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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Freshwater Wetlands Protection Act rules

Proposed Readoption with Amendments: N.J.A.C. 7:7A

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: 17-07-08/575

Proposal Number: PRN 2007-

Three public hearings concerning the proposal will be held as indicated below:

2:00 P.M., Thursday, October 4, 2007
Pequest Fish Hatchery
605 Pequest Road
Oxford, New Jersey

2:30 P.M., Thursday, October 11, 2007
NJ Department of Environmental Protection
Public Hearing Room
401 East State Street
Trenton, New Jersey

2:00 P.M., Tuesday, October 16, 2007
Gloucester County Office of Government Services
1200 N. Delsea Drive
Clayton, New Jersey 08312

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Submit written comments on this proposal by November 3, 2007, 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. Submission of a disk or CD is not a requirement. The Department prefers Microsoft Word 6.0 or above. MacIntosh formats should not be used. 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.

Pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-5.1, the Freshwater Wetlands Protection Act (FWPA) rules were scheduled to expire on August 3, 2007. Timely filing of this proposal with the Office of Administrative Law resulted in the extension of the expiration date to January 30, 2008.

The Department of Environmental Protection (Department) has reviewed the FWPA rules and has determined them to be necessary, reasonable and proper for the purposes for which they were originally promulgated. However, the Department

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recognizes that certain amendments to the rules are necessary and is therefore proposing herein to readopt the FWPA rules with various amendments and certain new provisions.

The FWPA rules at N.J.A.C. 7:7A establish the procedures by which the Department reviews permit applications and appeals from permit decisions under the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.) As authorized by the statute, the FWPA rules govern the removal, excavation, disturbance or dredging, drainage or disturbance of the water level or water table, dumping, discharging or filling with any materials, driving of pilings, and placing of obstructions in a freshwater wetland, and the destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees. The FWPA rules also regulate the discharge of dredge and fill material in State open waters. Finally, the FWPA rules prohibit within a wetland transition area (an upland area that may extend 50 or 150 feet from the wetland boundary depending upon the wetland classification): removal, excavation, or disturbance of soil, dumping or filling, erection of structures, placement of pavement and the destruction of plant life that would alter the existing pattern of vegetation.

In addition, since March 2, 1994, New Jersey's freshwater wetlands program has operated in place of the Federal wetlands permitting program, also known as the "Federal 404 program" as implemented by the Army Corps of Engineers (ACOE). The Federal 404 program is Section 404 of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq. The authority for the Department to assume the federal permitting authority also derives from the Federal Clean Water Act at Section 404(g). The United States Environmental Protection Agency (EPA) oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and EPA. The requirement imposed by the Federal Clean Water Act on a State assuming the federal permitting authority is that the State implement equally stringent regulatory standards to those currently in place for the Federal 404 program for the protection of waters of the United States, including wetlands.

The rules at N.J.A.C. 7:7A are administered by the Department's Division of Land Use Regulation.

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The rules proposed for re adoption at N.J.A.C. 7:7A and the amendments proposed to N.J.A.C. 7:7A are described below.

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

SUBCHAPTER 1. General Information

Subchapter 1 contains general information including scope and authority, contact information for the Department, definitions, the relationship of these rules to other statutes and regulations, and provisions for hearings and appeals of Department decisions.

N.J.A.C. 7:7A-1.3 Forms and information , internet web site

Beginning at N.J.A.C. 7:7A-1.3 and continuing throughout the chapter, the Department is proposing to change the name of the program implementing this chapter from the Land Use Regulation Program to the Division of Land Use Regulation.

N.J.A.C. 7:7A-1.4 Definitions

The Department is proposing to add a definition for “architectural survey.” It incorporates by reference the standards and guidelines of the Secretary of the Interior. The guidelines provide technical advice and guidance about archaeological and historic preservation activities and methods, organize information gathered about preservation activities, and describe results to be achieved by Federal agencies, States, and others when planning for the identification, evaluation, registration, and treatment of historic properties. The term “Architectural survey” is referenced at N.J.A.C. 7:7A-12.2, USEPA Review, when the Department describes the steps necessary for an applicant to demonstrate that he or she has adequately examined a site for the presence of historic resources.

Beginning in the definition section and continuing through the chapter, the Department is proposing to change the term “conservation restriction” to “conservation

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restriction or easement” because the term “restriction” and “easement” are frequently used interchangeably by the public.

The Department is proposing to amend the definition of “critical habitat for fauna or flora” to delete the reference to “commercially and recreationally important” wildlife because these types of habitats are important for all fauna including migrating birds and threatened and endangered species and not solely to commercially and recreationally important wildlife.

The Department is proposing to add stump removal to the definition of “discharge of fill material.” This is consistent with the existing provision at N.J.A.C. 7:7A-2.8(d) which states that the normal harvesting of forest products does not include stump removal because stump removal results in a discharge of dredged or fill material, and a change in use and an impairment of flow or circulation of a wetland.

The Department is proposing to add a definition of “fair market value” to the rules. The term is used at N.J.A.C. 7:7A-6.5 to describe the price at which a property must be offered for sale when the applicant is seeking a hardship waiver, and also at N.J.A.C. 7:7A-17 when an applicant is requesting reconsideration of the Department’s action or inaction regarding a permit decision. The proposed definition is based on the definition used in the real estate profession.

The Department is also proposing to add a definition of “Historic preservation restriction or easement.” The proposed definition is based on that in N.J.S.A. 13:8B-1 et seq., the New Jersey Conservation Restriction and Historic Preservation Restriction Act. The Department may require, as a condition of approval for a freshwater wetland permit, that a historic resource be protected against future impacts. It is more appropriate to use a historic preservation restriction or easement for this purpose than a conservation restriction or easement because the latter requires that a site be protected in its natural state and does not contain the appropriate limitations for the protection of historic resources.

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The Department is proposing to amend the definition of “HUC 11” to instead define the term “HUC” and to provide a more descriptive explanation of the designation. The proposed definition explains how the hydrologic unit code (HUC) numbering system indicates the relative size of a watershed. For example, a HUC 11 is larger than and may contain several HUC 14 drainage areas. The Department is also updating the address for locating the HUC information for the State of New Jersey.

The Department is proposing to delete the definition of “individual transition area waiver” because it is unnecessary and confusing. The term “transition area waiver” sufficiently describes all the transition area waivers contained within the current definition of “individual transition area waiver.” Further, the definition of “individual transition area waiver” is frequently confused with the transition area waiver based upon individual permit criteria described at N.J.A.C. 7:7A-6.3(g). The reference to “individual transition area waiver” will be amended to read “transition area waiver” wherever it occurs throughout the rules.

The Department is proposing to amend the definition of “person” to include corporate officers or officials since they may also be responsible for the submittal of applications to the Department.

The Department is proposing to add a definition for “Phase IA historical and archaeological survey.” It incorporates by reference the standards and guidelines of the Secretary of the Interior. The guidelines provide technical advice and guidance about archaeological and historic preservation activities and methods, organize information gathered about preservation activities, and describe results to be achieved by Federal agencies, States, and others when planning for the identification, evaluation, registration, and treatment of historic properties. The term “Phase IA historical and archaeological survey” is referenced at N.J.A.C. 7:7A-12.2, USEPA Review, when the Department describes the steps necessary for an applicant to demonstrate that he or she has adequately examined a site for the presence of historic resources.

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The Department is proposing to delete the term “residential development project” because its use in the rules was held invalid. See, *In the Matter of Freshwater Wetlands Protection Act Rules*, 180 N.J. 478 (2004).

The Department is proposing to explicitly state, in the definition of “silviculture” that orchards, tree farms and nurseries are not silviculture but rather farming activities.

The Department is proposing to amend the definition of “swale” to exclude wetland features that are naturally occurring and contain palustrine forest. In the case where a forested wetland depression is naturally occurring within an upland forest, the Department believes that the forested wetland is a critical component of the overall forest system. Therefore, such wetlands should not be identified as “swales” since such designation would allow the wetland to be classified as “ordinary resource value,” precluding the establishment of a transition area, and allowing the elimination of the feature in accordance with general permit 7 at N.J.A.C. 7:7A-5.7.

The Department is making several clarifications to the definition of “vernal habitat.” The first is the addition of a reference to the methods for identifying all wetlands or State open waters contained elsewhere in the rules. The second clarification at item one is the indication that a vernal habitat can occur in or contain a confined basin depression without a permanent flowing outlet. At 2i and 2ii, the Department is clarifying that obligate species may be found in or immediately adjacent to the area of ponded water. The final clarification relates to the presence of fish in a potential vernal habitat. At item 4, the Department is clarifying that, although fish may be introduced into a vernal habitat through stocking, the habitat is free of reproducing fish populations throughout the year.

N.J.A.C. 7:7A-1.7 Hearings and appeals

At N.J.A.C. 7:7A-1.7(b), the Department is correcting the reference from N.J.A.C. 7:7A-16.18 to 16.7 to the section of the rules containing the procedures for

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contesting an administrative order or penalty assessment from an enforcement matter.

The changes to the enforcement sections are discussed in detail later in this summary.

At N.J.A.C. 7:7A-1.7(c)5, 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 Division of Land Use Regulation.

SUBCHAPTER 2 Applicability

N.J.A.C. 7:7A-2.1 Jurisdiction; permit or waiver requirement

Subchapter 2 describes jurisdiction, regulated activities in freshwater wetlands and wetlands transition areas, the resource classification of wetlands, and activities that are exempt from the Freshwater Wetlands Protection Act.

The Department is proposing to amend N.J.A.C. 7:7A-2.1(e) to clarify that responsibility for ensuring that a permitted project complies with all requirements of the FWPA rules resides with the owner of property upon which regulated activities occur, the permittee and any person who manages, oversees, or works on a proposed project since any one of these individuals can cause environmental damage in conducting their job responsibilities as they relate to a wetland project.

In addition, the Department is proposing to add a new N.J.A.C. 7:7A-2.1(g) to state explicitly that failure to obtain a permit or waiver to conduct regulated or prohibited activities, or to conduct activities in accordance with an approved permit or waiver is a violation of the FWPA and the FWPA rules, subject to enforcement action.

N.J.A.C. 7:7A-2.2 Regulated activities in freshwater wetlands and State open waters

The Department is proposing to amend N.J.A.C. 7:7A-2.2(a) to delete from the list of regulated activities in freshwater wetlands and State open waters the placement of

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any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4. This provision was held invalid. See In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478 (2004).

N.J.A.C. 7:7A-2.4 Classification of freshwater wetlands by resource value

At N.J.A.C. 7:7A-2.4(d)4 the Department is proposing to clarify the description of ordinary resource value wetlands as it relates to detention facilities. The proposed language states that a detention facility that is constructed in uplands is ordinary resource value regardless of the wetland resource classification of the body of water or wetland to which it discharges.

N.J.A.C. 7:7A-2.6 Regulated activities in transition areas

The Department is proposing to amend N.J.A.C. 7:7A-2.6(a) to delete from the list of regulated activities in transition areas the placement of any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4. As explained previously, provisions related to residential development projects were held invalid. See In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478 (2004).

The Department is proposing to amend N.J.A.C. 7:7A-2.6(b) to provide that normal property maintenance activities may not be conducted in a transition area that is subject to a conservation restriction or easement unless the activities have been explicitly permitted by the restriction. Once a transition area has been altered and the remaining transition area protected by a conservation restriction or easement, it is necessary to more carefully control the activities that are permitted to occur since the remaining transition area is the minimum necessary to protect the adjacent wetland from the permitted development activities. Unless the restriction states otherwise, the Department requires that the transition area subject to the restriction be allowed to return to its natural condition and will not permit mowing, landscaping or any of the other normal property

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maintenance activities that are permitted in a transition area that is not subject to a conservation restriction or easement.

At N.J.A.C. 7:7A-2.6(b)1i(1), the Department is proposing to separate the mowing of lawns at N.J.A.C. 7:7A-2.6(b)1i(1), from the maintenance of fields at new proposed N.J.A.C. 7:7A-2.6(b)1i(2), in the list of activities considered to be normal property maintenance, in order to make it clear that converting an existing field to a lawn is not considered normal property maintenance. A field, in the transition area, provides greater values and functions for the protection of the adjacent wetland than a lawn because there is a greater variety of vegetation with a deeper root system, and less compacting of the soil that helps to better control runoff. An existing field can therefore be maintained as a field but cannot be mowed as a lawn because converting a field to a lawn would result in a substantial alteration of the characteristic of a transition area and a loss in ecological value. Therefore, such conversion activities require pre-approval from the Department in the form of a transition area waiver.

The Department is proposing to recodify N.J.A.C. 7:7A-2.6(b)1i(3) through (8) as N.J.A.C. 7:7A-2.6(b)1i(4) through (9).

At recodified N.J.A.C. 7:7A-2.6(b)1i(5), the Department is proposing to amend the language to allow replacement of existing non-native plants with either native or non-native species so long as the replacement planting does not significantly change the character of the existing vegetational community of the transition area. The proposed language is consistent with the existing rule at recodified N.J.A.C. 7:7A-2.6(b)1i(6) which allows supplemental planting so long as the character of the vegetational community is not significantly altered.

At recodified N.J.A.C. 7:7A-2.6(b)1i(8) the Department is proposing to reduce the size of new gardens that can be developed in the transition area and unregulated as “normal property maintenance.” The Department is proposing to reduce the acceptable area from 0.25 acre (or approximately 10,000 square feet) to 2,500 square feet. The Department is proposing this reduction because many lots in the State are themselves less than 10,000 square feet and allowing impacts of 10,000 square feet for a garden could result in the complete elimination of the transition area. The proposed 2,500 square foot

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area provides a sufficiently large area for vegetable or flower gardening while limiting the impact to transition areas. In addition, the Department is proposing to prohibit entirely the creation of gardens in forested transition areas or in transition areas subject to a conservation restriction or easement. Forested transition areas provide a higher level of protection for adjacent wetlands than other vegetation types. The elimination of a forested transition area has adverse effects on the adjacent wetland. Therefore, if an applicant wants to eliminate a forested transition area, the proposed amendment will require the applicant to obtain a transition area waiver so that the Department can evaluate the resulting impacts to the adjacent wetland that the transition area is intended to protect. If a transition area is subject to a conservation restriction or easement, it is afforded a higher level of protection than a non-restricted transition area because it represents the portion of the transition area that remains after other portions have been eliminated. It is therefore important that it remain entirely unaltered.

Finally, at N.J.A.C. 7:7A-2.6(b)1ii, the Department is clarifying that any activity which involves or causes the substantial alteration or change of the existing characteristics of a transition area is not considered normal property maintenance and therefore requires a transition area waiver. In addition, the Department is adding the word “alteration” for consistency within this subparagraph that describes activities which involve or cause substantial alteration or change of the transition area.

The Department is proposing to clarify at N.J.A.C. 7:7A-2.6(b)2 that fencing is not regulated if it is placed at the boundary between the transition area and upland area. At N.J.A.C. 7:7A-2.6(b)3 the Department is proposing to exclude chain link fences from the definition of “temporary structures” which are permitted without approval in the transition area because chain link fences are installed with cement footings and therefore are not temporary.

N.J.A.C. 7:7A-2.8 Activities exempted from permit and/or waiver requirement

At N.J.A.C. 7:7A-2.8(a), the Department is adding language to emphasize that any activity conducted under an exemption that does not meet all standards, conditions,

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or limitations of the exemption is a violation subject to enforcement action in accordance with N.J.A.C. 7:7A-16.

The Department is amending N.J.A.C. 7:7A-2.8(b)2 to correct a typographical error.

The Department is proposing to reorganize the provision at N.J.A.C. 7:7A-2.8(b)3 that describes how the Department determines what portion of a property is exempt pursuant to an exemption for farming activities. The reorganization of the section is intended to clarify the provision but does not change the meaning or eligibility of properties or portions of properties satisfying the exemption requirements. The addition of the June 30, 1988 date is intended to clarify that for purposes of qualifying for this exemption, a property or part of the property had to be actively farmed since June 30, 1988, the day prior to enactment of the FWPA on July 1, 1988. The date is also being provided in (b) to provide continuity and consistency with the definition at N.J.A.C. 7:7A-1.4 of “established, ongoing farming, ranching or silviculture operation” to which the exemption is limited at (c) and which already contains the June 30, 1988 date. Land that was not farmed prior to enactment of the FWPA does not qualify for this exemption and the proposed amendment does not alter this requirement.

At N.J.A.C. 7:7A-2.8(b)4, the Department is proposing to clarify the provision regarding the conduct of forestry activities in a freshwater wetlands and when such activities are exempt. The normal harvesting of forest products is exempt from the FWPA provided that the activities are part of a forest management plan that addresses wetlands and that is reviewed and approved by the State Forester before the activities are undertaken. A woodland management plan prepared for tax purposes but that does not address wetlands is insufficient to qualify for the exemption.

The Department is also proposing to amend the provisions which describe the exemption for the installation of ditching and water control facilities on agricultural lands at N.J.A.C. 7:7A:2.8(c)1ii. The proposed amendments make it clear that ditching and water control facilities are permitted in areas which are in established use for crop production. In addition, the installation of a ditch or water control structure cannot alter

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the bottom elevation of any watercourse, since such alteration could result in additional drainage of surrounding wetlands.

The Department is proposing to include standards in N.J.A.C. 7:7A-2.8(c)2 relating to the construction of farm ponds in wetlands that are also actively farmed areas. At proposed new N.J.A.C. 7:7A-2.8(c)2i, the Department states that ponds constructed in actively farmed areas do not constitute a change in use. A field that has had no crops or pasturing for five years or more is considered abandoned and not an actively farmed area. This is consistent with the definition of “abandoned” at N.J.A.C. 7:7A-1.4. Further, the Department does not consider forest land actively farmed unless it is part of an approved forest management plan.

Proposed new N.J.A.C. 7:7A-2.8(c)2ii contains the criteria by which the Department will determine whether a pond meets the requirements as an exempt farm pond. The criteria require that the pond be: constructed outside of a watercourse; created by excavation and not formed by creating an embankment within a watercourse; not associated with a development, as that term is defined under the Municipal Land Use Law, N.J.S.A. 40:55D-4; intended exclusively for agricultural purposes; sized appropriately for the intended use; and part of a farm conservation plan approved by the Natural Resource Conservation Service (NRCS).

In addition, the Department is proposing to amend N.J.A.C. 7:7A-2.8(c)3 as it relates to the construction of farm or forest roads. Both types of roads are exempt when part of an ongoing farming or forestry activity. The proposed amendment states that once a property no longer qualifies for farmland assessment (which serves as an indication of the presence of farming and woodlot management activities on the property), any roads that were constructed using fill material must be removed within 30 days. Once a property no longer qualifies for a farmland assessment, it is no longer exempt from the FWPA and therefore former farm and forest roads also lose their exemption. If a property owner wants to keep the existing road for a new use, for example to accommodate development, he or she is required to apply for a wetland permit. The purpose for requiring a wetland permit is to ensure that any permanent road through wetlands is built in accordance with the rules.

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Proposed new N.J.A.C. 7:7A-2.8(c)3i contains the criteria by which the Department will determine whether a new road qualifies as an exempt farm road under this chapter. The proposed criteria require that a new farm road be part of a farm conservation plan approved by the Natural Resource Conservation Service, located to minimize disturbance to wetlands, transition areas and watercourses and requires the use of an alternative location that would have lesser impacts. The proposed criteria also require that the road be necessary to provide support or access to a farming operation and not to development. The road cannot exceed 14 feet in width, unless large equipment necessitates a larger road. In the latter case the road can be no greater than 20 feet in width. The roads must be constructed at grade unless the applicant can demonstrate why fill material in wetlands for a road is necessary to support the farming operation. Any fill is limited to 6 inches deep with a total impact to wetlands or State open waters of 0.25 acres. Finally, pipes are required to be installed to maintain wetland hydrology.

Proposed new N.J.A.C. 7:7A-2.8(c)3ii provides a definition for “maintenance of a farm road.” These activities are exempt provided that the existing road remains the same width before and after maintenance, that any fill is placed entirely within the existing footprint of the existing road, and that a culvert shall be used only to replace an existing culvert. If a culvert has never been placed and the owner desires to place one for the first time, the Department considers that to be construction of a new farm road subject to the exemption limitations contained at N.J.A.C. 7:7A-2.8(c)3i.

Finally, at N.J.A.C. 7:7A-2.8(d), the Department is proposing to amend the provision regarding activities that are exempt from regulation because they are part of an approved forest management plan. The first amendment is a clarification that the approved plan must have been obtained prior to conducting the forestry activities in the wetlands, State open waters or transition area. Finally, the rule states that stump removal is not an exempt activity and the Department is clarifying that such activity can only be undertaken with a permit under these rules.

N.J.A.C. 7:7A-2.8(g) contains the limitations on exemptions from the transition area provisions of the FWPA. The Department is proposing to add the issuance of a

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certificate of occupancy at N.J.A.C. 7:7A-2.8(g)4 as one of the points at which an exemption is “used up” for residential approvals.

The Department is proposing to amend N.J.A.C. 7:7A-2.10, exemption letters, as it relates to letters of exemption for farming, silviculture and ranching activities. The Department is proposing to amend N.J.A.C. 7:7A-2.10(b)2 to require submittal of a site plan or other drawing showing all activities for which the exemption is requested, the location and total area of existing and proposed activities, and the size, location and use of all proposed dwellings or structures. This is consistent with N.J.A.C. 7:7A-2.8(b) which states that only the portion of a property with ongoing farming, silviculture and ranching activities will qualify for this exemption. The Department needs a comprehensive plan in order to be able to assess the portion(s) of the property that may or may not qualify for the exemption.

At N.J.A.C. 7:7A-2.10(b)3, the Department is proposing to add to the list of items required to demonstrate that a farming activity is exempt, a copy of the farm conservation plan as approved by the Natural Resource Conservation Service. Existing (b)3 will be recodified as (b)4.

Finally, at N.J.A.C. 7:7A-2.10(c)1, the Department is proposing to add the requirement to provide the location and plans for a proposed forest road in accordance with an approved forest management plan.

N.J.A.C. 7:7A-2.11 Stormwater Management

Proposed N.J.A.C. 7:7A-2.11 requires an applicant proposing a project, or an activity that is part of a project, that in its entirety meets the definition of “major development” at N.J.A.C. 7:8-1.2, in the Department’s Stormwater Management rules, to comply with those rules. Currently, the Department has been requiring compliance with the Stormwater Management rules as a standard condition for general permits under N.J.A.C. 7:7A-4.3(b)10 and for all individual permits under N.J.A.C. 7:7A-7.2(b)5 (will not cause or contribute to a violation of any applicable State water quality standard), (b)6 (will not cause or contribute to a violation of any applicable toxic effluent standard or prohibition

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under the Water Pollution Control Act), and (b)8 (will not cause or contribute to a significant degradation, as defined at 40 C.F.R. 230.10(c), of ground or surface waters). However, the existing requirements do not clearly indicate that the project in its entirety is subject to a stormwater review when it meets the definition of “major development.” Consequently, for general permits, the Department has only been applying the Stormwater Management rules when the proposed general permit activity rises to the level of a “major development.” Proposed N.J.A.C. 7:7A-2.11 is intended to clarify and make more prominent the requirement that applicants seeking freshwater wetland general and individual permit approvals, must comply with the Stormwater Management rules if the project in its entirety constitutes a “major development.”

N.J.A.C. 7:7A-2.12 Conservation Restrictions or Easements

The Department is proposing a new section, N.J.A.C. 7:7A-2.12, to address conservation restrictions or easements when required in accordance with this chapter. This section replaces existing provisions throughout the rules regarding conservation restrictions or easements. The Department is also proposing to amend the following sections which currently contain references to conservation restrictions or easements to specifically reference new N.J.A.C. 7:7-2.12: N.J.A.C. 7:7-5.18(e), dam general permits; 6.1(e), general transition area requirements; 6.3(f), special activity waiver transition areas; 15.14(a), protecting a mitigation area from future development; 15.16(a), requirements that apply after the Department approves restoration, creation, or enhancement; and 15.23 mitigation banks.

Proposed N.J.A.C. 7:7A-2.12(a) requires that after approval of a transition area waiver, the transition areas and their associated wetlands must be permanently restricted. It also includes conservation easement or restriction requirements for approved mitigation sites. Currently, while the Department routinely requires a conservation restriction or easement on transition areas that remain after a transition area waiver has been approved, it has been making a case by case determination regarding whether or not to protect the

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adjacent wetlands. Since the primary function of a transition area is to protect the adjacent wetland, the Department determined that wetlands should be routinely protected when the Department imposes a conservation restriction or easement as part of a transition area waiver. In addition, the Department is proposing to restrict wetlands remaining on a site after a wetland permit is approved if circumstances make such restriction necessary in order to protect the remaining wetland. For example, if a site has been totally developed except for the wetlands and transition areas remaining on the site, the Department will require that both the wetlands and transition areas be placed within a conservation restriction or easement.

Proposed N.J.A.C. 7:7A-2.12(b) states that the Department will provide an applicant with the form of the conservation restriction or easement and that the form shall not be altered by the applicant except in consultation with the Department and for the purpose of addressing site-specific conditions. The Department's forms are posted at www.state.nj.us/dep/landuse. The Department has worked with the Attorney General's office to incorporate all necessary legal provisions in its forms. Consequently, if the form is altered, the Department will reject the altered form.

Proposed N.J.A.C. 7:7A-2.12(c) states that a conservation restriction or easement shall require that a designated area be permanently preserved in its natural state, and prohibit all regulated or prohibited activities. Further, the Department will require that the area be allowed to succeed naturally, that is, grow from a field, to a scrub-shrub and eventually to a forested condition. Each succeeding vegetative stage provides a greater level of protection for the adjacent wetland. Proposed N.J.A.C. 7:7A-2.12(c)1 states that a conservation restriction or easement shall include a requirement for each owner of the land to notify the county and municipality when applying for a local approval on a property with a conservation restriction or easement whenever submitting an application for a local approval involving the land, and(c)2 states that the conservation restriction or easement will contain language requiring that the easement or restriction be inserted in any subsequent deed or legal instrument when the owner sells the property. Proposed N.J.A.C. 7:7A-2.12(c)3 states that in those cases deemed appropriate by the State Historic Preservation Office, the Department may impose a historic preservation restriction or easement, with all the attendant rights, restrictions, prohibitions and

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limitations associated therewith. In accordance with its approved Federal wetlands program, the Department has been attaching such conditions on a case by case basis as appropriate.

Proposed N.J.A.C. 7:7A-2.12(d) requires that agricultural fields that will no longer be maintained as part of a farming operation after a permit or waiver is approved must be allowed to revert to their natural state and not be subject to mowing or other practices that would prevent or inhibit natural succession.

