and Blue Mine Brook watersheds in north-central Passaic County), and the method was also peer-reviewed and published. Application of GSR-32 and the Posten method resulted in similar annual recharge rates: 9.8 and 10.2 inches (under drought conditions), respectively. Such agreement between two respected methods supports the validity of the value used for the recharge variable in the nitrate-dilution model applications.

The protocol that was followed to determine septic density in the Highlands and the specific analyses performed are fully detailed in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available on the web at <http://www.state.nj.us/dep/highlands/>. Regarding the background concentrations used to set the endpoints, the representative, regional background level of 0.76 mg/L nitrate for mixed land use was based on existing data from mixed land uses in the Highlands, as corroborated by published literature values. This was the same approach used to generate the background for forested areas. This standard provides for no further degradation on average and is expected to result in improvement should agricultural areas be converted to development because agricultural uses are associated with the highest observed ambient nitrate concentrations.

386. COMMENT: The rule requirement for minimum lot sizes of 88 acres and 25 acres, for properties with 50 percent or greater forest, and less than 50 percent forest, respectively, where individual subsurface disposal (septic) systems are intended for use, is not supported by the DEP model described in "A recharge-based nitrate-dilution model for New Jersey" (the NJGS Method) and is intended to be applied on a site by site basis. Given that the septic system effectiveness relies on subsurface characteristics (for

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example, permeability), and adequate groundwater recharge, we agree that a minimum lot size requirement is consistent with the Act's goal of preserving and protecting the water resources of the Highlands. However, the reliance on ground-water resources to remediate and appropriately assimilate subsurface septic discharges (that is, carrying capacity) is typically assessed based on site and locale-specific hydrologic and hydrogeologic characteristics. The NJGS has provided such characterization for the Highlands Region using techniques described in GSR-32 illustrated by publicly available GIS mapping for the area. The NJGS by way of these tools enables determination of appropriate carrying capacity based minimum lot sizes relative to septic system discharges. (85, 87)

RESPONSE: The rule as adopted modified the approach for determining whether to apply a forest or a non-forest standard for determining septic density. Parcels are no longer categorized as all-forest or non-forest based on a majority of one or the other land use types on the parcel. Instead, the area of the parcel that is forest is subject to the 88-acre standard while the area that is non-forest is subject to the 25-acre standard. The determination of the standards is detailed in the "Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4," available online at <http://www.state.nj.us/dep/highlands/> and described in the response to comments 371 through 379 above. The variables selected for use in the nitrate-dilution model are applicable to the Highlands Region. The nitrate-dilution model can be used to assess septic tank impacts on a site-by-site basis, but is best when used to predict a regional outcome because discharges from Individual Subsurface Disposal System's (ISSDS) do not infiltrate straight down in predictable columns: they disperse and spread based on differences in soil structure, porosity, and bulk density. These individual *plumes* from ISSDS's in residential areas can accumulate into what behaves like a much larger, regional plume.

387. COMMENT: Please provide a basis for requiring 88 acres of forested and 25 acres of non-forested land as an acceptable septic density when nitrate dilution models for the soil

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types for the land in the region suggests approximately eight acres are required to adequately protect water resources. (65)

RESPONSE: The technical basis for establishing the septic density standards is detailed in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available online at <http://www.state.nj.us/dep/highlands/> and described above in response to comments 371 through 379. With regard to alternative outcomes, it should be noted that the results of the NJGS *A Model of Residential Carrying Capacity for New Jersey, Based on Water Quality* nitrate-dilution model are driven primarily by the nitrate target selected. For example, a shift from 4-persons per household to 3-persons per household, or increasing the annual recharge from 9.8 inches to 13 inches, would result in less difference to the final septic density than changing the nitrate target from 0.21 or even 0.76 mg/L to 2.0 mg/L, as the following two tables illustrate:

Recharge Volume (inches/year)	9.8	9.8	9.8	9.8	9.8	9.8
NO3 Loading (lbs/person/yr)	10	10	10	10	10	10
Persons in Household	4	4	4	3	3	3
NO3 Target (mg/L)	2.0	0.76	0.21	2.0	0.76	0.21
Avg. Lot Size Required (acres)	9.3	24.5	88.6	7.0	18.3	66.4

Recharge Volume (inches/year)	13	13	13	13	13	13
NO3 Loading (lbs/person/yr)	10	10	10	10	10	10
Persons in	4	4	4	3	3	3

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Household						
NO3 Target (mg/L)	2.0	0.76	0.21	2.0	0.76	0.21
Avg. Lot Size Required (acres)	7.0	18.5	66.8	5.2	13.9	50.2

In order to get lot sizes of approximately eight acres, as mentioned by the commenter, if the Department's model was used, a nitrate target of approximately 2.0 mg/L would have to be selected. This would allow ten times the amount of nitrate into the groundwater than permitted using the Department's nitrate targets. As explained in the response to comments 371 to 379, the Department believes that its nitrate targets of 0.76 mg/L for nonforested areas and 0.21 mg/L for forested areas are warranted, scientifically justified, and consistent with the mandate of the Highlands Act.

388. COMMENT: The consideration of the degree of forestation on its own is not a valid basis for determining minimum lot sizes relative to septic system density. Equally if not more important are soil characteristics, ground-water depth, slope, proposed land use (which incorporates degree of forestation), and disposal rate, which are all the foundation of the NJGS method. The consideration of "deep" aquifer recharge is not consistent with the mechanisms by which the bulk of septic system effluent is renovated. The majority of this renovation is generally associated with "shallow" recharge and is typically addressed by the NJGS using the concept of ground-water recharge. Based on our review of the NJGS specified groundwater recharge rates for the Highlands and application of the NJGS Method, we do not believe there are scientific bases for the use of a blanket approach to utilizing minimum lot sizes of 88 acres and 25 acres, respectively, based on the degree of forestation. (85, 87)

RESPONSE: The technical basis for establishing the septic density standards is outlined in detail in the "Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4," available online at

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<http://www.state.nj.us/dep/highlands/> , and described in the response to comments 371 through 379. The basis for two standards is the difference in ambient water quality, and therefore, the dilution target allocated to forested areas vs. non-forested areas. This distinction is made because of the Highlands Act's mandate to adopt a septic density standard at a level to "prevent the degradation of water quality..." (See N.J.S.A. 13:20-32e). The Department is not suggesting that forested land is less able to renovate septic effluent, thereby requiring a larger lot size. Rather, the distinction is justified based on the large bulk of supporting literature that strongly correlates human land disturbance with increased levels of nitrate and other nonpoint source pollutant loadings in both surface and ground water compared to ambient water quality in areas not subject to human uses.

Consideration of deep aquifer recharge is required by the Act; nevertheless, the tools available and used in developing the standards do consider recharge in the zone where renovation occurs. The nitrate-dilution model can be used to assess septic tank impacts on a site-by-site basis, but is best when used to predict a regional outcome because discharges from Individual Subsurface Disposal Systems (ISSDS) do not infiltrate straight down in predictable columns: they disperse and spread based on differences in soil structure, porosity, and bulk density. These individual *plumes* from ISSDS's in residential areas can accumulate into what behaves like a much larger, regional plume.

389. COMMENT: If the rules intend to utilize the NJGS Method as a basis for septic system density, the use of over 300 to 350 gallons per day for the sizing of an individual subsurface disposal system for residential lots is not consistent with projections provided by the DEP or other available sources regarding the sizing of respective wastewater disposal systems. The typically used conservative value is 75 gallons per day per bedroom/person. By using discharge values greater than 300 to 350 gallons per day as a basis for septic system design, the rules are potentially artificially inflating the minimum lot sizes reported necessary to meet its goals. Furthermore, studies completed by the U.S. Forest Service recommended a scientifically based impervious surface limit (ISL) of 10

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percent for the Highlands. Utilizing a blanket ISL value of three percent in the NJGS Method will lead to potentially artificially inflated minimum lot sizes. Based on NJGS groundwater recharge mapping for the Highlands, the average groundwater recharge rate is about 13 inches per year for portions of the Highlands. Thus the proposed blanket use of 9.8 inches per year is not justified. The NJGS Method indicates that nitrate concentration goals of 5.2 mg/L (milligrams per liter) and 2 mg/L are appropriate criteria for non-degradation, standards, for protection of ground water and C1 Surface Water bodies, respectively. The proposed use of 0.21 and 0.76 mg/L by the rules contradicts the DEP supported criteria of the NJGS Method, and will lead to artificially inflated minimum lot sizes considered necessary for providing adequate septic effluent renovation. (85, 87)

RESPONSE: The current Recharge-Based Nitrate-Dilution Model for New Jersey (version 5.0) assumes a nitrate input expressed as pounds per person per year. The suggested loading rate is 10 pounds per person per year. This is independent of the volume of water generated by the lot. This protocol applies to all single-detached, residential dwellings. Volumes are only important in sizing a system to accept hydraulic loadings.

The maximum threshold of three percent impervious cover used in the model was based on the requirements of the Highlands Act. It may be of interest to note, however, that the impervious percent is directly related to the estimated lot size. That is, the larger the impervious surface percentage, the larger the lot must ultimately be to generate sufficient recharge to dilute nitrate to the specified standard. For any given nitrate standard, if the calculated lot is assumed to be 10 percent impervious, it will have to be much larger than if the lot is assumed to be 3 percent impervious.

Regarding the annual recharge rate, the Department is assessing recharge based on a critical condition rather than average condition. By making this assessment, the Department ensures that water quality in the Highlands will be protected under all conditions including drought. The New Jersey Drought of Record is recognized as an extended period of dry conditions that occurred between 1961-1965/66.

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The analyses performed to estimate the representative recharge value for the Highlands Region are detailed fully in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available online at <http://www.state.nj.us/dep/highlands/> .

The NJGS methodology specifically does not recommend nitrate standards. The report's abstract carefully states that: "Nitrate targets depend on specific program and regulatory requirements. In general, an anti-degradation approach as defined in New Jersey's ground-water-quality regulation (N.J.A.C. 7:9-6) leads to a nitrate target of about 5.2 in most areas of New Jersey. However, in areas of special ecological concern, lower targets may be appropriate." By law, the Highlands Region has been declared an area of special ecological concern and the lower nitrate target is in keeping with the mandate of the Highlands Act.

390. COMMENT: In the summary for Loading Rate for Nitrate, it states that the municipal household population is not available. This is not true. Household rates are available through the 2000 Census. The discussion implies that no household data is available for municipalities. In addition it states that 40 percent of households contain four persons or more. Why base the analysis on a figure that represents less than half of the total number of households? (85, 87)

391. COMMENT: Census data shows that the number of people per household is approximately 2.7, which is consistent throughout New Jersey. In fact, New Jersey data reveals that 70 percent of households have 4 or less people. Yet, the DEP uses a figure of four people, representing only 30 percent of all New Jersey households. The use of this figure is not “conservative.” Accordingly, a rounded figure of three persons per household would be a more appropriate and conservative figure for use in the septic density calculations for the Highlands Region. (62, 75, 114)

RESPONSE TO COMMENTS 390 AND 391: The Department did examine the latest U.S. census data to determine a representative residential density. US Census data is

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organized in various ways, for example, by State and County. However, data for each individual *municipality* are not available, so the Department was limited to those municipalities within the Highland Region for which census data are available.

There are a total of 45 municipalities that lie at least partly within the Highlands preservation area. Of these, 20 have individual data available either as a municipality or as a Census Designated Place (CDP). A CDP is an area identified by the U.S. Census Bureau for statistical reporting. It is a recognized concentration of population but one that is not legally incorporated under the laws of the state in which it is located, such as an urbanized area that extends beyond the boundary of an incorporated municipality. CDP boundaries may change from one census to the next to reflect changes in settlement patterns. The 20 applicable localities within the Highlands preservation area are detailed on page 10 of the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available on the web at <http://www.state.nj.us/dep/highlands/>. The range of average household size per municipality or CDP is 2.2 to 3.1 persons per household, with an overall mean of 2.7.

The municipal and CDP data was further analyzed, however, to calculate the distribution of household size, that is one-person, two-persons, up to seven or more, relative to the total number of households per municipality and CDP. This exercise was necessary to assess how significantly nitrate loading could be underestimated based on the range versus average of household sizes.

The Department’s nitrate-dilution model is based on annual average recharge estimates, because during the wet spring season nitrate may be diluted to less than the standard, while during dry summers or times of drought there will be less dilution and the standard may be locally exceeded. Due to these naturally recurring shifts, it is important to specify a household size that represents *actual* or *likely* conditions on a vicinity level. Though the model can consider ultimate dilution of nitrate on a regional basis, it cannot assume that “hotspots” of potentially high concentrations will not cause adverse affects locally before being attenuated regionally. By assessing the census data in this manner, the Department found that as many as 40.1 percent of households contain four or more residents (the weighted average over the entire Highlands preservation area is that 30.6

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percent of households contain at least four persons). Because the nitrate-dilution model assumes complete mixing and is based on annual average recharge estimates, there is already a risk of nitrate levels exceeding the target. This is because mixing is not complete, and as noted above, and while during the wet spring season nitrate may be diluted to less than the standard whereas during dry summers or drought there will be less dilution and the standard may be locally exceeded. To offset this risk, it is important to specify a household size that is sufficiently conservative. Therefore, the Department assumed four persons per dwelling unit for incorporation into the model calculations.

392. COMMENT: Do you know that if you look at the area of Hunterdon, Sussex and Warren counties and determine the land required for the average household in those counties today it works out to about one average household for about every seven acres of land. Do the math; 640 acres per square mile, an average family of 3.2 people, the population and land in Hunterdon, Sussex, and Warren and that is what you get. Do you know that if all 7,787 square miles of New Jersey was forested, it would only be possible to put in about 56,600 septic systems based on one per 88 acre? That means that the population of the state should be capped at about 180,000. So, perhaps there is some science behind these proposals, but where is it? There certainly is not anything based on the population densities that exist. There certainly is not anything to note how Morris County, with about one household per every two acres can be okay with much good water supplied by wells while it takes 88 acres in an area with arbitrary boundaries.
(108)

RESPONSE: Existing development has exacted a price in terms of water quality. This is clearly reflected in the ambient ground water analyses that led to different standards for forested and non-forest areas. Ground water quality differs in areas with human influence compared to areas with little or no influence. Distinguishing between undeveloped, forested areas and other "mixed use" land cover is justified based on the large bulk of supporting literature that strongly correlates human land disturbance with increased levels of nitrate and other nonpoint source pollutant loadings in both surface and ground water.

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The Highlands Act requires the Department to establish standards to prevent degradation of water quality in the Highlands preservation area. The Department's septic standard was developed to achieve that goal.

The complete methodology is detailed in the "Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4," available online at <http://www.state.nj.us/dep/highlands/> and described in the response to comments 371 through 379.

393. COMMENT: Where is the scientific study that put my farm in the preservation area? Where is the scientific study that says an average household produces 500 gallons of sewage a day with septic tanks at 80 percent because that goes back into the ground? Where is the scientific study that requires 88 or 25 acres for one dwelling? What kind of scientific data is really in place? For a family you use four people. About one-third of that is actually four people to a house. The rest of it is maybe 2.6 people. There is two-thirds of the state or the Highlands that does not have that. A third of it does. And I think that is in the census. (47, 82)

RESPONSE: The New Jersey Legislature established the boundaries of the Highlands preservation and planning areas in the Highlands Act. The Act delineates a "preservation area of exceptional natural resource value that includes watershed protection and other environmentally sensitive lands where stringent protection policies should be implemented." See N.J.S.A. 13:20-2. The specific boundaries of the preservation area are described in the Highlands Act at N.J.S.A. 13:20-7.

The Standards for Individual Subsurface Disposal Systems at N.J.A.C. 7:9A-7.4, establish the hydraulic capacity requirements for septic systems. Five-hundred gallons per day is the volume associated with a three-bedroom house and was used as the typical unit for defining an equivalency for non-residential development, expressed as Equivalent Disposal Units (EDUs) in order to apply the nitrate standards to all types of development in an equitable manner. It should be noted that volume is not a factor in the

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nitrate-dilution model, which instead assumes a nitrate load in terms of pounds per person/per year.

As explained in the response to comments 371 through 379 above, the technical approach established to determine septic densities in the Highlands preservation area was a lengthy, comprehensive and deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration throughout the Highlands Region.

In addition, the rationale for selecting 4 persons per dwelling unit is described in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available online at <http://www.state.nj.us/dep/highlands/> and explained above in the response to comments 390 and 391.

394. COMMENT: We feel that the 25-acre and 88-acre minimum septic density sizes are excessive and cannot be supported by sound science. We question the DEP's basis for the septic density. Treatment system data was gathered using non-representative non-Highlands soil. The use of total nitrogen in this model was skewed. The actual nitrogen form of nitrate that reaches the groundwater on which the goal is based, the total human production that is used is very misleading since only a portion of that total will be converted to nitrate and reach into the aquifer. The standards use a weighted average of four persons per household when the true average is 2.75 persons per household. Both mixed land uses and forest land use must be defined. Without definitions they have no meaning. We would recommend the DEP defer the establishment of lot sizes for septic development to the Highlands Council as they develop the Regional Master Plan. The Highlands Council will have the most up-to-date scientific data available to make these determinations. This would allow the maximum flexibility for the Council which is responsible for balancing the equity of landowners with the protection of the environmental resources. The standards in the proposed rule limits the ability of the Council to establish and manage programs that will protect the landowner equity. Furthermore, the sole use of septic does not allow for new innovative treatment

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technologies that address groundwater quality. These alternative wastewater systems are better suited for cluster development. But the cluster development options that are in the Highlands rules are far too limited in scope. (69, 87)

395. COMMENT: The use of septic does not allow for new, innovative technologies that can be used to address ground water quality especially for cluster developments. The existing cluster development provision in the rule is far too limited. Also, the rule does not take nitrate filter technology for treating effluent into consideration. As an incentive, the rules should give a density bonus for utilizing wastewater technologies which maintain or improve water quality and recharge. (62, 114)

RESPONSE TO COMMENTS 394 AND 395: As explained in the response to comments 371 through 379 above, the technical approach established to determine septic densities in the Highlands preservation area was a lengthy, comprehensive and deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration and soils in the Highlands Region.

The loading rate of nitrogen used in the nitrate model is based on data on per-capita generation of nitrogen in wastewater. Studies show that the principal initial form of nitrogen in wastewater is organic or ammonia. In a properly functioning septic system, this is converted in the ground to nitrite and nitrate-nitrogen. Most of the ammonia ultimately converts to nitrate, since nitrite is very short lived. Because nitrate is soluble and because little de-nitrification takes place under most soil conditions, the majority of nitrate-nitrogen reaches the ground water, where dilution is the principal means of attenuation.

The rationale for selecting four persons per dwelling unit is detailed in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available online at <http://www.state.nj.us/dep/highlands/> and in the response to comments 390 and 391.

The terms “mixed land uses” and “forest land” are not used in the Department’s rules. The rules distinguish the two septic density standards in terms of the presence of

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“forest.” N.J.A.C. 7:38-3.4 states that “forest” is determined in accordance with N.J.A.C.

7:38-3.9. All other areas are not forest and are subject to the standard that applies to areas that are not forest.

The Highlands Act mandates that the Department establish a septic density for the Highlands preservation area. However, the Department has provided that it will apply its rules and those in the Regional Master Plan (RMP) when adopted by the Highlands Council. Further, if there is an inconsistency in the standards, the Department will apply the RMP standards insofar as they are consistent with the purposes of the Highlands Act to sustain and maintain the overall ecological values of the ecosystem with special reference to surface and ground water quality and supply. See N.J.A.C. 7:38-1.1(i).

The use of alternative technologies that improve the quality of septic effluent is not prohibited and would be encouraged. Many of these focus on reducing organic load and nitrate, but because nitrate is used as a surrogate for all parameters of concern in septic effluent and alternative technologies may not address all parameters, use of such technologies will not be allowed to increase the septic density. Further, the improvements provided by these technologies are easily rendered ineffective if homeowners do not maintain them.

N.J.A.C. 7:38-3.4 allows aggregation of the areas of non-contiguous lots in common ownership for the purpose of assessing the number of Equivalent Disposal Units (EDUs) allowed under the applicable septic density standard and the option to cluster the EDUs allowed on one or more of the non-contiguous lots, with several caveats intended to protect water quality. These caveats require that the placement of the development conforms with all Highland rule requirements; the clustering occurs within a single watershed at the HUC 14 level; and the area included in the calculation of the allowable number of EDUs, if not used for the construction of the development, is deed restricted against future development. The Department believes that while clustering provides an opportunity to minimize sprawl, clustering should not be permitted unless it complies with all applicable standards of the Highlands Act. The Department believes that the limitations to which the commenter objects are necessary in order to satisfy the requirements of the Highlands Act.

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396. COMMENT: The 25 acre and 88 acre septic density sizes are excessive and cannot be supported by sound science. This standard uses the most conservation data which is not justified. Recent studies conducted by the Hunterdon County Planning Board draws different conclusions. The treatment system data was gathered using a non-representative, non-Highlands R17 soil and the usage of total nitrogen in the model skews the actual nitrogen in the form of nitrate that reaches ground water. (62)

RESPONSE: As explained in the response to comments 371 through 379 above, the technical approach established to determine septic densities in the Highlands preservation area was a lengthy, comprehensive and deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration throughout the Highlands Region.

For its Smart Growth Study, Hunterdon County chose to use the State's anti-degradation limit for nitrate contained in the State's ground water-quality standards at N.J.A.C. 7:9C-1.8. The current anti-degradation standards for nitrate in groundwater is defined as a change that does not exceed 50 percent of the difference from the existing nitrate standard (10 mg/L) and the background concentration (default is assumed to be 0.4 mg/L). In the Highlands preservation area, the Department is required to establish standards to maintain existing water quality, so a *non*-degradation approach is necessary. That is, because the Department is required to protect existing water quality, the outcome differs from an approach that allows significant increases in nitrate concentration associated with growth, as was done in Hunterdon's study. To achieve non-degradation requires determining the current levels of nitrate and then determining what septic density will be required to prevent changes to those limits, which is the approach used by the Department.

The Department does not agree that its nitrogen loading rates are skewed. The loading rate of nitrogen used in the nitrate model is based on data on per-capita generation of nitrogen in wastewater. Studies show that the principal form of nitrogen in wastewater is either organic or ammonia. In a properly functioning septic system, this is

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converted in the ground to nitrite and then nitrate, with the predominant form being nitrate. Because nitrate is soluble and because little de-nitrification takes place under most soil conditions, the majority of nitrate reaches the ground water, where dilution is the principal means of attenuation.

397. COMMENT: I have a farm in Lebanon Township I bought in 1971 from an elderly gentleman who used the proceeds of the sale to retire to Florida. Part of the purchase price for the farm was the development rights, and what I could do with it at that time. The development rights went from three acres to five acres to seven and one-half acres, and now as it is a 58-acre farm, it is probably less than a building lot. That's the story of this piece of land that was cleared in 1760 to make this farm. According to the U.S. Department of Agriculture 2002 Census, these are the farm incomes for three counties in New Jersey:. Hunterdon: in 2002, the average farm income was minus \$6,638; in Sussex, it was minus \$1,075. In Warren, where the real farmers live, they made \$4,926 per farm. So much for agricultural viability. I also am providing an excerpt from the Hunterdon County Smart Growth exercise that they did. It includes groundwater recharge. The primary data source was the New Jersey Geological Survey. It puts a lie to everything that is in the Highlands Act and the proposed regulations about groundwater recharge and about nitrate dilution. DEP's own data and the permit to Elizabethtown Water Company now owned by the Germans, for an additional 20 million gallons a day calculated that the water usage per person was 63 gallons per day. The numbers that are in these regulations conflict within DEP's own organization. The nitrate dilution scenario is 5.2 milligrams per liter, which is I believe the State accepted standard. It indicates that in Hunterdon County, the area that is within the Highlands by those maps, has the smallest lot size. The larger lot sizes are down in the Sourland Mountains, completely opposite of that plan. The same is true of the 1.6 milligrams per liter, the same story. The best place for septic systems in terms of nitrate dilution is in the Highlands. (87)

RESPONSE: A calculation of 63 gallons per day is reasonable in terms of literature on actual rates of domestic water use in metered public systems. N.J.S.A. 58:11-23 et seq.,

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also known as “Chapter 199,” uses a higher rate to pro-rate for uses other than domestic use. However, the current version of the nitrate model does not rely on water-use rates, but assigns a nitrogen-loading rate per capita, then dilutes this load with recharged ground water.

For its Smart Growth Study, Hunterdon County chose to use the State’s anti-degradation limit for nitrate of 5.2 mg/L, which is contained in the State’s ground water-quality standards at N.J.A.C. 7:9C-1.8. Anti-degradation standards are intended to protect existing water quality from *significant* degradation, which in the case of nitrate, is 50 percent of the difference from the existing nitrate standard (10 mg/L) and an acceptable background concentration (0.4 mg/L). In the Highlands preservation area, the Department is required to establish standards to maintain existing water quality, so a *non*-degradation approach is necessary. That is, the Department is required to protect existing water quality instead of allowing some degradation associated with growth, as was done in Hunterdon’s study. Non-degradation requires determining the current levels of nitrate and then determining what septic density will be required to prevent changes to those limits. Thus, the Department determined current levels of nitrate concentration for the two selected categories of land cover, forested and non-forested.

398. COMMENT: The section on Water Quality Target Selection states that the septic densities will provide for the restoration of groundwater quality. However the rules provide no mechanism to clean up polluted sites. To restore water quality the use of existing septic system will have be discontinued and the homes connected to a better system that cleans the water before discharging. (85, 87)

RESPONSE: The water quality target for nonforest areas was derived by averaging ground water quality for all land uses, including forested. As a result, this target is lower than a target based exclusively on disturbed land covers. This is expected to result in a modest improvement in quality as future development is held to a density consistent with this standard. Additional water quality improvement can be obtained through other measures that address existing sources, without discontinuing existing

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septic system use, for example, implementation of best management practices for stormwater, agriculture and lawn care.

399. COMMENT: The water quality analysis used for the County Strategic Plan used 2 mg/l as ambient nitrate levels based on secondary information from the Pinelands. The EPA standard is 10 mg/l. The standards proposed by NJDEP are unrealistic because they are based on ultra pristine conditions that apparently exist in state forested areas or parklands. (85, 87)

RESPONSE: The Department assumes the commenters are referring to Hunterdon County. The Highlands Act requires the Department to establish regulations to “ensure that existing water quality shall be maintained, restored, or enhanced.” See N.J.S.A. 13:20-32b. The Highlands Act directs establishment of a septic density consistent with this goal. In order to accomplish this mandate, water quality throughout the Highlands Region was assessed in order to establish a baseline, and a method was selected to relate septic density to ground water quality. A standard based on the ambient water quality in the Pinelands or the drinking water standard of 10 mg/l would not be appropriate. What best represents *pristine* conditions in northern New Jersey is, in fact, undeveloped, forest areas, some of which have been preserved as National, State, or regional parks and open-space lands. However, ambient nitrate concentrations in these areas appear to be on the order of less than 0.1 mg/L. If the Department were to use 0.1 mg/L as its nitrate target in forested lands, the lot size required would be over 186 acres. The Department did not base its nitrate targets on “ultra pristine conditions” but rather the best available data describing the actual ambient ground water quality.

400. COMMENT: In general, the regulations prohibit the extension of public sewers. There is no rational basis for the absolute prohibition. Appropriately designed and installed sewers can protect the environmental resources of the State as well as serve as a catalyst for economic development. The blanket prohibitions disregard current technological advances and will stifle and subvert the State's economy. There is no

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rational basis for the regulatory prohibition. Similarly, the limitation on wastewater disposal system density is not rationally related to any scientific fact or theory. Current technology and potential future technology regarding wastewater disposal are completely disregarded. The regulations encourage a stagnant economic base that will continue to create disparity between the high and low income peoples of the state. The regulations discriminate against low income households as well as middle income households by eliminating the potential for reasonable cost housing and employment opportunity. (111)

401. COMMENT: The Act requires that the Department establish septic densities to protect water quality and ecological uses. The Department has used an internal model to establish the densities. This process resulted in densities of 88 acres for a single-family home on a forested site and 25 acres for each single-family home on non-forested sites. This standard will significantly impact the ability to provide housing for the region and thus must be thoroughly and carefully considered. (114)

RESPONSE TO COMMENTS 400 AND 401: The Highlands Act amended the Water Quality Planning Act at N.J.S.A. 58:11A-7.1 to revoke designated sewer service areas for which wastewater collection systems had not been installed by August 10, 2004, and cancelled as of that date associated treatment works approvals in the preservation area other than those for projects that are exempt from the Highlands Act. This statutory change is the basis for the prohibition in the Highlands rules.

The septic density standard was developed based on a scientific analysis, as detailed in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available online at <http://www.state.nj.us/dep/highlands/>, and described in the response to comments 371 through 379. The use of alternative technologies that improve the quality of septic effluent is not prohibited and would be encouraged, but because nitrate is used as a surrogate for all parameters of concern in septic effluent, use of such technologies is cannot be used to increase the density because these technologies may not address all

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parameters of concern in septic effluent. Further, the improvements provided by these technologies are easily rendered ineffective if homeowners do not maintain them.

The Act and these rules (see N.J.A.C. 7:38-2.3(a)17), provide exemptions for certain types of housing within areas designated as Planning areas 1 (metropolitan) and 2 (suburban) as identified in the State Development and Redevelopment Plan since these areas are likely to have appropriate infrastructure necessary to support development. In addition, the rules include a waiver provision to allow the construction of 100 percent affordable housing developments in five townships that are entirely contained within the Highlands preservation area so that these townships might meet their affordable housing requirements. The remaining townships in the Highlands Region contain area in both the preservation and planning areas and thus should have the ability to provide affordable housing.

402. COMMENT: The use of median statistics in some cases and mean statistics in other cases, no consideration of the latest designs in septic system technology and the use of a non-representative model for nitrate dilution for determining lot sizes are not science-based. (75)

RESPONSE: The Department's analyses are detailed in the "Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4," available online at <http://www.state.nj.us/dep/highlands/>. This document contains more detail as well as figures and tables than could be included in the Highlands rule text and summary. The decision to use the mean versus median in the Department's analyses was based on the number of data points and/or the number of outliers and how variable they were. After reviewing other methodologies and published resources that produced comparable results, the Department believes its approach is both reasonable *and* science-based.

The use of alternative technologies that improve the quality of septic effluent is not prohibited and would be encouraged. However, because nitrate is used as a surrogate for all parameters of concern in septic effluent, use of such technologies would not be

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allowed to increase the density since these technologies may not address all parameters of concern in septic effluent and are easily rendered ineffective if homeowners do not maintain them.

403. COMMENT: New realistic studies need to be done based on the actual conditions. A cost-benefit analysis of this huge impact to land owners was not done and should be done before further devaluing hundreds of thousands of acres of private property. (45, 46)

RESPONSE: The Department supports studies assessing impacts to water quality as well as development of methods that lead to water quality enhancement or restoration. The Department used the best available existing information and methods to develop the septic density standards.

The Economic Impact analysis in the proposal evaluated the costs and benefits relating to water quality and wastewater issues (see 37 N.J.R. 4809 through 4810) and concluded that overall the rules will have a positive net economic effect.

404. COMMENT: The underlying assumptions for household population and soil types appear to be incorrect. Households in the Highlands average far less than four people. The assumption of four people is the highest number from Vernon, a town full of condominiums and young families, which is not the case in the preservation area. The household population in the preservation area is believed to be about 2.7. Calculations are based on studies done in the Pinelands, with known problems in the assumptions and vastly different soils. While the Department states that census data is not available, I found it on the referenced website. Finally, the calculations make no allowance for alternative septic designs or modern day compact sewerage plants, some of which have zero effluent, like composting toilets. (19, 28, 45, 46)

RESPONSE: The rationale for selecting four persons per dwelling unit relies on available census information and is detailed in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,”

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available online at <http://www.state.nj.us/dep/highlands/> , and explained in the response to comments 390 and 391 above. Soils found in the Highlands Region were used in the dilution model, not soils from the Pinelands. The Department's approach is described in detail in the Basis and Background document and in the response to comments 371 through 379. The use of alternative technologies that improve the quality of septic effluent is not prohibited and would be encouraged. However, because nitrate is used as a surrogate for all parameters of concern in septic effluent, use of such technologies is not allowed to increase the density because these technologies may not address all parameters of concern in septic effluent. Further, the improvements provided by these technologies are easily rendered ineffective if homeowners do not maintain them. Zero-effluent technologies, which are limited in their potential and actual application, do not address the wastewater generated from bathing, kitchen and laundry uses, all of which generate a portion of the septic system load.

405. COMMENT: This section prohibits extensions of sewer lines yet allows some growth, low income housing for example. Wouldn't it be better to get the sewage into a treatment plant? For example, in Holland Township, septic systems in the preservation area will put waste into the preservation area. If the sewer line was expanded, the sewage would be moved out of the Highlands preservation area, treated and then released into the Delaware River. Wouldn't that be better if protection of Highlands water was the issue? Since this is not being proposed, what are the objectives of these proposed regulations? They are contrary to the goals of the Highlands Act. In fact, why not consider shipping as much of the sewage as possible out of the Highlands preservation area? This would do more for the protection of Highlands water than the proposed regulations. (19)

RESPONSE: One of findings of the Legislature is that the Highlands Region is important because of the water it supplies to a substantial portion of the State's population. Thus, the Highlands Act is intended to protect both water quality and water quantity, including maintaining stream base flow and recharge of aquifers. The commenter's suggestion to collect, treat and discharge wastewater generated in the Highlands outside of the

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Highlands is not in keeping with the requirements of the Highlands Act because the export of sewage from any area equates with the export of water as well, resulting in lost base flow and recharge.

406. COMMENT: The use of forest and field at N.J.A.C. 7:38-3.4(b)1 is arbitrary at best. Forests become fields and fields become forest. It is a continual cycle in the Highlands. Many forests have barbed wire and/or stone walls running through them indicating part of their history. Why freeze the use in 2004? Why not 1900, 1950, 2000 or 2050? This section is arbitrary and capricious. What is the science that it is based on? (9-12)

407. COMMENT: The relationship between farmland and forest land seems to be subject to further clarification. How many experts were used to determine the acreage requirements? Were the farmers and the foresters given the opportunity to provide expert determinations? It appears this is an extreme position on the number of acres required for a septic system. (3)

408. COMMENT: Septic density is proposed to be lower in forested areas than open areas. It is stated that this is to "avoid degradation of the ground water quality." The cost to society and land owners would be less if this problem were solved by cutting down the trees since trees have such a higher evapotranspiration rate when compared with grass. A simpler method which would not impose such a great financial burden on landowners and the state would be to cut down more trees so as to end up with more open space. This would also enhance the scenic views which is another stated goal of the Highlands Act. This method has not been explored in these proposed regulations yet it should be. The idea is not as crazy as it sounds. It certainly is not as crazy as the proposed regulations. (9-12)

RESPONSE TO COMMENTS 406 THROUGH 408: As explained in the response to comments 371 through 379 above, the technical approach established to determine septic densities in the Highlands preservation area was a lengthy, comprehensive and

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deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration throughout the Highlands Region. The Highlands Act was enacted in 2004. As a result, the standards and requirements of the Act are keyed to that date. Ambient concentration of nitrate in undeveloped forest vs. other mixed land uses is so substantially different that two distinct targets were required in order to meet the mandates of the Highlands Act.

The distinction in septic density targets is not based on the presence of forest per se, but in recognition of the fact that groundwater quality in areas with little or no human influence is better. Forest is an indicator of these areas. Further, it should be noted that, although trees transpire large volumes of water individually, forests enhance groundwater recharge by lowering ground temperatures which helps to keep water in the soil instead of allowing it to evaporate, and have a relatively short growing season. Trees also provide myriad other beneficial functions related to conservation of water quality and quantity: reduced runoff, reduced soil erosion and sedimentation, filtration of nutrients and contaminants through their roots, regulation of baseflow to streams, and contributing to aquatic productivity and diversity by keeping surface water temperatures lower. The New Jersey Geological Survey ground-water-recharge model, which relies on a soil-moisture budget, demonstrates that for the same soils, ground-water recharge is highest in forests and shrub areas. Higher recharge results in more abundant and steady ground-water discharge to streams (known as base flow). A US Geological Survey (USGS) study of the quality of streams in the Upper Delaware River Basin in New Jersey (USGS Fact Sheet FS-090-02) concluded that the concentrations of most chemical constituents studied and levels of fecal coliform bacteria were lowest, and concentrations of dissolved oxygen were highest, in streams whose watersheds contain the most forested or undeveloped land. It is also well known in the agricultural community that buffers of trees help hold up the water table by capillary action.

Finally, “open space” does not mean land that is devoid of vegetation like trees. It means land that is devoid of development, but open space may be comprised of forests, lakes, ponds, wetlands, or any other types of environmentally sensitive land, and in some

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cases agricultural lands that have been preserved. The absence of trees would not enhance the scenic views.

409. COMMENT: The requirement to aggregate houses at N.J.A.C. 7:38-3.4(b)5 is social engineering and has nothing to do with water quality or quantity. If you are limiting a 210 acre lot to three houses there should be no further limits of the rights of the property owner. What is the cost of implementing this section and what is the benefit to the Highlands? (9-12)

RESPONSE: The aggregation provision allows a landowner with multiple, noncontiguous parcels to obtain the maximum yield from the land, as if it were contiguous, without loss of the ground water quality protection afforded by the septic density standards, provided the established conditions for aggregation and clustering are met. There is no agenda of “social engineering. Rather, the Department is providing an opportunity to lessen sprawl effects if development is clustered. There is no cost resulting from providing this flexibility since the owner of the property who chooses clustering is not losing the right to develop but is instead gaining the opportunity to develop in a different pattern. Further, there may be benefits both to the property owner and for the Highlands Region. The property owner benefits because infrastructure, like roadways and utility lines, are costly and clustering houses instead of spreading them out allows the use of shorter roads and utility lines. The benefit to the Highlands Region is the protection of more contiguous areas of undeveloped land that is deed restricted against future development.

410. COMMENT: Requiring deed restricting at N.J.A.C. 7:38-3.4(b)5 casts in stone the opinions of these proposed regulations. That is bad policy. Since the land cannot be built on based on these proposed regulations, that should be enough. Adding deed restricting language is superfluous. If the benefit is so great, it should not be hard for the DEP or Highlands Council to keep track of this. There is no cost/benefit to deed restrictions in the

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proposed regulations. This is an arbitrary and capricious regulation that is an undue burden on property owners. (9-12)

RESPONSE: A prospective purchaser of property may not be aware that the property was the subject of an HPAA and is therefore restricted. A conservation restriction that is memorialized in the deed will ensure that future purchasers of the property will be aware of the limitations on future development. This is important where aggregation and clustering is applied since the owner will be transferring density from one parcel to another and the parcel from which development is transferred must be protected against future development in order to ensure that the nitrate dilution it provides is realized.

411. COMMENT: At NJ.A.C. 7:38-3.4(c), why are things like mounded septic systems banned? They provide the same quality water to the aquifer as traditional fields do. This is an additional burden on the residents of the Highlands with no payback. No cost/benefit is included. If it is such a great idea, why is it not implemented Statewide? Why are residents of the Highlands discriminated against while residents outside the Highlands are not? What is the cost of this proposal and what are the benefits? (9-12)

412. COMMENT: The exclusion of “extraordinary measures” such as using select fill or mound systems is not explained or justified, particularly since these “extraordinary measures” are ordinary outside the preservation area. Furnish all data including but not limited to meeting minutes, correspondence, e-mails, telephone conversation records and notes, personal meetings and meeting notes that NJDEP used to develop the rationale for its own use or may have furnished to the New Jersey Legislature or any member of the New Jersey Legislature, or their staff on this subject. Furnish resumes of all your experts, internal or external to NJDEP, involved in developing the rational basis for the exclusion of “extraordinary measures “ in septic systems. (87)

RESPONSE TO COMMENTS 411 AND 412: Because septic systems are intended to be the long-term method of wastewater management in the Highlands preservation area, it is

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essential to maximize the likelihood of success and operation of the systems. The language of the Highlands Act prohibits the degradation of water. Consequently, the use of systems highly modified to accept the hydraulic load, like a mound or a soil replacement bed, are excluded since such systems are inherently less reliable than traditional systems. In terms of costs and benefits, the benefit to the property owner is that traditional systems are less expensive to build and operate than alternate systems. The benefit to the Highlands Region is an added measure of protection for the water quality of the region.

The correspondence and other records sought by one of the commenters is beyond the scope of the explanation and information the Department can publish in response to a comment in a notice of adoption. Should the commenter still be interested in obtaining the additional information, the request would more appropriately be made as an Open Public Records Act (OPRA) request.

413. COMMENT: The allowable density of one disposal system for each 88 acres of forested land is not supported by scientific evidence and is inconsistent with specific provisions of the Highlands Water Protection and Planning Act. The scientific basis as set forth in the explanatory provisions of the rule proposal are improperly relied upon and do not apply to the lands and soils within the region. Assumptions are not based in scientific truths and are not causally related to a protection of the groundwater supply. The distinction between forested and non-forested parcels is not rationally related to the stated purposes of the Act. In fact, given the existence and status of other regulatory schemes that currently exist, the rule limitations are not required. The proposed rules completely disregard scientific fact and protections afforded elsewhere in the Administrative Code, giving the clear impression that the rules are not directed at the intents and purposes of the Act but of the unstated purpose of simply stopping and preventing development of any type. (111)

RESPONSE: The Highlands Act acknowledges the existence of various statutes and regulations but also requires the Department to establish standards in the Highlands rules

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for septic densities. See N.J.S.A. 13:32e. Further, the distinction in septic density targets is not based on the presence of forest per se, but in recognition of the fact that groundwater quality in areas with little or no human influence is better. Forest is an indicator of these areas.

As detailed fully in response to comments 371 through 379 above, the technical approach established to determine septic density was a lengthy, comprehensive and deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration throughout the Highlands Region. The technical basis relies on data, including soils and population, specific to the Highlands Region and is intended to comply with the mandate of the Highlands Act and is detailed in the “Basis & Background of the Septic Density Standard of the Highlands Water Protection and Planning Act Rule at N.J.A.C. 7:38-3.4,” available online at <http://www.state.nj.us/dep/highlands/>.

414. COMMENT: N.J.A.C. 7:38-3.4(b)5 states that non-contiguous lots in existence as of August 10, 2004 may be aggregated such that the number of individual subsurface dispose systems or disposal units that would be permitted under this section on one or more of the aggregated lots is transferred to one or more of the aggregated lots provided that the proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units does not require a waiver of any requirement of this chapter. It seems that any transfer will require of waiver from a Highlands rule contained in another section. It seems that the above non-contiguous, septic transfer technique is being rendered ineffective by imposing these type of conditions on its use. (85, 87)

RESPONSE: N.J.A.C. 7:38-3.4(b)5 refers to all other preservation area standards contained in Subchapter 3, for example, impervious surface limits and adherence to the 300-foot buffer adjacent to Highlands open waters. The aggregation/clustering provision is intended to allow a property owner with multiple noncontiguous lots realize the development potential of the land while still protecting the ground water. For example, if

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three noncontiguous lots, all in non-forest areas, were individually 118 acres, the owner would be permitted to develop four units on each lot (118 divided by 25 equals 4 plus an 18 acre remainder, which is insufficient to accommodate an additional unit). However, if all of the 18-acre remainders residuals were aggregated, there would be enough additional non-forest acreage (4 times 18 equals 72) to allow an additional two units to be placed on the parcel designated to house the development. If all areas are located within the same HUC 14, the overall effect on the ground water will remain within the objectives of the standard, since they would be the same as if all three 118 acre lots were contiguous.

415. COMMENT: The rule provides some detail with regard to the development of the septic densities. The Department has chosen a model and selected the various data inputs. In each instance the choices made are very "conservative." This applies to such inputs as household size, water quality targets and climate factors. The proposal notes that choices were made to provide for more conservative results. The layering of conservative estimates however has resulting in results that are beyond scientific justification. It is recommended that the establishment of the septic densities be subject to a technical peer review. This process will allow for the development of more realistic densities that will provide the needed water quality protection. The review should assess the overall approach as well as the choice of model and input parameters. It is further recommended that applicants be given the option of developing site-specific septic densities subject to Department review. In these cases site-specific data will be used to identify the densities necessary to meet the goals of the Act. (113)

RESPONSE: As explained in the response to comments 371 through 379 above, the technical approach established to determine septic densities in the Highlands preservation area was a lengthy, comprehensive and deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration throughout the Highlands Region.

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Establishing a standard based on a regional background was selected as an approach rather than assessing a site-specific nitrate target for each development application because: 1) site-specific analyses significantly increase the financial burden and involve a lengthy review process for every application, 2) “piecemeal” permitting for development proposals has proven ineffective at protecting water resources against the secondary and cumulative impacts of human encroachment; 3) the available tools for assessing the effects of septic system development on ground water are most accurate on a regional basis; and 4) the regional standard provides regulatory predictability.

416. COMMENT: Use of “drought condition” recharge value is overly conservative to the point of being unrepresentative of anywhere in New Jersey. While droughts do occur, they are not the normal climactic condition. A simple analysis of the average recharge (annual) values across the Highlands reveals a recharge value of 15 inches per year, which significantly influences dilution calculations. (75)

RESPONSE: The Department disagrees that use of drought condition results in an overly conservative method. The Department’s model makes assumptions based on specific nitrate-loading variables (persons/home, nitrate generated per person in pounds per year), ground water recharge variables (soil, land use, climate differences by municipality) and a nitrate concentration standard or target, to determine the land area needed per septic tank to meet that target. The model is based on annual average recharge estimates and assumes complete mixing. In fact, septic effluent loads may remain incompletely mixed over a considerable distance. As a result, during the wet spring season nitrate may be diluted to less than the standard, while during dry summers or times of drought there will be less dilution and the standard may be locally exceeded. This seasonal mixture of wet and dry extremes generally balances out over the flow path of an entire development or area, but the occurrence of such conditions illustrates the importance of specifying a nitrate target sufficiently protective of ground water to account for these naturally recurring shifts, and opting for a regional basis for the standard. In consideration of seasonal variation, the Department consistently selected the more conservative value or

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range of values when considering determination of individual model parameters since by selecting a conservative value the Department ensures that the values will not be routinely exceeded.

417. COMMENT: The Trela-Douglas model on nitrate dilution, used for determining septic density, was developed in the early 1970s for the Pinelands Area. The soil and weather environment are quite different in the Highlands area and the use of this model without local calibration is not appropriate. The heavier soils in the Highlands have more buffering capacity than the sandy soils in the Pinelands with low pH. Higher organic matter content and attendant microbial activities will provide more opportunities for denitrification. The risk of groundwater pollution from nitrates is much lower in the Highlands than in the Pinelands. DEP should base its literature review on studies conducted with similar soil conditions as found in the Highlands (not “fine sand”). (75)

RESPONSE: The original nitrate model that served as the premise for the septic density standard was a thesis project undertaken by Trela and Douglas, and was developed based on conditions in the Pinelands. It was first applied in the Pinelands in response to the need for a planning tool to establish appropriate residential density based on water quality for the Pinelands Comprehensive Management Plan. The recharge model (GSR-32) that provides the dilution component for the NJGS nitrate-dilution model takes the Trela/Douglas model and enhances it to account for variable soil and rainfall conditions so that it can be applied throughout New Jersey. For the development of the septic density standard, conditions in the Highlands were the basis of the input variables, including soils and recharge.

Wastewater is injected into the subsoil. According to most sources, the organic matter in the subsoil is minimal and of significant age that it is not readily available for denitrification. Microbial denitrification was discussed in the support document for the nitrate model (New Jersey Geological Survey Open-File Report OFR 04-1). This research examined studies conducted in a variety of soils worldwide and concluded that denitrification in the subsoils is rare and requires a convergence of a number of ideal

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conditions that are not typically attained. The belief that the risk of contamination from nitrates in the Highlands is much lower than in the Pinelands is not supported by scientific documentation. The USGS has found elevated levels of nitrates in all geologic terrains in New Jersey, depending upon land use. There does not appear to be any consistent pattern of nitrate contamination that is correlated with soil type. The Department would welcome any valid evidence of the relationship between soils texture and ground-water vulnerability to nitrate. The adopted model is based on scientific data showing that denitrification is minimal to rare in most geologic settings.

As explained in the response to comment 371 through 379 above, the technical approach established to determine septic densities in the Highlands preservation area was a lengthy, comprehensive and deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration throughout the Highlands Region.

418. COMMENT: DEP uses an estimate of 75 gallons per person per day for water consumption. There is no indication of how much of that water use occurs in the home. Water use that occurs elsewhere lowers the effluent distribution and changes the potential concentration in groundwater. It is very reasonable to assume that a high percentage of the 2.7 people households are using water away from the home during the day in other locations where wastewater is treated via collection systems. (62, 75)

RESPONSE: The current Recharge-Based Nitrate-Dilution Model for New Jersey (version 5.0) assumes a nitrate input expressed as pounds per person per year. The suggested loading rate is 10 pounds per person per year. This is independent of the volume of water generated by the lot. Therefore, the current version of the nitrate model does not rely on water-use rates, but assigns a nitrogen-loading rate per capita, then dilutes this load with recharged ground water.

There are numerous techniques that effectively project water usage, for example, some methods monitor indoor water use while others monitor wastewater discharges. EPA cites numerous studies in its Onsite Wastewater Treatment Systems Manual (2002).

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In most of these assessments, the number of residences monitored is substantial, on the order on 150 to 200 upwards to almost 1,200. Some of these residences probably used much more or less water than others, but it is impossible to estimate how many residents of a region are using water or generating wastewater away from their homes during the day, just as it is impossible to estimate how many person who reside outside a region enter the region and use or generate water and wastewater on any given day. Therefore, for per capita assessments such as these, typical behavior and typical usage are assumed to average out such potential disparities.

419. COMMENT: DEP initially uses a rate of 300 gal/day per household (75 gallons times four persons). Later in the report, DEP uses an estimate of 500 gallons per day per household in its analysis. More accurately, the rate should be 2.7 people times 75 gallons/day/person or 200 gallons. DEP should be consistent in its analysis. (75)

RESPONSE: The current Recharge-Based Nitrate-Dilution Model for New Jersey (version 5.0) assumes a nitrate input expressed as pounds per person per year. The suggested loading rate is 10 pounds per person per year. This is independent of the volume of water generated by the lot.

Therefore, the current version of the nitrate model does not rely on water-use rates, but assigns a nitrogen-loading rate per capita, then dilutes this load with recharged ground water. The commenter may be confused by the assessment of impacts from development activities other than single-detached, residential dwellings such as duplexes, townhouses, commercial and industrial enterprises. The Standards for Individual Subsurface Disposal Systems at N.J.A.C. 7:9A apply to all discharges to ground water equal or greater than 2,000 gpd, which require a NJ Pollutant Discharge Elimination System (NJPDES) permit. N.J.A.C. 7:9A-7.4 details specifically how to assess discharge volume based on the type of establishment, for example, per *student* for schools, per *square foot* for shopping centers, per *bedroom* for residential dwellings, etc. The rules at N.J.A.C. 7:9A are designed to address these specific types of development proposals, but subsequently combines all types of residential dwellings into one formula (for example,

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single-family homes, townhouses, apartments). In most cases under N.J.A.C. 7:9A-7.4, a four-person (or three-bedroom) household would be allotted a discharge of 500 gpd. Therefore, in order to assess development projects that propose discharges of <2,000 gpd but that are also not single detached residential dwellings, the Department assigned an equivalency between the nitrate-dilution modeling results for the selected single detached, residential dwelling type to that of the flow criteria established at N.J.A.C. 7:9A-7.4.

420. COMMENT: Using a rate of 500 gal/day (125 gal/day/person), the average annual mean concentration of nitrogen is lowered to only 26 mg/l (more water with the same loading of 10lb/person/year). Using 75gal/person/day, the concentration is 36mg/l. Neither figure includes degradation or dilution due to recharge. If septic systems with “fine sand” reduce concentrations by as much as 20 percent, then without dilution due to recharge, the concentrations may be reduced to 22 mg/l and 30 mg/l respectively for “fine sand” media. DEP should use true values of household size and recharge in its calculation. (75)

RESPONSE: It is not clear to the Department why the commenter is referring to “fine sand.” The Department believes the commenter may be referring to the Trela-Douglas Nitrate-dilution Model (1980), that was originally developed in the Pinelands and used for dilution analyses in the Pinelands National Reserve. The model used to develop the Highlands standard was based on the GSR-32 recharge model, which has elaborated on the Trela-Douglas model, so that it can be used throughout New Jersey. The soil and precipitation data applicable to the Highlands were incorporated into the NJGS model for the septic density analyses. Consequently, fine sand is not a factor in the Department’s model.

It also appears that the commenter has assumed that dilution is related to the volume of water assumed to be discharged to the septic system. Nitrate load in the model is independent of the volume of wastewater; dilution is afforded by precipitation, not the

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volume of wastewater discharged to the system. For a description of the Department's model, see the response to comments 371 through 379 above.

421. COMMENT: In determining ambient nitrogen concentrations, DEP with the assistance of USGS, sampled numerous wells in the Highlands, for both "pristine" and "mixed use" areas and determined that concentrations of nitrogen were 0.21 mg/l and 0.76 mg/l, respectively. The document does not indicate at what depth these values were sampled. In areas where these values were determined from well water, DEP should sample ground water quality directly below or adjacent to existing septic systems to develop a relationship between septic system effluent quality and deep aquifer water quality. As currently proposed, DEP is essentially comparing water quality in the septic field to that found in area wells at depths presumably much greater than those of a septic field. DEP should use target effluent concentrations that are found at the same depth as a septic field, or should take readings in close proximity to existing fields (which are functioning properly), to ascertain what the real impact of a system is on groundwater nitrogen concentrations. (75)

RESPONSE: The approach suggested by the commenter would be counter to the regional standard approach, which considers regional ambient ground water quality not that which is most directly degraded by septic effluent, and allows for dilution over a broad area by precipitation, assuming complete mixing of effluent with surficial groundwater. It would be contrary to the mandate of the Highlands Act to base a standard on the degraded quality directly below a drainage bed.

422. COMMENT: The document provides a very simplistic formula for determining acreage needed for dilution to acceptable levels. Substituting more realistic values for numbers of persons per household (2.7 instead of 4) and normal recharge conditions (15 inches instead of 9.8 inches) yields 11 acres per field for "mixed use" conditions and 39 acres per field for "pristine" conditions. While these numbers are still high due to the various ambiguities and the use of extremely low target concentrations, they are certainly

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more reasonable than those of 25 and 88 acres proposed by DEP. This mathematical calculation alone reflects the aggressive nature of the densities proposed. A more direct and simple strategy may be to analyze existing septic system densities in various areas of the Highlands and compare them to aquifer water quality. An empirical relationship between field density and water quality representative of the area could easily and quickly be developed and used as guidance for rule/standards development. DEP should develop an analytical tool which can be used on a case-by-case basis to determine septic field densities which consider local conditions such as site-specific recharge, soils, geology and existing water quality in stead of the typical, “one size fits all” approach.

