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ENVIRONMENTAL PROTECTION
COMPLIANCE AND ENFORCEMENT

Freshwater Wetlands Protection Act rules

Proposed Amendments: N.J.A.C. 7:7A-16

Proposed New Rule: N.J.A.C. 7:7A-16.9

Authorized By: Lisa P. Jackson, Commissioner, Department of
Environmental Protection

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

Calendar Reference: See Summary below for explanation of exception to calendar requirement

DEP Docket Number:

Proposal Number: PRN

Submit written comments on this proposal by (60 days after publication), to:

Janis Hoagland, Esq.
Attn.: DEP Docket No. NUMBER
Office of Legal Affairs
Department of Environmental Protection
PO Box 402
Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper in order to facilitate

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incorporation of submitted comments into its comment-response document. For this purpose, the comments on disk or CD should not be access-restricted (locked or read-only). The Department prefers Microsoft Word 6.0 or above. MacIntosh formats should not be used. Submission of a disk or CD is not a requirement. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

A copy of the proposal is available on paper or on disk by calling the Department at (609) 633-7021. The rule proposal can also be found at the Department's website (www.nj.gov/dep). The agency proposal follows:

Summary

As the Department has provided a 60-day comment period on this notice of proposal, this proposal is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

The Department is proposing amendments to the Enforcement provisions of the Freshwater Wetlands Protection Act (FWPA) rules at N.J.A.C. 7:7A-16 to incorporate and implement changes to the FWPA made by P.L. 2007, c. 246, commonly referred to as the Environmental Enforcement Enhancement Act (EEEE). The EEEA was enacted effective January 4, 2008. It modified and enhanced the Department's enforcement powers under various environmental protection statutes, including the FWPA at N.J.S.A. 13:9B-21. Among the several changes effected in the FWPA by the EEEA are an increase in the maximum penalty from \$10,000 to \$25,000, a lengthened time of 35 days (as compared to the prior 20 days) in which a person to whom the Department issues an administrative enforcement action may request a hearing, and the explicit inclusion of the alleged violator's conduct as a basis for assessing a penalty (in addition to violation type, seriousness, and duration).

On September 4, 2007, the Department published a proposal to readopt the FWPA rules, N.J.A.C. 7:7A, with amendments, including amendments to the Enforcement provisions in Subchapter 16. See 39 N.J.R. 3587(a). That proposal is pending adoption at this time. However, in order to address the changes brought about by the enactment of

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the EEEA in the interim, the Department has determined to not adopt the amendments to N.J.A.C. 7:7A-16 published as part of the September 2007 proposal in order to separately propose, herein, amendments to N.J.A.C. 7:7A-16 that implement the EEEA as it applies to the FWPA enforcement program. As provided at N.J.S.A. 13:9B-21d, during the period prior to adoption of these proposed amendments implementing the EEEA changes, the Department will, on a case-by-case basis, assess civil administrative penalties up to a maximum of \$25,000 per day for each violation using the criteria set forth in the statute.

In addition to amendments implementing the EEEA changes, the Department is again proposing herein amendments to the enforcement provisions in N.J.A.C. 7:7A-16 that appeared in the September 2007 proposal, including those that reorganize, clarify, and correct the rules. Following is a summary of the proposed amendments.

N.J.A.C. 7:7A-16.1 General provisions

At N.J.A.C. 7:7A-16.1(a), the Department is proposing to add letters of interpretation, agreements, and settlements to the list of instruments contemplated by the term, “applicable law and/or condition” any violation of which may result in enforcement action under this chapter. The Department is also correcting the citation to the State Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Here and through N.J.A.C. 7:7A-16, “waiver” is being replaced with “transition area waiver” for clarity.

The Department is proposing to amend N.J.A.C. 7:7A-16.1(c)3 through 5 to update cross-references to reflect the addition of proposed new N.J.A.C. 7:7A-16.9 (explained below).

The Department is proposing to amend N.J.A.C. 7:7A-16.1(d) to clarify that the Enforcement provisions contained there apply to the entire chapter.

Proposed new N.J.A.C. 7:7A-16.1(g) states, as provided in the EEEA amendments to the FWPA (see N.J.S.A. 13:9B-21d), that an applicant or permittee must provide any information the Department requires to determine compliance with any applicable law and/or condition, which is defined at N.J.A.C. 7:7A-16.1(a).

N.J.A.C. 7:7A-16.2 USEPA review

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The Department is proposing to correct the language in N.J.A.C. 7:7A-16.2 to make it clear that the Department will share information used in the “enforcement” of the FWPA with the USEPA, since Subchapter 16 relates to enforcement. The remainder of the provisions describing the oversight by EPA of the Department’s regulatory program are found primarily at N.J.A.C. 7:7A-12.2.

N.J.A.C. 7:7A-16.3 Administrative order

N.J.A.C. 7:7A-16.3 describes the content of the administrative order that the Department may issue to a violator specifying the law or condition violated and requiring compliance as well as restoration of the wetlands resource affected by the violation. No amendments are proposed to this section.

N.J.A.C. 7:7A-16.4 Civil action

As provided in the EEEA amendments to the FWPA (see N.J.S.A. 13:9B-21c(4)), the Department is proposing to amend N.J.A.C. 7:7A-16.4(a)4 to reference natural resources, including but not limited to the resources already listed in the existing paragraph and adding habitat, plants, and historic or archaeological resources. The Department may seek compensatory damages in a civil action for the loss or destruction of any of these resources resulting from regulated activities conducted without authorization under the FWPA rules. Also as provided in the EEEA amendments to the FWPA (see N.J.S.A. 13:9B-21c(5)), the Department is proposing to amend N.J.A.C. 7:7A-16.4(a)5 to establish that if restoration is not practicable or feasible on the site of a violation, offsite restoration alternatives may be utilized as a corrective action, as approved by the Department.

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

For consistency with the changes to N.J.A.C. 7:7A-16.1(a) explained above, the Department is proposing to amend N.J.A.C. 7:7A-16.5(a) to include letters of interpretation, settlements, and agreements among the instruments that, if violated, may result in enforcement action under this chapter. In addition, the Department is

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substituting "each such violation" for the subsequent reference to the FWPA to simplify the section. Last, in accordance with the EEEA amendments to the FWPA, the maximum civil administrative penalty amount is amended to \$25,000. This maximum penalty is exclusive of any economic benefit that may be assessed under N.J.A.C. 7:7A-16.13. See N.J.S.A. 13:9B-21d.

The Department is proposing to similarly amend N.J.A.C. 7:7A-16.5(b) to include settlements and agreements in the list of instruments that, if violated, may result in enforcement action under the Water Pollution Control Act and replacing the subsequent redundant reference to the statute.

N.J.A.C. 7:7A-16.6 Assessment, settlement and payment of a civil administrative penalty

In accordance with the EEEA amendments to the FWPA at N.J.S.A. 13:9B-21d, the Department is proposing to amend N.J.A.C. 7:7A-16.6(a)3 to provide that the notice of civil administrative penalty assessment will include the basis for the penalty. In addition, since the EEEA amendments to the FWPA increase the period in which a person to whom the Department issues an administrative enforcement order may deliver to the Department a written request for a hearing from 20 days to 35 days, the Department is amending N.J.A.C. 7:7A-16.6(b)1 to provide that if no hearing request is timely delivered, the notice of civil administrative penalty assessment becomes a final order on the 36th day, rather than the 21st day, after the violator's receipt of the order.

Consistent with the EEEA amendments to the FWPA, the Department is proposing new N.J.A.C. 7:7A-16.6(c) to provide that if a penalty is not paid within 90 days of being due, the penalty is subject to an interest charge. If the penalty is contested, no additional interest charge accrues until after the date on which a final order is issued. The interest charges are to be based on the rate of interest on judgments provided in the New Jersey Rules of Court.