Proposed N.J.A.C. 7:7A-2.12(e) describes the process for proper recording of a conservation restriction or easement for projects other than mitigation banks and land donations. The Department at N.J.A.C. 7:7A-2.12(e)1 requires applicants to submit a copy of the draft conservation restriction or easement within 60 days of receipt of an approved permit or waiver. At that point, the Department will review the restriction or easement for compliance with the restriction or easement requirements. Proposed N.J.A.C. 7:7A-2.12(e)2 states that there are two points in time when the Department will require the submittal of proof that the restriction or easement has been properly recorded. Proof will be required at the time that an applicant seeks to transfer ownership of a property with a permit, as required at N.J.A.C. 7:7A-14.3; or when the applicant notifies the Department seven days before the commencement of site preparation or regulated activities, in accordance with N.J.A.C. 7:7A-13.1(a)14; whichever comes first. If the restriction or easement has not been properly recorded and the property changes ownership and/or construction begins, the applicant will be in violation of the permit or waiver. Proposed N.J.A.C. 7:7A-2.12(e)3 requires that a copy of the recorded restriction or easement be provided to the Department and to the municipal clerk to be placed in the property file for the land containing the restricted area.

Proposed N.J.A.C. 7:7A-2.12(f) requires that the restriction or easement be shown on a site plan which also depicts the approved project with all approved wetland and transition area impacts, and other relevant site conditions such as encumbrances or areas of known contamination. The requirement to identify contaminated areas is especially important when a conservation restriction or easement is placed on a mitigation site since it could affect the success of the proposed mitigation.

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At proposed N.J.A.C. 7:7A-2.12(g), the Department is requiring that the conservation restriction or easement include the deed book and page number where the restriction was properly recorded, together with a survey prepared in accordance with survey requirements enumerated at amended N.J.A.C. 7:7A-10.1(q) (application requirements). The survey requirements are described in greater detail in the summary of amended N.J.A.C. 7:7A-10.1(q). Proposed N.J.A.C. 7:7A-2.12(h) states that, once properly recorded, a deed restriction can only be released in accordance with the law establishing the authority for conservation restrictions or easements in New Jersey (N.J.S.A. 13:8B-1 et seq.).

At N.J.A.C. 7:7A-2.12(i), the Department is proposing to allow de minimis modifications of the restricted area boundary for a transition area waiver or wetland permit. In order to make a de minimis modification, N.J.A.C. 7:7A-2.12(i)1 requires an applicant to make such a request in writing to the Department as part of a request for a modification to the permit or waiver for which the original approval was given. In order to request a modification, N.J.A.C. 7:7A-2.12(i)2 requires that the conservation restriction or easement that is the subject of the request must have been properly recorded. N.J.A.C. 7:7A-2.12(i)3 requires that a de minimis modification must result in an increased level of protection for the resource it is intended to protect. If an increased level is not provided, then the modification must result in an equivalent area of resource protection that does not compromise the original protected resource. N.J.A.C. 7:7A-2.12(i)4 requires that all proposed modifications be consistent with all current Federal, State and local regulations.

N.J.A.C. 7:7A-2.12(j) provides that de minimis modifications shall not be allowed unless the established conservation restriction or easement expressly reserves the right of the permittee to undertake de minimis modifications of the restricted area. If such language was not contained within the conservation restriction or easement, the applicant will be required to modify the restriction or easement in accordance with the provisions of the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq.

De minimis modifications will not be permitted for conservation restrictions or easements associated with mitigation sites, in accordance with proposed N.J.A.C. 7:7A-

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2.12(k) because mitigation sites are planned and constructed by the same owner unlike conservation easements associated with transition area waivers which are frequently association with development sites designed by one entity, but sold to another for final development and construction. Finally, proposed N.J.A.C. 7:7A-2.12(l) and (m) state that in the case where the Department approves a request for a de minimis modification to the boundaries of the restricted area, all plans, descriptions and filing procedures conducted upon approval of the original restriction shall be repeated for the modified restriction.

SUBCHAPTER 3 Letters of Interpretation

Subchapter 3 describes the procedures for obtaining a “letter of interpretation”(LOI). An LOI provides the Department’s definitive determination regarding the location and extent of wetlands and wetland transition areas on a specific site.

N.J.A.C. 7:7A-3.1 Basic LOI information

At N.J.A.C. 7:7A-3.1(b), the Department is proposing to add a provision that provides that a municipality or county may require a letter of interpretation (LOI) for local planning approvals, for compliance with ordinances, or for other purposes, as a condition of application completeness or approval. Because an LOI is a useful tool for designing subdivisions, creating viable building lots, locating septic systems and other planning objectives, it is appropriate for municipalities and counties to require an LOI as part of the local planning process. Although the Department believes that the existing rules do not prevent a municipality or county from requiring an LOI, on several occasions the Department has been asked to support or oppose the effort by a municipality or county to adopt such a requirement. Consequently, the rule amendment makes it clear that municipalities and counties have the option of requiring LOIs.

The Department is proposing to amend the rules at N.J.A.C. 7:7A-3.1(i) to explicitly require an applicant to delineate the State open waters boundary line as well as

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the wetlands line. Both wetlands and open waters must be delineated as they are the features in and adjacent to which activities are regulated under these rules. The proposed amendments are consistent with the purpose of an LOI as described at N.J.A.C. 7:7A-3.1(a) and (b).

N.J.A.C. 7:7A-3.4 Line Verification LOI

The Department is proposing to amend N.J.A.C. 7:7A-3.4(b)3iii to allow a partial wetland line delineation of up to 10 percent of a publicly owned site if the site is 10 acres or larger. The proposed amendment is intended to better accommodate public entities such as municipal, county or State park programs that may have a proposed project that, though larger than one acre, will affect only a small portion of a larger parcel of land.

N.J.A.C. 7:7A-3.6 Effect, duration, and extension of a letter of interpretation

Proposed amendments to N.J.A.C. 7:7A-3.6(c) would prohibit applicants from requesting a five-year extension of a letter of interpretation more than one year before the LOI is due to expire. The Department will not consider or process an extension to an LOI before this time because the Department must be able to assess conditions as close to the expiration date as possible in order to determine whether or not to approve an extension. For example, the Department will want to review the resource classification of the wetlands to determine if a change has occurred during the five-year duration of the LOI. It defeats the purpose of reviewing the conditions of the letter of interpretation to assess potential changes, if the review occurs too soon after the original LOI is approved.

SUBCHAPTER 4 General Provisions for General Permits

Subchapter 4 describes the process the Department uses for adopting new general permits, and the standard conditions which must be satisfied in order for the Department to authorize the use of a general permit for a specific activity.

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N.J.A.C. 7:7A-4.2 Using a general permit to authorize specific activities

The Department is proposing to amend N.J.A.C. 7:7A-4.2(c) to clarify when the Department considers an impact to a transition area to be required for “access” to the regulated activity permitted in the wetlands under a general permit. The Department is proposing to amend N.J.A.C. 7:7A-4.2(c)2 to specify that the Department considers access to include activities necessary to accomplish construction, and for future use, of the activity authorized in the wetlands. In addition, proposed N.J.A.C. 7:7A-4.2(c)2i through iii detail the applicability of and limits on the transition area waiver for access. Proposed N.J.A.C. 7:7A-4.2(c)2i states that if the Department permits a wetland to be eliminated in its entirety under a general permit authorization, its associated transition area may also be eliminated without the requirement for the applicant to obtain a separate transition area waiver, except in the case where the wetland and transition area in question occur within the transition area of a separate wetland. In the latter case, a separate transition area waiver will be required. N.J.A.C. 7:7A-4.2(c)2ii states that the portion of the transition area that the Department considers necessary for access to a regulated activity in the wetlands is the portion of the transition area immediately adjacent to the regulated activity in the wetland. N.J.A.C. 7:7A-4.2(c)2iii states that upon completion of the regulated activities and the access through the transition area, a new transition area is reestablished adjacent to the new wetland boundary. In addition, any part of the transition area used for temporary access to a permitted activity in the wetland shall be restored or allowed to revert naturally upon completion of construction.

At N.J.A.C. 7:7A-4.2(e)1, the Department is correcting the cross-reference to the section containing the Department’s authority to add individual conditions to permit approvals at N.J.A.C. 7:7A-13.2.

The Department is proposing to amend N.J.A.C. 7:7A-4.3(b)1 to require that all activities to be performed under a general permit be “minimized.” The Department has been keeping permitting statistics from the start of the wetlands program because it is required to make a finding that the general permits do not have more than minimal

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adverse environmental impacts when performed separately and cumulatively. In addition, since 1994, the Department has been required to file an annual report with EPA summarizing the state of the program. The Department's reports show that the State continues to permit the loss of approximately 100 acres of wetlands per year. General permits account for 78 percent of the total wetland losses. Consequently, general permit impacts are having cumulative impacts and therefore the Department has determined it is necessary to evaluate whether each proposed activity must take place in the wetlands at all, regardless of whether the activity satisfies the limits of a general permit. Further, the FWPA at N.J.S.A. 13:9B-2 states that it is the policy of the State to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance. The Department is not requiring the alternatives analysis that is required for an individual permit to satisfy this requirement. Rather, the applicant will be required to demonstrate that a proposed activity has been designed to configure a project so that most or all of it is contained in the uplands on the site, or in the uplands and transition areas on the site. Once impacts have been minimized by using uplands and transition areas, the limits on impacts to wetlands under the respective general permits will apply.

N.J.A.C. 7:7A-4.3(b)5 is the general permit condition addressing protection for historic resources. The Department is proposing to organize and amend the paragraph to include subparagraphs i and ii to make it clear that if a possible historic resource is encountered during construction, the permittee must preserve the resource and contact the Department before proceeding. New N.J.A.C. 7:7A-4.3(b)5ii states that if an applicant, its consultants, engineers, surveyors and/or agents significantly adversely affect a historic resource to which a general permit authorization applies, the Department shall not approve the permit the applicant has requested unless the Department determines that circumstances justify permit approval as it relates to the historic resource. This proposed provision is necessary for consistency with Section 110 of the National Historic Preservation Act (16 U.S.C. 470).

The Department is proposing to amend N.J.A.C. 7:7A-4.3(b)10 for the reasons previously described for new N.J.A.C. 7:7A-2.11. The proposed amendment clarifies that if a project, of which a general permit activity is a part, meets the definition of major development contained in the Department's stormwater management rules, the

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Department shall not authorize the general permit unless the project as a whole complies with the Department's Stormwater Management rules, N.J.A.C. 7:8.

The Department is proposing to amend N.J.A.C. 7:7A-4.3(b)16 to except activities relating to general permits 1, 6 and 16 from the condition precluding use of general permits in vernal habitats. General permit 1 is for maintenance activities. Consequently, the vernal habitat may have either been eliminated by the originally approved activity in the wetland, or ongoing maintenance should have no effect. The condition as it relates to general permit 6 was held invalid. See *In the Matter of Freshwater Wetlands Protection Act Rules*, 180 N.J.478 (2004). However, the court found that the Department can impose additional conditions or deny general permit 6 on a case by case basis and when the issuance of a general permit 6 authorization would be in conflict with the Federal 404 program. General permit 16 is for fish and wildlife enhancement activities. Consequently, any potential vernal habitat concerns can be addressed as part of the overall habitat enhancement plan.

The Department is proposing to clarify N.J.A.C. 7:7A-4.4(a) to state that if an application contains more than one activity on a single site, the Department may authorize the activities under one or more general permits provided that the requirements at N.J.A.C. 7:7A-4.4(a)1 and 2 are satisfied.

At N.J.A.C. 7:7A-4.4(a)1, the Department is adding several examples of how to calculate the permitted impacts resulting from multiple activities of the same type on a single site. However, the Department is proposing to allow the combination of general permits 6 and 6A because, as discussed in the summary below, the Department is proposing new general permit 6A to address the use of existing general permit 6 in transition areas.

At N.J.A.C. 7:7A-4.4(a)2, the Department addresses the use of multiple permits for different types of activities to be conducted on a single site. The Department is proposing to add new general permits 6A and 17A to the list of general permits at N.J.A.C. 7:7A-4.4(a)2 to indicate that they can be used in combination with other general permits so long as the total impacts do not exceed one acre.

Proposed N.J.A.C. 7:7A-4.4(a)3 states that if an applicant is authorized to use general permit 6 for more than 0.5 acres of impacts, it cannot be combined with any other

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general permit authorization on the same site. While the FWPA at N.J.S.A. 13:9B-23b requires the Department to permit up to one acre of impacts to a wetland which is not a surface water tributary system discharging into an inland lake or pond, or a river or stream, it does not require that additional impacts be permitted by way of additional general permits when used in combination. Consequently, the Department will require an individual permit if an applicant proposes the use of general permit 6 for more than 0.5 acres in combination with other general permits for additional wetland impacts. However, the Department is proposing to allow proposed general permit 6 to be combined with general permit 6A so long as the total impacts to wetlands, State open waters and transition areas does not exceed one acre. The Department is adding an example to demonstrate that a combined impact of 0.75 acres of impacts to wetlands using general permit 6 can be combined with 0.25 acres of disturbance to transition areas under general permit 6A.

Proposed N.J.A.C. 7:7A-4.4(a)4 states that the Department shall not authorize both a general permit 10A and 10B on the same site. Since general permit 10A and 10B offer two approaches to enabling a road crossing under a general permit, the Department has determined that if all impacts cannot entirely satisfy either option, then the impacts are of such an extent that an individual permit is required. Finally, proposed N.J.A.C. 7:7A-4.4(a)5 states that the Department shall not authorize multiple crossings of the same wetland or State open water unless the applicant demonstrates that there is no other location, design or configuration for the proposed crossing to an otherwise developable lot that would reduce or eliminate the disturbance to the freshwater wetland or State open water. In addition, the applicant must demonstrate that he or she has used shared driveways to the maximum extent possible to access multiple lots.

The Department is proposing to delete N.J.A.C. 7:7A-4.6, combined general permit authorization and flood hazard area permit. Due to the requirement that flood hazard area permit decisions be issued under the 90-day Construction Permit Law, N.J.S.A. 13:1D-29 et seq., the Department is frequently unable to issue a combined freshwater wetland and flood hazard area permit. At the end of 90 days, the flood hazard area permit review may be complete while the freshwater wetland permit review may not

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be. The deletion of the section does not, however, preclude the Department from issuing a joint flood hazard and wetland approval if circumstances allow.

SUBCHAPTER 5 Adopted general permits

Subchapter 5 contains the standards for approval of specific general permits for the conduct of regulated activities in the wetlands, State open waters and transition areas. There are general permits addressing 27 specific activities.

The Department is proposing to require mitigation for several general permits including general permit 2 for underground utility lines, general permit 6 for non-surface water connected wetlands, general permits 10A and 10B for minor road crossings, general permit 11 for outfall structures, general permit 18 for dam repair, and general permit 21 for above ground utility lines. In addition, the Department is proposing to change the existing requirement for mitigation pursuant to general permit 23 for expansion of cranberry growing operations and general permit 27 for redevelopment to make them consistent with the new proposed mitigation requirements.

The Department's annual analyses of the impacts of its permitting program, have revealed that the greatest ongoing source of wetland loss in the State is the approval of general permits without mitigation. Further, in March 2007, the Army Corps of Engineers as part of the Federal 404 program, adopted new regulations making mitigation a standard condition of most Nationwide Permits, the federal equivalent of general permits in these rules. Consequently, in order to alleviate the ongoing loss of wetlands in the State, to continue to be able to make the finding that the adopted general permits will cause only minimal adverse environmental impact when performed separately and cumulatively, and to remain as stringent as the federal program in all ways, the Department is proposing to require mitigation for each general permit that has been contributing to ongoing wetland losses. Currently, mitigation is a requirement of general permit 4 for hazardous waste cleanup activities, general permit 5 for landfill closures, general permit 23 for expansion of cranberry growing operations in the Pinelands, and general permit 27 for redevelopment activities exceeding 0.5 acres. The Department will

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continue to monitor impacts from all general permits to determine if mitigation should be made a standard condition of any others in the future.

The proposed mitigation requirement for general permits will require that applicants comply with the standard mitigation hierarchy as it relates to smaller disturbances (see N.J.A.C. 7:7A-15.5). That is, the Department will presume that onsite restoration, creation or enhancement, and offsite restoration, creation, enhancement or upland preservation are not feasible, unless an applicant chooses one of these options and can demonstrate that such mitigation will be environmentally beneficial. Instead, the requirements for a small disturbance require purchase of mitigation credits from an approved mitigation bank. In the absence of an approved bank, applicants are required to make a monetary contribution in accordance with proposed standards at N.J.A.C. 7:7A-15.21(d) or through the donation of land in accordance with N.J.A.C. 7:7A-15.22. The Department is proposing standards for monetary contributions with the intent of revisiting the standard after several years' implementation because it is the Department's hope that the amended rules will reinforce the need for mitigation banks and encourage the creation of new banks in various watersheds throughout the State. If this does not occur and new banks do not become more readily available, the Department will reevaluate the monetary contribution to determine if it is appropriate to accomplish on-the-ground mitigation for general permit impacts.

Consistent with the terms of the existing general permits for which mitigation was already required, the Department is proposing to require submittal of the mitigation proposal with the general permit application. However, the Department will not authorize the use of the general permit, nor can the regulated activities begin, until the Department has approved a mitigation proposal. See N.J.A.C. 7:7A-15.3.

N.J.A.C. 7:7A-5.1 General permit 1-Maintenance and repair of existing features

The Department is proposing to amend N.J.A.C. 7:7A-5.1(c) to reflect the new codification in Subchapter 10, application contents and procedures, resulting from the proposed deletion of N.J.A.C. 7:7A-10.7, additional application requirements for a combined flood hazard area permit and general permit authorization. In addition, in this and all subsequent general permits, the Department is proposing to add to the standard

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condition that requires compliance with conditions at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, the requirement for compliance with N.J.A.C. 7:7A-13.2, Establishing permit conditions. N.J.A.C. 7:7A-13.2 describes the Department's authority to add application-specific permit conditions, as needed, to an approval.

N.J.A.C. 7:7A-5.2 General Permit 2- Underground Utility lines

At N.J.A.C. 7:7A-5.2(c)1, the Department is proposing to reduce the permitted, permanent impacts to wetlands and waters from one acre to 0.5 acre. The proposed change will make the Department's general permit for underground utility lines consistent with the Federal nationwide permit for utility lines (NP 12) that allows 0.5 acres of permanent impacts for under and above ground lines.

In addition, the Department is proposing to amend the provision to state that the installation of a utility line in scrub shrub or emergent wetlands is not considered a permanent disturbance. The Department assumes that scrub shrub and emergent wetland vegetation will naturally revegetate the disturbance created by installation of the utility line and therefore impacts to such wetlands will not be permanent.

At N.J.A.C. 7:7A-5.2(f), the Department is proposing to require mitigation as a condition of general permit 2 for permanent impacts resulting from the installation of underground utility lines. However, as explained above with regard to N.J.A.C. 7:7A-5.2(c)1, for utility lines that disturb scrub shrub or emergent wetlands, the Department will assume that the utility line, if properly installed, will allow the wetlands to re-establish and therefore no mitigation other than restoration is required. If a proposed utility line will pass through forested wetlands and the forest not allowed to re-establish over the lines, mitigation will be required. Between 2000 and 2006, the Department approved 334 general permits for underground utility lines with impacts to 30.67 acres. It is not clear from the Department's data what portion of those impacts were permanent.

Finally, the Department is proposing to recodify existing N.J.A.C. 7:7A-5.2(f), as 5.2(g) and is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

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N.J.A.C. 7:7A-5.2A Combined general permit 2 and flood hazard area permit

The Department is proposing to delete N.J.A.C. 7:7A-5.2A, combined general permit and flood hazard area permit, for the same reasons explained above regarding the deletion of the combined permit at N.J.A.C. 7:7A-4.6.

N.J.A.C. 7:7A-5.3 General permit 3—Discharge of return water

At N.J.A.C. 7:7A-5.3(b), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.4 General permit 4-Hazardous site investigation and cleanup

The Department is proposing to amend N.J.A.C. 7:7A-5.4(a) to update the name of the Department program that approves site investigation, cleanup and removal of hazardous substances and pollutants. In addition, at N.J.A.C. 7:7A-5.4(d), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.5 General permit 5—Landfill closures

At N.J.A.C. 7:7A-5.5(f), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

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

The Department is proposing to amend general permit 6 to create separate general permits for activities to be conducted in the transition area and those activities proposed in the wetlands and/or State open waters. The inclusion of transition areas within general permit 6 has resulted in confusion regarding the total impacts that would be permitted if impacts were proposed both in wetlands and transition areas. Therefore, the Department

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is proposing to delete the references to transition areas in N.J.A.C. 7:7A-5.6(a), (b)2 and (c).

At N.J.A.C. 7:7A-5.6(b)2, the Department is proposing to amend the rule as it relates to the regulation of wetlands that are also federal Waters of the United States to reduce the allowable impacts and to require mitigation. Both changes are necessary to ensure that the State's program remains as stringent as the Federal 404 program.

Proposed N.J.A.C. 7:7A-5.6(d) contains the standard condition for mitigation. General permit 6 is responsible for the greatest number of unmitigated impacts under the Department's permitting program. For example, from 2000 through 2006, the State lost 125 acres of wetlands as a result of approving general permits for impacts to non-surface water connected wetlands. Consequently, the Department has determined that requiring mitigation will benefit the State's wetland resources. The Department believes the majority of wetland impacts that have occurred under general permit 6, occurred in wetlands that are Federal waters of the United States but does not have any statistics to confirm this. However, the court found that the Department can impose additional conditions or deny general permit 6 on a case by case basis and when the issuance of a general permit 6 authorization would be in conflict with the Federal 404 program. See In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J.478 (2004). Consequently, the Department is proposing mitigation as a condition of general permit 6 only for impacts to wetlands and/or State open waters that are also federally regulated as waters of the United States.

Finally, the Department is recodifying existing N.J.A.C. 7:7A-5.6(d), as 5.6(e) and adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.6A General permit 6A-Transition areas adjacent to non-tributary wetlands.

The Department is proposing new general permit 6A to address the use of existing general permit 6 in transition areas. The combination of impacts to wetlands and/or State

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open waters and transition areas under the same general permit has resulted in confusion relating to the amount of permissible impacts. Proposed N.J.A.C. 7:7A-5.6A(a) will authorize activities in a transition area adjacent to wetlands and/or State open waters that are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream. At N.J.A.C. 7:7A-5.6A(b), the Department is proposing to limit the impacts permitted under general permit 6A to 0.5 acres, which is equivalent to the limit established for general permit 6 in a water of the United States. Proposed N.J.A.C. 7:7A-5.6A(b)1 states that this general permit is not required if the Department has already approved the complete elimination of a wetland and/or State open water under general permit 6 at N.J.A.C. 7:7A-5.6. The proposed provisions at N.J.A.C. 7:7A-5.6A(c) limiting the type of transition area that may be affected by general permit 6A are the same limits applicable under general permit 6 at N.J.A.C. 7:7A-5.6(c) except that they relate to the location of activities in the transition area instead of in the wetland and/or State open water. Proposed N.J.A.C. 7:7A-5.6A(d) makes all applicable conditions for general permits at N.J.A.C. 7:7A-4.3 and all other conditions established in accordance with N.J.A.C. 7:7A-13.2 applicable to this general permit.

N.J.A.C. 7:7A-5.7 General permit 7—Human-made ditches or swales in headwaters

At N.J.A.C. 7:7A-5.7(e), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.8 General permit—House additions

The Department is proposing amendments to general permit 8 at N.J.A.C. 7:7A-5.8 to address the replacement of an existing dwelling as well as the addition of up to 750 square feet to the existing dwelling. In recent years, it has become common to purchase an existing dwelling, demolish it and replace it with a new, larger dwelling. Consequently, the Department believes it is necessary to address the replacement of a dwelling that was lawfully existing as of July 1, 1988. Proposed N.J.A.C. 7:7A-5.8(a)1 states that if requested within five years of the destruction of a dwelling existing prior to

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July 1, 1988, the Department will permit the replacement of the dwelling with an increase of up to 750 square feet of additional fill or disturbance. The Department believes that after five years, the wetland conditions would be re-established at which point rebuilding the prior existing home would result in unacceptable impacts. The Department is proposing two conditions. At N.J.A.C. 7:7A-5.8(a)1i, the Department is requiring documentation that the dwelling was habitable at the time of destruction. "Habitable" means that a person could have legally occupied the dwelling and that the dwelling had utilities including a functioning septic system or legal connection to a sewer. The second condition is that there is a foundation remaining or other evidence of the size and location of the overall building footprint, such as a deed or a plat. Both conditions are intended to ensure that the permit will not be used to authorize construction of a new dwelling in the wetlands, where one did not previously exist.

Finally, at N.J.A.C. 7:7A-5.8(c), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.9 General permit 9—Airport site line clearing

At N.J.A.C. 7:7A-5.9(f), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

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

The Department is proposing to require mitigation as a condition of general permit 10A. The Department approves more authorizations for minor road crossings annually than under any other general permit. For example, from 2000 through 2006, the Department approved 915 authorizations for minor road crossings, as compared to 580 authorizations under general permit 6. However, because both general permits 10A and 10B are limited to 0.25 acres per authorization, the total number of acres of impacts under general permits 10A and 10B during this same period was 58 acres, as compared to 125 acres for general permit 6.

The Department is proposing to recodify N.J.A.C. 7:7A-5.10A(e) as 5.10A(f) and is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

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

The Department is proposing to amend N.J.A.C. 7:7A-5.10B, minor road crossings. The proposed amendment at N.J.A.C. 7:7A-5.10B(a) would re-emphasize the requirement at existing N.J.A.C. 7:7A-5.10B(b)1 that the crossing be necessary to access an otherwise developable upland area and would retain the 0.25 acre limit at N.J.A.C. 7:7A-5.10B(b)2 on impacts to wetlands/State open waters and transition areas. In addition, the Department is proposing to require mitigation as a condition of general permit 10B at N.J.A.C. 7:7A-5.10(e).

Finally, the Department is proposing to recodify N.J.A.C. 7:7A-5.10B(e) as 5.10B(f), and is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

The Department is proposing to delete N.J.A.C. 7:7A-5.10C, combined general permit 10A and flood hazard area permit, for the same reasons stated previously.

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

The Department is proposing to delete N.J.A.C. 7:7A-5.11(f) regarding stormwater and to recodify the remaining subsections because stormwater management issues are addressed by a standard requirement applying to all permits at proposed N.J.A.C. 7:7A-2.11, and by a standard condition applying to all general permits at N.J.A.C. 7:7A-4.3(b)10. The Department is proposing to recodify existing (g) through (i) as (f) through (h) with no change in text. At proposed new N.J.A.C. 7:7A-5.11(i), the Department is proposing to add mitigation as a condition of general permit 11. General permits for outfall structures are the second most frequently used permits. Between 2000 and 2006, the Department approved 776 outfall structures affecting 29.81 acres of wetlands.

In addition, at N.J.A.C. 7:7A-5.11(j), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

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The Department is also proposing to delete in its entirety N.J.A.C. 7:7A-5.11A, combined general permit authorization and flood hazard area permit for the same reasons stated previously.