(75)

RESPONSE: As explained in the response to comments 371 through 379 above, the determination of a representative household density and annual recharge rate was part of a lengthy, comprehensive and deliberative process that relied heavily on peer-reviewed methodologies and research publications, as well as contemporary levels of nitrate concentration throughout the Highlands Region. There is not a readily available, easily applicable, reliable alternative to the Department’s method for protecting the water of the Highlands.

Background levels of nitrate in undeveloped landscapes are normally minimal—on the order of ≤ 0.1 mg/L. The Department determined that it would establish a region-wide nitrate standard rather than require the establishment of a site-specific nitrate target for each development application for several reasons including: 1) site-specific analyses significantly increase the financial burden and involve a lengthy review process for every application, 2) “piecemeal” permitting for development proposals has proven ineffective at protecting water resources against the secondary and cumulative impacts of human encroachment; 3) the available tools for assessing the effects of septic system development on ground water are most accurate on a regional basis; and 4) the regional standard provides regulatory predictability.

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The Department consistently selected the more conservative value or range of values when selecting model input parameters since selecting conservative values helps to ensure that the targets will not be routinely exceeded.

423. COMMENT: Nitrate is identified in this document as the most stringent determinant factor of lot sizes. Use of appropriate recharge and population data alone will bring down the allowable lot size much lower than 88 acres. The use of appropriate processes for soils and microbial activities will further reduce the allowable lot size. Also modern septic system designs can reduce nitrate discharge to groundwater to the extent that nitrate may not be the dominant factor in the determination of lot sizes. (75)

RESPONSE: The response to comments 371 through 379 explains the Department's determination of both the representative annual recharge rate and persons per household, and reasserts that these numbers are the most appropriate for the long-term, reliable protection of Highlands water resources. Existing information regarding each of the Department's assumptions is sufficiently extensive to provide for the reasoned choices made. While new information may provide for the refinement of certain measures, the Department believes it is unlikely that any new information will be so substantially different that it would reverse or nullify the Department's approach and technical assumptions with regard to establishing septic density in the Highlands preservation area.

As explained in response to comment 417, wastewater is injected into the subsoil, and, according to most sources, the organic matter in the subsoil is minimal and of significant age that it is not readily available for denitrification.

The Department does not believe it is appropriate to consider the use of alternative technologies as a factor to increase density simply because they reduce nitrate, because nitrate was used as a surrogate for all parameters of concern in septic effluent. A technology that reduces nitrogen may be ineffective in reducing the other parameters of concern. Further, alternative technologies are easily rendered ineffective if a homeowner does not properly maintain them. Therefore, the dilution model assumes standard

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technology. This does not prohibit the use of technologies that produce a higher quality effluent.

424. COMMENT: A house with septic system in a woodlands area requires 88 acres and on open land needs 25 acres. The justification is that this amount of land is needed to protect against nitrates from septic systems. The natural load of nitrates from deer, birds, and other wildlife was not taken into account and would far exceed any human waste that was treated through a septic system. (54)

RESPONSE: The limitations on the number of septic systems was not based upon the intent to limit nitrates alone. Rather, nitrate was selected as a quantifiable and representative surrogate for the effects of septic systems on water quality. The Department used a dilution analysis to determine a density that comports with water quality goals articulated in the Highlands Act. Individual Subsurface Sewage Disposal Systems (ISSDS) discharge constituents including nutrients, bacteria, dissolved solids and organic compounds (USEPA, 2002). Some constituents are present in significant and predictable amounts while others are present in minute and/or variable amounts based on user behavior. Some constituents are significantly attenuated by the action of microorganisms and chemical reactions in the soil through which the effluent travels. Others, such as nitrate and dissolved solids like sodium and chloride, are attenuated primarily by dilution. Nitrate, phosphorus and total dissolved solids (TDS) were selected as parameters of concern to test for use in the model because they are present in septic effluent in relatively large and predictable amounts.

Pollutant loads from wildlife, which are discharged to the surface of the land or water, cannot be treated the same way as loads from humans, which are injected into the ground water directly. A portion of the wildlife load deposited on land will be attenuated by natural decomposition before it can reach a water resource. An unknown portion may reach the ground water. Areas with little or no human activity tend to have the lowest nitrate concentrations found, on the order < 0.1 mg/L. It is clear that the cumulative impacts of nitrates dispersed from wildlife are well assimilated in undisturbed

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ecosystems. Further, it is impossible to control wildlife inputs. The septic density standard is set so as not to exceed the current background level, which for purposes of this analysis, considers the inputs from wildlife as part of natural background.

425. COMMENT: We agree with the amendment allowing the aggregation of existing non-contiguous lots to allow permitted subsurface disposal units to be clustered on one suitable lot. However, limiting that provision to the same HUC 14 area may limit its effectiveness and use. (75)

RESPONSE: The Department believes the aggregation and clustering provision allows maximum use of land by an owner of multiple noncontiguous parcels. The Department determined that allowing this flexibility was warranted because the dilution model is most effective when assessing regional effects. However, in order to ensure that providing this flexibility does not sacrifice ground water quality, it is important that the clustering remain within a common hydrologic unit. That is, in order for the potential impacts from allowing clustered systems to be ameliorated, the land to remain undeveloped must be in close enough proximity to provide this balance. The Department believes that a larger area, for example an HUC 11, would not provide the close proximity necessary to provide the desired amelioration benefits from clustering.

426. COMMENT: We support requiring the areawide Water Quality Management Plan consistency determination. (73)

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

427. COMMENT: The term “equivalent disposal units” should be a defined term in the definitions section. (73)

RESPONSE: Because the term “equivalent disposal units” is used only in N.J.A.C. 7:38-3.4(b), it is defined there. Equivalent disposal units correlates the projected flow criteria

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established at N.J.A.C. 7:9A (the Standards for Individual Subsurface Disposal Systems) for the representative household size of four persons living in a single-detached, residential dwelling, to all other sizes of residential dwellings as well as all other types of establishments. The concept of equivalent disposal units relates the standard, which was developed relative to residential units, to other allowable types of development that would rely on individual subsurface sewage disposal systems in the Highlands.

428. COMMENT: We support the methodology proposed to calculate the allowable number of disposal systems. (73)

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

429. COMMENT: At N.J.A.C. 7:38-3.4(b)5, we support the concept of using the techniques of non-contiguous lot aggregation. However, the Department should be concerned about long-term practical administration of the deed-restricted lots. A simple deed restriction is far less secure than a conservation easement and is not generally enforceable by an outside party. Assuring that these lands remain permanently undeveloped will require monitoring and, in certain cases, enforcement to assure the public interest. The section, and no other section, of the proposal describes the nature of the restriction nor provides guidance as to monitoring and enforcement. (73)

RESPONSE: The Department does use a conservation restriction, as defined at N.J.A.C. 7:38-1.4, as the vehicle to impose a deed restriction under these rules as part of an HPAA in accordance with N.J.A.C. 7:38-6.3. The Department has designed a template Highlands conservation restriction that can be tailored to address the particular property to which it will attach.

The Department is modifying N.J.A.C. 7:38-3.4(b)5v and the similar requirement at N.J.A.C. 7:38-2.2(b)1, N.J.A.C. 7:38-3.5(a)2v, N.J.A.C. 7:38-3.7(e)9 and N.J.A.C. 7:38-6.4(i) to specify that the lots or resource areas to be protected from future

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disturbance will be subject to a conservation restriction in accordance with N.J.A.C. 7:38-6.3.

7:38-3.5 Impervious surface

430. COMMENT: Why do the regulations limit impervious surface to 3 percent? Why is that better than two percent or four percent or one percent or 10 percent? What is the water resource related scientific basis for this? (43, 45, 46, 107, 114, 116)

431. COMMENT: The three percent impervious surface restriction is arbitrary and unreasonable. Such a restriction results in the total inability for landowners with less than a two-acre lot to reasonably construct a home, garage and driveway. Even a landowner who does have enough property to support a septic system is significantly limited in the opportunity to build upon or landscape his property due to the three percent impervious surface restriction. For large lot owners, enormous amounts of acreage will be required to go into conservation restriction. This is arguably not the reason such owners purchased their property in the first place, and yet the regulations will require it. This will fundamentally result in a regulatory taking. The combination of the impervious surface restriction and the minimum lot size for new septic systems is the single most restrictive element of the new regulations. Even a landowner who does have enough property to support a septic system is significantly limited in the opportunity to build upon or even landscape his own property. There is no data to suggest such a restrictive measure is necessary to implement the purposes of the Highlands Act. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 45, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

432. COMMENT: All limitations on percent impervious surface should be replaced with the requirement that impervious surface not result in the degradation of the nearest streams or loss of aquifer recharge. There are methods to compensate for runoff from impervious surfaces such as dry wells and retention ponds that make this restriction unnecessary. In addition, gravel should not be considered an impervious surface. In other

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DEP publications such as the New Jersey Environmental Primer 2005, gravel is listed as a pervious surface. (19, 28, 45, 46)

433. COMMENT: There are no water resource related scientific justifications for the 3 percent impervious limit making it arbitrary, capricious and unreasonable. (3, 30, 93)

434. COMMENT: The proposed Rules disregard current state of the art systems and methods of development and use of a property in an effort to protect the identified resource. As a result, the rules are overbroad, over-reaching and unconstitutional. A 3 percent impervious limitation is not rationally related to any legitimate cause or purpose of the Act. (111)

RESPONSE TO COMMENTS 430 THROUGH 434: The three percent impervious surface limit is established in the Highlands Act at N.J.S.A. 13:20-32h. Impervious surface is also defined in the Highlands Act at N.J.S.A. 13:20-3 to include “porous paving, paver blocks, gravel, and crushed stone.” There are scientific justifications for such limits and a substantial volume of scientific literature that documents that increasing percentages of impervious surface on a basin-wide scale are strongly correlated with degradation of water quality. Negative impacts to water quality and quantity due to increasing percentages of impervious surface basically fall into three categories: 1. increased flooding due to more frequent and higher peak runoff volumes; 2. changes in stream and corridor shape and integrity; and 3. adverse changes in actual water quality (chemistry). Although impervious surface does not in itself generate pollutants, it does establish the means for pollutants to accumulate and then, due to runoff during rain events facilitated by impervious surface, to be carried directly into waterways as direct sheet flow or by storm drain systems.

435. COMMENT: I support the new provision within the rules that calculates impervious cover as already existing and proposed disturbance on "both the newly created lot or lots." I would like to see mandatory impervious cover limits put in place within the Act in

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addition to those already existing for residential and commercial development, but also for agriculture. Farmers need to be able to produce healthy local food and to do so requires that healthy soil resources be protected. Impervious cover limits also protect our water supply, which is so important for farming and the general public. (14)

RESPONSE: The Department acknowledges the commenter's support for the rules. However, agricultural uses are exempt from the rules, including the requirement to comply with the three percent impervious surface limit. However, the Highlands Act does establish impervious surface limits for agriculture that are to be implemented by agencies other than DEP, including the local soil conservation district, Natural Resource Conservation Service (NRCS), and the Department of Agriculture. See N.J.S.A. 13:20-29.

436. COMMENT: I agree with the amendment allowing the aggregation of existing non-contiguous lots to allow impervious surface to be transferred to one suitable lot. However, limiting that provision to the same HUC 14 area may limit its effectiveness and use. (75)

RESPONSE: The premise for permitting aggregation is that the lack of impervious surface on one lot compensates for additional impervious surface in another location. Therefore, in order to ensure that non-contiguous lots that are aggregated will continue to provide adequate water resource protection, the land to remain undeveloped must be in close enough proximity to provide this compensation. The Department believes that a larger area, for example an HUC 11, would not provide the close proximity necessary to provide the desired amelioration benefits from the aggregation of lots.

7:38-3.6 Open waters

437. COMMENT: As for no building within 300 feet of even an intermittent body of water, what is that, a rain puddle? I know my beautiful home overlooking a pond would

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not be allowed. Even my mother's lovely house, the original part of which was an Indian Trading Post in the early 1700s, built near a spring, would not be allowed. What are we are hurting? We are not polluting. What is the scientific basis for this? (43)

438. COMMENT: The typical protection zone for intermittent streams in other states is only 25 feet. Therefore, 300 feet is arbitrary, onerous and unreasonable. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 45, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98, 107)

439. COMMENT: Why should intermittent streams require a 300-foot buffer? Why not 50 or none? (107)

440. COMMENT: Mandating a 300-foot buffer is unnecessary for protection of Highlands open waters since there are many proven ways to preserve healthy buffers and clean water short of a total ban on buildings and severe restrictions on linear development. Driveways and roads have been placed within 300 feet of seasonal and year round streams for hundreds of years without causing any harm. In fact, fish are fond of resting in the cool area underneath roadways. (19, 28, 107)

441. COMMENT: The rule defines minimum (at least 300-feet per side) "open-water buffers," and maximum impervious surface areas (three percent) associated with development. However, no scientific basis is provided for these quantities. Furthermore, the scientific literature relative to these protective measures recommend for areas in the United States with physiographic and ecologic conditions similar to the Highlands, open water buffers of about 100 feet (U.S. Forest Service recommended 150 feet) and maximum impervious areas of 10 percent (U.S. Forest Service recommended 10 percent), and in some instance recommended that the measures vary based on the site-specific conditions (e.g., baseflow). These recommended protective measures are often based on the assumption that local groundwater recharge will be impacted due to inadequate stormwater management measures. According to the Act, such conditions would not be permitted. As a side note, research conducted in New Jersey indicated varying buffer

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widths depending on the proximity to a water supply reservoir, with recommendations for tributary streams indicating the adequacy of a 50-foot buffer. As such, we do not see a water-resource basis for the "across-the-board" required 300-foot buffer and three percent impervious area protective measures indicated by the rules. (85, 87)

442. COMMENT: The "across the board" 300 foot buffer requirement is arbitrary and unreasonable when applied. There is no basis in science for the 300-foot criteria, particularly given the broad definition of "open waters." Requirements for driveways are unreasonably onerous given the potential for degradation when properly designed and constructed. Proposed Rules in general, and in this instance, appear to be the result of improper intent to take property without the payment of just compensation through expense and regulation into inutility. Appropriate conservation and environmental protection measures exist for development to occur in a rational and proper manner without the blanket capricious prohibition. (111)

RESPONSE TO COMMENTS 437 TO 442: The Highlands Act at N.J.S.A. 13:20-32a mandates that the rules prohibit major Highlands development within 300 feet of any Highlands open waters. There is extensive scientific literature evaluating buffer widths. These studies reveal that widths may vary depending upon the function they are intended to provide. These functions include sediment removal; streambank stabilization; nutrient removal; contaminant removal; flood storage; wildlife habitat; aesthetics; and recreation and education. Because of the environmentally sensitive nature of the Highlands preservation area, adequate buffers adjacent to Highlands open waters would be desired to protect all of these functions. Narrow buffers (100 feet or less) may help with stream bank stabilization but will not be adequate for nutrient and contaminant removal or wildlife habitat. A study by the Environmental Law Institute concluded that a buffer of at least 325 feet (100 meters) is necessary to achieve water quality protection (Environmental Law Institute. 2003. Conservation thresholds for land use planners. Washington, D.C. 55 pages.). Consequently, it is likely that such literature was used to determine that 300-foot buffers are necessary and appropriate to adequately protect

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Highlands open waters. The 300-foot buffer requirement is consistent with the standards established by the Department for the protection of Category One waters Statewide under the Stormwater Management rules, N.J.A.C. 7:8.

The Act defines Highlands open waters to include intermittent streams, thus subjecting such streams to the 300-foot buffer requirement. The only exception to the prohibition on major Highlands development in the buffers is for “linear development” for infrastructure, utilities, and the rights-of-way therefor. The Department interprets this to include access roads and drives (see the definition of “linear development” at N.J.A.C. 7:38-1.4), but under the standards for Highlands open waters at N.J.A.C. 7:38-3.6 (as well as the standards for steep slopes at N.J.A.C. 7:38-3.8), will approve driveways in these areas under an HPAA only when there is no alternative use for the lot to which the driveway provides access that does not include development.

As explained in response to comments 430 and 434, the Highlands Act establishes, at N.J.S.A. 13:20-32h, a three percent limitation on the placement of impervious surface, which is also explained in that response, is supported in the scientific literature. The three percent impervious surface limit also is consistent with that established in the State's coastal area under the Coastal Zone Management rules (N.J.A.C. 7:7E) for certain environmentally sensitive areas.

443. COMMENT: We believe the provisions of the proposal that define private driveways to serve new development as “linear development” violates the steep slope, forest, open waters buffers, and scenic standards of the Act. (48)

RESPONSE: The Act and these rules exclude major Highlands developments in the buffers to Highlands open waters and on steep slopes except for linear development in limited circumstances. As explained in the response to comments 437 through 442, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the

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driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies. N.J.A.C. 7:38-3.9(e) requires that applicants, proposing driveways to be sited in upland forest located on a slope greater than 10 percent, demonstrate that there is no alternative use for the lot, in accordance with the standards for linear development, and that the activity is minimized. All other driveways proposed in upland forest will only be permitted if there is no alternative, the impact has been minimized, and there is no clearance of forest beyond 10 feet adjacent to the driveway.

Whether a driveway can be constructed to comply with the Department's public scenic attributes rule at N.J.A.C. 7:38-3.12 will depend upon the land upon which it is proposed, and the location of the driveway on the land.

444. COMMENT: A landowner who wishes to build a driveway to access a developable piece of property, but must cross open waters or steep slopes, must go through a convoluted and unfair process to do so. Requiring an applicant to attempt to transfer development rights from the property is premature considering that this program has yet to be developed. The second stipulation requires the applicant to offer the land for sale at an amount no greater than specific fair market value. A goal of the Highlands Act was to protect the equity of landowners. This is evident in the January 1, 2004 appraisal standard as the basis for compensation method. This rule should explicitly state that the landowner can offer the land for sale at the fair market value conditions prior to January 1, 2004. In order to keep within the intent of the Act, the DEP should not require any property owner within the Highlands to accept any value of land that is less than the land was worth before the Highland Act was signed into law. (69, 87)

445. COMMENT: The Department should not require an owner to offer a property for sale as a requirement of linear development because it takes away the owners right to put the land to its highest and best use. If a sale is forced, the sale must occur at the market value prior to January 2004 as in other areas of the Highlands Act and include a non-preservation area appreciation factor. If the Department requires relocation of linear

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development, the landowner should be compensated for any additional costs incurred.

This also applies to the provisions for steep slopes. (19, 28)

446. COMMENT: If someone with 88 acres of property proposes to install a driveway within 300 feet of a waterway, they would first have to offer their property for sale at a value determined by the DEP Highland Commission (below market value). If the property owner rejects a below market value offer, the Department can deny the application for the driveway. (54)

447. COMMENT: Linear development was specifically excluded from the Highlands Act but the Department is not only regulating it, but forcing the sale of property at far below pre-Highlands values in lieu of linear development. This is not consistent with the administrative guidelines given to the DEP for issuance of regulations. (19, 28)

RESPONSE TO 444 THROUGH 447: As explained in the response to comments 437 through 442, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies. N.J.A.C. 7:38-3.6 and 3.8 require that the fair market value be determined by a State-certified appraiser of the applicant's choosing. Neither the Department nor the Highlands Council establishes this value. In addition, when the future Transfer of Development Rights (TDR) program to be created by the Highlands Council (see N.J.S.A. 13:20-13) establishes a value for land that is not to be developed, it might be appropriate to use TDRs to preserve the land. The Department will not require the owner to demonstrate that he or she has attempted to use the TDR program until the program is in place.

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The Highlands Act provides that property owners who wish to sell land for preservation purposes are eligible for compensation at pre-Highlands values. The Act specifically requires that, commencing on the date of enactment (August 10, 2004) and through June 30, 2009, when the Green Acres program, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land for recreation and conservation purposes, it must obtain appraisals of the value of the land using current zoning and State environmental regulations, as well as using the zoning and the State environmental regulations in effect on January 1, 2004. The higher of the two appraisal values is to serve as the basis for negotiation with the landowner with respect to the acquisition price for the lands. See N.J.S.A. 13:8C-26j. Similar provisions in the Act apply when the State Agriculture Development Committee, a local government agency, or a qualifying tax exempt nonprofit organization seeks to acquire farmland or a development easement on farmland. See N.J.S.A. 13:8C-38j. Therefore, in the case where the owner is offering his or her land for sale to one of these agencies, if that agency is interested, it will obtain two appraisals and negotiate using the higher value. The Department has modified the rules at N.J.A.C. 7:38-3.6(b)2ii and 3.8(c)3ii on adoption to clarify that where the lot is to be offered to a government agency or land conservation organization, the fair market value will be that established in accordance with the above-cited requirements of the Highlands Act. However, the ability to obtain pre-Highlands Act and post-Highlands Act appraisal values and use the higher of the two as the basis for negotiating a sales price does not apply in the circumstance of the lot being offered to neighboring property owners, since individual buyers are not subject to the above-cited requirements of the Highlands Act.

448. COMMENT: The proposed revision to require applicants proposing driveways, to a developable property, through Highlands open waters and/or their 300 foot buffers, to investigate as part of their alternative analysis the possibility of using the Transfer of Development Rights or selling the property outright, before the Department will approve a driveway linear development is an abuse of private property rights. This means that driveways or utilities needed to access an existing otherwise developable property within

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300 feet of any kind of water, including seasonal streams, the land owner must go through a convoluted process of offering the land for sale at post Highlands market value and offered to conservation organizations. The offer must be accepted. If it is refused, the permission to build the driveway or run the utility is denied. The provision should be amended to exempt driveways. (45, 46)

449. COMMENT: Driveways were originally allowed in the rules published in May as permitted linear development. Current rule amendments require that before driveways are permitted as linear development, the entire property in question must be offered for sale or must be made available to the Highlands Council for TDR consideration. This adds an unnecessary burden to preservation area property owners already facing a great number of restrictions on use of their property. Driveways should be reinstated as a permissible form of linear development without the additional condition imposed by N.J.A.C. 7:38-3.6(b)2 and 4. (114)

RESPONSE TO COMMENTS 448 AND 449: As explained in the response to comments 437 through 442, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies. The Highlands Act limits incursions into the buffer adjacent to Highlands open waters and steep slopes for all but the most necessary projects. Therefore, if there is another use for the property that would avoid the need to damage the resource with a driveway, the Department will not approve the driveway.

The Department will not deny a driveway unless the owner has refused to accept a fair market value offer from a property owner within 200 feet or if the owner refuses an offer below the fair market value from one of the agencies using two appraisals for negotiation.

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450.COMMENT: N.J.A.C. 7:38-3.6(b) allows linear development in the 300 foot buffer provided there is no “feasible alternative” and N.J.A.C. 7:38-3.6(b)3 indicates that one feasible alternative may be to “require an area of land not owned by the applicant which could reasonably be obtained, expanded, or managed in order to fulfill the basic purpose of the proposed linear development.” While this option may be considered, landowners should not be subjected to undue pressure to purchase additional property to develop what is otherwise an “exempt” use. (114)

RESPONSE: As explained in the response to comments 437 through 442, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies. As the commenter notes, the provisions at N.J.A.C. 7:38-3.6(b)3 provides that another alternative that must be considered is the potential to acquire or obtain the use of land not currently owned or controlled by the lot owner where the linear development could be placed instead of in the 300-foot buffer. The Department acknowledges the commenter's concern about the lot owner being subject to "undue pressure" to purchase additional property and notes that the potential acquisition of property is subject to the qualification that the additional area must be able to be "reasonably" obtained, used, expanded or managed in order to meet the basic purpose of the proposed linear development.

451. COMMENT: The requirements for linear development are unreasonably burdensome, particularly the requirement to offer the property for sale. The regulations go beyond typical zoning requirements. This forced sale of property rights is arguably unconstitutional and amounts to a physical taking. This applies also to the same provision as it relates to steep slopes (13, 18, 28, 32, 43, 44, 74, 82, 87)

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RESPONSE: As explained in the response to comments 437 through 442, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies. In the case where there is no other use, and the applicant can satisfy all other requirements of the Act, the Department believes that it is appropriate issue an HPAA, which would obviate a claim of taking without just compensation.

452. COMMENT: The readoption with amendments fails to address the provisions in the special adoption which adversely impact the operations of County and Local governments. Bridge construction, reconstruction and repairs are ordinarily subject to NJDEP stream encroachment permits and general wetlands permits. N.J.A.C. 7:38-3.6 requires all linear developments within Highlands open waters provide an alternatives analysis. This will needlessly add to public expense in maintaining and improving necessary transportation facilities and delay and complicate public projects. The regulations should retain the use of general permits by County and local governments. (85, 87)

RESPONSE: The Highlands Act establishes the criteria for encroachment into a Highlands open water or its 300-foot buffer. The Act allows only linear development projects for which there is “no feasible alternative.” Consequently, a general permit for these activities is not appropriate because an alternatives test is required to determine if the applicant has feasible alternatives to the proposed linear development. However, certain types of maintenance and improvements to transportation facilities are exempt under the Act and these rules, in which case no HPAA or alternatives analysis would be required. See N.J.A.C. 7:38-2.3(a)9.

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453. COMMENT: Buffers for Highlands open waters extend into the planning area as well. A reader may be lulled into believing that the buffers only apply to the preservation area. Establishing 300-foot buffers in the planning area is contrary to the stated objective in the Highlands Act to allow development within the area. Such drastic buffer zones are not appropriate in an area targeted for development. The planning area buffers are beyond the scope of the Act and should not be made part of the rules. (13, 43, 44, 74, 85, 87)

RESPONSE: Although Highlands open waters are located in both the preservation and planning areas, the Highlands Act requires the 300-foot buffer only in the preservation area. N.J.S.A. 13:20-32a specifically provides that the 300-foot buffers shall not extend into the planning area. Consequently, the Department cannot, and these rules do not, establish buffers on Highlands open waters in the planning area. However, the Department notes that there are waters in the planning area that are subject to 300-foot special water resource protection areas under the Stormwater Management rules, (N.J.A.C. 7:8) because they are Category One waters and therefore subject to additional water quality protection measures under those rules.

454. COMMENT: What data supports the regulation of linear development? (82)

RESPONSE: The Highlands Act requires that these rules prohibit development within 300 feet of a Highlands open water except for linear development, “provided that there is no other feasible alternative, as determined by the department, for the linear development outside the buffer.” It is likely that the Highlands Act allows linear development within Highlands buffers because in some cases, a property might be inaccessible without access through the 300-foot buffer. However, as stated in response to comments 437 through 442, buffers adjacent to waterways are important for sediment removal; streambank stabilization; nutrient removal; contaminant removal; flood storage; wildlife habitat; aesthetics; and recreation and education. It is therefore appropriate to provide standards

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to limit any encroachment within a buffer, even when it is a linear development necessary for access.

455. COMMENT: Since any linear development, such as running an electric line within 300 feet of an intermittent stream, requires a landowner to offer the property for sale, this means that most people who want to run electricity to a field would need to offer the land for sale. The requirement is ridiculous, out of proportion and insulting. There is no cost/benefit of this regulation. Linear development should be exempt from these regulations. (30, 45, 46, 93, 116)

RESPONSE: If the proposed linear development is an electrical line, the applicant is required to demonstrate that there is no other location, design and/or configuration for the proposed linear development (in this case the electrical line) that would reduce or eliminate the disturbance to a Highlands open water. The “offering” requirement applies only to those proposing a driveway through or within 300 feet of a Highlands open water.

456. COMMENT: Access to driveways, roads, and power lines have been within 300 feet of seasonal and year round streams for hundreds of years without causing any harm to the open waters. Fish are known to prefer the cool underground crossings of roadways. The forced sale of land in lieu of linear development is inappropriate for other reasons. First, the forced sale of the owners land takes away the right of the owner to put the land into its highest and best use. Second, if a sale were to be forced, the sale must occur at the market value that existed prior to January 31, 2004 as specified in other areas of the Highlands Act plus non preservation area approval. If it is necessary to relocate linear development to comply with the Highlands Act the land owner should be compensated for any costs incurred to do so. (45, 46)

RESPONSE: The Highlands Act requires that these rules prohibit development within 300 feet of a Highlands open water except for linear development, “provided that there is no other feasible alternative, as determined by the department, for the linear development

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outside of the buffer.” As explained in previous responses, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies. In the case where there is no other use, and the applicant can satisfy all other requirements of the Act, the Department believes that it is appropriate to issue an HPAA, which would obviate a claim of taking without just compensation.

Also as explained in previous responses, the Highlands Act provides that property owners who wish to sell land for preservation purposes are eligible for compensation at pre-Highlands values. Until June 30, 2009, when the Green Acres program, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land for recreation and conservation purposes, it must obtain appraisals of the value of the land using current zoning and State environmental regulations, as well as using the zoning and the State environmental regulations in effect on January 1, 2004. The higher of the two appraisal values is to serve as the basis for negotiation with the landowner with respect to the acquisition price for the lands. Similar provisions in the Act apply when the State Agriculture Development Committee, a local government agency, or a qualifying tax exempt nonprofit organization seeks to acquire farmland or a development easement on farmland. However, the ability to obtain pre-Highlands Act and post-Highlands Act appraisal values and use the higher of the two as the basis for negotiating a sales price does not apply in the circumstance of the lot being offered to neighboring property owners, since individual buyers are not subject to the above-cited requirements of the Highlands Act.

457. COMMENT: The Highlands Act exempts linear development. (28, 116)

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RESPONSE: The Highlands Act does not exempt linear development. The Highlands Act specifies that linear development proposed within 300 feet of a Highlands open water is allowed, but only if “there is no feasible alternative for the linear development outside the buffer.” See N.J.S.A. 13:20-32a. Therefore, the Department established standards and an alternatives test in the rules at N.J.A.C. 7:38-3.6 and 3.8 for linear development proposed to be located in the buffers to Highlands open waters or on steep slopes.

458. COMMENT: The linear development exemptions from strict application of the standards are expressly defined and limited in scope to infrastructure, utilities, and rights-of-way. The legislative intent of these provisions was to allow critical public utilities and public infrastructure, such as power lines, pipelines, and other public infrastructure to traverse the region. The term "infrastructure" was clearly intended to apply to public infrastructure, not private, and was not intended as a loophole to serve growth in the region. The Department appears to be interpreting this provision far too broadly to exempt linear development. The Department's broad interpretation would allow private driveways and roads to serve new development to be exempt from all preservation area standards. This defies legislative intent and the express language of the Act. The New Jersey Legislature was cognizant of how other land use laws define "linear development" and how the Department interprets "linear development" in the stormwater rules, CAFRA, and other land use permitting programs. The Act intentionally narrowed the scope of these definitions and interpretations to allow for necessary public infrastructure, but to limit growth-inducing infrastructure. This legislative intent is consistent with and reflected in the Act's termination of previously approved sewer service areas and prohibitions on extension of new growth inducing water and sewer lines. The Department's interpretation is clearly in error here. It is important that the scope of linear development be narrowed to exclude private infrastructure to serve new development.

(101)

RESPONSE: Neither “infrastructure” nor “linear development” is defined in the Highlands Act. The Act at N.J.S.A. 13:20-32 does not specify that infrastructure is only

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public infrastructure with respect to the exception for linear development in buffers and on steep slopes, unlike, for instance, the exemption at N.J.S.A. 13:20-28 for routine maintenance and operations, repair, and similar activities related to "public utility lines, rights-of-way, or systems" undertaken by a "public utility," which is a term defined in the Act at N.J.S.A. 13:20-3. Consequently the Department believes it is reasonable to interpret linear development to include private as well as public infrastructure and utilities and their rights-of-way, and to define linear development to include access roads and drives. The Department does not believe that N.J.A.C. 7:38-3.6 creates a loophole for driveways that will spur growth in the Highlands preservation area. N.J.A.C. 7:38-3.6(b)2 requires the applicant for a driveway to demonstrate that no feasible alternatives to constructing the driveway in the buffer exist, and as part of this demonstration, to seek to transfer the development rights to the lot to which the driveway provides access as well as to offer it for sale to neighbors and land conservation agencies. Only if the applicant is able to make the demonstration that there is no feasible alternative, and only if the driveway and the development on the lot to which it provides access meet all other applicable requirements of these rules, will an HPAA be issued.

459. COMMENT: Linear development is specified in the Act to include infrastructure, utilities and rights of way therefore. The existing rules define linear development to include access roads and drives. The proposed language modifies the linear development exception with regard to both Highlands open waters and steep slopes. New proposed language at N.J.A.C. 7:38-3.6(b)2 addresses situations where an applicant needs to disturb the Highlands open water or buffer for access via a driveway. The new language requires that the applicant make a good faith effort to transfer the development rights for the lot and offer the lot for sale. The Act does not define linear development beyond stating it is for infrastructure, utilities and the rights of way therefore. The existing rules include access roads and drives in the definition of linear development. This definition is consistent with other DEP rules including the coastal permit and freshwater wetland rules. Those rules, however, do not establish separate, more stringent requirements for driveways. The same limitation is proposed for development on steep slopes at N.J.A.C. 3.8. For driveways on slopes with grades of 20 percent or greater the applicant must

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make a good faith effort to transfer the development rights and to sell the property. Again the Act requires that linear development be exempt from the limitation on development on such slopes and the Department has included driveways in the application of linear development requirements in other regulatory programs. To restrict the access to sites in this manner is inconsistent with the Act and Department policy. The proposed language should not be adopted. (112)

RESPONSE: As explained in previous responses, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies.

The Highlands Act limits incursions into the buffer adjacent to Highlands open waters and steep slopes for all but the most necessary projects. Therefore, the Department believes it appropriate, as part of the HPAA review process to determine if there is another use for the property that would avoid the need to damage the resource with a driveway.

460. COMMENT: N.J.A.C. 7:38-3.6(d) specifies that “existing structures and land use may remain in the buffers to open waters.” This section should be further amended to specify that farmers be exempt from obtaining an HPAA for repairs to structures within the existing footprint. Farmers should not subjected to expensive approval process to maintain access to and from their farms. They simply do not have the funds and means to do so. (45, 46)

RESPONSE: Agricultural and horticultural uses and developments are not regulated under these rule because they are excluded from the definition of “major Highlands development.” This is already stated in Subchapter 2 where the applicability of these

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rules is described and the Department does not believe it is necessary or appropriate to reiterate the various exemptions and exclusions throughout the rules.

461. COMMENT: The requirements for driveways are excessive. We support the concept of shared driveways. (75)

RESPONSE: As explained in previous responses, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies.

The Highlands Act limits incursions into the buffer adjacent to Highlands open waters and steep slopes for all but the most necessary projects. Therefore, the Department believes it appropriate, as part of the HPAA review process to determine if there is another use for the property that would avoid the need to damage the resource with a driveway.

462. COMMENT: We support the stringent procedures proposed governing the issuance of an exception for linear development within the 300-foot buffer. (73)

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

N.J.A.C. 7:38-3.7 Flood Hazard Area

463. COMMENT: The text of section N.J.A.C. 7:38-3.7 is not included in the proposed rule language. (75)

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RESPONSE: In accordance with the Office of Administrative Law's Rules for Agency Rulemaking, N.J.A.C. 1:30, a proposal to readopt rules need only include the text of any proposed amendments. The text of N.J.A.C. 7:38-3.7 was promulgated in the special adoption of N.J.A.C. 7:38 (published in the June 6, 2005, NJ Register). The Department did not propose any amendments to this section in the proposal to readopt the rules. Consequently, the text of N.J.A.C. 7:38-3.7 did not appear in the proposal published on December 19, 2005.

7:38-3.8 Steep slopes

464. COMMENT: It is clear that development on even moderate grades results in substantial water runoff and erosion. For that reason, no development should take place on steep slopes that are class I or class IIw since even moderate slopes must take into account water runoff and erosion. We are having 500 year-storms in New Jersey these days and the runoff from them can take out an entire valley as New Jersey has experienced in the last few years. We cannot allow that to continue to happen. (83)

RESPONSE: The Highlands Act requires that development on steep slopes (equal to or more than 20 percent grade) must be prohibited except for linear development for which there is no feasible alternative. On moderately steep slopes (between 10 and 20 percent grade), the Act requires that these rules include standards for development to prevent, among other things, soil erosion and sedimentation. N.J.A.C. 7:38-3.8(d) establishes these standards. As explained in the proposal summary, the Natural Resource Conservation Service Soil Surveys, employ a classification system that addresses soil erodability factors. Class I soils have few limitations that restrict their use. Class IIw soils have moderate limitations as a result of water in or on the soil. Neither soil classification indicates a soil that is prone to erosion. Further, Class I and Class IIw soils can be found anywhere in the landscape. Preventing development on them would not necessarily help to prevent the impacts from 500-year or any other storms. Under N.J.A.C. 7:38-3.8(d)3, major Highlands development is approvable on moderately steep slopes where Class I or

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If soil is found only if all other standards in the rules are met and only if the applicant shows there is no other location or configuration of the development that would reduce or eliminate the disturbance of the slope. If the soils are found on moderately steep slopes in the floodplain, the standards at N.J.A.C. 7:38-7 for flood hazard areas would also apply.

465. COMMENT: The provision requiring the owner to offer the property for sale is prohibitive, unreasonable and an unconstitutional restraint on property rights. (30, 93, 116)

466. COMMENT: Regarding linear development and the restrictions placed on driveways, current rule amendments require that before driveways are permitted as linear development, the entire property in question must be offered for sale or must be made available to the Highlands Council for TDR consideration. This adds an unnecessary burden to preservation area property owners already facing a great number of restrictions on use of their property. Driveways should be reinstated as a permissible form of linear development without the additional condition imposed by N.J.A.C. 7:38-3.8(c). (114)

RESPONSE TO 465 AND 466: As explained in previous responses, the Department interprets linear development to include driveways, but will approve their construction under an HPAA in buffers and on steep slopes only in very limited circumstances. The rules provide that a driveway will be permitted only when an applicant can demonstrate that there is no alternative use for the lot to which the driveway will provide access that would not involve development, including seeking to transfer development rights and offering the lot for sale to neighboring property owners and land conservation agencies.

The Highlands Act requires the Department to limit development on steep slopes in order to prevent soil erosion and sedimentation, prevent stormwater runoff, and protect water quality. It is likely, however, that the Highlands Act allows linear development on steep slopes because in some cases, a property might be inaccessible without access on a steep slope. However, because avoiding development on steep slopes provides so many

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important benefits to the preservation area, it is appropriate to provide standards to limit any encroachment on a steep slope, even in cases when a linear development is necessary for access.

467. COMMENT: N.J.A.C. 7:38-3.8 states that a Highlands preservation area approval shall not be issued if an applicant refused a fair market value offer to purchase the property for which the driveway linear development is sought. What if the person wants to live out a quiet life in solitude? Why should he be forced to sell against his will? What public purpose is served by refusing to issue a HPAA in these type cases? (85, 87)

RESPONSE: The provisions in Subchapter 3 apply to persons who are proposing to construct a “major Highlands development.” Unless such development is proposed there is no requirement to comply with any of the regulations of the Highlands Act. The purpose of the requirement to offer a property for sale, before the Department will issue an HPAA for a major Highlands development that includes a driveway within a Highlands open water, its 300 foot buffer or within a steep slope, is to assess whether or not the landowner can realize a use of the land without building a driveway. That is, if there is a buyer interested in purchasing the land who is willing to pay fair market value and has no intent to develop the property, the owner can realize a “use” for the land by selling it and the need to construct a driveway through the environmentally sensitive buffer or steep slope will be alleviated. Thus, the public purpose is that the land is preserved and the owner realizes an economic benefit from sale of the land. In the case where there is no other use for the property, including its sale for preservation, and the applicant can satisfy all other requirements of the Act and these rules, the Department believes that it is appropriate to issue an HPAA for the development.

468. COMMENT: Since there are no Federal standards for steep slopes, the guideline should be that each project should be evaluated separately to ensure that slope disturbances do not degrade water in adjacent streams. (19, 28)

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RESPONSE: The Highlands Act at N.J.S.A. 13:20-32j prohibits development on steep slopes that are that are 20 percent grade or more but for linear development where there is no feasible alternative, and requires that the Department establish standards for development on slopes between 10 percent and 20 percent grade. The standards for development on slopes between 10 and 20 percent grade, as explained in the proposal summary and required by the Act, are intended to prevent soil erosion and sedimentation, prevent stormwater runoff, and protect water quality. To accomplish these purposes the standards must necessarily address broader impacts than water quality degradation particular to adjacent streams. That there are not Federal standards for development on steep slopes does not affect the need for and content of these requirements, as they are required by the State Highlands Act.

469. COMMENT: Protection of Highlands open waters is what is critical, and restricting development on slopes of 20 percent and less is unnecessary since there are many proven ways to preserve clean water short of these restrictions. (28)

RESPONSE: As explained in the previous response, the Act requires that development on slopes of 20 percent or greater grade must be prohibited but for certain linear development, and that the Department establish standards for development on slopes of between 10 and 20 percent grade. The Highlands Act and these rules contain many other provisions to protect water quality including septic density standards, limitations on impervious surface, protections for Highlands open waters and a 300-foot buffer adjacent to these waters, and the protection for upland forest. All of these provisions, together with the protection for steep slopes are required by the Highlands Act for the protection of water quality.

470. COMMENT: What engineering or hydrology study proves an adverse watershed impact from construction on a slope? (82)

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RESPONSE: As explained in prior responses, the Highlands Act requires that development other than certain linear development be prohibited on steep slopes of 20 percent grade or more, and that standards be established in the rules for construction on steep slopes between 10 and 20 percent grade to prevent soil erosion and sedimentation, prevent stormwater runoff, and protect water quality. There are a wide variety of studies on this and related topics. For example, a study conducted by Earl R. Byron, and Charles R. Goldman, Land-Use and Water Quality in Tributary Streams of Lake Tahoe, California-Nevada, *J. Environ. Qual.* 18:84-88, 1989, examined the effects of man-made disturbance on sensitive lands (defined as having slopes from nine to 50 percent) on the watershed of Lake Tahoe, supports the need to protect steep slopes to avoid negative impacts to water quality. The study concluded that there was a direct relationship between the amount of disturbance to sensitive lands and the nitrate and suspended sediments (pollutants) present in the streams of the watershed. Another study conducted in the watershed of a Lake Macatawa in Michigan found that despite the presence of vegetation, there was greater sedimentation in the lake from spring runoff traversing slopes of five percent or more than from runoff originating in flatter areas. See Drake, R.H., and R.L. Reinking. 1978. Sources of sediment pollution in the Lake Macatawa drainage basin, Michigan. *Mich. Acad.* 10(3) 265-272.

471. COMMENT: Development of steep slopes should be allowed based on accepted engineering construction practices and standard zoning procedures. (18, 51, 54, 84)

472. COMMENT: Steep slopes should be examined on a case-by-case basis to determine their impact, if any, on protecting the nearby quality of the water. Restricting any development on all slopes of 20 percent is over-restrictive (11.3 degrees corresponds to slope of 20 percent or 20 feet rise in 100ft.). There are engineering ways to deal with erosion etc. on this amount of slope. This is a broad brush limitation for stopping development, not related to case-by-case analysis protection of the water resources. (45, 46)

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RESPONSE TO COMMENTS 471 AND 472: As explained in prior responses, the

Highlands Act requires that development other than certain linear development be prohibited on steep slopes of 20 percent grade or more, and that standards be established in the rules for construction on steep slopes between 10 and 20 percent grade to prevent soil erosion and sedimentation, prevent stormwater runoff, and protect water quality. To accomplish these purposes the standards must necessarily address broader impacts than water quality degradation on a case-by-case basis.

473. COMMENT: We support the stringent procedures proposed governing the issuance of an exception for linear development on steep slopes. (73)

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

7:38-3.9 Upland forest areas

474. COMMENT: Disturbance of forested areas should be allowed based on standard zoning procedures. (18, 84)

RESPONSE: It is unclear what the commenters mean by standard zoning procedures. Zoning is specific to and varies by municipality. The Highlands Act at N.J.S.A. 13:20-32k requires the Department to establish a uniform prohibition on development that disturbs upland forest throughout the preservation area, in order to prevent soil erosion and sedimentation, protect water quality, prevent stormwater runoff, and protect threatened and endangered animals and plants and their habitats. The Act also requires the Department to establish standards to protect upland forested areas that require all appropriate measures to be taken to avoid impacts or disturbance to upland forests and, where avoidance is not possible, require that all appropriate measure have been taken to minimize and mitigate impacts to upland forested areas as well as to, again, prevent soil erosion and sedimentation, protect water quality, prevent stormwater runoff, and protect threatened and endangered animals and plants and their habitats. Consequently, the rules at N.J.A.C. 7:38-3.9 provide a process for identifying forest, and then standards for

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demonstrating that there is no alternative to a proposed development that would have less adverse impact on the upland forest. The Department's rules also limit the number of incursions into an upland forest by limiting the amount of forest edge, which is important for protecting large, contiguous forest areas. Finally, if an applicant has successfully demonstrated that there is no alternative to the disturbance of upland forest, the rules require mitigation for the lost upland forest.

475. COMMENT: This provision prevents an existing homeowner within the preservation area from protecting his home from the threat of a hazardous tree if that tree is more than 20-feet away from the house. Many trees exceed twenty feet in height and can cause an unreasonable safety hazard. DEP is not allowing this hazard to be addressed by a homeowner. This poses a greater burden on those who cannot afford the cost of an HPAA, replanting, or potential fines pursuant to the new regulations. Neither can such landowners afford to let large trees endanger their home. In addition, the Department granted itself greater authority by adding aerial photography methods to determine whether an area should be designated as upland forest. This leaves too much discretion to DEP and may lead to arbitrary and capricious claims by landowners whose lots have been so designated. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE: As with all provisions in Subchapter 3, the requirement to limit disturbance to forest to 20-feet directly next to a lawfully constructed structure or the perimeter of a septic disposal bed applies only when an applicant is proposing to conduct a major Highlands development. The removal of one tree does not constitute major Highlands development. As explained in the proposal summary, the use of aerial photography to determine the area and extent of upland forest is easier and less expensive than extensive on-site sampling. Both the aerial photography and the overlay grid to determine coverage are available from the Department at no cost. If an applicant disputes the forest coverage shown by the aerial photography and overlay grid, the applicant can conduct on-site sampling using the method set forth in the rule at N.J.A.C. 7:38-3.9(c).

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476. COMMENT: The definition of upland forest is bizarre and complicated and seems to defeat the very purpose which I think is to limit development in forested areas. By counting saplings the DEP is encouraging owners to see to it that saplings do not grow in clear areas since building restrictions are far more severe in forest areas. Perhaps this is the desire since there is much throughout the legislation about protecting grasslands. The whole woodland vs. open land concept is vague and the goals confusing. Do we want forest more than fields? Would we rather build in open fields as the builders do now than in forests? Why do we want forests if trees use up far more water than fields, even when those fields are in agricultural use if we are trying to protect and conserve water? Finally, if disturbance of upland forest is somehow harmful to the water supply, then it should be restricted throughout the state instead of discriminating against residents in the Highlands. (19, 28)

RESPONSE: The Highlands Act does not favor forests over fields. However, its protection of upland forests will protect existing forests as well as forests that are planted or are regenerating, including forests that would grow up over time in a natural progression from open land to woodland. As explained in the proposal summary, the amendments to the on-site sampling methods in N.J.A.C. 7:38-3.9 are intended to accurately capture the sizes and density of trees typically found in a Highlands forest, including the smaller, younger trees in a newly developing forest.

As explained in prior responses, one of the major goals of the Highlands Act is to protect water quality and water quantity. Forest cover decreases runoff to streams and helps lessen turbidity. Streams in forested areas have better water quality overall, because dissolved oxygen is higher, and nutrient and coliform levels are lower. Although trees transpire large volumes of water individually, forests enhance groundwater recharge and consequently the groundwater discharge to surface waters (baseflow) is steadier and greater in forested areas.

Under the Highlands Act, the Department has jurisdiction to regulate and protect upland forest only in the preservation area. To regulate upland forests in the same way

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throughout the State, the Department would need appropriate statutory authority.

However, the Department does protect sensitive environmental resources under other regulatory programs, including the freshwater wetlands protection rules and the flood hazard area rules. In addition, under its various open space preservation and land acquisition programs, the Department facilitates the purchase and protection of forests throughout the State.

477. COMMENT: The concept of “edge” or breaks in the forest is exactly opposite to what I observe on my own land. The more “edges” the more wildlife and the more variety of wildlife there is. Those transitional areas are good, not bad, for species diversification. (19, 28)

RESPONSE: The loss of contiguous forest (also known as fragmentation) has a negative impact on many species and is one of the reasons species become threatened or endangered in New Jersey. For example, an analysis of 22 years of data for forest breeding bird species in three Mid-Atlantic States in relationship to forest patch size demonstrated that forest fragmentation was associated with both a reduced number of forest bird species as well as higher local extinction and turnover rates (Boulinier, T., J.D. Nichols, J.E. Hines, J.R. Sauer, C.H. Flather, and K.H. Pollock. 1998. Higher temporal variability of forest breeding bird communities in fragmented landscapes. *Proc. Nat. Acad. Sci.* 95:7497-7501.). Degree of isolation and forest area size are significant predictors of relative abundance for bird species (Robbins, C.S., D.K. Dawson, and B.A. Dowell. 1989. Habitat area requirements of breeding forest birds of the Middle Atlantic States. *Wildlife Monographs*. Number 103.). The distribution and abundance of native bird species decreases along an urban gradient (Blair, R.B. 1996. Land use and avian species diversity along an urban gradient. *Ecological Applications* 6(2): 506-519; Cam, E., J.D., J.R. Sauer, J.E. Hines and C.H. Flather. 2000. Relative species richness and community completeness: birds and urbanization in the mid-Atlantic states. *Ecological Applications* 10(4): 1196-1210.). Fragmentation results in both an increase of brood parasitism as well as nest predation by non-area sensitive species. Nest parasites, such as

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brown-headed cowbirds, will lay their eggs in a host nest whereby the young of the cowbird will be raised by the host at the expense of their own young. (Dobson, A.P. 1996. Conservation and Biodiversity. New York: Scientific American Library.). A similar dynamic occurs with plant species as well. Thus, while fragmentation may be good for common, non-native species, that will live anywhere including in urban settings, it is not good for native species dependent upon forested areas.

478. COMMENT: Since there are no Federal standards for upland forests, the guideline should be that each project should be evaluated separately to ensure that upland forest disturbances do not degrade water in adjacent streams. (19) (28)

479. COMMENT: The definitions of "forest" and "upland forest" are unreasonable and capricious and not rationally related to the intents and purposes of the Act. The region to which this Act applies does not lie within vast undeveloped reaches of the country but slices through the prime economic belt of New Jersey. Neither the Act nor the proposed regulations afford any consideration to the economic impact upon individual property owners or the general economy of the region. (111)

RESPONSE TO COMMENTS 478 AND 479: As explained in response to comment 474, the Highlands Act at N.J.S.A. 13:20-32k requires the Department both to establish a prohibition on development that disturbs upland forest and to establish standards to protect upland forested areas by avoiding impacts or disturbance and, where avoidance is not possible, to ensure impacts to upland forested areas are minimized and mitigated and to prevent soil erosion and sedimentation, protect water quality, prevent stormwater runoff, and protect threatened and endangered animals and plants and their habitats. As stated in response to comment 474 and in the proposal summary, the Department's rules at N.J.A.C. 7:38-3.9 provide a sampling method for identifying forest, and then establish the criteria for disturbance of upland forested areas, including the requirement to explore alternatives, to avoid and minimize encroachment into forested areas, evaluate forest edge, and to limit encroachment to 20 feet adjacent to a structure and 10 feet on each side

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of a driveway. Finally, all impacts to forest must be mitigated in accordance with N.J.A.C. 7:38-3.9(g).

As described in the proposal summary, the Department defines forest using a sampling method used successfully to identify forest in the Department's Coastal Zone Management rules (N.J.A.C. 7:7E), adapted specifically for the Highlands Region by using data from the U.S. Forest Inventory Field Procedures Manual, Forest Statistics for New Jersey 1987 and 1999 (Griffith, Douglas M. and Richard H. Widmann. 2001. Forest Statistics for New Jersey: 1987 and 1999. Resour. Bull. NE-152. Newtown Square, PA: U.S.D.A. Forest Service, Northeastern Research Station. 70 pp.), and Forests of the Garden State Resource Bulletin NE163 (Widmann, Richard H. 2005. Forests of the Garden State. Resource Bulletin NE-163. Newtown Square, PA: United States Department of Agriculture, Forest Service, Northeastern Research Station. 20 pp.). This method was field verified by Department officials from the Division of Parks and Forestry together with Highlands Council staff.

Also, as described in the proposal summary, the definition of "upland forest" describes forests, as identified using the methodology described above, but excludes such forests that are also wetlands, since forested wetlands are protected under the provisions set forth for Highlands open waters at N.J.A.C. 7:38-3.6.

To accomplish the purposes set forth in the Act, the standards regarding the disturbance of forest must necessarily address broader impacts than water quality degradation in particular adjacent streams. That there are no Federal standards for development in upland forests does not affect the need for and content of these requirements, as they are required by the State Highlands Act.

The criteria for the protection of upland forest, as provided in the Department's rules, is one of many Highlands resources to be considered by the Department before issuing an HPAA to conduct a major Highlands development. As such, the impacts of the protection for each resource, including upland forests, was assessed as part of the Department's Economic Impact Statement (see 37 N.J.R. 4812).

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480. COMMENT: We appreciate the Department's commitments to expand the scope of the alternatives analysis to consider off-site factors and to consider new metrics and approaches to enforce the Act's prohibition on forest fragmentation. We support the comments from New Jersey Audubon on "edge" metrics. However, the Department's proposed "no net loss" forest policy and the alternatives analysis/avoidance demonstration raise a new set of concerns. The Act provides an express prohibition on disturbance of upland forest unless a demonstration that "avoidance is not possible" is made. We urge the Department to include the Act's prohibition in the text of the rule. Standards and review procedures should assure that the prohibition could only be overcome by a regional demonstration by the applicant that disturbance was not possible. A prohibition subject to a "not possible" demonstration standard is far stronger than a "no net loss" policy or a feasibility or practicability test. At a minimum, such a demonstration should place the burden on the applicant to demonstrate conclusively that disturbance is "not possible," based on consideration of: (a) development in more environmentally suitable alternate off-site locations, including identification and acquisition of alternative land parcels for the development; (b) TDR into growth areas outside the region, and (c) non-development economically beneficial use options for the property. In the event that avoidance is not possible, mitigation requirements are necessary. (101)

RESPONSE: As explained in prior responses, the Highlands Act at N.J.S.A. 13:20-32k requires the Department both to establish a prohibition on development that disturbs upland forest and to establish standards to protect upland forested areas by avoiding impacts or disturbance and, where avoidance is not possible, to ensure impacts to upland forested areas are minimized and mitigated and to prevent soil erosion and sedimentation, protect water quality, prevent stormwater runoff, and protect threatened and endangered animals and plants and their habitats. The Department's rules contain the requirements and criteria by which an applicant must demonstrate that there is no alternative and has been minimized at N.J.A.C. 7:38-3.9(f)2. The applicant is required to demonstrate compliance with the requirements as part of a compliance statement submitted with an HPAA application, in accordance with N.J.A.C. 7:38-9.5(a)7. Since an applicant has to

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demonstrate compliance with all of the preservation area standards in the rules, is limited to the removal of 20 feet of forest directly next to a lawfully constructed structure and 10 feet on each side of a driveway, and has to replace (mitigate for) all forest that is removed, the Department believes it has provided sufficient protection for upland forests.