N.J.A.C. 7:7A-16.7 Appeal of an administrative order and/or notice of civil administrative penalty assessment

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At N.J.A.C. 7:7A-16.7(a), the Department is changing “address” to “addresses” since a second address is being added at N.J.A.C. 7:7A-16.7(b). At N.J.A.C. 7:7A-16.7(b), the Department is adding the street address of the office to which appeal requests are sent and including the requirement that a copy of the request be sent to the Bureau of Coastal and Land Use Enforcement.

At N.J.A.C. 7:7A-16.7(c), the Department is amending the 20 day deadline by which the Department must receive a written request for an adjudicatory hearing to 35 days, in accordance with the EEEA amendments to the FWPA.

N.J.A.C. 7:7A-16.8 Civil administrative penalty amount for failure to obtain a permit prior to conducting regulated activities

Existing N.J.A.C. 7:7A-16.8 describes how the Department determines the amount of a civil administrative penalty assessment. The Department proposes to amend this section to limit its application to the determination of a civil administrative penalty for the type of violations resulting from the failure to obtain a permit prior to conducting regulated activities, and to revise the section heading as “Civil administrative penalty amount for failure to obtain a permit prior to conducting regulated activities.” For the purposes of N.J.A.C. 7:7A-16.8, as reflected in the amendments proposed at N.J.A.C. 7:7A-16.8(a), a permit shall mean a permit as that term is defined in N.J.A.C. 7:7A-1.4, that is, an approval to engage in a regulated activity in a freshwater wetland, State open water, or transition area, issued by the Department under these rules, including freshwater wetlands permits and authorizations under general permits, open water fill permits, and transition area waivers. In addition, the Department is clarifying throughout N.J.A.C. 7:7A-16.8 that the enforcement provisions apply to both wetlands and wetland transition areas.

The Department is proposing a separate penalty assessment mechanism at new N.J.A.C. 7:7A-16.9, described below, for all permit-related violations and violations other than those covered by amended N.J.A.C. 7:7A-16.8 or governed by existing N.J.A.C. 7:7A-16.9 through 16.11 (proposed to be recodified as 16.10 through 16.12, and

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relating to violations for submitting inaccurate or false information, for failing to allow entry and inspection, and for failing to pay a penalty).

Separating the civil administrative penalty for violations resulting from the failure to obtain a permit prior to conducting regulated activities from other civil administrative penalties is intended to more fairly and appropriately assess penalties based on the variety of impacts to the program and to regulated areas occurring as a result of various violations that may not all be directly related to the size of a physical disturbance.

Accordingly, N.J.A.C. 7:7A-16.8(a) is proposed to be amended to state that the Department will use the procedures in N.J.A.C. 7:7A-16.8 to assess civil administrative penalties for conducting regulated activities prior to obtaining a permit. As amended, N.J.A.C. 7:7A-16.8 will be used to determine the number of points for conduct and seriousness and corresponding penalty amount for a specific violation of this type.

Under N.J.A.C. 7:7A-16.8(c) as it proposed to be amended, the Department will determine the amount of a base daily civil administrative penalty for failure to obtain a permit prior to conducting regulated activities based on the conduct of the violator and the seriousness of the violation. Points are assigned for conduct in accordance with N.J.A.C. 7:7A-16.8(c)1, and for seriousness in accordance with N.J.A.C. 7:7A-16.8(c)2. The seriousness of the violation is determined based on the acreage of wetlands or transition areas affected and the resource value classification of the wetlands. The revised point values are intended to better and more fairly assess penalties for more egregious violations of a greater scope, without affecting the lower range of point totals for violations resulting in smaller disturbances. The Department believes the change is necessary because the current rules do not adequately reflect the greater environmental harm that results from violations of a larger scale, or the higher deterrent factor necessary for knowing (versus unknowing) violations. Creating a wider point spread, which results in a wider range of per-day penalty assessments, enables the Department to assess a penalty that better reflects the degree of harm or potential harm caused by the particular violation and allows for a more precise penalty calculation based on the specific conditions of the violation. The revised point assignments will result in proportionately

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higher penalties for knowing violations and for violations in exceptional value wetlands or their transition areas.

At N.J.A.C. 7:7A-16.8(c)1i the points assigned to “major conduct” (i.e., intentional, deliberate, purposeful, knowing, or willful act or omission) is increased from three to five points to emphasize the importance of this factor in the overall penalty assessment. The points assigned under N.J.A.C. 7:7A-16.8(c)1ii for moderate conduct (unintentional but foreseeable act or omission) and under (c)1iii for minor conduct (any conduct not identified at (c)1i or ii) are two points and one point, respectively, and are not being amended. The Department believes that persons who knew, or should have known, that the activities they were conducting were in contravention of the FWPA should be assessed a higher penalty than someone who did not realize their actions were in violation of the FWPA.

N.J.A.C. 7:7A-16.8(c)2 is amended to establish that the acreage affected by the violation together with the resource value classification of the wetland or transition area impacted determine the seriousness of a violation. Points are assigned for acreage and for resource value and then totaled. In addition, the Department is proposing to amend the rules to spread the number of points across a wider range of acres of affected by a violation. The amended point values for the acreage of wetlands or transition area impacted by the violation set forth at N.J.A.C. 7:7A-16.8(c)2i are as follows: up to and including 0.25 acre, one point; greater than 0.25 acres up to and including 0.5 acres, two points; greater than 0.5 acres up to and including one acre, three points; greater than one acre up to and including two acres, four points; greater than two acres up to and including four acres, five points; greater than four acres up to and including seven acres, six points; and greater than seven acres, seven points. These changes reflect the greater environmental harm associated with impacts to larger areas of wetlands disturbance, provide a greater incentive to comply and restore the resource to its pre-disturbance and functional condition, and provide a greater deterrent to future violations.

At N.J.A.C. 7:7A-16.8(c)2ii, the Department is proposing to adjust the number of points to be assigned for a violation based upon the resource value classification of the wetlands and/or transition areas and to provide separate point values for violations

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occurring in transition areas only. The amended rule also provides that if the site of a violation contains wetlands or transition area of more than one resource classification, the points assigned to a violation for the highest resource classification on the site shall apply for the entire site. The amended point values for the resource value of the wetlands or transition area impacted by the violation set forth at N.J.A.C. 7:7A-16.8(c)2ii are as follows: for exceptional resource value wetlands, five points; for intermediate resource value wetlands, four points; for ordinary resource value wetlands, three points; for exceptions resource value transition areas, two points; and for intermediate classification transition areas, one point. The Department believes these point values more accurately reflect the functions, values and environmental benefits provided by the five types of resources and the difficulty of restoring each, and so provides for a more accurate and fair assessment of penalties. For example, exceptional resource value wetlands provide habitat for endangered or threatened species whose prospects for survival in New Jersey are in immediate danger because of a loss or change in habitat, or are associated with trout production waters—some of the cleanest waters in the State. The number of points associated with violations in exceptional resource value wetlands is increased from three to five points. Previously, the Department assigned to a transition area violation the point value of the wetland the transition area protected. In the proposed rule, lower point values are assigned for transition area only violations. The proposed point value for a violation that affects exceptional resource value wetland transition areas only is amended from three points to two points, and for a violation that affects intermediate resource value wetland transition areas only, from two points to one point.

At N.J.A.C. 7:7A-16.8(d), the Department is proposing to increase the maximum point total from nine to 17 and the maximum base penalty amount per day from \$10,000 to \$25,000 to reflect the changes to the point assessments at N.J.A.C. 7:7A-16.8(c) (described above) and the increased maximum penalty established by the EEEA amendments to the FWPA. The proposed point totals and the associated base penalties are set forth in Table D, at N.J.A.C. 7:7A-16.8(d).