N.J.A.C. 7:7A-5.12 General permit 12—Surveying and investigating

At N.J.A.C. 7:7A-5.12(d), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.13 General permit 13—Lake dredging

At N.J.A.C. 7:7A-5.13(i), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.14 General permit 14—Water monitoring devices

The Department is proposing two minor changes to this general permit. The Department is proposing to amend N.J.A.C. 7:7A-5.14(c) to update the name of the Department program that approves site investigation, cleanup and removal of hazardous substances and pollutants. In addition, at N.J.A.C. 7:7A-5.14(e), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.15 General permit 15—Mosquito control activities

The Department is proposing to amend N.J.A.C. 7:7A-5.15(f) to reflect the new codification in Subchapter 10, application contents and procedures, resulting from the proposed deletion of N.J.A.C. 7:7A-10.7, additional application requirements for a combined flood hazard area permit and general permit authorization.

At N.J.A.C. 7:7A-5.15(h), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

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N.J.A.C. 7:7A-5.16-General permit 16- Habitat creation and enhancement activities

The Department is proposing new N.J.A.C. 7:7A-5.16(f)3 to require that an area of habitat enhancement or creation be protected from future development by a recorded conservation restriction or easement. This provision will ensure that the enhanced or newly created habitat will be protected in perpetuity and protect the wetland species that the habitat creation and enhancement activities were designed to attract. In addition, at N.J.A.C. 7:7A-5.16(j), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.17 General permit 17—Trails and boardwalks

The Department is adding the reference to N.J.A.C. 7:7A-13.2, to N.J.A.C. 7:7A-5.17(g) for the reason described previously.

N.J.A.C. 7:7A-5.17A- Non-Motorized, Multiple-use Paths

The Department is proposing a new general permit for non-motorized, multiple-use paths. Such paths could be used for bicycles, skate boarding, rollerblading and other non-motorized means of transportation. The Department believes it is appropriate to propose a separate general permit for these activities rather than include them with trails and boardwalks under general permit 17 because multiple-use paths may have heavier usage at greater speeds, traverse greater distances and as a result, routinely require greater widths than necessary for trails and boardwalks.

Proposed N.J.A.C. 7:7A-5.17A(a) states that the general permit is intended for the construction of non-motorized, multiple-use paths constructed through freshwater wetlands, transition areas, and/or State open waters. It further describes the type of activities that are not covered by the general permit, including restrooms, gazebos, rain shelters, or any covered or enclosed structure. Further, general permit 17A does not authorize construction of a roadway for use by automobiles, golf carts, motorcycles,

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motorized trail bikes, all-terrain vehicles, or other motor vehicles. (The Department recognizes that in emergency situations, motor vehicles may use such a path to gain access to an accident site, for example.)

Proposed N.J.A.C. 7:7A-5.17A(b) limits the total area of impacts resulting from the construction of a multiple-use path to 0.25 acres. This condition, combined with the requirement at N.J.A.C. 7:7A-5.17A(d) to align the path to minimize impacts to wetlands, State open waters and transition areas, ensures that applicants will select the least environmentally damaging alignment for the path.

The Department is not proposing to establish a width limitation for the general permit. Many of these paths require review and approval by the New Jersey Department of Transportation (DOT). DOT applies various State and Federal standards, including the American Association of State Highway and Transportation Officials (AASHTO) standards, for determining the appropriate width of such paths. For example, some paths may be 8 feet wide if bicycle use is expected to be low, and the path can be designed to afford safe passing opportunities. A wider path is necessary if there is a higher usage anticipated by bicycles, joggers and skaters and/or if there are steep grades in the location of the path. Paths may also be wider when they are designed to be separated, by way of grading, to provide clearance from obstructions like trees, guardrails or fences, and to keep them away from canals, ditches or steep embankments. There are also various requirements for side slopes that may result in the paths affecting a wider area of environmentally sensitive area. Consequently, proposed N.J.A.C. 7:7A-5.17A(c) provides the flexibility to design a path with the width that is necessary for the intended use so long as the path is designed in compliance with the AASHTO Guide for the Development of Bicycle Facilities, published 1999, as amended and supplemented. It is available at www.communitymobility.org/pdf/aashto.pdf.

The proposed condition at N.J.A.C. 7:7A-5.17A(e) requires that when impacts to wetlands, transition areas and State open waters are authorized, the path be properly designed so as not to interfere with the natural hydrology of the area and to minimize impacts to vegetation. This condition ensures that there are no secondary impacts

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associated with the approved activity. Finally, proposed N.J.A.C. 7:7A-5.17A(f) contains the requirement to comply with the standard conditions which apply to all general permits at N.J.A.C. 7:7A-4.3, and establishing permit conditions at N.J.A.C. 7:7A-13.2.

N.J.A.C. 7:7A-5.18 General permit 18-Dam repair

The Department is proposing to amend N.J.A.C. 7:7A-5.18(e) as it relates to the requirement to execute a conservation restriction or easement to reference the proposed new section on conservation restrictions or easements, N.J.A.C. 7:7A-2.12. In addition, the Department is proposing to add mitigation as a condition of general permit 18 at N.J.A.C. 7:7A-5.18(f). If an applicant repairs or maintains a dam without expansion, the repair and maintenance activities will not result in new impacts to wetlands or waters and therefore will not require mitigation. However, when a dam repair includes an expansion, resulting in permanent impacts, mitigation will be required. The Department approved 39 authorizations under general permit 18 between July 1, 2000 and June 30, 2006 for a total of 6.68 acres of wetland and open waters impacts.

The Department is proposing to recodify N.J.A.C. 7:7A-5.18(f) as 5.18(g) and to add the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.19 General permit 19—Docks and piers

At N.J.A.C. 7:7A-5.19(i), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.20 General permit 20—Bank stabilization

The Department is proposing to amend the reference to the NRCS Engineering Field Handbook, at N.J.A.C. 7:7A-5.20(c)2i to include amendments and supplements since there have been updates since the 1996 publication date. In addition, at N.J.A.C.

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7:7A-5.20(f), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.20A Combined general permit 20 and flood hazard area permit

The Department is proposing to delete N.J.A.C. 7:7A-5.20A, combined general permit 20 and flood hazard area permit, for the reasons stated previously.

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

The Department is amending N.J.A.C. 7:7A-5.21(b)2 to state that the Department will consider temporary impacts resulting from the construction of above ground utility lines that disturb scrub shrub or emergent wetlands, since the Department will assume that the utility line, if properly installed, will allow the wetlands to re-establish. This clarification is necessary in order to address the proposed mitigation requirement for permanent impacts described in N.J.A.C. 7:7A-5.21(e) below. If a proposed utility line passes through forested wetlands and the forest is not permitted to re-establish, mitigation will be required. At N.J.A.C. 7:7A-5.21(b)2i, the Department is proposing to reduce the permitted, permanent impacts to wetlands and waters from one acre to 0.5 acre. The proposed change will make the Department's general permit for above ground utility lines consistent with the Federal nationwide permit for utility lines (NP 12) that allows 0.5 acres of permanent impacts for underground and above ground lines. In addition, at new N.J.A.C. 7:7A-5.21(e), the Department is proposing to require mitigation as a condition of general permit 21 for permanent impacts resulting from the installation of above ground utility lines. The proposed requirement for mitigation for above ground utility lines is consistent with that proposed for underground utility lines.

Finally, the Department is proposing to recodify existing N.J.A.C. 7:7A-5.21(e) as 5.21 (f) and is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

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N.J.A.C. 7:7A-5.23 General permit 23- Expansion of cranberry growing operations in the Pinelands

The Department is proposing to amend N.J.A.C. 7:7A-5.23 to make the mitigation requirements consistent with the proposed mitigation requirements for other general permits. Consequently, the Department is proposing to delete the provision at N.J.A.C. 7:7A-5.23(l) since it contains the requirement for transfer of Pinelands Development Credits (PDCs) which is not consistent with other State or Federal mitigation requirements. The Department is proposing to replace this provision with the standard requirement to perform mitigation for all loss and/or disturbances of freshwater wetlands and State open waters. The Department is proposing to delete N.J.A.C. 7:7A-5.23(m),(n) (q) and (u) because they also relate to the PDC requirement. N.J.A.C. 7:7A-5.23(o) and (p) are proposed to be recodified as N.J.A.C. 7:7A-5.23(m) and (n) to reflect the deleted sections. At recodified N.J.A.C. 7:7A-5.23(n), the Department is deleting the reference to (l) and (m) since those sections are proposed for deletion.

The Department is proposing to recodify N.J.A.C. 7:7A-5.23(r) through (v) as (o) through (r) to reflect the proposed deletion of existing N.J.A.C. 7:7A-5.23(u). In addition, at recodified N.J.A.C. 7:7A-5.23(p), the Department is proposing to amend the application submittal deadline to 90 days after the date that the general permit, as amended is published in the New Jersey Register and therefore effective. Finally, the Department is proposing to amend recodified N.J.A.C. 7:7A-5.23(r) to delete the reference to adding the cranberry general permit to the list of general permits subject to coordination with the U.S. Fish and Wildlife Service. Instead, the amendment states that the permit is subject to coordination procedures with the U.S. Fish and Wildlife Service under the Department's Memorandum of Agreement regarding the Endangered Species Act and New Jersey's assumption of the Federal 404 program. The proposed change is consistent with similar changes proposed at N.J.A.C. 7:7A-12.2(k) and described in detail below.

N.J.A.C. 7:7A-5.24 General permit 24- Spring developments

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At N.J.A.C. 7:7A-5.24(e), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.25 General permit 25—Malfunctioning individual subsurface sewage disposal (septic) systems

At N.J.A.C. 7:7A-5.25(c), the Department is proposing to amend the rules to make it clear that the replacement for a malfunctioning individual subsurface sewage disposal system can only be placed in a wetland or transition area when that wetland or transition area is on the same property where the malfunctioning system is located. The Department has provided the ability to replace a malfunctioning septic system within the wetlands or transition area only because the owner of a particular site usually has limited options for locating a more suitable site for the system. While the Department requires applicants to attempt to locate the replacement system on a portion of the property where the seasonal high water table is deeper, if such a location does not exist, the only other option may be to abandon the site if the Department does not allow a replacement system within the wetlands or transition area. In the case where an applicant has the ability to use property that is offsite, then he or she should seek a non-wetland, non-transition area location in which to construct a replacement septic system.

The proposed amendment to N.J.A.C. 7:7A-5.25(d) is a clarification of the condition that the need for repair or modification of a septic system cannot result directly or indirectly from an expansion of the facility served by the septic system. The proposed amendment provides that the repaired or modified system must be limited to serve those volumes of sanitary sewage that were approved prior to the malfunction, and cites the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A, as the source of information for estimating the volume of sanitary sewage.

At N.J.A.C. 7:7A-5.25(e), the Department is correcting the reference to the public notice section of the rules to reflect the new codification of that section as N.J.A.C. 7:7A-10.8.

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At N.J.A.C. 7:7A-5.25(e)2, the Department is requiring that the location of the site for which the permit authorization is sought be identified on both a regional map and a tax map. This will facilitate a faster review and response to applications for repair of malfunctioning individual subsurface sewage disposal (septic) systems.

Finally, at N.J.A.C. 7:7A-5.25(g), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.26 General permit 26—Minor channel or stream cleaning for local government agencies

The Department is proposing to make two minor amendments to N.J.A.C. 7:7A-5.26. At N.J.A.C. 7:7A-5.26(e)7, the Department is correcting the reference to the public notice section of the rules to reflect the new codification of that section as N.J.A.C. 7:7A-10.8 and at N.J.A.C. 7:7A-5.26(j), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

N.J.A.C. 7:7A-5.26A Combined general permit 26 and flood hazard area permit

The Department is proposing to delete N.J.A.C. 7:7A-5.26A, combined general permit authorization 26 and flood hazard area permit, for the same reasons stated previously.

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

The Department is proposing to amend the mitigation requirement at N.J.A.C. 7:7A-5.27(d), to require mitigation for all impacts resulting from redevelopment of previously disturbed areas instead of requiring mitigation when the impacts exceed 0.5 acres. The proposed amendment will make the general permit 27 mitigation requirements consistent with the mitigation requirements for other general permits.

In addition, at N.J.A.C. 7:7A-5.27(f), the Department is adding the reference to N.J.A.C. 7:7A-13.2, for the reason described previously.

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SUBCHAPTER 6 TRANSITION AREA WAIVERS

Subchapter 6 contains the standards for conducting regulated activities within transition areas.

N.J.A.C. 7:7A-6.1 General transition area provisions

The Department is proposing to amend N.J.A.C. 7:7A-6.1(a)5 to add general permit 6 to the list of general permits that do not authorize activities in transition areas because the Department is proposing a separate general permit, N.J.A.C. 7:7A-5.6A specifically for impacts in the transition area adjacent to non-surface water connected wetlands.

N.J.A.C. 7:7A-6.1(a)6 discusses access transition area waivers. The Department is proposing to amend (a)6ii to state that if the Department authorizes a permit to allow entire elimination of a wetland, the associated transition area may also be eliminated without the requirement to obtain a separate transition area waiver. In addition, the proposed amendment reiterates that “access” to a regulated activity shall be limited to the transition area adjacent to the location of the approved wetland filling. The proposed amendments are consistent with the previously described proposed amendments to N.J.A.C. 7:7A- 4.2(c).

The Department is proposing to delete N.J.A.C. 7:7A-6.1(b), which describes in general terms how transition area waivers affect the shape and size of a transition area, because it is inaccurate and not necessary for the proper functioning of the rules.

The Department is also proposing to delete N.J.A.C. 7:7A-6.1(c) that describes the requirement for a “20-foot envelope” adjacent to structures because the provision was held invalid. See, *In the Matter of Freshwater Wetlands Protection Act Rules*, 180 N.J.478 (2004). N.J.A.C. 7:7A-6.1(d) relates to N.J.A.C. 7:7A-6.1(c) so it is also being deleted. However, the content of N.J.A.C. 7:7A-6.1(d) provides relevant conditions that the Department may want to add to approved transition area waivers. Therefore, the

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content has been restructured as a list of potential conditions to be added to approvals of transition area waivers at recodified N.J.A.C. 7:7A-6.1(b)1 through 4. N.J.A.C. 7:7A-6.1(b)1 requires that construction activities be conducted such that no regulated activities will occur outside the areas approved by the permit. N.J.A.C. 7:7A-6.1(b)2 requires that the structure be designed and used so that no regulated activities occur outside of the area approved by permit. N.J.A.C. 7:7A-6.1(b)3 requires that a fence that will maintain all of the functions and values of the wetland and transition area, be installed prior to construction to prevent damage resulting from construction, and to demarcate the sensitive area for future owners of the property. N.J.A.C. 7:7A-6.1(b)4 requires the filing of a conservation restriction or easement to prohibit regulated activities from occurring in the transition area and wetlands in perpetuity. N.J.A.C. 7:7A-6.1(b)5 addresses acid-producing deposits. While the rules already contain a standard condition relating to monitoring acid producing deposits, for activities permitted under general permits at N.J.A.C. 7:7A-4.3(b)8, and for matrix reduction transition areas at N.J.A.C. 7:7A-6.4(b)2, such deposits provide the same potential for environmental damage if exposed during any construction in a transition area. Therefore, it is appropriate to make this a standard condition for all transition area waivers.

The Department is proposing to recodify N.J.A.C. 7:7A-6.1(f) and (g) as (c) and (d). The Department is proposing to amend recodified N.J.A.C. 7:7A-6.1(d) to eliminate the reference to a specific buffer model since there is more current information for assessing the value of buffer widths that can be used for the required research and documentation. The Department is proposing to amend recodified N.J.A.C. 7:7A-6.1(e) to require that all transition area waivers, except those for redevelopment and access, and their associated wetlands be subject to the recording of a Department-approved conservation restriction or easement in accordance with proposed new N.J.A.C. 7:7A-2.12. The detail relating to the conservation restriction is being removed from N.J.A.C. 7:7A-6.1(e) because it is now contained at N.J.A.C. 7:7A-2.12. The purpose of requiring a conservation restriction or easement upon completion of a transition area waiver is that the statutorily defined transition area width and/or shape have been altered. Without memorializing this alteration as part of the deed to a property, subsequent property owners would be unaware of the location and/or shape of the transition area. Therefore, it

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is appropriate that the approval of all transition area waivers have this condition. In addition, since the transition area is intended to protect the adjacent wetland, it is of limited value for the protection of the wetland to protect the transition area with a restriction while leaving the wetland itself unprotected.

In addition, the Department is proposing to add new N.J.A.C. 7:7A-6.1(e)1 and 2 to describe what happens in various cases when a transition area waiver is expiring, regulated activities have not been conducted, and the applicant wants to conduct regulated activities. At N.J.A.C. 7:7A-6.1(e)1i, the Department describes the scenario where no activities have been conducted on a site that was the subject of a transition area waiver and the conservation easement or restriction may or may not have been recorded. In that case, the applicant is required to obtain a new transition area waiver to conduct activities in the transition area. At N.J.A.C. 7:7A-6.1(e)1ii, the Department describes the scenario where no activities have been conducted and the conservation restriction or easement has been properly recorded, but the applicant wants to reconfigure the project to use portions of the transition area contained within the restricted area. In that case, the applicant is required to apply for a new transition area waiver, and may request a modification of the conservation restriction or easement in accordance with the procedures for a de minimis modification at N.J.A.C. 7:7A-2.12(i).

At N.J.A.C. 7:7A-6.1(e)2, the Department describes various scenarios relating to the expiration of a transition area waiver for a subdivision where regulated activities have been completed on certain lots but not on others. N.J.A.C. 7:7A-6.1(e)2i describes the scenario where the conservation restriction or easement may or may not have been recorded. In this case, if an applicant desires to develop some or all of the transition area on one or more of the lots for which no activity has occurred, a new transition area waiver is required. However, the Department will require that the plan to be submitted for the waiver be the same plan that was originally approved for the entire project. The reason for this requirement is that most transition area waivers (especially averaging plans) are based upon the finding that the changes to the transition area taken as a whole on the site do not negatively affect the ability of the transition area to perform all values and functions necessary for the protection of the adjacent wetland. The Department may not be able to make such a finding if only examining small portions or individual lots that

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are part of a larger site. However, the Department may be able to approve minor changes as part of the new transition area waiver if the restriction was recorded and the changes meet the standards for a de minimis modification at N.J.A.C. 7:7A-2.12(i).

Proposed N.J.A.C. 7:7A-6.1(e)3 states that if the permittee fails to record a conservation easement or restriction, the permittee is in violation of the FWPA and these rules.

The Department is proposing to recodify N.J.A.C. 7:7A-6.1(i), (j) and (k) as N.J.A.C. 7:7A-6.1(f), (g) and (h). At recodified N.J.A.C. 7:7A-6.1(f), the Department is correcting a cross-reference and simplifying the statement to indicate that the provisions for reconsideration by the Department of its action or inaction concerning a permit at N.J.A.C. 7:7A-17 may also apply to transition area waivers. The referenced section, N.J.A.C. 7:7A-7.3, was deleted in 2003 and replaced with Subchapter 17. The Department is also deleting the reference to “an individual” transition area waiver for the reasons previously described.

The deletion of the reference to “individual” transition area waiver is also proposed at recodified N.J.A.C. 7:7A-6.1(h). The Department is also clarifying recodified N.J.A.C. 7:7A-6.1(h) to better state the intent. The Department shall not allow a transition area waiver and a transition area general permit to be used in combination for the same activity. The exception to this rule is that the Department will permit the combination of a general permit and a transition area waiver for access (since one could not get to the area to conduct a regulated activity in the wetlands without such access) and the combination of a general permit with a waiver for redevelopment. Because a transition area that qualifies for redevelopment is significantly disturbed and not functioning as a transition area, the Department believes it is appropriate to allow that area to be used for an activity, under a transition area waiver, in combination with a general permit activity and that by permitting such a combination, the Department may effectively discourage impacts to other more valuable areas.

Finally, the Department is proposing new N.J.A.C. 7:7A-6.1(i) to include within the requirements applicable to all transition area waivers that a transition area adjacent to an exceptional resource value wetland cannot be reduced below 75 feet. This limitation is in the existing rule regarding transition area averaging plan waivers at N.J.A.C. 7:7A-

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6.2(d)3i and is found in the FWPA at N.J.S.A. 13:9B-18c. Exceptions to this limitation are the elimination of the wetland in its entirety, in which case the transition area is likewise eliminated, as provided at N.J.A.C. 7:7A-6.1(a)6 and the approval of a transition area waiver in accordance with individual permit wetland criteria as provided at in N.J.A.C. 7:7A-6.3(g).

N.J.A.C. 7:7A-6.2 Transition area averaging plan waiver

The Department is proposing to delete the current provision at N.J.A.C. 7:7A-6.2(b)4, which references N.J.A.C. 7:7A-6.1(c) and (d) since those sections are proposed for deletion as previously explained. The Department is proposing a new provision stating that a transition area averaging plan waiver shall not be approved if the proposed transition area compensation area is separated from the wetland by an intervening structure. The functions of a transition area are eliminated by the placement of a structure between the wetland and wetland transition area.

At N.J.A.C. 7:7A-6.2(c)2iii, the Department is proposing to add the requirement that an averaging plan that results in an average transition area of less than 25 feet does not provide the values and functions of an intermediate value transition area and therefore the Department will not permit such an averaging plan.

N.J.A.C. 7:7A-6.3 Special activity transition area waiver

At N.J.A.C. 7:7A-6.3(f)1, the Department is proposing to add as an example of a transition area eligible for redevelopment, a transition area containing a deck that is less than five feet above the ground. A structure like a wooden deck that is close to the ground prevents a transition area from performing most of the critical values and functions for protection of an adjacent wetland. Consequently, the Department is proposing that such an area should be eligible for redevelopment. At N.J.A.C. 7:7A-6.3(f)4, the Department is proposing to amend the cross-reference to point to the new proposed section on conservation restrictions or easements at N.J.A.C. 7:7A-2.12.

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The Department is proposing to amend N.J.A.C. 7:7A-6.3(g) to specifically cite the provisions of the individual permit process with which an applicant, who pursues a special activity transition area waiver based upon individual permit criteria, shall comply. In addition, the Department is adding the requirement that successful applicants for a transition area waiver based upon individual permit criteria be required to perform mitigation. Applicants were unclear about this requirement since the individual permitting criteria did not address transition area waivers. The Department has also included reference to the N.J.A.C. 7:7A-15.26 mitigation standards for this limited category of transition area waivers

N.J.A.C. 7:7A-6.4 Matrix type width reduction transition area waiver

The Department is proposing to amend N.J.A.C. 7:7A-6.4(g) to revise the method for determining slope in a transition area. The critical issue for determining whether or not to reduce the transition area adjacent to a wetland is if there are steep slopes contained within that area which could result in impacts to the adjacent wetland. Averaging the slopes in the transition area has the effect of masking the actual steepness of slopes contained within the area and therefore does not provide an accurate representation of the potential for impacts to the adjacent wetland. Therefore, the Department is proposing to amend the method to delete the process for averaging slopes across the area and instead to require the identification of the presence of all steep slopes in the transition area.

N.J.A.C. 7:7A-6.5 Hardship transition area waiver

At N.J.A.C. 7:7A-6.5(b), the Department provides the requirements for applicants requesting a transition area waiver based upon hardship criteria. At 6.5(b)7 and 8, the Department is proposing to add a requirement that the fair market value be determined by way of an appraisal, performed by a State-licensed appraiser, when offering a property for sale to adjacent property owners and those interested entities contained upon a list provided by the Department. The Department intends to provide a form letter to be used by applicants for this requirement. The form letter will contain an offer to sell the

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property, a copy of the fair market value appraisal, the asking price, a response time frame for those making an offer to purchase the property, and will clearly indicate that the property is contained within a wetland transition area that restricts its use. In addition, the Department is amending the hardship criteria to indicate that a hardship exists if an offer is refused by all and also in the case where an offer is made but the Department determines that it is not reasonable, assuming a minimum beneficial economically viable use, to alleviate the hardship. The Department will use the standards in N.J.A.C. 7:7A-17 to evaluate offers.

SUBCHAPTER 7 Individual Freshwater Wetlands and Open Water Fill Permits

Subchapter 7 provides the standards for review and approval of individual permits. Individual permits are required when there is no general permit for a proposed activity or the applicant cannot comply with the standards for a specific general permit. Generally, the standards require successful completion of an analysis demonstrating that there is no alternative location for the conduct of the desired activity. The standards presume that activities are best conducted outside of wetlands, State open waters and transition areas unless they are water-dependent activities (for example, docks and piers). There are additional criteria that must be met if an activity is non-water dependent and proposed in exceptional resource wetlands. Exceptional resource value wetlands are those discharging into trout production waters or their tributaries, or which feature threatened or endangered species habitat.

N.J.A.C. 7:7A-7.1 General provisions for individual permits

N.J.A.C. 7:7A-7.2 Standard requirements for all individual permits

The Department is proposing to amend N.J.A.C. 7:7A-7.1(a)2 and 3, and N.J.A.C. 7:7A-7.2(a) to correct cross-references.

At N.J.A.C. 7:7A-7.2(b) the Department is proposing to make the same changes to (b)9 relating to historic preservation and individual permits as were previously described at N.J.A.C. 7:7A-4.3(b)5 for historic preservation and general permits. The

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Department is proposing to reorganize and amend provisions of N.J.A.C. 7:7A-7.2(b)9 to include a subparagraph at N.J.A.C. 7:7A-7.2(b)9i to make it clear that if a historic resource is encountered during construction, the applicant is required to preserve the resource and contact the Department before proceeding.

The Department is proposing to add new N.J.A.C. 7:7A-7.2(b)15 to make it clear that an individual permit for a regulated activity will not be approved unless the entire project of which the activity is part satisfies the Department's Stormwater Management rule at N.J.A.C. 7:8. While currently the Department relies upon conditions at 7.2(b)5, which requires that permitted activities comply with applicable State water quality standards, and 7.2(b)10, which requires compliance with the Flood Hazard Area Control Act and implementing regulations, this provision explicitly requires compliance with the stormwater management requirements. This condition reflects the overall stormwater management requirement at proposed N.J.A.C. 7:7A-2.11.

N.J.A.C. 7:7A-7.4 Additional requirements for a non water-dependent activity in a wetland or special aquatic site

The Department is proposing to amend N.J.A.C. 7:7A-7.4(c)5 to correct a cross-reference.

SUBCHAPTER 8 Emergency Permits

Subchapter 8 provides the procedures for obtain an emergency permit authorization.

SUBCHAPTER 9 PRE-APPLICATION CONFERENCES

Subchapter 9 provides the criteria for requesting a pre-application conference with the Department. There are no proposed changes to the subchapter.

SUBCHAPTER 10 Application contents and procedure

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Subchapter 10 contains the application requirements and procedures for review of all applications under the FWPA program.

N.J.A.C. 7:7A-10.1 Basic application information

The Department is proposing to correct the codification in N.J.A.C. 7:7A-10.1(b)2 to reflect the elimination of section N.J.A.C. 7:7A-10.7, Additional application requirements for a combined flood hazard area permit and general permit authorization. In addition, the Department is proposing deletion of N.J.A.C. 7:7A-10.1(b)3 relating to combined flood hazard area permits and general permits, and the reference to “individual” transition area waivers at N.J.A.C. 7:7A-10.1(b)4 for the reasons previously described. Finally, the Department is proposing to recodify (b)5, 6 and 7 as (b)4, 5, and 6 with no change in text.