481. COMMENT: With respect to the definition of upland forest, we concur with the change to the method set forth by the Highlands Council and endorsed by the Highlands Coalition. However, we believe that there are some forest areas that may not be captured. For example, under the proposed analysis, a clearing of significant size that may remain from an historic agriculture use, homestead or otherwise within a forested area potentially could demonstrate that the site does not meet the definition of upland forest. If that were to be the case, and development were permitted, the exemption for linear development could then fragment the forest. It is also our opinion that the density requirement for new or regenerating forest of 408 seedlings or saplings per acre is too onerous. A lower density should be assigned. (48)

RESPONSE: The Department is required to protect upland forests. If a site is of sufficient size and does not contain trees, the forest standards will not be applicable. The requirement to provide 408 seedlings or saplings per acre is consistent with the Reforestation Act, N.J.S.A. 13:1L-14.2, which governs tree replacement for State entities.

482. COMMENT: In proposed 7:38-3.9(f)2i, the Department identifies what steps must be necessary to demonstrate that impact has been minimized. The first criterion, that the disturbance should be outside the drip line, should be enhanced by creating a 50-foot buffer from the drip line. Secondly, where the outer edge of the forested area is new or regenerating, there must be a buffer from the outermost treeline since a drip line will not yet have been established. (48)

RESPONSE: The first criterion at N.J.A.C. 7:38-3.9(f)2i already requires that disturbance be located outside the drip line of the tree canopy and at least 100 feet away from all trees

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of four inches or greater. For a regenerating forest, N.J.A.C. 7:38-3.9(h)9 requires that new tree clusters be protected by a conservation restriction. The Department can determine when a site specific restriction is discussed how to identify an outer limit to adequately protect the new trees.

483. COMMENT: We remain concerned about the potential for fragmentation and increase in forest edge that may result from the exemptions that would permit forest disturbance. While we believe these exemptions have been narrowed and the threshold for "no feasible alternative" increased, we urge the Department to be vigilant in ensuring limitations. We are concerned that the Department has not adequately considered several forest metrics that are critical to the protection of this important Highlands resource. Forest assessment should include patch size, contiguity, percent of landscape and perimeter to area ratio. The proposed regulations only consider perimeter area and only in the context of minimization of impact. We urge the Department to enhance the forest protections by carefully incorporating these important metrics. (48)

RESPONSE: The Highlands Act establishes various standards to protect the resources of the preservation area. Under the Highlands rules, the septic density standards for forested areas is one system per 88 forested acres. The total impervious surface on a lot is limited to three percent. The standards for forest disturbance will ensure that development does not result in a significant increase in the amount of forest edge. Limitations relating to slopes and Highlands open waters will affect the siting on a lot of a major Highlands development. In the Department's assessment, these standards combined will adequately protect forest areas from fragmentation. Further, there are no universally accepted standards associated with the additional forest metrics the commenter suggests incorporating into the Department's rules.

484. COMMENT: New natural gas transmission facilities are generally collocated with existing (i.e., lawfully constructed) rights-of-way. The width of the corridor is needed to accommodate construction equipment and the width of the trench to allow safe

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construction and installation of the pipeline, and temporary disturbance to forest often cannot be avoided. Once construction is complete, the temporary extra workspace is restored to preconstruction contours and allowed to revegetate. However, new permanent right-of-way must remain free of trees to meet various Federal standards for maintenance and operation of natural gas pipeline systems. Therefore, it is recommended that language be added to N.J.A.C. 7:38-3.9 to address construction projects associated with natural gas transmission systems. This language should include provisions for temporary disturbance; for example, HPAA's for disturbance to upland forest would be issued only if permanent disturbance is 20 feet directly next to a lawfully constructed structure or is the minimum width needed to meet federal safety and security requirements. (115)

RESPONSE: The Department does not consider any forest removal temporary because of the time it takes to replace such forest, even in the case where the area is allowed to revegetate. Consequently, the Department will not make the suggested change. However, an agency seeking to install new transmission facilities in the preservation area may submit a waiver request for a right-of-way exceeding a 20 foot width of forest, based upon health and safety considerations, if appropriate. Further, in providing mitigation for tree removal, the Department may consider, as part of the overall mitigation requirement, the natural revegetation of the area outside the permanent right-of-way if the applicant is willing to satisfy the monitoring and reporting requirements for the area, in accordance with N.J.A.C. 7:38-3.9(h).

485. COMMENT: New Jersey orchards are not considered forests in this definition. Forest "saplings" are included in the definition. Orchard management needs to include managing hedgerows and woodland adjacent to the orchard. Very often overgrowth occurs onto the crop area blocking sunlight and creating disease and crop management problems. Perhaps this is already an exempt item for orchards. (45, 46)

RESPONSE: Orchards are considered "agriculture" for purposes of the Highlands Act. Therefore, activities associated with orchard management would not be regulated under

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these rules including managing hedgerows and woodland to ensure that they will not overgrow the intended crop.

486. COMMENT: Farmers should be exempt to harvest firewood on their woodland property for their own use, most likely from fallen trees. The farmer pays taxes on his woodland without economic benefit other than a little firewood. (45, 46)

RESPONSE: Harvesting firewood from fallen trees is not a regulated activity under the Highlands Act because it does not constitute a major Highlands development. Further, harvesting other trees may be exempt if the owner has an approved woodland management plan.

487. COMMENT: We support the methodology for determining forest areas at N.J.A.C. 7:38-3.9(b)1,(b)2 and (c). We support the language stating that orchards, tree farms, and nurseries are not considered forests. However, in practical use, the term “tree farm” may include a broad range of conditions, some of which more closely resemble a natural (but managed) woodland. This term should be a defined term under the definitions section. (73)

RESPONSE: The Department will distinguish between orchards, Christmas tree farms, nurseries and forests, by determining whether a horticultural use exists on a property. To determine whether a horticultural use exists on a property, the Department would seek confirmation that the property upon which the owner is engaged in such use is farmland assessed for the production of horticultural products.

488. COMMENT: The replanting requirements specify only the planting of trees yet the goal of mitigation is the replacement of “upland forest of equal ecological value.” Forests are complex ecosystems and contain not only shrub under story but an herbaceous layer. Planting requirements should respect this ecological reality. (73)

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RESPONSE: While the Department appreciates the fact that the forest ecosystem contains more than trees, the hardest part of the system to replace and the most crucial is the trees. The understory and herbaceous layers tend to restore themselves so long as the trees are protected and allowed to mature. Consequently, the Department is requiring the replanting of trees.

489. COMMENT: The hierarchy proposed at N.J.A.C. 7:38-3.9(g)2 and 3 would seem to indicate that re-planting could be acceptable anywhere within the HUC 14, or anywhere within the preservation area. The desired mitigation objectives of forest preservation (for ecological and water quality protection) might not be met, if, for example, forest losses were mitigated by street tree plantings. These provisions should specify that mitigation sites should be selected to address the identified issues of forest fragmentation, stream buffering and steep slope stabilization to effectuate the goals of the rule and the Act. (73)

RESPONSE: The Department's hierarchy is intended to obtain forest mitigation as close to the site of forest removal as possible by requiring replanting onsite. If planting is not feasible onsite, then it is required in the same HUC 14 as the removal or elsewhere in the preservation area. The planting of street trees would not satisfy the Department's definition of "forest." Therefore, such plantings would not be accepted under any of the mitigation scenarios. The factors that the commenter suggests are the sort that the Department will consider in reviewing mitigation proposals for forest disturbance in particular site-specific cases in order to meet the "equal ecological value and function" standard.

490. COMMENT: We support the concept of protecting replanted areas with a "conservation restriction" as proposed. The monitoring and enforcement of these restrictions is a responsibility that must be met to assure the protection of the resource over time. The proposal is silent as to what constitutes a "conservation restriction" and who is to hold the restriction. There is no mechanism to fund the long term monitoring of these restrictions. (73)

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RESPONSE: Conservation restriction is defined in the rules at N.J.A.C. 7:38-1.4. The definition provides that a "conservation restriction" is a restriction, easement, covenant, or condition, in any deed, will or other legally binding instrument, other than a lease, that is executed by or on behalf of the owner of the land, that is appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded conditions for purposes of conservation of soil or wildlife; for outdoor recreation or park use; or for creation or maintenance of suitable habitat for fish or wildlife. The conservation restriction must grant the Department and the Highlands Council and their staff access to the property for the purpose of determining compliance with the Highlands Act and these rules, and also explicitly restricts or prohibits various uses and activities on the area subject to the restriction.

As with all conservation restrictions required by the State, the Department will be hold, monitor and enforce the restriction as part of its permitting program. The cost of monitoring conservation restrictions is part of the Department's regulatory program. The Department is authorized by the Highlands Act to establish reasonable permit fees necessary to meet the administrative costs of implementing the regulatory program including processing, review and enforcement.

7:38-3.10 Historic and archaeological study requirements

491. COMMENT: The requirement for a landowner to do "an intensive-level architectural survey completed by an architectural historian whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards" should be deleted. If the citizens of New Jersey would like to pay for such studies, that should be addressed separately as long as such studies do not delay land use permits. Relics and artifacts are everywhere in the Highlands but they have nothing to do with water protection and planning. If preserving them is desired, such preservation should not be restricted to the Highlands. Historical preservation as mentioned in the Act was to be a byproduct of eliminating the leveling of farmland and old farmhouses. It was not meant to apply to the

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person who buys 5 acres containing a burned building. Regarding the use of maps, photographs or other information to determine the presence of ruins over 50 years old, since anything other than a map requires trespassing or hearsay, they should be deleted. In addition, 50 years is an arbitrary number and old chicken coops with items from the post-war era are not historic. We should not go out of our way to save relics from periods of civilization that are well documented and preserved for posterity, including Victorian and post-Victorian times. Also the 50-year limit seems to conflict with the 100-year reference in N.J.A.C. 7:38-3.10(c)4. (19, 28)

492. COMMENT: N.J.A.C. 7:38-3.10(b)2 requires an “intensive level architectural survey” to be performed by a architectural historian whenever there is a building, structure or ruin over 50 years old within a regulated activity project area. No definition of “intensive level architectural survey” is provided. A definition should be provided. Structures dating to 1955 may not necessarily require an “intensive level” survey to determine relative architectural or historic relevance. (114)

493. COMMENT: N.J.A.C. 7:38-3.10(b)3 requires an “intensive level architectural survey” for new, replacement, reconstructed or rehabilitated bridges or culverts. However, N.J.A.C. 7:38-2.3(a)9 exempts “maintenance, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems by state and local government.” Government actions with regard to new, replacement, reconstructed or rehabilitated bridges or culverts structures should be exempt from this requirement, unless required under other State or Federal laws concerning regulated historic structures. (114)

494. COMMENT: The reference to “citizens” and “others” should be deleted from the requirement at N.J.A.C. 7:38-3.10(b)4 that an architectural survey be provided on sites where “citizens” or “others” have indicated the possible presence of a historic or archaeological feature. Allowing citizens to indicate the possible presence of historic or archaeological features allows the potential for abuse, delays in approvals, and loss of the

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owner's property rights. Combining the requirement for experts whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and uninformed citizens does not make sense. Highlands residents are not permitted to file protests against anyone building a house outside the Highlands and the reverse is discriminatory. (19, 28)

495. COMMENT: Privately owned properties that have the potential for listing on the National Register of Historic Places should be eliminated. Generally owners do not apply for listing on the Register due to the onerous and expensive regulations that go with listing. If the State wants to protect these properties it should purchase them fee simple. (19, 28)

496. COMMENT: This regulation is irrational and constitutes an equal protection violation. This provision makes any property with buildings as young as fifty years subject to extra regulation and subsequent costs for architectural surveys. This is irrational, in that the regulation of HPAA-related activity near a fifty-year-old building in no way furthers the stated purpose of the Highlands Act. That purpose is to protect drinking water supplies; extra costs and regulations imposed upon landowners who happen to own "older" or "historic" buildings is not rationally related to that purpose. In addition, N.J.A.C. 7:38-3.10(c)5 confers inappropriate standing on any citizen to challenge an HPAA application if they merely suspect there are archaeological sites on the property. This is overbroad and could lead to significant and unfounded delays for those attempting to obtain development permits. This comment also applies to 3.10(b). (4, 6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

497. COMMENT: N.J.A.C. 7:38-3.10 has nothing to do with protecting the water supply. (45, 46)

RESPONSE TO COMMENTS 491 THROUGH 497: As with all of the standards in Subchapter 3, the requirements to comply with the standards regarding preservation of

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historic resources apply only when a person is proposing to conduct a major Highlands development and is therefore applying for a Highlands preservation area approval (HPAA). When an application is submitted for an HPAA, the applicant is required to demonstrate that the proposed project or development will comply with all applicable standards in the rules. The Highlands Act at N.J.S.A. 13:20-34 prohibits the Department from approving a Highlands preservation area approval unless the Department is assured that such approval “would result in minimal practicable degradation of ...historical or archeological areas...of the site or within the surrounding area.” See N.J.S.A.13:20-34a(6). Similar requirements already exist outside of the Highlands Region for projects: funded by State or Federal monies; requiring Federal, permits, licenses, or other Federal approvals; located in the State’s coastal zone, and for projects proposed in freshwater wetlands. The standards applied in all of these cases, and to be applied under an HPAA as well, derive from Federal requirements for historic preservation as implemented by the State Historic Preservation Office (SHPO).

The term historic property was defined in the Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation, which was published in the Federal Register on September 29, 1983 (Volume 48, No. 190, pp.44716-44742). These standards and guidelines fall under the authority of Sections 101(f), (g), and (h) and Section 110 of the National Historic Preservation Act of 1966, as amended. In these guidelines, historic property is defined as “a district, site, building, structure, or object significant in American history, architecture, engineering, archeology, or culture at the national, State, or local level” (p. 44739).

Section 101 of the National Historic Preservation Act also directed the Secretary of the Interior to expand and maintain a National Register of Historic Places and develop criteria for properties to be included in the National Register of Historic Places. Pursuant to this directive, the National Park Service established criteria for eligibility in the National Register of Historic Places, which were published in the Code of Federal Regulations, Title 36, Part 60, Section 60.4 (<http://www.cr.nps.gov/nr/regulations.htm#603>). These same eligibility criteria are also specified in N.J.A.C. 7:4-2.3 for use in listing historic properties in the New Jersey

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Register of Historic Places. The criteria for National Register eligibility at 36 CFR Part 60.4 and New Jersey Register eligibility at N.J.A.C. 7:4-2.3 specify that historic properties must be at least 50 years of age to be included on the New Jersey and National Registers of Historic Places, unless they possess exceptional significance, in which case they may be younger than 50 years of age. Therefore, the Department identifies properties that are more than 50-years old as historic for the purposes of its regulatory programs to maintain consistency with the federal historic preservation program. This does not contradict the 100-year reference in N.J.A.C. 7:38-3.10(c)4 because the 100-year reference defines a circumstance in which an archaeological survey would be necessary.

There are many people who are not professional archaeologists or historians who have valid knowledge about the historic resources of a specific area. Consequently, the Department finds such input valuable when assessing historic resources. This does not confer any authority on any citizen that they do not already have. As a public agency, the Departments' permitting processes are all open to review and comment by members of the public regardless of whether the Department specifically invites comment. The Department will itself confirm and evaluate whether a resource identified by a citizen does exist on a site and merits protection. Further, the Department's rules have been structured to inform an applicant before submitting an application about the various requirements that have to be met so an applicant can do the appropriate field investigation and provide appropriate documentation with the application to avoid delays during permit review.

An "intensive-level architectural survey," has been described by SHPO in its Guidelines for Architectural Survey, available at www.state.nj.us/dep/hpo/1identify/gaspart1.pdf. It is a thorough examination of the area being surveyed, designed to document precisely and completely all potential historic resources in the area and evaluate whether they meet the National Register Criteria for Evaluation. On adoption, the Department is modifying the rule at N.J.A.C. 7:38-3.10(b) to include the specific list of items that are documented in an intensive-level survey. An intensive level survey documents the following:

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1. The kinds of properties looked for;
2. The boundaries of the area surveyed;
3. The method of survey, including an estimate of the extent of survey coverage;
4. A record of the precise location of all properties identified; and
5. Information on the appearance, significance, integrity, and boundaries of each property sufficient to permit the evaluation of its significance.

498. COMMENT: The requirements at N.J.A.C. 7:38-3.10(c) are confusing. N.J.A.C. 7:38-3.10(c)2 talks about 1,000 feet or the flood plain of various rivers while N.J.A.C. 7:38-3.10(c)3 talks about 500 feet from a Highlands open water. The difference appears arbitrary. Also, the reference to perennial stream, wetlands, pond and manmade lake should be removed. Native American relics may be found along waterways that existed at that time, but not along waterbodies that were man-made recently. (19, 28)

RESPONSE: On adoption, the Department has clarified the rule at N.J.A.C. 7:38-3.10(c)3 to state that a Phase I survey is needed when a regulated activity is proposed wholly or partially within 500 feet of a permanent Highlands open water except when the waterway is listed at N.J.A.C. 7:38-3.10(c)2. In that case, for purposes of determining when a Phase I survey is needed, N.J.A.C. 7:38-3.10(c)2 governs.

The rules require a Phase I study if a regulated activity is proposed within 500 feet of a permanent Highlands open water, for example, a wetland, pond, lake, river, or perennial stream. When an applicant hires a professional to conduct the Phase I study, the owner can provide the professional with information regarding water features or structures that may have been recently constructed on the site in question so that the professional can conduct the appropriate level of study for the site.

499. COMMENT: The requirements at N.J.A.C. 7:38-3.10(c)5 requiring a Phase 1 study when a citizen indicates the possible presence of a historic resource should be stricken entirely. Hearsay of citizens should not be allowed to adversely impact an owner's

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property rights or unduly hold up an application. Hearsay of citizens is not accepted in the permitting process outside the Highlands and is therefore discriminatory. (19, 28)

RESPONSE: The requirements at N.J.A.C. 7:38-3.10(c)5 are similar to those that apply Statewide under the Department's freshwater wetlands and coastal zone management programs. In those programs, if the Department is aware, or is made aware by citizens, local government units, historic preservation organizations or in any other manner of a possible historic or archaeological site on a property proposed for development, a Phase I Survey is required. Further, the Department will not approve a permit under these other programs until all historic or archaeological issues have been satisfactorily addressed.

The various permitting programs administered by the Department, including those whose requirements are consolidated under these rules for purposes of issuing HPAAAs, provide for notification to encourage public participation in the permitting process and comment on specific permit applications. Further, as stated in response to comments 491 through 497, the Department will itself confirm and evaluate whether a resource identified by a citizen does exist on a site and merits protection.

500. COMMENT: Proposed regulations addressing historic sites impose the intent and preservation will of a small minority of the State's population at the cost and expense of a few limited property owners. The regulations will actually encourage "demolition by neglect," as it is economically not feasible to comply with the regulations without the ability to further develop the property from an economic standpoint. (111)

RESPONSE: The Highlands Act prohibits the Department from issuing an HPAA unless the Department is assured that such approval "would result in minimal practicable degradation of ...historical or archeological areas..." See N.J.S.A. 13:20-34a(6). Compliance with the requirements at N.J.A.C. 7:38-3.10 is required only when a person is already proposing to conduct a major Highlands development. Consequently, the costs associated with complying with this provision will be part of the overall costs necessary to comply with all municipal, county and State development requirements. Further, the

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proposed development of the site may make it economically beneficial to address the restoration and reuse of a historic structure as part of the overall development plan.

501. COMMENT: To deny an HPAA unless historic features are rehabilitated is unduly harsh. If the citizens of New Jersey desire the site to be restored, then they should pay for the restoration and fair market value for the property before the Highlands Act was passed plus increases in equity that would have occurred since then. Forcing an owner to restore historic features is not practical. Such an expense would likely be overwhelming and the owner will abandon the application. (19, 28)

RESPONSE: As explained in previous responses, before issuing an HPAA the Department must find that the approval “would result in minimal practicable degradation of ...historical or archeological areas...” To meet this standard, the rules require that a property owner who seeks to obtain an HPAA to undertake a major Highlands development that would have an impact on a historic property, to make every effort to use that historic property as part of the proposed development project. As stated in response to comment 500, the Department believes that the proposed development of the site may make it economically beneficial to address the restoration and reuse of a historic structure as part of the overall development plan. Further, the restoration of the historic resource will likely increase the property value. Consequently, there is no basis upon which to demand that the State pay fair market value for a property that remains in private hands. The Department believes it is appropriate for the State to provide public money for historic restoration only in the case where the property to be restored will provide to the public a direct benefit from the restoration (for example, if the property is managed for public access and education).

502. COMMENT: Delete the requirement at N.J.A.C. 7:38-3.10(h)2i and ii for a conservation restriction or add the requirement that the owner be paid for the easement at the pre-Highlands fair market value including appreciation. (19, 28, 45, 46)

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RESPONSE: The requirements at N.J.A.C. 7:38-3.10(h)2i and ii apply when an owner is seeking to obtain an HPAA to undertake a major Highlands development on a property that contains an archaeological feature. The conservation restriction is a condition of the HPAA, such that the major Highlands development approved under the HPAA is in effect the consideration for the conservation restriction. The property owner is able to realize a use of the property within the constraints imposed by the resource protection standards of the Highlands Act, and the public realizes the benefit of the preservation and conservation of the Highlands resources on the property in perpetuity.

503. COMMENT: Delete the Transfer of Development rights requirement at N.J.A.C. 7:38-3.10(h)2iii until such time that the Highlands Council has developed and successfully implemented the program. (19, 28, 45, 46)

RESPONSE: The rules provide that an HPAA will not be issued for an activity that will have a impact on historic or archaeological areas, unless the applicant demonstrates that the activity would result in minimal practicable degradation of the historic or archaeological area, as required by the Highlands Act. See N.J.S.A. 13:20-34a(6). Consequently, the activity will be permitted only when an applicant can demonstrate that there is no alternative use for the lot containing the historic or archaeological area, including seeking to transfer development rights. When the future Transfer of Development Rights (TDR) program to be created by the Highlands Council (see N.J.S.A. 13:20-13) establishes a value for land, it might be appropriate to use TDRs to preserve the land instead of allowing an impact to the historic feature. The Department will not require the owner to demonstrate that he or she has attempted to use the TDR program until the program is in place.

504. COMMENT: Delete the requirement at N.J.A.C. 7:38-3.10(i)5 for review by a New Jersey licensed engineer “with demonstrated experience working with similar historic structures” since being licensed ought to be sufficient to perform the calculations.

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Finding someone with experience with historic resources could be daunting if not impossible and puts an unnecessary burden on the owner. (19, 28, 45, 46)

RESPONSE: Not all licensed engineers have experience working with historic structures. The Department notes that this requirement is imposed under various Federal and State permitting programs, and that consequently there are engineering firms that employ engineers with such qualifications. An owner who needs this service should specifically inquire about historic structure qualifications before selecting an engineer or engineering firm.

505. COMMENT: Amend the requirement at N.J.A.C. 7:38-3.10(i)6 referring to “roads, culverts, and historic bridges” to only require this information for structures owned by local, county or state governments. (19, 28, 45, 46)

RESPONSE: The Highlands Act requires the Department to ensure minimal practicable degradation of historical or archeological areas and does not provide an exclusion for historic structures that are privately owned. Further, as stated in response to comment 499, the requirements at N.J.A.C. 7:38-3.10(i)6 are similar to those that apply Statewide. Consequently, the requirements at N.J.A.C. 7:38-3.10(i)6 must apply to both public and private structures.

506. COMMENT: Delete the requirement at N.J.A.C. 7:38-3.10(i)8 requiring an applicant proposing a project with affects to a historic or archaeological area to demonstrate public benefit and need for the proposed regulated activity. There is no precedent for requiring such a demonstration for improvements to private property, nor should one be established if the United States and New Jersey constitutions are to be upheld. (19, 28, 45, 46)

RESPONSE: Under the Highlands Act, the comprehensive approach to the protection of Highlands resources is declared to be in the public interest. See N.J.S.A. 13:20-2. As

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explained in previous responses, before the Department issues an HPAA it must make the finding that the major Highlands development will result in minimal practicable degradation of historical or archeological areas. See N.J.S.A. 13:20-34. Consequently, the information at N.J.A.C. 7:38-3.10(i)8 helps facilitate the determination that the major Highlands development meets this test.

507. COMMENT: Delete the requirement at N.J.A.C. 7:38-3.10(i)11 requiring submittal of resumes of people preparing the submitted materials relating to historic or archaeological resources because it is onerous, unnecessary and not required elsewhere for applications to improve private property, so is therefore discriminatory. Forcing contractors and consultants to do so much extra work will make it difficult, if not impossible, to find one willing to work in the Highlands. If a homeowner asked for an electrician's resume, they could not hire an electrician because that electrician could easily get work with someone who does not ask for a resume. (19, 28, 45, 46)

RESPONSE: While general contractors may not routinely provide a resume with their work, consultants who conduct historic and archaeological surveys, wetland delineations, engineering work and other types of technical work are routinely required to provide their credentials when submitting information to the Department. Consequently, this is not a requirement unique to the Highlands rules and will not result in any additional work for these professionals.

508. COMMENT: At N.J.A.C. 7:38-3.10(l), how is "minimum practicable degradation" defined? It appears that any degradation will be used as a reason to deny the application. (19, 28)

RESPONSE: The Highlands Act establishes the standard of "minimum practicable degradation" for the protection of historical or archaeological resources at N.J.S.A. 13:20-34a(6). Under N.J.A.C. 7:38-3.10, an applicant will have successfully demonstrated compliance with the standards if either of the following is met: (1) the

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proposed project meets the Secretary of the Interior's Standards for the Treatment of Historic Properties (see N.J.A.C. 7:38-3.10(f)); or (2) the proposed project does not meet the Secretary of the Interior's Standards for the Treatment of Historic Properties, but the applicant has demonstrated that: (a) meeting the Secretary of the Interior's Standards for the Treatment of Historic Properties is infeasible; or (b) the proposed project is justified by following the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, as documented in information submitted as part of the requirements at N.J.A.C. 7:38-3.10; or (c) the proposed project is justified on the basis of public benefit and need, as documented in information submitted as part of the requirements at N.J.A.C. 7:38-3.10.

509. COMMENT: Since the New Jersey Legislature provided an exemption for farm operations in the Highlands Act it is believed that the Highlands Act did not saddle Highlands farmers with archaeological study. Restrictions and archaeological study regulations adversely affecting the farm operation. Unless there is a clear history of a historical event, such as "George Washington slept here with the Colonial Army" or some such record, farmers in the Highlands should not be saddled with regulations that prevent them from removing a broken down, old barn or outbuilding that is beyond economical repair and should be torn down. (45, 46)

RESPONSE: Agricultural and horticultural uses and developments are excepted from the definition of major Highlands development and therefore from regulation under these rules.

7:38-3.11 Rare, threatened or endangered plant and animal species

510. COMMENT: At N.J.A.C. 7:38-3.11, delete the protection for rare and threatened species and delete the part of the provision that would deny an HPAA based upon "the likelihood of the destruction or adverse modification of habitat for, any rare, threatened or endangered species of animal or plant." (19, 28, 45, 46)

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RESPONSE: Rare, threatened or endangered plant and animal species are among the Highlands resources specifically protected under the Highlands Act. N.J.S.A. 13:20-34a(4) provides that an HPAA may be issued only upon a finding that the proposed major Highlands development will not jeopardize the continued existence of species listed pursuant to State and Federal statutes protecting endangered and threatened species and will not result in the likelihood of the destruction or adverse modification of habitat for any rare, threatened, or endangered species of animal or plant. Therefore, the Department cannot delete this protection.

511. COMMENT: If a species is really endangered, and we really want to protect it, why does it matter whether or not it is in the Highlands? Why don't these rules apply statewide? There are plenty of areas outside of the Highlands where people enjoy beautiful views, why do we need separate rules in the Highlands? (30)

RESPONSE: The Highlands Act specifically requires protection for threatened, endangered and rare species and their habitats. Outside of the Highlands Region, endangered and threatened species are protected under other regulatory programs, including under the Department's Coastal Zone Management rules and the Freshwater Wetlands Protection Act rules, and in the Pinelands Region.

N.J.S.A. 13:20-34a(6) provides that an HPAA may be issued only upon a finding that the proposed major Highlands development would result in minimal practicable degradation of existing public scenic attributes at the site and within the surrounding area. There are similar rules for the protection of scenic resources contained within the State's Coastal Zone Management rules.

7:38-3.12 Unique or irreplaceable land types and existing public scenic attributes

512. COMMENT: Since there are no Federal standards for these (unique or irreplaceable land types and existing public scenic attributes) resources, the guideline should be that

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each project should be evaluated separately to ensure that disturbances do not degrade water in adjacent streams. Every piece of land is irreplaceable and owners should not be penalized or encumbered in any way for using that property. (19, 28)

RESPONSE: The Department is required by the Highlands Act at N.J.S.A. 13:20-34a(6) to ensure that an HPAA would result in minimal practicable degradation of these resources. To accomplish this purpose, the standards must necessarily address broader impacts than water quality degradation in particular adjacent streams. That there are no Federal standards for development that would impact these resources does not affect the need for these requirements, as they are required by the State Highlands Act.

513. COMMENT: N.J.S.A. 13:20-32j directs the Department to adopt regulatory standards protecting "existing scenic attributes at the site and within the surrounding area." We are pleased that the Department agreed to consider the New York State SEQRA approach to scenic impact and quality of life assessment methods and standards. Additional regulatory alternatives include those implemented in the Adirondack Park and Berkshires. (101)

RESPONSE: The rules identify public scenic attributes as any Federal, State, county or municipal parks, forests, wildlife management areas and natural areas, any areas acquired for recreation and conservation purposes with Green Acres funding, program or a non-profit conservation organization, and any lands preserved as open space by a non-profit conservation organization and other areas as identified by the Highlands Council. The Department has reviewed and will continue to review methods used by other States that may assist the Department in assessing a minimal practicable degradation to a public scenic attribute

514. COMMENT: N.J.A.C. 7:38-3.12 should only reference the Freshwater Wetlands Protection Act and should not be expanded upon in these regulations. Delete N.J.A.C. 7:38-3.12(b). (19, 28, 45, 46)

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RESPONSE: The provisions at N.J.A.C. 7:38-3.12(b) do not expand upon the standards for determining if a wetland is a vernal habitat under the Freshwater Wetlands Protection Act (FWPA) rules. However, because the Department has identified vernal habitats as a unique or irreplaceable land type for purposes of the Highlands rules, it is necessary to include in these rules the standards by which a water of the Highlands or a Highlands open water will be determined to be a vernal habitat. The rule cross-references the FWPA rules only for the obligate and facultative species listed in the Appendix to those rules.

515. COMMENT: How is "minimum practicable degradation" defined, particularly in reference to a "scenic attribute"? "Scenic" is in the eyes of the beholder, is it not? The impression is that any degradation will be used as a reason to deny the application. (19, 28, 45, 46)

RESPONSE: The Department will work with an applicant proposing a development in the vicinity of any of the places described at N.J.A.C. 7:38-3.12(c) to locate the development in such a way as to minimize its visual impact on the existing scenic attribute.

516. COMMENT: We appreciate inclusion of the Landscape Project, Natural Heritage Priority sites, and Rutgers identified vernal ponds in establishing standards required by the Act. We understand that the Rutgers identified vernal sites will be presumed to exist. Unless a site-specific demonstration shows that they do not in fact exist, they will be protected. We support the Department's position that standards will prohibit disturbance of these sensitive features. However, we are unclear about the Department's approach to demonstrations or alternatives analyses that potentially could provide site-specific relief from strict application of these standards. (101)

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RESPONSE: The Department is required to ensure that an HPAA will result in the minimum practicable degradation of a vernal habitat. The vernal habitat database used by the Department to initially locate such habitats includes Rutgers-identified vernal habitats. The method for assessing minimum practicable degradation is to examine the proposed impact to the vernal habitat and to assess whether the habitat will be degraded by the impact such that it will not longer provide the necessary values to the species which inhabit it. The Department anticipates that it would only consider site specific relief to the strict application of the standards in the case where a waiver is requested and the Department makes the finding that the waiver should be approved.

517. COMMENT: The definition for Existing Public Scenic Attribute gives a lot of discretion to the Highlands Council in defining what may be considered Public Scenic Attributes. The phrase should be deleted. (85, 87)

RESPONSE: The Department is required by the Highlands Act at N.J.S.A. 13:20-34a(6) to ensure that a Highlands preservation area approval would result in minimal practicable degradation of existing public scenic attributes. One of the goals of the Regional Master Plan (RMP), to be developed by the Highlands Council, is to “protect the natural, scenic, and other resources of the Highlands Region.” See N.J.S.A. 13:20-10b(3). Consequently, the Department anticipates that the Council may identify existing public scenic attributes as part of the RMP and the Department’s rules accommodate this possibility in order to ensure protection for these resources if so identified.

518. COMMENT: The purpose of government parks and recreation areas must be recognized by the NJDEP in its review of this and associated standards. Local and county governments have purchased lands in the preservation area to satisfy current and future active and passive recreation needs for both local and regional populations. Development and maintenance associated with these needs (recreation facilities, trails, parks office, parking) should be exempted from these and other Highlands standards, particularly those concerning impervious surface and open water buffers. This may be

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accomplished in conjunction with a “parks or facility management plan” similar to the plans required for agricultural uses. (114)

RESPONSE: Some of the exemptions established under the Highlands Act and these rules (see N.J.A.C. 7:38-2.3) might apply to activities that could be associated with park development, such as reconstruction of any building or structure within 125 percent of the footprint of existing impervious surface, the construction of trails with non-impervious surfaces, and the construction of bicycle and pedestrian facilities. In addition, if other activities for which all the findings required for the approval of a major Highlands development can be made, the activities might be considered for purposes of developing a new Highlands general permit.

Subchapter 4 Highlands resource area determinations

7:38-4.1 Highlands resource area determinations

519. COMMENT: Eliminate the requirements at N.J.A.C. 7:38-4.1(c)1i(2) and (3) which require a separate fee to be paid for each footprint and limits footprints to no more than three. The fees are excessive and the costs to the state are not different based on the number of footprints. Footprints are already limited due to the impervious surface limitations, and the number of them is not relevant, and limits many uses of the land, including recreation. (19, 28, 45, 46)

RESPONSE: The adopted fees are based on the relative amount of work involved with the processing of the application. The Department considered its experience with the freshwater wetland Letter of Interpretation, footprint of disturbance in determining the fees and limits on this type of application. The Highlands resource area determination (HRAD) involves significantly more work than a wetland footprint of disturbance because the Highlands open waters (HOW) and their associated buffers must be delineated for the entire site rather than only for the footprint of disturbance. The full delineation is necessary in order to calculate the net land area (total area of site minus

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area of HOW) for the purpose of determining the impervious surface limits. Furthermore, Department staff must evaluate more resources, including steep slopes and forest, within the footprint of disturbance in the Highlands than they do for a wetlands application. Each additional footprint on a site requires additional field-work to evaluate the resources within that footprint. Consequently, the Department believes it is appropriate to charge a fee for each portion of the footprint.

The Department limited the number of footprints of disturbance to three because in its experience with wetland footprints of disturbance, it is more efficient to conduct a determination on the entire site than to conduct determinations on more than three footprints of disturbance for one site. Finally, while the Highlands Act did place limits on the development of a site, the number of permitted HRAD footprints of disturbance is unrelated to these limits. The HRAD footprint of disturbance is intended to provide an applicant who is considering development within a distinct area with information on the presence or absence of Highlands resource areas within the footprint and with sufficient information to determine the amount of allowable impervious cover on site. If the limitations placed on the land were already known to the applicant, then the application for an HRAD footprint of disturbance would be unnecessary and the applicant could proceed directly to apply for a Highlands preservation area approval (HPAA).

520. COMMENT: N.J.A.C. 7:38-4.3 and 4.4 should be eliminated as they do not relate to water protection or planning, or the preservation of natural beauty, the stated goals of the Highlands Act. The very nature of the limitations on development will result in the maintenance and evolution of habitat in the Highlands. This is a side effect of the legislation, but was not intended as part of the legislation as it does not fall under the goal of the legislation which is "protecting the incomparable water resources and natural beauty of the New Jersey Highlands." In addition, endangered species are already protected with other land use rules, so reference to those statutes is the only necessary verbiage. (19, 28, 45, 46)

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RESPONSE: The Department assumes the commenter is referring to N.J.A.C. 7:38-

4.1(d)1i(3) and (4) since they refer to rare, threatened and endangered plant and animal species habitat. The Highlands Act establishes standards for several Highlands resources including rare, threatened and endangered species. The Highlands Act at N.J.S.A. 13:20-34a(4), requires the Department to make a finding before issuing an HPAA, that a proposed major Highlands development, “will not jeopardize the continued existence of species listed pursuant to ‘The Endangered and Nongame Species Conservation Act,’ P.L.1973, c.309 (C.23:2A-1 et seq.) or the ‘Endangered Plant Species List Act,’ P.L.1989, c.56 (C.13:1B-15.151 et seq.), or which appear on the federal endangered or threatened species list, and will not result in the likelihood of the destruction or adverse modification of habitat for any rare, threatened, or endangered species of animal or plant.” The Highlands Act is broader and protects more species and habitat than other existing regulations. For example, the Freshwater Wetlands Protection Act (N.J.A.C. 7:7A) protects Federally listed endangered or threatened plants and animals, State-listed endangered or threatened animals, and does not provide any protection for rare species. Because the Highlands Act requires the Department to protect rare and upland species and habitats, which are not provided protections under other existing regulations, reference to existing regulations would not be sufficient to satisfy the intent of the Highlands Act.

521. COMMENT: The Highlands Act says that it is the Regional Master plan that will address what kind of development can occur without harm to rare and endangered species. Therefore it is unnecessary for the Department to provide rules that could possible be in conflict with those established by the Regional Master Plan. In addition, any reference to species that are rare or threatened in New Jersey should be removed. The vast majority of development will be forbidden in the preservation zone, and this will inevitably result in habitat degradation for many species as the ecosystem returns to a forested state. It is not possible to maintain private property in the state it was in on August 10, 2004, and species that depend on grassland, wetland and forest understory will eventually be unable to thrive in Highlands forest without tampering with the natural

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habitat. Also, species that do thrive in mature forests will inevitably increase in numbers, and should therefore also not be included. (19, 28)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-32, requires the Department and not the Highlands Council to establish a regulatory program that includes protection for rare, threatened and endangered species. The Act requires that, “the standards shall be developed to prevent soil erosion and sedimentation, protect water quality, prevent stormwater runoff, protect threatened and endangered animal and plant species sites and designated habitats, provide for minimal practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing scenic attributes at the site and within the surrounding area, protect upland forest, and restrict impervious surface; and shall take into consideration differing soil types, soil erodability, topography, hydrology, geology, and vegetation types.”

Thus, while the Highlands Council is charged with developing a Regional Master Plan that is consistent with the Department’s rules and that may address rare, endangered and threatened species, the Highlands Act gives the authority to regulate these species in the Highlands preservation area to the Department. This point is reemphasized when the Highlands Act requires the Department to make a finding, before issuing an HPAA, that a development, “will not jeopardize the continued existence of species listed pursuant to ‘The Endangered and Nongame Species Conservation Act,’ P.L.1973, c.309 (C.23:2A-1 et seq.) or the ‘Endangered Plant Species List Act,’ P.L.1989, c.56 (C.13:1B-15.151 et seq.), or which appear on the federal endangered or threatened species list, and will not result in the likelihood of the destruction or adverse modification of habitat for any rare, threatened, or endangered species of animal or plant.” See N.J.S.A. 13:20-34a(4).

It is unclear how the commenter believes that restricting development activities in the preservation area will lead to habitat losses, since development is the greatest source of habitat loss Statewide. If the implication is that activities that property owners routinely undertake on their properties provide habitat benefits, the commenter should note that the requirements of the Highlands Act apply only to applications for proposed major Highlands developments and not to routine property maintenance activities

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conducted by property owners. Consequently, the Department's rules do not change the ability of property owners to maintain their land as they did before the passage of the Highlands Act. Further, if property owners want to undertake activities that exceed maintenance type activities but that would benefit wildlife, the Department has established a general permit for habitat creation and enhancement to facilitate such activities. See N.J.A.C. 7:38-14.1.

Finally, the exemptions provided by the Highlands Act for agricultural and forest management activities promote the continuation of farming and forest management activities in the Highlands preservation area and the continued cooperation and stewardship of the agricultural and forestry community to maintain habitats such as grasslands and forest understory.

522. COMMENT: N.J.A.C. 7:38-4.1(d)6 requires that a letter be obtained from the Natural Heritage Program. This has nothing to do with water. What is the justification for this unusual and onerous requirement? Why is one small section of the state subject to these requirements and not the whole state? What does this have to do with the Department of Environmental Protection? When did the legislator give the Department of Environmental Protection the license to go into Heritage issues? Who in the Department is qualified to do this? What is the cost associated with hiring the required people and how is this going to benefit the people of the Highlands or the water of the Highlands? (9-12)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-32 requires the Department to establish a regulatory permit program that implements standards to protect Highlands resources, including rare, threatened and endangered species, steep slopes and many other resources in addition to water. The Department has included the requirement to obtain a letter from the Natural Heritage Program, which is a part of the Department, so that the applicant can determine if any rare, threatened or endangered species or Natural Heritage sites are present on or near a property before submitting an application to the Department. The Natural Heritage Program maintains the Natural Heritage Program database

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containing the locations of documented species sitings and Natural Heritage Priority sites for the State of New Jersey. A letter from the Natural Heritage Program provides the property owner or applicant with the results of a site-specific query of the Natural Heritage Program Database of documented species sitings and Natural Heritage Priority sites for a specific property so that this information can be included with an application for an HPAA. The Department is incorporating into the Highlands rules an existing Department process that has been available through the Natural Heritage Program for several years which process is often used by applicants seeking other Department land use permits, for example, a Coastal Area Facility Review Act (CAFRA) permit. The process, which is referred to as a Data Request, is described at <http://www.nj.gov/dep/parksandforests/natural/heritage/#datarequest> and requires that an applicant submit the following information:

Name and address of user or organization;

Type of data needed;

Copy of USGS quad with exact boundaries; and

Explanation of how the information will be used.

The average processing time for these requests is two weeks and the fee is a minimum of \$20.00. Charges for searches exceeding one hour are charged in half-hour increments at \$20.00 per hour. A fee estimate can be given prior to initiating a search. The submission of a data request does not require the hiring of an expert since all of the information needed for the search can be gathered by a layperson. Since the process already exists in the Natural Heritage Program, the Department is not required to hire new experts to process these requests.

The process for obtaining a letter from the Department's Natural Heritage Program will benefit applicants because it is well established, efficient and inexpensive. An applicant can use one data source to obtain information on plants, animals and Natural Heritage Priority sites, and the public need not hire an expert to determine what species are present on a property. The overall benefit is that the information in the database has been verified by experts and is frequently updated so that the Department is

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using the best data available in order to protect the resources of the Highlands preservation area.

Subchapter 5 Rare, threatened and endangered species habitat evaluations

7:38-5.1 Rare, or threatened or endangered species habitat evaluations

523. COMMENT: This section should be eliminated and replaced with reference to the Freshwater Wetlands Protection Act and the Endangered Species Conservation Acts to avoid conflict with those acts. (19, 28, 114)

RESPONSE: The Highlands Act specifically establishes standards for several Highlands resources including rare, threatened and endangered species. As stated in response to comment 521, the Highlands Act requires the Department to make specific findings regarding impacts to rare, threatened and endangered species and their habitats before issuing an HPAA. The Highlands Act is broader than the Freshwater Wetlands Protection Act (FWPA) (N.J.S.A. 13:9B-1 et seq.) since the Highlands Act protects rare, threatened and endangered plant and animal species. The FWPA does not protect rare species, or State-listed plant species. Because the Highlands Act and these rules consolidate aspects of the FWPA and the Endangered and Nongame Species Conservation Act (ENSCA)(N.J.S.A. 23:2A-1 et seq.) in addition to several other laws and regulations, an applicant complying with the Highlands Act and rules will also be in compliance with those other laws and regulations, including the FWPA and the ENSCA and there will be no conflict..

524. COMMENT: In general, the requirements in Subchapter 5 are extremely onerous and/or expensive, such as descriptions of vegetation, water features including seeps, and topographical information on the area within a half mile of the permit application area. The need for such information is unclear, yet if it is desired, it should be done promptly and paid for by the citizens of the State of New Jersey. In looking at the studies and standards in N.J.A.C. 7:38-5.4(b)1vi it became clear that such detailed studies would be

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prohibitively expensive when the basic study that is done routinely by the foresters at the Soil Conservation District results in a wealth of information that certainly seems to satisfy answers to what species, classes of species, geologic features, soils and habitats exist on the land. In many cases since owners already have a Woodland Management Plan, they already have a vast amount of data prepared by professionals, and further studies are redundant. (19) (28)

525. COMMENT: There are requirements in Subchapter 5 that are onerous and expensive, such as descriptions of vegetation, water features, including seeps, and topographical information within a half mile of the permit application area. If these studies are required they should be paid for by the state. Soil Conservation already maintains data on soil types and other geological information which should be all that is required. (114)

RESPONSE TO COMMENTS 524 AND 525: A person would only undertake the process outlined in Subchapter 5 if such person is proposing a major Highlands development and obtains information from the Department's database indicating that a property contains habitat for rare, threatened or endangered species. If that person disagrees with the Department's determination and seeks to provide documented proof to demonstrate that the Department's information is no longer correct, he or she is required to follow the procedure established in Subchapter 5. This process is similar to the process established in the Department's Rules on Coastal Zone Management (N.J.A.C. 7:7E).

A person may provide the Department with any data that already exists as a result of another study such as a Woodland Management plan. The Department is not requiring that a person undertake new studies to obtain the information required in this Subchapter.

526. COMMENT: What are the Department's landscape maps? They are not defined. What does this section have to do with water? If these proposed regulations are in the public interest, why are they not implemented on a Statewide basis? Why are the people

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of the Highlands discriminated against? What is the cost on implementing these regulations and what is the benefit? (9-12)

527. COMMENT: What does this section have to do with water? If these proposed regulations are in the public interest, why are they not implemented on a statewide basis? Why are the people of the Highlands discriminated against? What is the cost on implementing these regulations and what is the benefit? (9-12)

RESPONSE TO COMMENTS 526 AND 527: The "Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife or "Landscape Maps" are defined in subchapter 1.4 (Definitions) of the Highlands rules. "Landscape Maps" are the Department's maps delineating areas used by or necessary for endangered and threatened species and other priority wildlife to sustain themselves successfully. The maps depict areas of contiguous habitat types (forest, grassland, forested wetland, emergent wetland and beach/dune) that are ranked based upon intersection with documented occurrences of endangered and threatened and priority wildlife species. Mapped habitat areas are classified based upon the status of the wildlife species whose presence is documented. Rank 5 is assigned to areas containing one or more documented occurrences of at least one wildlife species listed as endangered or threatened on the Federal list of endangered and threatened species. Rank 4 is assigned to areas with one or more documented occurrences of at least one State endangered species. Rank 3 is assigned to areas containing one or more documented occurrences of at least one State threatened species. Rank 2 is assigned to areas containing one or more documented occurrences of at least one non-listed State priority wildlife species. The maps also delineate, as Rank 1, habitat areas that meet habitat-specific suitability requirements, such as minimum area criteria for endangered, threatened and priority wildlife species, but that do not intersect with any documented occurrences of such species. The report entitled New Jersey's Landscape Project provides additional information on mapping methodology and is available at the website www.nj.gov/dep/fgw/ensphome.htm or by contacting the address given below. The Department's Landscape Maps may be updated periodically and may be obtained via

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file download from www.nj.gov/dep/fgw/ensphome.htm or through the Interactive

ImapNJ website: www.state.nj.us/dep/gis/imapnj/imapnj.htm or by writing to the

Division of Fish and Wildlife, Endangered and Nongame Species Program at:

The Landscape Project

NJ Division of Fish and Wildlife

Endangered and Nongame Species Program

PO Box 400

Trenton, NJ 08625-0400.

As stated in response to comment 521, the Highlands Act requires the Department to make specific findings regarding impacts to rare, threatened and endangered species and their habitats before issuing an HPAA. Consequently, the Department has included the Landscape maps as part of the process for obtaining needed information on the presence of rare, threatened and endangered species so that applicants can make better applications to the Department and the Department can make the necessary findings before issuing an HPAA. The Department has addressed the costs and benefits of each of its regulations in its Economic Impact Statement.

Subchapter 6 Highlands preservation area approval

N.J.A.C. 7:38-6.2 Standard requirements for all Highlands preservation area approvals

528. COMMENT: The conservation restriction should exempt those activities necessary to maintain the restriction. However, the text of sections 6.2, 6.3 and 6.5 are not included in the proposed rule language. (75)

RESPONSE: In accordance with the Office of Administrative Law's Rules for Agency Rulemaking, N.J.A.C. 1:30, a proposal to readopt rules need only include the text of any proposed amendments. The text of N.J.A.C. 7:38-6.3 was promulgated in the special adoption of N.J.A.C. 7:38 (published in the June 6, 2005, NJ Register). The Department

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did not propose any amendments to this section. Consequently, the text of N.J.A.C. 7:38-6.3 did not appear in the proposal published on December 19, 2005. The language to which the commenter is referring was included in the special adoption at N.J.A.C. 7:38-6.3(a). N.J.A.C. 7:38-6.3(a) reads: "Every HPAA shall require a binding conservation restriction as defined in N.J.A.C. 7:38-1.4 on any area of the lot not authorized for development or disturbance under the HPAA that shall permanently preserve the undeveloped and undisturbed portion of the lot in its natural state, **except for those activities necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created**" (emphasis added). The Department believes this satisfies the commenter's concerns.

N.J.A.C. 7:38-6.3 Protecting Highlands resource areas from future development

529. COMMENT: Requiring conservation restrictions on undeveloped areas remaining after the Highlands preservation area approval is obtained, without paying for these restrictions, is not authorized in the Highlands Act, and is an infringement on the property rights of Highlands landowners. In addition, the language of the rule is unclear as to whether agricultural practices would be able to continue under such conservation restrictions. Furthermore, it is objectionable to us that the Department would allow non-government agencies to administer the terms of its conservation easements on private land. (45, 46, 62, 69, 87)

530. COMMENT: This regulation constitutes dramatic and unauthorized overreaching by the Department. Nowhere in the Highlands Act is there a requirement to place land not authorized for development pursuant to an HPAA into permanent conservation restriction status. The Department conjured this requirement up with absolutely no legislative authorization. In addition, this provision is far too broad and vague and amounts to an unconstitutional regulatory and physical taking of private property. In addition, this provision provides the Department with an "end run" around the later provision providing potential waivers of HPAA requirements to avoid takings. Once an HPAA is issued, the

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waiver section is no longer applicable. Yet a landowner may have had to sacrifice hundreds of acres to a conservation restriction in order to obtain a permit for even a minor development. Such regulatory behavior is truly draconian as well as misleading. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE TO COMMENTS 529 AND 530: The Highlands Act does not expressly provide that the Department can require a conservation restriction on the area of a lot containing any Highlands resources that were not approved for disturbance or elimination under an HPAA to undertake a major Highlands development on that lot. However, as explained in the proposal summary, the entire site is evaluated during the HPAA application review process, and in many cases, the major Highlands development authorized under the HPAA will have maximized the use of the Highlands resources allowable under the Act and these rules, such as the three percent impervious surface limit. If the limit has been reached under the initial HPAA, the conservation restriction will ensure that the impervious surface limit is not exceeded in the future if, for example, a subsequent owner were interested in undertaking some development of the property.

The Department has the ability to indicate and exclude areas of a site from all or part of the conservation restriction if there is a compelling reason that is consistent with the Highlands Act. For example, if the impervious surface limit has not been reached under the initial HPAA, the conservation easement will acknowledge the remaining amount for the site, including any restrictions where the impervious surface may be placed. That is, on a site containing forest or a Highlands open water (HOW) that provides habitat for rare, threatened or endangered species, but for which only two percent impervious surface is to be placed as part of the approved HPAA, the conservation restriction will indicate the square footage of additional impervious surface that may be placed, but will also indicate that the forest areas, HOWs and buffers adjacent to HOWs are restricted from all future impacts. In another example, as part of an approved HPAA where there is no remaining potential for development since the acreage will not support additional septic systems, if the owner indicates at the time of the approval that a portion of the property upon which no development is proposed will

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remain under active agricultural cultivation, the conservation easement and the site plan accompanying the easement will expressly state that the site is restricted from all future activities except agricultural activities to be conducted in the area indicated on the site plan accompanying the conservation restriction. The same type of exception to the restriction may be included on a site containing forest land for which the owner indicates that woodland management activities are ongoing and will continue after site development. N.J.A.C. 7:38-6.3(a) provides that the conservation restriction, "shall permanently preserve the undeveloped and undisturbed portion of the lot in its natural state, except for those activities necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created." Agriculture and woodland management activities are two activities that could be identified as part of the restriction and allowed to continue.

The waiver for "taking without just compensation" is the only one of the waivers that is not considered at the time an HPAA application is reviewed. N.J.A.C. 7:38-6.8 requires that a request for a waiver to avoid a taking can be submitted only after the Department denies an HPAA under the rules as strictly applied, and upon conclusion of any challenge to the Department's denial of an HPAA. If the Department denies an HPAA, no conservation restriction is required. If an applicant's application for an HPAA is approved, there will be a conservation restriction and no ability to seek a waiver subsequently to avoid a taking.

The use of conservation restrictions to protect resources is a common practice as part of subdivision approvals at the municipal level and as a condition of permit approval at the State level. Such restrictions are used to protect stream corridors, open space areas, wetland buffers, steep slopes, specimen trees, hedgerows, stormwater management areas and other special resources. Like the conservation restrictions required by the Department in the preservation area, the purpose of such restrictions is to inform future property owners of the legal use or development restrictions applicable to a given property.

The Department anticipates that most conservation restrictions will be held by it, a local government, or the Highlands Council. If a conservation restriction were to be held by a charitable conservancy, as allowed under the New Jersey Conservation

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Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq., it would only be in the appropriate circumstance and with the agreement of the property owner.

Finally, the Department notes that there is a statutory process for releasing conservation restrictions. See N.J.S.A. 13:8B-1 et seq., New Jersey Conservation Restriction and Historic Preservation Restriction Act. This process requires a public hearing in the municipality where the land is situated and is subject to the Department's finding that the public interest is better served by lifting the conservation restriction than by leaving it in place. If an HPAA with health and safety waiver is sought on a site that has already received an HPAA and been the subject of a conservation restriction, the Department can consider whether to lift the existing restriction together with the review of the waiver request.