Amended N.J.A.C. 7:7A-16.8(e) provides for a penalty mitigating factor multiplier to be applied to reduce the base civil administrative penalty assessed under

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N.J.A.C. 7:16.8(d) if appropriate. N.J.A.C. 7:7A-16.8(e)1 provides that if the violator restores the disturbed area and comes into compliance within 30 days, a mitigating factor multiplier of 0.5 will be applied to the base daily penalty. N.J.A.C. 7:7A-16.8(e)2 provides that if the violator submits an application for the unauthorized regulated activity within 30 days and the activity for which the violation was received is subsequently permitted without any modifications to the regulated activity, a mitigating factor multiplier of 0.25 will be applied to the base daily penalty. The application of the mitigating factor multiplier recognizes and rewards a violator's responsiveness to the Department's notices of violation, or a violator's efforts to rapidly restore the resource or to seek a permit, since the Department's goal is compliance in the shortest timeframe possible.

Proposed new N.J.A.C. 7:7A-16.8(f) provides that the total civil administrative penalty for a particular violation is obtained by taking the base daily penalty amount determined under (c) and (d), adjusted if applicable using the penalty mitigation amount calculated under (e), and multiplying the result by the number of days during which the violation continued to impact the functions and values of the freshwater wetlands or freshwater wetlands transition areas that were disturbed.

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

The Department is proposing, at new N.J.A.C. 7:7A-16.9, a separate penalty assessment for violations other than the failure to obtain a permit before conducting regulated activities. The proposed new section addresses more fairly and appropriately the variety of impacts to the program and regulatory requirements that are not reflected in the penalty assessment criteria identified in N.J.A.C. 7:7A-16.8 and that may not be directly related to the physical size of a disturbance.

The creation of a separate penalty assessment at new N.J.A.C. 7:7A-16.9 mirrors the bifurcated penalty assessment processes in other Department land use rules such as the Highlands Water Protection and Planning Act rules (N.J.A.C. 7:38), and the Coastal

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Permit Program rules (N.J.A.C. 7:7) and separates the penalty assessment process for violations for basic land disturbance or unpermitted activities from others such as the violation of permit conditions. The potentially significant environmental or programmatic harm that occurs when a permit condition is violated may not be measurable by acreage of impact and thus a penalty assessment based upon the size of a land disturbance may not be appropriate or reflect the impact of the violation. For example, violation of an administrative condition of a permit such as the failure to record a conservation restriction or easement can have a significant negative impact since the purpose of the condition is to warn future owners of restrictions associated with a property. Failure to comply with the condition may increase the likelihood that regulated wetlands and transition areas may be unwittingly encroached upon by a new owner in the future due to the lack of notice that a properly and timely recorded conservation restriction/easement would have provided. However, these potential impacts are not appropriately addressed by a calculation that is tied in part to the amount of land disturbed since the land disturbance has not occurred but may occur due to the lack of notice. The presence of a properly recorded conservation restriction or easement also alerts the Department to the presence of a restriction should it receive a future application for permits to develop the site.

In another example, at both N.J.A.C. 7:7A-4.3(b)5, a condition of all general permits and N.J.A.C. 7:7A-7.2(b)9, a condition of all individual permits, applicants are required to notify the Department and await direction upon encountering a probable historic resource during the conduct of regulated activities. Failure to comply with this requirement has the potential to permanently deprive the public of the historic resource and/or the information provided by the historic resource if investigated and studied in its historic setting prior to being disturbed by development activities. As another example, failure to comply with timing restrictions which protect vulnerable stages of life cycles for various fish and reptile species, is not accurately or fairly reflected by a penalty calculation based upon computation of acreage of land disturbance.

Proposed N.J.A.C. 7:7A-16.9(a) establishes that this section contains the procedures for determining the civil administrative penalty for types of violations other

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than failing to obtain a permit before conducting regulated activities, for which the penalty is determined under N.J.A.C. 7:7A-16.8, and other than the violations specifically addressed under N.J.A.C. 7:7A-16.10 (submitting inaccurate or false information), 16.11 (failure to allow entry and inspection), and 16.12 (failure to pay a penalty).

Proposed N.J.A.C. 7:7A-16.9(b) provides that the Department will use the factors of conduct and seriousness to determine the base daily civil administrative penalty for this type of violation. The seriousness of the violation is determined under subsection (c), and the conduct of the violator is determined under subsection (d). The applicable daily penalty amount is then determined using the base daily penalty matrix in Table E at N.J.A.C. 7:7A-16.9(b).

Using the daily base penalty matrix in Table E, the Department will assess the statutory maximum penalty of \$25,000 for a violation of major seriousness and major conduct. For a violation of less than major seriousness and less than major conduct, the Department will assess the penalty in Table E that reflects the applicable combination of seriousness and conduct warranted by the violation. Accordingly, for a violation of minor conduct and minor seriousness, the penalty is \$1,000; and for a violation of moderate seriousness and conduct, the penalty is \$7,500.

Proposed N.J.A.C. 7:7A-16.9(c) sets forth how the seriousness of a violation will be determined. N.J.A.C. 7:7A-16.9(c)1 defines major seriousness as applying to any violation that has caused or has the potential to cause serious harm to human health, safety, the regulatory program or the environment, or a violation which seriously deviates from any applicable law and/or condition (as that term is defined at N.J.A.C. 7:7A-16.1(a)). The provision further defines serious deviations as those that are in complete contravention of the applicable law and/or condition, and/or severely impair or undermine the protection, operation, or intent of the law and/or condition. Also provided are examples of the types of violations that the Department considers “major.” These include activities that negatively affect water quality; the clearing, grading or filling of a freshwater wetland or transition area in excess of that authorized by a permit; failing to timely record a conservation restriction or easement where the property has been sold or transferred; failure to report the presence of a historic resource during construction and/or

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the destruction of a historic resource without prior Department approval; failure to comply with a historic resource or mitigation requirement; and failure to provide information to the Department when requested for purposes of determining compliance. Each of these violations results in the loss of the values and functions of the freshwater wetland resource or a serious deviation from the Act or the program. For example, the failure to implement soil and sediment control requirements during construction on a site contiguous to a trout production waterway would be a serious violation because the failure to control erosion of soil has the potential to negatively affect water quality resulting in a degraded habitat and lower reproductive success.

Proposed N.J.A.C. 7:7A-16.9(c)2 defines moderate seriousness as applying to any violation which has caused or has the potential to cause substantial harm to human health, safety, the Freshwater Wetland Protection Act program or the environment, or that substantially deviates from any applicable law and/or condition (as that term is defined at N.J.A.C. 7:7A-16.1(a)). If a violation is limited solely to the transition area but is not associated with a permit, it will be considered a violation of moderate seriousness. Examples of violations of “moderate” seriousness include failure to notify the Department of commencement of construction; failure to timely record a conservation easement or restriction where the property has not been sold or transferred; and failure to transfer a permit in accordance with the rules.

Proposed N.J.A.C. 7:7A-16.9(c)3 defines minor seriousness as applying to any violation not included in the definitions of “major” or “moderate.”

Proposed N.J.A.C. 7:7A-16.9(d) describes how the Department will determine the conduct of a violator. N.J.A.C. 7:7A-16.9(d)1 states that major conduct includes any intentional, deliberate, purposeful, knowing or willful act or omission by the violator. The Department considers all violations of permits, transition area waivers, letters of interpretation, agreements, orders, settlements, exemption letters, or mitigation proposals issued under the FWPA and/or these rules to be knowing violations since in seeking and obtaining these approvals, the recipient acknowledges that he or she knows that the law exists, that areas are regulated, and that approval is required to conduct activities in these regulated areas.