The Department is also proposing to correct the codification at N.J.A.C. 7:7A-10.1(d) to reflect the elimination of section N.J.A.C. 7:7A-10.7.

The Department is proposing to add a new section at N.J.A.C. 7:7A-10.1(q) to establish standardized criteria for conducting surveys when required throughout this chapter. The Department’s Green Acres Program established such criteria in rules early in 2006 (see N.J.A.C. 7:36). While the Green Acres requirements exceed what is needed for every survey, the proposed new provision references the sections of the Green Acres rules relevant to surveys to be conducted under these rules.

The Department notes that it anticipates providing the option of filing applications under this chapter electronically in the near future. When the electronic filing option is available for use, the Department will post an announcement and instructions on its website at www.nj.gov/dep/landuse.

N.J.A.C. 7:7A-10.2 Basic content requirements for all applications

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The cross-references in N.J.A.C. 7:7A-10.2(a) and (b)1 and 6 are proposed to be corrected to reflect the elimination of N.J.A.C. 7:7A-10.7 as stated previously.

N.J.A.C. 7:7A-10.2(b)4 and 5 are proposed for amendment in order to provide more detail and some new requirements regarding the information that an applicant must provide as part of an application. The Department is proposing to require submittal of visual, written narrative and other information and/or certifications regarding the presence or absence of other areas of the Department's land use regulatory jurisdiction, for example, is the proposed activity in a flood plain, thus requiring a flood hazard area permit? At N.J.A.C. 7:7A-10.2(b)7, the sentence stating that failure to provide the required information could result in permit denial or termination or enforcement action is deleted, in favor of proposed new N.J.A.C. 7:7A-10.2(e) (explained below). In addition, the Department is deleting the option of providing information or a certification regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, or other features on the site. The Department is requiring that the applicant provide all available documentation. The Department is proposing to add the requirement at N.J.A.C. 7:7A-10.2(b)8 for applicants to provide information demonstrating compliance with the stormwater management requirement at N.J.A.C. 7:7A-2.11.

The Department is proposing new N.J.A.C. 7:7A-10.2(e) to emphasize that the failure to provide all information of which the applicant, its consultants, engineers, surveyors, or agents are or should be aware may result in denial or termination of a permit and may subject these individuals to penalties for submittal of false information.

N.J.A.C. 7:7A-10.3 Additional application requirements for an LOI

The Department is proposing to amend N.J.A.C. 7:7A-10.3(d)1 to provide criteria for delineating a State open water based upon the width of the feature. The Department is requiring that for State open waters that are one to five feet in width measured from top of bank, the delineation shall indicate the centerline of the State open water with several data points numbered and shown on the plans. For State open waters that are greater than

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five feet in width, the delineation must include two survey lines with numbered points, depicting the top of bank on both sides of the State open water.

N.J.A.C. 7:7A-10.4 Additional application requirements for a general permit authorization

At N.J.A.C. 7:7A-10.4 (a)2, the Department is proposing to add the requirement that applicants provide the total area, in acres, of wetlands and State open waters on the site that is the subject of the general permit application. The Department is not requiring that an LOI be obtained in order to determine the total area of wetlands/State open waters. Rather, the area can be determined using any reasonable mapping method to which the applicant has access. The reason for this requirement is for the Department to more completely assess the successes or failures of its regulatory program. Currently, while the Department tracks the amount of wetlands and State open waters that are lost to permitted filling and modification, there is no ability to compare this to the amount of wetlands that may be remaining or preserved as a result of the permitting action. This proposed requirement is intended to fill this knowledge gap and to gain a more comprehensive view of the program.

The Department is also proposing three additional requirements for general permit applications. At N.J.A.C. 7:7A-10.4(a)5, the Department is requesting information regarding when the lot that is the subject of the general permit was created by subdivision. At N.J.A.C. 7:7A-10.4(a)6, the Department is requiring a history of the ownership of the property beginning June 30, 1988 to present, and at N.J.A.C. 7:7A-10.4(a)7 the Department requires a listing of contiguous lots that were in common ownership with the lot on which the activities are proposed and the ownership history of each lot beginning June 30, 1988 to present. Together, these requirements are necessary in order to demonstrate that no general permit has been previously approved for the lots that would result in the segmenting of the project, as described at N.J.A.C. 7:7A-4.2(f), and that the total disturbance authorized under a site under general permits since July 1,

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1988 has not been exceeded in accordance with N.J.A.C. 7:7A-4.4(b). If the project has been segmented or exceeds the general permit limits an individual permit is required.

N.J.A.C. 7:7A-10.5 Additional application requirements for an individual transition area waiver

The Department is proposing to amend the title of this section and N.J.A.C. 7:7A-10.5(a) to delete the reference to “individual” transition area waiver for the reasons described previously. In addition, the Department is proposing a new N.J.A.C. 7:7A-10.5(b) to establish the application requirements to obtain a special activity transition area waiver based upon individual wetlands permit criteria. Proposed N.J.A.C. 7:7A-10.5(b)1 requires submittal of an application fee for a transition area waiver. Proposed N.J.A.C. 7:7A-10.5(b)2 requires the submittal of application information required for an individual wetlands permit application at N.J.A.C. 7:7A-10.6 (requirements for demonstrating the lack of alternatives to a proposed activity). N.J.A.C. 7:7A-10.5(b)3 states that a mitigation proposal is required in accordance with new proposed standards at N.J.A.C. 7:7A-15.26.

The Department is recodifying existing N.J.A.C. 7:7A-10.5(b) as 10.5(c), and is replacing the reference to requiring information for an individual freshwater wetlands permit in favor of the information contained in N.J.A.C. 7:7A-17.1(i)4, 5, 7, 8i through iii, and a statement indicating that the property owner has requested a hardship waiver. These requirements include at N.J.A.C. 7:7A-17.1(i)4, documentation regarding when the property was purchased and the purchase price; at N.J.A.C. 7:7A-17.1(i)5, documentation regarding the amount, nature and date of any investments made to maintain and/or develop the property, other than the purchase price; at N.J.A.C. 7:7A-17.1(i)7, documentation that the property has been offered for sale to all property owners within 200 feet of the property and to a list of additional organizations supplied by the Department; and at N.J.A.C. 7:7A-17.1(i)8, the requirement to maintain the offer for 90-days, include a copy of the fair market value appraisal as performed by a State-licensed appraiser, and to include full disclosure regarding the environmental constraints on the property.

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N.J.A.C. 7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

At N.J.A.C. 7:7A-10.6(a)2, the Department is proposing to add the requirement that applicants provide the total area, in acres, of wetlands and State open waters on the site that is the subject of the general permit application. This requirement is being added for the same reasons previously described at N.J.A.C. 7:7A-10.4(a)2.

N.J.A.C. 7:7A-10.7 Additional application requirements for a combined flood hazard area permit and general permit authorization

The Department is proposing to delete in its entirety N.J.A.C. 7:7A-10.7, additional application requirements for a combined flood hazard area permit and general permit authorization for the same reasons stated above. The Department is proposing to recodify N.J.A.C. 7:7A-10.8 through 10.11 as N.J.A.C. 7:7A-10.7 through 10.10.

N.J.A.C. 7:7A-10.7 Additional application requirements for a modification or extension

The Department is proposing to amend requirements at recodified N.J.A.C. 7:7A-10.7, additional application requirements for a modification or extension, to provide better documentation to the Department when an applicant transfers an approval from one owner to another. The Department is proposing to replace N.J.A.C. 7:7A-10.7(b)1ii with more detailed requirements as follows. At (b)1ii(1), the Department is requiring a written request for a transfer that contains the notarized signature of each original owner of the site (that is, the owner who originally obtained the approval). At (b)1ii(2), the Department is requesting the names and addresses of each new owner or contract purchaser. At (b)1ii(3), the Department requires a list of adjacent properties owned by the new owner. At (b)1ii(4), the Department requests the date of property transfer, and at (b)1ii(5), a signed and notarized statement by the new owner or contract purchaser accepting the permit and all conditions is required. Finally, at proposed N.J.A.C. 7:7A-

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10.7(b)1ii(6), the Department is requiring submittal of a copy of a recorded conservation restriction or easement, if one was required as a condition of the approval that is the subject of the transfer. This information is necessary for the Department to track ownership of and responsibility for compliance with Department approvals and attached conditions of approval.

At recodified N.J.A.C. 7:7A-10.7(c), the Department is deleting the provision that waives the fee for minor modifications, because the Department is proposing a fee of \$240 (see summary below regarding fee provisions in subchapter 11). The Department is also correcting the codification to reflect the elimination of N.J.A.C. 7:7A-10.7.

N.J.A.C. 7:7A-10.8 Public notice requirements for applications

The Department is proposing to add new N.J.A.C. 7:7A-10.8(j) to establish notice requirements for a mitigation proposal. The notice requirements are the same as those required for individual permit applications except that the notice must be sent to the officials and neighbors in the vicinity of the mitigation site, which may be different from the site of the proposed wetland impact for which notice was given to satisfy requirements for a permit. The purpose for the new requirements is discussed in greater detail in the summary of N.J.A.C. 7:7A-15.11 below.

N.J.A.C. 7:7A-10.8(j) and (k) are recodified as 10.8(k) and (l).

SUBCHAPTER 11 Fees

Subchapter 11 contains the application fees for all applications under the chapter.

N.J.A.C. 7:7A-11.1 General fee provisions

At N.J.A.C. 7:7A-11.1(b), the Department is proposing to delete, from the list of activities for which a permit fee is not required, applications for minor amendments in accordance with N.J.A.C. 7:7A-14.3. The deletion is proposed because the Department is also proposing a fee of \$240 and making additional changes to N.J.A.C. 7:7A-14.3, modification of a permit, to make it mandatory that permits be modified when there is a

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change in ownership. This is discussed in greater detail in the summary of N.J.A.C. 7:7A-14.3.

The Department is proposing to clarify N.J.A.C. 7:7A-11.1(d) by adding an example of how to calculate application fees for multiple permits under the Division of Land Use Regulation.

The Department is proposing to amend the fee table at N.J.A.C. 7:7A-11.1(g) to delete all of the fees associated with combined general permits and flood hazard area permits for the reasons previously described. In addition, the Department proposes to delete the reference to per acre “affected” from the \$1,080.00 plus \$96.00 fee per acre under the category “any transition area waiver if the site is not covered by a valid LOI, or has a presence/absence LOI only; and the site is larger than one acre,” because it is incorrect. The Department assesses this fee based upon the size of the property and not the size of the proposed impact area since the impact area will only be approximated at the time of application. Previous amendments to this subchapter have inadvertently left this incorrect reference in place.

The Department is also proposing to add a fee for the review of minor modifications. The Department is proposing a fee of \$240 since this is consistent with the fee for general permit modifications. The Department believes a fee is needed at this time because it is also making a change to N.J.A.C. 7:7A-14.3, modification of a permit, to make it mandatory that permits be modified when there is a change in ownership. This is discussed in greater detail in the summary of N.J.A.C. 7:7A-14.3.

SUBCHAPTER 12 DEPARTMENT REVIEW OF APPLICATIONS

Subchapter 12 outlines the Department’s review procedures for all applications.

N.J.A.C. 7:7A-12.1 Completeness review

The Department is proposing to amend N.J.A.C. 7:7A-12.1(d) and(e) to correct the cross-references as necessary due to the recodifications within subchapter 10 to which these sections refer.

N.J.A.C. 7:7A-12.2 USEPA Review

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The Department is proposing to delete the detailed description contained at N.J.A.C. 7:7A-12.2(k), which discusses a process for circulating certain Department permits directly to the U.S. Fish and Wildlife Service for review of the potential impacts to Federally listed threatened or endangered species. Instead, the Department will retain the requirement to circulate applications to the Service in accordance with the Memorandum of Agreement (MOA) between the Service and the Department and any amendments or clarifications thereto. Over the past several years, the U.S. Fish and Wildlife Service staff has been reassigned to other duties, requiring the Service and the Department to reassess the method by which applications are reviewed by both agencies. At this time, the Department retains the majority of responsibility for reviewing potential impacts to Federally listed threatened or endangered species, and only provides applications to the Service for comment when a potential impact has been identified. This revised process will become an addendum to the existing MOA and the rules are being amended to reflect this change. The MOA is available at the address listed at N.J.A.C. 7:7A-1.3.

The Department is also proposing to amend N.J.A.C. 7:7A-12.2(l), that describes the Department's responsibilities relating to compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. § 470(f)). In order to remain as stringent as the Federal 404 program, the Department cannot approve a permit that would result in effects to property which is listed or is eligible for listing on the New Jersey or National Register of Historic Places. Therefore, in order to obtain a freshwater wetland/State open water permit approval, an applicant must demonstrate to the Department that a proposed activity will not result in such effects. The Department proposes to require submittal of a historic and archaeological survey when any one of the characteristics listed at N.J.A.C. 7:7A-12.2(l)1 through 5 exist on a site. Currently, the Department uses the list of characteristics to identify sites that require assessment for the presence of historic or archaeological resources and forwards these applications upon receipt to the Department's State Historic Preservation Office (SHPO). However, without information relating to the site, the Department cannot make an assessment and frequently responds

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with a request for a Phase IA historical and archaeological survey, or an architectural survey, thus resulting in delays in the processing of the application. Therefore, it is more efficient to request such information as part of an application for sites containing the listed characteristics.

The Department is also proposing to add a new N.J.A.C. 7:7A-12.2(m), to define additional items to be submitted to facilitate review efficiency and compliance with the historic and archaeological resource requirements. These include at N.J.A.C. 7:7A-12.2(m) 1 through 3: clear color photographs of all buildings, structures, ruins of buildings and structures, and burial grounds on the site; a key map locating the photographs; and all information and correspondence relating to historic and archaeological resources on the site.

The Department is proposing to recodify existing N.J.A.C. 7:7A-12.2(m) and 12.2(n) as N.J.A.C. 7:7A-12.2(n) and 12.2(o).

The Department is proposing new N.J.A.C. 7:7A-12.2(p), to clearly state that when a wetland/State open water permit is required, demolition of buildings or structures potentially over 50 years of age or disturbance of soils shall not be undertaken prior to receipt of an approved permit. Doing so will be considered a violation of this chapter. The proposed provision clarifies the requirement adopted by the State for the protection of historic resources consistent with requirements for obtaining permits under Section 404 of the Federal Clean Water Act.

N.J.A.C. 7:7A-12.3 Public comment on an application

The Department is proposing to amend N.J.A.C. 7:7A-12.3(a) and (c) to correct the cross-references as necessary due to the recodification of subchapter 10 to which these sections refer.

N.J.A.C. 7:7A-12.4 Hearings on an application for an individual permit or individual transition area waiver

The Department is proposing to amend this section to delete the references to “individual” transition area waiver for reasons previously discussed. In addition, the rule

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at N.J.A.C. 7:7A-12.4(e)1 is being amended to correct the cross-references, as necessary, due to the recodification of subchapter 10 to which these sections refer and to update the name of the program implementing this chapter, as previously described.

N.J.A.C. 7:7A-12.5 Final decisions

The Department is proposing to delete N.J.A.C. 7:7A-12.5(f), relating to final decisions on applications for combined flood hazard area permits and general permit authorizations for the same reasons stated above.

N.J.A.C. 7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications

The rule at N.J.A.C. 7:7A-12.6(f)1 is being amended to correct the cross-reference as necessary due to the recodification of subchapter 10 to which the section refers.

SUBCHAPTER 13 Contents of permits and waivers

Subchapter 13 contains broad, standard conditions applying to all approvals under the Freshwater Wetlands Protection Act program.

N.J.A.C. 7:7A-13.1 Standard conditions that apply to all permits

The rule at N.J.A.C. 7:7A-13.1(a)11 is being amended to correct the cross-reference as necessary due to the recodification of subchapter 10 to which the section refers. In addition, the Department is proposing a new requirement, N.J.A.C. 7:7A-13.1(a)14, to require that the applicant notify the Department's Enforcement Bureau, seven days prior to the commencement of site preparation or regulated activities, whichever comes first. This condition is routinely placed on approved Department permits and waivers. The Department is also requiring at that time, the submittal of documentation demonstrating that any conservation restriction or easement, required as a condition of the approval, has been recorded.

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SUBCHAPTER 14 Changes to issued permits or waivers

Subchapter 14 contains procedures for amending, transferring, extending or terminating an approved permit.

N.J.A.C. 7:7A-14.2 Transfer of a permit

The Department is proposing to amend N.J.A.C. 7:7A-14.2 to make it clear that the transfer of ownership of a site or of permitted activities at a site requires the submittal of a minor modification meeting the requirements at N.J.A.C. 7:7A-14.3 before transferring the permit. Further, without an official transfer of the permit, no regulated activities can be conducted by a party other than the permittee.

N.J.A.C. 7:7A-14.3 Modification of a permit

The Department is proposing to amend N.J.A.C. 7:7A-14.3(a) to require that a modification be obtained for a change in ownership or operational control of a project. The Department is also proposing to amend N.J.A.C. 7:7A-14.3(c)3 to add additional requirements at N.J.A.C. 7:7A-14.3(c)3i(1) through (6) for the transfer of a permit from one owner to another. The proposed new requirements will assist the Department in assessing compliance with the terms and conditions of an approved permit. Proposed N.J.A.C. 7:7A-14.3(c)3i(1) and (2) state that the Department will only allow a permit to be transferred when the approval is valid, and is not an emergency permit. An emergency permit cannot be transferred because it is of limited duration and may be approved with a minimum of written documentation with an understanding between the Department and the applicant of the duration and scope of the emergency work. Final permit approval is not received until the activity is completed and all documentation has been provided as part of an application for the project “as built.” N.J.A.C. 7:7A-14.3(c)3i(3) states that the approval may be transferred to a person who currently owns the site or who is under contract to purchase the site, which is the subject of the approval. N.J.A.C. 7:7A-14.3(c)3i(4) allows the transfer so long as it will not alter a basic condition upon which

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the original approval was granted or otherwise circumvent a requirement of this chapter. For example, if after receiving an individual permit based upon a finding of “no alternatives” the property is transferred to a neighboring owner for whom alternatives exist, the basic condition upon which the permit was approved will have been altered and the Department’s permitting requirements circumvented. At N.J.A.C.7:7A-14.3(c)3i(5), the permittee is required to notify the Department in accordance with the requirements for a minor modification before the new owner or operator conducts regulated activities and N.J.A.C. 7:7A-14.3(c)3i(5) requires the original permittee, who wants to transfer the property, to provide proof that he or she has recorded a conservation restriction or easement if one was required as a condition of the permit to be transferred. The requirement to provide proof of filing of any conservation restriction or easement that was a requirement of the approved permit or waiver to be transferred is necessary to inform the prospective owner about any limitations that may have been imposed on the property by the Department, by way of a conservation restriction or easement.

In addition, the rule at N.J.A.C. 7:7A-14.3(h) is being amended to correct the cross-reference as necessary due to the recodification of subchapter 10 to which the section refers.

N.J.A.C. 7:7A-14.6 Permit extensions

The rule at N.J.A.C. 7:7A-14.6(e) is being amended to correct the cross-reference as necessary due to the recodification of subchapter 10 to which the section refers.

SUBCHAPTER 15 Mitigation

Subchapter 15 contains the criteria for mitigating the loss of wetlands associated with an approved wetlands permit. Mitigation measures include creating new wetlands, restoring or enhancing existing wetlands, obtaining mitigation credits from an approved mitigation bank, preserving wetlands, or making a monetary contribution to a fund used to create, restore or enhance wetlands.

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N.J.A.C. 7:7A-15.1 Mitigation definitions

The Department is proposing to amend the definition of “enhancement” to clarify that the Department does not consider the removal of trash or debris, wetland “enhancement.”

In addition, the Department is adding a definition of “mitigation banking instrument” to be used when describing the type of documentation the Department will provide when approving a new mitigation bank. The proposed definition contains a list of 14 items that may be contained in the document provided by the Department. Finally, the Department is adding the word “easement” to the term conservation restriction as it is used in the definition of “upland preservation” to make it consistent with the changes made to the conservation restriction or easement sections throughout the rules.

N.J.A.C. 7:7A-15.2 General mitigation requirements

The Department is proposing to amend N.J.A.C. 7:7A-15.2(b) to add transition areas to the list of resources for which mitigation may be required. More specifically, the Department is proposing to add new N.J.A.C. 7:7A-15.2(b)3 to reference the one type of transition area waiver, a special activity transition area waiver based upon the criteria for an individual permit, for which mitigation may be required.

The Department is also proposing to amend N.J.A.C. 7:7A-15.2(d)3 to preclude the use of discharged stormwater to create the hydrology of a wetland mitigation area.

At N.J.A.C. 7:7A-15.2(i), which states that a mitigation site shall be permanently protected from future development, the Department is adding a reference to new N.J.A.C. 7:7A-2.12 that contains the standards for conservation restrictions or easements.

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The Department is proposing new N.J.A.C. 7:7A-15.2(n), to permit the aggregation of multiple small (less than 0.5 acres) mitigation areas onto one site. This provision is intended for single projects that span more than one watershed management area, for example road projects. Currently, each portion of a road project through wetlands would have to be mitigated in the same watershed as the proposed impact. This could potentially result in the need for multiple small mitigation sites in several watersheds. This is not desirable since mitigation is often more successful ecologically and more cost effective when aggregated. Therefore, the proposed amendment would permit the aggregation of small wetland mitigation areas onto one site in those cases where one project spans more than one watershed management area.

N.J.A.C. 7:7A-15.3 Timing of mitigation

The Department is proposing to amend N.J.A.C. 7:7A-15.3(a) to add the requirement that a mitigation proposal be submitted and approved prior to commencing the permitted activity. The proposed change makes this section more consistent with the time periods for mitigation provided at N.J.A.C. 7:7A-15.11(a).

N.J.A.C. 7:7A-15.4 Property suitable for mitigation

The Department is proposing to amend N.J.A.C. 7:7A-15.4 to add to the list of criteria for when mitigation is permitted on public land and to include criteria for addressing contaminated sites. At N.J.A.C. 7:7A-15.4(a)3, the Department is proposing to add that mitigation is allowed on public land when the land obtained or held by the government agency, is or was formerly a wetland and the government agency is proposing to restore or enhance it. This is consistent with the prohibition against allowing the use of public land for mitigation since the intent of the prohibition is to prohibit the conversion of land that already has a public purpose to use as a wetland mitigation project. Public land that is or was wetlands would not be converted to a different use if restored or enhanced as part of a mitigation project.

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At N.J.A.C. 7:7A-15.4(d) where the Department describes the types of land that are already considered valuable and therefore cannot be used for mitigation, and such lands include areas with significant cultural or historic resources, the Department is proposing to add a cross-reference to the section addressing historic resources.

At N.J.A.C. 7:7A-15.4(e), the Department is proposing to delete the provision that would allow the acceptance of mitigation on land containing an encumbrance that has not been extinguished. The Department is proposing a similar amendment at N.J.A.C. 7:7A-15.22(c). The Department has determined that land should be free of encumbrances in order to be accepted as a donation.

At N.J.A.C. 7:7A-15.4(h), the Department is proposing to add a requirement for the proper characterization of a site containing suspected contamination. This is necessary both to assess the likelihood of success of a potential mitigation site, and to protect the health and safety of Department staff who will be inspecting the site. At proposed N.J.A.C. 7:7A-15.4(h)1, the Department is requiring that the site be properly characterized in accordance with the Department's site remediation requirements (N.J.A.C. 7:26C). At N.J.A.C. 7:7A-15.4(h)2, the Department is also proposing to require that such characterization be obtained before submittal of a mitigation bank proposal for the site to the Department. The Department cannot properly review a mitigation bank proposal without knowing the potential for success as it relates to contamination on a site.

Finally, the Department is proposing new N.J.A.C. 7:7A-15.4(i) to explicitly state that stormwater management facilities shall not constitute mitigation. This is consistent with Department practice.

N.J.A.C. 7:7A-15.5 Mitigation for a smaller disturbance

The Department is proposing to amend N.J.A.C. 7:7A-15.5(c)2 to delete the option for upland preservation as a second option when onsite and offsite mitigation is

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not feasible. The option for upland preservation is proposed for addition at N.J.A.C.

7:7A-15.5(f) as a final option when all other options are exhausted. While preserving land is beneficial, it is not as beneficial for replacing wetlands as purchasing credits from a mitigation bank where wetlands are being created or making a donation to be used for a wetland creation, restoration or enhancement project. Consequently, it should not be considered until all other options are exhausted. In addition, these amendments will assist the Department in maintaining consistency with the federal mitigation policy proposed in 2006.

N.J.A.C. 7:7A-15.6 Mitigation for a larger disturbance

The Department is proposing to make a similar amendment at N.J.A.C. 7:7A-15.6(d)3 as was made at N.J.A.C. 7:7A-15.5(c)2 to delete the option for upland preservation and to move it to a later point in the mitigation option hierarchy. The option for upland preservation is proposed for addition at new N.J.A.C. 7:7A-15.6(g) which is the last option when mitigation is not feasible onsite or offsite, and when no credits are available for purchase from a mitigation bank in the same HUC 11, in the same watershed management area, or which includes the disturbance site in its bank service area. In addition, the Department is proposing to amend N.J.A.C. 7:7A-15.6(e)1 to move the option of purchasing credits from a mitigation bank which includes the disturbance site in its bank service area, to a point later in the mitigation hierarchy at N.J.A.C. 7:7A-15.6(f)1, and to instead require that credits be purchased in a bank in the same watershed management area as the disturbance. Finally, the Department is proposing new N.J.A.C. 7:7A-15.6(g) to add the options for a monetary contribution, upland preservation or a land donation when all other mitigation options have been exhausted.

All of the proposed changes are consistent with the federal mitigation policy and consistent with the Department's goal of ensuring that mitigation occurs as close to the disturbance site as possible and that wetlands are replaced using the most successful types of mitigation available.

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N.J.A.C. 7:7A-15.10 Conceptual review of a mitigation area

The Department is proposing to amend N.J.A.C. 7:7A-15.10(c)4 to require that potential, suspected and/or known contamination on a site be indicated at the same time that the type of soils are indicated on a county soil survey and submitted to the Department for conceptual approval of a mitigation project. Like the amendments at N.J.A.C. 7:7A-15.4, this is necessary both to assess the likelihood of success of a potential mitigation site, and to protect the health and safety of Department staff who will be inspecting the site.

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

As previously mentioned in the description of amendments to N.J.A.C. 7:7A-10.8, public notice requirements for applications, the Department is proposing to amend N.J.A.C. 7:7A-15.11(b) to add a requirement for notification at the time that a mitigation proposal for creation, enhancement or restoration (except restoration for a temporary disturbance) is submitted to the Department. This new requirement is necessary because significant time may have passed between the original notice regarding the application for a wetland permit and when a mitigation project is constructed, and because some mitigation projects may not be carried out on the same site where the wetland impacts will occur. The Court found in *Rinaldo v. RLR Investment and DEP*, Docket No. A-1447-04T3 that where mitigation would occur on a different site than the permitted activities, notice to neighboring property owners is required. Therefore, the Department believes that it is appropriate to inform the town, county and neighbors who will be hosting a mitigation project about the nature of the proposed mitigation so that they can express to the Department any questions or concerns that they may have about the proposed mitigation project.