531. COMMENT: Conservation restrictions should not be required. They are redundant since these regulations along with the Highlands Act forbid further development. And certainly, the state has the capability to keep applications and approvals on file. (19, 28, 114)

RESPONSE: The Department acknowledges that in many circumstances once a Highlands preservation area approval (HPAA) is obtained there may be no ability to undertake additional regulated activities in the future. However, the recorded conservation restriction puts any prospective purchaser on notice that the property was the subject of an HPAA and that consequently there are limits on further development of the property.

532. COMMENT: N.J.A.C. 7:38-6.3(b) talks about conservation restrictions running with the land. This sounds more like a conservation easement. If that is the case, then such easement must be purchased at a negotiated price from the owner of the land. (19, 28, 45, 46)

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RESPONSE: As provided in the definition of “conservation restriction” at N.J.A.C.

7:38-1.4, a conservation restriction can be an easement. The conservation restriction is a condition of the HPAA, such that the major Highlands development approved under the HPAA is in effect the consideration for the conservation restriction. The property owner is able to realize a use of the property within the constraints imposed by the resource protection standards of the Highlands Act, and the public realizes the benefit of the preservation and conservation of the Highlands resources on the property in perpetuity.

533. COMMENT: This section states that the Department believes conservation restrictions are necessary. What is the scientific basis for this? What is the cost of this to the people so restricted? Since the proposed regulations are so draconian in their entirety, why is it necessary to add this insult and restriction to the people of the Highlands? Why is the burden of this section placed on the owners of lands within the Highlands and not on the regulatory agency that is charged with enforcing this? What are the long-term effects of placing such large tracts of land under permanent deed restrictions? What is the effect on the water supply of land which will most likely grow into unmanaged forests? Does this not conflict with the intent of the Highlands Act? Does this not place undue restrictions on future generations without proper public input or scientific study? (9-12)

RESPONSE: As explained in prior responses and the proposal summary, the conservation restriction is the means by which the Department ensures that the limits on impacts to Highlands resources established by the Highlands Act and these rules are not exceeded. Also as explained in prior responses, conservation restrictions are a means for prospectively protecting resources in appropriate circumstances as part of subdivision approvals at the municipal level and as a condition of permit approvals at the State level. The long-term effect of the conservation restriction is to enable the land to endure in its natural condition. A forest protected by the conservation restriction may be “unmanaged” by humans, but the effect on the water supply of forest, whether it is managed in accordance with a woodland management plan or a forest management plan for purposes of wood harvesting, or is unmanaged and continues in its natural condition,

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has been shown by various studies to be positive. Please see the responses to comments 137 and 476 on the benefits of protecting forest. Forest is one of the specific natural resources that the Highlands Act seeks to conserve and protect. See N.J.S.A. 13:20-2.

534. COMMENT: N.J.A.C. 7:38-6.3 provides that if property does get an approval, the remaining portion of the property must be deed restricted. This is the problem for a landlord in that if a landlord has to decide whether or not to lease part of his property for telecommunication, build a strip mall, build a home or whatever, that landlord has a very tough decision. Clearly, the landlord is going to decide what is best for him in the long run and not necessarily consider a lease. This would cause a serious impact on the ability to build out the network. Without the ability to build out the network certain areas would not have any type of service whatsoever. (17)

535. COMMENT: The requirement to permanently restrict a property once a HPAA is granted is misguided. If a property owner obtains a HPAA for a portion of his land, and continues to have a percentage of his land available for development, that portion should not be permanently restricted. In addition, the issue of whether a portion of the property is leased is not addressed. The provision set forth in N.J.A.C. 7:38-6.3(a) mandating that every HPAA shall require a binding conservation restriction on any area of the subject property not authorized for development or disturbance, will have a chilling effect upon the siting of telecommunications facilities. Telecommunications companies lease portions of private, municipal, state or federal properties for the siting of their facilities. Property owners will not be willing to enter into such leases if they will be required to burden their remaining property with a conservation restriction that will run with the land, be binding upon the property owner and his or her successors in interest, and preclude further development of the property. This form of inverse condemnation and barrier to entry in which the State seeks to preserve the land for ecological reasons in its natural environment without change, as opposed to imposing a restriction for the purpose of flood control or the preservation of land for a park or recreational area, is an unreasonable and unduly burdensome exercise of the State's police power. See, American Dredging

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Co. v. State, 161 N.J. Super. 504, aff'd, 169 N.J. Super. 18 (App. Div. 1979); Karam v. Dept. of Environmental Protection, 308 N.J. Super. 225, 236-37 (App. Div. 1998). This restriction may well violate the intent of the TCA and the WCPSA. Agency action is necessarily tempered by principles of fundamental fairness. When specific parties are particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action. Bally Mfg. Corp. v. New Jersey Casino Control Commission 85 N.J. 325, 345 (1981) (Handler, J., concurring). (17)

RESPONSE TO COMMENTS 534 AND 535: In the case where a regulated activity occurs on a portion of a property that is leased, the Department will not require that the entirety of the remaining property be subject to a conservation restriction. Rather, some restriction may be made on the property in the vicinity of the leased area, with the owner's knowledge, to acknowledge that a certain percentage of the impervious surface limit has been used, but the entire remainder of the property will not be subject to a conservation restriction. The Department will determine, case by case, based upon the proposed location of the equipment, the size of the leased area, and the resources contained within or near the area, if there is the need for a conservation restriction, as a result of the application in question.

536. COMMENT: Pursuant to N.J.A.C 7:38-6.3, every HPAA will require a binding conservation restriction on any portion of the lot not authorized for development or disturbance under the HPAA. Since natural gas transmission systems are linear systems constructed within right-of-way easements on properties owned by others, this condition should not be applicable to these systems unless a project entails addition of new aboveground facilities on property owned by the pipeline company. (115)

RESPONSE: In the case where a regulated activity occurs within an existing easement on a property, the Department will not require that the entirety of the remaining property be

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subject to a conservation restriction. The Department will determine on a case by case basis what resources on the site need to be restricted as a result of the application in question.

537. COMMENT: Forest Management should be encouraged on all forest lands as part of the "binding conservation restriction," as a means of enhancing water and environmental quality. As written, the binding conservation restriction intends to "preserve the undeveloped and undisturbed portion of a lot in its natural state." Nature is not static. Forest management will allow for provisions in the event of wildfire, insect infestation, disease, control of non-native and invasive plants, amelioration of deer damage, reforestation, planting of forest in non-forested areas, and enhancement of forest health and vigor. Conservation easements can be expensive to maintain and administer properly. Ideally, a property with a conservation easement / restriction would be visited periodically to determine continued compliance. As the framework already exists within the woodland portion of the Farmland Assessment Act for this review to occur, land under a conservation restriction should be encouraged to have a Forest Management Plan, and be permitted to participate in the New Jersey Farmland Assessment program. Under such a program, a woodlot would be visited by a forester at least once every other year, and would be reviewed periodically by the Department's Forest Service. Easement maintenance could be as easy as contacting the forester and obtaining updated property maps/aerial photos. (39, 41, 42)

538. COMMENT: Woodland management plans should not be viewed as an obstruction to the development of conservation easements that are created within the regulated area. It seems much more intuitive that a Forest Management Plan should be a prerequisite to the development of an easement within the area. Management should be encouraged on these lands. By preserving land in its natural state, we create regulations which, oftentimes, make it impossible to ensure continued productivity and sustainability of these lands. Active management can reduce the magnitude of natural phenomena, such as storm damage, insect and disease infestation, and damage caused by deer and the

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influence of non-native and invasive plants. Furthermore, the administration of the easement, which past experience has shown to be very difficult, could be eased by the fact that a trained forester would visit the property at regular intervals. (99)

RESPONSE TO COMMENTS 537 AND 538: N.J.A.C. 7:38-6.3(a) provides that the conservation restriction “shall permanently preserve the undeveloped and undisturbed portion of the lot in its natural state, except for those activities necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created.” Certain uses may be identified and allowed as part of a conservation restriction. Forest and woodland management activities could be identified as part of the restriction and allowed.

7:38-6.4 Waivers

539. COMMENT: We have experience that waivers have been obtained for political friends in the past and this kind of action by the Department must stop. No waivers should be given except for clear health and safety issues. You either meet the requirements or you do not. I also do not think affordable housing should override the environmental considerations that should primarily apply to any building. Affordable housing should meet the standards for building in the Highlands area. (83)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-33 requires that the permitting program established under these rules include waivers to protect public health and safety; for redevelopment in certain previously developed areas (brownfields); and in order to avoid the taking of property without just compensation. The Department proposed and is adopting an additional waiver for the construction of low and moderate housing units, in five municipalities that are entirely contained within the preservation area. This waiver is intended to provide these municipalities with an opportunity to address their constitutional obligations under the State Fair Housing Act, N.J.S.A. 52:27D-301 et seq. to provide affordable housing for low and moderate income residents. As with the other

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waivers, an applicant for an HPAA with the affordable housing waiver must identify the particular requirement(s) of the rules sought to be waived, and the development overall must still meet the resource protection standards of the Highlands Act and these rules to the maximum extent possible.

7:36-6.5 Waiver for the protection of public health and safety

540. COMMENT: Private property owners should not have to notify the Department of emergency measures they take on their own land to protect their safety, welfare and property and that of their neighbors unless they need assistance or they need a permanent change in a waterway. (19, 28, 45, 46)

RESPONSE: The requirements for a waiver for the protection of public health and safety apply only in the context of an application for an HPAA when a person is proposing to undertake a major Highlands development, as defined. An activity that is not major Highlands development is not subject to the waiver provisions or to these rules generally.

541. COMMENT: The summary for N.J.A.C. 7:38-6.5(b) states that, "there may be an alternate water source available from whom water can be purchased to serve those in need." The proposed regulations state that people in the Highlands need to find bottled water instead of building or maintaining a water line, yet impose no restrictions on the water usage in the rest of the state. This is a clear discrimination against a minority of New Jersey residents. This is unequal protection of the state's residents. These proposed regulations treat a minority of residents differently than the majority with no justification. What is the cost of implementing this section? What are the benefits to the people of the Highlands? How can you justify one class of people in the state needing to check alternate sources for water while the rest of the state can use water produced from that very same area in an unlimited manner? (9-12)

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RESPONSE: The summary describes the situation when a well serving many users, for example, a municipal well, has to be replaced for a reason relating to health or safety. The alternative to placing a new well within the preservation area may be the purchase, by the water purveyor, of water from another water company. The summary was not intended to suggest that the individual residents served by the water purveyor would be required to purchase bottled water.

The Highlands Act limits or prohibits, within the preservation area, the construction of any new public water systems and the extension of any existing public water systems to serve development in the preservation area except to serve development that is exempt from the Highlands Act or in the case of a demonstrated need to protect public health and safety. The latter is the circumstance in which this waiver provision comes into play.

However, as stated in response to comments 348 and 350 through 355, the Department's efforts to conserve water are not limited to the preservation area. Purveyors throughout the state are required to implement conservation measures to ensure water is conserved to the maximum extent practicable and the Department requires conservation and the proper use of water resources across the state, and not just within the preservation area.

The provisions in the Highlands Act and implemented by these rules benefit those residing or doing business within the preservation area. Placing restrictions on extending new or expanded water supply systems to serve development in the preservation area, and the additional requirements placed on diversions of water to protect water resources and dependent ecosystems protect the water supply for those living in the preservation area as well as those depending on this water who reside elsewhere.

542. COMMENT: N.J.A.C. 7:38-6.5(b)l - If this section is good for the Highlands, why is it not good for the rest of the state? Why are a minority of residents being discriminated against? What are the costs of implementing this section and what are the benefits? (9-12)

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RESPONSE: It is not clear how the commenters believe N.J.A.C. 7:38-6.5(b)1, which establishes as a criterion for the health and public safety waiver that the activity will correct or avoid a threat to life or health, severe loss of property, or severe environmental degradation if the activity is not permitted, discriminates against Highlands residents. The Highlands Act establishes the standards for approval of permits as well as the criteria for waiving those standards as appropriate. There are very similar provisions as part of hardship tests or emergency permitting criteria in other Department regulatory programs, including the flood hazard area and the freshwater wetlands permitting programs. The cost to implement this section is the cost for a preapplication meeting and to prepare and submit an application for an HPAA with a waiver based upon health and safety. The benefit is the approval of an activity necessary to correct or avoid a threat to life, health or safety.

543. COMMENT: Add an additional example to those describing public health and safety at N.J.A.C. 6.5(c)4 that states: "The provision of wireless telecommunications to satisfy the Wireless Communications Public Safety Act of 1999 in order to provide critical communications links among members of the public. In the alternative, add an additional waiver from strict compliance stating: A waiver may be granted if the application is consistent with the Act, not violative of the Act and creates a de minimis impact on the property. (17)

RESPONSE: The list of activities that might be considered under the public health and safety waiver is illustrative, not exclusive. A wireless telecommunications facility could be considered under N.J.A.C. 7:38-6.5 if the applicant meets all of the requirements of the rule. Rather than a standard of de minimis impact, the Department must ultimately determine the appropriateness of a waiver in consideration of the standards for decision set forth in the Highlands Act at N.J.S.A. 13:20-33 that the development meet the requirements prescribed for a finding at N.J.S.A. 13:20-34 (and reiterated in the Highlands rules at N.J.A.C. 7:38-6.2) to the "maximum extent possible."

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544. COMMENT: The public health and safety waiver is restricted to activities that serve existing public health and safety needs or correct existing environmental degradation and is not intended or designed to support future development. While the rules will limit most new development in the preservation area, it will not be eliminated entirely. Under the rules, homes will still be built (including builder's remedy and settlement projects), redevelopment will occur on brownfields and other sites and there will be other waivers needed to avoid takings. The public health and safety waiver should allow municipalities to make improvements in anticipation of future development. (114)

RESPONSE: The Department believes it is contrary to the intent of the Highlands Act to permit, under an HPAA with public health and safety waiver, development that is intended to accommodate undetermined future development. However, the approval of any major Highlands development with another waiver provided for under the Act and rules will encompass needed utilities and infrastructure. If a health and safety need arises in the future, the municipality can submit an application for an HPAA with health and safety waiver, and will be better able to define the scope of, and provide a remedy for, the specific health and safety need.

545. COMMENT: The Department should develop either an expanded exemption at N.J.A.C. 7:38-2.3(a)11 or an accelerated waiver process at N.J.A.C. 7:38-6.5(b)3 to address the upgrade and potential expansion of public utilities as well as both existing and anticipated development in the preservation area. For example, the Morris County Municipal Utilities Authority, a public utility providing solid waste, recycling and potable water services to municipalities in Morris County, has several of its facilities located in the preservation area. Its ability to maintain its various systems and functions and to upgrade these as needed to address public health and safety concerns including, but not limited to, the possibility of locating new wells in the preservation area, should not be unduly and unnecessarily hindered. (114)

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RESPONSE: The exemptions at N.J.A.C. 7:38-2.3(a)11 are those established by the Highlands Act. If there is an urgent health or safety need, an emergency HPAA can be obtained in accordance with the requirements at N.J.A.C. 7:38-7. For other activities, the applicant for an HPAA with waiver should apply as far in advance as possible, including allowance for the required pre-application meeting, since the Highlands Act anticipates that the circumstances under which a waiver can be approved are very limited. The information required to be submitted and the extent of review of an application for an HPAA and for an HPAA with waiver are necessary to ensure the resource protection standards of the Highlands Act are met.

7:37-6.6 Waiver for redevelopment in certain previously developed areas in the Highlands preservation area: Department-designated brownfields

546. COMMENT: I don't understand the various brownfields designations. What kinds of pollution are in each? Why should development approval occur for brownfield sites in the preservation zone when no development would otherwise be permitted? Why are owners of contaminated land being rewarded? Shouldn't brownfields with significant impervious cover be the only ones where redevelopment is approved? Shouldn't brownfields just be cleaned up and left alone? (19, 28)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-33b(2), requires the Department to establish a waiver for brownfield redevelopment in the Highlands preservation area. N.J.A.C. 7:38-6.6 establishes the requirements for this waiver. Brownfield sites are specifically identified in the Highlands Act as areas where redevelopment should be encouraged. Cleaning up and reinvesting in these properties takes development pressures off of undeveloped, open land, and both improves and protects the environment. In addition, redevelopment of these sites is an incentive to clean up areas that otherwise may not be remediated.

The application for an HPAA with a waiver for brownfield redevelopment is a three-step process. First, the Department must designate a proposed site as a brownfield,

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pursuant to the criteria at N.J.A.C. 7:38-6.6(b). Once designated, the site must be approved by the Highlands Council as a site appropriate for redevelopment, pursuant to N.J.S.A. 13:20-9(b) and 13:20-11(a)6h. Once the site is eligible for an HPAA with a waiver for brownfield redevelopment in the Highlands preservation area, an application may be submitted to the Department for review and approval. The criteria for approval of an HPAA with a waiver for brownfield redevelopment are found at N.J.A.C. 7:38-6.6(k).

The Department created three “tracks” for the designation of brownfields to address the differing circumstances of potential brownfield sites that may be identified. The three tracks do not differentiate between the types of contamination that may occur on a site.

Track One addresses the potential designation of landfill sites. On such sites, the Department will consider for brownfield designation the part of a landfill site containing the limit of the waste and any other areas on the same site that were legally disturbed as of August 10, 2004.

Track Two addresses the potential designation of sites that may have already met the Department’s remediation requirements – that is, the sites are “cleaned up”. As noted in the summary for N.J.A.C. 7:38-6.6(d), this track has been established because the Department does not want to penalize those who previously took action to clean up a site by excluding them from an opportunity to apply for an approval to redevelop the site. The Department will designate those areas upon which remediation has been completed or other areas that were legally disturbed as of August 10, 2004.

Track Three addresses the potential designation of sites with contamination suspected or confirmed onsite, and that have not yet received a No Further Action letter from the Department in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. The designation criteria for Track Three were bifurcated to recognize the varying levels of progress that may have been made in the site remediation process. For sites for which only an on site Preliminary Assessment and Site Investigation that confirm the presence of contamination has been completed, the Department may limit designation to those portions of the site that were legally disturbed

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as of August 10, 2004 (N.J.A.C. 7:38-6.6(e)). For those sites for which the remediation has progressed beyond a Preliminary Assessment and Site Investigation and on which remedial activity has occurred, the Department will limit the designation to any area that has a Department-approved soil contamination delineation, areas legally disturbed as of August 10, 2004, or areas disturbed for remediation activities.

547. COMMENT: Clear standards must restrict the scope of the brownfields and redevelopment to avoid the creation of loopholes. Specific standards must: (a) limit the universe of sites; (b) limit intensive development on a site; (c) establish restoration requirements; and (d) retain the Act's strict prohibition on extension of growth inducing water and/or sewer infrastructure to the preservation area. The only statutory exceptions to the prohibitions on extension of sewer and water infrastructure are for documented public healthy and safety reasons, or to serve exempted projects. Brownfield sites or intensive redevelopment projects should not be provided water and sewer. (101)

RESPONSE: The Highlands Act requires that the waiver of any provision of a Highlands permitting review for brownfield redevelopment be conducted on a case-by-case basis. The Department must evaluate each site and its potential for development individually to assess the Highlands resources on the site and the potential impacts to the resources as a result of redevelopment. The Department believes that the intensity and type of development on designated brownfields are best determined through local and regional (Highlands Council) planning efforts, provided that development is consistent with all Highlands rule criteria. The scope of brownfields redevelopment is limited under N.J.A.C. 7:38-6.6 to those areas identified in each Track, and by excluding Highlands open waters from brownfield redevelopment. The remediation and restoration requirements are those already established under the Department's Technical Requirements for Site Remediation, N.J.A.C. 7:26E-6, and the Highlands rules at N.J.A.C. 7:38-6.6(k)7 and 8.

Finally, the Department does not agree that the only statutory exceptions to the prohibitions on extension of sewer and water infrastructure are for documented public

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healthy and safety reasons, or to serve exempted projects. The Highlands Act establishes waivers for brownfield redevelopment, redevelopment of sites containing 70 percent or more impervious surface, and to avoid a taking of property without just compensation. Consequently, if a site qualifies for any of the waivers in N.J.A.C. 7:38-6.4, including brownfield redevelopment, and the Department can make the necessary findings contained at N.J.S.A. 13:20-34 (and reiterated in the Highlands rules at N.J.A.C. 7:38-6.2) to the maximum extent possible, the Department may approved the extension of sewer and water infrastructure if necessary.

548. COMMENT: The waiver provision for redevelopment is too limited and will discourage the remediation and use of such sites. The waiver applies to sites designated as brownfields by the Department. The rule establishes three categories (or Tracks) of sites eligible for designation as a brownfield. Track One is limited to sanitary landfill sites. The rule limits the redevelopment of such sites to that part of the site that contains the waste "or" and any other areas that were legally disturbed as of August 10, 2004. It is not clear if this language allows for the designation of both categories on a particular site. The rule summary is clear that this provision means that the Department will consider designating both areas as brownfields. This needs to be clarified in the rule language by replacing the "or" with "and" at N.J.A.C. 7:38-6.6(c). This provision is very restrictive and includes no opportunity for flexibility. If a site's waste containing area and other disturbed areas are non contiguous, it is unclear how the size of the redevelopment area is to be determined. Will there be two distinct areas or will the distinct areas be connected in some way? At a minimum, the area containing the waste, all disturbed areas and the land areas in between should be included. To encourage the redevelopment of such sites, the rules should allow for further expansion, perhaps an additional 25 percent beyond the footprint of the disturbed areas and the waste containing areas. At a minimum this should be allowed where it can be shown that redevelopment is otherwise not feasible. (112)

549. COMMENT: The provision for Track Two sites also limits the potential brownfield designation. For Track Two sites the Department may designate areas where remediation

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has been completed "or other areas that were legally disturbed as of August 10, 2004."

The rule language at N.J.A.C. 7:38-6.6(d) states that the Department may designate as a Highlands brownfield only that portion of the site that meets "one or both" criteria. The language should be modified to make clear that both the remediated and previously disturbed portions of the site may be designated as brownfields. Further, as noted above for the Track One sites, the rule language should be modified to establish how the redevelopment area will be configured and to allow for some increase where necessary and to encourage redevelopment. (112)

550. COMMENT: The same concerns regarding the limitations associated with Track one and two sites also apply to the Track Three sites. For these sites, the area eligible for designation as a brownfield is described in the summary as including the extent of contamination "and" areas previously disturbed as of August 10, 2004. The rule language at N.J.A.C. 7:38-6.6(f) states that the Department may designate as a brownfield only that portion -of the site that meets one or more of the specified criteria which include approved soil contamination delineated areas, areas legally disturbed as of August 10, 2004, or areas disturbed for remediation activities. The language needs to be revised to make clear that all such areas are eligible for designation on any given site. Further, as noted above, the rule language should be modified to establish how the redevelopment area will be configured and to allow for some increase where necessary and to encourage redevelopment. (112)

RESPONSE TO COMMENTS 548 THROUGH 550: Track One addresses the potential designation of landfill sites. On such sites, the Department will consider for brownfield designation the part of a landfill site containing the limit of the waste and any other areas on the same site that were legally disturbed as of August 10, 2004. All such areas are eligible for designation.

Track Two addresses the potential designation of sites that may have already met the Department's remediation requirements – that is, the sites are "cleaned up." As noted in the summary for N.J.A.C. 7:38-6.6(d), this Track has been included because the

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Department does not want to penalize those who previously took action to clean up a site by excluding them from an opportunity to apply for redevelopment. The Department will designate those areas upon which remediation has been completed or other areas that were legally disturbed as of August 10, 2004. All such areas are eligible for designation. Track Three addresses the potential designation of sites with contamination suspected or confirmed onsite, and that have not yet received a No Further Action letter. The designation criteria for Track Three were bifurcated to recognize the varying levels of progress that may have been made in the site remediation process. For sites that have only completed an on site Preliminary Assessment and Site Investigation that confirm the presence of contamination, the Department may limit designation to those portions of the site that were legally disturbed as of August 10, 2004 (N.J.A.C. 7:38-6.6(e)). For those sites that have progressed beyond a Preliminary Assessment and Site Investigation and for which remedial activity has occurred, the Department will limit its designation to any area that has a Department approved soil contamination delineation, areas legally disturbed as of August 10, 2004, or areas disturbed for remediation activities (N.J.A.C. 7:38-6.6(f)). All such areas are eligible for designation, depending on the progress of the site in the site remediation process.

The conjunction 'or' is used in these provisions to allow designation of any area meeting any of the designation criteria in each Track. If "and" were used, only those areas that met all of the designation criteria would be eligible for designation.

Areas that do not meet these specific requirements, that is areas "in between" and areas beyond those established for each track, are not eligible for brownfield designation in order to protect the Highlands resource areas onsite that have not been previously developed or disturbed. The Department will consider modification of a Highlands brownfield designation to include an area identified by the Council pursuant to N.J.A.C. 7:38-6.6i. The Department expects that the appropriateness and intensity of redevelopment of a brownfield site will be addressed through Highlands Council review of a request to designate a site for redevelopment, and the Highlands Regional Master Plan, so far as the redevelopment is consistent with the criteria set forth by this chapter.

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551. COMMENT: The rule specifies three types of sites as being eligible for designation as brownfields. The three tracks defined include sanitary landfills and contaminated commercial or industrial sites. It is unclear if other sites, such as contaminated agricultural sites, would be included. There are many active and inactive agricultural sites in New Jersey, where due to prior application of pesticides, the soil is contaminated. These sites threaten water quality, as they are a potential source of ground and surface water contamination. These contaminated sites should be included for consideration as potential redevelopment sites. (112)

RESPONSE: As noted in the rules at N.J.A.C. 7:38-6.6(b), sites on which contamination is the result of a current or previous agricultural use are not eligible for brownfield designation. The Highlands Act does not contemplate that every contaminated site could potentially be eligible for this waiver. N.J.S.A. 13:20-33 establishes that the waiver is for redevelopment “in certain previously developed areas in the preservation area,” specifically those that are DEP-designated brownfields and those that contain 70 percent or more impervious surface. “Brownfield site” connotes a former or current commercial or industrial site that is currently vacant or underutilized and on which there has been or there is suspected to have been, a discharge of a contaminant. See the Brownfield and Contaminated Site Remediation Act, at N.J.S.A. 58:10B-1.

552. COMMENT: The rule is unclear as to the rationale for establishing three categories of sites eligible for brownfield designation. There is no indication that the tracks will be treated differently with regard to issuing a waiver or any other aspect of the rule. The reason for establishing the tracks should be provided. (112)

RESPONSE: The Department created three Tracks for the designation of brownfields to address the differing circumstances existing at potential brownfield sites, that is, among landfills (Track One), industrial or commercial sites on which remediation has already taken place (Track Two), and industrial or commercial sites where contamination is suspected or confirmed but not yet remediated. The documentation and submittal

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requirements differ by Track. However, the Tracks are not intended to indicate that the Department has established any priority or hierarchy among the types of sites with regard to how decisions will be made on applications under the rules for approval of an HPAA with a waiver for redevelopment.

553. COMMENT: The waiver for redevelopment limits Track 2 and Track 3 Highlands brownfields to industrial or commercial sites. This ignores potential government and residential brownfields sites also in need of remediation and redevelopment. These categories should be included. (114)

RESPONSE: As explained in response to comment 551, “brownfield site” connotes a former or current commercial or industrial site that is currently vacant or underutilized and on which there has been or there is suspected to have been, a discharge of a contaminant. See the Brownfield and Contaminated Site Remediation Act, at N.J.S.A. 58:10B-1. Government-owned properties and current residential sites are not precluded from being eligible for designation, so long as the contamination resulted from a former or current commercial or industrial use on the site.

554. COMMENT: We are very concerned with the proposed changes affecting brownfields. In particular the broad definition presented as Track 3, including sites where contamination is merely “suspected” open an unknown and undefined universe of sites to potential development. Although the Department will not authorize “destruction” of Highlands waterways for brownfield development, we believe the waiving of any environmental criteria for slopes, waterway buffers, forest cover or habitat for endangered or threatened species should not be authorized. (50)

RESPONSE: N.J.A.C. 7:38-6.6(e) provides criteria for Track Three sites with either suspected or confirmed contamination on site. As explained in the summary for N.J.A.C. 7:38-6.6(e), while sites suspected of contamination are eligible for designation and applicants may submit designation applications to the Department, the designation will

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not be made until, at a minimum, the first steps in remediation - an on site Preliminary Assessment and Site Investigation - have been completed and confirm the presence of contamination. Because Track Three sites will have undergone only the first steps in remediation but will have not proceeded far enough to adequately delineate the full extent of remediation onsite, the Department has limited the designation of such brownfields to areas that were legally disturbed as of August 10, 2004.

As explained in previous responses, the Highlands Act requires that the waiver of any provision of a Highlands permitting review for brownfield redevelopment be conducted on a case-by-case basis. The purpose of the waiver is to allow the relaxation or waiver of any of the Highlands resource protection standards in the appropriate case. Even so, the commenter's concern about avoiding impacts to steep slopes, buffers to Highlands open waters, upland forest, and habitat for endangered or threatened species is addressed by the requirement that the Department's approval of development under an HPAA with waiver must be conditioned on a finding that the requirements related to the protection of various Highlands resources as well as the public health, safety and welfare at N.J.S.A. 13:20-34 (and reiterated in the Highlands rules at N.J.A.C. 7:38-6.2) are met to the "maximum extent possible."

555. COMMENT: We find it troubling that the Department is proposing to weaken existing stormwater regulations for brownfield sites. The proposed rules will actually result in a lower standard within the Highlands preservation area than is currently applied statewide. Under the existing statewide stormwater rules, total suspended solids (TSS) must be reduced by 80 percent in the stormwater treatment for any major development, including redevelopment. Under the proposed Highlands rules, redevelopment projects that cover the same or smaller development "footprint" must only meet a 50 percent TSS removal rate. The result will be increased pollution and decreased water quality within the Highlands preservation area, a direction that is in complete opposition to the Act's main purpose. (50)

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RESPONSE: The Highlands Act at N.J.S.A. 13:20-2 states that, as part of the comprehensive approach to the protection of water and other natural resources in the Highlands, it is appropriate to encourage appropriate patterns of compatible residential, commercial, and industrial development, redevelopment and economic growth in or adjacent to areas already utilized for such purposes. The Highlands Act also requires that the Department establish a waiver for brownfield redevelopment in the Highlands preservation area. See N.J.S.A. 13:20-33b(2). Therefore, as part of the waiver requirements for redevelopment of brownfields at N.J.A.C. 7:38-6.6, the Department has established criteria for redevelopment areas that take into consideration the unique challenges associated with providing stormwater management on previously disturbed sites.

There are three different redevelopment scenarios: (1) redevelopment in the same footprint of existing development where there is an existing stormwater management system; (2) redevelopment in the same footprint of existing development where there is no existing stormwater management system; and (3) redevelopment outside of the existing footprint of development. When redevelopment is confined to the footprint of existing development, and there is an existing stormwater treatment system onsite, the Department requires that the existing stormwater treatment system be retained so long as it removes at least 50 percent total suspended solids (TSS). For example, if it currently removes 60 percent TSS, it satisfies the rule requirement because it removes at least 50 percent TSS. If an existing system removes 30 percent TSS, it must be upgraded to remove at least 50 percent TSS. In order to address the situation where the existing system does not remove TSS to the required standard, the Department is making a change on adoption to N.J.A.C. 7:38-6.6(k)6i to clarify the existing system can be kept in place but it must be upgraded to the standard.

In the case where redevelopment is proposed in the same footprint of existing development but there is no stormwater system existing on the site, a system must be installed that removes at least 50 percent TSS. If redevelopment is proposed outside the area of the current footprint of development, then it must have a stormwater system in place that removes at least 80 percent TSS.

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The Department believes it is appropriate to establish different standards for stormwater management based upon whether redevelopment will occur in the same footprint or a different footprint because when redeveloping in the same footprint it is more difficult to incorporate a stormwater management system if one was not already incorporated into the original project. Manufactured treatment devices, an alternative to stormwater basins, generally provide up to 50 percent TSS removal. Conversely, when redeveloping outside the footprint of existing development, stormwater management methods with higher TSS removal can be properly designed into the project from the start.

In no case will the rules result in increased pollution or decreased water quality because the Department requires that TSS removal be maintained at current levels or increased in all scenarios described above.

556. COMMENT: N.J.A.C. 7:38-6.6(k)7 requires that areas of a redevelopment site in which impervious surface is removed be further restricted from future development via a binding conservation restriction. It should be anticipated that over time, there will be a need for some alteration and expansion of redevelopment sites in keeping with the normal course of nonresidential turnover and building modification. The requirement for a conservation easement penalizes the redeveloper for reducing coverage on site while eliminating the ability to reclaim previously covered areas, if needed, to address future needs. Provided impervious surface on such a site is not expanded beyond 125 percent or $\frac{1}{4}$ acre from the original coverage footprint, development on applicable sites need not be further restricted by a conservation restriction. (114)

RESPONSE: As explained in previous responses, the major Highlands development authorized under the HPAA with waiver may have maximized the use of the Highlands resources allowable under the Act and these rules, such as the three percent impervious surface limit. If the limit has been reached under the initial HPAA with waiver, as will generally be the case with a redevelopment site because, by its nature, the site has already been developed and has impervious surface to a coverage likely greater than three

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percent, the conservation restriction will ensure that the impervious surface is not further increased in exceedance of the limit in the future if, for example, a subsequent owner were interested in undertaking some development of the property. The exemption for reconstruction within 125 percent of the existing impervious surface footprint or the addition of up to 0.25 acre impervious surface does not apply because the impervious surface must have been lawfully existing on the site as of August 10, 2004.

Consequently, if a future owner determines that additional or different development is desired, he or she must apply to the Department for a new or amended HPAA. If the Department were to approve the proposed development, it would undertake the process to amend or lift the conservation restriction as appropriate. See response to comments 529 and 530.

7:38-6.7 Waivers for redevelopment in certain previously developed areas in the Highlands preservation area: 70 percent impervious surface

557. COMMENT: The proposed amendments appear to prohibit a HPAA waiver for lands that may contain 70 percent impervious coverage that are not Brownfields. This would appear to be an extremely narrow exercise of the Department's powers under the HWPPA, Section 33(b). (24)

558. COMMENT: The proposed regulation at N.J.A.C. 7:38-6.7 is at best ambiguous as to whether non-Brownfield redevelopment of areas with more than 70 percent impervious cover will be permitted a waiver. (24)

559. COMMENT: We understand that any redevelopment in the 70 percent impervious area must remove non-essential impervious coverage and replace it with beneficial plantings and include mitigation of wetlands. However, the requirements appear to require a Highlands Brownfield designation. Is this what is meant? (24)

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RESPONSE TO COMMENTS 557 THROUGH 559: At N.J.A.C. 7:38-6.7, the

Department requires that an HPAA with a waiver for redevelopment of sites with 70 percent impervious surface in the Highlands preservation area meet the requirements in N.J.A.C. 7:38-6.6(k) 6, 7 and 8. N.J.A.C. 6.6(k)6 states, "The proposed redevelopment satisfies the requirements in (c), (d), (e) or (f) above as applicable" and seems to be the source of confusion. Reference to these subsections of N.J.A.C. 7:38-6.6 is intended to ensure that brownfield sites that may also meet the 70 percent impervious surface threshold under N.J.A.C. 7:38-6.7 also meet the requirements of N.J.A.C. 7:38-6.6. To be clear, sites that meet the 70 percent impervious surface threshold do not have to be brownfield sites to be eligible for an HPAA with a waiver for redevelopment of sites with 70 percent impervious surface. However, sites that meet the 70 percent impervious surface threshold and that are also brownfield sites, must meet the requirements for brownfield redevelopment at N.J.A.C. 7:38-6.6(k), as applicable.

7:38-6.8 Waiver to avoid the taking of property without just compensation

560. COMMENT: The requirements for submitting a Highlands preservation area approval (HPAA) (N.J.A.C. 7:38-6.2) are so onerous and expensive as to render the Waiver procedure (N.J.A.C. 7:38-6.8) to avoid taking of property without compensation futile and meaningless. The expenses which will be incurred in submitting an HPAA will exceed the value of any award. Failure to provide a legitimate administrative mechanism to address takings claims violates the Fifth Amendment of the U.S. Constitution and Article 1, paragraph 20 of the New Jersey Constitution. (85, 87)

RESPONSE: Courts have long held that the government must first be given an opportunity to make a final determination as to what development is permissible on the property under the relevant regulations, before a legal claim for a constitutional taking can be brought. That determination is made in an administrative process which commences when the property owner submits a permit application to the Department.

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N.J.S.A. 13:20-33b reflects the Legislative decision to avoid legal takings claims by requiring an administrative process in the Department's Highlands permitting program that allows the Department to waive any rule, on a case-by-case basis, in order to avoid the taking of property without just compensation. N.J.A.C. 7:38-6.4 and 9.6 allow a property owner to apply for an HPAA and a waiver of the permitting requirements. The process is not an undue burden on the constitutional right to "just compensation," as the commenter claims. The process is not part of a constitutional takings claim at all but is, again, the permit application process which necessarily must precede a takings claim.

In the application, the property owner identifies all alternatives to the proposed project that would reduce environmental impacts, explains the reasons why the alternatives were not pursued, and asks the Department to issue an HPAA. If the Department determines there is a beneficial, economically viable use for the property that is consistent with the Highlands rules, an HPAA can be issued for that use. Only after the Department determines that a project cannot be approved under the rules as strictly applied, does the Department consider waiving a rule requirement. N.J.A.C. 7:38-6.8 establishes the criteria by which the Department determines whether a taking will occur if a waiver is not granted and identifies the specific rule that must be waived to avoid that result. Issuance of a waiver that provides a beneficial, economically viable use for property eliminates the foundation of successful legal takings claims.

561. COMMENT: N.J.A.C. 7:38-6.8 addresses waivers to avoid the taking of property. The rules establish that the Department will not consider a waiver to avoid a taking until the applicant has applied for a Highlands permit under a strict application of the rules, appeals a decision through an administrative hearing and receives a Final Decision from the commissioner. Assuming a denial (or an approval with unacceptable conditions), the applicant would then have to appeal to the Appellate Division. If the Court finds that the applicant is not entitled to the Highlands permit, then the Department is to review and decide on a waiver to avoid a taking of property. The applicant would still have to have offered the property for sale and not refuse any reasonable offer based upon the minimum beneficial, economically viable use. The proposed waiver process is extreme in its

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application. If an applicant is fully aware that the proposed development is not consistent with the requirements of the proposed rules, the applicant should be entitled to file a waiver request with the Department. The applicant should not have to go through an entire administrative review and legal processes to receive a denial of a permit when it is clearly known at the initiation of the process that the permit would be denied under the rules. The proposed waiver process is clearly outside the scope of reasonable due process and should be modified. (112)

RESPONSE: The Department's regulations provide as an option an appeal to the Appellate Division before the Department will process an application for an HPA with waiver for taking without just compensation. Such court appeal is not required by the Department before it proceeds to consider an applicant's claim. The rules do not bar a legal claim for a taking of property without just compensation under the State or Federal constitutions, and leave that determination to the courts. The rules establish, instead, the administrative process which precedes a legal claim for a taking.

As explained in the response to comment 560, courts have long held that the government must first be given an opportunity to make a final determination as to what development is permissible on the property under the relevant regulations, before a legal claim for a constitutional taking can be brought. That determination is made in an administrative process which commences when the property owner submits a permit application to the Department.

The Highlands Act at N.J.S.A. 13:20-33b specifically provides that the Department should establish such an administrative process to avoid legal takings claims by considering the waiver of any of the Highlands rules, on a case-by-case basis, in order to avoid the taking of property without just compensation. Only after the Department determines that a project cannot be approved under the rules as strictly applied, does the Department consider waiving a rule requirement. Issuance of a waiver that provides a beneficial, economically viable use for property eliminates the foundation of successful legal takings claims.

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562. COMMENT: The rule provision for a waiver to avoid a taking without just compensation is unacceptable. Not only does an applicant have to go through the expensive and time consuming process to be denied a Highlands area approval, they then must attempt to sell their property at an amount no greater than the specific fair market value in order to qualify for a hardship waiver exemption. Once a Highlands preservation area approval is denied by the Department, it can be assumed that there is the possibility of only minimal use of the land, thus the fair market value of the land will have been significantly decreased as a direct result of the Highlands Act and these rules. A goal of the Highlands Act was to protect the equity of landowners. This is evident in the January 1, 2004 appraisal standard as the basis for compensation method. This rule should explicitly state that the landowner can offer the land for sale at the fair market value conditions prior to January 1, 2004. In order to keep with the intent of the Act, the Department should not require any property owner within the Highlands to accept any value of land that is less than the land was worth before the Highland Act was signed into law. (69, 87)

RESPONSE: Neither Federal nor State law guarantees a property owner the maximum “development potential” of property or payment if that maximum use is not achieved. If a zoning or land use regulation deprives a land owner of all beneficial uses of property, the law requires “just” compensation, not compensation for the maximum “development potential.” What is just compensation for a single lot owner will likely be less than what is compensation for an owner of a larger property. Compensation under the Highlands Act may take the form of cash or comparable development opportunity, such as transfer of development rights (TDR) in other, less environmentally sensitive areas. In either event, all property owners in the preservation area are entitled to just compensation if their property is left with no beneficial use following completion of the HPAA application process.

The mechanism to determine whether or not there is a use for the property that does not involve development is to find an entity interested in purchasing the land by offering the property for sale. The Highlands Act provides that property owners who wish

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to sell land for preservation purposes are eligible for compensation at pre-Highlands values. The Act specifically requires that, commencing on the date of enactment (August 10, 2004) and through June 30, 2009, when the Green Acres program, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land for recreation and conservation purposes, it must obtain appraisals of the value of the land using current zoning and State environmental regulations, as well as using the zoning and the State environmental regulations in effect on January 1, 2004. The higher of the two appraisal values is to serve as the basis for negotiation with the landowner with respect to the acquisition price for the lands. See N.J.S.A. 13:8C-26j. Similar provisions in the Act apply when the State Agriculture Development Committee, a local government agency, or a qualifying tax exempt nonprofit organization seeks to acquire farmland or a development easement on farmland. See N.J.S.A. 13:8C-38j. Therefore, in the case where the owner is offering his or her land for sale to one of these agencies, if that agency is interested, it will obtain two appraisals and negotiate using the higher value. The Department has modified the rules at N.J.A.C. 7:38-6.8(g)3 on adoption to clarify that where the lot is to be offered to a government agency or land conservation organization, the fair market value will be that established in accordance with the above-cited requirements of the Highlands Act. However, the ability to obtain pre-Highlands Act and post-Highlands Act appraisal values and use the higher of the two as the basis for negotiating a sales price does not apply in the circumstance of the lot being offered to neighboring property owners, since individual buyers are not subject to the above-cited requirements of the Highlands Act.

563. COMMENT: If a landowner knows that some feature of the property will result in a likely denial of an HPAA, they should not be forced to go through the time and expense of all the studies and paperwork. Instead, disclosure of the feature should be all that is required. (19, 28, 45, 46)

564. COMMENT: At N.J.A.C. 7:38-6.8(g), to force an owner through the HPAA process only so they can get turned down as a prerequisite of applying for a waiver is unjust. To

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force an owner into court to contest the HPAA before applying for a waiver is unjust.

Normal citizens simply do not have the resources to expend hundreds of thousands of dollars on studies and legal fees. In many cases, that is all the land is worth, and the regulations appear to be intentionally crafted to make it impractical for the average homeowner or farmer to recover the investment of time and money in their property. (19, 28)

RESPONSE TO 563 AND 564: Please see the responses to comments 560 and 561 above regarding the establishment of this waiver provision under the Highlands Act to specifically facilitate the Department's consideration through the administrative permitting process of whether it is appropriate in a particular case to waive any of the Highlands rules in order to avoid a legal takings claim. The applicant is not forced into court under N.J.A.C. 7:38-6.8 in order for the waiver request to be considered. If the Department denies an application for an HPAA under the rules as strictly applied, and the applicant forgoes appealing that decision, then he or she can request a waiver to avoid a taking of property at the point. However, should the applicant appeal the Department's decision on the HPAA, then the Department will not consider a request for a waiver to avoid a taking of property unless and until that appeal is fully concluded. As explained in the proposal summary, this is to avoid the Department's expending resources on a waiver application when the applicant is asserting in legal proceedings that the proposed development does meet the HPAA requirements.

565. COMMENT: N.J.A.C. 7:38-6.8(g) refers to a transfer of development rights program that does not exist and has no chance of existing when these proposed regulations are planned to become law. This is contrary to the Highlands Act. It also forces landowners into programs and restrictions which are arbitrary and capricious in nature and have restrictions which are outside the Highlands Act. (9-12)

RESPONSE: The use of the transfer of development rights (TDR) program to alleviate claims of taking without just compensation is entirely consistent with the Highlands Act

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which specifically requires the creation of such program by the Highlands Council. The Department acknowledges that until such time the TDR program is active, the Department will not require applicants to demonstrate that they have attempted to use such program.

566. COMMENT: All references to the use of TDR's should be removed until such time as the system is developed and successfully implemented. (19, 28, 45, 46)

RESPONSE: The timing of the Department's rules and the Regional Master Plan (RMP), as dictated by the Act, makes it impossible for the Department to await completion of the RMP and transfer of development rights program before promulgating these rules. The Department must view the Act in its entirety and presuppose that all provisions of the Act will be implemented as directed by the New Jersey Legislature. Therefore, the Department believes it is appropriate to reference the transfer of development right program because it is contained in the Act.

567. COMMENT: These sections are unconstitutional and overreaching. To protect public funds, the New Jersey Legislature instructed the Department to include a waiver provision that would short circuit the need for litigation and, more important, for payment by the State of just compensation. By its inclusion of the regulations contained in subsections (c) through (k), the Department has altered its role from an enforcement body of the executive branch of government to that of judicial decision-maker. The interpretation of the constitution is a task that has always been left exclusively to the courts. In making a determination as to whether an unconstitutional taking has occurred, a court assesses the equities of each situation. This balancing procedure is exactly what the Department has tried to delineate with great detail in section 6.8. However, this is not what the Act authorizes or what the New Jersey Legislature could have intended, because such evaluation is not the purview of a regulatory body, but rather the courts. Moreover, requiring a landowner to first go through an extensive permitting process and be denied before he or she can then be permitted to go through a second burdensome administrative

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proceeding (rather than a judicial proceeding) places an impermissible undue burden on the constitutional right to just compensation. Finally, the Department will undoubtedly try to argue that the administrative determinations it makes in these proceedings cannot be reviewed de novo, but only under administrative law standards of review. For all these reasons, the detailed waiver provisions should be deleted and the regulations should simply provide that in the event a court of law determines an unconstitutional taking has occurred with respect to the Highlands regulations, the Department is authorized to waive the requirement for an HPAA. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE: As explained in prior responses, the establishment of this waiver provision under the Highlands Act specifically facilitates the Department's consideration through the administrative permitting process of whether it is appropriate in a particular case to waive any of the Highlands rules in order to avoid a legal takings claim. Regarding the review of its determinations under this provision, the first-level review of an HPAA denial is at the administrative level. A hearing request is submitted to the DEP and the hearing would be held by an administrative law judge at the Office of Administrative Law. This is a de novo review of the HPAA decision. After the hearing, the ALJ issues an initial decision, which the DEP Commissioner reviews and accepts, modifies, or rejects by issuing a final decision. The same process applies under the rule for the review of the Department's determination on a waiver request. The Commissioner's final decision makes a case ripe for adjudication in Superior Court where the standard of review varies based on the specific issue presented. The Department will argue each case based on the specific circumstances of the case, and takings case law and jurisprudence.

568. COMMENT: Most of this section seems to be targeted at land owned by developers or land where development approvals were being sought or about to be sought. Certainly, the rules simply do not apply to homeowners and farmers who have been good stewards of the land and rebuffed offers from developers. For example, farmers do not make investments in their property in pursuit of development of that property as required in

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N.J.A.C. 7:38-6.8(d), but they are still entitled to the normal appreciation that applies to land investments. Nor should local zoning be a consideration given the likelihood that variances are often granted. Nor should land be valued at its agricultural value - that is only one of many values in the bundle of rights that used to exist with land in the Highlands. (19, 28, 45, 46)

569. COMMENT: N.J.A.C. 7:38-6.8(c)l constitutes an equal protection/due process violation. The investments made by a property owner in property as a whole include more than cash expenditures. Investments in the property must include the net future value of the original purchase price of the property, even if the property was purchased by an ancestor of the current property owner several centuries ago. Investments in the property must also include the capital appreciation of the property stored in the land by a farmer who chose to engage in a marginally yielding agricultural activity with the comforting knowledge that his total return on invested capital included the annual appreciation of his farmland, thus economically justifying the activity. To exclude long time landowners from a takings waiver is a violation of equal protection and due process. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE TO COMMENTS 568 AND 569: Any property owner in the preservation area, including farmers, may apply for a waiver to avoid a taking after their application for an HPAA under the rules as strictly applied is denied. Whether the Department will approve a waiver depends upon whether a minimum viable, economically beneficial use for the property can be achieved in accordance with the Highlands rules. If it can, then the waiver will be issued pursuant to N.J.A.C. 7:38-6.8 to allow that minimum viable, economically beneficial use. Since this is the use to which all property owners are legally entitled, including farmers, the proposed regulations do not discriminate against farmers.

The monetary investment made by a land owner in purchasing and developing land is only one of three factors in proposed N.J.A.C. 7:38-6.8(c) which the Department considers in determining the minimum viable economically beneficial use for a property. Verifiable facts such as purchase price and development expenditures are indications of

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the land use the property owner anticipated at the time of purchase or investment, and a factor in determining whether a currently proposed use is economically viable. The primary concern is usually whether an extravagant purchase price or consulting fee is a reasonable reflection of the legally permissible uses for the property at that time and, therefore, legitimately part of the calculation of a minimum viable, economically beneficial use.

The Department disagrees that a property owner's decision to pass up a development opportunity is the equivalent of an actual cash expenditure for which the government must "refund" the land owner when the development laws change. Federal and state courts have warned land owners for years that government is not responsible for preserving a property owner's hopes of any future use or land value. Property owners who obtain the necessary permits and approvals obtain a vested right to a particular land use for a specific, future period of time. In the absence of these permit and approvals, property owners are entitled to a beneficial use for their property, but not the most profitable one or the one they could have had but did not secure either through a sale or development approval.

It is important to note that farming is not regulated under these rules. See response to comment 157. Furthermore, the Highlands Act promotes the protection of farm land *for farming* by requiring the Department of Agriculture and the Department's Green Acres Program to obtain pre-Act and post-Act appraisal values and to offer the owner the higher of the two values if the owner desires to preserve a farm through the Farmland Preservation or Green Acres Programs.

570. COMMENT: N.J.A.C. 7:38-6.8(d)l, investments in property, should not be limited to those made in pursuit of development. All investments made to improve or preserve the property, the land and the environment must also be considered, including the investment decision to store appreciation in the land by not selling it. The investment-backed expectations of a farmer or forester or any other good steward of our environment must have equal footing with the investment expectations of a developer. To provide the developer with special treatment in considering investment-backed expectations is

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favoritism and an egregious violation of the equal protection rights of the farmer as a class. A landowner who is not a developer has the same reasonable expectation of property rights and land value protection as a developer. If two individuals owned the same bond worth the same \$100 face value, both individuals have the same expectation of receiving the same \$ 100 in a redemption or simultaneous sale. It does not matter if one individual invested in the bond ten years (or one hundred years) before the other individual. The contract rights of the bond are equal, as must be the ownership rights of all property owners. The thought that the developer, who made a recent investment in property with the intention of "destroying" the environment the Act seeks to preserve, has a preferred position under the Fifth Amendment takings clause when compared to a multi-generational farmer whose family has cared for and preserved the environment for centuries is simply irrational, insulting and offensive. Farmers, foresters, and other landowners who have cared for the environment must not be excluded from obtaining a takings waiver. The state's attempt to do so is irrational and unjust, and in violation of its citizens' due process and equal protection rights. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE: As explained in response to comment 567, the Department disagrees that a property owner's decision to pass up a development opportunity is the equivalent of an actual, out-of-pocket cash expenditure. Nor does the Department agree that it must "refund" this speculative profit when a farmer or other long-time steward of the land places property up for sale to developers who will not pay as much as they offered prior to the Act. No landowner, including farmers or real estate developers, is exempt from future changes in land use or zoning unless the necessary permits and approvals are obtained that guarantee the right to undertake a specific project. See N.J.S.A. 13:20-28a(3). Court decisions only take into account actual cash expenditures by property owners in assessing reasonableness of development plans, and determining economically viable land uses. Were it otherwise, the public would become cash guarantor of every private speculative real estate dream and could never obtain necessary improvements in zoning or land use law.

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The Department agrees with the commenter, however, that a land owner who is not a developer has the same "property rights and land value protection" as a real estate developer. Thus, all land owners are entitled to the minimum viable economically beneficial use for their particular property, not the most profitable use or a use available but voluntarily passed up in favor of the income stream produced by farming.

The Department disagrees that the rules favor recent purchasers of property in the Highlands in comparison to long-time residents. All preservation area property owners may construct a house on their property and can pursue the other activities under N.J.S.A. 13:20-28a (see also N.J.A.C. 7:38-2.3) which are exempt from the permitting requirements of the Act. The average homeowner may even view farmers to be in a superior position due to agricultural and horticultural property tax exemptions and the income farmers derive from use of their property. The average homeowner's property produces no income whatsoever and is taxed fully.

Finally, the Act protects the reasonable economic expectations of farmers who wish to see farming continue on their land. The Department of Agriculture and the Department's Green Acres Program must obtain pre-Act and post-Act appraisal values and offer the farmer the higher of the two values as long as the owner preserves the farm through the Farmland Preservation or Green Acres Programs.

571. COMMENT: Being left with "minimum beneficial economically viable use of the property as a whole," as written at N.J.A.C. 7:38-6.8(e) is in opposition to the Highlands Act which insists that economic benefits and maintenance of the quality of life of Highlands residents be preserved and improved. When a generation of farmers and landowners cannot afford to retire because their net worth has been regulated away, the cost to NJ taxpayers will be enormous. I have researched the legal precedents and could not find anything that left an entire population without any equity. Please provide the case law precedents described in this paragraph. (19, 28, 45, 46)

572. COMMENT: The summary for N.J.A.C. 7:38-6.8(e) states that, "The Department is obligated only to ensure an applicant minimum beneficial economic viable use for the

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property." Is not this a rather low standard? How does the Department justify taking over 90 percent of the value of some property, adding draconian restrictions and then providing no compensation? Yet the people at the other end of the water pipe have no new restriction and are not obligated to pay for any of the takings of property in the Highlands? What is the cost of this to the people of the Highlands? What are the benefits of this section to the people of the Highlands? How is this discrimination of a minority of people in the Highlands by the majority of people in the state of N.J. justified and how does the Department justify its flagrant violation of the U.S. and N.J. Constitution? (9-12)

573. COMMENT: The requirement that a property owner, prior to receiving a takings waiver, must offer to sell the property to any buyer willing to pay a price equal to only the minimum beneficial economically viable use value is in contradiction to all case history regarding the definition of "just compensation" in takings law. Just compensation is clearly defined within case law as fair market value. A generally accepted financial concept, fair market value is always defined as the "highest and best use" value of a property. When just compensation is awarded in a takings action, it is always the fair market value of the property that is paid. In requiring that a landowner accept only the minimum beneficial economically viable use value for the Highlands Act regulatory taking, and not the fair market value of the property, the Department is overreaching its authority and stepping into the realm of the judicial system by trying to rewrite case law. The Act states that preservation area properties purchased by the State shall utilize appraisals of the property's value as of January 2004, a date prior to enactment of the legislation when Highlands land sold based on its development value which was, de facto, its highest and best use. The Department regulations fail to honor this requirement of the Act, and fail to honor the environmental preservation intent of the New Jersey Legislature. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE TO 571 THROUGH 573: The New Jersey and Federal constitutions prohibit government from depriving any person of property without just compensation. The courts

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have determined that the constitutionally guaranteed use of property is the minimum viable economically beneficial use, not the most profitable use or the highest value that was available in past years, but never realized. Since the Highlands Act allows the Department to issue a waiver of regulatory requirements to allow this minimum viable economically beneficial use, the Act and the rules assure that landowner's constitutional rights in this regard are protected.