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Proposed N.J.A.C. 7:7A-16.9(d)2 defines moderate conduct as any unintentional but foreseeable act or omission by the violator. The Department considers conduct to be unintentional but foreseeable if reasonable due diligence prior to proceeding with potentially regulated activity would have identified the site of violation as containing or likely to contain areas subject to regulation under the Freshwater Wetlands Protection Act and the activity to require a permit or other approval. Examples of due diligence would include, but not be limited to, a search of publicly available (on-line) maps showing areas regulated under the FWPA, or publicly available soil maps to identify an area as containing or likely to contain areas and features regulated under the FWPA rules. Also in many cases it would be prudent to discuss development plans with a licensed engineer or land use consultant prior to proceeding with regulated activities. The FWPA has been in effect since 1988 so people are generally aware of its existence and the need to identify regulated areas and comply with its requirements. Additionally, there exists a consulting community available to assist a property owner who suspects his or her project site is regulated. The Department works with landowners through the letter of interpretation (LOI) process (for a fee) to provide a reliable determination that an area is or is not regulated. N.J.A.C. 7:7A-16.9(d)3 identifies minor conduct as any other conduct not included in “major” at N.J.A.C. 7:7A-16.9(d)1 or “moderate” at N.J.A.C. 7:7A-16.9(d)2.

N.J.A.C. 7:7A-16.9(e) provides for a penalty mitigating factor to be applied to reduce the civil administrative penalty assessed under N.J.A.C. 7:16.9(d) if appropriate. N.J.A.C. 7:7A-16.9(e)1 provides that if the violator restores the disturbed area and comes into compliance within 30 days, a mitigating factor multiplier of 0.5 will be applied to the base daily penalty. N.J.A.C. 7:7A-16.9(e)2 provides that if the violator submits an application for the unauthorized regulated activity within 30 days and the activity for which the violation was received is subsequently permitted without any modifications to the regulated activity, a mitigating factor multiplier of 0.25 will be applied to the base daily penalty. As explained above with regard to N.J.A.C. 7:7A-16.8(e), the application of the mitigating factor multiplier to a civil administrative penalty recognizes and rewards a violator’s responsiveness to the Department’s notices of violation, or a violator’s efforts

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to rapidly restore the resource or to seek a permit, since the Department's goal is compliance in the shortest timeframe possible.

Proposed new N.J.A.C. 7:7A-16.9(f) provides that the total civil administrative penalty for a particular violation is obtained by taking the base daily penalty determined under (b) through (d), adjusted if applicable using the penalty mitigation amount calculated under (e), and multiplying the result by the number of days during which the violation continued.

N.J.A.C. 7:7A-16.10 (recodified from N.J.A.C. 7:7A-16.9) Civil administrative penalty amount for submitting inaccurate or false information

The Department is proposing to amend N.J.A.C. 7:7A-16.10(a) to explicitly specify that the presence of a historic resource or regulated areas such as wetlands or transition areas are items about which submittal of inaccurate information or a false statement may result in a civil administrative penalty. Although this is implied under the existing rule, the amendment makes clear that the Department will assess such a penalty if warranted.

N.J.A.C. 7:7A-16.11 (recodified from N.J.A.C. 7:7A-16.10) Civil administrative penalty amount for failure to allow entry and inspection

N.J.A.C. 7:7A-16.11 contains the assessments for a civil administrative penalty for a person who refuses, inhibits or prohibits immediate lawful entry and inspection of any premises, building or place by an authorized Department representative. Pursuant to the EEEA amendments to the FWPA (see N.J.S.A. 13:9B-21m), the Department is proposing new N.J.A.C. 16.11(a), which clearly states the Department's right of entry to determine compliance with the Freshwater Wetlands Protection Act and these rules.

N.J.A.C. 7:7A-16.12 (recodified from N.J.A.C. 7:7A-16.11) Civil administrative penalty for failure to pay a civil administrative penalty

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N.J.A.C. 7:7A-16.12 provides the civil administrative penalty for the failure to pay a civil administrative penalty when due. No amendments to this section are proposed.

N.J.A.C. 7:7A-16.13 (recodified from N.J.A.C. 7:7A-16.12) Economic benefit factor

N.J.A.C. 7:7A-16.13 provides that the Department may add to a civil administrative penalty the amount of economic benefit in dollars that the violator has realized as the result of not complying with, or by delaying compliance with, an applicable law or condition. This provision is being amended to delete existing subsection (b) and modify subsection (a) in order to specify that, consistent with the EEEA amendments to the FWPA (see N.J.S.A. 13:9B-21d), the amount of economic benefit in dollars can be assessed in addition to the assessed civil administrative penalty, notwithstanding the penalty maximum of \$25,000.

N.J.A.C. 7:7A-16.14 (recodified from N.J.A.C. 7:7A-16.13) Civil penalty

N.J.A.C. 7:7A-16.14 contains the provisions by which a violator may be subject to a civil penalty. In accordance with the EEEA amendments to the FWPA (see N.J.S.A. 13:9B-21e), the provision at N.J.A.C. 7:7A-16.14(a) is being amended to provide that the maximum civil penalty per day of violation is \$25,000. This maximum penalty is exclusive of any economic benefit that may be assessed under N.J.A.C. 7:7A-16.13. In addition, at N.J.A.C. 7:7A-16.14(a)3, the provision establishing a penalty for failure to pay a penalty in full is being amended to also apply to failure to make payments in accordance with a payment schedule, in accordance with the EEEA amendments to the FWPA related to civil penalties.

Also consistent with the EEEA amendments to the FWPA, new N.J.A.C. 7:7A-16.14(a)4 is proposed to allow for the assessment of a civil penalty for a knowingly false or misleading statement on any application, record, report or other document required to be submitted to the Department.

The Department proposes to delete existing N.J.A.C. 7:7A-16.14(b) because it is redundant with subsection (b) as amended.

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N.J.A.C. 7:7A-16.15 (recodified from N.J.A.C. 7:7A-16.14) Criminal action

N.J.A.C. 7:7A-16.15 contains the provisions by which the Department may petition the Attorney General to bring a criminal action in court for certain violations of the Freshwater Wetlands Protection Act or this chapter. It also contains the fines for conviction of a crime. The Department is proposing several amendments to N.J.A.C. 7:7A-16.15 in accordance with the EEEA amendments to the FWPA (see N.J.S.A. 13:9B-21f). At N.J.A.C. 7:7A-16.15(c), “willfully or negligently” is replaced by “knowingly, purposely, or recklessly” with regard to the person found to have violated the FWPA under this section. In addition, if convicted, such persons will be found guilty of a crime of the third degree and subject to a fine ranging from \$5,000 to \$50,000 per day of violation, or imprisonment, or both. At N.J.A.C. 7:7A-16.15(d), the provision for a second offense is being deleted. Existing N.J.A.C. 7:7A-16.15(e) is being recodified as N.J.A.C. 7:7A-16.15(d) and amended to provide that a violator convicted of knowingly, purposely, or recklessly making a false statement, representation or certification in any application, record or other document filed or required to be maintained under the FWPA, or falsifies or tampers with any monitoring device will be found guilty of a crime of the third degree and subject to a maximum fine of \$50,000 per day of violation, or imprisonment, or both.

N.J.A.C. 7:7A-16.16 (recodified from N.J.A.C. 7:7A-16.15) Forfeiture of conveyances

N.J.A.C. 7:7A-16.16 describes procedures for the forfeiture of conveyances used or intended for use in the purposeful or knowing discharge into State open waters of any pollutant or toxic pollutant in violation of the Water Pollution Control Act. No amendments to this section are proposed.