N.J.A.C. 7:7A-15.12 Contents of a mitigation proposal

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N.J.A.C. 7:7A-15.12(b) contains the checklist items required for a mitigation proposal. The Department is proposing to amend the list to add at N.J.A.C. 7:7A-15.12(b)8 the requirement for the owner of a proposed mitigation site to allow the Department unconditional access to enter the property and inspect the proposed mitigation. This is necessary because the owner of a mitigation site may not be the same as the original owner who consented to allow access and inspection as part of the permit application that resulted in the required mitigation.

At N.J.A.C. 7:7A-15.12(d)5, where the Department lists information that must be submitted by applicants proposing to restore, create or enhance wetlands, to preserve uplands or to donate land, the Department is proposing to add a cross-reference to the section addressing historic resources to the provision requiring information regarding archaeological resources.

The Department is proposing to amend N.J.A.C. 7:7A-15.12(d)14, to better detail the type of documentation required to describe a potential mitigation site containing suspected contamination. The Department is requiring submittal of a copy of the characterization of the site, required at proposed N.J.A.C. 7:7A-15.4, as well as detailed information regarding the applicable human health and ecological effect thresholds for each contaminant at N.J.A.C. 7:7A-15.12(d)14i, the method of exposure and method of transmission for each of the contaminants at N.J.A.C. 7:7A-15.12(d)14ii and 14iii respectively, the potential to transmit health risks or contamination offsite at N.J.A.C. 7:7A-15.12(d)14iv, and the current status of a cleanup at N.J.A.C. 7:7A-15.12(d)14v.

At N.J.A.C. 7:7A-15.12(e)6, in the list of information required for proposals to restore, create, or enhance wetlands, where the rule requires certification that the proposed mitigation will not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places, the Department is proposing to add a cross-reference to the section addressing historic resources.

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At proposed N.J.A.C. 7:7A-15.12(f)1i and ii, the Department is distinguishing between general and Individual permits when describing the requirements for monetary contributions. Applicants mitigating for approved individual permit activities will continue to follow the monetary contribution procedures currently contained in the rules. Applicants mitigating for general permit activities will be required to calculate monetary contributions in accordance with the proposed standards at N.J.A.C. 7:7A-15.21(d).

N.J.A.C. 7:7A-15.13 Financial assurance for a proposal to restore, create, or enhance wetlands

At N.J.A.C. 7:7A-15.13(c), the Department is proposing to change the amount of the financial assurance required for a proposed mitigation project. N.J.A.C. 7:7A-15.13(c)1 addresses the financial assurance necessary to ensure that construction of a site is completed. N.J.A.C. 7:7A-15.13(c)2 addresses a maintenance assurance to ensure success of the mitigation project for the duration of the required monitoring period. The Department is proposing to change the amount required for maintenance from 30 percent of the costs of construction, to 115 percent of the estimated cost of monitoring and maintaining the site, including the cost to replant the mitigation area. The Department believes the financial assurance for maintenance should be more properly tied to the costs for maintenance instead of to the construction costs for the site. It is likely that 115 percent of the maintenance costs will be less than 30 percent of the cost of construction.

N.J.A.C. 7:7A-15.14 Protecting a mitigation area from future development

The Department is proposing to amend N.J.A.C. 7:7A-15.14(a) to reference the new conservation restriction or easement provisions at N.J.A.C. 7:7A-2.12. In addition, the Department is proposing to delete N.J.A.C. 7:7A-15.14(b), (f) and (g) which generally describe conservation restrictions or easements because all of that information is contained in the new section. The Department is retaining N.J.A.C. 7:7A-15.14(c),(d) and (e) and recodifying them as N.J.A.C. 7:7A-15.14(b),(c) and (d) since they relate solely to conservation restrictions or easements on mitigation sites.

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N.J.A.C. 7:7A-15.16 Requirements that apply after the Department approves restoration, creation, or enhancement

At N.J.A.C. 7:7A-15.16(a), when describing the requirement of recording a conservation restriction or easement to protect a mitigation site, the Department is proposing to add a cross-reference to the section addressing conservation restrictions or easements. In addition, at N.J.A.C. 7:7A-15.16(c), the Department is proposing to change the date for submittal of a post-planting monitoring report from November 15 to December 31st, to give applicants until the end of the calendar year to submit their annual report.

N.J.A.C. 7:7A-15.17 Requirements that apply after the Department approves credit purchase or uplands preservation

At N.J.A.C. 7:7A-15.17(b)2ii, the Department is changing the reference to the requirement to submit to the Department a conservation restriction, to requiring submittal of a conservation restriction or easement for consistency with the rest of the chapter.

N.J.A.C. 7:7A-15.18 Requirements that apply after the Department approves mitigation through a monetary contribution

The Department is proposing to amend N.J.A.C. 7:7A-15.18(a) and (b) to distinguish between requirements that apply to mitigation for general permit impacts and individual permit impacts after the Department approves the use of a monetary contribution. The procedures for individual permits remain unchanged at N.J.A.C. 7:7A-15.18(a)1, while at N.J.A.C. 7:7A-15.18(a)2, the Department is requiring applicants to calculate a monetary contribution in accordance with proposed N.J.A.C. 7:7A-15.21(d). At N.J.A.C. 7:7A-15.18(b)1, the success of a monetary contribution for mitigation of impacts due to individual permits remains unchanged. Proposed new N.J.A.C. 7:7A-15.18(b)2 contains the requirements for determining the success of a monetary

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contribution for mitigation of impacts due to general permits, and requires that the contribution be properly calculated, in accordance with N.J.A.C. 7:7A-15.21(d), and be approved and completed in accordance with a general permit checklist for monetary contributions.

N.J.A.C. 7:7A-15.19 Requirements that apply after the Department approves mitigation through a land donation

At N.J.A.C. 7:7A-15.19(c)2, the Department is amending the provision requiring a maintenance fund for maintenance and supervision of a mitigation area to require an “adequate” fund. The proposed change is intended to make it clear that when the mitigator and the agency or conservancy determine the amount of the fund, the goal is to agree to an amount that is adequate for maintenance and supervision of the mitigation area.

At N.J.A.C. 7:7A-15.19(c)3 the Department is amending the provision describing the requirements that apply after the Department approves mitigation through a land donation, to require that applicants provide the Department with a copy of a conservation restriction or easement in accordance with N.J.A.C. 7:7A-2.12 and 15.14, that the restriction or easement is recorded with the county and that a copy is provided to the Department.

N.J.A.C. 7:7A-15.20 Wetlands Mitigation Council

At N.J.A.C. 7:7A-15.20(a)1, the Department is proposing to delete the review of proposed mitigation bank proposals, at N.J.A.C. 7:7A-15.20(a)liii from the list of Mitigation Council duties and functions. The Mitigation Council is required at N.J.S.A. 13:9B-14 to oversee the Wetlands Mitigation Bank: a repository for monetary contributions accepted for mitigation. In addition, N.J.S.A. 13:9B-15 gives the Council the authority to disburse funds from the Bank to purchase land upon which to restore degraded wetlands, preserve wetlands and transition areas deemed to be of critical

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importance for the protection of wetlands, contract with nonprofit organizations to undertake mitigation, and purchase upland for future mitigation sites. The FWPA also gave the Council the ability to disburse funds for research on wetland mitigation.

Although the Council has shared responsibility with the Department for reviewing and approving private mitigation banks, the new Federal policy on mitigation places the responsibility for ensuring that mitigation banks are created and successful with a State entity, in this case the Department. Consequently, while the Council may advise the Department on new mitigation banks, it is the Department's responsibility to ensure that such banks succeed.

Further, while research on mitigation is a laudable goal, the federal policy does not acknowledge research as a mitigation option. That is, while research may accompany another acceptable mitigation option with a primary purpose of creation, enhancement or restoration, it cannot be the only requirement of an applicant seeking to mitigate for impacts to wetlands. Therefore, the Department is proposing to amend N.J.A.C. 7:7A-15.20(a)5 to clarify that research may be approved as a part of a Council-funded and approved creation, restoration or enhancement project.

The Department is also proposing to clarify N.J.A.C. 7:7A-15.20(c) to inform the public that other information relating to Council meetings can be obtained by contacting the Department.

N.J.A.C. 7:7A-15.21 Council review of a proposed monetary contribution

The Department is proposing to amend N.J.A.C. 7:7A-15.21(a), for review of a monetary contribution, to separate the review of a monetary contribution for impacts resulting from an individual permit from those resulting from a general permit. For individual permits, the process by which the Mitigation Council approves a monetary contribution remains unchanged. However, the Department is proposing that the amount of a contribution for mitigation resulting from general permits be calculated in accordance with 15.21(d).

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The Department is amending N.J.A.C. 7:7A-15.21(b)1 to clarify that the Council can approve a monetary contribution if the contribution is equal to the cost of buying, enhancing and/or restoring existing degraded wetlands and/or State open waters.

At N.J.A.C. 7:7A-15.21(d), the Department is proposing a new standard to calculate the amount of a monetary contribution to mitigate for impacts associated with general permits. The FWPA requires that a contribution be equivalent to the lesser of the cost of purchasing and restoring existing degraded freshwater wetlands, or the cost to purchase property and create freshwater wetlands. Currently, monetary contributions for Individual permits are assessed on a site by site basis. This is reasonable because the Department approves less than 25 individual permits annually. However, the Department is proposing that a simplified method be used to assess contributions for general permits because of the significantly larger number of permit applications which will now be subject to mitigation. The Department's proposed method is based upon an evaluation and assessment of the analyses submitted to the Department and the Mitigation Council for previous monetary contributions. Each monetary contribution proposal includes an evaluation of the following costs for restoring existing, degraded wetlands at a 3:1 ratio (wetlands to be restored to wetlands lost) and for creating wetlands at a 2:1 ratio (wetlands to be created to wetlands lost): land appraisal, purchase price, engineering, environmental consulting fees, obtaining a no further action letter, attorney fees, site preparation and construction, plant purchase and planting, construction supervision, and the cost of monitoring the site. Based upon this assessment, the Department has determined that it costs approximately \$300,000 to mitigate for impacts to one acre of wetlands.

Therefore, at N.J.A.C. 7:7A-15.21(d)2, the Department is proposing, for all property owners who are not single family, to calculate the appropriate amount of a monetary contribution by multiplying the acreage of wetland/waters impacts by \$300,000. This amount will be adjusted annually using the Consumer Price Index for Urban Consumers as published by the United States Department of Labor.

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At N.J.A.C. 7:7A-15.21(d)1, the Department is proposing that a monetary contribution for a single family property owner be determined by multiplying the acreage of wetland/waters impacts by \$38,000. This calculation is currently being used by the Mitigation Council to determine single family monetary contributions for Individual permit impacts and is adjusted annually using the Consumer Price Index for Urban Consumers as published by the United States Department of Labor.

At proposed N.J.A.C. 7:7A-15.21(e), the Department describes the process it will use when it determines that it is necessary to adjust the amount of a monetary contribution using the Consumer Price Index for Urban Consumers. The Department will publish in the New Jersey Register a notice of administrative change that announces the adjustment and the amount of the adjusted monetary contribution and that incorporates the revised monetary contribution into the rule.

As stated previously, the Department's mitigation hierarchy does not permit the use of a monetary contribution unless onsite mitigation is not feasible and there is no available mitigation bank from which credits may be purchased. The Department intends to revisit the monetary contribution formulas to determine if more mitigation banking options have become available and if the contribution formulas need adjusting to better facilitate on-the-ground mitigation efforts.

N.J.A.C. 7:7A-15.22 Council review of a proposed land donation

N.J.A.C. 7:7A-15.22 has been reorganized to put the most important provisions earlier in the rules. N.J.A.C. 7:7A-15.22(a) remains unchanged. The Department is proposing to insert new N.J.A.C. 7:7A-15.22(b) and (c). Proposed N.J.A.C. 7:7A-15.22(b) states that the amount of land to be donated must fully compensate for the loss of functions and values to the wetlands being disturbed. This provision has been relocated from existing N.J.A.C. 7:7A-15.22(c) but also amended to delete the acceptance by the Council of land having an easement or other encumbrance attached. The Department has determined that land should be free of with encumbrances in order to be accepted as a donation. Existing N.J.A.C. 7:7A-15.22(d) has been relocated in its entirety to new N.J.A.C. 7:7A-15.22(c) and states that a land donation cannot be accepted if the owner is

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making the donation to satisfy requirements of another government agency, unless the owner agrees to enhance or restore wetlands on the parcel. An example of this scenario is also provided.

N.J.A.C. 7:7A-15.22(b) is recodified as 15.22(d).

N.J.A.C. 7:7A-15.23 Mitigation banks

For the reasons discussed previously, throughout N.J.A.C. 7:7A-15.23, the Department is proposing to change the authority for the review of mitigation banks from the Mitigation Council to the Department. In addition, at N.J.A.C. 7:7A-15.23(a) the Department is defining “approval” for the purposes of the section as “final approval.” The clarification is needed because the Department may give both “conceptual” and “final” approvals to mitigation banks but final approval is required before credits can be sold.

At N.J.A.C. 7:7A-15.23(c), because the Mitigation Council is not required in every case to review applications for mitigation banks, a resolution is no longer the appropriate vehicle for memorializing the contents of an approved mitigation bank. Instead, the Department will provide the application with a banking instrument, as previously defined. The Department has made the same change to replace “resolution” with “banking instrument” at N.J.A.C. 7:7A-15.23(e), (g), (h) and (i).

At N.J.A.C. 7:7A-15.23(f), where the Department is requiring the recording of a conservation restriction or easement, the Department is proposing to add a cross-reference to the new section addressing procedures for conservation restrictions or easements.

At N.J.A.C. 7:7A-15.23(g), the Department is proposing to add a definable end point to the period of time that a bank operator is required to monitor a bank. The proposed amendment requires monitoring until the last credit is sold, the final inspection is conducted or the bank is transferred to a charitable conservancy, whichever occurs last.

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The Department is proposing to amend N.J.A.C. 7:7A-15.23(j), so that a mitigation bank approval can be extended for a permit of five years, instead of for one year, in the case where a permit requiring the mitigation bank is also extended for five years. This is logical since most mitigation projects are not independent but are conditions of approved wetland permits.

N.J.A.C. 7:7A-15.24 Application for Wetlands Mitigation Council approval of a monetary contribution of land donation

The Department is proposing to amend N.J.A.C. 7:7A-15.24(b) to exclude the need for Mitigation Council approval of a monetary donation to mitigate for general permit activities. This is consistent with the proposed requirements at N.J.A.C. 7:7A-15.21(d) which establish formulas for the determination of mitigation contributions for general permits.

N.J.A.C. 7:7A-15.25 Application for [Wetlands Mitigation Council] approval of a mitigation bank

The Department is proposing to change the title of this section from “application for Wetlands Mitigation Council approval of a mitigation bank,” to “Application for approval of a mitigation bank,” since in some cases, the approval will be performed by the Department and not the Wetlands Mitigation Council. Throughout the section, the Wetlands Mitigation Council is replaced with the Department, as appropriate. The Department is proposing to amend N.J.A.C. 7:7A-15.25(a) to require, instead of recommend, that a prospective bank operator obtain conceptual review of a proposed mitigation bank before investing in buying the land or preparing a detailed proposal. The Department is trying to avoid the situation where a bank operator has made a significant investment in a mitigation bank before ensuring that the bank will be acceptable to the Department. The Department is proposing to further amend this provision to establish a period of validity for a conceptual approval of three-years or until the rules governing

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conceptual approval are amended in such a way that would render the conceptual approval inconsistent, whichever occurs sooner. The Department is proposing a three-year period for conceptual approvals instead of the 5-year period proposed for final approvals since a conceptual approval is preliminary and only allows an applicant to move forward to develop a final plan while a final approval confers the right to create the bank. Because a conceptual approval is not final, the Department wants to retain the ability to require changes in the case where the rules are amended in such a way that the conceptual approval no longer comports.

In addition, the Department is proposing to amend N.J.A.C. 7:7A-15.25(a)2 which addresses previous uses of the site, to add a cross-reference at proposed N.J.A.C. 7:7A-15.25(a)2ii and require compliance with the historic and archaeological resources provisions of the rules, and at N.J.A.C. 7:7A-15.25(a)2i to require the characterization of a site containing possible contamination.

At N.J.A.C. 7:7A-15.25(b)4v, the Department is proposing to prioritize the wetlands for which a service area may be designated. The “service area” is the location where wetland impacts may occur that may be compensated for by the bank in question. The Department is proposing that the service area be designated to give first priority to wetland impacts in the same HUC 11, followed by wetlands that are adjacent to and within the same watershed management area, and finally in the same watershed management area as the proposed bank. The proposed hierarchy is designed to ensure that mitigation occurs as close to the source of wetland impacts as possible.

At N.J.A.C. 7:7A-15.25(c), the Department is proposing to reduce the number of required copies of a mitigation bank proposal from 10 to five since the Department will be undertaking review of the proposal in most cases.

Proposed N.J.A.C. 7:7A-15.26 Mitigation for transition area impacts

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The Department is proposing new N.J.A.C. 7:7A-15.26 to be used for transition area impacts resulting from a special activity waiver based upon individual permit criteria at N.J.A.C. 7:7A-6.3(g). Currently, while the special activity waiver implies that mitigation is required because it is a condition of all individual permit approvals, there are no criteria to mitigate for transition areas. Proposed new N.J.A.C. 7:7A-15.26 provides that criteria. The hierarchy provided at proposed N.J.A.C. 7:7A-15.26 parallels that for wetland mitigation and prioritizes mitigation to keep it as close to the disturbance site as possible and to replace the disturbance using the most successful types of mitigation possible. Proposed N.J.A.C. 7:7A-15.26(a) establishes onsite mitigation as the preferred option but does not permit onsite upland preservation. Proposed N.J.A.C. 7:7A-15.26(b) permits three options for mitigation when onsite mitigation is not feasible. These are the purchase of credits from a mitigation bank in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area; the purchase of credits from any approved bank which has the disturbance in its service area; or offsite restoration or enhancement in the same HUC 11 or in an adjacent HUC 11 within the same watershed area as the disturbance. If the options at proposed N.J.A.C. 7:7A-15.26(a) and (b) are not feasible, proposed N.J.A.C. 7:7A-15.26(c) would allow purchase of credits from a bank in the same watershed management area as the disturbance, or restoration, enhancement or upland preservation in the same watershed management area as the disturbance. When the options at proposed N.J.A.C. 7:7A-15.26(a), (b) and (c) are not feasible, proposed N.J.A.C. 7:7A-15.26(d) allows the purchase of credits from a mitigation bank which includes the disturbance site in its service area or restoration or enhancement in the same drainage. Finally, proposed N.J.A.C. 7:7A-15.26(e) allows mitigation through a monetary contribution, upland preservation or a land donation approved by the Mitigation Council.

SUBCHAPTER 16 Enforcement

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

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Subchapter 16 provides the enforcement provisions for the FWPA and this chapter.

At N.J.A.C. 7:7A-16.1(a), the Department is proposing to add letters of interpretation and settlement agreements to the list of instruments included as part of the term, “applicable law and/or condition.” Although these items are implied, since they are part of the FWPA, because other instruments are listed, it is necessary for a complete list to add these two items. The Department is also correcting the reference to the State Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.

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

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

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-16.5 Civil administrative penalty

For consistency with the changes to N.J.A.C. 7:7A-16.1, the Department is amending the list of items at N.J.A.C. 7:7A-16.5(a) which may be subject to violation to include letters of interpretation and settlement agreements. In addition, the Department is deleting the repeat reference to the FWPA to simplify the section. The Department is making a similar change to N.J.A.C. 7:7A-16.5(b) to include settlement agreements to the list of items that may be violated in accordance with the Water Pollution Control Act and is also deleting the redundant reference. The Department is also correcting the reference to the section containing the amount of a civil administrative penalty to reflect the recodification.

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

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.

N.J.A.C. 7:7A-16.8 Civil administrative penalty amount

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 violations resulting from the failure to obtain a permit prior to conducting regulated activities, and to rename it “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, a permit shall mean a permit, waiver, authorization, or other approval issued pursuant to the FWPA. In addition, throughout the section, the Department is clarifying that its enforcement regulations 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, to be described later, for violations other than those at amended N.J.A.C. 7:7A-16.8 or in existing N.J.A.C. 7:7A-16.10 through 16.12 (proposed to be recodified as 16.11 through 16.13).

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, not all of which are directly related to the size of a physical disturbance.

The Department is proposing to amend N.J.A.C. 7:7A-16.8(a) to state that the Department will use the procedures in this section and Table D in N.J.A.C. 7:7A-16.8(d) to assess civil administrative penalties for conducting regulated activities prior to

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obtaining a permit. As amended, N.J.A.C. 7:7A-16.8(a) will be used to determine the number of points and corresponding penalty amount for a specific violation, unless the violation is listed in recodified N.J.A.C. 7:7A-16.10 through 16.12.

In addition, the Department has clarified at N.J.A.C. 7:7A-16.8(a) and at N.J.A.C. 7:7A-16.8(c)2 that the Department's penalty assessment authority also applies to the conduct of regulated activities without a permit or waiver in freshwater wetland transition areas.

N.J.A.C. 7:7A-16.8(c) identifies the three factors the Department uses to determine the amount of a civil administrative penalty for failure to obtain a permit prior to conducting regulated activities. The three factors are the conduct of the violator, the size of the freshwater wetland and/or freshwater wetland transition area affected by the violation, and the resource value classification of the freshwater wetland and/or freshwater wetland transition areas affected. Each factor is assigned points as described in N.J.A.C. 7:7A-16.8(c)1, 2 and 3. The Department is proposing to amend the assigned point values to better and more fairly assess penalties for more egregious violations of a greater scope, without affecting the lower range of penalties 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 allows the Department to make the penalty better reflect the degree of harm caused by the violation, and allows for a more precise penalty calculation based on the specific conditions of each violation. In general, the Department has attempted to 'spread out' the point totals associated with the different penalty assessment criteria to issue penalties that more precisely and fairly reflect the scope of real or potential environmental or programmatic harm associated with a violation, assess proportionately higher penalties against knowing violations, and assess proportionately higher penalties against violations occurring in exceptional value wetlands or their transition areas.

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The Department is proposing to amend N.J.A.C. 7:7A-16.8(c)1i, to increase the points assigned to “major conduct” from three to five points to emphasize the importance of this factor in the overall penalty assessment. The Department believes that persons who knew, or should have known that the activities they were conducting were in contravention of the Act should be assessed a higher penalty than someone who did not realize their actions were in violation of the Act.

The Department is proposing to clarify N.J.A.C. 7:7A-16.8(c)2 by explicitly stating that the Department’s penalty assessment is based in part on the scope of regulated activities conducted without first obtaining Department approval in freshwater wetlands and freshwater wetland transition areas. In addition, the Department is proposing to amend the rules to increase the number of points assigned to a violation affecting more than three acres of wetlands from three to five points. This change reflects the greater environmental harm associated with impacts to larger areas of wetland disturbance, provides a greater incentive to comply and restore the resource to its pre-disturbance and functional condition, and provides a greater deterrent to future violations.

At N.J.A.C. 7:7A-16.8(c)3i, the Department proposes to increase the number of points to be assigned for a violation based upon the resource value classification of the wetlands and/or transition areas impacted by a violation from three to five. 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 proposed increase in the number of points associated with violations in exceptional resource value wetlands and transitions areas is intended as an increased deterrent for unpermitted impacts to these wetlands and their transition areas.

At N.J.A.C. 7:7A-16.8(d), the Department is proposing to amend the point totals and some of the daily penalty amounts according to the following: a point total of five points that currently results in a penalty of \$4,500 per day is proposed to increase to \$5,000 per day; the penalty for seven points is proposed to decrease from an assessment of \$7,500 per day to \$7,000 per day; and eight points is proposed to decrease from an

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assessment of \$9,000 per day to \$8,000 per day. In addition, the Department is proposing to create a new point total of nine points and to assess \$9,000 per day, and 10-15 points with a proposed assessment of \$10,000 per day. The proposed amendments are intended to represent a more balanced and fair application of all factors to allow for a consistent, reasonable, predictable and fair penalty, while providing an incentive for swift compliance and a sufficient deterrent to future violations.

Proposed new N.J.A.C. 7:7A-16.8(e) states that the total civil administrative penalty shall be obtained by taking the daily penalty amount from Table D and multiplying by the number of days during which the violation continued.

New N.J.A.C 7:7A-16.9 Civil administrative penalty amount for violations other than failure to obtain a permit for regulated activities

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 to conduct 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 land use rules such as the Highlands Water Protection and Planning Act rules (N.J.A.C. 7:38), and the Coastal 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

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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 reptiles, is not accurately or fairly reflected by a penalty calculation based upon computation of a square footage of land disturbance.

The penalty of \$10,000 for each violation of the FWPA, and criteria for penalty assessment at proposed N.J.A.C. 7:7A-16.9(a) and (b) respectively, are consistent with N.J.A.C. 7:7A-16.5(a), which establishes civil administrative penalties.

Proposed N.J.A.C. 7:7A-16.9(b) establishes Table E as a matrix to assess the appropriate daily penalty amount based on the seriousness of the violation and the conduct of the violator. To determine the appropriate penalty, the Department will determine the seriousness of the violation at (c), the conduct of the violator at (d) and will consult Table E as per (e) to determine the appropriate daily penalty amount.

The Department has developed per violation penalty assessments in the boxes in Table E to assess penalties based on the seriousness and conduct of a particular violation. The Department has assessed the statutory maximum \$10,000 per violation for violations

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of major seriousness and major conduct. To assess the per violation penalty for situations of less than major seriousness and less than major conduct, the Department has correspondingly reduced the per violation penalty assessments in Table E to reflect varying degrees of seriousness and conduct warranted by each violation. The Department has assessed a per violation penalty for a situation consisting of minor conduct and minor seriousness as \$500 per violation to reflect the unknowing conduct and minor impact those violations carry. For violations that are moderate in seriousness or conduct, the Department will assess penalties reduced from the major determinations. For violations of moderate conduct and moderate seriousness, the Department has determined that the midway between penalty \$0 and \$10,000, or \$5,000 is appropriate.

Proposed N.J.A.C. 7:7A-16.9(c) describes how the seriousness of a violation will be determined. N.J.A.C. 7:7A-16.9(c)1 defines major seriousness as 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 requirement of the Act and this chapter. The Department also provides examples of the types of violations the Department considers “major.” They 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, transferring ownership of a property without having properly recorded a required conservation restriction/easement, failure to report the presence of a historic resource during construction and/or demolition of a historic resource, or failure to comply with a historic or mitigation requirement. Each of these violations results in the loss of the values and functions of the freshwater wetland resource or a 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 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 other requirement of the Act or any rule or condition. The Department

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provides examples of violations of “moderate” seriousness such as the failure to notify the Department of commencement of construction, failure to transfer a permit properly, failure to report the presence of a historic resource during construction, or failure to provide information upon request to determine compliance.

Proposed N.J.A.C. 7:7A-16.9(c)3 defines minor seriousness as any violation not included as “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 Department permits or authorizations to be knowing violations since in seeking and obtaining permits, the permittee acknowledges that he or she knows that the law exists, that areas are regulated, and that a permit is required to conduct activities in these regulated areas.