The Highlands Act does not guarantee any specific "economic benefit" concerning land sale by farmers or any other property owner. In enacting the Highlands Act, the New Jersey Legislature found that the continued *economic viability of the Highlands Region* and, indeed, the entire State was jeopardized by the rampant and accelerating loss of land critical to the preservation of a water supply upon which large numbers of New Jersey residents depended. The New Jersey Legislature also expressed its commitment to "*appropriate*" opportunities for economic growth, that is, growth consistent with the goals and purposes of the Act.

574. COMMENT: At N.J.A.C. 7:38-6.8(g)3, a property owner should not be forced to put property on the market at less than market value. This is certainly not the common method of marketing property unless you want to get rid of it fast. In this case, the owner is seeking to improve the property, not sell it, and has already expended many thousands of dollars toward that improvement, so has no logical reason to put it on the market below market value. Instead, the owner would of course be seeking to recover the entire investment along with a profit. It is certainly not up to the Department to decide whether or not an offer on the property is "sufficient to serve the applicant's needs." In addition, market value should be defined to mean the market value before the Highlands Act was in effect plus appreciation that would have occurred had the Act not been passed. (19, 28, 45, 46)

575. COMMENT: N.J.A.C. 7:38-6.8(g)3 requires a land owner to offer their property for sale under certain conditions. This is absurd. A land owner should not be obligated to offer their property for sale in order to comply with a government regulation, This section

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and those like it point to two of the problems with the construction of these regulations.

To an average person, who must not have been at the table when these regulations were created, requiring the offer of sale of a property is ridiculous. It has no justification and is not required in the rest of the state. Requiring the offer of sale to "conservation organizations" but not agricultural organizations shows the extreme pressure that environmental organizations had in crafting these proposed regulations. This discriminates against farmers by giving environmental organizations a higher ranking and greater control in creating, implementing and benefiting from these regulations. Why is one class of residents (environmental organizations) given more rights than another (farmers). What is the cost of this discrimination and what are the benefits?

By stating that the below market value that a land owner may accept could be "sufficient for the applicant's needs" is insulting. This sounds like something that would be more appropriate in the failed USSR than in the United States of America. Who thought that line up? Was it an employee of the Department or a member of an "environmental organization"?

Why do "environmental organizations" get a superior standing under these regulations than farmers or any other citizens on New Jersey? What is the cost to society of elevating this group and what is the benefit? Why is everyone who is not a member of an environmental organization discriminated against? (9-12)

RESPONSE TO COMMENTS 574 AND 575: The Department is not requiring an applicant to put a property on the market for less than fair market value. It is requiring that the fair market value be determined by an independent certified appraiser of the applicant's choosing and the property be offered for sale at the value established by that appraiser. Further, the Department is not deciding what is sufficient to meet the applicant's needs, the applicant is. The Department's summary stated that the land is to be offered at or below fair market value. Consequently, the owner has the choice of accepting a value at or below fair market value. Only in the case where an offer at fair market value is rejected by the owner will the Department automatically deny a waiver for taking without just compensation. If an offer is below fair market value, the owner

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can choose to accept the offer or can continue to pursue a waiver for taking without just compensation. It is the owner's choice.

The purpose of requiring that land be offered for sale to conservation organizations is because such organizations buy land to preserve it and do not expect to develop the property they purchase. Consequently, if there is to be an alternative, viable use of the property that provides an economic benefit to the property owner, it is most likely to be in sale of the land for preservation. Further such organizations purchase and preserve both agricultural and environmentally sensitive lands so there is no bias on the part of the Department by requiring that land be offered to these organizations, and there is equal opportunity for agricultural and other land to be purchased. Finally, the owner of the land can offer the land for sale to anyone he or she thinks would be interested in purchasing it. If the owner knows of another organization or individual with interest in purchasing the land, it remains his right to make that transaction since the goal of the process is to obtain a financial benefit for an owner that may not be achievable through a development option.

Regarding the desire to obtain pre-Highlands Act values for the land, the Highlands Act specifically requires that when the State Green Acres program, State Agriculture Development Committee, a local government unit, or a qualifying tax exempt nonprofit organization seeks to acquire land for recreation, conservation or farmland, using constitutionally dedicated moneys in whole or in part, it shall conduct or cause to be conducted an appraisal or appraisals of the value of the lands using current regulations, and the regulations in effect on January 1, 2004. The higher of those two values is to be used by the Green Acres program, State Agriculture Development Committee, a local government unit or a qualifying tax-exempt nonprofit organization as the basis for negotiation with the landowner with respect to the acquisition price for the lands. Therefore, as stated in response to comment 562, in the case where the owner is offering his or her land for sale to one of these agencies, if that agency is interested, it will obtain two appraisals and negotiate using the higher value. The Department has modified the rules at N.J.A.C. 7:38-6.8(g)3 on adoption to clarify that where the lot is to be offered to a government agency or land conservation organization, the fair market

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value will be that established in accordance with the above-cited requirements of the Highlands Act. However, the ability to obtain pre-Highlands Act and post-Highlands Act appraisal values and use the higher of the two as the basis for negotiating a sales price does not apply in the circumstance of the lot being offered to neighboring property owners, since individual buyers are not subject to the above-cited requirements of the Highlands Act.

576. COMMENT: Denying a waiver based upon taking without just compensation when the owner refuses a fair market value offer for his property at N.J.A.C. 7:38-6.8(h) represents an unconstitutional taking. (9-12)

577. COMMENT: The provisions at N.J.A.C. 7:38-6.8(k) represent an unconstitutional taking. (9-12)

RESPONSE TO COMMENTS 576 AND 577: According to court case law regarding taking without just compensation, an “unconstitutional taking” exists when a property owner is denied all use of his property without compensation. If an owner has been offered fair market value for his property, then there is obviously a use for that property with compensation to be paid by the interested purchaser. Selling the land at fair market value negates the need for a waiver of Highlands standards since someone is offering to buy the parcel as is. Therefore, nothing has been “taken” from the owner, there is no need to obtain a waiver from the provisions of the Highlands regulations, and the basis for a claim of “taking without just compensation” does not exist. This provision is entirely consistent with procedures for addressing the constitutional protections relating to “taking without just compensation.”

578. COMMENT: The term “minimum beneficial economically viable use” should be a defined term in the definition section. The Department may wish to specify more detailed requirements for appraisals, as is currently done by the Green Acres Program to

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assure accurate appraisals, rather than strictly relying on the “State licensed” approach proposed in the section. (73)

579. COMMENT: An objective and quantifiable basis should be developed to determine “minimum viable and economically beneficial use” of a property, as discussed throughout N.J.A.C. 7:38-6.8. (114)

RESPONSE TO COMMENTS 578AND 579: The Department cannot provide a definition of minimum viable economically beneficial use because it will vary depending upon the circumstance. Very generally, a minimum viable economically beneficial use is a use that can be conducted on a property that provides sufficient economic benefit to the owner such that the property owner has not been denied all use of his property. Neither Federal nor State law guarantees a property owner the maximum “development potential” of property or payment if that maximum use is not achieved. If a zoning or land use regulation deprives a land owner of all beneficial uses of property, the law requires “just” compensation, not compensation for the maximum “development potential.” What is just compensation for a single lot owner will likely be less than what is just compensation for an owner of a larger property. Compensation under the Highlands Act may take the form of cash or comparable development opportunity in other, less environmentally sensitive areas, for example through a transfer of development rights (TDR) program. In either event, all property owners in the preservation area are entitled to just compensation if their property is left with no beneficial use following completion of the permit application process.

580. COMMENT: We commend the Department for the provisions at (b) and (b)(1) requiring that an applicant exhaust all administrative and legal challenges prior to having a waiver considered. While it may seem unnecessary to state this since it is generally recognized as a matter of law, the number of requests for takings based waivers is, in our view, expected to be large. These provisions will help prevent frivolous challenges and requests on this sensitive issue. (73)

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

7:38-6.9 Waiver for the construction of 100 percent affordable housing

581. COMMENT: The number one cause of sprawl in the Highlands is because towns lose lawsuits filed by builders, and the vicious circle of building more and more houses is forced to continue. The more housing that is built, the more that is required. Even in the preservation zone, we're still stuck with the requirement for development. The fact that the Department insisted in the beginning that the towns in the preservation zone could find a way to fulfill the affordable housing requirements without building on less than 88 acres is somewhat amusing, but I'm glad to see that reality set in. Nonetheless, the question remains. Why doesn't the State of New Jersey re-examine the whole affordable housing issue from the standpoint of the interpretation that was given to the legal judgements passed that spawned COAH to begin with? In addition, this waiver seems counterproductive in that a town can "opt in" to the preservation area, thereby making it eligible for a low and moderate income housing waiver. How will this abuse be stopped? (19, 28)

582. COMMENT: The proposed waiver for 100 percent inclusionary developments is an unfair discrimination against non-inclusionary development. The designed attempt to avoid the obvious conflict with other regulatory schemes highlights the absurdity of the entire proposal. (111)

583. COMMENT: How does the construction of 100 percent affordable housing in the preservation area qualify for a waiver? These projects generate wastewater and pollute the environment just like the others that are being prohibited in the preservation area. Affordable housing should be in or near towns, villages and cities so services are close by, ideally within walking distance. Building affordable housing in the preservation area goes against conventional smart planning practice. (85, 87)

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RESPONSE TO COMMENTS 581 THROUGH 583: The Department proposed and is adopting the waiver for the construction of low and moderate housing units for five municipalities entirely contained within the preservation area. Unlike market rate development, low and moderate income housing is required in all municipalities by the State Fair Housing Act, N.J.S.A. 52:27D-301 et seq. and by the New Jersey constitution. Regardless of where the commenter believes affordable housing should be located, every municipality in New Jersey has an affordable housing obligation. Without accommodating the affordable housing needs of the five towns in question, they would not be able to fulfill their constitutionally mandated obligation since affordable housing regulations preclude the transfer of all affordable housing outside the township. Other townships in the Highlands Region, include both preservation and planning areas within their boundaries and therefore have the opportunity to plan their affordable housing in the planning area. However, the five municipalities identified in the waiver at N.J.A.C. 7:38-6.9 do not have that option.

Like all applicants for waivers, in applying for a Highlands preservation area approval, the municipalities will have to specify the provisions for which they are seeking a waiver. As with other applications for waivers, the Department will approve the waiver of only those provisions necessary to accommodate the proposed project to prevent the housing requirements from overriding the environmental considerations.

584. COMMENT: Bethlehem Township is approximately 94 percent in the preservation area, the remaining 6 percent being in the planning area. In 1998 the Township purchased property with Green Acres funds and as a part of that purchase the Township carved out a 10 acre area (paid for solely with Township funds) for use in meeting the Township's COAH obligations and for other future municipal uses. Concurrent with the acquisitions of the property, the Township made arrangements with the Association of Retarded Citizens ("ARC") such that ARC would be able to construct 100 percent affordable housing on a portion of the 10 acre carve out. These affordable ARC units are part of the Township's Fair Share Plan. In addition to the expenditures of the Township on the

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acquisition of the 10 acre parcel, ARC has expended significant time and money in developing engineering plans and septic feasibility studies for said parcel. As to the 6 percent of the Township in the planning area (roughly 870 acres in total) approximately 778 acres is preserved farms, with a few scattered homes. The remaining 92 acres in the preservation area consists of two active farms. Given this situation, the Mayor and Township Committee of Bethlehem Township respectfully request that the Department accept the following recommendations: Allow the proposed waiver to apply to the construction of 100 percent low and moderate income housing, in townships that are 94 percent or greater in the preservation area.

In the event that the above is not acceptable, consider the following alternative: Create an expedited review process for municipalities/applicants proposing 100 percent affordable housing development. In addition to the proposed N-J.A.C. 7:38-6.9(a), (b) and (c), use the following as favorable criteria in judging an application's qualification for waiver: 1. Did the municipality expend funds to acquire the property on which the affordable housing is proposed prior to the effective date of the Act; 2. Did a not-for-profit expend funds in anticipation of development of affordable housing on a municipally owned property; 3. Is the proposed development for "special needs" affordable housing; 4. How much developable land is available outside preservation area to meet current and future COAH obligations. (4)

585. COMMENT: The current regulations allow a waiver for 100 percent affordable housing projects, but only for the five communities that are located entirely within the preservation area. A community with only a few acres of land outside the preservation area is restricted from making application for this waiver, even though it will have substantially similar difficulties in providing for affordable housing within its boundaries. We would rather see an outright exemption from the Department's Highland rules for 100 percent affordable housing projects so as not to further hinder the production of needed affordable housing in the region. Should the Department fail to change the rules to allow the outright exemption as recommended, a reevaluation of the currently proposed waiver should be conducted. (114)

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586. COMMENT: In the absence of modifying N.J.A.C. 7:38-2.3(a)17, this office recommends that the waiver for affordable housing be permitted in all communities in which 50 percent or more of the community is impacted by preservation area designation. Given the high and rising price of housing in New Jersey and difficulties already facing those who would produce affordable housing in this state, expanding this waiver as suggested would be appropriate. (114)

RESPONSE TO COMMENTS 584 THROUGH 586: As explained in prior responses, the Department proposed and is adopting the waiver provisions for the construction of 100 percent low and moderate housing units in five municipalities entirely contained within the preservation area to enable them to provide constitutionally mandated housing. The remaining townships within the Highlands Region have varying amounts of land in both the planning and preservation areas and the Department believes that it would be inconsistent with the purpose and intent of the Highlands Act to extend this waiver to towns that have 50 percent or more of their land area in the preservation area or to those that may experience some degree of difficulty in relocating affordable housing because the Act clearly requires strict standards be applied to proposed development in the preservation area.

The Department is required by the Highlands Act at N.J.S.A. 13:20-34 to make a series of findings before approving an HPAA. Applicants in the five municipalities that apply for an HPAA with the waiver for 100 percent affordable housing are still required to demonstrate that they meet the resource protection standards for protection contained in the Highlands Act and these rules “to the maximum extent possible.” Consequently, while the Department can consider as part of its review the factors suggested by the commenter regarding the nature of the housing to be constructed, the Department cannot create an expedited process for reviewing applications nor can the housing factors supersede the resource area protections required by the Highlands Act.

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The Department is willing to meet with applicants to discuss the possible options for accomplishing the municipalities housing requirements while satisfying the requirements of the Highlands Act and these rules.

587. COMMENT: N.J.A.C. 7:38-6.9 is a new waiver category. This provision allows for waivers from provisions in the rules for the construction of 100 percent affordable housing development projects. This provision is limited to those municipalities located entirely in the preservation area, because otherwise the rules would prohibit these towns from meeting their constitutional obligation under the State Fair Housing Act. The Highlands Act does not require that low and moderate income housing meet a 100 percent standard. Low and moderate income housing is typically provided in mixed communities. The waiver should be provided for any development that was planned in accordance with COAH substantive certification without limitation. To require otherwise may result in projects no longer viable and clearly will discourage construction of housing for low and moderate income families and compliance with the Fair Housing Act. (114)

RESPONSE: The Department purposely excluded from the waiver provision mixed communities because the Highlands Act clearly requires strict standards be applied to proposed development in the preservation area. Consequently, while the Department believes the New Jersey constitution and State Fair Housing Act support the inclusion in the Highlands rules of a provision to accommodate 100 percent affordable housing projects, this same support does not apply to market rate housing that can be accommodated outside the preservation area and virtually anywhere in the State.

588. COMMENT: The Department is proposing an amendment to the waiver provisions to include construction of housing that is 100 percent affordable. The mandate to create affordable housing has caused more environmental damage in New Jersey than any other State or municipal program. It was hoped that some consensus might be achieved between State agencies balancing the water protection goals of the Highlands Act and the

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affordable housing obligation under COAH. For example, a “lack of land” condition might be extended by COAH to towns wholly within the preservation area. Instead the Department is proposing to waive environmental standards for affordable housing. This is egregious and such a waiver is prone to abuse. We ask the Department to revisit this measure and attempt to achieve a more equitable compromise. (52)

589. COMMENT: The proposed changes to N.J.A.C. 7:38-6.4, which would allow a waiver “to permit the construction of a 100 percent affordable housing development” in preservation areas should be deleted. The provisions of the Fair Housing Act, and the regulations developed pursuant to the act, have led to unnecessary environmental degradation since the enactment of the act over thirty years ago. The Council on Affordable Housing and the Highlands Council should address the deficiencies in the regulations, and the act itself, if needed, so that there is no need for waivers for housing developments in preservation areas which would violate the preservation area standards set forth in N.J.A.C. 7:38-3.1 et seq. (27, 49)

590. COMMENT: A significant factor in over development in the Highlands (Pohatcong Township for example) is that builders remedy lawsuits that the towns loose, forcing them to build large numbers of high density housing to satisfy the state mandated affordable housing laws. To be consistent, the Highlands Act should forbid affordable housing to be built in the preservation area since it would use all of the available land with its 25 acre and 88 acre limitation. (45, 46)

RESPONSE TO COMMENTS 588 THROUGH 590: The Department’s accommodation for those five communities contained entirely within the preservation area is strictly limited to the construction of 100 percent affordable housing. The Department’s understanding is that these communities are complying with past obligations not yet satisfied. In the future, since new affordable housing obligations are based upon the development of market rate housing and commercial development, communities in the preservation area should experience a decrease in the obligation as market rate

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development declines. Consequently, the Department does not believe that the waiver is prone to abuse.

In addition, like all applicants for waivers, in applying for a Highlands preservation area approval, the municipalities will have to specify the provisions for which they are seeking a waiver. As for other waiver applications, the Department will approve the waiver of only those provisions necessary to accommodate the proposed project to prevent the housing requirements from overriding the environmental considerations.

591. COMMENT: The limited scope and the additional safeguards provided at N.J.A.C. 7:38-6.9(b)(1), (2), (3), and (c) should be sufficient to protect natural resources. The use of this waiver provision limited to 100 percent affordable projects addresses many of the problems we have observed with the so called “inclusionary” or “builder’s remedy” projects within our service area. (73)

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

Subchapter 7 Emergency permits

N.J.A.C. 7:38-7.1 Emergency permits

592. COMMENT: The onerous and time consuming nature of emergency permits constitute a hazard to public safety. They also discriminate against people who live in the Highlands by reducing their safety while not reducing the safety of those outside the Highlands. (9-12)

RESPONSE: The requirements for an Emergency Permit authorization in the Highlands rules are similar to the requirements that have existed Statewide for several years for an Emergency Permit authorization in the Freshwater Wetlands Protection Act rules (N.J.A.C. 7:7A) and the Flood Hazard Area Control rules (N.J.A.C. 7:13). The Director of the Division of Land Use, or his or her designee, can issue an immediate oral

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authorization and is required to fax a letter memorializing the Director's oral

authorization to be posted at the work site in extreme cases where unacceptable threats to human life, a severe loss of property and/or severe environmental degradation will occur if an Emergency Permit is not issued. The Department does not agree with the commenter that this process is onerous or time consuming and constitutes a hazard to public safety.

Once the immediate emergency or public safety issue has been addressed using the process described above, it is the responsibility of the individual or entity requesting the Emergency Permit authorization to follow-up with the Department and submit documentation consistent with that required for all Highlands approvals.

Subchapter 9 Application contents

7:38-9.1 Basic application information

593. COMMENT: Regarding N.J.A.C. 7:38-9.1(r), since only highly paid technical experts are allowed to provide information, it is not justified to fine the property owner, who is not an expert, unless the owner directed the expert to be inaccurate. (19) (28) (45, 46)

RESPONSE: The rules at N.J.A.C. 7:38-9.1(r) specifically state that the submission of false, inaccurate, or incomplete information that is “knowing and willful” **may** subject the applicant, its consultants engineers, surveyors or agents to penalties under the Department’s rules and the Highlands Act. The purpose of this provision is to give the Department the option to pursue an applicant if the Department determines that the applicant did indeed direct the expert to submit false information. If the Department determines that the owner was not involved in the knowing or willful submission of false, inaccurate or incomplete information or any other violation identified in N.J.A.C. 7:38-9.1(r), the Department would not seek to impose liability on the owner.

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594. COMMENT: What special status do environmental groups have that property owners are required to notify them of any plans to build? (82)

RESPONSE: The Department does not require the notification of environmental groups. Rather, at N.J.A.C. 7:38-9.4(b) and 9.5(a), the Department requires notification of municipal and county environmental commissions. These commissions are part of municipal and county government.

595. COMMENT: The requirements for site plan submissions should be defined so they are not unduly burdensome to State, County, and local public agencies (N.J.A.C. 7:38-9). (85, 87)

RESPONSE: The Department's requirements for site plan submissions include all information necessary for the Department to make a reasoned decision, as well as the type of requirements necessary to render a site plan useable legally for Department purposes (for example, plans signed and sealed). State, county and local public agencies have experts on staff or on retainer who are qualified to produce acceptable site plans. It is unclear to the Department what additional refinements the commenters believe are necessary or would be useful to public agencies.

596. COMMENT: The existing rule requires that an application for an HPAA provide information on the amounts of existing and proposed impervious cover. For natural gas pipeline projects, rights-of-way traverse other existing land uses that may include existing impervious cover. Typically construction of new facilities does not include the addition of impervious cover unless new launchers/receivers, meter/valve stations, or compressor stations are proposed. Therefore, for natural gas transmission projects, it is recommended that information required for impervious cover amounts be limited to the amount of impervious cover associated with the pipeline facilities and not other developments as these impervious cover amounts are only incidental to the right-of-way crossings. (115)

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RESPONSE: The commenters' suggestions are reasonable and the Department has made similar accommodations on a case by case basis for utility line projects in the past under other Department permit programs. Prior to submittal of an application for an HPAA, the applicant should request a preapplication meeting so the Department can assess with the applicant the specific extent of impervious cover to be associated with a particular proposed project.

7:38-9.2 Application requirements for a Highlands Applicability Determination

597. COMMENT: An exemption is an exemption and should not require a letter of exemption or an HAD. These are costly and have not been expeditiously handled to date. (19, 28, 45, 46)

RESPONSE: The Department does not in all cases require that an applicant obtain an applicability determination for projects that are exempt. As stated in the Department's summary, an applicability determination is required when the applicant is proposing impacts that require some other type of Department land or water permit such as a freshwater wetlands, floodplain or sewer extension permit, in order to know whether the Highlands regulations or the Department's other regulations apply to a specific application. In these cases an applicability determination is required. Applicants may also voluntarily obtain an applicability determination for any project. Such determination may be desired to facilitate the sale of a parcel of land or to satisfy a local requirement and will require documentation demonstrating that a project meets the requirements for a Highlands exemption. The Department has hired staff specifically to review Highlands applicability determinations and has received 592 requests to date and has made decisions on 477. The Department does not agree that its fees are excessive. The fee for applicability determinations vary. For individual applications proposing development costing \$100,000 or less; municipalities; and for a determination regarding agricultural

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and horticultural uses, the fee is nominal: \$100. The fee for all other applicants exceeding development costs of \$100,000 (except the Department of Transportation for whom there is no fee) is \$750.

598. COMMENT: In the summary regarding N.J.A.C. 7:38-9.2(d)5 and 7, the statement that an "applicability determination is not generally required" should be changed to "an applicability determination is not required" since additions to private homes and woodland management are exempt. (19, 28, 45, 46)

RESPONSE: While an applicability determination is not routinely required for additions to single family homes or woodland management plans, the Department is leaving open the opportunity to obtain a Highlands applicability determination if the applicant so chooses or if a municipality determines that one is necessary to satisfy a local requirement. The Department has amended its rules on adoption at N.J.A.C. 7:38-2.4 to clarify when a Highlands applicability determination is required.

599. COMMENT: The voluntary nature of the HAD for agricultural/horticultural use and development needs to be clarified. Municipalities may require a HAD whether the activity is exempt or not. If such a determination is necessary for agricultural and horticultural use and development, the New Jersey Department of Agriculture would be the appropriate entity to provide such a determination at no cost. (75)

RESPONSE: The Department has done everything in its power through its regulations and its regulatory and enforcement programs to make it clear to all that individuals performing agricultural and horticultural activities should not be required to obtain a Highlands applicability determination. The Department will continue to spread this message and will seek assistance from the New Jersey Department of Agriculture if an issue arises regarding an agricultural or horticultural activity.

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600. COMMENT: At N.J.A.C. 7:38-9.2(d)8, trail construction on private property should be exempt. Trails are generally either recreational or for use in accessing forest land for maintenance, with or without a forest management plan. They will aid in extinguishing forest fires as well, and are thus of benefit to the environment. (19, 28, 45, 46)

RESPONSE: The Highlands Act at N.J.S.A. 13:20-28a(8), and the Department's regulations provide an exemption for the construction or extension of trails with non-impervious surfaces on publicly owned lands or on privately owned lands where a conservation or recreational use easement has been established. However, trails will only be regulated on public or private property if they constitute major Highlands development. That is, if constructing the trail: requires an environmental land use or water permit (for example, because it is being placed through wetlands); results in the ultimate disturbance of one acre or more of land; results in a cumulative increase of 0.25 acre or more impervious surface; or results in the ultimate disturbance of one-quarter acre or more of forested land, it is regulated. Therefore, if a trail can be constructed without becoming a major Highlands development it is exempt on private property. For those trails that are not exempt, the Department requires submittal of an application for a Highlands preservation area approval. The Department has discussed trail construction in detail in its response to comments 285 through 291.

601. COMMENT: At, N.J.A.C. 7:38-9.2(d)11, in addition to an application, official documentation necessary for cell tower proposals must include the following: (1)A site plan signed and sealed by a New Jersey Professional Engineer that depicts the proposal, including, the area of new disturbance and new impervious surface, if any. This should be deleted and replaced with: A letter signed and sealed by a New Jersey Professional Engineer stating that the proposal will not result in additional impervious surface; and photographic documentation of the existing location including the existing impervious surfaces. The commenter believes the recommended language will allow the Department to achieve their goal of streamlining the process, while continuing to protect the watershed. (17)

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RESPONSE: The Department does not agree that a letter signed by a professional engineer is sufficient to replace a site plan. Consequently, the Department requires, “a site plan signed and sealed by a New Jersey Professional Engineer that depicts the proposal, including the area of new disturbance and new impervious surface, *if any*”(emphasis added). The commenter can submit the letter being suggested with supporting photographs to demonstrate that there is no new impervious surface being proposed but the Department does not agree that the requirement for a site plan should be eliminated.

7:38-9.3 Basic application requirements for all Highlands Resource Area Determinations, and Highlands preservation area approvals with or without waivers including modifications and extensions

602. COMMENT: This section should not apply to farmer landowners as the Act exempted agriculture operations. (45, 46)

RESPONSE: This section does not apply to agricultural or horticultural activities that are exempt in accordance with the Highlands Act.

603. COMMENT: At N.J.A.C. 7:38-9.3(b)12, the Department requires a letter from the National Heritage foundation. The commenters have not found that the National Heritage foundation has the staff to respond to my questions, let alone write me a letter. Please provide the commitment from them that demonstrates the workability of this requirement. (19, 28)

RESPONSE: The Department is requiring a letter from the Department’s Natural Heritage Program. As part of the Department, this Program routinely provides information upon receipt of a written request regarding the presence, absence and types

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of threatened, endangered and rare species contained on a property. The Department's Natural Heritage Program responded to 2766 data requests in 2005.

Subchapter 10 Fees

7:38-10.1 Fees

604. COMMENT: The fees are excessive as well as the fines that can be imposed. These constitute additional costs to the individual landowner and cause undue hardship if any improvement to the property is warranted. (2)

RESPONSE: The Highlands Act requires that, "...The department shall, in accordance with a fee schedule adopted as a rule or regulation, establish and charge reasonable fees necessary to meet the administrative costs of the department associated with the processing, review, and enforcement of any application for a Highlands permitting review. These fees shall be deposited in the "Environmental Services Fund," established pursuant to section 5 of P.L.1975, c.232 (C.13:1D-33), and kept separate and apart from all other State receipts and appropriated only as provided herein. There shall be appropriated annually to the department revenue from that fund sufficient to defray in full the costs incurred in the processing, review, and enforcement of applications for Highlands permitting reviews." (N.J.S.A. 13:20-33f) In addition, the Highlands Act establishes the fines associated with violations by stating, "The commissioner is authorized to assess a civil administrative penalty of up to \$25,000 for each violation of any provision of section 32 of this act, a Highlands permitting review approval issued pursuant to section 36 of this act, or any rule or regulation adopted pursuant to sections 33 and 34 of this act, and each day during which each violation continues shall constitute an additional, separate, and distinct offense." (N.J.S.A. 13:20-35d) The Highlands Act also states, "A person who violates any provision of section 32 of this act, a Highlands permitting review approval issued pursuant to section 36 of this act, or any rule or regulation adopted pursuant to sections 33 and 34 of this act, an administrative order

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issued pursuant to subsection b. of this section, or a court order issued pursuant to subsection c. of this section, or who fails to pay a civil administrative penalty in full pursuant to subsection d. of this section, shall be subject, upon order of a court, to a civil penalty not to exceed \$10,000 per day of such violation, and each day during which the violation continues shall constitute an additional, separate, and distinct offense.”

(N.J.S.A. 13:20-35e) Consequently, the Department remains consistent with the Highlands Act in establishing its fines and fees. The Department provided a complete explanation for the fees that it is assessing to implement the Highlands program in its summary that accompanied the proposed readoption.

It is unclear what type of “improvements” the commenters are referring to. The Highlands Act and regulations regulate major Highlands developments and not day to day activities. Further, if a property and development were existing on August 10, 2004, any improvement to a lawfully existing single family dwelling is exempt providing the improvement maintains the use as a single family dwelling as defined by code or ordinance in the municipality, and some additions to commercial development within specified parameters are exempt from the provisions of the Highlands Act.

605. COMMENT: The fees are so high that future development within the preservation area is virtually impossible for citizens, including those with low income, to apply and therefore creates a potential Equal Protection violation. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE: The Highlands Act requires that, “...The department shall, in accordance with a fee schedule adopted as a rule or regulation, establish and charge reasonable fees necessary to meet the administrative costs of the department associated with the processing, review, and enforcement of any application for a Highlands permitting review. These fees shall be deposited in the "Environmental Services Fund," established pursuant to section 5 of P.L.1975, c.232 (C.13:1D-33), and kept separate and apart from all other State receipts and appropriated only as provided herein. There shall be appropriated annually to the department revenue from that fund sufficient to defray in full

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the costs incurred in the processing, review, and enforcement of applications for Highlands permitting reviews.” (N.J.S.A. 13:20-33f) Consequently, the Department has based its fees upon other existing fees for similar types of reviews since this is the best way to approximate what is reasonable and necessary. For example, the Highlands resource area determination (HRAD) fees are structured similarly to those for obtaining a letter of interpretation (LOI) under the Freshwater Wetland Protection Act regulations (N.J.A.C. 7:7A). The HRAD fees are higher, however, because, instead of having to confirm or identify wetlands on a site, as required for an LOI, the Department will have to confirm the boundaries of Highlands open waters, forest areas, steep slopes, impervious cover and unique and scenic resources for an HRAD. Similarly, the fees for Highlands preservation area approvals are based upon the fees for individual wetland permits under the Freshwater Wetlands program since the review process will be similar. The remaining additional fees for stormwater reviews, and stream encroachment reviews are the same fees that are charged for such reviews statewide.

The additional fees charged to applicants who need to have a water supply review are similar to those required for applicants outside the Highlands preservation area. One difference, however, is the fact that the fees must be paid by applicants diverting 50,000 gallons per day since this is the regulatory threshold in the Highlands vs. 100,000 gallons per day elsewhere in the State. A water supply review involves a source-specific hydrologic assessment, including an analysis of potential impacts to the resource, other water users, and environmentally sensitive environmental features such as stream flow, wetlands, and threatened and endangered species. It includes an assessment of regional hydrologic impacts, to evaluate changes in ground water levels. The review also includes an inventory of contaminated sites in the vicinity of the diversion and an assessment of the potential of a proposed diversion to contribute to movement of ground or surface water contamination. Another difference between the water allocation fees charged as part of an application for a Highlands approval versus an application independent of a Highlands approval are the fees based upon non-potable and consumptive uses. The fees in the Highlands rules are structured to be lower for the use of low quality water for non-

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potable uses to encourage the use of lowest quality water for such uses, consistent with the requirements of the Highlands rules.

The same fees are charged to anyone in the preservation area proposing to conduct a major Highlands development. If a property constitutes raw land, regardless of where it is located in the State, there are extensive costs associated with developing such a site and it is likely that the property owner would require an engineer and other professionals and would have to obtain both local and State approvals to meet all local and State requirements. Therefore, it is entirely consistent for Department to establish fees for the review of a permit to conduct regulated activities in the Highlands preservation area as it has for the review of other land use permits statewide.

Finally, as noted previously in response to comments, there are several exemptions that apply to single family dwellings. Individuals pursuing exempt activities will not be paying fees for Highlands reviews or approvals.

606. COMMENT: Why is the Department seeking to recover its costs of reviewing onerous regulations that it wrote itself from property owners? Why not either recover the cost from those that want the regulations or just make the regulations simpler? (19, 28)

RESPONSE: The Department is not seeking to recover the costs from reviewing its own regulations. The Department is seeking to cover the costs of reviewing Highlands applications in order to assess compliance with regulations required to implement the Highlands Act. As stated in response to comment 606 above, the Department has the authority to charge reasonable fees necessary to meet the administrative costs associated with the processing, review, and enforcement of any application for a Highlands permitting review. The Department is complying with the Act's mandates.

607. COMMENT: State, County, and local authorities undertaking exempt activities should also be exempt from fees (N.J.A.C. 7:38-10). (85, 87)

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RESPONSE: Aside from the Department of Transportation, other State agencies do not routinely undertake development projects requiring land use permits for which an exemption would be needed. The Department deems it appropriate to reduce, but not eliminate the fees for municipal government applications.

608. COMMENT: The fees are excessive, especially when a landowner is attempting to improve his property for the sake of the environment. Any such fee would discourage anyone from doing anything especially since any application would probably require the assistance of an engineer, lawyer or environmentalist or all of them. (3)

RESPONSE: It is unclear to what type of “improvements” the commenter is referring and consequently what fees might apply. For example, the Department has included in its rules two general permits, one for habitat creation and enhancement activities and one for bank stabilization activities to facilitate property improvements that benefit the environment. There is no fee to obtain a permit for habitat creation and enhancement and a \$500 fee for bank stabilization activities since such activities may require an engineering review and analysis. If an individual finds it necessary to replace a septic system, an improvement that will improve water quality, the activity is exempt. Woodland management activities, also beneficial to the environment are also exempt. For all other proposed major Highlands developments, the Department is seeking to cover the costs of reviewing Highlands applications in order to assess compliance with regulations in compliance with the Highlands Act.

7:38-10.2 Fee tables

609. COMMENT: The rule says that the Department has worked out ways to recover its costs for reviewing applications for municipalities and the DOT, yet property owners must pay 100 percent of those fees. Why do property owners have to pay the full fee plus pay taxes to pay the fees for other agencies? (19, 28, 45, 46)

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RESPONSE: The property owner will be getting the benefit derived from conducting a major Highlands development. Therefore, it is equitable to charge fees for the review of an application to the individual getting the benefit from obtaining the Highlands approval. The Department has an internal agreement with DOT so while it does not paying fees directly, it does provide funding to the Department through an internal agreement. Municipal governments are not required to pay a full fee because they obtain their money from the public through taxes and the Department does not want its permit fees to cause a municipality to raise taxes.

610. COMMENT: Why is there a reference at N.J.A.C. 7:38-10.2(b)1 to projects under \$100,000? With the studies that are required, plus the cost of the improvements, it is all but impossible for a project to come in at under \$100,000. Seven hundred fifty dollars is an excessive amount to pay just to obtain an applicability determination. It appears that the idea is to put so much of the owner's equity at risk as to make any improvements impractical, a clear violation of the owner's rights. (19, 28, 32, 45, 46)

RESPONSE: The projects referred to in this section are major Highlands developments as regulated by the Highlands act and these regulations. The Department does not in all cases require that an applicant obtain an applicability determination, for projects that are exempt. As stated in the proposal summary, an applicability determination is required when the applicant is proposing impacts that require another land use or water permit from the Department such as a freshwater wetlands, flood hazard area, or sewer extension permit. This is necessary for the Department to be able to determine whether the Highlands regulations or the Department's other regulations apply to a specific application. If an individual knows that a project is not exempt from the Highlands Act, he or she can skip the applicability determination and clearly state that fact in an application for a Highlands preservation area approval.

It is unclear what type of "improvements" the commenters are referring to that would necessarily exceed \$100,000 in value and require some type of Highlands approval. The Highlands Act and these rules provide an exemption for any improvement

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to a lawfully existing single-family dwelling in existence on August 10, 2004 so long as the improvements maintain the use of the dwelling as single family, and some additions to commercial development within specified parameters. Consequently, projects that would require Highlands approvals are likely new projects. As stated in response to comment 606 above, the Department has the authority to charge reasonable fees necessary to meet the administrative costs associated with the processing, review, and enforcement of any application for a Highlands permitting review.

611. COMMENT: Charging a \$2,000 fee at N.J.A.C. 7:38-10.2(h)3 to someone who has had their property taken unconstitutionally is predatory. (19, 28, 45, 46)

RESPONSE: The fee at N.J.A.C. 7:38-10.2(h)3 is for the review of a request for a waiver to avoid a taking without just compensation. Until an applicant demonstrates that the rules as strictly applied will prevent any beneficial use of a property, in accordance with the requirements at N.J.A.C. 7:38-6.8, there is no basis upon which the Department can make a determination to waive a Highlands rule requirement in order to avoid a taking. The Department's review of the request requires careful scrutiny of the history and circumstances surrounding the purchase and development of the property in order to evaluate if the waiver of any of the rules will enable a beneficial, economically viable use for the property in consideration of takings case law. The fee will cover the Department's costs to undertake this review, including the necessary consultation with the deputy attorneys general in the Division of Law in the Department of Law and Public Safety.

612. COMMENT: At N.J.A.C. 7:38-10.2(i), there should be no fee for habitat creation, nor should it be regulated in any way. It is counter-productive to the process of encouraging owners to provide habitats for wildlife. Installation of bluebird nesting boxes, for example, has been quite successful in encouraging bluebirds to nest, but if a permit is necessary, such activities will be discouraged. (19, 28)

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RESPONSE: N.J.A.C. 7:38-10.2(i) provides that there is no fee for the general permit for habitat creation. Further, the placement of bluebird nesting boxes would not be regulated under the Highlands regulations because such activity will not constitute a major Highlands development. The activities that are regulated relating to habitat creation and enhancement are those activities at a magnitude to require a permit and that therefore have the potential for impacts if not properly designed and constructed. For example, while alteration of a stream bed may provide good habitat for certain aquatic species, it also has the potential to affect flooding on neighboring properties. Consequently, such activities can only be conducted using an approved permit and it is therefore necessary and appropriate to regulate such activities. The permitting process for a general permit has been streamlined as much as possible given the requirements of the Highlands act so as not to discourage such activities.

613. COMMENT: Fees are too high and represent an undue burden on one class of New Jersey citizens. Fees are also charged for permission to do exempt activities. Exempt means exempt. How can exempt mean ask permission and file all kinds of paperwork and fees? This conflicts with the Highlands Act. What is the cost of these new additional fees and what is the benefit? (9-12)

614. COMMENT: The commenter is concerned with the fees associated with the law. Not only are the fees high, they are not always necessary and it makes it hard for a farmer or any other citizen to go through the process. (66)

RESPONSE TO COMMENTS 613 AND 614: The Department established the fees applicable to different review activities in accordance with the mandates of the Highland Act. Please see response to comment 606. In addition, Highlands Applicability Determinations (HADs) are voluntary, except for projects that require other land use permits from the Department. Applicants are required to obtain a HAD for these projects so that the Department may determine if the project is reviewed under the Highlands rules, or other Department rules. Applicants may also voluntarily obtain an applicability

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determination for any project. Such determination may be desired to facilitate the sale of a parcel of land or to satisfy a local requirement and will provide documentation demonstrating that a project meets the requirements for a Highlands exemption. Because the Department must undertake a review in order to complete an applicability determination, and the review requires staff and time, the Department deems it necessary and reasonable to charge a fee for applicability determinations.

615. COMMENT: N.J.A.C. 7:38-10.2(g) institutes fees for water producers in the Highlands. There are no fees for people at the other end of the pipe. This is discriminatory. If water fees are to be implemented they should be fair and statewide. (9-12)

RESPONSE: The Department's rules institute a fee for the review of an application to conduct a major Highlands development that includes a water supply element. Once a purveyor obtains a Highlands approval, the water purveyors are permitted to charge their users for water. However, as the commenter implies, there is no comprehensive state law or regulation that assesses a fee to water users. The Department does not have the authority to assess such fees.

616. COMMENT: If you add up all the fees found in N.J.A.C. 7:38-8.1 through 12.4, the Highlands application fee would range between \$50,000 and \$100,000 for one single family home. This allows only the rich and politically connected to potentially use this land. (54)

RESPONSE: There is no reason to add up all the fees in the Highlands fee schedule. The fees are a "menu" from which the appropriate fees are to be chosen. There is no scenario in which a single family home would need to pay all of the fees in the fee schedule. In fact, a single family home may be exempt from the provisions of the Highlands Act. In this case, the owner could request an exemption for \$750. If exempt, there are no more fees associated with the Highlands Act. If not exempt, the owner could request a

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Highlands resource area determination. Assuming a site is 100 acres, the owner could request: (1) a footprint of disturbance which would cost \$500 plus \$50 per acre ($\$50 \times 100 = \5000) for \$5,500; or (2) a boundary delineation for \$500; or (3) a boundary verification for \$750 plus \$100 per acre ($\$100 \times 100 = \$10,000$) for \$10,750. Upon receipt of an HRAD, the owner could then request a Highlands preservation area approval. Since they have already obtained an HRAD, the fee is \$2,500 plus \$50 per acre or any fraction thereof of Highlands resource areas to be affected. The Department is modifying the rule at N.J.A.C. 7:38-10.2(d) to state clearly that the \$50 fee is to be assessed for each acre or any fraction thereof "of Highlands resource areas to be affected" since this will be the only area of review upon which the Department will have to focus for applicants who previously obtained an HRAD. Assuming 2 acres will be affected, that will be \$2,500 plus ($\$50 \times 2 = \100) or \$2,600. If a stormwater review is required there is an additional \$2,000. Assuming worst case scenario, there could be a groundwater recharge review for the area to be disturbed (fee for less than 3 acres, in our case 2 acres is \$500); runoff quantity calculations for area to be disturbed (less than three acres, \$500); and water quality calculations for new impervious surface (assuming all 2 acres will be impervious (one to three acres \$1,000) for a total stormwater fee of \$4,000. Finally, if the property owner locates the proposed development in the floodplain, again assuming worse case scenario the fee could be \$1,000 for review for the construction of a single family house. The remaining fees in the fee schedule would not apply to a single-family house. Therefore, the total fee is \$18,100 assuming that the proposed development needs all of the most expensive reviews. This fee reflects the level of review required by the Department to assess all of the various impacts proposed as part of the project. While this may appear to be a significant fee, when someone is undertaking a development, this is likely a small part of the total costs that will be accrued.

617. COMMENT: The Fee Schedule is extremely burdensome to everyone affected by these rules, particularly to homeowners and small business owners. Owners of land located in the preservation area are all going to be subject to significant regulation and

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constraint on their properties and business enterprises. The added burden of “fees” is excessive. (75)

RESPONSE: The provisions of the Highlands regulations, including the fees, only apply to people proposing to conduct a major Highlands development in the preservation area. Consequently, homeowners and small business owners will not be affected by the Department’s fees unless undertaking a major Highlands development that does not otherwise comply with one of the many exemptions provided by the Highlands Act. For those who are proposing to conduct a major Highlands development, the Department established the fees applicable to different review activities in accordance with the mandates of the Highland Act. Please see response to comment 606.

618. COMMENT: The fees set forth in the Fee Table are excessive and should be substantially reduced. Most fees associated with utility projects are duplicative since the normal Department reviews, fee structures and requirements remain in place. (114)

RESPONSE: The normal fee structures and requirements contained in the Department’s other permit programs are superseded by the Highlands preservation area approval fee structure and requirements. Therefore, the fees are not duplicative and will not be reduced.

619. COMMENT: Fees for pre-application meetings and HAD applications to determine exemption or classification as a Major Highlands Development should be eliminated. Pre-application meetings and HAD applications deal primarily with interpretive issues made necessary by a lack of adequate detail and clarity from the Department regarding the various circumstances under which exemptions may exist and to the application of the rules, in general. (114)

RESPONSE: The Department does not agree that pre-application meetings and Highlands applicability determinations are made necessary by lack of adequate detail and

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clarity in the Department's rules. Regardless of how clearly a regulation is written, or how many scenarios the Department tries to anticipate, individual circumstances relating to a specific application often result in additional questions. Further, due to the comprehensive nature of a Highlands preservation area approval, it will be necessary for the Department together with the applicant to determine the nature of the necessary reviews and the timing of each part of a review when a waiver is sought. Again, the Department cannot anticipate the type of applications or the circumstances for which waivers such as a waiver for a health or safety issue, will be sought. Accordingly, it is necessary to have a process, the pre-application process, to address these applications when they occur. Because pre-applications and Highlands applicability determinations take personnel from other permit processing activities, the Department believes it is reasonable to charge a fee.

Subchapter 11 Review of applications

7:38-11.3 Public comment on an application

620. COMMENT: All notices on complete applications should be put on the Department website so that the public can easily view such information. Not everyone receives the DEP "Bulletin." The public should have sixty days to comment on an application, not 30 days which is far too short a period for the working public. Everybody works and the public needs time to talk it over. Thirty-days is never sufficient for true public notice. There should be 60 days for the public to review Highlands applicability determinations. How does an individual get a copy of the DEP "bulletin" so that they can be a part of the informed public? (83)

RESPONSE: The DEP Bulletin, containing notices of complete applications, is accessible on-line at www.state.nj.us/dep/bulletin. In selecting a 30-day comment period instead of anything longer, the Department is balancing the needs of the applicant to obtain a final determination from the Department in a timely manner with the needs of the public to have an adequate opportunity to review and comment on an application. The

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Department has established a 30-day comment period because that is a reasonable period for applications to be discussed at a public planning board, environmental commission or other meetings, if appropriate, since these meetings occur at least once per month. In the future, the Department hopes to have electronic application procedures that will make complete applications more easily accessible. That technology is currently being developed.

621. COMMENT: Owners have time limits imposed on them everywhere in the regulations. The Department should have time limits as well. The logic that time limits are not mentioned in the Highlands Act is ridiculous - the Act didn't specify regulations beyond those necessary to protect the watershed, yet the Department has proposed them. When a permit is submitted anywhere else in the State of New Jersey, there is a time limit on the amount of time the agency has to review the permit and accept or approve it. Forcing citizens into a costly application with no indication whatsoever of how long it will take is not right, and is discriminatory against residents of the Highlands. Applicants will spend a significant amount of time and money to submit all this paperwork, and they deserve a prompt response. (19, 28, 45, 46)

622. COMMENT: N.J.A.C. 7:38-11.3(f) makes clear that the Department has no deadlines. Why should the applicants be under tight timelines and the regulating agency be under none? What is the cost of the delays that will come from that. Since justice delayed is justice denied, are not there constitutional and legal issues with this? (9-12)

RESPONSE TO COMMENTS 621 AND 622: Regardless of the fact that the Highlands Act did not contain timelines for review of applications, the Department has included a timeline in the rules by stating at N.J.A.C. 7:38-11.7, that it will make a decision on a Highlands preservation area approval (HPAA) within 120-days of receipt of a complete application, or 180 days for an HPAA with waiver. However, because a Highlands approval incorporates many review aspects that might require additional coordination, for example with the U.S. Environmental Protection Agency, or the U.S. Fish and Wildlife

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Service on wetland-related issues, or may require a plan amendment process that cannot commence until it is clear that a project satisfies several other Highlands requirements, there may be cases when additional time is required in order to complete all aspects of the Highlands review. In those cases only, the Department will notify the applicant in writing (and likely will have already informed the applicant as the review progressed) about the likely time line for completing its reviews. Contrary to what the commenters believe, there are few permits that have set time limits. The only regulations subject to the review time frames contained within the Ninety-day law are those pursuant to the Flood Hazard Area Control Act (N.J.S.A. 58:16A-50 et seq.), the treatment works approval provisions of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. and certain reviews under the Coastal Zone Management Program. None of the other Department permitting programs, for example the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.), Water Quality Planning Act (N.J.S.A. 58:11A-1 et seq.), Safe Drinking Water Act (N.J.S.A. 58:12A-1 et seq.) or other environmental regulations implemented by the Department are subject to the Ninety-day law.

623. COMMENT: In all other kinds of construction and property improvement permitting in New Jersey, members of the public who will be directly affected, such as property owners adjacent to the property in question, are entitled to a public hearing only when a variance is requested, not when permitted uses are requested. The general public should not have the right to a public hearing. Even adjacent property owners should not be entitled to a hearing when the proposed use of the land is allowed under these regulations. When the owner is forced to use approved consultants for the work, why would an uneducated and untrained member of the general public be allowed to challenge and critique the work of a professional? The Department's intent here seems to make the application process more onerous and at the same time open the door to arbitrary decisions with no scientific foundation. (19, 28, 45, 46)

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RESPONSE: The Department's Land Use program has made it a practice to require notification of all property owners within 200 feet and to allow those owners to request a public hearing on an application. While it is true that much of the work to compile an application is done by professionals, these professionals do not live on or adjacent to the property and do not know the day to day circumstances associated with a property. For example, while an engineer can prepare a stormwater plan, he or she may not know that a certain property currently floods during a heavy rain storm. Neighbors will know this and their knowledge may assist the professionals in designing a successful project.

The Department does not grant all requests for public hearings. Rather, the Department will only grant a hearing where one of the standards contained in N.J.A.C. 7:38-11.5 has been established. The Department will be more likely to grant a hearing request when the request is supported by a significant degree of public interest in the application, as manifested by written requests for a hearing within the 30 day hearing request period; the application involves a waiver of a requirement for an HPAA; a public hearing is requested by the U.S. Environmental Protection Agency; or the Department determines that the public interest would be served by holding a hearing.

Regardless of whether or not a public hearing is granted, the Department's decision on an application will not be "arbitrary" but will be based on the findings contained in the rules.

N.J.A.C. 7:38-11.5 Hearings on an application for an HPAA

624. COMMENT: The summary of N.J.A.C. 7:38-11.5(e) refers to "certain individuals" without saying who they are. Who are they? (9-12)

RESPONSE: The "certain individuals" referred to in the summary are those listed at N.J.A.C. 7:38-11.5(e). They are all persons to whom a complete application must be sent under N.J.A.C. 7:38-9; all persons to whom a notice of an application must be sent under N.J.A.C. 7:38-9; and all persons who submitted comments on the application during the hearing request period.

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N.J.A.C. 7:38-11.7 Final decisions

625. COMMENT: At N.J.A.C. 7:38-11.7, timelines should be required of the Department. (9-12)

RESPONSE: The Department has already included a timeline by stating that it will make a decision on a Highlands preservation area approval (HPAA) within 120-days of receipt of a complete application, or 180 days for an HPAA with waiver. However, because a Highlands approval incorporates many review aspects that might require additional coordination, for example with the U.S. Environmental Protection Agency, or the U.S. Fish and Wildlife Service on wetland-related issues, or may require a plan amendment process that cannot commence until it is clear that a project satisfies several other Highlands requirements, there may be cases when additional time is required in order to complete all aspects of the Highlands review. In those cases only, the Department will notify the applicant in writing (and likely will have already informed the applicant as the review progressed) about the time line for completing its reviews.

626. COMMENT: At N.J.A.C. 7:38-11.8, why doesn't the Department provide refunds? (9-12)

RESPONSE: If an application is rejected because it is administratively incomplete, the applicant may request and will receive a refund. Once an application is declared administratively complete, the Department has invested time in its review and will not provide a refund. However, once declared administratively complete, most applicants do not withdraw an application permanently. Most often, the application is withdrawn because it has inadequate information that will lead to a denial and the applicant prefers a withdrawal to a denial. These applications are then resubmitted at a later date. Because the State accounting system requires the Department to make deposits within 24 hours of

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receiving a check, and because of the large numbers of applications received on a daily basis, it is more efficient for the Department to apply a fee to a resubmitted application then to refund a fee each time an application is withdrawn.

Subchapter 12 Contents of approvals

7:38-12.1 Standard conditions that apply to all orders, decisions, approvals or determinations issued pursuant to the Highlands Act and its implementing rules

627. COMMENT: At N.J.A.C. 7:38-12.1(a)3, which requires an applicant to halt or modify activities due to adverse consequences, who decides if an activity that was already approved and is underway has an adverse environmental impact? Who pays for the correction of the adverse impact? What is in place to insure that an order to halt is not arbitrary when all the activities were reviewed and approved by a host of environmental experts? (19, 28)

RESPONSE: The Department believes this provision will be used infrequently, because as the commenter states, all permitted activities will be reviewed and approved by several experts before the permit is issued. However, in rare circumstances, information upon which the permit issuance was based may prove to be incorrect, new information which was not available during the permit review period may come to light or unanticipated impacts may arise. For example, the Department approved a permit for a stormwater outfall structure to subsequently discover that the structure was discharging on property not owned or controlled by the applicant. In those rare cases, if the activity is halted quickly enough, there should be no permanent impacts to be corrected. Once the activity has been halted, the Department will work with the applicant to assess the changes necessary to allow the project to continue and to correct adverse impacts if they need active correction.

628. COMMENT: N.J.A.C. 7:38-12.1(a)5 requires an applicant to notify the Department when it encounters an previously unidentified historic resource in the course of

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construction. Why does this apply only in the Highlands and not the rest of the state? (9-12)

RESPONSE: This provision is applicable statewide for applicants undertaking work under a freshwater wetlands permit (see N.J.A.C. 7:7A-4.3(b)5 and N.J.A.C. 7:7A-7.2(b)9), or as part of any project receiving state or Federal funding, for example a State or Federally-funded school or highway project. This provision also applies to projects in the Coastal zone and in the Pinelands Area.