N.J.A.C. 7:7A-16.17 (recodified from N.J.A.C. 7:7A-16.16) Notice of violation recorded on deed to property

N.J.A.C. 7:7A-16.17 provides that, on order of the Commissioner of the Department, a notice of violation will be recorded on the deed of the property on which

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the violation occurred. For consistency with the EEEA amendments to the FWPA (see N.J.S.A. 13:9B-21g), N.J.A.C. 7:7A-16.17(b) is amended to require that the Commissioner will immediately order such notice be removed from the property deed once the violation is remedied, or upon other conditions that the Commissioner may establish.

N.J.A.C. 7:7A-16.18 (recodified from N.J.A.C. 7:7A-16.17 “After the fact” permit; and N.J.A.C. 7:7A-16.19 (recodified from N.J.A.C. 7:7A-16.18) Public participation

N.J.A.C. 7:7A-16.18 provides the standards for Department to issue an “after the fact” permit and N.J.A.C. 7:7A-16.19 establishes requirements for public participation in the Department’s enforcement process. No amendments are proposed to these two sections.

N.J.A.C. 7:7A-16.20 (recodified from N.J.A.C. 7:7A-16.19) Grace period applicability, procedures

At N.J.A.C. 7:7A-16.20, Table E is amended to Table F, to reflect the addition of Table E at N.J.A.C. 7:7A-16.9.

Social Impact

The proposed amendments to N.J.A.C. 7:7A-16 incorporate and implement the changes to the FWPA made by the Environmental Enforcement Enhancement Act (EEEA). The amendments increase the deterrent effect of the penalties by raising the maximum civil administrative penalty to \$25,000 and strengthen the Department's enforcement capabilities under the wetlands program overall. Protecting wetlands from the effects of unauthorized regulated activities helps protect and preserve drinking water supplies, provide flood and storm damage protection, and protect habitat for fish and wildlife. The separation of the civil administrative penalties for violations resulting from the failure to obtain a permit from other civil administrative penalties will have a positive

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social impact because they will enable the Department to more fairly and appropriately assess civil administrative penalties for the variety of impacts to the program and regulated areas that may result from violations.

Economic Impact

As noted above in the Social Impact statement, the proposed amendments to N.J.A.C. 7:7A-16 reflect the EEEA amendments to the FWPA and strengthen the Department's enforcement capabilities under the wetlands program. There should be no economic impact as a result of the proposed amendments for the majority of applicants and permittees who comply with the Department's permitting requirements and who are therefore not subject to the penalties associated with violations. For violators, however, there is a potential increased, negative economic impact because of the increased maximum civil, civil administrative, and criminal penalties.

Environmental Impact

The proposed amendments to N.J.A.C. 7:7A-16 will have a positive environmental impact because they will ensure that those proposing to conduct regulated activities do so in accordance with the FWPA and the rules at N.J.A.C. 7:7A. The strengthened enforcement capabilities and increased maximum penalties incorporated into the rules to reflect the EEEA amendments to the FWPA will have a positive environmental impact if the result is increased deterrence and restoration of illegally disturbed regulated areas. Further, the penalties have been structured commensurate with the real or potential environmental or programmatic impact in order to better protect wetlands resources.

Federal Standards Statement

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

New Jersey's FWPA program replaces the Federal Clean Water Act Section 404 program (33 U.S.C. 1344) throughout most of the State. Consequently, the State's implementing rules replace the Army Corps of Engineers (ACOE) regulations for implementation of the Section 404 program. The basic structure of the Department's freshwater wetlands permitting program, and much of its substance, are essentially the same as the Federal 404 program. Both provide for individual and general permits. Both use similar key concepts and definitions, and apply similar standards in approving both general and individual permits. The Department is obligated under Federal law to ensure that its program is at least as stringent as the Federal 404 program.

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

The Federal program, as administered by the ACOE and EPA, does not distinguish between administrative penalties for failure to obtain a permit from all other

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administrative penalties, as the Department is proposing at N.J.A.C. 7:7A-16.8 and 16.9. Consequently, the proposed amendments do not make the Department's program more or less stringent than the comparable Federal enforcement standards. However, the proposed increases in penalties, resulting from the EEEA amendments to the FWPA, make the Department's penalties more consistent with the Federal program. Before the EEEA amendments to the FWPA, the maximum penalty the Department could impose was \$10,000 per day, whereas the USEPA has the ability to assess at least \$11,000 per violation per day. Under the EEEA amendments and the proposed rules, the Department may assess penalties up to a maximum \$25,000 per violation per day. Consequently, the Department's program is now as stringent, or, in cases where penalties exceed \$11,000, more stringent than the Federal program. It is difficult to further identify when the Department's enforcement program might be more stringent than the Federal enforcement program because the FWPA and the rules at N.J.A.C. 7:7A classify wetlands according to resource value and use resource value as a factor when determining the penalty assessment. There is no equivalent Federal wetlands resource classification system. However, in the case where the Department assesses a penalty for impacts to a transition area, the Department's program is more stringent than the Federal program because the latter does not provide protection for transition areas.

Jobs Impact

The Department does not anticipate that there will be any impact on the generation or loss of jobs as a result of the proposed amendments to N.J.A.C. 7:7A-16, since they relate to enforcement of the wetlands regulatory program and apply only to violators of the FWPA and rules.

Agriculture Industry Impact

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Pursuant to N.J.S.A. 52:14B-4, the Department evaluated this rulemaking to determine the nature and extent of the impacts of the proposed amendments on the agriculture industry. As with any business or individual, the proposed amendments to N.J.A.C. 7:7A-16 will affect the agriculture industry only if violations, such as conducting unauthorized non-exempt regulated activities, or failing to comply with the exemptions of the Act and rules, occur on agricultural sites.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that some of the builders and property owners that conduct activities in areas regulated under the FWPA are "small businesses" as defined by the Regulatory Flexibility Act.

The proposed amendments to N.J.A.C. 7:7A-16 will not impose additional reporting or recordkeeping requirements on small businesses. Small businesses will incur the penalties only if they are determined to be in violation of N.J.A.C. 7:7A.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies that adopt, amend or repeal State regulations to include in the rulemaking document a Smart Growth Impact Statement that describes the impact of the proposed rule on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the impact of the proposed amendments on smart growth and the implementation of the State Plan.

The proposed amendments to N.J.A.C. 7:7A-16 do not change land use policies or the nature and scope of regulation, but strengthen the enforcement capabilities and increase the maximum penalties for violations of the State's wetlands regulatory program

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to reflect the EEEA amendments to the FWPA. The rules do not therefore have any impact on the achievement of smart growth. To the extent the amended enforcement provisions encourage protection and restoration of wetlands resources they support the conservation and environmental protection goals and policies underlying the State Plan.

Housing Affordability Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments and new rules at N.J.A.C. 7:7A-16 for purposes of determining their impact, if any, on the affordability of housing. The Department has determined that the proposed rules will impose an insignificant impact because there is an extreme unlikelihood that the rules will evoke a change in the average costs associated with housing. Subchapter 16 of the FWPA rules applies only to persons who violate the Act and/or the rules protecting freshwater wetlands, State open waters and/or transition areas. The proposed amendments and new rules at N.J.A.C. 7:7A-16 do not change land use policies or the nature and scope of regulation, but strengthen the Department's enforcement capabilities and increase the maximum penalties for violations of the State's wetlands regulatory program to reflect the EEEA amendments to the FWPA. Therefore, there is an extreme unlikelihood that the proposed rules would evoke a change in the average costs associated with housing.