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 a reasonable due diligence prior to proceeding with potentially regulated activity would have identified the site of violation as containing or likely to contain areas of land use jurisdiction. Examples of due diligence would be to search publicly available (on line) land use maps or publicly available soil maps to identify an area as containing or likely to contain regulated land types. The Act has been in effect since 1988. Additionally, there exists a consulting community available to assist a property owner who suspects his project site is regulated. The Department works with landowners through the LOI program (for a fee) to provide a reliable determination that an area is free from regulatory requirements or limitations. 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. Proposed N.J.A.C. 7:7A-16.9(e) indicates that the total civil administrative penalty shall be the daily penalty amount

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obtained from Table E multiplied by the number of days during which the violation has continued.

N.J.A.C. 7:7A-16.9 is recodified as 16.10.

Recodified N.J.A.C. 7:7A-16.10.

The Department is proposing to amend N.J.A.C. 7:7A-16.10(a) to explicitly include the presence of a historic resource in the list of activities for which submittal of inaccurate information or a false statement may result in a civil administrative penalty. Although this is currently implied in the rule, since the protection for historic resources is part of the FWPA rules, the Department wanted to make it clear that it will assess such a penalty if warranted.

N.J.A.C. 7:7A-16.10 through 16.18 are recodified as 16.11 through 16.19 with no change in text.

As recodified, 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. N.J.A.C. 7:7A-16.12 provides the civil administrative penalty for the failure to pay a civil administrative penalty when due. 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, or by delaying compliance with an applicable law or condition. N.J.A.C. 7:7A-16.14 contains the provisions by which a violator may be subject to a civil penalty. 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. 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. N.J.A.C. 7:7A-16.17 provides the Department's authority for requiring that a notice of violation be

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recorded on the deed of the property. N.J.A.C. 7:7A-16.18 provides the standards for Department issuance of an “after the fact” permit. N.J.A.C. 7:7A-16.19 provides the Department’s requirements for allowing public participation in the Department’s enforcement process.

Recodified N.J.A.C. 7:7A-16.20

Table E and references to Table E in N.J.A.C. 7:7A-16.20 are recodified as Table F. In addition, the rule citations found in Table F have been updated to reflect amendments proposed throughout this chapter.

N.J.A.C. 7:7A-17 Reconsideration by Department of its action or inaction concerning a permit

N.J.A.C. 7:7A-17.1 Reconsideration by Department of its action or inaction concerning a permit

The Department is proposing to amend N.J.A.C. 7:7A-17.1(d)1ii, (f)2, and (i)10 to add the reference to the provisions for assessing historic resources on a site at N.J.A.C. 7:7A-12.2. In addition, the Department is proposing amendments to at N.J.A.C. 7:7A-17.1(i)3 and (j)1ii to reflect the recodification of the application requirements in Subchapter 10.

APPENDIX 1

The Department is proposing to add Bull Frog to the list of facultative species found in vernal habitats and fairy shrimp to the list of obligate species. These are two new indicator species for vernal habitats.

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Social Impact

The rules proposed for re adoption with amendments will continue the positive social impacts of the existing rules that regulate impacts to freshwater wetlands, State open waters and freshwater wetlands transition areas. Wetlands protect and preserve drinking water supplies, purify surface and groundwater resources, provide a natural means of flood and storm damage protection, reduce flooding, and provide essential breeding, spawning, nesting and wintering habitats for fish and wildlife including migratory birds, endangered and threatened species and commercially and recreationally important species. All wetland functions provide social benefits. Therefore, since the rules result in protecting wetlands from unnecessary and random impacts, they provide an overall positive social impact.

The proposed new rules at N.J.A.C. 7:7A-2.11, which explicitly require compliance with the Department's Stormwater Management rules, will ensure that the positive social impacts associated with the Stormwater Management rules, for example, reduced runoff and reductions in non-point source pollution, will be supported and promoted by the freshwater wetland rules.

The proposed new rules that define the process for filing conservation restrictions or easements at N.J.A.C. 7:7A-2.12 are specifically intended to have a positive social impact by ensuring that those who purchase properties for which Department approvals have already been granted receive adequate notice of the restrictions and limitations associated with those approvals.

The addition of mitigation as a condition on certain general permits will have a positive social impact. It either will further discourage development in wetlands and State open waters, or require replacement of those resources for approved disturbances. Consequently, it will result in better protection for the wetlands and State open waters with all of the functions and benefits they provide.

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Proposed new N.J.A.C. 7:7A-5.6A, general permit 6A, which will allow impacts to transition areas adjacent to non-tributary wetlands, and proposed amendments to N.J.A.C. 7:7A-5.8, general permit 8, that will allow replacement of houses which existed before July 1, 1988 but were subsequently destroyed, will both have a positive social impact because they provide applicants with the ability to use a site, while still protecting the onsite wetlands.

The proposed new general permit for non-motorized, multiple use paths at N.J.A.C. 7:7A-5.17A will have a positive social impact because it will promote healthier modes of transportation like bicycling or skateboarding while providing a safe location for the activities.

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 will have a positive social impact because it addresses more fairly and appropriately the variety of impacts to the program and regulated areas that may result from violations.

Economic Impact

In adopting the Freshwater Wetlands Protection Act the legislature made the finding that the public benefits arising from the natural functions of freshwater wetlands and the public harm from wetland losses are distinct from and may exceed the private value of wetland areas. Consequently, the rules proposed for readoption with amendments, which make it more difficult to develop within wetlands, will continue the overall positive economic impact of the existing rules on the public as a whole while continuing to have neutral or negative impacts on those seeking to develop within the wetlands. Because wetlands protect and preserve drinking water supplies, purify surface and groundwater resources, provide a natural means of flood and storm damage protection, reduce flooding, and provide essential breeding, spawning, nesting and wintering habitats for fish and wildlife including migratory birds, endangered and

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threatened species and commercially and recreationally important species, the proposed readoption with amendments which protects wetlands provides positive economic benefits to the public as a whole. For example, wetlands reduce the need for drinking water purification, thereby saving the costs associated with water purification. They provide habitat for wildlife which promotes hunting, fishing, ecotourism and ecosystem viability; and protect against flooding and associated damage to life and property, which can be economically catastrophic for individuals and all residents of New Jersey.

The rules proposed for readoption with amendments also provide positive economic benefits (or help to avoid negative economic impacts) for home owners if they successfully discourage builders from placing homes in the wetlands. It may not be possible for a home owner to expand a house constructed in wetlands, forcing them to move to another house if they need to expand; the structure may be subject to more settling than a house built in uplands, resulting in the need for structural improvements at the owner's cost; and the home may be more vulnerable to mold and mildew, which is a health hazard and very costly to remediate.

Conversely, those individuals who own wetlands may experience neutral or negative economic impacts depending upon what they intend to do with the property and how much of the property is wetlands. Those proposing to develop a property and who can design the project to avoid wetlands in their entirety, will experience a neutral economic impact from the Department's rules. Development proposed partially in transition areas can be accommodated by the rules proposed for readoption with amendments. The costs for compliance with the rules for a project proposed in transition areas will be the cost of consultants to assist with layout and design of the project, a cost associated with most development projects, and the permit application fees. However, those who own wetlands with the intent to develop them will experience a negative impact from the proposed rules with amendments. The costs will be high to comply with the rule requirements, especially the proposed requirement for mitigation for wetland impacts associated with most general permits. Formerly, it was much less costly to comply with general permits than with individual permits because there was no mitigation requirement. An individual permit application will still require a complete application including alternatives analysis while a general permit does not, but applicants

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for both types of permit will, in most cases, have to address the mitigation requirement if the project is approved.

The Department is providing a section by section analysis of those provisions of the rule deemed to have the potential to result in an economic impact.

Subchapter 2: Applicability

The proposed rules at N.J.A.C. 7:7A-2.8(c) that describe criteria for exempt farm ponds and farm roads will have no economic impact because, although the Department is proposing to require that such activities be performed in accordance with a Farm Conservation plan, such plans are provided free of charge by the Natural Resources Conservation Service and provide suggestions and guidance for best management practices that protect the environment while supporting the agricultural industry. The best management practices provide an alternative, more environmentally protective option for accomplishing the goal of building a farm pond or road. Because the owner already intended to build the farm pond or road, using an alternative method of construction, or a location with less environmental impact, should not result in costs that would not have been incurred anyway.

The proposed rules at N.J.A.C. 7:7A-2.11, requiring compliance with the Department's stormwater management rules, will have a neutral or negative economic impact because, although it is a new requirement in these rules, the requirement has been in place through other Department rules and at the municipal level since 2004. Currently, as described in the summary of this section above, applicants are required to comply with the stormwater management rules as conditions of both general and individual permits. However, when reviewed as part of a general permit application, the determination of whether an activity rises to the level of a "major development" is currently limited to the portion of the activities proposed within the wetlands and transition area. The proposed amendments will require the assessment of all activities upon sites for which general permit activities are proposed to determine whether the project is a "major development." However, because compliance with the Stormwater Management rules is also a condition of local planning approvals, applicants are required to design their projects in accordance

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with the rules regardless of whether a freshwater wetland approval is required. Therefore, the additional costs relating to compliance with the Stormwater management requirement will be the cost of the fee for a stormwater review as part of the wetlands application. The fee can range from \$500, for a project requiring groundwater calculations on a site up to three acres in size, to \$4000 for the same calculations on a site of 100 acres or greater.

Proposed N.J.A.C. 7:7A-2.12, that describes the process for review, approval and filing of conservation restrictions or easements, may have minimal negative economic impacts since the Department is proposing to require conservation restrictions or easements for all transition area waivers, thereby subjecting certain categories of applicants to this requirement for the first time. Currently, the requirement to protect remaining transition areas by way of a conservation restriction or easement is applicable to matrix type width reductions and averaging plan transition area waivers. However, because the Department is now providing applicants with an approved conservation restriction or easement form that should not be altered, it will not be necessary for an applicant to obtain a lawyer to assist them in creating an approvable conservation restriction or easement. Therefore, the economic impact will result from the need to pay a nominal fee to record the restriction with the County clerk. Recording fees range from \$30 to \$40 for the first page, plus \$10 for each additional page.

The proposal to require mitigation for certain general permits will have a negative economic impact for those applicants that seek to impact wetlands or State open waters, because they will have the added cost of mitigating for that impact. The cost of mitigation will vary depending upon the size of the wetland and/or State open waters impact and whether an applicant chooses to create wetlands, buy credits from a mitigation bank, or make a monetary contribution. Generally, however, all costs are high because they require the creation, restoration or enhancement of freshwater wetlands, a purchase from a mitigation bank, or a donation equal to the lesser of the cost to purchase and restore existing degraded freshwater wetlands or the cost to purchase property and create freshwater wetlands of equal ecological value to those that were lost as a result of the approved permit. The costs of performing mitigation include purchasing the land (if performing offsite mitigation), engineering and environmental consulting fees, attorney fees, costs for excavators to conduct site preparation and construction, plant purchase and

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planting, construction supervision, and the cost of monitoring the site. The largest part of these costs is the purchase price for the land upon which to conduct mitigation. However, the other costs can be substantial. The Department anticipates that the majority of applicants receiving general permits will not have suitable conditions available onsite to perform mitigation and will likely have to go to an approved mitigation bank or make a donation.

Because it is preferable for applicants to purchase credits from an already established mitigation bank, consultants, developers, and large property owners may find it economically beneficial to establish mitigation banks to serve this demand. If they do so successfully, the proposed mitigation requirements may provide those individuals with a positive economic impact.

Proposed new N.J.A.C. 7:7A-5.6A, general permit 6A which will allow impacts to transition areas adjacent to non-tributary wetlands, and proposed amendments to N.J.A.C. 7:7A-5.8, general permit 8, that will allow replacement of houses which existed before July 1, 1988 but were subsequently destroyed, will both have a positive economic impact because they provide applicants with more flexibility in planning and using a site containing freshwater wetlands.

Proposed new N.J.A.C. 7:7A-5.17A, general permit 17A which will permit impacts to wetlands, State open waters and transition areas for non-motorized, multiple use paths, will have a positive economic impact because it will facilitate the construction of such paths without the need to obtain an individual permit. The Department will charge a standard general permit application fee, currently \$600, for the review of these activities, while an individual permit fee would cost \$2,400 plus \$240 for each 0.1 acre of wetlands to be affected by a path.

Subchapter 10 Application Contents and Procedures

Proposed N.J.A.C. 7:7A-10.1(q), that requires that a survey be conducted in accordance with standards promulgated by the Green Acres program at N.J.A.C. 7:36 will have a neutral or positive economic impact because the Division of Land Use Regulation already requires surveys within the rules for letters of interpretation at

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N.J.A.C. 7:7A-3.1(i), as part of every permit application at N.J.A.C. 7:7A-10.2(b)4, for mitigation proposals at N.J.A.C. 7:7A-15.2(d)3, and to locate a conservation restriction or easement (formerly located at N.J.A.C. 7:7A-15.4 and now located at 2.12(g)), and the Green Acres survey requirements will provide an authoritative source of information for the standardized conduct of surveys.

Proposed N.J.A.C. 7:7A-10.4(a) and 10.6(a) that require submittal of information on the total acres of wetlands and State open waters contained on the site that is the subject of a general permit or individual permit application will have a minimal negative economic impact. Because this is an additional requirement, some additional effort will be required by applicants and their consultants. However, with programs like geographic information systems (GIS), computer aided design (CAD), or a simple planimeter, the information can be obtained and the requirement satisfied at a minimal additional cost.

Subchapter 11 Fees

The economic impact from the proposed deletion of the option to obtain a combined permit, where the applicant's project requires a freshwater wetlands general permit, and a flood hazard area permit, may be negative depending upon the elements requiring review under the flood hazard area program. Fees may be higher when determined separately than they would have been when combined. For example, the current Flood Hazard Area (FHA) permit review fees range from \$1000 for a minor element to \$4000 for a major element, and require that all elements be summed to get the total fee, while the general permit fee under the FWPA rules is set at \$600. The fees proposed for deletion provided combined general permit and flood hazard area permit fees ranged from \$600 for a general permit for minor channel or stream cleaning and a flood hazard area permit, to \$5,250 for a combined application for a minor road crossing, outfall structure or bank stabilization general wetlands permit with a flood hazard area permit. (Note that a pending proposal under the Flood Hazard Area Control rules, N.J.A.C. 7:13, would alter the fee structure to establish fees based upon proposed activities and whether they qualify for newly defined general permits or individual permits. However, the range of fees will remain the same as those in the current rules.

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See 38 N.J.R. 3950(a)). However, as described in the summary regarding the proposed deletion of N.J.A.C. 7:7A-4.6, since the Department has been unable to make concurrent permit decisions on general permits and flood hazard area permits, the Department has been doing two separate reviews which merits two separate fees.

Subchapter 12 Department Review of Applications

The proposed amendments to N.J.A.C. 7:7A-12.2(k) that delete the requirement to circulate certain general permits to the U.S. Fish and Wildlife Service (Service), will have a neutral economic impact. An applicant may save review time if his or her application does not need a separate federal review for endangered or threatened species impacts, thus resulting in a slightly positive economic impact. However, because the endangered and threatened species review will continue to be conducted by the State, and certain of those reviews will result in a subsequent review by the Service, there will be no positive or negative economic impact resulting from having the initial review conducted by the State instead of the Federal government.

Similarly, the proposed amendments to N.J.A.C. 7:7A-12.2(l), that require applicants to submit, with certain applications, a Phase IA historical and archaeological survey, and/or an architectural survey, may have a positive, neutral or negative economic impact. Currently, the Department circulates projects meeting the criteria at N.J.A.C. 7:7A-12.2(l) to the State Historic Preservation Office (SHPO). SHPO then advises of the need to conduct surveys. The Department believes that in many cases, the surveys have already been conducted by the applicant but are withheld until the Department specifically requests their submittal. This is inefficient, costing the applicant and the Department extended review times for permit applications. Consequently, requesting submittal of the surveys with the application may have a somewhat positive to neutral economic impact. However, in those cases where applicants have not routinely conducted such surveys until requested to by the Department, the following economic impacts will result. For public agencies, the application to the Historic Preservation Office for project authorization for any undertaking that constitutes an encroachment upon or that will damage or destroy a property listed in the New Jersey Register is straightforward, and is

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not complicated to complete. The Department estimates that for most undertakings, the application can be completed by a project manager for a State, county or municipal agency in about one-half of a working day, without professional assistance. Required attachments (plans, maps, photographs) are usually already available, hence costs are primarily for reproduction and postage. Under such circumstances, an application might cost between \$250 and \$1,000 to prepare. If the attachments must be prepared, the Department estimates that it will cost approximately \$785 to \$2,625 to prepare the application.

For large or complex undertakings, the applying public agency may find it more efficient to have an architect, engineer or historic preservationist prepare the application, and make a brief presentation and answer questions at the Historic Sites Council meeting. For such professionally assisted applications, the Department estimates that the cost to the applicant would range from approximately \$2,100 to \$5,250. The Department estimates that a cost for a structural assessment for a building proposed for demolition might cost between \$3,675 and \$8,400, although in many cases, such a document would have already been prepared even if the property proposed for demolition were not listed in the New Jersey Register of Historic Places.

Though public hearings on applications are rare, if such a hearing were called by the Commissioner, the applicant likely would incur costs of approximately \$315 to \$735 for transcription and public notice. All of these impacts already exist by virtue of New Jersey Register of Historic Places Act (N.J.S.A. 13:1B-15.131) and The New Jersey Register of Historic Places Rules (see N.J.A.C. 7:4-7).

In those cases where a private applicant is required to perform an assessment of a site 20 acres or larger, a background investigation with field inspection is estimated to cost around \$5,250. If the background investigation and field inspection indicates that the site contains listed or eligible historic or archaeological resources that may be adversely affected by construction activities, or that the project site is likely to hold undiscovered, eligible, archaeological resources, then a more thorough field investigation would be required at a cost of approximately \$15,750. Such archaeological investigation has been required in appropriate cases for a wetland permit since the Department first began

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implementing historic preservation requirements in 1994, for consistency with Federal requirements.

Subchapter 13 Contents of Permits and Waivers

The requirement that a permittee notify the Department seven days before the start of construction should have no economic impact since this does not require the assistance of a professional.

Subchapter 14 Changes to Issued Permits or Waivers

The requirement that a permit be officially transferred in accordance with the procedures at N.J.A.C. 7:7A-14.3 will result in a negative economic impact to those applicants who transfer a property after a permit is issued but before the approved activities have been conducted, because the Department is proposing a \$240 fee for such transfers. The proposed fee is the same minimum fee charged for other basic permit actions like general permit modifications, and various permit extensions. Currently, the Department does not charge a fee for minor permit modifications. However, since the Department is proposing to make this requirement mandatory, a minimal fee is being proposed to address the administrative paper work that will result.

Subchapter 15 Mitigation

The proposed changes to the mitigation hierarchy at N.J.A.C. 7:7A-15.5 and 15.6, mitigation for a smaller and mitigation for a larger disturbance, respectively, should have a neutral economic impact. The changes do not eliminate any options for mitigation. Rather, the options are reordered with the goal of exhausting options that result in mitigation either onsite or as close to the site as possible before exploring the options of monetary contributions or upland preservation. Since monetary contributions are based upon the cost of buying, enhancing and/or restoring existing degraded wetlands, or the cost of buying uplands and creating freshwater wetlands, there is no economic advantage

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to being allowed to choose a monetary contribution option before exhausting the other options.

The proposed amendments to N.J.A.C. 7:7A-15.12, 15.14, 15.18, and 15.21 that separate the processes for mitigation contributions resulting from individual and general permit impacts will have varying economic impacts. For those performing individual permit activities, there will be no impact because no changes are proposed. For those performing general permit activities, the ability to calculate the monetary contribution directly, without having to first appear before the Mitigation Council, may save the applicant the cost of hiring a professional to assist in the determination of the contribution. However, the cost of the mitigation contribution will have a negative economic impact, as previously described.

The proposed amendments to N.J.A.C. 7:7A-15.23, which require the Department to review and approve proposed mitigation banks instead of the Mitigation Council, may have a neutral or slightly positive economic impact because an applicant may be able to provide a bank proposal to the Department for review and approval in less time than it takes to be placed on the agenda and appear at a meeting of the Wetlands Mitigation Council.

There should be no economic impacts to most applicants as a result of the proposed amendments throughout subchapter 16, enforcement, because the majority of applicants comply with the Department's permitting requirements and are therefore not subject to the penalties and fines associated with a violation.

Federal Standards Statement

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

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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.

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. In addition, several recent court cases at the Federal level have made the Federal jurisdiction less clear. Consequently, there may now be wetlands identified under the State and Federal programs which only receive protection in New Jersey because they have lost the protection of the Federal Clean Water Act.

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 Department provides the following additional comparison between the Department's proposed rule amendments and the Federal 404 program.

Subchapter 1 General Information

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The proposed addition of the terms “architectural survey,” “historic preservation restriction or easement,” and “Phase IA historical and archaeological survey” for the protection of historic resources, and the addition of stump removal as part of the definition of “discharge of fill material” are both consistent with, and no more stringent than, the equivalent definitions contained within the Federal 404 program. The remaining proposed new, amended and deleted definitions all are necessary to the proper function of the State’s program but are outside the jurisdiction of the Federal program. For example, the proposed new definition of “fair market value” is intended to clarify the term as it is used in the Department’s hardship waiver provision for impacts to transition areas-- areas not regulated under the Federal 404 program.

Subchapter 2 Applicability

The proposed amendments to the ongoing farming activities exempt from permitting at N.J.A.C. 7:7A-2.8(b)3 and (c)2 and 3 are consistent with the same Federal program farming exemptions.

Proposed N.J.A.C. 7:7A-2.11 that makes compliance with the Department’s stormwater management rules more prominent in this chapter, has no current, analogous Federal requirement. 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, requiring a stormwater review for the placement of impervious surface above a certain threshold reduces the potential for non-point source pollution and is consistent with Federal requirements.

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Proposed new N.J.A.C. 7:7A-2.12, that standardizes the requirements for conservation restrictions or easements, draws its authority from State and not Federal law (see the “New Jersey Conservation Restriction and Historic Preservation Restriction Act,” N.J.S.A. 13:9B-1 et seq.). However, for mitigation sites, the ACOE does require permanent protection by way of a real estate instrument, such as a conservation easement, deed restriction, and transfer of title to Federal or state resource agencies or non-profit conservation organizations.

Subchapter 4 General provisions for general permits

The Department’s process for adopting new general permits is almost identical to the Federal process. However, because the Department is a State agency with an assumed wetlands program, the Department is also required to provide its general permits to EPA for review. The Department has the authority under the Freshwater Wetlands Protection Act to adopt its own general permits and to review the Federal nationwide permits and adopt those it deems appropriate.

The process for obtaining authorization to use a general permit is also similar to that required for a nationwide permit. The Department requires submittal of an application that undergoes review by Department staff. Most of the Federal nationwide permits as of 2007 also require a preconstruction notification to allow the Army Corps of Engineers the opportunity to review a project for which a nationwide permit is requested.

Proposed amendments to N.J.A.C 7:7A-4.2 address the relationship between transition areas adjacent to wetlands for which the Department approves a general permit. There is no comparable Federal standard because the Federal 404 program does not provide protection for transition areas. However, the proposed amendment to N.J.A.C. 7:7A-4.3(b)1 that explicitly requires that all activities to be performed under a general permit be “minimized” is consistent with federal requirements. The ACOE has a standard condition in its nationwide permits (which are equivalent to the State’s general permits) that states, “the activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).” (See 72 FR 11193, March 12, 2007).

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The amendments to N.J.A.C. 7:7A-4.4(a)1 regarding the use of multiple general permits is a clarification and not a substantive change. However, the Federal program also contains an equivalent mechanism for combining nationwide permits. The proposed change to N.J.A.C. 7:7A-4.4(a)2 relating to the combination of specific general permits, is necessary for the implementation of the State's FWPA and has no federal equivalent.

Subchapter 5 Adopted general permits

The Department has 27 adopted permits and 2 proposed new general permits. With the exception of the proposed general permit for activities in transition areas adjacent to non-surface water connected wetlands, there are federal nationwide permits for all of the Department's general permit activities, although the terms and conditions are not identical. For example, the Army Corps permit for linear transportation projects only requires an application if an impact would exceed 0.1 acres, while the Department requires an application for all impacts. In addition, the total impacts permitted by the Army Corps permit are 0.5 acres. The Department's general permit limit for road crossings is 0.25 acres. The Department believes this is appropriately more stringent for the reasons previously stated. Finally, the Army Corps of Engineers has a total of 50 nationwide permits. The Department has reviewed the nationwide permits and adapted those that it deems appropriate as part of its rules. In general, the nationwide permits that are not part of the State program are those that would not apply in New Jersey. For example, the Army Corps has recently adopted a nationwide permit for coal mining activities that is not appropriate for New Jersey.

As previously discussed, in March 2007, the Army Corps of Engineers as part of the Federal 404 program, adopted new regulations making mitigation a standard condition of most Nationwide Permits, the federal equivalent of general permits. The ACOE also follows the same hierarchy for performing mitigation, although the Federal government tends to discourage in lieu fee programs (monetary contributions) mainly because such programs do not exist nationwide. Consequently, the proposed amendments

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which require mitigation for certain general permits are no more stringent than the equivalent Federal standards.

Proposed new N.J.A.C. 7:7A-5.6A relates exclusively to transition areas and consequently has no federal equivalent.

The proposed amendments to N.J.A.C. 7:7A-5.8 for house additions, has no exact federal equivalent. The ACOE has a nationwide permit for “minor discharges” which allows up to 0.1 acre of wetland/waters fill. The Department’s permit is limited to additions to single family houses and to 750 square feet. The permit limitations were provided by the FWPA. The proposed amendments which allow reconstruction of a dwelling with a 750-foot addition within five years of the destruction of the original structure are also unique to the State’s program.

The addition of the requirement to protect an area of habitat enhancement from future development, at N.J.A.C. 7:7A-5.16(c)6 is more stringent than the Federal permit for aquatic habitat enhancement and restoration activities (NP 27). The Federal government allows such activities to “revert” back to the pre-enhanced condition after the permit expires, and permits the discharge of fill to facilitate reversion because it believes that most people will not take advantage of this option. The Department believes that once a permit has been approved and habitat created, there should be no option for reversion. Due to the development pressures unique to New Jersey, it may be more likely that New Jersey owners would take advantage of this provision and this would be detrimental to the State’s fish and wildlife resources. Because the State is more stringent than the Federal government in this provision, the residents of New Jersey will benefit from the permanent protection of wetlands and all of the functions and values they provide, but will especially benefit from the protection of valuable fish and wildlife resources. The costs will be the same as those incurred by any individual seeking to develop wetlands in the State of New Jersey.