629. COMMENT: The provision at N.J.A.C. 7:38-12.1(a)19 stating that an HPAA and HRAD do not convey property rights appears to be in conflict with N.J.A.C. 7:38-12.1(a)14 which states that HPAA and HRAD run with the land. Therefore the rights granted by them are conveyed. (19, 28)

RESPONSE: A Highlands preservation area approval (HPAA) and Highlands Resource Area Determination (HRAD) are a specific finding regarding activities and resources associated with a specific site (block and lot). By approving an HPAA or an HRAD, the Department does not take the land for itself, nor convey it to any other person or entity. The owner still owns all rights to the land that they owned before the approval was granted. Therefore, the HPAA and HRAD do not “convey property rights.” However, if the land is sold, the HPAA and HRAD remain as valid for the new owner as they were to the former owner. The new owner doesn’t have to go back to the Department for a new HPAA or HRAD. Therefore, the HPAA and HRAD “run with the land.”

Subchapter 13 Enforcement

7:38-13.1 General provisions

630. COMMENT: The imposition of excessive penalties is not an effective way to obtain the results you desire. The best method is through education and incentives. If you do not work with the landowners you will not achieve the desired results nor will you be able to

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provide sufficient policing of the landowners. The assistance of the landowners is of paramount importance. (3)

RESPONSE: The Department agrees that cooperation, education, and incentives are effective ways to foster compliance with Department regulations and, ultimately, stewardship of the natural lands and sensitive environmental areas in New Jersey. Based on this belief, the Department has provided written materials to municipalities and has attended outreach sessions to provide information regarding the new requirements. However, where voluntary compliance is not achieved, it is necessary for the Department to have the ability to take enforcement action to assure that the public health and safety, and the environment are protected. Recognizing the necessity of enforcement in appropriate circumstances, the New Jersey Legislature authorized the Department in the Highlands Act to assess civil administrative penalties to deter violations, remove economic incentives associated with projects that violate the law, and to compel restoration and compliance whenever violations occur. The Department generally does not use penalties against homeowners as the first step in obtaining or maintaining compliance but usually only as a last resort when it appears that there is no other way to ensure or compel compliance or the violation is particularly egregious. The Department generally does not assess penalties against homeowners unless the violation has an adverse environmental impact, the type or nature of the violation is such that an environmental impact may occur if the violation remains uncorrected, or the violator has failed to comply with a previously-issued Department directive or notice.

631. COMMENT: The penalty of \$5,000 for violations is much too small and violators will routinely violate for such a small penalty. The penalty should start at \$25,000 for each act or omission. (83)

RESPONSE: The New Jersey Legislature has set the maximum penalty assessment for violations of the Highlands Water Protection and Planning Act at \$25,000.00 per violation per day. In its rules, the Department has developed two processes for assessing

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a reasonable, appropriate, and fair penalty. These processes apply several criteria to determine the per day penalty for a particular set of circumstances, depending on the conduct of the violator. Specifically, the Department determines whether the violator had knowledge of the rules, whether the violator deliberately or unintentionally violated them, determines the size of the disturbance, and the number of special resource areas affected by the violation for unpermitted activities, and determines the conduct and seriousness (extent of deviation) from the permit standard as well as or the intended object of the permit condition. The smallest possible penalty assessment is \$500 per day for an unpermitted activity and \$1,000 per day for violation of a condition of a permit. The Department is authorized to assess these penalty amounts on a daily basis until the damage to the resource has been corrected, the violation cured, or an agreement including a schedule for completion of corrective activities has been formally signed with the Department. It is not the Department's intention to assess the highest penalty it possibly can in each situation, but rather to assess a penalty that "fits the violation" by reflecting the environmental or programmatic harm caused by the violation, which encourages rapid compliance with the Highlands Rules, and deters future violations. The Department believes the amount of a civil administrative penalty assessed using the identified regulatory processes will be fair and appropriate for each individual scenario. Although the Department does not normally assess a penalty for each day of violation, should a violator not comply with an initial enforcement action or penalty, the Department can use its penalty assessment power and assess larger and larger penalties until compliance is achieved.

Some violations will be assessed at an amount greater than \$5,000 per day, although a first time violation. For example, a knowing disturbance of a quarter acre of ground (10,000 square feet) that affects one special resource area would result in a daily penalty of \$15,000. As another example, the minimum penalty for violation of a condition of a Highlands Preservation Area Approval is \$10,000 because the Department considers all violations of permits to be 'knowing' violations.

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632. COMMENT: The enforcement provisions for fines of up to \$25,000 per day are outrageously high and not in line with similar infractions or with the Highlands Act. (30, 45, 46, 93, 114, 115)

RESPONSE: The Highlands Act has established the maximum per day fine that can be imposed for violations at \$25,000 per day. See N.J.S.A. 13:20-35. It should also be noted that many other environmental statutes, for example, the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.), Air Pollution Control Act, (N.J.S.A. 26:2C-1 et seq.) and the Solid Waste Management Act, N.J.A.C. 13:1E-1, authorize a maximum penalty of up to \$50,000 per violation per day. Nevertheless Department enforcement efforts under the Highlands Act are chiefly aimed at achieving public compliance, not collecting fines. The assessment of penalties is a statutorily authorized tool to encourage, compel, and restore compliance as quickly as possible, while providing a sufficient deterrent to future violations. The Department assesses penalties commensurate with the scope, nature or type of the violation, the extent of deviation from the regulatory standard, and the degree of willfulness of the violation to determine an appropriate per day penalty assessment for a particular violation. As the rules illustrate, the maximum lawful penalty will be assessed only in rare cases. Also, if the person against whom the penalty is assessed requests a hearing, the penalty may be reviewed by an administrative law judge at the Office of Administrative Law, by the Commissioner of the Department of Environmental Protection and, if the person continues his or her appeal, by the Appellate Division of the Superior Court.

633. COMMENT: The proposed fines are cruel and unusual and so severe that innocent property owners can be quickly forced into bankruptcy. While the Act authorized fines up to \$25,000, the intent is clear: "the Commissioner may take into account the economic benefits from the violation gained by the violator." No attempt was made to do so. In fact, knowledge of the rules results in a stricter fine, as does resource damage, but no allowance is made for the average person who realizes no gain as a result of the violation. The Act clearly stated that the fines "shall fall within a range established by regulation by

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the commissioner for violations of similar type, seriousness and duration". This has not happened. What are the fines used for? To protect the water? To pay salaries of the Department? The fines are more severe than for improperly handling hazardous waste yet the violation may be as simple as removing a tree that fell in a stream during a hurricane and caused flooding and property damage. The rules should be modified and simplified, property owners should be educated and input solicited before the rules are made permanent. (19, 28)

RESPONSE: As stated above, the Highlands Act established the maximum fine for violations. The Department has designed its penalty assessment process to evaluate all relevant criteria (described in more detail in a response to comment 631) so as to yield a penalty within the Legislatively-set maximum that is commensurate with the willfulness of the violation and the environmental damage or extent of deviation from the regulatory standard. The Department believes that this process distinguishes between major, willful actions and the minor, accidental acts with which the commenter is concerned. The Department does not specifically correlate "type, seriousness and duration" of penalty among the myriad Department regulatory programs since each program regulates unique environmental concerns. The Highlands regulations do, however, distinguish between degrees of environmental seriousness and violator conduct as it relates to areas regulated by the Highlands Act. The Department is responsible for ensuring that it fairly and consistently classifies degree of seriousness and behavior from one Highlands Act violation to another. The commenter misinterprets the role that economic benefit plays in the calculation of penalties under the Highlands Act. The rules give the Department the discretion to increase a penalty to reflect the economic benefit realized by a person as a result of failing to comply with the rules. A penalty calculated using Department criteria is not reduced because a violator has realized no economic benefit from a violation. It is not the intention of the Department to force anyone into bankruptcy. The fines imposed by the Highlands Act are, like most State environmental statutes, tools to maintain compliance, compel restoration if violations have occurred, deter would be violators, and punish serious or persistent violators of the rules. The Department believes the adoption

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of these penalty assessment criteria will make any Highlands Act penalty assessment predictable, fair, consistent, and reasonable. The Department does not intend to fund its Enforcement efforts in the Highlands solely by the imposition of penalty assessments. Penalty assessment amounts are not driven by the need to fund Enforcement activities but by the reasons identified earlier in this response.

It is also important to note that the removal of one tree within the preservation area does not constitute a major Highlands development as defined in the rules and is therefore not an activity requiring a Highlands approval or subject to penalties or fines under the Highlands Act or these rules.

634. COMMENT: The penalties and fines proposed are Draconian. Fines on private citizens of up to \$25,000 that contain daily multipliers can only be interpreted as a means to seize private property. (45, 82)

RESPONSE: As stated above, the Department is adopting regulations through the public process to establish a process that will result in fair, predictable, consistent, and reasonable penalties. The Department generally only uses a daily multiplier when a violation has been egregious, knowing, of significant environmental impact, or where the violation involves a violator who, upon being cited for conducting an activity in violation, does not comply with Department notices or directives. The Department will not use the assessment of daily penalty assessments to seize property.

635. COMMENT: Fines due to an owner being unaware of the regulations should be significantly lower. High fines, by virtue of the legislation itself, should only be imposed on someone who willfully, and for significant profit, violates the regulations. Any property owner not engaged in the actual construction of an illegal building or moving of over an acre of land should not be subjected to such unprecedented fines. (19, 28)

RESPONSE: Generally, fines for first-time unknowing violations, when imposed at all, are relatively low. Fines for repeat violations or for commercial enterprises operating for

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profit or for persons who, by virtue of their profession should or must know better, will be commensurately higher. The Department believes the rules adopt this strategy and establish a fair approach to assessing penalties against individuals who are not knowingly violating the rules. As to the commenter's suggestion to penalize only the construction of an illegal building or disturbances over one acre, the Highlands Act has prohibited "major Highlands development" which is defined by the Act and the Department's rules to include more than those two categories of activities (see detailed discussion in response to comment 36), without prior Department approval and has authorized the Department to impose penalties for violations of the Highlands Act, a Highlands permit or any Department rule. The penalty process in the proposed rules allows the Department to consider various, relevant factors to reach a penalty commensurate with the willfulness of the violation and the environmental seriousness, extent of deviation from the rules or permit, and state of mind of the violator at the time of the violation.

636. COMMENT: Fines should generally not be assessed on a "per day" basis as that method is subject to abuse by the Department. Since the Department depends on fines for its funding, it will be in the Department's best interest to delay filing charges of violations. It can also be used as a tool to extort private property. Such big fines will easily exceed the value of most property in a very short time. Instead, charges should be filed through the municipal court, and if the owner is found guilty, a fixed fine should be assessed with a per diem amount assessed at a later date if remediation is required and not completed in a timely manner. This is the method that municipalities use to enforce local environmental ordinances, and it works quite well. Fines should only be assessed on the party guilty of committing the offense. Contractors must be held to a higher standard than owners. (19, 28, 45, 46)

RESPONSE: As stated above, the Highlands Act authorized the assessment of daily fines. However, as stated in response to comment 634, the Department does not use the daily multiplier except in situations warranting such an application of its penalty assessment authority. It would be a rare circumstance if the Department's Land Use

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Enforcement program imposed a fine that exceeded the value of the property in question.

The commenter's approach to impose a reasonable penalty and tack on additional days for non-compliance with an agreed-to compliance schedule is what the Department does in many cases by executing Administrative Consent Orders (ACOs) containing reduced, compromised penalties, but which carry stipulated and ascending penalties for failure to perform the restoration/compliance measures required by the ACO.

637. COMMENT: The fines are excessive and should not be subject to a summary legal proceeding. (19, 28)

RESPONSE: Whenever the Commissioner issues a Notice of Civil Administrative Penalty for a violation of the Act, its rules, or a Highlands permit, the Commissioner must notify the violator by writing of the facts alleged, the amount of the penalty to be imposed and affirm the rights of the alleged violator to a hearing. (see N.J.S.A. 13:20-35d.) N.J.A.C. 7:38-1.5(b) provides that persons contesting civil administrative orders or notices of civil administrative penalty assessments may request hearings. The filing requirements and procedures for such hearings are set forth in N.J.A.C. 7:38-13.13. All such hearings are conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Procedure rules, N.J.A.C. 1:1. See N.J.A.C. 7:38-13.13(e).

N.J.S.A.13:20-35a authorizes the Commissioner to bring a civil action in Superior Court pursuant to N.J.S.A. 13:20-35c to seek (1) a temporary or permanent injunction; (2) assessment for costs of investigation; (3) assessment for state costs in correcting or controlling effects of violations; (4) assessment of compensatory damages for destruction of wildlife; and/or (5) an order requiring the violator to restore the site to pre-violation condition. Civil actions are instituted by filing of a complaint (R. 4:2-2) and service of a summons upon the violator. R. 4:4-1. The New Jersey Court Rules provide an entire range of process to defendants in civil actions. Penalties for violations under the Highlands Act -- which are assessed following conclusion of a civil action -- are collectible only upon court order. N.J.S.A.13:20-35. It is penalty collection, not

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establishment of liability, that may be accomplished in a summary fashion under the Penalty Enforcement Law. N.J.S.A. 13:20-35e. Thus, the public is provided with significant opportunity to challenge liability prior to penalty collection.

638. COMMENT: Excessive fees cannot be paid immediately in most cases. This appears to be another effort to extort private property. The regulations talk about using fines as an incentive for compliance, yet the fines go far beyond what the average property owner would term "incentive." It will, in many cases, bankrupt the owner. The majority of development activities in the Highlands will be for one house on one lot, and both the regulations and the fines should be taking that into account. This is a normal, low-risk activity everywhere in the United States except in the New Jersey Highlands where someone building their own home stands to lose everything they have because of these regulations and fines. (19, 28, 45, 46)

RESPONSE: The Department issues many Notices of Violation identifying non-compliance with a land use statute which require compliance but which assess no penalty. In the vast majority of cases, the noticed party complies with the notice, the Department confirms this, and the case is closed with no penalty assessed. The Department rarely imposes a fine against a residential property owner for a minor violation without first giving the recipient a chance to comply and avoid a penalty altogether. As to the criteria by which penalties are calculated, see the Department's response to comment 631. The Department is not as lenient with commercial entities and permittees who violate, usually bringing a penalty action against those entities upon evidence that a significant violation has occurred. The Department believes commercial entities should know and comply with the rules, and have environmental professionals to advise them, if necessary. The Department likewise believes all permittees have knowledge of what is required of them to comply with their permit.

It is also important to note that activities in the Highlands are not regulated unless they meet the definition of "major Highlands development" which is defined by the Act and the Department's rules. Further, many activities relating to single family dwellings,

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for example improvements, are exempt from the Highlands Act and therefore not subject to the Department's regulations. For a detailed description regarding the definition of a major Highlands development see the response to comment 36.

639. COMMENT: The penalty and enforcement provisions within these regulations are unreasonably harsh, particularly in light of the heavy administrative financial burden already imposed on landowners who wish to attempt any development on their property. Once again, an equal protection and due process constitutionality problem is created by these regulations. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

640. COMMENT: The fines in these rules and laws are not commensurate with the crimes. People who drive while talking on their cell phones are a greater threat to public safety and their fine is not as high as \$25,000. (45)

RESPONSE TO COMMENTS 639 AND 640: As noted in response to comment 631, the Highlands Act establishes the maximum penalties for violations of the Act. Further, the Highlands Act authorizes the Department to administer a permit program and to impose penalties upon those who violate the Act, a permit condition, a Commissioner's order, or any Highlands program regulation. Also as stated previously in response to comment 631, no person is penalized under the Highlands Act without being afforded an opportunity to contest the alleged violation and the penalty amount as calculated pursuant to the Department's penalty calculation criteria. Finally, owners who properly obtain a permit and comply with its terms and conditions will not be burdened at all with fines associated with permit violations.

641. COMMENT: The Highlands rules set fines ranging from \$1,000 to \$25,000 per day which must be paid immediately, prior to appeal by the alleged violator. The fine may be adjusted by the Department based on the violator's state of mind. This may be a violation of due process. (54)

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RESPONSE: The commenter has wrongly stated the point in time when the fine, if any, must be paid. Pursuant to the administrative procedures which guide the enforcement process of this regulations, a fine is not due and payable until a final order is issued by the Commissioner of the Department. This does not happen until the matter has been through full plenary hearings, when one is requested, in the Office of Administrative Law (OAL), a process overseen by an impartial OAL judge who is charged with ensuring that a full and fair record of the facts is documented, and who renders an initial decision after that record is established. The Commissioner of the Department then reviews the initial decision and, after consideration, may accept, reject, or modify the initial decision. At that point, upon issuance of a final agency determination by the Commissioner, unless that determination is stayed by an action in the Superior Court, a fine becomes payable. This happens after the full appeal process concludes and constitutes adequate due process for the civil administrative matters addressed by these regulations. The Department agrees that an initial penalty assessment may be adjusted based on the violator's conduct, including whether the violator knowingly violated the law.

642. COMMENT: Violations should not be "presumed to have a negative impact" as stated in the summary of N.J.A.C. 7:38-13.2(c). The negative impact should be proven. (19, 28)

RESPONSE: The Department's summary states, "Activities that occur without appropriate authorizations from the Department, or in violation of a condition to an HPAA constitute a violation of the Highlands Act and are presumed to have a negative impact on the natural resources of the Highlands.

The Highlands Act has clearly stated that in order to protect the resources of the Highlands an approval is needed from the Department before conducting regulated activities. Consequently, an individual who proceeds to conduct a regulated activity without appropriate approvals or in violation of a condition of his or her approvals is not

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protecting the resources of the Highlands, as mandated by the Act, and is therefore having a negative impact on the natural resources of the Highlands.

643. COMMENT: N.J.A.C. 7:38-13.11(a), which establishes penalties for people who refuse the Department entry to their “land, premise, area, building, facility or property,” is unconstitutional and not part of the Highlands Act. It amounts to domestic spying. It should be removed. (30, 32, 34, 45, 46, 116)

644. COMMENT: I now find out that the Department can come into my property whenever they want, test, bore, do anything they want without even asking me, and I have no say about that. No one has the right to enter our homes without permission. (36, 87, 102)

645. COMMENT: To allow the Department unfettered access to private property without notice for any reason is a violation of the Constitutional rights of the property owner. (19, 28)

646. COMMENT: I do not want people from the Department trespassing while I am hunting. It is dangerous. (113)

647. COMMENT: As written, N.J.A.C. 38:13.11 can clearly be interpreted to mean that if the Department knocks on my door at two a.m. and I refuse to allow them to inspect my home or barns or outbuildings, or go wherever they wish, however they wish, on my property, including, perhaps, driving a truck through my lawn or garden, I will be in violation of N.J.A.C. 38:13.11(a) and will be fined pursuant to 13.11(b). Can this be the true intent? Please tell me how these regulations elude the requirement for a search warrant? Absent a search warrant, how is this not unlawful search and seizure? I must permit any Department inspection, at any time, or I am a criminal and must pay \$5,000, per 13.1(c)2? Where are the customary American legal protections for me? Have I done

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something to abridge my rights, rights which are intact for my fellow citizens who do not live in the preservation area? (37)

648. COMMENT: N.J.A.C. 38:13.11 provides government officials with unchecked powers to enter private property. The wording contained in this provision is tremendously broad and over-inclusive, allowing Department officials to enter private property for any conceivable reason, and puts no requirements on the government officials to either request entry to private property or even provide notice to the landowners. This is a violation of United States citizens' right to be secure in their property against governmental intrusion pursuant to the Fourth Amendment of the U.S. Constitution. (6, 7, 9, 10, 13, 22, 23, 30, 36, 37, 43, 44, 46, 56, 58, 67, 71, 74, 78, 79, 87, 96, 97, 98)

RESPONSE TO COMMENTS 643 THROUGH 648: At N.J.S.A.13:20-35k, the Highlands Act explicitly gives DEP the right to enter any property, facility, premises or site, for the purpose of conducting inspections or sampling of soil or water, and the otherwise determining compliance with the provisions of the environmental requirements of the Highlands Act. A right of entry provision in an environmental statute is not new or unique to the Highlands Act.

The courts have upheld DEP's right of entry, under appropriate circumstances and reasonably exercised, because of the need to investigate and monitor acts potentially affecting the health and well-being of the general population. Prior to entry, DEP always attempts to announce its presence and inform the property owner of its intention to perform an inspection and the purpose of that inspection. If DEP is denied entrance to a property, an administrative warrant can be obtained in Superior Court and the Department will enter the property under this authority.

The Highlands Act provides this authority on the Department due to the Department's need to be able to access a site on a reasonably immediate basis to ensure that, should any violations be occurring, the violators would not have the opportunity to deny entry and destroy or remove evidence of the violation. The right of entry provision is limited to the enforcement of civil (not criminal) regulations. The standards for right of

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entry to investigate criminal matters are much higher and, where a violation can mean incarceration, more balanced in favor of the property owner. The Department is responsible to perform its duties in a reasonable manner, respectful of a person's right to privacy and control of who enters his or her property.

As with any enforcement action under these rules, if a person files a request for a hearing on a penalty assessed for failure to allow entry, the person is entitled to an administrative hearing and, if not satisfied with the decision after that hearing, may make further appeal to the Appellate Division of the Superior Court. The court will carefully weigh all appropriate factors before making a decision regarding whether the Department acted properly in assessing a penalty. The penalty for failure to allow entry for a site that has obtained a Department permit is \$10,000 and the penalty for failure to allow entry for a site that has not obtained a Department permit is \$5,000.

649. COMMENT: The definition of conservation restriction includes the grant of seemingly unlimited rights to government officials to enter private property. This is a violation of U.S. citizens' right to be secure in their property against governmental intrusion and unreasonable search pursuant to the Fourth Amendments of the U.S. Constitution. (44, 87, 93)

RESPONSE: As stated in response to comment 533, a conservation restriction is the means by which the Department ensures that the limits on impacts to Highlands resources, established by the Highlands Act and these rules are not exceeded. Government officials are given the right to enter property that is subject to a conservation restriction, for any purpose specifically recited in the conservation restriction. These purposes relating to a conservation restriction associated with an HPAA may include but are not limited to: inspection, investigation and remediation of dumping or pollution on the surface or underground; inspection and investigation of any unauthorized development or land clearing including removal of signs, barriers or survey markers; and detection and control of flood, fire, disease or any other condition that adversely affects

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or has the potential to adversely affect the health, safety and welfare of any member of the public or any vegetation or animal on the property.

650. COMMENT: Recording violations on an owners deed, as stated at N.J.A.C. 7:38-13.15 is an act of discrimination against property owners in the Highlands, and far more severe than what happens to corporations responsible for massive pollution. Such an action is out of step with actions for other environmental violations and results in furthering the unmarketability of property in the Highlands Region. (19, 28, 45, 46)

RESPONSE: The provision to enable the Department to attach a violation to the deed of a site, at N.J.A.C. 7:38-13.15 codifies the similar provision contained in the Highlands Act at N.J.S.A. 13:20-35g. The Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.), which applies Statewide, similarly allows notices of violation to be attached to the deed of the site in question. The Highlands Act has provided the Department with the ability to attach violations to the deed to encourage property owners to comply with the Act and rules, or to conduct restoration where a violation has occurred. The Department will attach a violation to a deed when confronted with a recalcitrant violator or the imminent sale of a home or property containing a violation that has not been corrected. Use of this authority is necessary to protect an unsuspecting party from buying a home, commercial or industrial site with a violation, created by a former owner who left without resolving the violation, that the new owner will have to pay to remedy. Attachment of a Notice of Violation to a deed is in no way comparable in degree of severity to the fines and other penalties imposed upon corporations responsible for massive pollution.

7:38-13.16 Duty to provide information

651. COMMENT: The Highlands Act is social engineering and its rules are extremely onerous. For example, N.J.A.C. 7:38-13.16 states, "The Department may require an applicant or permittee to provide any information the Department deems necessary to

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determine compliance with any provision of this Act, a Highlands preservation area approval, or any rule and/or condition.” The commenter strongly opposes this Act. (8)

RESPONSE: When a person applies for a permit from the Department, that person is requesting authorization to conduct an activity regulated in accordance with State law. For example, the Highlands Act and these rules, provide the standards necessary to protect the exceptional natural resources, identified by the Act, while permitting the conduct of certain development activities. Therefore, the applicant must provide the Department with information necessary to demonstrate that the proposed activity will comply with all of the standards of the law and implementing rules, and the Department cannot, without adequate information, make the appropriate findings necessary to approve the activity. The Department has included in the rules lists of the necessary information to accompany an application for a Highlands approval (HPAA), applicability determination (HAD), or resource area determination (HRAD). See N.J.A.C. 7:38-9. Because every application is unique, additional questions may arise to address the varying environmental characteristics of a site or specific details of a proposed project. The Department will notify the property owner and list the additional information it requires with a reasonable period of time by which to provide the information. If the applicant needs additional time beyond that provided in the Department’s letter, he or she may contact the Department and arrange for a more acceptable submittal deadline.

Subchapter 14 Adopted general permits

7:38-14.1 Highlands general permit number 1, habitat creation and enhancement activities

652. COMMENT: Captive hunting grounds should not be considered "habitat enhancement." Neither should places like the present wildlife management areas where deer are grown to be shot to death be considered "habitat enhancement." Places like that are killing fields. Habitat enhancement should mean humane fields where wildlife and birds are permitted to live in peace and tranquility. Habitat enhancement should have a

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peaceful, non-violent meaning where wildlife can live in complete peace from human killers. Highlands general permit 1 requires a fish and wildlife "plan." The commenter has severe concerns about what the New Jersey Division of Fish & Wildlife will require from that "plan." The commenter opposes letting any plan for the wildlife and birds in the Highlands or anywhere else in New Jersey be subject to the killing philosophy that exists at the present New Jersey Division of Fish & Wildlife.

The commenter also objects to the Partners for Fish and Wildlife program administered by USFWS which under the Bush administration is very much in the control of the hunting/killing/violence prone cadre of our society, which in fact represents less than four per cent of all U.S. citizens. The USDA Natural Resources Conservation Service is similarly under the assault of the agribusiness community to let millions of birds and wildlife be slaughtered to satisfy agribusiness profiteers which the commenter does not consider to be unbiased in such plans to slaughter wildlife and birds. The commenter requests that animal humane groups be included. The commenter also objects to burning and cutting vegetation. Pollution of our air through prescribed burning causes heart attacks, lung cancer, allergies, asthma and strokes. (83)

RESPONSE: The methods used for wildlife control, while part of an overall wildlife management plan, are separate from habitat creation and enhancement methods. Habitat creation and enhancement includes altering hydrology to restore or create wetlands conditions, such as by blocking, removing, or disabling a human-made drainage ditch or other drainage structure such as a tile, culvert or pipe; breaching a structure such as a dam, dike or berm in order to allow water into an area; placing habitat improvement structures such as nesting islands, and fencing to contain, or to prevent intrusion by, livestock or other animals; fish habitat enhancement devices or fish habitat improvement structures such as placed boulders, stream deflectors, or brush piles; regrading to provide proper elevation or topography for wetlands restoration, creation, or enhancement; and cutting, burning or otherwise managing vegetation in order to increase habitat diversity or control nuisance flora. By altering the habitat to make it more appealing for certain

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species, it may become less appealing to others, like deer, thereby reducing the need for hunting.

The New Jersey Division of Fish and Wildlife, U.S. Fish and Wildlife Service, and USDA Natural Resources Conservation Service all provide financial and technical expertise to individuals to create habitat enhancement projects. Together they have been responsible for the preservation and restoration of thousands of acres of wetlands and other habitats. Therefore, they are important partners and the Department values their contribution to its permitting process.

While the Department agrees that burning habitat can result in other negative environmental impacts like air pollution, it remains a viable tool for habitat enhancement in limited circumstances. It also may be more desirable than mass herbicide applications, in some cases. Therefore, the Department believes it should remain an option so long as it is part of a plan that has been designed and approved by one of the agencies so designated for this permit. If cutting of vegetation was prohibited, the State would be overtaken by noxious weed species like multiflora rose, inedible by wildlife and a nuisance to humans.

653. COMMENT: The commenter strongly supports the use of the general permit for habitat creation and enhancement activities, but cautions the Department that parks commissions often have multiple objectives and are not necessarily purely “resource protection agencies”. Park commissions often create infrastructure, roads, parking, active recreation facilities, golf courses and a host of other developments on public property that are not primarily designed to protect or enhance natural resources. The commenter trusts that the Department will critically review these proposals prior to granting a general permit. (73)

RESPONSE: The Department acknowledges the commenter’s support for the general permit for habitat creation and enhancement activities. The rule at N.J.A.C. 7:38-14.1(d) states that the sole purpose of the activities that qualify for this general permit must be

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habitat creation and enhancement and this permit cannot be incidental to another activity.

The Department will review all applications to ensure compliance with the rules.

654. COMMENT: Section (8) indicates that the general permit may only be issued to a charitable conservancy “provided that the plan is part of a program listed at (b) 2-5 above”. While the commenter has partnered with the Wildlife Habitat Incentive Program (WHIP) and Partners for Wildlife Program and has found these relationships valuable, the commenter questions the need to constrain its activities in such a specific manner, particularly if a plan meets all other requirements of the section. (73)

RESPONSE: By requiring that the proposed plan for habitat creation and enhancement be approved by one of the identified State or Federal agencies, the Department is ensuring that the plan has been reviewed in detail, will fulfil the intended purpose, and has adequate funding for completion provided by a qualified agency.

7:38-14.2 Highlands general permit 2- bank stabilization activities

655. COMMENT: The commenter strongly supports the use of a general permit for stream bank stabilization and applaud the Department for limiting the scope of the proposal to vegetative (bio engineering) projects. (73)

RESPONSE: In order to satisfy the findings at N.J.A.C. 7:38-6.2, and to provide a general permit with limited requirements for review and approval, the Department deemed it necessary to limit the scope of activities for bank stabilization to those that can be accomplished with bioengineering materials. While other bank stabilization activities may be permissible, the Department will assess them individually through the full HPAA review process.

656. COMMENT: The commenter’s somewhat limited experience with stream bank stabilization projects indicates that failures can and do occur. In the commenter’s

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experience, failures often can be attributed to underestimating the hydrologic disruption of the upstream drainage area. The commenter strongly suggests that stabilization projects for which general permits are considered be prioritized to areas where the upstream watershed has a low percentage of impervious cover (less than eight percent) and that the projects be located on first order tributaries. This approach would allow stabilization activities to be favored where there is a higher chance of success, rather than in mid-reaches or lower sections of watersheds subject to more intense storm flows. Stabilizing the first order tributaries address the most upstream problems first and allows the benefits to flow downstream, making future efforts in the downstream reaches more likely to succeed. (73)

RESPONSE: The application for a general permit for bank stabilization activities requires the submittal of all necessary information regarding the engineering of a project to determine whether or not the project will result in a stable condition. Unless the Department obtains from applicants several options for the conduct of stabilization activities on the same waterbody it will not have the opportunity to prioritize such projects. However, the Department may make the determination, as a result of project review, that a project should not be approved because the applicant has proposed to employ inappropriate or inadequate engineering techniques for the project location.

Social Impact

657. COMMENT: The rules state "The Highlands Region provides drinking water to one half of the State's population." Does this agree with the Department statistics? Elsewhere, the proposal says that the Highlands Region provides drinking water to one half of NORTHERN New Jersey. Which is right? And is it half geographically or by population? (19, 28)

RESPONSE: In 1999 the Highlands supplied 34 percent of the total withdrawals of potable water in New Jersey. That water is supplied to 292 communities, most of which

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are located in northern New Jersey. Based on 2000 Census data, the residents of those communities represent over one-half of New Jersey's total population. However, the communities vary widely in terms of how much of their potable water supply comes from the Highlands, with a range from 100 percent down to 7 percent or less. The residents of those communities that are not entirely reliant upon potable water from the Highlands also use portable water withdrawn from wells located outside the Highlands or surface water sources with watersheds entirely outside the Highlands.

658. COMMENT: The Highlands Act and the Department's rules do not have a positive impact on property owners in the Highlands, contrary to the verbiage of the rule proposal. Residents in the preservation area have lost significant equity, the ability to borrow money with their property as collateral, the ability to sell their property, the ability to elect officials who are responsible for land use decisions, and the ability to use their property as they wish under existing local zoning rules. (19, 28)

659. COMMENT: There is no positive social impact to a landowner who used to be able to develop land without degradation of the water and maintain or improve his equity in the land. When such rights are taken away without just compensation, equity is destroyed and the social impact is horrific. An owner of 100 acres does NOT experience a positive social impact when forced to go through years of approvals and studies and spend hundreds of thousands of dollars before even knowing if he can proceed. All this has to be done to recover a small fraction of the equity he once had by building 2 houses on 100 acres. In many cases, the expenditures may not be recovered in what the owner can charge for the land since market values have plummeted in the preservation zone. (19, 28)

RESPONSE TO COMMENTS 658 AND 659: The Department recognizes that rulemaking has potentially a variety of impacts including social and economic. The Department analyzed the potential impacts of the Highlands rules before proposing the readoption with amendments. Impacts relating to property values and owner equity were

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assessed as part of the Department's economic impact statement. In developing the rules, the Department analyzed the overall impact of the rules including the social impacts, as summarized in the proposal. For example, the rules for determining septic density, and percent impervious surface are the minimum standards necessary to adequately protect water quality; the protection for forest land and steep slopes also contribute to the protection of water quality, but also protect habitat for fauna and flora; and the rules to protect rare threatened and endangered plant and animal species and historic resources are necessary to protect resources which contribute to the value and character of the Highlands Region. The Highlands rules further the goal of the Highlands Act to protect an essential source of drinking water and other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, and many sites of historic significance. These benefits accrue to those who live in the preservation area as well as to others statewide. Therefore, the rules have an overall positive social benefit.

660. COMMENT: Forcing owners to sell at or below market rates of up to 90 percent of pre-Highlands values before they get approval to improve their property does not result in a positive social impact for any of the parties involved. The buyer is preying on the seller, who is forced to sell out because of these rules. Encouraging such predatory behavior which devours a person's assets when they are in a weak position is unethical and immoral. The potential for abuse is enormous. And it should be quite obvious that the person who is forced to sell will experience no positive social impact unless one considers living as a ward of the state due to state-forced poverty to be a positive social impact. (19, 28)

RESPONSE: There is nothing in the Department's regulations that force an owner to sell his or her land at any value. The regulations do not affect people living, working or conducting day to day activities in the Highlands preservation area. Rather, the Department's rules regulate activities meeting the definition of "major Highlands development" when proposed in the preservation area. In the case where an owner is

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trying to develop a property and cannot meet one of the exemptions, he or she is required to comply with the standards contained in the Department's rules.

If, in the course of trying to develop a property, an owner proposes to place a driveway within 300 feet of a Highlands open water, or through a steep slope, to access an otherwise developable property, the rules require that the land be offered for sale at fair market value to various groups before the Department will permit such activity. The Department has further described the reasons for the rule requirement in response to comments 444 to 447. As also stated in that response, the Department is modifying the rules on adoption to clarify that two appraisals will be obtained where a government or non-profit organization is planning to use Garden State Preservation Trust Act monies to preserve land since such organizations are required to obtain pre-and post-Highlands Act values and to negotiate using the higher value.

661. COMMENT: The reference to the TDR's should be removed because they do not exist. (19, 28)

RESPONSE: The timing of the Department's regulations and the Regional Master Plan (RMP), as dictated by the Act, makes it impossible for the Department to await completion of the RMP and transfer of development rights program before promulgating these rules. The Department must view the Act in its entirety and presuppose that all provisions of the Act will be implemented as directed by the New Jersey Legislature. Therefore, the Department believes it is appropriate to reference the transfer of development right program because it is contained in the Act. However, in the absence of the developed TDR program, the Department's rule contain adequate alternative provisions to be used by an applicant to successfully apply for and receive a Highlands approval.

662. COMMENT: How does a definition of forest, right or wrong, have a positive social impact? (19, 28)

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RESPONSE: A definition, can have a positive social impact if it clearly explains a concept that will assist the public in understanding or complying with a regulation. As stated in the Department's Social Impact, the Highlands Act emphasizes the value of forests and the need to preserve them as part of a strategy intended to protect the water quality and natural habitats within the Highlands Region. The Highlands Act at N.J.S.A. 13:20-3 defines the disturbance of one-quarter acre or more of forest as "major Highlands development" subject to regulation. N.J.S.A. 13:20-30 authorized the Department to adopt interim standards for the protection of upland forests and N.J.S.A. 13:20-32 directed the Department to prepare regulations prohibiting development disturbing upland forests. Therefore, amending the method of identifying forested areas (or in the commenters' terms, the "definition of forest") will have a positive social impact by ensuring that areas containing the characteristics of a forest in the Highlands Region will be properly identified and protected under these regulations.

663. COMMENT: How does allowing development in the preservation zone for those lucky few who manage to prove that they have brownfields have a positive social impact? In the pilot program in Oxford, funded by the taxpayers, pristine land next to an undeveloped lake was taken over by the town for back taxes and a development was planned. The Highlands Act came along and it was suddenly in the preservation zone. According to the new regulations, this can (and is) being designated as a brownfield since it contains slag from a pre-revolutionary war iron furnace, and now the land can be flipped to the developer and high density housing can be built. How does this favoritism result in a positive social impact? (19, 28)

RESPONSE: The redevelopment of brownfields has at least two clearly positive social impacts. First, in order for a site to be redeveloped, all hazardous materials have to be remediated. Consequently a site that is currently contributing to pollution of the environment will be cleaned up. That is a positive impact for society. Second, by directing development to sites that have already been used in the past for industrial or

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commercial development, land is being recycled and society is protecting pristine lands from new development. This too is a positive social impact.

Before a brownfield site located in the preservation area, like the one cited by the commenter, is permitted to undergo redevelopment, several steps must be taken: the owner of the site must develop a detailed clean up plan acceptable to the Department and conduct the clean up activities; the Highlands Council must designate the site as appropriate for redevelopment; and the owner must apply for a Highlands approval, describing in detail the scope of the proposed development, how it will comply with Highlands standards, and the standards for which a waiver is being sought and why. The township retains the ability to approve or deny a project through its planning board, and the density of the proposed development will be established by the township through its zoning. The public has the opportunity to participate in each of these processes and express its concerns or support for such development.

664. COMMENT: Forcing two more kinds of general permits does not have a positive social impact. It is more paperwork and more reasons for the Department to fine the residents of the Highlands. And the streams do not provide recreational benefits. The majority are privately owned, and the public is not allowed to access them, and I ask that all such references be taken out of the regulations. There is far too much ink dedicated to the misleading impression that this land is available to the general public to enjoy. It is not. The state of New Jersey has taken away water rights, and development rights, and the right to improve and maintain property in the Highlands, but that is all. The Highlands is not a public park. If the taxpayers want parks, let them buy them. (19, 28)

RESPONSE: When the Department adopts general permits the purpose is to identify categories of activities for which a streamlined permit application review process can be provided. In this case, an applicant seeking to enhance habitat for fish and wildlife or stabilize an eroding stream bank, who would previously have had to go through a more intensive permit process, will now be able to seek approval to conduct the activity through a simpler process. Further, the two types of Highlands general permits created in

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this rulemaking are both for activities that are environmentally beneficial. Habitat enhancement activities result in more and better habitat for fish, wildlife and plant species. Stream bank stabilization helps to improve the health of a stream by eliminating sources of erosion and sedimentation that would otherwise have negative impacts on water quality both at the point of erosion and downstream. Further, while it may be true that all portions of all waters in the Highlands are not entirely accessible, recreation, including fishing, is a significant activity in the Highlands which will be positively affected by the types of activities covered by these two general permits. Consequently, the Department concludes that its general permits provide positive social impacts.

665. COMMENT: It is premature to state that there is a positive social impact from implementation of the rules. In addition, the positive or negative social affects must be characterized as "macro" (New Jersey proper) or "micro" relating to the communities within the preservation district. (85, 87)

RESPONSE: The Department is required to evaluate the social impact of every rule it proposes. Therefore, it cannot wait until the rule is in place to determine the social impact. The Department believes, however, that the social impact of the Highlands rules is positive in both the "macro" and "micro" sense, as described by the commenter. The Highlands rules further the goal of the Highlands Act to protect an essential source of drinking water and other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, and many sites of historic significance. These benefits accrue to those who live in the preservation area as well as to others in New Jersey. Therefore, the rules have an overall positive social benefit.

666. COMMENT: There is no evidence presented that conclusively demonstrates that the rules provide a macro social impact that is not redundant in the context of prior-existing rules and regulations. Further, the degree to which an impact will be realized is wholly dependant upon presupposed eventualities that have not occurred since adoption of the

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Act and may, or may not, occur outside the preservation district. Implementation of TDR's is an excellent example. (85, 87)

RESPONSE: The Highlands Act consolidates aspects of several existing programs, strengthens their protections, and adds some unique protection provisions as well. The result is a law that requires one thorough and comprehensive review of a proposed major Highlands development. Therefore, the Department does not agree that the social benefits of the Highlands Act are redundant with prior existing rules. The timing of the Department's regulations and the Regional Master Plan (RMP), as dictated by the Act, made it impossible for the Department to await completion of the RMP and transfer of development rights program before proposing its regulations. Therefore, the Department must view the Act in its entirety and presuppose that all provisions of the Act will be implemented as directed by the New Jersey Legislature.

However, as stated in response to previous comments, the Highlands Act contains more than TDR provisions to reduce its impacts on property owners, including an extensive list of exempt activities, the exclusion of agricultural and horticultural uses from the definition of "major Highlands development" thus keeping these activities unregulated by the Department, the requirement that agencies seeking to acquire land for open space and farmland preservation obtain pre- and post Highlands appraisals and negotiate using the higher value, and the provision of a waiver for the taking of property without just compensation if a Highlands approval has been denied and the owner can recognize no alternative use for the property.

667. COMMENT: The rules presuppose under social doctrine that the rights of the general populace exceed the rights of the individual. The purported social benefits realized by segments of the general populace, in particular the users of water resources generating from within the Highlands, are garnered at the expense of the private property owners who either live within, or own land within, the Highlands Region proper. (85, 87)

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RESPONSE: The Department's rules, in conformance with the Highlands Act, seek to maintain the resources of the Highlands preservation area, including water quality, agricultural and horticultural uses, recreation, historic resources, and fish and wildlife resources in a state of existence as close as possible to what existed on August 10, 2004. Unless the commenter is suggesting that conditions on August 10, 2004 were severe and unpleasant for private property owners, and in need of changes now precluded by the Department's rules, maintaining such resources in that prior condition benefits private property owners by maintaining their environment and quality of life, while also benefiting others who use the resources but do not reside in the area. Further, as stated above, the Highlands Act has included several provisions to reduce impacts on property owners. Consequently, the positive social impacts derived from protecting water quality are realized by the private property owners as well as by society in general and the Highlands regulations that promote protection of water quality and quantity, as well as the other resources of the Highlands Region will have a positive social benefit.

Economic Impact

668. COMMENT: I think the value of an acre of wetlands is far more than \$20,000 in New Jersey. The value of an acre of wetlands is more like \$200,000 since it is so rare! This undervaluing of the value of natural places is wrong and this assessment is wrong. Further, the value of an acre of water is also \$200,000, not the low value imputed in this proposal, which is wrong and not indicative of the value of open land in the most congested place in this entire world - New Jersey. It has been shown over and over that people who have open space around them behave better than those who are crammed in, so the health benefits have been undervalued. (83)

RESPONSE: The value for an acre of freshwater wetlands is based on a review of 12 independent studies (most of which were published in peer-reviewed journals and referenced in the Department's proposal at 37 N.J.R. 4822) by researchers outside the Department. The studies covered eight different ecosystem services provided by

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freshwater wetlands and collectively provided a total of 23 estimates of the dollar value per acre of those services (some studies presented more than one estimate). Similarly, the value for an acre of open water is based on a review of 13 independent studies (most of which were also published in peer-reviewed journals) by outside researchers; the studies covered the two main ecosystem services provided by open water bodies and collectively provided a total of 19 estimates of the dollar value per acre of those services (again, some studies presented more than one estimate). The Department believes that this review of independent valuation sources resulted in reasonable value estimates. The commenter is correct in indicating that the economic impact statement does not include human health benefits. Inclusion of those benefits in the per acre valuation would have required a separate analysis relying on a number of somewhat speculative assumptions. However, to the extent that water supply, nutrient filtering and retention and protection from flood damage contribute to human health, such factors were included in the Department's analysis (see 37 N.J.R. 4821).

669. COMMENT: The Highlands Water Protection and Planning Act Rules are an outstanding achievement, and, if appropriately implemented, will benefit the residents of the Highlands, and will help to protect the sources of drinking water for approximately one-half of New Jersey's population. Challenges to these rules will come from some landowners and potential developers in the Highlands. Their concerns are largely and selfishly economic. Departmental staff have very well documented and reported on the Economic Impacts of these rules. The Department's summary of economic benefits is noteworthy for its relatively unbiased interpretation of various economic studies. (27, 49)

RESPONSE: The Department acknowledges these comments in support of the rules.

670. COMMENT: Table 8 purports to be a table of studies on the "Effect on Home Prices of Proximity to Open Space." The interpretation says, "while the benefits appear to generally fall in the range from zero to about three percent increase in value, the economic impact of the Highlands rules on housing and land values can fairly be

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characterized as generally positive." However, the only three studies in the presented table which showed, in fact, a significant increase in value for being within 1,500 feet of open space or parks were in Portland, Oregon, and Boulder, Colorado, both of which are cities. This area is rural and not comparable. At our already existing 7.5-acre minimum lot size, this claim is utterly ludicrous. Beyond that, the conclusions drawn from this table are ludicrous and totally unjustified. The analysis is not statistically supported nor are appropriate scientific methods employed. (37)

RESPONSE: Table 8 cited by the commenter also includes studies for four counties in Maryland, including the rural areas of those counties (Irwin 2002 and Geoghegan et al. 2003) and Wake County, North Carolina, including the rural areas of those counties (Smith et al. 2000). Comprehensive reviews of the peer-reviewed literature in this field reveal relatively few studies that did not present problems of study design and that obtained statistically meaningful results. The studies that meet those criteria have tended to focus on areas where development pressures are impinging on previously undeveloped land (including farmland). The two Maryland studies are especially relevant to New Jersey in this regard. The Department believes that it has used the best analytic methods available given the information available to it and has reached an appropriate conclusion based on the information available that the anticipated impact on housing and land value can fairly be characterized as generally positive.

671. COMMENT: The analysis regarding the impact on property values is incomplete. We agree that property located near preserved areas has a higher market value. Proximity to these areas increases the property value of the existing homeowner. The economic analysis did not consider the lost development potential of landowners. Owning land near preserved areas does not have much value when it cannot be utilized. (75)

RESPONSE: Unless all of the undeveloped properties in the Highlands were appraised before and after enactment of the Highlands rules, it is impossible to know for sure what changes in land prices are caused by the Act and not by other factors, such as the general

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weakening of the New Jersey real estate market. Price changes reported for individual parcels unfortunately do not provide a sufficient basis for the kind of general conclusions that the Department is required to draw. Further, as stated in response to previous comments, and in its conclusions to the Economic Impact Analysis at 37 N.J.R. 4816, the Highlands Act provides several mechanisms to reduce its impact on landowners. These include an extensive list of exempt activities, the exclusion of agricultural and horticultural uses from the definition of “major Highlands development” thus keeping these activities unregulated by the Department, the requirement that agencies seeking to acquire land for open space and farmland preservation obtain pre- and post Highlands appraisals and negotiate using the higher value, the provision of a waiver for the taking of property without just compensation if a Highlands approval has been denied and the owner can recognize no alternative use for the property, the establishment of a Transfer of Development Rights program, and potential assistance from the Highlands Protection Fund. Consequently, while a reduction in development potential may result in a negative impact, these alternatives to development are intended to provide a positive economic impact thus making it difficult to make additional projections about the net economic impact on an individual or a group.

672. COMMENT: Land acquisition and tools such as TDR, as well as a dedicated funding source for the Highlands Region are not mentioned as potential strategies to recoup the lost development values. In addition, farmers can no longer sell off a single lot to help make ends meet during difficult times or to provide a housing opportunity for a family member. (75)

RESPONSE: Land acquisition and Transfer of Development Rights (TDR), as well as a dedicated funding source are indeed potential strategies to recoup lost development values. However, none of these provisions are governed by the regulations that are the subject of this rulemaking. The Highlands regulations do affect the ability of a farmer to subdivide land in the preservation area to sell a single lot. Depending upon the size and characteristics of the original farm, a single subdivision can likely occur. Simply because

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a new lot is not exempt and has to comply with Highlands standards does not mean that it cannot be subdivided. If a subdivision is carefully assessed in advance to assure it creates lots with adequate acreage containing few Highlands resource areas to constrain development, a one-lot subdivision remains a viable option.

673. COMMENT: The Department gives the protection of “bird watching industry” as one of its economic justifications for the taking of peoples land. The Department claims that 1.9 million out-of-state people come to New Jersey for bird watching and spend approximately 1.24 billion dollars with an annual increase of 7.4 percent. These numbers are approximately the same numbers as the 2004/2005 attendance at the Meadowlands Stadium for all the Giants and Jets games and Springsteen concerts combined. (54)

RESPONSE: The Department does not agree that the rules result in the taking of land without compensation. For greater detail regarding the taking of property without just compensation please see response to comments under N.J.A.C. 7:38-6.8 above. The figures the commenter is questioning were taken from a study by the United States Fish and Wildlife Service. The Department did not look into the number of people attending sporting events or concerts. If the commenter’s statistics are accurate, they only further illustrate the significance of this influx of out-of-state individuals coming to New Jersey to enjoy its wildlife resources.

674. COMMENT: The Department is assigning values to upland forest (\$3,400/acre), wetlands (\$20,400/acre), and other land types. The Department, in assigning these values to land, is hardly objective. (54)

RESPONSE: The Department did not assign the values in question. Instead, the value for an acre of freshwater wetlands is based on a review of 12 independent studies (most of which were published in peer-reviewed journals) by researchers outside the Department. These studies covered eight different ecosystem services provided by freshwater wetlands and collectively provided a total of 23 estimates of the dollar value per acre of those

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services (some studies presented more than one estimate). Similarly, the value for an acre of forest is based on a review of 32 independent studies (most of which were also published in peer-reviewed journals) by outside researchers; the studies covered nine ecosystem services provided by forests and collectively provided a total of 68 estimates of the dollar value per acre of those services (again, some studies presented more than one estimate). The Department believes that this review of independent valuation sources resulted in reasonable value estimates.

675. COMMENT: A great effort has been applied to demonstrating the tremendous anticipated and almost perhaps unbelievable benefits that will be realized as the result of the proposed regulations. Your extremely innovative and aggressive scenarios claim benefits when totaled, which are in the tens of billions of dollars. You state, for instance, that benefits from upland forest in the Highlands preservation area will be \$872 million annually or 12.3 billion in present value terms. You go on to demonstrate the myriad of benefits from the many other constraints to be effected by the rules on lands in the preservation area. You even claim benefits for endangered species in the hundreds of billions of dollars. Where did the technical persons come up with that kind of number?
(79)

RESPONSE: All sources for the estimates in the economic impact statement are provided in the statement, including the sources for the estimated benefits from protection of endangered and threatened species.

676. COMMENT: In the economic impact statement, the Department attempts to demonstrate that the losses of taxable ratables to municipalities will be negligible or perhaps offset by anticipated benefits. You mentioned various studies actually conducted within the Department; studies which other units of your Department have conducted that substantiate your projection of benefits. That sounds like a conflict of interest, like an inside job. You have exerted tremendous time and effort to show economic benefits from

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the rules with little time and effort to evaluate what we consider to be the tremendous losses to those who's land is being involuntarily preserved. (79)

RESPONSE: The Department disagrees that its approach reflects a conflict of interest. For a complex subject such as the economic impact of the rules proposed for readoption, many units of the Department need to be involved, since the required expertise transcends that available in any single unit of the Department. Wherever possible, the analyses have relied on outside studies performed by independent scholars and subjected to peer review. The fact that the Department commissioned additional outside studies is an indication of the seriousness with which the Department takes its responsibilities in this area.

The exact impacts on existing owners in the Highlands are in fact very difficult to quantify in precise numbers. Implicit in this comment and many of the other comments received is the sincere belief that the provisions of the rule proposed for readoption have fundamentally changed the real estate market in the Highlands and reduced the value of undeveloped land in that region. However, unless all of the undeveloped properties in the Highlands were appraised before and after that event, it is impossible to know for sure what changes in land prices were caused by the Act and not by other factors, such as the general weakening of the New Jersey real estate market. Price changes reported for individual parcels unfortunately do not provide a sufficient basis for the kind of general conclusions that the Department is required to draw. Further, as to the ability to sell farmland, the Newark Star-Ledger on July 12, 2006, reported on a study being performed for the Highlands Council that is expected to show that for the State as a whole, the number of property sales in 2005 was about 16.0 percent below 2004; while the decreases for the Highlands Region during the same timeframe were reportedly 16.5 percent for the planning area and 13.7 percent for the preservation area. These data clearly show that the decrease in home sales in the Highlands Region in 2005 was in line with the overall decrease in the State, which implies that there was no reduction in ability to sell that hit the Highlands as a region more substantially than other regions of the State. The Highlands Council will be releasing a draft Regional Master Plan for public comment

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which will include a financial component and the analysis performed to date on the financial implications of the Highlands Act.

677. COMMENT: There is no positive economic impact from the current temporary rules. These rules resulted in the immediate loss of up to 90 percent of land equity in the preservation zone. Small parcels adjacent to "preserved" areas have not gone up in value, and these parcels are often unmarketable. (19, 28)

RESPONSE: For the many reasons stated in the economic impact statement, the Department disagrees that there is no net positive economic impact. The Department is not aware of any independent documentation of the loss of 90 percent of equity cited by the commenters. Further, as to the ability to sell farmland, the Newark Star-Ledger on July 12, 2006, reported on a study being performed for the Highlands Council that is expected to show that for the State as a whole, the number of property sales in 2005 was about 16.0 percent below 2004; while the decreases for the Highlands Region during the same timeframe were reportedly 16.5 percent for the planning area and 13.7 percent for the preservation area. These data clearly show that the decrease in home sales in the Highlands Region in 2005 was in line with the overall decrease in the State, which implies that there was no reduction in ability to sell that hit the Highlands as a region more substantially than other regions of the State. The Highlands Council will be releasing a draft Regional Master Plan for public comment which will include a financial component and the analysis performed to date on the financial implications of the Highlands Act.

The many independent studies cited in the economic impact statement show that property located near preserved open space tends to appreciate in value. It is important to note that those studies are based on completed market transactions (that is, actual home sales) rather than on appraisals. In some studies the increases appear to be modest, and the studies do not always provide specific timeframes within which the appreciation occurred. However, on the basis of this evidence the Department disagrees that parcels

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adjacent to preserved areas do not tend to increase in value, all things other than proximity to the preserved area being equal.