Smart Growth Development Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments and new rules at N.J.A.C. 7:7A-16 for purposes of determining their impact, if any, on smart growth development. The Department has determined that the proposed rules will impose an insignificant impact because there is an extreme unlikelihood that the rules will evoke a change in housing production within Planning areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. Subchapter 16 of the FWPA

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rules applies only to persons who violate the Act and/or the rules protecting freshwater wetlands, State open waters and/or transition areas. The proposed amendments and new rules at N.J.A.C. 7:7A-16 do not change land use policies or the nature and scope of regulation, but strengthen the Department's enforcement capabilities and increase the maximum penalties for violations of the State's wetlands regulatory program to reflect the EEEA amendments to the FWPA. Therefore, there is an extreme unlikelihood that the proposed rules would evoke a change in housing production within Planning areas 1 or 2 or within Designated Centers.

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Full text of the proposed amendments follows (additions indicated in bold **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 16 ENFORCEMENT

N.J.A.C. 7:7A-16.1 General provisions

(a) For the purposes of this subchapter (N.J.A.C. 7:7A-16), the term "applicable law and/or condition" means one or more applicable provisions or conditions of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the New Jersey Water Pollution Control Act, N.J.S.A. **58**:10A-1 et seq.; and/or any **letter of interpretation**, permit, **agreement**, **transition area** waiver, order, **settlement**, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

(b) (No change.)

(c) If the Department finds that a person is or has been violating any applicable law and/or condition, the Department may take one or more of the following actions:

1. - 2. (No change.)

3. Assess a civil administrative penalty under N.J.A.C. 7:7A-16.5 through 7:7A-[16.12]**16.13**, and in accordance with the grace period requirements set forth at N.J.A.C. 7:7A-[16.19]**16.20**;

4. Bring an action for a civil penalty under N.J.A.C. 7:7A-[16.13]**16.14**; and/or

5. Bring a criminal action under N.J.A.C. 7:7A-[16.14]**16.15**.

(d) For [all] **each** violation[s] under this [subchapter] **chapter**, each day during which each violation continues shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

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

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(g) Each applicant and/or permittee shall provide, upon the request of the Department, any information the Department requires to determine compliance with any applicable law and/or condition.

N.J.A.C. 7:7A-16.2 USEPA review

The Department shall make available without restriction any information obtained or used in the [implementation] **enforcement** of the Freshwater Wetlands Protection Act, the Water Pollution Control Act, and/or this chapter, to USEPA upon request.

N.J.A.C. 7:7A-16.4 Civil action

(a) Whenever, on the basis of available information, the Department finds a person in violation of any applicable law and/or condition, the Department may institute a civil action in superior Court for appropriate relief. Such relief may include, singly or in combination:

1. - 3. (No change.)

4. Assessment against the violator for compensatory damages for any loss or destruction of **natural resources, including but not limited to** wildlife, fish, [or] aquatic life, **habitat, plants, or historic or archaeological resources.** and for any other actual damages caused by an unauthorized regulated activity. Assessments under this section shall be paid to the State Treasurer except that compensatory damages shall be paid by specific order of the court to any persons who have been aggrieved by the unauthorized regulated activity; and /or

5. A requirement that the violator restore or rehabilitate the site of the violation to the maximum extent practicable, as defined in N.J.A.C. 7:7A-1.4 **or, in the event that restoration of the site of the violation is not practicable or feasible, provide for off-site restoration alternatives as approved by the Department.** If the violator does not do so, the Department may take corrective action, and will assess the violator pursuant to this chapter.

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

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Freshwater Wetlands Protection Act, or of any permit, **transition area** waiver, **letter of interpretation, agreement,** order, **settlement,** exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than \$ [10]**25**,000 for each violation, **not including any amount assessed for economic benefit as determined under N.J.A.C. 16.13.** The amount of the civil administrative penalty for [a violation of the Freshwater Wetlands Protection Act] **each such violation** shall be determined under N.J.A.C. 7:7A-16.8 through [16.12] **16.13.**

(b) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Water Pollution Control Act, or of any permit, approval, **agreement, transition area** waiver, order, **settlement,** exemption, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than \$ 50,000 for each violation. The amount of the civil administrative penalty for [a violation of the Water Pollution Control Act] **each such violation** shall be determined under the Department's rules implementing the enforcement provisions of that law at N.J.A.C. 7:14-8.

(c) (No change.)

N.J.A.C. 7:7A-16.6 Assessment, settlement and payment of a civil administrative penalty

(a) To assess a civil administrative penalty, the Department shall notify the violator by certified mail (return receipt requested) or by personal service. This notice of civil administrative penalty assessment shall:

1. - 2. (No change.)

3. Specify the amount of the civil administrative penalty **and state the basis thereof;**
and

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4. (No change.)

(b) The violator shall pay a civil administrative penalty immediately upon receipt of the Department's final order in a contested case, or as soon as a notice of civil administrative penalty assessment becomes a final order as follows:

1. If no hearing is requested under N.J.A.C. 7:7A-16.7 a notice of civil administrative penalty assessment becomes a final order on the [21st] **36th** day after the violator receives the notice of civil administrative penalty assessment;

2. - 3. (No change.)

(c) A civil administrative penalty assessed, including any portion thereof required to be paid pursuant to a payment schedule approved by the Department, which is not paid within 90 days of the date that payment of the penalty is due, shall be subject to an interest charge on the amount of the penalty, or portion thereof, which shall accrue as of the date payment is due. If the penalty is contested, no additional interest charge shall accrue on the amount of the penalty until after the date on which a final order is issued. Interest charges assessed and collectible pursuant to this subsection shall be based on the rate of interest on judgments provided in the New Jersey Rules of Court.

[(c)]**(d)** The Department may, in its discretion, settle any civil administrative penalty assess under this subchapter, based on an evaluation of the factors at [(c)]**(d)**1 through 4 below. As provided at N.J.A.C. 7:7A-16.5(c), this subsection does not apply to penalties assessed for violation of the Water Pollution Control Act:

1. - 4. (No change.)

N.J.A.C. 7:7A-16.7 Appeal of an administrative order and/or notice of civil administrative penalty

(a) A violator may request an adjudicatory hearing to contest an administrative order, and/or a notice of civil administrative penalty assessment issued under this chapter. To

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request an adjudicatory hearing, the violator shall submit the following information in writing to the Department at the addresses es in (b) below:

1. - 6. (No change.)

(b) A request for an adjudicatory hearing under this subchapter shall be [addressed to] **submitted as follows:**

1. Submit the original request to:

Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection
401 East State Street, 4th Floor
P.O. Box 402
Trenton, New Jersey 08625-0402

2. Submit a copy of the request to:

Bureau of Coastal and Land Use Compliance and Enforcement
Department of Environmental Protection
401 East State Street, 4th Floor
P.O. Box 422
Trenton, New Jersey 08625-0422

(c) If the Department does not receive the hearing request within [20]**35** days after the violator receives the notice of civil administrative penalty assessment and/or the administrative order which is being contested, the Department shall deny the hearing request.

(d)-(e) (No change.)

N.J.A.C. 7:7A-16.8 Civil administrative penalty amount **for failure to obtain a permit prior to conducting regulated activities**

(a) When the Department assesses a civil administrative penalty **for the failure to obtain a permit prior to conducting regulated activities**, the Department shall use the procedures in this section to determine the amount of the penalty if the violation pertains

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to **freshwater** wetlands and/**or freshwater wetland** transition areas, except if the violation **type** is listed at N.J.A.C. 7:7A-16.9, 16.10, [or] 16.11, **or 16.12**, in which case the penalty amount shall be determined under whichever of those sections applies. **For the purposes of this section, permit shall have the meaning set forth at N.J.A.C.**

7:7A-1.4

(b) (No change.)