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There is no NP specifically to allow non-motorized multiple use paths. However, NP 42, recreational facilities, includes things like bike and horse paths, which would be covered by proposed new N.J.A.C. 7:7A-5.17A. However, the Department's proposed general permit is narrower in scope and more stringent than the NP because it is limited to 0.25 acres of impacts and does not permit support facilities, while the NP permits up to 0.5 acres of impacts with some "small support facilities" ("small" is not defined). The Department believes that it is reasonable to have more stringent standards in New Jersey, to encourage more environmentally-sensitive designs in a state that is experiencing heavy development pressure. Because the State is more stringent than the Federal government in this provision, the residents of New Jersey will benefit from the more stringent protection of wetlands and all of the functions and values they provide. By limiting the impacts that non-motorized multiple use paths can have on wetlands, the Department encourages designing such paths outside of environmentally sensitive wetlands. While there may be greater costs for construction if the path has to be extended in order to avoid wetland areas, a path constructed in uplands does not have to be designed to protect hydrology of the wetland, which should lessen the expense of construction. Thus, the difference in cost, if any, is difficult to estimate.

Subchapter 6 Transition area waivers

As previously stated, New Jersey's program regulates an upland "transition area" adjacent to most wetlands. The Federal program does not contain similar protections. Consequently, the State's program is more stringent than the Federal program as it relates to the protection of transition areas. However, the protection for transition areas emanates from the FWPA, because a transition area is an important ecological transition zone from uplands to wetlands, providing several values and functions for the protection of the adjacent freshwater wetland.

Subchapter 10 Application contents and procedures

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Subchapter 10 provides the application contents and procedures necessary for the Department's implementation of its program. Consequently, where the Department's program differs from the Federal program, the application contents and procedures reflect that difference. For example, proposed N.J.A.C. 7:7A-10.1(q), which requires that the survey standards contained in the Department's Green Acres standards be followed, and the requirement at N.J.A.C. 7:7A-10.2(b)8 to provide documentation regarding compliance with the State stormwater rules have no Federal equivalent since they require compliance with other State rules and standards applied in New Jersey and not nationwide.

The requirement at N.J.A.C. 7:7A-10.4(a)2 and 10.6(a)2, requiring that an applicant provide the total area in acres of wetlands and State open waters on a site before the regulated activity is performed is also unique to the State regulations. The Federal program tracks the total acres of impact resulting from the approval of a permit and the location of the impact but does not assess the total wetland acreage as part of the regulatory program.

The requirement to provide the subdivision history of a lot at N.J.A.C. 7:7A-10.4 is also a State and not Federal requirement. It is the State's mechanism to track total impacts permitted on a given lot to ensure that the Department requires an individual permit to assess cumulative impacts, when the total impacts on the site have exceeded those for general permits.

None of the requirements in N.J.A.C. 7:7A-10.5 have Federal equivalents since these requirements apply to transition area waiver applications which are not part of the Federal program.

The requirement to provide a written request to transfer an approval does have a Federal equivalent. The ACOE provides a form to be completed for transferring a property that contains the same information as that contained in the Department's proposed rule.

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The proposed requirement to notify neighbors adjacent to a proposed mitigation site, at recodified N.J.A.C. 7:7A-10.8 does not have a Federal equivalent. However, a court found in *Rinaldo v. RLR Investment and DEP*, Docket No. A-1447-04T3, that this was necessary for proposed mitigation sites in New Jersey.

To the extent that the majority of the proposed changes in Subchapter 10 do not have Federal equivalents they may be viewed as exceeding Federal standards since the Department is imposing requirements that are not required by the Federal program. However, the requirements are necessary and appropriate because they provide the information and documentation necessary to implement the Department's more stringent program.

Subchapter 11 Fees

The Department's wetlands regulatory program is a fee-supported program, assessing fees for each type of review activity including letters of interpretation, general and individual permits and transition area waivers. Although all money is deposited in the State Treasury, it is allocated back to the program in an amount based upon the fee money that was collected. The Federal government operates the ACOE program using an annual appropriation instead of assessing permit fees sufficient to support its operations. Consequently, the ACOE charges nominal fees for a minor subset of its review activities with the actual operating costs supported by Federal taxes. There are no fees for Nationwide permit authorizations, for jurisdictional determinations, or for transition area waivers (since transition areas are not regulated features pursuant to the Federal program). The ACOE charges individual homeowners \$10 for the review of an individual permit application. For commercial entities, the individual permit review fee is \$100.

The State of New Jersey is required to balance its budget each year, while there is no obligation for an annually balanced Federal budget. Consequently, the State assesses fees to assist in paying for its programs. The State has opted to charge fees to those who will receive the major benefit from developing environmentally sensitive lands, while the Federal government has determined to spread the cost of its environmental programs

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among all taxpayers. Therefore, the Department has concluded that the freshwater wetland permit fee amendments do not exceed any Federal Standards or requirements.

Subchapter 12 Department Review of Applications

Proposed amendments at N.J.A.C. 7:7A-12.2(k), (l), new (m) and (p) all relate to additional information necessary to demonstrate compliance with State standards for which there is a Federal equivalent. For example, N.J.A.C. 7:7A-12.2(l), new (m) and (p) relate to the protection of historic resources, while N.J.A.C. 7:7A-12.2(k) relates to the protection of Federally-listed threatened and endangered species. The proposed amendments are intended to make the Department's regulatory process more efficient and more similar to the Federal program. The remaining differences result from the fact that the Department is operating a State and not a Federal program. For example, the requirement for an applicant to provide information by which the Department can assess compliance with the requirement to avoid impacts to a historic resource is necessary and similar to that required by the ACOE when reviewing proposed wetland applications with the potential to affect historic resources. Consequently, the proposed amendments do not exceed the comparable Federal requirements.

Subchapter 13 Contents of Permits and Waivers

The proposed addition to the list of conditions at N.J.A.C. 7:7A-13.1(a), that requires an applicant to notify the Department seven-days before the commencement of site preparation or regulated activities is similar to a requirement employed by the ACOE in the implementation of the Federal program. The ACOE requires submittal of a "notification/certification of work commencement form" 10 days prior to the commencement of authorized work. Consequently, the Department's proposed requirement does not exceed the comparable Federal standard.

Subchapter 14 Changes to Issued Permits or Waivers

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The proposed amendment to N.J.A.C. 7:7A-14.3, modification of a permit, that makes it mandatory to modify a permit to record a change in ownership is equivalent to the ACOE requirements for transfer of a permit. The only difference between the two processes is that the ACOE requires submittal of a signed statement indicating that all terms and conditions of the transferred permit remain in effect, while the Department is not proposing such a requirement. Instead, the Department has proposed certain conditions on the transfer of a permit and is requiring submittal of a copy of any recorded conservation restriction or easement, if one was required as a condition of the permit to be transferred. These variations reflect the differences between the State and Federal programs. However, the State program does not exceed the Federal standard.

Subchapter 15 Mitigation

On March 28, 2006, the Environmental Protection Agency (EPA) proposed rules entitled, “Compensatory Mitigation for Losses of Aquatic Resources.” The proposed rules contained the guidelines that EPA had been using to assess mitigation projects nationwide, and also proposed some changes relating to “in lieu fee” programs. “In lieu fee” programs are designated funds set up to accept monetary contributions when other types of mitigation are not available (that is, when there is no opportunity for creating, enhancing, or restoring a wetland, or purchasing wetland credits from a bank where wetlands have already been created). The FWPA created an “in lieu fee” program when it established the Wetlands Mitigation Bank. The EPA suggested in its rule proposal that in lieu fee programs should be eliminated in favor of using existing mitigation banks. However, it invited comments on that proposal and no final rule has yet been published.

The Department’s rules relating to mitigation are consistent with the mitigation rules proposed by EPA. As described in the summary, many of the proposed changes throughout the subchapter are intended to bring the Department’s rules into closer harmony with the Federal standards by ensuring that the mitigation option hierarchy remains consistent with the equivalent Federal standards.

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With one exception, the Department's proposed rules and rule amendments relating to mitigation are no more stringent than the Federal rules. The one exception is proposed new N.J.A.C. 7:7A-15.26. Because this section requires mitigation for transition areas for a small subset of transition area waiver impacts, and because, as previously stated, the Federal program provides no protection for transition areas, the requirement for mitigation in these cases is more stringent than the Federal mitigation requirements. However, since the FWPA requires the protection of transition areas, the Department believes the requirement for mitigation is necessary, in those limited cases when a transition area waiver is approved based upon individual permit criteria, since without mitigation, such approvals may result in unacceptable impacts to the transition area and adjacent wetland.

Subchapter 16 Enforcement

The Federal government does not distinguish between administrative penalties for failure to obtain a permit from all other administrative penalties, as the Department has proposed at N.J.A.C. 7:7A-16.8 and 9. However, the proposed change does not make the Department's regulations more or less stringent than the comparable Federal enforcement standards since both types of violation result in comparable penalty assessments.

Environmental Impact Statement

The rules proposed for readoption with proposed amendments will continue to have the positive environmental impacts of the existing rules which regulate impacts to freshwater wetlands, State open waters and freshwater wetlands transition areas. Wetlands protect and preserve drinking water supplies, purify surface and groundwater resources, provide a natural means of flood and storm damage protection, reduce flooding, and provide essential breeding, spawning, nesting and wintering habitats for fish and wildlife, including migratory birds, endangered and threatened species, and commercially and recreationally important species. The proposed clarifying amendments will facilitate compliance with the rules and foster greater protection. Taken as a whole,

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the rules proposed for readoption with amendments increase protection for these important resources, thereby providing a positive environmental impact. The following is a review of all subchapters and their likely environmental impact. It should be noted that “regulated areas” means freshwater wetlands, transition areas or State open waters.

Subchapter 1 General Information

Subchapter 1 provides general information including scope and authority, contact information for the Department, definitions, the relationship of these rules to other statutes and regulations, and provisions for hearings and appeals of Department decisions. Proposed changes include the addition of several new definitions, amendments to several existing definitions, and several definition deletions. The proposed additions, amendments and deletions include: “Conservation restriction or easement,” “Critical habitat for fauna or flora,” “Discharge of fill material,” “Fair market value” or “Market value,” “HUC,” “Individual transition area waiver,” “Person,” “Silviculture,” “Swale” and “Vernal Habitat.” These proposed additions, amendments or deletions provide a positive environmental impact by assisting the Department and/or property owners to properly assess applications and projects, to understand rights and responsibilities under this chapter through clarifying regulatory language, and to protect regulated areas by redefining them in a way that is more protective. For example, amendments to the definitions of “swale” and “vernal habitat” make them more protective.

Subchapter 2 Applicability

Subchapter 2 contains provisions describing applicability criteria relating to jurisdiction, regulated activities, resource value classification, how to determine transition areas due to wetlands on adjacent property, exemptions, stormwater management and conservation restrictions. There are numerous important proposed amendments to subchapter 2, including new sections on Stormwater management and conservation restrictions.

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N.J.A.C. 7:7A-2.1 strengthens language regarding liability for work or activities conducted pursuant to this chapter, or under a permit issued pursuant to this chapter. Language has also been added which explicitly states that failure to obtain a permit or waiver, or to conduct regulated or prohibited activities in accordance with an approved permit or waiver, is a violation of the FWPA and the FWPA rules. This additional language will have a positive environmental impact by more clearly putting applicants, property owners, and workers on notice of liability for violation which will make them more likely to obtain necessary permits and follow permit conditions. These actions will ensure that environmental impact from activities in regulated areas will be minimized by proper Department review of projects, and applicant adherence to minimization conditions in this chapter.

Proposed amendments to N.J.A.C. 7:7A-2.4 indicate that wetlands associated with a manmade stormwater detention facility created in uplands are of ordinary resource value, regardless of the classification of the water body to which they discharge. This language was added to clarify that detention facility wetlands which may drain to FW-1 or FW-2 trout production waters, should not themselves be classified as exceptional resource value wetlands since the function of a detention basin is to provide water quality and quantity control for the waterways to which they discharge. Basins are intended to collect sediments so sediments do not reach adjacent waterbodies and, as such, require maintenance. Consequently, any wetland features within the basin may be degraded in the short term. Therefore, the proposed amendment should result in a neutral environmental impact. It is important to note that detention facility wetlands may still be considered exceptional if they were originally constructed in wetlands or if the current basin provides a present or documented habitat for a threatened or endangered species.

N.J.A.C. 7:7A- 2.6 provides additional protective and clarifying language for activities that are not regulated in transition areas. In particular, language has been added to provide that, if new gardens are to be developed in transition areas, they must be 2,500 square feet or less in size, must be located in a non-forested area, and must be in an area

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that is not subject to a conservation restriction or easement. This language has a positive environmental impact in that it clarifies that new gardens are not allowed in high quality forested transition areas, and that such gardens cannot be overly large. Because gardens do have some environmentally positive aspects, such as providing food for pollinating insects, the rules continue to allow them to be placed in lower value (non-forested) transition areas. Proposed N.J.A.C. 7:7A-2.6 also adds environmentally beneficial language which states that if a transition area is protected by a conservation restriction or easement, normal property maintenance is not permitted. Further, proposed amendments clarify that the conversion of a field to a lawn is not considered normal property maintenance and therefore requires a transition area waiver. These changes are beneficial since they clarify activities that are regulated, as opposed to those that are considered normal property maintenance, reducing confusion and possible inadvertent negative impacts to transition areas. Proposed N.J.A.C. 7:7A-2.6 also has clarifying language for replacement of non-native plants with native plants, and fence construction. These proposed amendments will have an environmentally positive impact since they will reduce confusion by the regulated community on what is regulated versus normal property maintenance thus reducing the likelihood of inadvertent negative impacts to the environment.

Proposed N.J.A.C. 7:7A-2.8 contains numerous clarifying amendments on farming, ranching and silviculture exemptions; clarifying language on when pond construction may or may not be exempt from this chapter; and, clarifying language regarding limitations on farm road construction and maintenance. This language attempts to more clearly define the appropriate size, location, use, acceptable impact limits, and construction techniques for farm ponds and farm roads. This clarifying language will have a positive environmental impact since it will help to minimize inappropriate, non-exempt wetlands impact (whether intended or not), by letting the regulated community understand the applicability of the rules while allowing the construction of farm ponds and roads in a manner that minimizes unnecessary impacts to the wetland resource.

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N.J.A.C. 7:7A- 2.11 is a new section which clearly states that any project which meets the definition of “major development “at N.J.A.C. 7:8-1.2, shall comply with the Department’s Stormwater Management rules at N.J.A.C. 7:8. Compliance with the Stormwater Management rules will have a positive environmental impact since any major development must conform to water quality and quantity requirements, ensuring groundwater will receive adequate recharge, and that discharges to surface water will be adequately cleansed.

N.J.A.C. 7:7A- 2.12 is a new section which addresses conservation restrictions or easements. This new section addresses and clarifies limitations, terminology, technical and administrative requirements, conditions, and modification requirements for conservation restrictions or easements. This new section will have a positive environmental impact since in the past, confusion on the various requirements and limitations for conservation restrictions or easements has resulted in violations of this chapter. For example, if a conservation restriction or easement is not properly recorded, successive property owners may unknowingly disturb restricted transition areas. This has a negative impact on the freshwater wetlands the transition area is intended to protect. Hence, as more permittees know the requirements and limitations, there should be fewer transition area violations, and more wetlands protection. In addition, if there are fewer transition area violations, the Department’s Bureau of Land Use Compliance and Enforcement will need to spend fewer employee hours on violations associated with conservation restrictions or easements allowing them to ensure environmental impacts are minimized through compliance with other requirements of this chapter and permits issued pursuant to it.

Subchapter 3 Letters of Interpretation

Subchapter 3 provides general information regarding Letters of Interpretation (LOI), discusses the various types of LOIs, application procedures, and duration of LOIs. Proposed N.J.A.C. 7:7A-3.1 includes new language requiring that delineated State open waters be shown on LOI survey plans, in addition to the already required wetlands

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delineation. This amendment will have a positive environmental impact since the more accurately a State open water is identified, the more efficient and thorough Department staff can be in their review. Also, a natural resource that is clearly identified can be better protected.

Subchapter 4 General Provisions for General Permits

Subchapter 4 contains provisions relevant to issuance of new general permits, use of a general permit to authorize specific activities, conditions that apply to all general permit authorizations, use of multiple general permits, and general permit application procedures. There are numerous proposed amendments to Subchapter 4.

N.J.A.C. 7:7A-4.2 provides clarifying amendments regarding the location and extent of the access that will be permitted without a separate access waiver, to access activities to be conducted in the wetlands by way of a general permit. The lack of clarity regarding the need for an access waiver has caused unnecessary and unauthorized encroachment into transition areas, as well as undue application review time. The proposed language should help to alleviate this situation, and is environmental beneficial since it clarifies what activities are or are not allowed under access waivers, and when additional permits or formal waiver authorization is required. This should help to minimize environmental damage, and make Department application review more efficient.

Amendments to N.J.A.C. 7:7A- 4.3 include requirements to minimize impacts to regulated areas, as well as amendments to clarify that major developments must comply with the Stormwater Management Rules at N.J.A.C. 7:8, and that the use of general permits 1, 6 and 16 is not precluded in vernal habitats. The amendments regarding minimization and stormwater management requirements will have positive environmental benefits, because they will help to maintain wetlands on a site and protect them from non-point source pollution. Allowing general permits 1 and 16 in vernal habitats should have no environmental impact. General permit 1 is for maintenance activities. The vernal

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habitat may have either been eradicated by the originally approved activity in the wetland, or if it was not affected, it should still be unaffected by conducting maintenance on that activity. General permit 16 is for fish and wildlife enhancement activities. Any potential vernal habitat concerns can be addressed as part of the overall habitat enhancement plan.

Allowing general permit 6 to be used in vernal habitats will potentially have a negative environmental impact, since vernal habitats may be lost. However, the Department was required to make this change due to a court decision. See *In the Matter of Freshwater Wetlands Protection Act Rules*, 180 N.J. 478 (2004). The court found that the Department can impose additional conditions or deny general permit 6 on a case by case basis and when the issuance of a general permit 6 authorization would be in conflict with the Federal 404 program. Therefore, negative impacts to vernal habitats may occur.

N.J.A.C. 7:7A- 4.4 provides additional clarifying language on the use of multiple general permits. The language clarifies the maximum disturbance limits, and what permits may be used in combination with which others. The addition of this language will have a positive environmental impact since it limits the use and combination of certain general permits, which should result in less disturbance to regulated areas.

N.J.A.C. 7:7A- 4.6 is proposed to be deleted. This section addresses combined general permits and flood hazard area permits. The environmental impact is considered to be neutral, since regulated activities will continue to be reviewed separately under N.J.A.C. 7:7A and N.J.A.C. 7:13.

Subchapter 5 Adopted General Permits

Subchapter 5 provides limitations, conditions, and application requirements for general permits. The most significant change to the rules is a proposed requirement for mitigation for general permit 2 (underground utility lines), 6 (non-surface water connected wetlands), 10A and 10B (very minor and minor road crossings), 11 (outfall

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structures), 18 (dam repair), and 21 (above ground utility lines). Also, existing mitigation requirements at general permit 23 (expansion of cranberry growing operations) and 27 (redevelopment) are proposed to be amended to make them consistent with the proposed new mitigation requirements. The new mitigation requirement will help to alleviate the ongoing loss of wetlands in New Jersey, with the goal of zero net wetlands loss. Zero net loss will assist in retaining the wetland functions of protecting, preserving and purifying drinking water, surface water and groundwater resources; providing flood and storm damage protection; reduction of flooding; and, providing essential fish and wildlife habitat, especially for endangered and threatened species. The Department has also added a condition that the general permit will not be authorized, nor can the regulated activities begin, until the Department has approved the mitigation proposal. This new mitigation requirement will have a positive environmental impact.

At the end of each general permit, the Department is proposing to add the requirement that activities under each permit comply with N.J.A.C. 7:7A-13.2, Establishing permit conditions. The addition of this language is intended to make it clear that the applicant must comply with any permit-specific conditions the Department may add as part of a general permit approval. This amendment is environmentally beneficial. The Department is proposing to delete combined general permits 2A, 10C, 11A, 20A and 26A. However, the environmental impact is neutral, since all impacts from the regulated activities covered by these combined general permits will still be reviewed separately under N.J.A.C. 7:7A and N.J.A.C. 7:13 (Flood Hazard Rules).

N.J.A.C. 7:7A- 5.2, for underground utility lines, is proposed to be changed to reduce permitted impacts from one acre to 0.5 acre. This is a positive environmental impact since less wetlands disturbance is allowed, thereby maintaining more of the important ecological functions that wetlands provide.

Proposed amendments to N.J.A.C. 7:7A-5.6, for non-tributary wetlands, remove all references to transition area disturbance (part of new general permit 6A, discussed below). The purpose of the proposed amendment is to avoid confusion regarding the

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total impacts that would be permitted if impacts were proposed both in wetlands, and wetland transition areas. These amendments will have positive environmental impacts.

Proposed N.J.A.C. 7:7A- 5.6A, for transition areas adjacent to non-tributary wetlands, is a new general permit derived from the transition area language removed from general permit 6. In addition, the proposed general permit limits transition area disturbance to one half acre (instead of the one acre allowed under the existing general permit 6). This change will have a positive environmental impact because it limits impacts to transition areas which are critical to protecting isolated wetlands, especially those that are vernal in nature.

Proposed amendments to N. J.A.C. 7:7A- 5.8, for house additions, incorporate new language that allows construction of a new, replacement dwelling within five years of the destruction of a former dwelling in freshwater wetlands or transition areas. Proposed conditions are intended to ensure that the permit will not be used to authorize construction of a new dwelling where one did not previously exist in the wetlands or transition areas, or existed so long ago that wetland or transition area functions have returned. As such, this new, clarifying language is considered to have a positive environmental impact.

N.J.A.C. 7:7A- 5.10B, for minor road crossings, is proposed to be amended to incorporate new and clarifying language, which should have a net positive environmental impact. The language clarifies that the permit is to be used to gain access to otherwise inaccessible, developable upland. This will have the positive environmental impact of minimizing the impact to regulated areas since the applicant will only be permitted access through the wetlands as a “last option,” when other viable “non-regulated area” options do not exist.

The Department is proposing to delete language for stormwater treatment from N.J.A.C. 7:7A-5.11 for outfalls and intake structures since this requirement is now at N.J.A.C. 7:7A-4.3 as part of the conditions that apply to all general permit authorizations.

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This language deletion will have a neutral environmental impact, since the requirement for stormwater treatment is still present, just in another section of the rule.

The Department is proposing additional language at N.J.A.C. 7:7A-5.16 for habitat creation and enhancement activities to require that an area of habitat enhancement or creation be protected from future development by a recorded conservation restriction or easement. The addition of this provision will ensure that the enhanced or newly created habitat will be protected in perpetuity, and protect the wetland species that the habitat creation and enhancement activities were designed to attract. Hence, this added language is considered to have a positive environmental impact.

Proposed new N.J.A.C. 7:7A-5.17A for non-motorized, multiple-use paths, is intended to facilitate the construction of certain paths (for example bicycle paths) that must meet certain standards in order to obtain public funding. Sometimes these standards require the path to be wider than the six feet allowed under general permit 17. Allowing wider paths will have a somewhat negative environmental impact on the wetlands since it will allow greater encroachment. However, the additional disturbance is minimized by the fact that impacts to regulated areas will be limited to one quarter acre, regardless of whether the property upon which the path will be built is publicly owned. Also, alignment of the path must be designed to minimize impacts to regulated areas, and to not interfere with the hydrology of the area in which the activity is proposed. Finally, if providing paths results in reduced use of automobiles, there will be a positive environmental impact to air quality and global warming.

N.J.A.C. 7:7A-5.21 for above ground utility lines, is proposed for amendment to reduce allowed permanent impacts to wetlands and waters from one acre to 0.5 acre. The proposed amendments will have a positive environmental impact since less impact will be allowed in regulated areas without undergoing a full examination of alternatives as required as part of an individual permit review.

Proposed N.J.A.C. 7:7A-5.25, for malfunctioning individual subsurface sewage disposal (septic) systems, has some minor new, clarifying language that will have

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positive environmental impacts. The first is new language which requires that the permit be used on the same property where the malfunctioning system is located. This amendment will have positive environmental impacts because it will only allow a system to be located in the wetlands when no better location is available. The Department has provided the ability to replace a malfunctioning septic system within the wetlands or transition area, which is generally not a favorable environmental location, only because it believes that the owner of a particular site has limited options for locating a more suitable location for the system. In the case where an applicant has the ability to use property that is offsite, the amended rule will not allow the placement of the system in a wetland using general permit 25. An individual permit will be required in order to demonstrate that the applicant has no non-wetland, non-transition area alternative location which would have lesser environmental impacts in which to construct a replacement septic system.

The Department is also adding a reference to the Department's septic rules at N.J.A.C. 7:9A-7.4, to ensure that the general permit is not needed as a result of an expansion of the facility the subsurface system serves. The new language will have a positive environmental benefit by reinforcing existing language that ensures that expanded facilities with increased subsurface disposal will go through a more thorough permitting system to avoid potential subsurface pollution.

Subchapter 6 General transition area waiver provisions

N.J.A.C. 7:7A-6.1 provides the types of transition area waivers available, and the general requirements for obtaining a transition area waiver. Proposed amendments to N.J.A.C. 7:7A-6.1(a) state that if the Department authorizes a permit that would allow elimination of a wetland in its entirety, the transition area associated with that wetland is also eliminated in its entirety without the need for obtaining a separate transition area waiver. If the Department authorizes a permit that allows partial elimination of a wetland, the access shall be limited to the transition area adjacent to the location of the approved wetland filling. This clarifying language will have a positive impact since applicants should better be able to determine the area permitted for access and other areas for which

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a separate waiver will be required. N.J.A.C. 7:7A-6.1(b) has specific conditions proposed for the protection of transition areas and wetlands. These include confining all construction activities to the area permitted for impact as part of the waiver, fencing the transition area, recording a conservation restriction or easement, and monitoring construction activities for the presence of acid producing soils. These conditions will have positive environmental impacts since they will lessen impact and provide more protection to regulated areas and their known functions.

N.J.A.C. 7:7A-6.1(e) has proposed language about the requirements and obligations of permittees regarding conservation restrictions associated with transition area waivers. This clarifying language will be more protective of transition areas modified or reduced with waivers. N.J.A.C. 7:7A-6.1(h) has proposed language that allows a redevelopment waiver at N.J.A.C. 7:7A-6.3(f), to be used on a site in conjunction with a general permit. This new language is considered environmentally neutral, since a redevelopment waiver allows redevelopment in an area that is not functioning as a transition area. Consequently, its use with a general permit is not considered to have any more environmental impact than the general permit itself. N.J.A.C. 7:7A-6.1(i) clarifies that, with limited exception, no transition area waiver will be approved that allows encroachment within 75 feet of an exceptional resource value wetland. This language protects exceptional resource value transition areas and their associated wetlands, and as such will have a positive environmental impact.

N.J.A.C. 7:7A-6.2 provides requirements, conditions and limitations for transition area averaging plan waivers. This section has two minor, but important, wording changes that will have positive environmental impacts. The first adds language that a structure may not come between a transition area compensation area and the wetlands it protects. The second change states that for averaging plans adjacent to intermediate resource value wetlands, the width of a transition area resulting from an averaging plan can be no less than 25 feet. By providing greater protection for the transition area, both proposed amendments result in greater protection for the freshwater wetlands that transition areas protect.