678. COMMENT: While the economic impact include some areas where estimates must be used, this economic impact does not include any facts whatsoever, despite the availability of many facts since we are already a year and a half past the date when the Highlands Act was passed. (19, 28)

RESPONSE: The economic impact statement includes detailed documented facts on numerous issues including water supply (from the Highlands Task Force), flood-related costs, and Highlands acreage by zoning class and extent of infrastructure, among others. Where information specific to the Highlands was not available, the Department used the best independently-derived information available to it. It should be noted that the Department is required to assess the economic impacts of proposed rules prior to their adoption and implementation, and this requirement forces the Department to make estimates of future events based on the information available to it. The Department believes that the factual information utilized in conjunction with the review of the independent sources cited in the proposal provided it with all information necessary to appropriately analyze the potential impacts of these rules.

679. COMMENT: References to such works as those of Daily should be better explained if they are to be used. Daily used "non-market" economics to value environmental resources, which while indicating the public's preference of one thing over another, is of no value in determining actual financial benefits. The data gathered when questioning the public does not include the question as to whether or not they can actually afford to pay all the money they feel the items on the questionnaire are worth. The questions are strictly hypothetical and can only be used to discover how much a person values a particular thing compared to how much they value something else. It's purely a relative exercise to assist environmentalists in deciding where to spend their resources. When the benefit is something that the public prefers but does not actually pay for, it makes more

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sense to the general public if these rules just spell out the "economic" impact - it's a non-cash, non-market benefit. It is misleading to try and sell the Highlands Act on those kinds of benefits. Those kinds of benefits should, of course, be weighed against the actual cash costs of the project, but in the real world of finance, they are intangible benefits and should not be presented using the same language as tangible benefits. (19, 28)

RESPONSE: The works edited or co-authored by Ms. Daily were cited in the economic impact statement to show the sources of ideas or information contained in the economic impact statement. The ideas and information themselves were explained in the impact statement, and the Department regrets if its explanations were not sufficiently clear. The use of non-market techniques cannot be avoided where the goods or services being valued are not sold in markets, as is the case for the ecosystem services provided by the Highlands. While non-market benefits do not necessarily correspond with financial benefits, they are accepted by economists as a legitimate component of total economic value. While some estimates of non-market values are based on surveys, the responses that individuals give in such surveys are always limited by their incomes, since no one can willingly pay an amount greater than his or her income. While the valuation questions in such surveys are often hypothetical, economists have developed a number of techniques to screen out frivolous or ill-considered responses, and the use of such "contingent value" techniques was recognized in 1993-1994 by a panel of leading economists convened by the National Oceanic and Atmospheric Administration (NOAA) in connection with the Exxon-Valdez disaster.

In addition to use by "environmentalists," the results of valuation studies of whatever type are being increasingly used by government agencies at all levels in the development of environmental preservation policies and program. The Department disagrees that the analysis of benefits contained in the economic impact statement is misleading. Although intangible benefits are probably not financial benefits to private parties in the sense intended by the commenters, they are clearly economic benefits to society as understood by economists, although they may indeed be benefits which cannot

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be converted into actual cash payments absent legislation authorizing or requiring such payments.

680. COMMENT: Is it true that Table 1 is based on the Daily methods and therefore does not show the actual cash value of economic services, but the intangible economic value? If so, it should be noted that the economic value is NOT the cash value, but the intrinsic or intangible value. (19, 28)

RESPONSE: Some of the methods applied in the economic impact analysis were discussed in the 1997 volume edited by Ms. Daily; others come from a broad range of ecosystem valuation studies and environmental and natural resource economic texts cited in the Department's reference list provided in the summary, and some were developed by the Department in the absence of clear models in the economics literature. As discussed in response to comment 680, while "cash" and "intrinsic" or "intangible" values differ in various ways, both are considered legitimate types of value in the economics literature. "Intrinsic" or "intangible" values represent values to society as a whole, albeit values for which it may not always be possible to obtain cash payments in the absence of appropriate legislation authorizing or requiring such payments.

681. COMMENT: Since water quality in the Highlands "is rated as being among the purest in the State" why are regulations being proposed to cripple the stewards of the land when all that had to be done was buy their land at fair market value when they or their heirs were ready to sell? (19, 28)

RESPONSE: The rules being readopted do not cripple the stewards of the land; instead, they strengthen the protections for the land and water quality and ensure that it remains among the purest in the State. The Highlands Act requires the Department to enact regulations to implement protection for the resources in the preservation area. In addition, as described in response to comments 52 through 57, there are several provisions in the Highlands Act that reduce the impact of the Act on property owners. These include

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excluding agricultural and horticultural uses from the definition of “major Highlands development” so that they are not regulated by the Department; requiring that agencies seeking to purchase land for preservation, like the Green Acres program and State Agricultural Development Committee (SADC), obtain two appraisals (one representing pre-Highlands values and the other representing current value) and negotiating based upon the higher of the two values; providing 17 different exemptions for activities proposed in the preservation area; and requiring that the Highlands Council establish a transfer of development rights program for the Highlands region

682. COMMENT: Why are not regulations on the use of road salt being issued since that is causing so much of the water purification expenses? (19, 28)

RESPONSE: The Department is not aware of any documented evidence that the use of road salt is a major factor leading to the need for water purification in the Highlands. If such were proved to be the case, the Department would consider taking appropriate action, consistent with its statutory authority. The regulations being proposed for readoption are intended to address the factors identified by the Highlands Act as necessary to protect water quality and quantity, and the need for these regulations is therefore independent of the need, if any, for regulations dealing with the use of road salt.

683. COMMENT: The "constraint" analysis scenarios have virtually no relevance. The savings for the Highlands preservation area is pegged at \$80,000,000 per year, which conflicts with my own numbers. Please provide the details of who is purifying water in the Highlands preservation zone for use by residents there and how much it is currently costing per year. (19, 28)

RESPONSE: The constraint analysis was developed by a group convened by the United States Forest Service, a unit of the U.S. Department of Agriculture. The Department believes that this analysis is highly relevant to the present economic analysis. The analysis is available at http://www.na.fs.fed.us/highlands/maps_pubs/technical_report/

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[technical_report.shtm](#). The commenters did not provide their numbers or details on how their numbers were derived, and the Department is therefore unable to comment on them or to compare them with the Department's published economic analysis. The water quality benefits discussed in the economic impact statement are for northern New Jersey as a whole and not simply for the Highlands. The savings estimate is based on a study by the North Jersey District Water Supply Commission, a body which is independent of the Department. The study included Highlands municipalities in all counties containing land within the Highlands region, as well as five counties in New York.

684. COMMENT: Economic Research Service of the USDA valuations are not valid for the Highlands. As indicated by the Economic Research Service, values of wetlands vary widely depending on how imminent the development pressure is and on its proximity to a populated area. The truth is that development pressure on the farms in the Highlands preservation zone is not severe, nor is there a big population there, so the value is far less. Please provide the details of the study in progress that pegs the value of wetlands in the Highlands at \$20,400, and open water at \$13,700. (19, 28)

RESPONSE: The value for an acre of freshwater wetlands is based on a review of 12 independent studies (most of which were published in peer-reviewed journals) by researchers outside the Department. The studies covered eight different ecosystem services provided by freshwater wetlands and collectively provided a total of 23 estimates of the dollar value per acre of those services (some studies presented more than one estimate). Similarly, the value for an acre of open water is based on a review of 13 independent studies (most of which were also published in peer-reviewed journals) by outside researchers. These studies covered the two main ecosystem services provided by open water bodies and collectively provided a total of 19 estimates of the dollar value per acre of those services (again, some studies presented more than one estimate). The Department believes that this review of independent valuation sources resulted in reasonable value estimates.

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The commenter states that the studies covered by the USDA review do not apply to the Highlands because development pressure on the farms in the Highlands preservation zone is not severe and the population is lower. However, the studies reviewed by USDA did not relate solely to wetlands located on or near farms. Further, one of the reasons for passage of the Highlands Act was a finding that 65,000 acres of the Highlands has been developed since 1984 and the Department's data shows that an additional 9,800 acres of land was developed between 1995 and 2002.

685. COMMENT: The data on costs of floods, flood prevention and flood insurance are irrelevant since there will be no increase or decrease as a result of this act. Stormwater management practices already in place prevent excessive runoff from developed areas. (19, 28)

RESPONSE: The regulations being proposed for readoption are intended to address sources of runoff from undeveloped areas (such as agricultural areas) and to minimize the increased need for stormwater management that would result if such undeveloped areas were to be developed. Before 2004, when the Department adopted statewide stormwater management rules (N.J.A.C. 7:8) that included the requirement for maintaining a riparian buffer adjacent to streams and waterways, stormwater management systems of demonstrated effectiveness had not been universally implemented in the State. In the Department's judgment it is more prudent and cost-effective to minimize the amount of runoff where possible by protecting forests, wetlands, and other types of land cover that retain stormwater than to rely solely on existing and potential stormwater management systems.

686. COMMENT: "Willingness to pay" is used throughout the economic impact section. This should be used cautiously as it is not something that is going to ever be paid, nor could it be since it is not based on the ability to pay, just the willingness to pay. (19, 28)

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RESPONSE: Willingness to pay (WTP) is the generally accepted definition of value in modern economics. As measured by valuation studies such as those cited in the economic impact statement, WTP is inherently limited to the ability to pay of the population studied. That ability necessarily reflects the financial resources of the respondents to WTP surveys and their other uses of those resources, for example, for essential costs of living. Whether or not the potential ability to pay is reflected in actual payments depends on whether mechanisms exist that mandate such payments. For example, many townships and counties in New Jersey have enacted and subsequently increased open space taxes after public referenda have indicated the willingness to pay for open space. The repeated success of these referenda coupled with the payment of open space taxes indicates that the willingness to pay can and does translate into actual payment and is therefore a legitimate measure of economic value.

687. COMMENT: The Economic Impact Statement only considered the environmental benefits and costs saved by implementing the rules. The economic impact that these rules will have on every farmland owner and property owner in the Highlands preservation area was completely ignored. The extraordinary breadth and scope of these rules called for a measured deliberation that weighs and addresses these impacts before the final regulations are put in place. The existence, option and bequest values are not considered when a property owner goes to the bank to get a loan. (75)

RESPONSE: The economic impact statement contained extensive discussions of the economic impacts of the regulations proposed for readoption on development potential in the Highlands, property values, local property taxes, and other benefits relating to housing, communities, and infrastructure. The existence, option and bequest values referenced by the commenter constitute intangible economic benefits to society as a whole, and the Department recognizes that such benefits may not translate into an equivalent level of financial collateral for loans to private parties by commercial banks.

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688. COMMENT: The availability of permit waivers, statutory exemptions, funds for State and private acquisition of property, and municipal assistance from the Highlands Protection Fund and other sources will have a significant, positive economic impact upon taxpayers in the Highlands Region. The environmental resource protection standards established under the rules will prevent the destruction or deterioration of irreplaceable natural capital of enormous value that provides high-value services to the State on a long-term basis; will save billions of dollars in future avoided costs related to water treatment and other infrastructure improvement; will create significant numbers of jobs associated with the identification, protection and enjoyment of natural resources; will permit a reasonable level of development to proceed in the preservation area, including redevelopment of contaminated sites; and will likely yield a general increase in the value of property in the preservation area by preserving nearby high quality natural resources. (27, 49)

RESPONSE: The Department acknowledges these comments in support of the rules.

689. COMMENT: The rules come up with a savings of \$12.3 billion for the 257,000 acres of upland forest. Aside from the misleading inclusion of non-cash savings, please provide the time period and discount rate used to turn \$872 million per year into a present value of 12.3 billion. (19, 28)

RESPONSE: The present value is based on conventional discounting using a constant discount rate of 5 percent over a 25-year time horizon (used throughout the economic impact statement to ensure comparability of present values. The discount rate of five percent represents the midpoint between two rates used by the United States Office of Management and Budget: that is a social discount rate of three percent, and a private discount rate of seven percent. There is no generally accepted standard regarding the time horizon for an analysis such as this except that the horizon should not be so short or long to skew the results.). Other discounting techniques would produce higher present values.

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The inclusion of non-cash savings is not misleading since these represent clear benefits to society as a whole for the reasons discussed in the impact statement.

690. COMMENT: Please provide the data on how the willingness to pay on the species chart got extrapolated over the entire population in the state of New Jersey. The commenters indicate they conducted their own survey of several dozen people in their area and not one was willing to pay one cent to protect any of the species listed. (19, 28)

RESPONSE: The commenters did not provide the details of their survey. However, the Department does not believe that a sample of several dozen people, however chosen, is sufficiently large to permit valid inferences to be drawn from the responses. In contrast, the willingness to pay data provided in the economic impact analysis was based upon an independent review of 21 published, peer-reviewed studies drawn from various parts of the country. The benefits referred to by the economic impact analysis are benefits experienced by people throughout the state and not just local residents of the areas in question. In that regard, it is worth noting that one in nine Americans lives within a 2-hour drive of the Highlands, according to the New York-New Jersey Highlands Regional Study: 2002 Update (available at http://www.na.fs.fed.us/highlands/maps_pubs/regional_study/section1.pdf). Since it is impossible to survey entire populations, willingness to pay studies are always based on a sample of individuals, and the results obtained from such individuals are always extrapolated to a larger population to obtain useful results. The identification of the population or geographic area over which it is proper to perform such extrapolations is always a question in willingness to pay studies. The Department believes that extrapolating the study results to the state as a whole is reasonable in the context of this analysis.

691. COMMENT: "Watching Wildlife" may be a big thing in areas outside the Highlands, but, at least in Warren County, there are almost no expenditures for wildlife watching. Certainly, free bird watching goes on at Merrill Creek, and now Round Valley Reservoir charges \$50 a year just to walk around. The commenters know two fisherman

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who go camping one night to come out from the city to fish in the Pequest, and they have been known to buy a beer or two, but, the commenters assert that they frequent the places and know owners of the places where all this money is supposed to be changing hands, and it is not much. Please provide details on expenditures that go into the hands of local businesses in the Highlands. (19, 28)

RESPONSE: The expenditure figures for wildlife viewing discussed in the economic impact analysis are based on state-level surveys by the U. S. Fish and Wildlife Service (USFWS). Those studies do not specify where within a given state the survey respondents live or where in the state they were watching wildlife when USFWS surveyed them. There is no reason to assume anything other than a proportional distribution of survey respondents within New Jersey, which means that a portion of the statewide expenditures can be considered to relate to the Highlands. USFWS surveys ask wildlife watchers and others about the amounts and types of expenditures they made in connection with wildlife watching and do not ask respondents to specify the particular businesses that benefited from the expenditures in question.

692. COMMENT: Property next door to property that is regulated by endangered species regulations is not worth more. It often is not worth the paper the deed is written on. Ask any builder. In the paragraph of the economic impact that references Standiford and Scott, a correlation is drawn between "protected open space" and designated "rare, threatened and endangered species habitat." There is no correlation in terms of benefit to the neighbors. Open space that they didn't have to pay for and can use for free is one thing, while fear of a species crossing the property line into their yard thus causing the immediate regulation of their property is the factor on the endangered species side. And why on earth was Standiford and Scott selected? What does their expertise in the value of oak trees in Southern California have to do with the Highlands? Are we paying Department people to go to symposiums in Southern California? (19, 28)

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693. COMMENT: The insinuation that having an endangered species on one's farm or forest actually raises the property value is false and should be stricken from the record. Firstly, willingness to pay for a house adjacent to endangered habitat is an inaccurate means of measuring economic impact. Instead, the Department should have used federal information regarding those properties, specifically in the American west and mid-west, where use and activities have had to cease as a result of presence of protected species.
(40, 41, 42)

RESPONSE TO COMMENTS 692 AND 693: The commenters cite no evidence for any of their assertions. Sandiford and Scott was selected as one example of a recent peer-reviewed study of the issues in question; the study was cited to document the concept of proximity value, and the Department did not use the study's numerical results. The information was obtained through electronic search and did not require any Department staff to leave Trenton. Willingness to pay is accepted by economists as the proper measure of economic value. Real estate markets are highly local. While studies of price impacts in other areas are useful in providing some evidence of the types of factors people take into account when they are purchasing property and whether those factors work to increase or decrease the purchaser's potential future price, information on the actual dollar value of a specific factor in some other geographic market is of limited value when projecting the actual dollar value in a different market. The literature on endangered species is vast, and the commenters did not provide a citation to the Federal information to which they refer.

694. COMMENT: Table C-1 cites a value of 18.3 billion dollars, mostly for creatures that don't even live here. I cannot follow your math or how the present value assumptions fit in. (19, 28)

695. COMMENT: "The willingness to pay" keeps coming back even when the Department admits that the studies were not done in New Jersey, nor were they done on

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less-than huggable species like rattlesnakes. Some people won't even go to the Delaware Gap Recreation area because of them. (19, 28)

696. COMMENT: Why is supply and demand, a solid economic concept for the actual prices of goods, being used to price out the value of endangered species? There is no connection. No one is buying or offering to sell the little critters. If there is any meaning to the "willingness to pay" theory, then agencies such as the Department should fund themselves with private donations, part of which goes to purchase land or pay owners to manage it, and part of which goes to the Department to cook up the rules. (19, 28)

RESPONSE TO COMMENTS 694 THROUGH 696: The commenters are correct that most of the species listed in Table C-1 are not native to the Highlands. However, the intent behind Table C-1 was to show the importance that many members of the public assign to species protection in general. While the values shown in Table C-1 do add up to \$18.3 billion, Table C-1 does not itself show that total, because economists recognize that the willingness to pay amounts for protection of individual species are probably not additive. As stated in the economic impact analysis at 37 N.J.R. 4812, because many of the species are not native to the Highlands, and because the individual amounts are probably not additive, the economic impact analysis does not claim willingness-to-pay benefits of \$18.3 billion or any other specific amount for species protection since the intent of this particular analysis was, as stated above, simply to document the probable importance of a source of economic value sometimes overlooked in regulatory impact analyses. As with some of the other types of economic value considered in the economic impact analysis, this particular value is usually a non-cash value, that is, the public would undoubtedly be willing to pay some amount for species protection but may not actually have to pay that amount. Despite its non-cash nature, this is an accepted type of economic value in analyzing environmental economics.

697. COMMENT: Costs of species protection - Loss of landowner equity DOES exist and should be considered a direct cost since the Highlands Act promised compensation.

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The economic consequences caused by the delay in paying landowners should also be included. Many property owners are forced to borrow against unsecured credit lines in order to finance ongoing operations. The inability to sell property has caused economic hardships on residents and they, in turn, are unable to put money into the economy as they once did. (19, 28)

RESPONSE: The Department is unaware of a provision in the Highlands Act which promises landowner compensation. However, as stated in response to previous comments, and in its conclusions to the Economic Impact Analysis at 37 N.J.R. 4816, the Highlands Act provides several mechanisms to reduce its impact on landowners. These include an extensive list of exempt activities, the exclusion of agricultural and horticultural uses from the definition of “major Highlands development” thus keeping these activities unregulated by the Department, the requirement that agencies seeking to acquire land for open space and farmland preservation obtain pre- and post Highlands appraisals and negotiate using the higher value, the provision of a waiver for the taking of property without just compensation if a Highlands approval has been denied and the owner can recognize no alternative use for the property, the establishment of a Transfer of Development Rights program, and potential assistance from the Highlands Protection Fund. Consequently, while a reduction in development potential may result in a negative impact, these alternatives to development are intended to provide a positive economic impact thus making it difficult to make additional projections about the net economic impact on an individual or a group. Further, as to the ability to sell farmland, the Newark Star-Ledger on July 12, 2006, reported on a study being performed for the Highlands Council that is expected to show that for the State as a whole, the number of property sales in 2005 was about 16.0 percent below 2004; while the decreases for the Highlands Region during the same timeframe were reportedly 16.5 percent for the planning area and 13.7 percent for the preservation area. These data clearly show that the decrease in home sales in the Highlands Region in 2005 was in line with the overall decrease in the State, which implies that there was no reduction in ability to sell that hit the Highlands as a region more substantially than other regions of the State. The Highlands Council will be

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releasing a draft Regional Master Plan for public comment which will include a financial component and the analysis performed to date on the financial implications of the Highlands Act.

698. COMMENT: The comment that "much of the threatened or endangered species habitat in NJ is already regulated" conflicts with data elsewhere in the rules and with the maps of habitat on the Department website. Please quantify how much land the new regulations will affect in terms of habitat regulation. (19, 28)

RESPONSE: The Department is not sure to which perceived data conflicts the commenter is referring. By overlaying habitat maps on maps of the Highlands, the Department determined that, as of 1995-1997, the Highlands contained 300,388 acres of such habitat. The Department updated this figure to 295,681 acres as of 2000.

699. COMMENT: Tourism dollars and jobs will not increase as a result of these rules since the land will continue to be privately owned and is not a public park. Contrary to the suggestion made by a Highlands authority, we will not quit our day jobs and open up bicycle rental shops. Most of the jobs that will be generated are for government employees, and since this comes out of the taxpayer's pockets and fines imposed on Highlands property owners, this should not be included as a benefit, but rather as a cost. (19, 28)

700. COMMENT: The Catania extrapolations are misleading. First, this is private property, and there will be no eco-tourism on private property. None of us plan to run bog turtle tours. Second, Mr. Catania of the Nature Conservancy apparently offered his personal communication as the source of these numbers. Since he is willing to share with the Department, please share the numbers with the public. Perhaps they apply to land that is open to the public? (19, 28)

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701. COMMENT: Regarding historic and archeological resources, there can be no increase in tourism when the property is privately owned and will remain so. And, again, to list tourism dollars from existing State owned facilities as a benefit of the Highlands Act makes no sense. They were there, and will continue to be there, Highlands Act or not. (19)(28)

RESPONSE TO 699 THROUGH 701: The issue is not an increase in tourism dollars and jobs but rather the preservation of the *existing* economic benefits of tourism. The Department is not suggesting that individual landowners will convert their property to parks or historical sites open to the public, but rather that limiting development in the Highlands in accordance with the legislative intent of the Act will help preserve the benefits of the parks and historic sites that already exist. Some of the jobs in these existing facilities are indeed held by State employees, but others are held by employees of private sector businesses, and the expenditures associated with the jobs held by State employees support secondary economic benefits (including private sector jobs) through the multiplier effect. In addition, businesses like restaurants, owned by private individuals outside park boundaries, receive customers who are drawn to the area to visit the park. Fines account for a very small portion of the revenues of the State Park Service, and those fines are in any case levied on users of State parks and forests who have violated the regulations governing such use and not on Highlands property owners. The economic impact analysis has already provided all of the information supplied by Mr. Catania in response to the Department's original inquiry to him.

702. COMMENT: As with the other areas of regulation, a historical designation is the kiss of death to property values, not the nirvana that is outlined in the rules. The designation brings with it enormous restrictions and huge increases in costs. Sometime, property values do indeed go up, but rarely by enough to compensate for the outlay caused by the designation and ensuing restoration and maintenance. It is not "prudent on economic grounds alone to preserve those sites." If they are to be preserved, it is because

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they sometimes cannot be replaced, and that preservation should be born by those who value it. (19, 28)

RESPONSE: The Department disagrees that the regulations proposed for readoption would have the impacts on property values and costs anticipated by the commenters. A historic designation does not impose restrictions that may result in increased costs but instead identifies and lists those structures meeting the criteria for historic designation. If a municipality so chooses, it may adopt an ordinance imposing standards and a review process upon its residents based upon a historic designation.

A number of independent studies in other states have found that the value of properties located in close proximity to properties with historic designation is maintained or increases rather than decreases. The State Historic Preservation Office has commissioned such a study using New Jersey data. Other types of studies (including a study by Rutgers University relating specifically to New Jersey) have found that historic properties and historic districts stimulate economic activity in nearby commercial establishments by attracting visitors to the areas in question. Many irreplaceable historic sites and districts are indeed supported financially with public and private funds, both in New Jersey and elsewhere.

703. COMMENT: In the summary of benefits, 100 percent of the benefits listed appear to be intangible, non- cash benefits. None of them accrue to the residents and landowners in the Highlands. We already owned the streams, rivers, fields and forests, so the Highlands Act did not do us any favors. If the residents of New Jersey wish the Highlands to remain as it is, they should pay the billions and billions the rules say they think it is worth. (19, 28)

RESPONSE: While “cash” and “non-cash” or “intangible” values differ in various ways, both are considered as legitimate types of value in an economics analysis. “Non-cash” or “intangible” values represent values to society as a whole, albeit values for which it may

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not always be possible to obtain cash payments in the absence of appropriate legislation authorizing or requiring such payments.

As stated in the conclusion to the economic impact, the Department believes that its rules have a net positive economic impact because they include several mechanisms to limit impacts to property owners while preventing the destruction or deterioration of irreplaceable natural capital that provides high-value services to the State on a long-term basis.

704. COMMENT: Regarding the costs, the Department says that studying property records in 40 or 50 towns is beyond the Department's resources. What kind of resources were expended to write these rules and read the thousands of pages of source materials cited? The Department does have the resources to go through a few tax records, most of which are readily available. (19, 28)

705. COMMENT: Why is a measure of the increase in development from exemptions not within the Department's resources? The Department performed an analysis of various "studies" to justify the economic benefits of the rules. An analysis of development potential under the exemptions could have been completed. Most counties have parcel mapping available with MOD-IV tax assessment records to identify vacant and farmland parcels. (85, 87)

RESPONSE TO COMMENTS 704 AND 705: A typical town in New Jersey contains hundreds or thousands of individual parcels of land; transactions covering those parcels occur at various times over a period of years, so that records for many years would need to be examined and the relevant data extracted. This work must be done on-site where the records are located, which necessitates considerable travel time and expense. The data in the MOD-IV records (MOD-IV is the computer system used to administer local property tax assessments in New Jersey; the term is also used to refer to the tax assessment records themselves) reflect numerous categories of land that *may* be exempt from development for one reason or another, and considerable effort is required to determine which

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categories are in fact exempt. The data must also include variables other than price, since many factors other than acreage determine land prices, for example lot size, number of rooms (for developed properties), etc. This information is not included in the MOD-IV files and must be obtained from other sources, for example, commercial data vendors. The data obtained must then be entered into a computerized database for analysis. The data must then be analyzed statistically to quantify the relative impacts of the various factors and hypotheses must be developed as to the extent to which those factors would change under the Act and the rules proposed for readoption. The results obtained would need to be compared to what was found in other published studies to determine whether the results were plausible given what other researchers have found.

The Department believes that many hundreds or thousands of hours of staff time would likely be required for this effort and that the final result would be speculative, providing no information more valid than that collected and used by the Department to prepare the economic impact statement.

706. COMMENT: The build out analyses and population figures do not seem to match the information developed and used by the counties. Were the county plans used in this analysis? If not, what is the build out based on? (19, 28)

RESPONSE: Rather than rely on plans prepared by other parties, the Department performed its own build-out analysis using the data and assumptions provided in the economic impact statement. The Department's methods for obtaining population figures and determining build out were described in detail in 37 N.J.R. 4814.

707. COMMENT: The rules state that there are 175,000 undeveloped acres in the planning area that are not environmentally sensitive. Can I see the details on the location of those acres? (19, 28)

RESPONSE: The figure of 175,000 acres in the economic impact statement is from Appendix D of the March 2004 Action Plan of the Highlands Task Force; the Task Force

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in turn obtained it from the Grant Walton Center for Remote Sensing and Spatial Analysis (CRSSA) at Rutgers University. Contact information for CRSSA can be found at <http://www.crssa.rutgers.edu/>. The land in question is not in any one location but rather is scattered throughout the planning area. CRSSA developed its estimate independently of the Department. After the issuance of the March 2004 Action Plan, the Department independently estimated the amount of developable land in the planning area at about 183,000 acres; this figure is higher than CRSSA's because the legal limits of the planning area were expanded by the Highlands Act after CRSSA completed its work and after the March 2004 Action Plan was issued. The Department used the CRSSA's lower figure of 175,000 acres in the Department's economic impact statement in order to provide a conservative analysis so as not to overestimate the overall development potential of the Region.

708. COMMENT: There is no provision for the adverse economic impact of finding housing for the expected 5 million extra people that you project in just 20 years. What are the plans to house them and how much will that cost? Blocking off the Highlands from development will surely cause an increase in the cost of housing as single family detached homes become a thing of the past. (19, 28)

RESPONSE: As the economic impact statement notes, the New Jersey Department of Labor projected in 2004 that the State's population will increase from its current level of about 8.5 million to 10.3 million in 2025, an increase of 1.8 million. The Department is not aware of any projections that show an increase of 5 million over that period. As the commenters note, the cost of providing housing (including affordable housing) for all New Jerseyans is a major issue in the State, especially given the increases in the State's population projected by demographers at the New Jersey Department of Labor and elsewhere. However, the adopted regulations include 17 categories of activities that are exempt from the Highlands Act, including two exemptions for the construction of single family dwellings on lots in existence on August 10, 2004 and a third exemption for subdivisions receiving municipal and State approvals on or before March 29, 2004. The

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rules provide a permitting process for other more limited development and provide waivers for redevelopment of brownfields and properties containing 70 percent or more impervious surface. Further, the most current State affordable housing requirements assess a town's affordable housing need based upon the number of new market rate houses that receive building permits and the amount of new square footage of commercial space approved by the municipality. Therefore, once former rounds of low and moderate housing requirements are satisfied, limits on new market rate housing will also result in a lesser need to provide low and moderate income housing in the preservation area. Finally, there is abundant housing already existing in the preservation area and immediately adjacent in the planning area, a factor which led to the concerns about the future of the water supply underlying the region and the need for the Highlands Act. Consequently, while the limits on new housing may result in some increase in the prices to buy existing homes in the preservation area, other developable land exists outside the preservation area but in close proximity, continues to be developed for single-family housing, and may be less expensive to purchase because it will be more proximate to existing infrastructure such as roads and highways, schools, healthcare facilities, etc.

709. COMMENT: The section regarding Impact on Property Values is double speak. Of course, people bought their property because it was prettier than other property on the market at the time. This does not translate into stupidity. A person pays more for something that is pretty and expects to get better appreciation on it because it is pretty. Does the buyer of a Monet painting expect to make money on the deal or did he only buy it because it is pretty, and doesn't mind if it is substituted with a print? After all, the print is just as pretty. It's just that it is not saleable. (19, 28)

RESPONSE: The Department does not fully understand this comment but will respond to the best of its ability. The Department nowhere stated that purchasing property under the circumstances indicated constituted stupidity; such a purchase is in fact quite rational under economic theory given the preference that most people have for scenically attractive locations. The "amenity" value associated with proximity to preserved open

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space is, in fact, an important economic benefit of most or all land preservation programs.

The Department assumes that purchasers of different assets have multiple, differing motivations and will not speculate as to whether the motivations of purchasers of art are the same or different than those purchasing real estate.

710. COMMENT: The increases in property value next to preserved areas have yet to be realized. The vast majority of the studies that I have seen on this as well as the majority of cases that are cited in the rules are for urban areas where open space is rare. The commenters do not agree that the chance for appreciation is "good." How can urban areas be compared to the rural preservation zone? In addition, there was no mention made of the large tracts of land that have become worthless. (19, 28)

RESPONSE: The increase in value of property with scenic amenities is normally realized when the land is sold. While many of the published studies do relate to urban or suburban areas, several of those cited in Table 8 of the economic impact study cover entire counties, including undeveloped rural areas. Based on those studies, the prospect for such appreciation must be considered good, even if there may have been a slowdown in the pace of development in the Highlands as those in the region adjust to the Highlands Act and its implementing regulations. The Department is not aware of any hard evidence that large tracts of land have become worthless.

711. COMMENT: Based on the Hedonic price theories that you reference, the commenters assert that prices in their area will without a doubt go down. Prices have always been low for houses on large lots because they are far from neighbors and schools. The entire area is far from stores and work. The homes on the larger lots are old and drafty and in need of repair. They don't have air conditioning, they have wild animals running around, they don't have streetlights. Properties adjacent to farms, lakes, and ponds have a lower value because of the mosquito problem and the abject terror of West Nile virus and Lyme Disease that people live with. People from outside the area do not like to live too close to a farm or undeveloped land. Without actually doing the math,

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there is no doubt that it is the homes in the developments that have the best prices, and those prices are now at risk since the lifestyle the new residents hoped to have as the area grew is now not possible. Most of the newer residents came here because the houses were cheap, and for no other reason. Urban people snapped up condos out in the middle of nowhere not because they liked the open space, but because they were cheap. While the commenters agree with the Hedonic price theory and see practical applications for it in urban areas, in the more rural areas of the preservation area, proximity to open space is not a plus to most people. (19, 28)

RESPONSE: The Department notes that if prices for houses on large lots of the type described by the commenters have always been low, then those prices are unlikely to have resulted from the publication of the Department's rules. However, the Department does not believe that prices for houses on large lots are low or that people initially move into previously undeveloped areas because they expect those areas to become even more developed in the future. In fact, all of the evidence in New Jersey indicates the contrary, that is, that once people have moved into a previously undeveloped area they oppose further development in order to preserve the less congested environment to which they moved. The Department acknowledges that house size and price are also key factors in home-buying decisions. For all of these reasons, the Department disagrees that proximity to preserved open space is not a plus to most new residents of previously rural areas.

712. COMMENT: No one is arguing that land inside the preservation area far from a highway was ever worth as much as land in the planning area right on a main road. The reference to a run-up in prices that we are complaining would be taken away is confusing. The value of the land was taken away, and had nothing to do with any run-up in prices. Values in the table [table not specified] have nothing to do with the impact of the Highlands Act on landowners. And to imply that Green Acres funding represents the value of the real estate is simply not true. As with all preservation programs, the money goes to the landowner who asks for the least amount of money. Green Acres and Farmland preservation are fine for those who can walk away with enough to live out their

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lives, but won't work for most people who own small parcels that are not desired by the preservation programs and were only valuable as building lots. (19, 28)

RESPONSE: The Department believes the commenter is referring to the discussion at 37 N.J.R. 4815. The Department acknowledges that the prices paid by the Green Acres and Farmland Preservation programs are not the only sources of information on property values. However, the Department is using these prices not to estimate the actual market value of properties in any area but rather to make it possible to compare land prices *between* areas by providing a common metric. The fact that the per-acre prices paid by these programs for land in the preservation area do not exceed prices outside that area (and in fact are less than prices outside the area) suggests that conditions upon which appraisals were based, between the planning and preservation area, were comparable though somewhat lower in the preservation area before the Department's rules were enacted. It is also meant to illustrate that the land values owners believed existed before passage of the Highlands Act were not based upon documented information. Land appraisals and therefore values are commonly based upon development potential. The "development potential" of all property is inherently unpredictable since each parcel is unique in character and land development is fundamentally speculative in nature. Future events affecting sewerage capacity, traffic flow, air quality, or water quality can dramatically affect property value. So while there is certainly a value inherent in every property, it is much more difficult to quantify the effect of the Department's rules, if any, on the value of a particular property without taking into consideration the original limitations on the property and the exemptions, and waivers, included in the Department's rules to limit impacts on landowners..

713. COMMENT: The impact on local taxes has the potential to be enormous in towns with regional school systems that service both planning and preservation areas if the planning area allows growth without the ratable base in the preservation area to pay for the schools. (19, 28)

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RESPONSE: The comment implies that the ratable base in the preservation area would not increase, presumably due (in the view of the commenters) to constraints on growth in the preservation portion of the regional school district. However, the same argument would imply that the ratable base in the planning area *would* increase, and as stated in response to comment 708, there are several opportunities for housing remaining in the preservation area. Since the overall increase in school costs would presumably reflect the growth in school-age population in both the preservation and planning areas (though mainly the planning area), there is no apparent reason for the increase in ratables in the planning area not to keep pace with any increase in overall school costs. Moreover, it is not necessarily the case that the ratable base in the preservation portion of the school district would not also increase with the overall housing market.

714. COMMENT: It is certainly possible to quantify costs to townships once the Regional Master Plan is out and towns have decided whether or not to opt in. The costs should be updated at that time, but before the plan is implemented so irreparable harm is not done. (19, 28)

715. COMMENT: The calculation of change in value of property in the preservation area must be done before the Regional Master Plan is implemented to avoid irreparable harm to property owners and to the municipality's ability to provide services. (19, 28)

RESPONSE TO COMMENTS 714 AND 715: The Department is required to make a projected assessment of the economic impacts of a proposed regulation before the regulations are proposed for adoption or readoption. In order to accomplish this task, the Department frequently reviews the available evidence on what occurred when similar regulations took effect to develop an educated estimate of what will occur with the proposed new rules. What the commenters suggest is impossible since the impacts the commenters imply will occur when the rules are in place cannot be measured until the rules are in place. Accordingly it would not be possible to study the impacts before the rules are implemented.

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716. COMMENT: Table A-1 has no meaning in terms of actual dollars and cents. Or dollars and sense either. \$478,809 an acre for wetlands? The Department has a different way of calculating net present value (NPV) than the economics textbook authors do. Why is the Department using NPV anyway? It is meaningless to calculate a time value of money when the numbers are not money, but an attempt to value an intangible. Intangible assets are not used in NPV and internal rate of return (IRR) analyses in the private sector unless actual cash is affected. (19, 28)

RESPONSE: The \$478,809 present value total in Table A-1 was calculated by adding up the present value estimates presented in the USDA study on which Table A-1 was based; the Department did not calculate these component present values, and in any case the Department used a lower figure in preparing its own estimate of the value of wetlands. Use of NPV in circumstances such as this is accepted by most economists, although the commenter are correct that in this context the values in question do not currently represent actual cash payments by any party but rather the economic value to the State of the ecosystem goods and services provided by wetlands as determined in the 33 studies on which the USDA estimates were based. NPV and IRR analyses in the private sector are not comparable to the analyses in the economic impact statement because the former relate to profit-seeking enterprises for which projected cash flow is used to evaluate capital investments. (The Department notes however that the value of so-called “goodwill” is an intangible asset that is shown on many corporate balance sheets.) In contrast, the economic impact statement is required to evaluate, among other things, the impact on society as a whole, and “intangible” assets are key components of that value.

717. COMMENT: It is premature to state that there is a positive economic impact from implementation of the Act rules. In addition, the positive or negative economic affects must be characterized as "macro" (New Jersey proper) or "micro" relating to the communities within the preservation district. (85, 87)

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RESPONSE: The Department is required to evaluate the economic impact of every rule it proposes. Therefore, it cannot wait until the rule is in place to determine the economic impact. The Department believes, however, that the economic impact of the Highlands rules is positive in both the "macro" and "micro" sense, as described by the commenter. The Highlands rules further the goal of the Highlands Act to protect an essential source of drinking water and other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, and many sites of historic significance, without the costs associated with water purification, wastewater treatment, flood control projects and other costly undertakings that would be required to accomplish such goals after land is developed. These benefits accrue to those who live in the preservation area as well as to others in New Jersey. Therefore, the rules have an overall positive economic benefit.

718. COMMENT: The "preliminary" affects of the Act and Act rules is ambiguous. Mechanisms intended by the Act to afford parity to affected property owners are not yet in place. These include TDR's. The effective implementation of TDR's is expected to take years with the market's acceptance of same being too speculative for credible consideration at this time. (85, 87)

RESPONSE: It is the Department's understanding that transfer of development rights (TDRs) programs will be implemented shortly after the Highlands Council adopts the Regional Master Plan, which the Department understands is expected to take place by December of 2006. The market will depend upon how the credits are assigned and the availability of receiving districts and that information is currently being discussed by the Highlands Council and with the public.

719. COMMENT: The net result of transferring development potential and associated economic impact value from the preservation district to areas outside the core is an effective transfer of property worth from owners within the preservation district to other private property owners. The order of magnitude for transferred value from one group of

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private individuals to another is demonstrated by the following model. The rules cite several different development and buildout scenarios as probable occurrences within the preservation area. These include that the potential dwelling units within the preservation area (at buildout) total 215,421 units (say 215,000). The independent analysis of Holzhauer & Holenstein, LLC (Real estate advisory services) supports that the 2006 median home value within the Highlands Region is reasonably \$373,000. The impact that the rules have on property owners within the preservation area is estimated as follows:

$$215,000 \text{ units} @ \$373,000/\text{unit} = \$80,195,000,000.$$

This calculation demonstrates an \$80 Billion loss in ratable base for Highlands preservation area municipalities. Further, the above depiction does not account for other forms of development, for example, commercial and industrial. It also does not make a distinction among dwelling units as may be developed with other than single family residential homes. The "average economic multiplier" for the U.S. is cited within the rules as being 2X. Therefore, the cost to local economies resulting from the failure to construct and sell 215,000 dwelling units is estimated as follows:

$$\$80.195\text{Billion} * \text{Factor (2X)} = \$160 \text{ Billion Dollars}$$

Given the methodology cited within the rules, the loss in sales and realty transfer tax, together with the lost jobs, and jobs spending multipliers results in the conclusion that the rules will have an astronomical impact on the economy and the ratable bases of the preservation area communities.

However, this statement is not necessarily true based on the same criticisms of the rules' cost-benefit analysis. The problem must be evaluated on a micro and macro basis. Therefore, it may be stated that Statewide, and over a period of time, the loss of ratable base, and the gross affects on the economy are likely to be negligible. The rules do not prevent development, the same are just redistributed. The absorption of the theorized dwelling units will be delayed due to the increased regulation and the time necessary to facilitate increased density potentials within "appropriate" areas for development but the gross demand for housing will eventually be met. What can be stated with certainty is that whatever economic benefit is received by areas outside the preservation area will

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come at the expense of the property owners and the local economies within the preservation area. (85, 87)

RESPONSE: For the reasons set forth at length in the economic impact analysis, the Department believes that the long-term statewide impact of the rules being readopted will be significantly positive rather than negligible or neutral. In terms of the asserted short-term redistributive impacts, the Department notes the following: (1) The commenters assume that the value of \$373,000 per home can be extrapolated to new housing. However, as the supply of housing increases, the price of new housing may decline as a result of supply and demand effects and because as new housing is built, the areas in which the construction takes place will, by definition, become more congested and therefore less attractive to subsequent homebuyers. (2) To the extent that development occurs outside the preservation area, the communities in the preservation area will not have to bear the costs of development, for example, the cost of new roads, water and sewer lines, schools, fire and police protection, etc. To the extent such costs are avoided, communities in the preservation area may experience no net fiscal impact. (3) Some portion of the new housing would likely be affordable housing, which would likely have a lower average price than the existing median cited by the commenters. (4) Any change in sales tax or realty transfer tax revenues is already reflected in the multiplier, and such changes would not constitute additional benefits or costs to communities in the preservation area. (5) The Department's rules contain several exemptions to permit single-family dwellings so the estimated loss of 215,000 units is an obvious overestimate. To date, the Department has confirmed 351 exemptions. (6) The Department's regulations may result in some level of reduction in value for landowners in the Highlands but does not deny all use. Consequently, municipalities will not assess these lots as having zero value. (7) A transfer of development program is yet to be developed and its potential positive impacts on property owners cannot be assessed.

For these reasons, the Department believes that any short-term redistributive impacts are likely to be significantly lower than the commenters project.

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720. COMMENT: The Act and the Act Rules place significant emphasis on the quality of water and the costs associated with water treatment. Based on the Act-Rules presentation, it is evident that less than 1 percent of the users of water treated by Highlands Water Purveyors actually live within the preservation area. Further, and most significant, is the Act-Rules' representation that restricting development within the preservation area will "save" millions in future costs. The analysis fails to accurately represent that, as long as the development does occur, the costs will be incurred. As the restriction of development within the PD redistributes growth to other areas, any representation that costs will be reduced to the levels cited rings hollow unless that development does not occur at all. (85, 87)

RESPONSE: The Department acknowledges that many users of water originating in the Highlands live outside the Highlands. However, this fact does not reduce the overall benefits to the residents of New Jersey. The savings estimates are based on a study performed by the North Jersey District Water Supply Commission, an independent agency. That study analyzed the *difference* in water treatment costs that would occur based on where in the relevant watersheds future development occurs. Development upstream of municipal water intakes has a greater impact on water treatment costs than development downstream, and it is this difference in treatment costs that is relevant to the economic impact analysis.

721. COMMENT: The summary states that New York City is meeting its EPA drinking water standards by acquiring land areas in upstate New York and saving about \$8 billion in water treatment costs by doing so. It is not clear how preventing the further degradation of the New York water supply helps meet the EPA standard. Is the EPA standard a current standard or a future standard? Simply protecting land from development does not improve water quality if no other measures are taken to clean up the existing sources of contamination. (85, 87)

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RESPONSE: New York City was out of compliance with then-applicable EPA standards.

Therefore, in addition to preventing or minimizing the extent of future threats to the quality of its drinking water (which was of significant concern to the City and to EPA), the New York program included measures to address then-existing sources of pollution.

722. COMMENT: The economic impact statement notes the New York/Catskills example of constraining land to protect water supply, but fails to mention the huge financial incentives provided to the affected landowners, including 100 percent cost-share funding for the implementation of farm conservation plans. (75)

723. COMMENT: Reference is made to the work of New York City in the protection of its reservoir and watershed system, particularly since 1990. However, the economic impact statement completely ignores the methods taken in order to achieve those results. The New York City method included acquisition of land (and then active forest management on that land), conservation easements, stricter limits on stormwater runoff and discharge to ground or surface waters, and financial incentives for environmentally sound development projects. Put simply, the method utilized by the State of New Jersey turns the New York City model on its head by devaluing private land, then attempting to purchase it at a lower price. (40, 41, 42)

RESPONSE TO COMMENTS 722 AND 723: The Department acknowledges the differences between the New York City watershed protection program and its rules. However, New Jersey has taken a more comprehensive approach to ensuring that watersheds in the Highlands are protected with the passage of the Highlands Act. However, there are several provisions in the Highlands Act to reduce the impact on property owners. One provision specifically excludes agricultural and horticultural uses from the definition of “major Highlands development” thus keeping these activities unregulated by the Department’s regulations for the preservation area. A second provision is the requirement that an agency seeks to preserve open space in the preservation area using funding from the Garden State Preservation Trust, two appraisals

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must be obtained (one representing pre-Highlands values and the other representing current value). The agencies seeking to purchase the land are required to inform the landowner of both values and negotiate using the higher of the two. A third provision is the list of 17 exemptions to the Act, many of which provide criteria by which the construction of single family homes remain exempt from the requirements of the Act. Another provision is the requirement that the Highlands Council establish a transfer of development rights program for the Highlands region.

724. COMMENT: The buildout figures provided in the rule proposal are based on erroneous assumptions. It does not reduce development potential by factoring out environmentally constrained lands, preserved lands, and lands already developed. Failing to factor these land areas out yields high buildout numbers. Any worthwhile buildout will factor out these land areas and provide for further reductions for roadways and other easements that are typically necessary. The buildout provided in the summary is flawed and should not be used for any meaningful purpose. (85, 87)

RESPONSE: The commenter is correct in implying that the Department's build-out analysis represents an upper bound on the number of dwelling units that could be constructed in the preservation area and that a more precise estimate would require taking account of environmentally sensitive lands, land needed for roads, etc. Data on these factors was not available by zoning status, which made it difficult to quantify their precise impact on build-out capacity; moreover, including them in the analysis would have required a much more complex analysis, for example, one that estimated the land required to meet future road needs. However, the issue of development capacity is simply too important not to address in the economic impact statement. The Department therefore developed a build-out analysis using conservative assumptions to demonstrate that even the preservation area by itself appears to have sufficient capacity to absorb a plausible level of population increase. The Department continues to believe that the analysis adequately makes this case.

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725. COMMENT: The projected population of the preservation area relies on Federal and State estimates of population growth in the Highlands Region as a whole. Growth in the preservation area should not be based on these estimates. In Warren County, growth in the preservation area is generally less than in the planning area for several reasons. Most of the public sewer is in the planning area. Most of the flat lands are in the planning area. It is more difficult to construct septic systems and drill wells in the preservation area because of its geologic formations, depth to bedrock, and slopes. Consequently larger acreages are needed to sustain on-site water and septic system. The Department could have estimated population growth in the preservation area by reviewing the development applications that have been approved. The Department could have obtained the information from the respective county planning departments. (85, 87)

RESPONSE: The Department based its assessment of economic impacts on the long-term picture insofar as that can be estimated with reasonable confidence. Review of approved development applications would provide at most a partial near-term picture of future population growth in the Highlands. In contrast, the population projections published by the New Jersey Department of Labor (NJDOL) chart anticipated growth to 2025. Unfortunately, those projections are only published for counties and not for smaller areas within counties. Moreover, the Department's economic impact statement did not separately analyze the implications of future population growth for the preservation and planning areas but for the Highlands as a whole, and then only in the context of estimating the projected demand for housing in the Highlands. The distribution of future housing development within the Highlands will be determined by a variety of factors, including, as indicated by the commenter, the need for larger acreages to sustain on-site water and septic systems in the preservation area.

726. COMMENT: In Impact on Property Value, the Department states that "for the period 1999-2003, the Green Acres Program acquired approximately 22,400 acres of open space in municipalities located in the Highlands Region, the largest portion of which was located wholly or partially in the preservation area. Based on the prices paid

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by the Program for the individual acquisitions, the following average per acre prices were:

Wholly in preservation area (PA) \$1,885

In Highlands Region; partially in PA \$3,379

In Highlands Region; wholly outside PA \$5,516

In Warren County, when the Planning Department administered the County's open space acquisition program, land values for open space in the preservation area were close to \$3,000 to \$5,000 per acre. This leads me to believe that the figures presumed by the Department in the rule proposal reflect the Green Acres match and not the full cost of property acquisition after the local and non-profit contributions are made. This would skew any conclusion made by the Department in how much land values may be reduced in the preservation area. (85, 87)

RESPONSE: The commenter is correct that the figures referred to represent the cost to the Green Acres program rather than the total cost of the land purchased. However, the importance of the figures lies in their relationship to each other rather than in their absolute levels. The Department's purpose in citing these figures was to show that the prices paid by Green Acres were no higher in the preservation area than outside it. Since there is no indication that the Green Acres "match" represents a higher proportion of the total cost inside the preservation area than outside it, the Department believes that the comparison is a fair one and supports the conclusion drawn from it in the economic impact analysis.

727. COMMENT: Regarding the assessment of Impact on Property Taxes, the statement that development results in substantial costs to society ignores the fact that development also has a benefit to society. Otherwise why would our society build homes and businesses unless there was a social and economic benefit and need to do so. (85, 87)

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RESPONSE: The Department did not mean to imply that development has no benefits; the issue is whether and under what circumstances the costs outweigh the benefits. Many of the benefits of development tend to occur in the early years of that development while many of the costs, for example, road and highway widening, school construction, etc., tend to occur in later years. Since many individuals focus on short or near-term impacts, there tends in practice to be a bias in favor of activities that seem to show quick payoffs, regardless of their longer-term cost. In addition, many of the long-term costs of development are what other commenters have called “intangible,” for example, reduction in scenic amenities, reduction in wildlife populations, removal of natural water purification systems such as forests and wetlands, and the like. Where those intangible benefits are not taken into account, the true costs of development to society tend to be understated, and therefore the net benefits tend to be overstated.

728. COMMENT: Regarding the costs on Highway infrastructure, I-287 is a major north south highway the Department should mention. (85, 87)

RESPONSE: The Department acknowledges the importance of I-287 but does not understand its relationship to the regulations being readopted. Uncontrolled development in the Highlands would increase the already heavy burden of traffic on north-south routes in the Highlands such as Route 206 and on east-west routes that pass through the Highlands such as I-78 and I-80 and could in fact necessitate major highway expansion in the Highlands at a time when the State’s resources for highway construction, improvement, and maintenance are already strained.

729. COMMENT: In Appendix B, Estimation of New Jersey Ecotourism Benefits, the analysis should compare preservation area employment gains resulting from land development vs. the ecotourism benefits. The analysis should provide this comparison to see if ecotourism is the preferred industry for the area. (85, 87)

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RESPONSE: The Department is not authorized to investigate alternative commercial or industrial bases for localities within the State and is not suggesting that one industry is preferable to another. The Department is simply analyzing the economic impacts of the rules being proposed for readoption.

730. COMMENT: Willingness to pay studies at Appendix C, should not be used. Are we to believe as shown on TABLE A-1 that people will pay \$83,159 per acre for wildlife habitat? The public becomes suspicious if the government pays more than \$5,000 per acre for marginally developable lands. Land values are based on competent appraisals and bonafide sales transactions, not through willingness to pay studies. (85, 87)

RESPONSE: Willingness to pay studies are one of the tools recognized by economists as legitimate for use in valuing natural assets under certain circumstances. Wildlife habitat is infrequently bought and sold in the commercial real estate market, and comparable sales are therefore not usually available. Commercial appraisals do not usually take into account the non-cash benefits of preserving wildlife habitat, since those benefits often accrue to society as a whole rather than to individual landowners or prospective purchasers. The estimates used by the Department were taken from published peer-reviewed studies by independent outside experts, and the Department believes that they are a proper part of the basis for the economic impact analysis.

731. COMMENT: The commenters strongly suggest that the economic impact statement be reevaluated. These rules do not result in a "positive economic impact" based on the devaluation of land within affected areas. Ignoring the effect of the devaluation of farm and forest land within the preservation area, as reflected in private sales and in the cancellation of several multi-million dollar real estate contracts, completely undermines the economic impact statement. Furthermore, this statement has exacerbated a deep and fervent resentment of the State of New Jersey and the Department within the citizenry of farm and forest landowners. (40, 41, 42)

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RESPONSE: The Department believes that the economic impact statement provides an appropriate analysis of the potential impacts of readoption of the rules. As the analysis concludes, from the standpoint of society as a whole, the overall benefits of the rules proposed for readoption outweigh the costs cited by the commenter. The Department has not seen any hard data that documents the effects on land sales and prices cited by the commenter. The Department notes that the level of detail contained in the economic impact statement goes well beyond the level of detail routinely provided in such statement in New Jersey, reflecting the Department's appreciation of the importance of these issues to the residents of the Highlands.

732. COMMENT: The economic figures quoted within the "Wetlands and Other Highlands Open Waters" section are unsupportable. First, it relies on results of a study that has not been completed to come up with values of \$20,400/acre for wetlands. However, these figures completely ignore the principle of "willingness to pay." First, accurate figures would rely on land sales involving wetlands within the preservation area. Then, since most, if not all, of those lands were already protected by other laws, then the value of those lands previously protected should be subtracted from the first number, leaving the reasonable reader with a figure significantly less than the \$11.8 billion/year given in the statement. (40, 41, 42)

RESPONSE: The Department disagrees. The \$20,400 figure was in fact based on studies of willingness to pay; however, it appears that the commenters may be using a definition of this term that does not reflect the standard economic definition, since the commenters refer to actual land sales, which implies actual payments rather than willingness to pay. The prices paid in actual sales are part of the broader category of willingness to pay. The commenters are correct that some of the wetlands and open waters in question already received some protection under other laws and regulations, and to that extent the analysis presents the total benefits of the rules proposed for readoption rather than their net incremental benefits.