(c) The Department shall use the [three]**two** factors described **at (c)1 and 2** below, **conduct and seriousness**, to determine the amount of [a] **the base daily** civil administrative penalty under this section. Using the standards below, the Department assigns each violation a point value for each factor. The total number of points is used in Table D at (d) below to determine the **base** penalty amount per day for each violation. The factors, and the point values assigned to them, are as follows:

1. The conduct factor of the violation shall be classified as major, moderate or minor and assigned points as follows:

i. Major conduct shall include an intentional, deliberate, purposeful, knowing or willful act or omission by the violator and is assigned [three] **five** points;

ii.-iii. (No change.)

2. **The seriousness factor of the violation is assigned points as provided in (c)2i and ii below based on the acreage of wetlands and/or transition areas impacted and the resource value of the freshwater wetlands.**

i. The acreage of wetlands **and/or transition areas** impacted [factor] shall be assigned points [as follows] **in accordance with (c)2iA through G** below:

[i]**A.** A violation impacting [more]**greater** than [three]**seven** acres of wetlands **and/or transition areas** is assigned [three] **seven** points;

[ii]**B.** A violation impacting [one to three]**greater than four acres up to and including seven acres** of wetlands **and/or transition areas** is assigned [two]**six** points;
[and

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iii]C. A violation impacting [less than one acre]greater than 2 acres up to and including 4 acres of wetlands and/or transition areas is assigned [one]five points; [and]

D. A violation impacting greater than one acre up to and including 2 acres of wetlands and/or transition areas is assigned four points;

E. A violation impacting greater than 0.5 acre up to and including one acre of wetlands and/or transition areas is assigned three points;

F. A violation impacting greater than 0.25 acre up to and including 0.5 acre of wetlands and/or transition areas is assigned two points; and

G. A violation impacting up to and including 0.25 acre of wetlands and/or transition areas is assigned one point; and

[3] ii. The resource value classification [factor] shall be assigned points [as follows] in accordance with (c)2iiA through E below. If the site of a violation contains regulated areas of more than one resource value classification, the points assigned to a violation for the highest resource classification on the site shall apply for the entire site:

[i]A. A violation impacting exceptional resource classification wetlands is assigned [three] five points;

[ii]B. A violation impacting intermediate resource classification wetlands is assigned [two]four points; [and]

iii]C. A violation impacting ordinary resource classification wetlands is assigned [one] three points[.];

D. A violation impacting only exceptional resource classification transition areas is assigned two points; and

E. A violation impacting only intermediate resource classification transition areas is assigned one point.

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(d) The Department shall sum the total points assigned according to the [three] **two** factors in (c) above, and shall determine the **base** penalty amount per day using the following table:

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Table D

Base p[P]enalty points table

Total Points	<u>Base</u> Penalty Amount Per Day
<u>17</u>	<u>\$25,000</u>
<u>16</u>	<u>\$23,000</u>
[9] <u>15</u>	\$ [10,000] <u>21,000</u>
[8] <u>14</u>	[9,000] <u>\$19,000</u>
<u>13</u>	<u>\$17,000</u>
[7] <u>12</u>	[7,500] <u>\$15,000</u>
[6] <u>11</u>	[6,000] <u>\$13,000</u>
[5] <u>10</u>	[4,500] <u>11,000</u>
[4] <u>9</u>	[3,000] <u>10,000</u>
[3] <u>8</u>	[1,500] <u>9,000</u>
<u>7</u>	<u>8,000</u>
<u>6</u>	<u>6,000</u>
<u>5</u>	<u>5,000</u>
<u>4</u>	<u>4,000</u>
<u>3</u>	<u>3,000</u>

(e) The Department shall subtract from the daily base penalty determined pursuant to (d) above a penalty mitigation amount calculated by multiplying the daily base penalty times the penalty mitigating factor multiplier pursuant to (e)1 or 2 below, if applicable.

1. Where the nature, timing and effectiveness of any measures taken by the violator to correct the violation and restore the site to its pre-disturbance condition

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results in compliance within 30 days of receipt of the notice of violation from the Department, the mitigating factor multiplier is 0.50; or

2. Where a complete application for a general permit or an individual permit is submitted within 60 days of receipt of the notice of violation from the Department and an authorization under a general permit or an individual permit is subsequently obtained for the unauthorized regulated activity cited in the notice of violation without the need for any changes to the regulated activity for which the notice of violation was issued, the mitigating factor multiplier is 0.25.

(f) The total civil administrative penalty shall be the daily civil administrative penalty determined as provided under (c) through (e) above, multiplied by the number of days during which each violation continued.

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

(a) When the Department assesses a civil administrative penalty for a violation other than the failure to obtain a permit prior to conducting regulated activities, the Department shall use the procedures in this section to determine the amount of the penalty, except if the violation type is listed at N.J.A.C. 7:7A-16.10, 16.11, or 16.12, in which case the penalty amount shall be determined under whichever of those sections applies.

(b) The Department shall use the two factors described at (c) and (d) below, seriousness and conduct, to determine the amount of the base daily civil administrative penalty under this section. The applicable daily penalty amount is determined using the base daily penalty matrix in Table E below, based on the seriousness of the violation determined pursuant to (c) below and the conduct of the violator determined pursuant to (d) below.

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Table E

Base daily penalty matrix

		<u>SERIOUSNESS</u>		
		<u>MAJOR</u>	<u>MODERATE</u>	<u>MINOR</u>
<u>CONDUCT</u>	<u>MAJOR</u>	<u>\$25,000</u>	<u>\$15,000</u>	<u>\$10,000</u>
	<u>MODERATE</u>	<u>\$15,000</u>	<u>\$7,500</u>	<u>\$5,000</u>
	<u>MINOR</u>	<u>\$10,000</u>	<u>\$5,000</u>	<u>\$1,000</u>

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

1. “Major” seriousness shall apply to any violation which has caused or has the potential to cause serious harm to human health, safety, the Freshwater Wetlands Protection Act regulatory program, or the environment, or seriously deviates from any applicable law and/or condition. “Serious” deviations include, but are not limited to those violations which are in complete contravention of the applicable law and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the applicable law and/or condition. Violations of “major” seriousness include, but are not limited to:

- i. Any activity that negatively affects water quality;**
- ii. Clearing, grading, or filling of freshwater wetlands;**
- iii. Clearing, grading, or filling of transition areas when done in conjunction with such activities in freshwater wetlands;**

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iv. Clearing, grading, filling, or disturbance of freshwater wetlands and/or transition areas in excess of that authorized by a permit or plan;

v. Failure to timely record a conservation restriction or easement, and the property has been sold or transferred;

vi. Failure to report the presence of a historic resource during construction and/or the destruction of a historic resource without Department approval;

vii. Failure to comply with a historic resource or mitigation requirement; and

viii. Failure of an applicant or permittee to provide information upon request to determine compliance with any applicable law and/or condition;

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

i. Failure to notify the Department of commencement of construction;

ii. Failure to transfer a permit in accordance with this chapter; and

iii. Failure to timely record a conservation restriction or easement, and the property has not been sold or transferred.

3. “Minor” seriousness shall apply to any violation not included in (c)1 or 2 above.

(d) The conduct of the violator shall be determined as major, moderate, or minor as follows:

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1. “Major” conduct shall include any intentional, deliberate, purposeful, knowing, or willful act or omission by the violator. The Department presumes a violation of any provision of a permit, transition area waiver, letter of interpretation, agreement, order, settlement, exemption letter, or mitigation proposal, as well as any violation by a person who has previously applied for or received any such instrument pursuant to the Freshwater Wetlands Protection Act and/or this chapter, to be a knowing violation;

2. “Moderate” conduct shall include any unintentional but foreseeable act or omission by the violator; and

3. “Minor” conduct shall include any other conduct not included in (d)1 or 2 above.

(e) The Department shall subtract from the daily base penalty determined using Table E at (b) above a penalty mitigation amount calculated by multiplying the daily base penalty times the penalty mitigating factor multiplier pursuant to (e)1 or 2 below, if applicable.