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733. COMMENT: The economic numbers regarding "Upland Forests" are based on an internal study authored by the Department and included such economic "analysis" as: (1) The land value of the holdings of the State Parks and Forest system is valued at \$1.2 billion. Any reasonable person would realize that the development potential of Liberty State Park in Jersey City alone is equal to about that amount. (2) The value of the standing timber on 238,336 acres of State Parks and Forests that is not restricted by wetlands, natural areas, or active recreation rules is said to be worth \$270 million. This is stated as an opportunity cost, due to the unwillingness of the Division of Parks and Forestry to actively manage its own resource. If the State's own methodology were used to analyze timber revenue of one percent of total reserves per year, or \$2.7 million, the net present cost of not managing the resource would be equal to \$189 million/year not including jobs generated as a result of sales benefits. Nowhere in the study does it describe the reason that forests cannot be actively managed within appropriate areas of the State Forest and Park system. (3) The operating costs of the State Park and Forest system equal \$30 million/year. The study insists that this expenditure is actually an economic benefit with a present value of \$2.1 billion. If the park service cost \$60 million/year to administer, it would be difficult to believe that the present value would be \$4.2 billion/year. (40-42)

RESPONSE: (1) In citing an estimate of \$1.2 billion for the development potential of Liberty State Park alone, the commenters appear to imply that the Department has underestimated the value of Highlands forests. Given its proximity to Manhattan, the development potential of Liberty State Park is probably not representative of forestland in the Highlands. Moreover, the actual figure cited in the economic impact analysis for the present value of Highlands forests alone is \$12.3 billion rather than \$1.2 billion. (2) The estimate of \$270 million is based on the actual annual increase in commercial-grade sawtimber and on actual publicly quoted prices for specific tree species. Consequently there is no reason to take one percent of that number for further calculation. Thus the Department does not understand the commenters' reasoning for their estimate of \$189 million and is unable to compare it to the \$270 million figure. The relevance of the

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comments about the management policies of the Division of Parks and Forestry is not clear. (3) The operating costs of the State parks and forests generate economic activity in the same fashion as any other payroll and any other purchases of goods and services and therefore represent a source of economic benefits; in the context of the State parks and forests they also reflect an economic cost.

734. COMMENT: The figures utilized regarding upland forests, having been copied from the State Parks and Forests study, do not correspond with upland forests (for example, economic values of wetlands, etc.) and figures found elsewhere in the economic impact statement (for example, rare, threatened and endangered species habitat) and should not be "double-counted." (40, 41, 42)

RESPONSE: The Department does not understand this comment. The Department does not believe that it has double-counted any benefits in its analysis.

735. COMMENT: Reduction in land values as a result of this takings-without-compensation has been well documented as a result of several well-publicized lawsuits. Willingness to pay can be reasonably measured by hard data specific to New Jersey by researching the amounts donated as a result of the wildlife "check off" donation available on each NJ citizen's State income tax return. To the best of the commenters' knowledge, State revenue from the wildlife donation does not equal "tens or hundreds of millions of dollars annually" (40, 41, 42)

RESPONSE: The Department disagrees that the wildlife check-off is an adequate measure of the value assigned to preserved open space (including species habitat) by the residents of New Jersey. For example, approval rates for open space bond issues, many of which impose new tax burdens on the municipalities issuing such bonds, indicate a willingness to pay far exceeding the revenues from the checkoff. According to information on local budgets from the Department of Community Affairs, municipal open space taxes totaled \$66.5 million statewide in 2004 and \$73.5 million in 2005, an

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increase of \$7 million or 10.5 percent. The substantial magnitude of this willingness to pay is confirmed by many studies from other states. Unfortunately, such studies have not been performed in New Jersey, forcing the Department to use the indirect evidence cited in the economic impact statement.

736. COMMENT: The expected benefits of the rules proposed for readoption with amendments are multifold. The entire Highlands preservation area would experience benefits of \$80 million annually in avoided drinking water treatment costs. Approximately 41,140 acres of wetlands (excluding buffers) valued at \$20,400 per acre would be preserved and 17,979 acres of open waters (excluding buffers) valued at \$13,700 per acre would be protected from inappropriate development. Approximately 26,688 acres of flood hazard areas (58,930 acres including buffers) will be protected from inappropriate development, thereby avoiding or reducing flood control and recovery costs, only the magnitude of the savings being uncertain. Upland forests of 57,065 acres, valued at almost \$3,400 per acre, will be protected from inappropriate development. Habitat for threatened and endangered wildlife species amounting to 300,388 acres (excluding buffers) will be protected from inappropriate development at an estimated total benefit of tens to hundreds of millions of dollars per year. Four national historic landmarks, 434 individual historic sites, and 52 archaeological sites including Revolutionary War sites would be preserved; the average statewide value of such sites has been estimated at \$6 million per site per year. Unquantified benefits would be realized due to the protection of areas containing unique and irreplaceable resources such as unique ecological communities, vernal habitats and scenic resources. It is clear that the preservation area ecosystems provide very substantial economic value to New Jersey that in many cases is either irreplaceable or replaceable only over extremely long time periods. (27, 49)

RESPONSE: The Department acknowledges these comments in support of the rules.

Federal Standards Statement

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737. COMMENT: In many cases, these rules are not necessary in order to meet Federal Standards. Septic densities, buffers, and habitat protection and limitations on impervious surface (which doesn't even have a federal guideline) can all be in compliance without these measures. No provisions have been made for development that does not harm the water supply and has only a minimal impact on habitat. For some reason, the Department has chosen to exceed Federal Standards without sufficient quantification of the benefit, and with poor estimation of the costs. (19, 28, 45, 46)

RESPONSE: The Department agrees that much of the Highlands regulations are not necessary in order to meet Federal standards. In fact, many of New Jersey's environmental regulations are more protective than comparable Federal standards. For example, the Department's wetland regulations, safe drinking water standards, ground water standards, and hazardous waste cleanup standards are all more protective than required by Federal standards. The State also protects flood plains by way of its flood hazard area control standards, for which there is also no comparable Federal program.

The Department has provided sufficient information regarding the purpose of its rules and the estimated costs and benefits. The Department provided a Federal Standards Analysis that compares the Highlands rules and the comparable Federal standard, if one exists, and that explains in detail why each rule provision is required regardless of whether there is a comparable Federal standard. The Department has also provided an extensive economic impact analysis that describes in detail the costs and benefits of the rules in their entirety.

738. COMMENT: Basic definitions such as those for "impervious surface", "open water" "intermittent stream" conflict with those in both Federal regulations and those in other the Department regulations, with no apparent benefit. (19, 28)

RESPONSE: The Department has not provided a definition of "intermittent stream" in the Highlands regulations. However, the definitions of "Highlands open water" and

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“impervious surface” were provided by the Highlands Act at N.J.S.A. 13:20-1.4. It appears that the New Jersey Legislature may have used language similar to that in other existing state or Federal definitions and then adapted those definitions to provide protections consistent with the intent of the Highlands Act. For example, like the Highlands definition of impervious surface, the State rules on Coastal Zone Management (N.J.A.C. 7:7) include gravel in the definition of impervious cover and limit the quantity of impervious cover to three percent. The Department does not agree that there is no benefit from the Highlands definitions of “Highlands open waters” and “impervious surface” since they provide a greater level of protection for water quality than the definitions used elsewhere in the State. For example, by including intermittent streams in the definition of Highlands open water, intermittent streams are also protected. Intermittent streams frequently flow into perennial streams. Therefore, by adding protection for intermittent streams, the New Jersey Legislature has increased the level of protection for perennial streams. The same principal applies to the definition of impervious surface. The amount of impervious surface is limited to facilitate the return of water to the aquifer. By using a definition of impervious surface that includes gravel like existing rules for the coastal zone, the New Jersey Legislature has decreased the types of materials that can be placed in the preservation area thus assuring that the maximum amount of recharge to the aquifer will occur.

739. COMMENT: "Endangered Species" became distorted into "rare in New Jersey". "Rare in New Jersey" programs should be in the venue of public awareness and nature tours, and not part of land use regulations since it is the evolution of the ecosystem that caused them to become rare. The bears are back now that trees are not rare anymore, but that means that the vesper sparrow and the bobolink will have to find a new field to live in. This is not a land use issue. Protection of 'rare in New Jersey species' was not directed in the Highlands Act. (19, 28)

RESPONSE: The commenter is not correct in stating that endangered species became distorted into rare species, or that the Highlands Act did not direct the protection of rare

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species. The Department has defined rare species at N.J.A.C. 7:38-3.11 to refer to wildlife species listed as special concern that warrant special attention because of population decline or inherent vulnerability to environmental deterioration, or habitat modification, and to plant species of concern listed at N.J.A.C. 7:5C-3.1. Therefore, this is a specific and not a relative term. There are specific plant and animal species that have been identified as “rare” but not “endangered” in New Jersey. Further, the Highlands Act at N.J.S.A. 13:20-34 prohibits the Department from approving a Highlands permit unless the Department can find that the permit, “will not jeopardize the continued existence of species listed pursuant to “The Endangered and Nongame Species Conservation Act,” P.L.1973, c. 309 (C.23:2A-1 et seq.) or the “Endangered Plant Species List Act,” P.L.1989, c. 56 (C.13:1B-15.151 et seq.), or which appear on the federal endangered or threatened species list, ***and will not result in the likelihood of the destruction or adverse modification of habitat for any rare, threatened, or endangered species of animal or plant.***” (emphasis added). Consequently, the Department is required to assess the potential impacts of a Highlands permit on endangered, threatened or rare animal and plant species.

Jobs Impact

740. COMMENT: This Impact Statement is incomplete and inaccurate. Real studies should be done regarding these impacts before these proposed regulations are implemented. (9-12)

RESPONSE: The Department is required to make a projected assessment of how a proposed regulation will affect jobs, before the rules are in place. Therefore, what the commenters suggest is difficult because the Highlands Act was implemented in phases. Some provisions of the Act were effective immediately upon passage of the law, others took effect approximately nine months later, and the final rules are not yet in place. Thus, in order to provide a complete and accurate projection of the impact of the rules on jobs,

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the Department reviewed what occurred when similar regulations were implemented and made an educated assessment of what will occur when the new rules are adopted.

741. COMMENT: The jobs associated with the identification, protection and enjoyment of natural resources are important but are not likely high-paying jobs. The economic impact of potentially losing existing or not acquiring non service-oriented, high tech or other professional businesses is not addressed. (75)

RESPONSE: There is no reason to believe that readoption of the Highlands rules will result in the loss of existing high tech or professional businesses. As stated in the Department's Jobs Impact analysis, existing businesses will not be affected until or unless they propose to conduct a "major Highlands development" at any time in the future. In addition, if a business is proposing an expansion and can keep the expansion within 125 percent of the existing building and limit the increase in impervious surface to no more than 0.25 acres, the business will remain exempt. Further, an existing business can be sold and a new owner can continue that business or any other without being regulated by the Highlands Act unless a major Highlands development is proposed. The number, types, and salaries of other jobs which the Highlands might attract are highly speculative and would require a separate, time-consuming and costly study even to define plausible ranges for these parameters. The estimates presented in the economic impact analysis are based on actual data or on accepted values for the relevant parameters, for example, the strength of economic multiplier effects.

Agriculture Industry Impact:

742. COMMENT: The Agricultural Impact Statement in the rule states that the implementation of the rule will have no impact on agricultural or horticultural use or development because they are excluded from the definition of major Highlands development. This statement does not address the impact of the rule on equity or agricultural viability. The land is a farmer's key financial asset, so the development value

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is critical. A Harvard land study shows that more than 80 percent of farmland value in New Jersey is its development value. With 25 and 88-acre septic density requirements this severely impacts the land value. Reduced net worth affects the landowner's ability to hedge risk, obtain loans and also the terms of long- and short-term lending. Although there is some protection in the January 1, 2004 appraisal date, the standards for the Green Acres and Farmland Preservation Funding Program, the funds are dwindling and are due to expire in 2009. The projection is that it's going to be defunct in 2007. There has not been a dedicated funding source for the purchase of these development rights and for outright land purchases in the Highlands. (62, 69, 74, 87)

743. COMMENT: The statutory structures to protect the equity interests of large lot owners are inadequate and ephemeral. Funding for acquisition through Green Acres (P.L.2004, Ch. 120, 3) and Farmland Preservation (P.L.2004, Ch. 120, 44), programs will soon be exhausted and the period for payment of pre-Act values lapses in 2009. The Transfer of Development Rights (TDR) program (P.L.2004, Ch. 120, 46) is ephemeral. The TDR program in the Pinelands took twenty years to develop and incorporated mandatory receiving zones in a finite area. The Highlands TDR program provides for voluntary receiving zones and has been described by staff of the Highlands Council as the largest such program ever undertaken in the United States. (85, 87)

RESPONSE: The Green Acres and Farmland Preservation programs were given funding by the State Legislature to purchase land and development rights specifically in the Highlands: \$20 million was appropriated for Green Acres land acquisition and \$15 million for the State farmland preservation program. To date, this funding is not exhausted.

It is the Department's understanding that transfer of development rights (TDRs) programs will be implemented shortly after the Highlands Council adopts the Regional Master Plan, which the Department understands is expected to take place by December of 2006. The availability of receiving districts and the assignment of credits is currently being discussed by the Highlands Council and with the public.

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However, as stated in response to previous comments, the Highlands Act contains more than TDR provisions to reduce its impacts on property owners, including an extensive list of exempt activities, the exclusion of agricultural and horticultural uses from the definition of “major Highlands development” thus keeping these activities unregulated by the Department, the requirement that agencies seeking to acquire land for open space and farmland preservation obtain pre- and post Highlands appraisals and negotiate using the higher value, and the provision of a waiver for the taking of property without just compensation if a Highlands approval has been denied and the owner can recognize no alternative use for the property.

744. COMMENT: The assessment is incorrect. Without the value of the land, the farm is not viable. Check the Farm Bureau’s income statistics. Farms generally operate at a loss and need the value of the land to survive. The new buffers take huge amounts of land out of agricultural use and incur enormous costs for fencing. Water allocation reductions and delays could severely reduce profits. It is possible that farming for a living is already past the point of recovering in New Jersey, but this law does not help agriculture, it puts the final nail in the coffin. (19, 28)

RESPONSE: As stated in the Agriculture impact statement, the Department’s regulations relating to water allocation and the requirement for 300-foot buffers adjacent to Highlands open waters do not apply to agricultural and horticultural uses and development since such uses are excluded from the definition of “major Highlands development” and therefore are not regulated. Therefore, farmers should not lose agricultural land to buffers or spend time pursuing permits to conduct agricultural activities.

The Department understands that five factors are considered by a loan agency when evaluating a loan application. These are character (the owner’s credit score), capital (the owner’s net worth), collateral (security pledged for the payment of a loan), capacity (earnings and cash flow) and conditions (the terms of the loan). The Department’s rules have the potential to affect capital and collateral but would not affect the remaining

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factors. Consequently, the Department cannot make generic conclusions regarding whether loans will be denied to agricultural operations in the Highlands.

745. COMMENT: Prior to possibly destroying a critical industry to the local economy and to the watersheds themselves, real work should be done regarding the impact to Agriculture. A cursory review of newspapers articles which cover the Highlands Council meetings show that farmers are being hurt. The Department representative to these meetings should have given the Department input into these issues. Why was no work done to identify the impact of decreased land values on agriculture? To say that there was not enough time is insulting and discriminatory. The Department had enough time to put together an elaborate benefit study. Why was there not time to find out who was being hurt? This implies a prejudice against farmers and a willingness to promote the objectives of environmental organizations. This is not equal protection and is contrary to public policy. (9-12, 28)

746. COMMENT: The rules' impact on vacant agricultural land is also misrepresented. Per Plantinga (February 2002) 82 percent of New Jersey agricultural land value was found to be attributable to agricultural and future development rights. In an independent study of New Jersey agricultural property conducted in cooperation with the New Jersey Farm Bureau (as differentiated from other surveys cited within the rules) Clarion Samuels Associates (September 2004) found that the decrease in agricultural land values attributable to down-zoning ranged from "no impact" to as high as 77 percent. The majority of data supports loss in value in the 50 percent to 60 percent range. What may be gleaned from these studies supports the independent appraisal analysis conducted by Holzhauer & Holenstein, LLC (Real estate advisory services). Clearly the value of agricultural land is base on highest and best use which is seldom for agriculture. If the development potential is taken away through regulation, the value of the property is negatively impacted. (85, 87)

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RESPONSE TO 745 AND 746: In providing the required impact analyses, the Department is not required to undertake new studies to support its rules. Rather, the Department uses the best available published information to provide a thorough analysis. The study cited by the commenters was not available to the Department. In assessing agricultural impact, the Department projected what affect its regulations would have on the ability of farmers to continue to farm the land. The Department determined that because agricultural and horticultural activities are exempt in their entirety from the rules, there would be no new restrictions and no changes to the way farming would be conducted in the preservation area. Further, because the Highlands Act and these rules discourage development in the preservation area, the development pressure which results in the loss of farms statewide would be reduced and agricultural uses promoted in the preservation area. The Department did not consider the development potential of property as a function of agricultural use since all property owners have an interest in this topic regardless of their occupation. Consequently, the impact of the Department's rules on property values was assessed overall as part of the economic impact assessment. The Department also did not consider the commenters' concerns regarding the affect of its rules on the ability of farmers to get loans, because as stated in response to comment 745 above, capital and collateral are only two of several factors considered by loan institutions. The remaining factors relate to personal financial circumstances and the Department did not speculate about the number of farmers who might be affected if the loan institutions perceive a reduction in collateral or capital.

The Department notes that the Act contains several provisions intended to ameliorate hardships for landowners and farmers. As stated above, the Highlands Act specifically excludes agricultural and horticultural uses from the definition of "major Highlands development" thus keeping these activities unregulated by the Department's regulations for the preservation area. There are 17 exemptions provided by the Highlands Act and these rules for activities other than agricultural uses. The Highlands Act requires the Green Acres program, State Agricultural Development Committee (SADC), local government unit, or a qualifying tax exempt nonprofit organization seeking to acquire land to be preserved in the Highlands, to obtain two appraisals (one representing pre-

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Highlands values and the other representing current value). The agencies seeking to purchase the land are required to inform the landowner of both values and negotiate using the higher of the two. Another provision intended to alleviate hardship for landowners in the Highlands is the requirement that the Highlands Council establish a transfer of development rights program for the Highlands Region. Such program could provide another source of revenue to landowners with land upon which development has been restricted.

747. COMMENT: The rules document accurately reports the impact that the rules will have on agriculture. Effectively stated, the rules have no impact on agriculture. In consequence, activities that are otherwise restricted by the rules are permitted under the Right to Farm. The implications of this condition support that the unavoidable affects of farming, including soil erosion and application of fertilizers and nutrients, will continue unabated. Even under best practices, tilled land and dairy farming surpasses many forms of development with respect to sustained impact on the land and water. (85, 87)

RESPONSE: As the commenter states, the Highlands Act provides protections for farming that are not provided for development activities, for example allowing the unlimited disturbance of soil, which may result in soil erosion, and the ability to apply fertilizers to the land. In fact, the Highlands Act states that there are approximately 110,000 acres of agricultural lands in active production in the New Jersey Highlands; that these lands are important resources of the State that should be preserved; that the agricultural industry in the region is a vital component of the economy, welfare, and cultural landscape of the Garden State; and, that in order to preserve the agricultural industry in the region, it is necessary and important to recognize and reaffirm the goals, purposes, policies, and provisions of the "Right to Farm Act," (N.J.S.A..4:1C-1 et seq.) See N.J.S.A. 13:20-2. At N.J.S.A. 13:20-29, the Highlands Act provides some limitations on the amount of impervious surface that can be placed on a farm management unit, to be enforced by the Department of Agriculture. The relatively unlimited protections for farming are appropriately balanced by the strict protections provided to the preservation

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area by the Act and the Department's rules when a major Highlands development is proposed.

Regulatory Flexibility Analysis

748. COMMENT: It is stated that the number of small businesses, including farms and small builders that will be affected is unknown. As the impact is so severe on them, the number of people affected should be looked at. That information exists in State databases. The cost to small businesses is also grossly underestimated. The costs of hiring environmental consultants will be in the many tens of thousands for each application. The costs of being unable to expand or get enough water need to be examined. The inability of new entrepreneurs to come into the area will cause hardships on those who will be forced to commute as existing businesses leave the area. (19, 28)

RESPONSE: The Department did not consider farms as part of the definition of "small businesses" under the regulatory flexibility analysis because it addressed impacts to agriculture as part of its agriculture industry impact. If it had included farms, the Department would have concluded that there is no need for more flexible regulatory standards because, as stated above, the Department's rules do not regulate agricultural and horticultural uses at all.

While the Department may be able to obtain information to approximate the number of small businesses currently existing in the preservation area, as stated in the Department's regulatory flexibility analysis, existing businesses will not be affected until or unless they propose to conduct a "major Highlands development" at any time in the future. In addition, if a business is proposing an expansion and can keep the expansion within 125 percent of the existing building and limit the increase in impervious surface to no more than 0.25 acres, the business will remain exempt. Further, an existing business can be sold and a new owner can continue that business or any other without being regulated by the Highlands Act unless a major Highlands development is proposed. Consequently, the Department does not agree that the Highlands Act is having a severe

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impact on small businesses, will force existing businesses to leave the area, or will prohibit new entrepreneurs from coming to the area.

Those businesses that propose a major Highlands development and that exceed the limits for an exemption are required to obtain a Highlands preservation area approval (HPAA). The costs for obtaining an HPAA were stated in the Department's published regulatory flexibility analysis as ranging from \$5,000 to \$7,000 to hire a consultant or higher if a Highlands resource area determination (HRAD) is also obtained.

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Federal Standards Analysis

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

The Highlands Act delineates a contiguous area in the northwest of the State of New Jersey as the “Highlands Region” based on common physical and geographic features. It further divides the Region into two parts: the preservation and planning areas. The Highlands Act mandates that the Department’s rules provide enhanced environmental standards for development in the preservation area to protect its important water, ecological and cultural resources. By inference, the planning area is deemed to have fewer critical resources and may be more suitable for development.

The enhanced standards in the preservation area apply to all aspects of potential development. They include strict limitations on obtaining new sources of potable water and constructing new wastewater facilities, and preclude development in areas containing statutorily-identified, environmentally sensitive features. Further, the Highlands rules require a comprehensive analysis of the environmental impact of all project components.

A comprehensive regional approach to regulation is not common in Federal environmental regulation. The Federal Environmental Protection Agency (EPA) establishes one set of standards nationwide and then requires individual states to establish their own, comparable standards. States often retain the ability to devise more stringent or regional standards if appropriate. There is no requirement to apply all Federal standards to a single site in a comprehensive manner. That is, certain aspects of a proposed development may comply with a standard and be approved while other aspects may not comply and may be denied. There are no comprehensive Federal standards that apply specifically to the Highlands Region like the State rules adopted herein. Therefore, there is no basis for comparison between these rules in their entirety and any one specific

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Federal regulation. However, some of the individual standards comprising a Highlands preservation area approval do have comparable Federal regulations.

Comparison of Individual Components of the Highlands Regulations to Federal Regulations

The Federal Clean Water Act (33 U.S.C. §1251 et seq.) provides the fundamental requirements for protection of the nation's surface and ground water resources, including wetlands. It establishes standards for safe drinking water, classification of surface and ground water, discharges to surface and ground water and, in Section 404 of the Act, an extensive program for the regulation of discharge of dredge and fill material to waters of the United States, including wetlands.

The Department's Highlands preservation area approval (HPAA) review is comprised of several components that may or may not have comparable Federal standards.

Water Supply

There are no comparable Federal standards for water supply.

Safe Drinking Water

The Highlands rules require compliance with the State's safe drinking water standards. The Safe Drinking Water Act (Federal SDWA) was enacted in 1974, and amended in 1986 and 1996 (42 U.S.C. § 300f et seq.). The EPA promulgated regulations for twenty-three drinking water contaminants at 40 CFR §141 in 1975. The Federal SDWA regulations were amended in the late 1980's and 1990's such that there are now more than 90 regulated microbiological, chemical and radiological parameters.

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In response to the passage of the Federal SDWA, the State SDWA was passed in 1977 and the Department's Safe Drinking Water regulations were adopted in 1979. The Department adopts and incorporates by reference all National Primary Drinking Water Regulations, 40 CFR §141, as amended and supplemented, including all siting requirements, filtration and disinfecting requirements, maximum contaminant levels, monitoring and analytical requirements, reporting requirements, public notification requirements, and record keeping requirements as the New Jersey primary drinking water regulations applicable to all public water systems. Therefore, the adopted Highlands rules are no more stringent than the Federal regulations with respect to safe drinking water standards.

Septic Density

The Federal Clean Water Act (CWA), 33 U.S.C. §1251 et seq., as amended by the Water Quality Act of 1987 (PL 100-4), requires the establishment of water quality standards for all surface waters of the United States. The Water Quality Act of 1987 amended the CWA to require the adoption of criteria for toxic pollutants identified as causing or contributing to an impairment of a waterbody's designated use(s). Individual states are given the primary responsibility for developing and adopting surface water quality standards (SWQS) applicable to their waters. The Department's SWQS provide a higher level of protection for waterways designated as "Category One (C1)." A waterway can be designated C1 in New Jersey because of its exceptional ecological, water supply or recreational significance or because it is an exceptional shellfish or fisheries resource. In addition, Federal regulations implementing the CWA at 40 CFR §131.12 require states to develop and adopt antidegradation policies and implementation procedures to ensure that the level of water quality needed to protect existing uses is maintained, and that water quality better than necessary to protect existing uses is maintained and protected.

The Highlands Act identified the waters of the Highlands preservation area as deserving of the highest level of water quality protection. The Highlands Act at N.J.S.A.

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13:20-30b(2) requires that any new or expanded point source discharge shall not degrade existing water quality, while N.J.S.A. 13:20- 30b(5) mandates that the Department apply Category One SWQS antidegradation policies to Highlands open waters. The Highlands rules for septic density have been specifically formulated to assure that these antidegradation standards are achieved. Limiting septic density is consistent with Federal requirements since there are no specific Federal standards of this type available for comparison.

Impervious Surface limitations

There are no current, analogous Federal requirements for stormwater management planning. However, there are several Federal programs concerning stormwater runoff and nonpoint source pollution control. The Federal Clean Water Act (33 U.S.C. §1251 et seq.) requires permits under Section 402 of that Act for certain stormwater discharges. The Department's requirements to obtain such permits are set forth in the New Jersey Pollutant Discharge Elimination System Rules, N.J.A.C. 7:14A. Since impervious surface generally increases non-point source pollution, limiting the amount of impervious surface reduces the potential for non-point source pollution. Therefore, the imposition of impervious surface limits in the Highlands is consistent with Federal requirements.

Highlands open waters

The definition of “Highlands open waters” in N.J.S.A. 13:20-3 and N.J.A.C. 7:38-1.4 is broader than the definition of “waters of the United States” contained in the Federal Act (and Section 404 regulations, 40 CFR §230.10(b)(3)). For example, Federal regulations in some cases exclude artificial features while the Highlands rules include all water features in the preservation area except swimming pools.

N.J.A.C. 7:38-3.6 requires a 300-foot buffer adjacent to all Highlands open waters. Further, only linear development, a narrow class of activities, is permitted within

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a Highlands open water or its buffer. In comparison, the Federal Act directs states to identify and designate its waters for various levels of protection, as previously described, but does not specify the measures to be taken to achieve the desired level of protection. Therefore, the imposition of a buffer and the strict limitation on activities within the waters and buffer in the Highlands rules is consistent with Federal requirements, even though there is no comparable Federal regulation available for comparison.

Pursuant to the Highlands Act, “Highlands open waters” include wetlands. As previously mentioned, the Federal regulations contain extensive standards and regulation for the deposition of dredge and fill material into wetlands (Army Corps of Engineers regulations for the implementation of Section 404, 40 CFR §230.10(b)3). The Army Corps regulations do not require buffers adjacent to wetlands and permit, with limits, many activities in addition to linear development. For linear development activities, the Army Corps regulations limit the length of a crossing if the activity is to be permitted pursuant to a simplified permit process (Nationwide permits #14 for minor road crossings and NWP#7 for utility lines). Those who wish to exceed the limits of a Nationwide permit are required to obtain an Individual permit. The Individual permit application process requires an alternatives analysis demonstrating that there is no practicable alternative to the size and scope of the proposed activity. If a project is approved, mitigation must be provided.

The Highlands rules at N.J.A.C. 7:38-3.6(b) require an alternatives analysis for all linear development but do not explicitly limit the length of the disturbance. However, regardless of the length, mitigation is required for all disturbances pursuant to N.J.A.C. 7:38-3.6(c). Consequently, the Highlands rules treat all proposed linear developments through Highlands open waters and their buffers like Federal Individual 404 Permit applications.

The Department is adopting general permits to permit two activities suitable for the Highlands preservation area, habitat creation or enhancement activities and bank stabilization. The Army Corps’ Nationwide permit #27 allows stream and wetland restoration activities similar to the activities being proposed as part of the Department’s general permit for habitat creation and enhancement. Therefore, the Department’s

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proposed general permit is consistent with and no more stringent than the comparable Nationwide permit.

Nationwide permit 13 allows bank stabilization activities. The Department's adopted general permit is different from the Nationwide permit because the Department's permit requires the use of bioengineering methods for bank stabilization and does not authorize stabilization that involves hard structures such as gabions or rip-rap. The Department believes that these limitations are appropriate in the preservation area since they promote water quality by encouraging reestablishment of vegetation on stream banks—something that hard structures do not do. Some may view the bioengineering requirement as more stringent than the Nationwide permit because it reduces the types of bank stabilization methods available under the Department's general permit. . However, the Department believes that the bioengineering requirement is necessary for the general permit to satisfy the standards and conditions in the Highlands Act.

Floodplain standards

The Department's authority for regulating development within flood hazard areas and riparian corridors comes solely from State statutes, specifically N.J.S.A. 58:16A-50 et seq., 58:10A-1 et seq. and 13:1D-1 et seq. N.J.A.C. 7:38-3.7 establishes a zero net fill requirement in the preservation area pursuant to N.J.S.A. 13:20-30b(4) and is not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law.

Steep slopes

There are no comparable Federal standards that apply to steep slopes.

Upland forested area

There are no comparable Federal standards that apply to upland forested area

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Rare, threatened and endangered plants and animals

Section 9 of the Endangered Species Act (ESA) of 1973 (16 U.S.C. § Chapter 35) prohibits the “incidental take” of Federally listed plant and animal species. “Federally-listed species” are those that are endangered or threatened in the wild, nationwide and are listed at 50 CFR §17.11 (animals) and §17.12 (plants). The Federal definition of “incidental take” is “takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.” 50 CFR §17.3. The Federal definition of “take” is to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect any threatened or endangered species.” 16 U.S.C. §1531 et seq. In addition, “harm” may include significant habitat modification where it actually kills or injures a listed species through impairment of essential behavior (for example, eliminating sites for nesting or reproduction). 50 CFR §17.3.

The Highlands rules protect rare, threatened and endangered plants and animal species and their habitats, in accordance with N.J.S.A. 13:20-2, 30b(8) and 32j. The Department uses the State’s lists of threatened and endangered species that include not only the Federally-listed species, but also species whose prospects for survival are in jeopardy in New Jersey but not necessarily nationwide. State-listed animal species are found in N.J.A.C. 7:25-4 (Endangered, Nongame and Exotic Wildlife), promulgated pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq. State-listed plant species are found in N.J.A.C. 7:5C-5.1 promulgated pursuant to the Endangered Plant Species List Act, N.J.S.A. 13:1B-15.151 et seq. As they apply to Endangered Species, the adopted rules apply to the habitats of more species in New Jersey than the Federal regulations do. The Endangered and Nongame Species Conservation Act and the sections of the Highlands Water Protection and Planning Act cited above give the Department all of the same authority.

The Highlands rules also protect rare species. “Rare species” means plant species of concern listed pursuant to N.J.A.C. 7:5C-3.1, and wildlife species that are not endangered or threatened wildlife species but are considered by the Department to be

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imperiled or rare. Wildlife is classified in New Jersey as “S1” (critically imperiled in New Jersey because of extreme rarity), “S2” (imperiled in New Jersey because of rarity), “S3” (rare in New Jersey), “G1” (critically imperiled globally), “G2” (imperiled globally because of rarity) or “G3” (globally very rare and local throughout its range or found locally in a restricted range). The Department’s adopted rules will not authorize issuance of an HPAA for an activity that would likely jeopardize a rare, threatened or endangered plant or animal species.

Therefore, the Highlands rules are more stringent than the Federal standards for endangered and threatened species because they provide protection to a larger number of species than do the Federal regulations. However, these heightened standards are required pursuant to the Highlands Act.

Historic Resources

The National Historic Preservation Act, 16 U.S.C. § 470, established the National Register of Historic Places. The implementing Federal regulations for the National Register are codified at 36 CFR §60. As is the case with the New Jersey Register of Historic Places established pursuant to N.J.S.A. 13:1B-15.128, the National Register provides a permanent record of properties which are determined to have significant historical, architectural, archaeological, engineering or cultural value.

The procedures for registration of properties in the New Jersey Register are integrated with those of the National Program. The New Jersey and National Registers both use the same nomination criteria, nomination forms, state administrative agency (Historic Preservation Office), and State Review Board. Moreover, the New Jersey requirement for the submission of application information and accompanying documentation parallels those of the National Register.

Additionally, to assess a project’s impact upon cultural resources, the Federal agency or its delegate must identify those properties that are potentially eligible for listing in the National Register of Historic Places. Architectural or archaeological surveys may be required by the Federal Register in order to determine whether a property is

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eligible for inclusion. Therefore, by including properties that are potentially eligible for listing in the National Register of Historic Places, the Federal Program encompasses a larger universe of historic resources than does the State Program.

The Department has determined that the Highlands rules regarding preservation of historic resources at N.J.A.C. 7:38-3.10 do not contain any standards or requirements that exceed the standards or requirements imposed by Federal law.

Unique and Irreplaceable Resources and Existing Scenic Attributes

The Highlands Act directs the Department to protect “unique and irreplaceable” resources but does not define the term. The Department has defined the term in N.J.A.C. 7:38-3.12 to include important ecological communities, vernal habitats and public scenic landscape attributes. There are no comparable Federal standards that apply to ecological communities, vernal habitats or scenic attributes.

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Summary of Agency-initiated changes

At N.J.A.C. 7:38-2.2(a)3, in the description of a major Highlands development, the Department is changing the wording from “one or more acres” of land to “one acre or more” of land to remain consistent with the language of the Highlands Act.

At N.J.A.C. 7:38-2.3(a)2, in the description of the criteria for an exemption for construction of a single family dwelling on a lot in existence on August 10, 2004, the Department is changing the wording from “more than one acre” to “one acre or more of land” to remain consistent with the language of the Highlands Act.

The Department is deleting the definition of “lawfully existing” at N.J.A.C. 7:37-2.3(a)5i, and relocating it as new N.J.A.C. 7:37-2.3(b) since the term is not only used at (a)5 but is used throughout the section at N.J.A.C. 7:37-2.3(a)4, 5 and 11.

At N.J.A.C. 7:38-2.3(a)11, the Department is replacing the term “legally existing” with “lawfully existing” since this is the defined term used consistently throughout the section.

At N.J.A.C. 7:38-3.4(a), in order to remain consistent with the Highlands Act, the Department is adding an exception for discharges from water supply facilities to the provision that excludes any new discharges to surface water or ground water that would require an individual or general NJPDES permit. Also, in response to a comment, the Department is providing a clarification to define what constitutes a discharge from a water supply facility.

At N.J.A.C. 7:38-3.9(b), the Department is deleting the word "been" so that the opening sentence of the subsection as amended is identical to the sentence as it had appeared in the prior rule at N.J.A.C. 7:38-3.9(d). In the special adoption, the provision at (d) required that an applicant identify on a site plan all forest in existence on the lot as of the

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date the Highlands Act was enacted (August 10, 2004) as well as "those forest areas that have subsequently developed." The addition of "been" in the amendment as proposed at (b) is potentially misleading in that it could be inferred to require that the applicant's site plan must show forest that was there on August 10, 2004, and also forest that has been subsequently "developed" in the sense of having been removed or modified by construction or other activities. This is not the intent. The intent is to identify all currently forested areas on the site at the time of the application in order to determine the potential impacts of the proposed major Highlands development on the existing upland forested areas. Compare the HPAA application requirements at N.J.A.C. 7:38-9.5(a)5, under which a delineation of various Highlands resources, including forests, must be provided, and at (a)6vii, under which a detailed description of the proposed project must be provided, including, among other things, the total area of upland forest on the site and the total area of upland forest that will be (not has been) disturbed or destroyed as a result of the proposed activities.

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

7:38-2.2 “Major Highlands development” regulated by the Department

(a) No person shall commence work on a major Highlands development in the preservation area without first receiving a Highlands Applicability Determination pursuant to N.J.A.C. 7:38-2.4 and/or a Highlands Preservation area Approval (HPAA) pursuant to N.J.A.C. 7:38-6. The following activities in the preservation area constitute major Highlands development unless excluded pursuant to N.J.A.C. 7:38-2.3:

1.-2. (No change.)

3. Any residential development that results in the ultimate disturbance of ***[one or more acres]*** *one acre or more* of land or a cumulative increase in impervious surface by one-quarter acre or more;

4.-5. (No change from proposal.)

(b) For lots created by subdivision after August 10, 2004, ultimate disturbance and cumulative increase in impervious surface shall be calculated as follows:

1. Ultimate disturbance means the total of existing and proposed disturbance on the created lot(s) and all existing disturbance on the remainder lot. For a residential development under (a)3 above where the existing disturbance equals one acre or more, in order to reduce the ultimate disturbance below one acre the applicant may cease all disturbance in a given area, remove all impervious surface and ***[permanently deed restrict]*** *subject* that area *to a conservation

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restriction in accordance with N.J.A.C. 7:38-6.3* so that there will be no continuing or future disturbance.

2. (No change from proposal.)

7:38-2.3 Exemptions

(a) The following projects or activities are exempt from the requirements of this chapter, but are required to comply with all other Federal, state and local requirements that may apply to the proposed project. For the purposes of this section, a single family dwelling shall include those group homes, community residences, and other alternative living arrangements that are specifically authorized to be given equivalent treatment as a single family dwelling under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. and that are using or proposing to use a new individual subsurface disposal system or aggregate of equivalent disposal units where the sanitary wastewater design flow is 2,000 gallons per day or less:

1. (No change from proposal.)

2. Construction of a single-family dwelling on a lot in existence on August 10, 2004, provided that construction does not result in the ultimate disturbance of ***[more than one acre]* *one acre or more of land*** or a cumulative increase in impervious surface by one-quarter acre or more;

3. (No change.)

4. (No change from proposal.)

5. Any improvement to a lawfully existing single-family dwelling in existence on August 10, 2004, including but not limited to an addition, garage, shed, driveway, porch, deck, patio, swimming pool, or septic system as long as the improvement

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maintains the use as a single-family dwelling as defined by code or ordinance in the municipality in which the dwelling is located and does not permit use of the structure as a multiple unit dwelling *[*]* *₁.*

[i. For the purposes of this exemption, “lawfully existing” means that the dwelling was constructed or impervious surface placed in accordance with all applicable state and Federal environmental land use and water permits and valid municipal approvals, including building permits, septic system approval, limitations on lot coverage and, where applicable, certificates of occupancy;]

6.-7. (No change from proposal.)

8.-10. (No change.)

11. The routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of the Highlands Act;

i. For the purposes of this exemption, installation of cellular equipment on a *[*]* *lawfully* existing overhead utility tower and the construction of the attendant 10- foot by 20-foot pad, when located within the four footings of such tower within a Right-of-way owned or controlled by a public utility, constructed with the consent of the public utility is consistent with the goals and purposes of the Highlands Act and this exemption;

12.-15. (No change.)

16. (No change from proposal.)

17. (No change.)

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(b) For the purposes of this section, “lawfully existing” means that the dwelling or utility tower was constructed, or impervious surface placed, in accordance with all applicable state and Federal environmental land use and water permits and valid municipal approvals, including building permits, septic system approval, limitations on lot coverage and, where applicable, certificates of occupancy.

Recodify existing (b) as (c). (No change in text.)

7:38-2.4 Highlands applicability determination

(a) *[Any person proposing to undertake an activity that constitutes a major Highlands development shall either clearly stipulate that the proposed activity is subject to the Highlands Act in an application to the Department for an HPAA, or obtain a]* *A* Highlands Applicability and Water Quality Management Plan Consistency Determination (Highlands Applicability Determination) *[from the Department. The Highlands Applicability Determination]* answers the following questions:

1. Is the proposed development or activity a major Highlands development pursuant to N.J.A.C. 7:38-2.2?
2. Is the proposed development or activity a major Highlands development that is exempt from the Highlands Act, pursuant to N.J.A.C. 7:38-2.3?
3. Regardless of the answer to (a)1 or 2 above, is the proposed development or activity consistent with the applicable areawide Water Quality Management Plan?

(b) Any person proposing to undertake any activity in the preservation area that requires any environmental land use or water permit from the Department other than, as provided

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at (c) below, a NJPDES permit or TWA, shall * either clearly stipulate that the proposed activity is subject to the Highlands Act in an application to the Department for an HPAA, or* obtain an Highlands Applicability Determination *, before submitting an application for the environmental land use or water permit* unless the activity is one of the following:

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

(c) Following submission under N.J.A.C. 7:14A of an application for a TWA or an individual NJPDES permit, or a request for authorization (RFA) under a general NJPDES permit, for an activity in the Highlands preservation area, the Department will notify the applicant whether the activity that is the subject of the application or RFA is a major Highlands development that requires a Highlands Applicability Determination under this section. This section does not apply to NJPDES permit no. NJ0088323 (see N.J.A.C. 7:38-2.6(d)).

7:38-2.6 Applicability for purposes of *[wastewater discharges and treatment systems]**NJPDES-permitted discharges and wastewater facilities*

(a) Pursuant to N.J.S.A. 58:11A-7.1, within the preservation area, designated sewer service areas for which wastewater collection systems have not been installed as of August 10, 2004, were revoked effective August 10, 2004, and any associated treatment works approvals in the impacted areas expired on August 10, 2004 except for sewer service areas and any associated treatment works approvals necessary to serve:

1. (No change.)

2. (No change from proposal.)

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

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(d) Except for projects to be constructed by the New Jersey Department of Transportation (NJDOT), a request for authorization *(RFA)* under NJPDES Permit No. NJ0088323 (category 5G3 “construction activity” stormwater general permit) shall be submitted directly to the appropriate Soil Conservation District, from which *[applications]* *RFA forms* may also be obtained. *[Except as provided at N.J.A.C. 7:38-2.4(b)]* *Notwithstanding N.J.A.C. 7:38-2.4(b) and (c)*, *[such a]* request*s* for authorization shall not be considered complete for review under N.J.A.C. 7:14A unless accompanied by a HPAA or a Highlands Applicability Determination that the proposed activity is exempt from the Highlands Act and consistent with a WQMP, or exempt from the Highlands Act and not addressed by a WQMP.

7:38-3.4. NJPDES Permitted discharges and wastewater facilities

(a) Any new discharge to surface water or ground water *. except discharges from water supply facilities.* that would require an individual or general NJPDES permit and any extension of a sewer line that requires a Treatment Works Approval is prohibited within the preservation area unless the development in the preservation area that *[needs the permit or approval]* *satisfies any one of the following criteria. For purposes of this chapter, the Department defines water supply discharges as those discharges resulting from the processing of water for potable supply, such as discharge of filter backwash, and that require a New Jersey Pollutant Discharge Elimination System (NJPDES) permit *:

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

(b) A new individual subsurface disposal system or aggregate of equivalent disposal units where the sanitary wastewater design flow is 2,000 gallons per day or less is permitted within the preservation area as set forth at (b)1 through 4 below. Forest under this subsection shall be identified and calculated in accordance with N.J.A.C. 7:38-3.9. For the purposes of this subsection, “equivalent disposal unit” means: for residential

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development, one system serving one single-family home sized in accordance with the Standards for Individual Subsurface Sewage Disposal Systems, Volume of sanitary sewage, at N.J.A.C. 7:9A-7.4; or for non-residential development or residential development comprising structures other than single family homes, 500 gallons of wastewater per day generated for the development type, as determined in accordance with N.J.A.C. 7:9A-7.4:

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

3. (No change.)

4. (No change from proposal.)

5. For purposes of this section, non-contiguous lots in existence as of August 10, 2004 may be aggregated such that the number of individual subsurface disposal systems or equivalent disposal units that would be permitted under this section on one or more of the aggregated lots is transferred to one or more of the aggregated lots provided:

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

v. The lot or lots from which the individual subsurface disposal systems or equivalent disposal units are to be transferred are *[permanently deed restricted from]* *subject to a conservation restriction against* future disturbance *in accordance with N.J.A.C. 7:38-6.3.*

7:38-3.5 Impervious surfaces

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- (a) The Department shall not issue an HPAA if a proposed development or activity will result in impervious surface of greater than three percent of the land area of a lot. As to lots created by subdivision after August 10, 2004, calculation of this limit shall include all impervious surface existing on the entire land area of the lot which existed on August 10, 2004. For example, if a lot in existence as of August 10, 2004 currently has two percent impervious surface within its August 10, 2004 boundary, only one percent additional impervious surface will be permitted within that boundary, assuming the new impervious surface is placed in accordance with the Highlands Act and this chapter and any other applicable Federal, state and local law. Thus, if that lot is further subdivided, the newly created lot(s) could only receive an HPAA for a cumulative total of additional impervious surface equal to one percent of the area of the original lot that existed on August 10, 2004.

1. (No change.)

2. For purposes of this subsection, non-contiguous lots in existence as of August 10, 2004, that contain less than three percent impervious surface may be aggregated such that the percentage of impervious surface that would have otherwise been permitted under this subsection on one or more of the aggregated lots is transferred to one or more of the aggregated lots, provided:

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

v. The lot or lots from which the percentage impervious surface is transferred are permanently *[deed-restricted from additional]* * subject to a conservation restriction against future* disturbance *in accordance with N.J.A.C. 7:38-6.3*.

7:38-3.6 Highlands open waters

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...

(b) All new major Highlands development is prohibited within a Highlands open water and its adjacent 300-foot buffer except for linear development, which shall be permitted provided that there is no feasible alternative for the linear development outside the Highlands open water or Highlands open water buffer.

1. In order to demonstrate “no feasible alternative for linear development” the applicant shall demonstrate*[:]* *that there is no other location, design and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to a Highlands open water or the adjacent buffer. The additional limitations at i and ii below apply for proposed linear development that would provide access to an otherwise developable lot.*

i. *[There is no other location, design and/or configuration for the proposed linear development that would provide access to an otherwise developable lot that would reduce or eliminate the disturbance to a Highlands open water or the adjacent buffer;

ii.]* The proposed linear development is the only point of access for roadways or utilities to an otherwise developable lot; [and]

[iii.] *ii* Shared driveways are used to the maximum extent possible to access multiple lots, especially in areas containing steep slopes, Highlands open water or Highlands open water buffers[.] ; and

2. For a driveway, the applicant shall, in addition, demonstrate that:

i. (No change from proposal.);

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ii. The lot has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the lot, *and* to the land conservancies, environmental organizations, the Highlands Council and all other government agencies on a list provided by the Department, *at an amount determined in compliance with N.J.S.A. 13:8C-26j or N.J.S.A. 13:8C-38j, as applicable* by letter sent by certified mail, return receipt requested, with a copy to the Highlands Council, using the form provided by the Department, disclosing the location on the lot of all Highlands resource areas as defined in N.J.A.C. 7:38-1.4 and stating that an application to develop the lot has been filed and enclosing a copy of a fair market value appraisal, in accordance with iv(5) below*, performed by a State-licensed appraiser based on the minimum beneficial economically viable use of the property allowable under local law; and

iii. (No change from proposal.)

iv. Documentation for (b)2i through iii above shall include:

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

(5) *For submittal to all property owners within 200 feet,* *[A]* *a* copy of the fair market value appraisal required under (b)2ii above; and

(6) (No change from proposal.)

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

7:38-3.7 Flood hazard areas

...

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(e) Flood storage volume can be created offsite to compensate for regulated activities that displace flood storage as described in (b)2 above provided the offsite compensation:

1.-8. (No change.)

9. Is proposed on land that is *[deed restricted]* *subject to a conservation restriction* against future flood storage volume displacement *in accordance with N.J.A.C. 7:38-6.3*.

7:38-3.8 Steep slopes

...

(c) Linear development as defined at N.J.A.C. 7:38-1.4 shall be permitted on a slope with a grade of 20 percent or greater provided that there is no feasible alternative for the linear development outside the steep slope. In order to demonstrate “no feasible alternative for linear development,” the applicant shall demonstrate*[:]* *that there is no other location, design and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to a slope with a grade of 20 percent or greater. The additional limitations at 1. and 2. below apply for proposed linear development that would provide access to an otherwise developable lot.*

1. *[There is no other location, design and/or configuration for the proposed linear development that would provide access to an otherwise developable lot that would reduce or eliminate the disturbance to the steep slope;

2.]* The proposed linear development is the only point of access for roadways or utilities to an otherwise developable site;

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[3.] *2.* Shared driveways are used to the maximum extent possible to access multiple lots, especially in areas containing steep slopes, Highlands open water or Highlands open water buffers;

[4.] *3.* For a driveway, the applicant shall, in addition, demonstrate that:

i. The applicant has made a good faith effort to transfer development rights for the lot pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;

ii. The lot has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the lot, *and* to the land conservancies, environmental organizations, the Highlands Council and all other government agencies on a list provided by the Department, *at an amount determined in compliance with N.J.S.A. 13:8C-26j or N.J.S.A. 13:8C-38j, as applicable* by letter sent by certified mail, return receipt requested, with a copy to the Highlands Council, using the form provided by the Department, disclosing the location on the lot of all Highlands resource areas as defined in N.J.A.C. 7:38-1.4 and stating that an application to develop the lot has been filed and enclosing a copy of a fair market value appraisal, performed by a State-licensed appraiser based on the minimum beneficial economically viable use of the property allowable under local law; and

iii. (No change from proposal.)

iv. Documentation for (c)4i through iii above shall include:

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

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(5) *For submittal to all property owners within 200 feet,* *[A]* *a* copy of the fair market value appraisal required under (c)4ii above; and

(6) (No change from proposal.)

Recodify existing 5.-6. as 4.-5. (No change in text.)

7:38-3.9 Upland forested areas

...

(b) The applicant shall identify on a site plan submitted to the Department all forest in existence on the lot as of August 10, 2004 as well as those forest areas that have subsequently ~~*[been]*~~ developed. A forest area shall be determined in accordance with the following method:

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

7:38-3.10 Historic and archaeological areas

...

(b) An HPAA application for a proposed regulated activity as described at (b)1 through 4 below shall include an intensive-level architectural survey completed by an architectural historian whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and related guidance as part of the larger Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation as referenced at 36 CFR 61, incorporated herein by reference*[:]* * . An "intensive-level architectural survey" is a thorough examination of the area being surveyed, designed to document precisely and completely all potential historic resources in the area and

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evaluate whether they meet the National Register Criteria for Evaluation. An intensive level survey documents:

1. The kinds of properties looked for;
2. The boundaries of the area surveyed;
3. The method of survey, including an estimate of the extent of survey coverage;
4. A record of the precise location of all properties identified; and
5. Information on the appearance, significance, integrity, and boundaries of each property sufficient to permit the evaluation of its significance:*

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

(c) An HPAA application for a proposed regulated activity as described at (c) 1 through 5 below shall contain a Phase I (identification of resources) archaeological survey completed by an archaeologist whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and related guidance as part of the larger Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation as referenced in 36 CFR 61, incorporated herein by reference:

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

3. A proposed regulated activity on a site that includes a permanent Highlands open water (for example*, a* wetland, pond, lake, river or perennial stream) or that *[are]* *is* located wholly or partially within 500 feet of a permanent Highlands open water *, except when the waterway is listed at (c)2 above, in which case (c)2 governs*;

4.-5. (No change from proposal.)

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

7:38-6.4 Waivers

...

(i) In cases where the Department determines to approve a waiver in accordance with this chapter, the approval will include specific conditions to restrict any activities that might otherwise occur as a result of the waiver. These conditions include but are not limited to *[deed]* *conservation* restrictions, resolutions from a municipal utilities authority restricting sewage flows, physical limitations on sewer lines and/or pump stations and other mechanisms necessary to preclude secondary impacts that may otherwise result from the approved activities.

7:38-6.6 Waiver for redevelopment in certain previously developed areas in the Highlands Preservation area: Department-designated Highlands Brownfields

...

(k) Once the Department designates a site as a Highlands brownfield, and the Council has identified all or part of the brownfield as appropriate for redevelopment in accordance with N.J.S.A. 13:20-9b and N.J.S.A. 13:20-11a(6)(h), an applicant shall be eligible for a HPAA with a waiver [if,] for redevelopment under this section if the applicant demonstrates that:

1.-2. (No change.)

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

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6. The proposed redevelopment satisfies the requirements in (c), (d), (e) or (f) above as applicable, and:

i. If the redevelopment is located in the footprint of existing impervious surface, the existing stormwater treatment system*[s]* removes 50 percent or greater total suspended solid (TSS). If *the existing system removes less than 50 percent TSS or* there is no existing treatment system, *the existing system is upgraded to remove at least 50 percent TSS or* a new stormwater treatment system that removes at least 50 percent TSS is installed; or

ii. (No change from proposal.)

7.-8. (No change from proposal.)

(l) (No change from proposal.)

7:38-6.8 Waiver to avoid the taking of property without just compensation

...

(g) An applicant for an HPAA may request that the Department waive a requirement of this chapter under (a) above only after the Department has rendered a decision on an HPAA application under the rules as strictly applied, all legal challenges to the decision that the applicant chooses to bring have concluded pursuant to (b)1, above, and the applicant satisfactorily demonstrates the following to the Department:

1.-2. (No change.)

3. The property has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the property as a whole, *and* to the land conservancies, environmental organizations, and the

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Highlands Council and all other government agencies on a list provided by the Department, *at an amount determined in compliance with N.J.S.A. 13:8C-26j or N.J.S.A. 13:8C-38j, as applicable* by letter sent by certified mail, return receipt requested, using the form provided by the Department, disclosing the location of all Highlands resource areas on the property and stating that an application for a waiver of the requirements of this chapter to permit development on the property has been filed and enclosing a copy of a fair market value appraisal, that was performed by a State-licensed appraiser and that assumed that the minimum beneficial economically viable use of the property is allowable under local law; and

4. That no reasonable offer based upon the minimum beneficial, economically viable use for the property has been received;

i. Documentation for (g) 3 and 4 above shall include the following:

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

(4) Receipts indicating the letters were sent by certified mail; and

(5) A copy of the fair market value appraisal required under (g)3 above[; and].

[(6) A written response or a resolution from the Highlands Council demonstrating that it has considered and rejected the offer.]

(h)-(k) (No change.)

7:38-10.2 Fee tables

...

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(d) The fee for an HPAA pursuant to N.J.A.C. 7:38-6 shall be:

1. For projects with a completed HRAD, \$2,500 plus \$50.00 per acre, or any fraction thereof *, of Highlands resource areas to be affected*;

2. (No change.)

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

Date

Lisa P. Jackson
Commissioner