1. Where the nature, timing and effectiveness of any measures taken by the violator to correct the violation and restore any site disturbance to its pre-disturbance condition results in compliance within 30 days of receipt of the notice of violation from the Department, the mitigating factor multiplier is 0.50; or

2. Where a complete application for a modification of authorization under a general permit, transition area waiver or an individual permit is submitted within 60 days of receipt of the notice of violation from the Department and a modification of the subject authorization(s) is subsequently obtained for the activity that was cited in the notice of violation without the need for any changes to the regulated activity or the site for which the notice of violation was issued, the mitigating factor multiplier is 0.25.

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(f) The total civil administrative penalty shall be the daily civil administrative penalty determined as provided under (b) through (e) above, multiplied by the number of days during which each violation continued.

N.J.A.C. 7:7A-[16.9] **16.10** Civil administrative penalty amount for submitting inaccurate or false information

(a) When the Department assesses a civil administrative penalty for submittal of inaccurate information or submittal of a false statement, representation, or certification in an application, record, or other document required to be submitted or maintained under the Freshwater Wetlands Protection Act or under a permit, **transition area** waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, the Department shall use the procedures in this section to determine the amount of the civil administrative penalty. **This section applies with regard to information including, but not limited to, the presence of a historic resource and/or the presence of regulated areas such as freshwater wetlands and freshwater wetlands transition areas on a site.**

(b)-(g) (No change.)

N.J.A.C. 7:7A-[16.10]**16.11** Civil administrative penalty amount for failure to allow entry and inspection

(a)The Department shall have the authority to enter any property, facility, premises or site for the purpose of conducting inspections, sampling of soil or water, copying or photocopying documents or records, and for otherwise determining compliance with any applicable law and/or condition.

Recodify existing (a) - (e) as **(b) - (f)** (No change in text.)

Recodify existing N.J.A.C 7:7A-16.11 as **16.12** (No change in text.)

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N.J.A.C. 7:7A-[16.12]**16.13** Economic benefit factor

(a) **Notwithstanding the maximum civil administrative penalty of \$25,000 pursuant to N.J.A.C. 7:7A-16.5(a)**, [T]he Department may add to a civil administrative penalty assessed under this subchapter the amount of economic benefit in dollars that the violator has realized as the result of not complying, or by delaying compliance with, an applicable law and/or condition.

[(b) The Department may use the economic benefit factor to increase a civil administrative penalty to an amount no greater than the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(c) If the total economic benefit was derived from more than one violation, the Department may apportion the total economic benefit amount among the violations from which it was derived [so as to increase each civil administrative penalty to an amount no greater than the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b)].

N.J.A.C. 7:7A-[16.13]**16.14** Civil penalty

(a) Each person who does any of the following shall be subject, upon the order of a court, to a civil penalty **not to exceed \$25,000 per day of the violation, not including any amount assessed for economic benefit as determined under N.J.A.C. 16.13:**

1. (No change.)
2. Violates an administrative order or a court order issued pursuant to the Freshwater Wetlands Protection Act, the Water Pollution Control Act, or this chapter; [or]
3. Fails to pay in full a civil administrative penalty assessed under this subchapter, **or fails to make a payment pursuant to a penalty payment schedule entered into with the Department; or**
- 4. Knowingly makes any false or misleading statement on any application, record, report, or other document required to be submitted to the Department.**

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[(b) [A civil penalty imposed under this section shall not exceed the maximum allowed at N.J.A.C. 7:7A-16.5(a) and (b).

(c)] (No change.)

N.J.A.C 7:7A-[16.14]**16.15** Criminal action

(a) – (b) (No change.)

(c) A person who [willfully or negligently] **knowingly, purposely, or recklessly** violates the Freshwater Wetlands Protection Act, or any permit, approval, **transition area** waiver, order, exemption, or rule promulgated or approved pursuant thereto, shall be guilty, upon conviction, of a crime of the [fourth]**third** degree and shall be subject to a fine of no less than [\$2,500]**\$5,000** nor more than [\$25,000]**\$50,000** per day of violation, **or imprisonment, or both.**

(d) [A second offense under this section shall subject the violator to a fine of no less than \$5,000 nor more than \$50,000 per day of violation.

(e)]A person shall **be guilty**, upon conviction, **of a crime of the third degree and shall be subject to a fine of not more than \$50,000 per day of violation, or imprisonment, or both, if the person:**

1. Knowingly, **purposely, or recklessly** makes a false statement, representation, or certification in any application, record or other document filed or required to be maintained under the Freshwater Wetlands Protection Act, or under a permit, **transition area** waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto; or

2. Falsifies, tampers with or **purposely, recklessly or** knowingly renders inaccurate, any monitoring device or method required to be maintained under the Freshwater Wetlands Protection Act, or a permit, **transition area** waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

Recodify existing N.J.A.C. 7:7A-16.15 as **16.16** (No change in text.)

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N.J.A.C. 7:7A-1[16.16]**16.17** Notice of violation recorded on deed to property

(a) (No change.)

(b) The notice of violation shall remain attached to the property deed and shall remain recorded at the Superior Court until the violation has been remedied and the Commissioner has ordered the clerk to remove the notice of violation. **The Commissioner shall immediately order the notice removed once the violation is remedied, or upon other conditions set forth by the Commissioner.**

Recodify existing N.J.A.C. 7:7A-16.17 and 16.18 as **16.18 and 16.19** (No change in text.)

N.J.A.C. 7:7A-16.[19]**20** Grace period applicability; procedures

(a) Each violation identified in Table [E]**F** at (f) below by an “M” in the Type of Violation column, for which the conditions of (d)1 through 6 below are satisfied, and each violation determined under (c) below as minor for which the conditions of (d)1 through 9 below are satisfied, is a minor violation and is subject to a 30-day grace period as described at (e) below.

(b) Each violation identified in Table [E]**F** at (f) below by an “NM” in the Type of Violation column is a non-minor violation and is not subject to a grace period.

(c) If a violation is not listed in Table [E]**F** at (f) below, the designation of the violation as minor or non-minor is determined as follows:

1. If the violation is not listed in Table [E]**F** at (f) below but is comparable to a violation designated as “M” in Table [E]**F** and the violation meets all of the criteria of (d)1 through 6 below, then the violation is minor. The minor violation shall be subject to a grace period of 30 days as described at (e) below.

2. If the violation is not listed in Table [E]**F** at (f) below and is not comparable to a violation listed in Table [E]**F** but the violation meets all of the criteria of (d)1 through 9

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below, then the violation is minor. The minor violation shall be subject to a grace period of 30 days as described at (e) below.

3. If the violation is not listed in Table [E]F at (f) below but is comparable to a violation designated as “NM” in Table [E]F, then the violation is a non-minor violation and is not subject to a grace period.

4. If the violation is not listed in Table [E]F at (f) below and is not comparable to a violation listed in Table [E]F, and the violation does not meet all of the criteria at (d)1 through 9 below, the violation is non-minor and is not subject to the grace period.

5. Comparability of a violation to a violation in Table [E]F at (f) below is based on the nature of the violation[s] (for example, recordkeeping, accuracy of information provided to the Department, amount and type of impacts to the protected resources). A violation shall not be considered comparable to any violation designated as “M” in Table [E]F unless the violation also meets the criteria at (d)7 through 9 below.

(d) – (e) (No change.)

(f) The designations of violations of the Freshwater Wetlands Protection Act Rules as minor (“M”) or non-minor (“NM”) are set forth in Table [E]F below. The violation descriptions are provided for informational purposes only. In the event that there is a conflict between a violation description in Table [E]F and the rule to which the violation description corresponds, the rule shall govern.

Recodify existing Table E as **Table F**. (No change in text.)