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N.J.A.C. 7:7A-6.4 provides requirements, conditions and limitations for matrix type width reduction transition area waivers. The proposed clarifying language for measuring percent slope of a transition area will have a positive environmental impact because it will ensure that the transition area at all locations is not so steep that reducing it could result in erosion and sedimentation in the adjacent wetland

N.J.A.C. 7:7A-6.5 provides requirements, conditions and limitations for hardship transition area waivers. This section contains clarifying amendments for appraisal of properties to be offered for sale at fair market value. The proposed clarifications will have a positive environmental impact because they will provide clear, standardized appraisal requirements and ensure that only those with a true hardship will be permitted to reduce a transition area when such reduction does not meet any of the other waiver provisions.

Subchapter 7 Individual Freshwater Wetlands and Open Water Fill Permits

Subchapter 7 contains limitations, conditions, and application requirements for individual permits. There is one amendment to this subchapter that would have an environmental impact. N.J.A.C. 7:7A-7.2 clearly states that any project that meets the definition of major development shall comply with the Department's Stormwater Management rules. This language provides a positive environmental impact since it ensures that major developments will meet standards for water quality, quantity and recharge.

Subchapter 10 Application Contents and Procedures

Subchapter 10 provides information on required contents and procedures for applications submitted pursuant to this subchapter. There are several language changes and additions relevant to environmental impact.

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N.J.A.C. 7:7A-10.2 contains an amendment indicating that if all required information is not provided, an application may be denied, a permit terminated, and penalties may be assessed to those responsible for submitting the information. This language will have a positive environmental impact since it promotes the submittal of more accurate and complete information in permit applications, allows the Department to make more informed and accurate decisions, and therefore will result in greater protection for regulated areas. This section also contains language requiring the submittal of information necessary to demonstrate compliance with the stormwater management requirements. The new language is environmentally beneficial since it ensures that major developments will meet standards for water quality, quantity and recharge.

N.J.A.C. 7:7A-10.3, additional application requirements for an LOI, has proposed language regarding how a State open water is to be field delineated. The proposed language will have a positive environmental impact since the more clearly a natural resource is identified and marked in the field, the better it can be protected.

N.J.A.C. 7:7A-10.4, additional application requirements for a general permit authorization, has proposed language requiring that the applicant provide the total approximate acreage of wetlands on the entire site, as part of a general permit application. Similar language is included at N.J.A.C. 7:7A-10.6, additional application requirements for an individual freshwater wetlands or open water fill permit. The proposed language will have a positive environmental impact because it will allow Department staff to assess whether other areas of the project site contain regulated features that will remain after project development. Over time, this information together with periodic aerial photographic surveys and land use/land cover mapping may make it easier for the Department to assess the success of the regulatory program and if secondary impacts to wetlands are occurring.

Subchapter 12 Department review of applications

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Subchapter 12 provides information on completeness review, USEPA review, public comment on applications, hearings for individual permit applications, final decisions, cancellation, withdrawal and resubmittal of applications. The Department is proposing to amend N.J.A.C. 7:7A-12.2 to delete the detailed description of the process for circulating certain permit applications to the U.S. Fish and Wildlife Service (USFWS), and to rely upon the Memorandum of agreement among the Department, the Environmental Protection Agency, and the USFWS for review of the potential impacts on Federally-listed threatened or endangered species. Staff reassignments and cutbacks at USFWS, have necessitated a change in the process for reviews by the USFWS. Since the Department has always had the responsibility for reviewing potential impacts to Federally listed threatened or endangered species as part of the FWPA, the change in review process should have little, if any, environmental impact.

Subchapter 14 Changes to issued permits or waivers

Subchapter 14, changes to issued permits or waivers, provides requirements and limitations for changing an issued permit or waiver.

At N.J.A.C. 7:7A-14.3, the Department is requiring that applicants submit to the Department a request to modify a permit. In addition, the Department is requiring that, for permits containing a requirement to place a conservation restriction or easement on the property, documentation be submitted with the request for modification showing that the restriction or easement has been recorded. This provision will have a positive environmental impact because a conservation restriction or easement cannot provide notice of the requirement to protect wetlands and transition areas if it is not depicted on the official plans and recorded as part of the deed for reference when the property is transferred.

Subchapter 15 Mitigation

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Subchapter 15 provides both basic and detailed information about mitigation. Most of the proposed amendments are clarifications or the shifting of responsibilities from the Mitigation Council to the Department, all of which have positive environmental impacts since they will facilitate the mitigation process.

N.J.A.C. 7:7A- 15.2 has new language which states that hydrology for a proposed mitigation area shall not include stormwater. Stormwater is unreliable as a source of hydrology for both quantity and quality. As such, the proposed language will have a positive environmental impact. N.J.A.C. 7:7A- 15.2 also contains proposed language allowing a permittee to aggregate onto one site the mitigation for multiple small (less than 0.5 acre in size) wetland disturbances resulting from the same project but that span several Watershed Management Areas. The proposed amendment will have a positive environmental impact because mitigation is costly and often technically difficult to accomplish successfully. It is therefore more environmentally beneficial to aggregate small mitigation projects into larger projects with a greater potential for success.

N.J.A.C. 7:7A- 15.3 has clarifying language indicating that regulated activities shall not take place prior to Department approval of a mitigation proposal. This language is important since often permittees start, and complete, regulated activities on a project site without an approved mitigation plan. Once the project is complete, it is more difficult to ensure that mitigation will occur, since there is little, if any, financial incentive once the regulated activities are completed. This language will help the Department to ensure that mitigation actually occurs, which results in a positive environmental impact.

N.J.A.C. 7:7A- 15.4 has new and clarifying language regarding property suitable for mitigation. The language pertains mainly to criteria for allowing mitigation on sites that were once contaminated, or may still contain contamination. The proposed new language regarding contamination on a mitigation site will have a positive environmental impact since it protects ecological communities and humans.

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N.J.A.C. 7:7A- 15.5 and 15.6 address mitigation for small and large wetlands disturbances, respectively. The Department is proposing to amend both sections to reorder the options to make upland preservation a final option only when all other types of mitigation are not feasible. The proposed amendments will have a positive environmental impact because while preserving land is beneficial, especially when the land contains important wetland communities, it still results in the net loss of wetlands. Consequently, it should not be considered until all other options are exhausted.

N.J.A.C. 7:7A- 15.12 addresses the contents of a mitigation proposal. New language in this section requires unconditional written consent from the owner of the proposed mitigation area, to allow Department access to the property for inspection of the proposed mitigation area. This new language will have a positive environmental impact since Department access to mitigation sites will allow the Department to assess the effectiveness and survival of the mitigation project, and to ensure that the mitigation has been properly performed and maintained.

N.J.A.C. 7:7A- 15.13 addresses the provision of a financial assurance for proposed mitigation projects. The Department is proposing to change the amount required for maintenance from 30 percent of the costs of construction, to 115 percent of the estimated cost of monitoring and maintaining the site, including the cost to replant the mitigation area. Because the Department is proposing to relate the financial assurance for maintenance to the costs for maintenance, instead of to the construction costs for the site, the cost to applicants will be the same whether they undertake the required maintenance themselves, or provide the financial assurance. Consequently, the proposed change should have a neutral environmental impact.

N.J.A.C. 7:7A-15.23 addresses mitigation banks. Proposed amendments provide the Department instead of the Wetlands Mitigation Council, with the authority to review and approve mitigation banks except for preservation banks which by statute require Wetland Mitigation Council approval. The proposed amendments will have a neutral or slightly positive environmental impact since the review and approval criteria used by the

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Council are the same as those to be used by the Department. The only potential for a positive environmental impact is if the Department is able to successfully approve mitigation banks in less time than it takes to obtain a hearing with the Council.

N.J.A.C. 7:7A-15.23 also contains proposed language which states that monitoring of a bank shall continue until such time that the last credit is sold, the final inspection is conducted, or the bank is transferred to a charitable conservancy. The proposed language should have a positive environmental impact by ensuring that mitigation banks meet mitigation functions and values. Finally, additional proposed language allows for a one time five year extension on mitigation bank approvals, as necessary, to coincide with an extended Department permit. The proposed language helps to ensure that approval and permit timeframes coincide, and that mitigation bank activities will be properly carried out, which will have a positive environmental impact.

N.J.A.C. 7:7A-15.25 addresses applications for approval of a mitigation bank, and has several proposed language additions. Most are clarifications and codifications of existing review procedures. Included in these clarifications is how the Department assesses the service area for a proposed mitigation bank. The proposed change will have a slightly positive environmental impact because it expresses a preference for a bank to be located as close to the location of the wetlands to be lost as possible. While the creation of wetlands in any location is positive for the environment, in order to ensure that each watershed is protected, it is necessary to locate proposed wetland mitigation banks within the same watershed area where the wetland losses are being experienced, to the greatest extent possible.

Proposed N.J.A.C. 7:7A-15.26 addresses mitigation alternatives and locations for impacts for one category of transition area waiver. The proposed section will have a positive environmental impact since transition areas mitigated by restoration, enhancement, purchase of credits, monetary contribution or land donation, will better provide the intended functions and values of an ecological transition zone from uplands to freshwater wetlands.

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Subchapter 16 Enforcement

Proposed changes to Subchapter 16 for Enforcement 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 its implementing regulations. For example, N.J.A.C. 7:7A-16.8 addresses civil administrative penalties for failure to obtain a permit and is being distinguished from proposed new N.J.A.C. 7:7A-16.9, a new section for civil administrative penalties for violations other than failure to obtain a permit. This proposed change coupled with the reallocation of points for various levels of seriousness in N.J.A.C. 7:7A-16.8 will have a positive environmental impact if it successfully results in restoration of illegally disturbed regulated areas, and dissuades individuals from becoming violators. Further, the penalties have been structured commensurate with the real or potential environmental or programmatic impact in order to better protect the wetland resource.

APPENDIX 1

The Department is proposed to add two species to the appendix containing the indicator species for vernal habitats. The species are the Fairy shrimp (order Anostraca), proposed to be added to the list of obligate vernal species, and Bull Frog to be added to the facultative vernal species list. The addition of these species will have a positive environmental impact in protecting vernal habitat, since inclusion of these two new species in the appendix will help to certify, and thus protect, additional important vernal habitats, and their many vital ecological functions.

Jobs Impact

The Freshwater Wetlands rules should be considered during the planning and construction of developments. As such, the existing and proposed rules have a positive impact on the planning, engineering, surveying, construction and legal professions since professionals from these fields are employed to facilitate development with the potential

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to affect wetlands. The construction of new homes appears to be a function of the overall economy in New Jersey and not the Department's wetland rules since throughout the period that the Department has had freshwater wetland rules (since 1988), there have been construction increases and decreases, regardless of the rules in place or pending amendments. However, as the State becomes more developed and land without environmental constraints such as wetlands becomes scarcer, the rules could affect negatively the construction trade if that trade becomes dependent upon construction in the wetlands or wetlands transition areas.

The proposed amendments will result in minimal job impacts. The proposed new requirement to comply with the Department's stormwater management rules should not result in additional engineering or other jobs because applicants have been required to comply with stormwater requirements since 2004, if not by the Department, then by the municipality in which the development is proposed. The proposed requirements for conservation restrictions or easements should not result in the need to hire an attorney specifically to review a conservation restriction or easement, since part of the purpose of the amendments is to standardize requirements so that applicants or their agents can address the requirement. The proposed amendments requiring mitigation as a condition of certain general permits may result in more jobs in the mitigation area. The design and construction of mitigation projects, including new mitigation banks may create jobs for those with expertise in wetlands ecology, hydrology and land excavation work. Because the Department prefers that applicants purchase credits from an already established mitigation bank to satisfy mitigation requirements, consultants, developers, and large property owners may find it economically beneficial to establish new mitigation banks.

Because the proposed new general permits and amendments to general permits are similar to existing permits (for example, proposed new general permit 6A is part of currently adopted general permit 6), there is no need for additional consulting or legal assistance for compliance with the proposed amendments beyond those which already exist.

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Consequently, the Department concludes that there will be an overall minimal impact to jobs as a result of the readoption of the Freshwater Wetlands Protection Act Rules with amendments.

Agriculture Industry Impact

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. Subject to certain limitations, ongoing farming, ranching and silviculture are exempt from the FWPA and rules. The exemption also permits certain discharges necessary to continue ongoing farming, for example, the discharge of material for the purpose of installing ditching incidental to planting, protecting or harvesting wetland crop species, and the construction or maintenance of farm or stock ponds, or farm roads. The exemptions, and their implementation, are similar to ongoing farming exemptions contained in the Federal Clean Water Act that have been in effect since 1977. These exemptions are considered neutral or positive on the agriculture industry since they allow for continuance of existing operations.

Many of those conducting ongoing farming activities since 1987, when the FWPA was enacted, are aware of the limitations associated with the farming exemptions for activities in the wetlands. However, when farms are sold, the new owners, while still entitled to the farming exemption if agricultural activities continue, appear to be less familiar with the exemption limitations. Consequently, since 20 years have elapsed since the passage of the FWPA, the Department has found it necessary in this proposal to provide a greater level of detail and explanation for the farming exemptions.

The requirement to obtain a farm conservation plan in order to construct a farm pond or road that is exempt from the FWPA rules should have a neutral or positive impact on agriculture industry. As previously stated, the Natural Resources Conservation Service provides professional assistance to farmers to compile farm conservation plans, and to design farm ponds and roads. In addition to ensuring compliance with the

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limitations on farming exemptions in wetlands, obtaining a conservation plan can help to qualify a farmer for certain Federal funding sources to assist him or her to improve various farming operations and practices. Consequently, the Department concludes that this requirement will have a neutral impact on farmers who have already obtained a conservation plan and potentially positive benefits for those who may be required to obtain the plan to comply with the Department's exemption.

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 those builders and property owners that may be affected by the proposed readoption with amendments are "small businesses" as defined by the Regulatory Flexibility Act. Because the FWPA rules apply to any person owning property containing freshwater wetlands, State open waters and/or transition areas, who intends to engage in a regulated activity, it is impossible for the Department to estimate the number of small businesses that own property that will be affected by the proposed amendments. It would be necessary for the Department to know the number of small businesses that own land containing wetlands, State open waters or transition areas, and the number that intend to propose construction that would affect these areas in order to more definitively estimate the effect of this rule on small business. To the extent that a small business is proposing new construction that may effect areas regulated under this chapter, proposed amendments establishing requirements like conformance with the Department's Stormwater Management rules at proposed N.J.A.C. 7:7A-2.11, the filing of a conservation restriction or easement for certain approved transition area waivers in accordance with N.J.A.C. 7:7A-2.12, and the mitigation requirements for certain general permits will apply to small businesses as it would to all other individuals proposing similar projects on similar properties.

The rules proposed for readoption with amendment impose reporting, recordkeeping and other compliance requirements as discussed above in the summary, with the costs related to such requirements as discussed in the Economic Impact above.

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The proposed amendments will not impose additional reporting or recordkeeping requirements on small businesses. The reporting, recordkeeping, and other compliance requirements include the requirement to apply for and obtain a permit for regulated activities; to provide information to the Department and the public in the form of applications, reports, and public notices; and in most cases, the requirement to perform mitigation. Costs will vary depending upon the amount of environmental impact. It will be simpler and require less professional assistance to prepare an application for an activity that is eligible for authorization under a general permit than for an individual permit. Thus, the cost of preparing an individual permit application will be significantly higher. Although both types of applications will require mitigation, the costs will also vary with the chosen mitigation option. If the small business chooses to perform onsite mitigation, the requirements and costs will be the same as those described in the Economic Impact above. However, if the chosen mitigation option is the purchase of credits from a mitigation bank or a monetary contribution, the business owner can work directly with the Department and it will not be necessary to hire a consultant specifically for this purpose. If the applicant designs a project to stay entirely within uplands and transition areas, the associated costs and requirements will relate solely to application costs and the costs for professional assistance to prepare the application.

The rules regulate based on environmental impacts and will generally have the same impact on a small business as on any other person. Because the values and functions of freshwater wetlands are important to all of the State's citizens, and the proposed readoption with amendments is necessary to provide continuing protection for this resource, no lesser requirements for small businesses are provided.

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

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and extent of the proposed new rule and amendments impact on smart growth and the implementation of the State Plan.

The rules proposed for readoption with amendments are consistent with the law and policy of New Jersey to promote smart growth and to reduce the negative effects of sprawl and disinvestment in older communities, as described in Executive Order 4 (2002). Executive Order 4 states that New Jersey requires sound and integrated planning, as well as coordination with local planning, in order to conserve natural resources, revitalize urban centers, protect the environment and provide needed housing and adequate public services, all at a reasonable cost, and all while promoting beneficial economic growth, development and renewal. The Executive Order also encourages redevelopment, repair, rehabilitation and replacement of existing facilities. These goals are reflected in a number of provisions that will be continued in the proposed readoption with amendments.

The rules proposed for readoption with amendments promotes State Plan General Policy 4, Prevention of Water Pollution. Wetlands protect and preserve drinking water supplies, purify surface and groundwater resources, provide a natural means of flood and storm damage protection, reduce flooding, and provide essential breeding, spawning, nesting and wintering habitats for fish and wildlife, including migratory birds, endangered and threatened species, and commercially and recreationally important species. Without the regulatory framework to protect wetlands and wetland transition areas, there would be no method to ensure that developments are constructed to avoid random, unnecessary or undesirable alteration or disturbance to this important resource.

The State Plan policy also identifies the protection and enhancement of water resources through coordinated planning efforts aimed at reducing sources of pollution and other adverse effects of development, encouraging designs in hazard-free areas that will protect the natural function of stream and wetland systems, and optimizing sustainable resource use. The rules proposed for readoption with amendments contain provisions to achieve this State Plan policy, including stringent limitations on

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encroachment into wetlands, State open waters and wetland transition areas, which result in protecting water quality and often reducing the size and impacts of development.

Furthermore, by requiring that all wetland impacts be minimized by using upland areas and wetland transition areas before using general permits for impacts to wetlands, the rules encourage development to relocate outside wetland areas. In addition, by requiring mitigation for wetland impacts from general permits, the rules also encourage development to relocate outside wetland areas and require the replacement of these areas when impacts are permitted. This is consistent with the goals of protecting the quality of the environment, encouraging growth in areas suitable for growth, and promoting reinvestment in older communities where such features are not present.

The rules further advance the State's Smart Growth policies by providing clear standards and guidance to the regulated public. This promotes more predictable and expeditious review and approval processes.

Therefore, the rules proposed for readoption with amendments comport with the goals of smart growth and implementation of the State Plan as required in Executive Order No. 4

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Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:7A.

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

SUBCHAPTER 1. GENERAL INFORMATION

7:7A-1.3 Forms and information, internet web site

(a) Forms or other information related to this chapter may be obtained from the Division of Land Use Regulation [Program] as follows:

1. Through the Division of Land Use Regulation [Program] website at www.state.nj.us/dep/landuse; or

2. By contacting the Division of Land Use Regulation [Program] at:

Division of Land Use Regulation [Program]
New Jersey Department of Environmental Protection
P.O. Box 439
Trenton, New Jersey 08625 - 0439
(609) 292-0060
Fax: (609) 292-8115

(b) Applications, fees, and correspondence shall be submitted to the address in (a) above, except that courier and hand deliveries shall be delivered to:

Division of Land Use Regulation [Program]
New Jersey Department of Environmental Protection
5 Station Plaza
501 East State Street

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Trenton, New Jersey 08609

(c) (No change.)

(d) Other sources of information referred to in this chapter are available on the Division of Land Use Regulation [Program] website at www.state.nj.us/dep/landuse, or from the Office of Maps and Publications, located at 428 State Street, Trenton, New Jersey 08625, (609) 777-1038.

N. J.A.C. 7:7A-1.4 Definitions

...

“Architectural survey” means an intensive-level historic 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 in 36 CRF 61, as amended and supplemented, incorporated herein by reference.

...

...

"Conservation restriction or easement" means a restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded conditions, or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife, to forbid or limit any or all:

1. Construction or placing of buildings, roads, signs, billboards or other advertising, or other structures on or above the ground;

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2. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials;

3. Removal or destruction of trees, shrubs or other vegetation;

4. Excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance;

5. Surface use except for purposes permitting the land or water area to remain predominantly in its natural condition;

6. Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or fish and wildlife habitat preservation; and/or

7. Other acts or uses detrimental to the retention of land or water areas according to the purposes of this chapter.

...

"Critical habitat for fauna or flora" means:

1. For fauna, areas which serve an essential role in maintaining [commercially and recreationally important] wildlife, particularly for wintering, breeding, spawning and migrating activities;

2. For flora, areas supporting rare or unique plant species or uncommon vegetational communities in New Jersey.

...

"Discharge of fill material" means the addition of fill into State open waters or freshwater wetlands. The term includes, but is not limited to, the following activities:

1. Placement of fill that is necessary for the construction of any structure;

2. The building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction;

3. Site-development fill for recreational, industrial, commercial, residential, and other uses;

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4. Causeways or road fills;
 5. Dams and dikes;
 6. Artificial islands;
 7. Property protection or reclamation devices, or both, such as riprap, groins, seawalls, breakwaters, and revetments;
 8. Beach nourishment;
 9. Levees;
 10. Fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and underground utility lines; [and]
 11. Artificial reefs[.] ; and
 12. Stump removal.
- ...

“Fair market value” or “market value” means the most probable price for which land will sell in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by any unusual benefit to the purchaser.

...

“ Historic preservation restriction or easement” means an interest in land less than fee simple absolute, stated in the form of a right, restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to preserving a structure or site which is historically significant for its architecture, archeology or associations, to forbid or limit any or all:

1. Alteration in exterior or interior feature of such structure;
2. Changes in appearance or condition of such site;
3. Uses of such structure or site which are not historically appropriate; and/or

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4. Other acts or uses detrimental to the appropriate preservation of such structure or site.

["HUC 11" or "hydrologic unit code 11" means an area within which water drains to a particular receiving surface water body, which area is identified by an eleven digit hydrologic unit boundary designation, as shown on the map] "HUC" means the hydrologic unit code system developed by the United States Geological Service for delineating and identifying drainage areas. The system starts with the largest possible drainage areas and progressively smaller subdivisions of the drainage area are delineated and numbered in a nested fashion. As used in this chapter, "HUC 14" indicates a drainage area with a hydrologic unit code designation with 14 numbers. "HUC 11" indicates a larger subwatershed that is composed of several HUC 14 subwatersheds. There are 921 HUC 14 subwatersheds in New Jersey that range in size from 0.1 to 42 square miles. The boundaries are included in the United States Geological Survey, Water Resources Investigations Report 95-4134, 1995, entitled "Development of a 14-digit Hydrologic Coding Scheme and Boundary Data Set for New Jersey." The HUC codes for New Jersey can be downloaded from [www.njgeodata.state.nj.us] <http://www.nj.gov/dep/gis/>. The HUC 11 data is entitled "subwatersheds." Software designed for use with Geographic Information Systems (GIS) will be required to view the downloaded data.

...

["Individual transition area waiver" means a transition area waiver issued by the Department under N.J.A.C. 7:7A-6, which is not granted as part of a general permit authorization. The following are the types of individual transition area waivers:

1. An averaging plan transition area waiver;
2. A special activity transition area waiver;
3. A matrix type width reduction transition area waiver;
4. A hardship transition area waiver; and

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5. An access transition area waiver.]

...

"Person" means an individual, corporation, corporate officer or official, partnership, association, the Federal government, the State, municipality, commission or political subdivision of the State or any interstate body.

"Phase IA historical and archaeological survey" means an archaeological survey the purpose of which is to identify resources 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, as amended and supplemented, incorporated herein by reference.

...

["Residential development project" means the construction of a new structure for residential use and the area within 20 feet of the structure on all sides, measured outward from the outside edge of the foundation of the structure. An addition to an existing residence is a residential development project if the addition has a foundation. A residential development project may include construction of one or more single family home(s) or multi-unit residential building(s).]

...

"Silviculture" means the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis. The normal harvesting of forest products is a part of some silviculture operations. Orchards, tree farms and nurseries are not silviculture but are farming.

...

"Swale" means a linear topographic depression, either naturally occurring or of human construction, which meets all of the following criteria:

1. It is surrounded by uplands except where runoff flows out of it.

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- i. A depression is not a swale if it is located within a larger wetland or if it is merely an undulation in a wetland boundary;
 - ii. A depression is not a swale if it is naturally occurring, contains palustrine forest, and is located within an upland forest;
2. It has formed or was constructed in uplands to convey surface water runoff from the surrounding upland areas;
 3. It drains less than 50 acres;
 4. It is not a seep or spring;
 5. It is not an intermittent stream;
 6. It has no definite bed and banks; and
 7. At its widest point, it is generally 50 feet wide or narrower.
- ...

"Vernal habitat" means a wetland as identified at N.J.A.C. 7:7A-2.3, or State open water, as defined at N.J.A.C. 7:7A-1.4 above that meets all of the criteria at 1 through 4 below. Evidence of breeding by an obligate species under 2i below creates a rebuttable presumption that the criteria at 3 and 4 below are met:

1. Occurs in or contains a confined basin depression without a permanent flowing outlet;
2. Features evidence of breeding by one or more species of fauna adapted to reproduce in ephemeral aquatic conditions, identified in N.J.A.C. 7:7A, Appendix 1, incorporated herein by reference. The following shall constitute evidence of breeding by such a species:
 - i. One or more obligate species listed in Appendix 1, or evidence of such a species, is found in or immediately adjacent to the area of ponded water; or

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ii. Two or more facultative species listed in Appendix 1, or evidence of the presence of such a species, are found in or immediately adjacent to the area of ponded water;

3. Maintains ponded water for at least two continuous months between March and September of a normal rainfall year; and

4. Is free of reproducing fish populations throughout the year, or dries up at some time during a normal rainfall year.

N. J.A.C. 7:7A-1.7 Hearings and appeals

(a) (No change.)

(b) A person seeking to contest an administrative order or a penalty assessment arising from an enforcement matter under this chapter shall do so under N.J.A.C. 7:7A-[16.18] 16.7.

(c) A request for an administrative hearing shall:

1.-4. (No change.)

5. Be submitted to the Department at the following address, with a copy to the Division of Land Use Regulation at the address at N.J.A.C. 7:7A-1.3(b) above:

Office of Legal Affairs

Attention: Administrative Hearing Requests

Department of Environmental Protection

401 East State Street, 4th Floor

PO Box 402

Trenton, New Jersey 08625-0402

(d)-(j) (No change.)

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SUBCHAPTER 2 APPLICABILITY

N.J.A.C. 7:7A-2.1 Jurisdiction; permit or waiver requirement

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

(e) A permittee shall be [solely] responsible for ensuring that the permitted project complies with all requirements in this chapter [, regardless of whether others] . However, any person who owns the property on which the project occurs, or who manages, oversees or works on the project may share liability for work or activities that are not performed in accordance with this chapter.

(f) (No change.)

(g) Failure to obtain a permit or waiver to conduct regulated or prohibited activities, or to conduct regulated or prohibited activities in accordance with an approved permit or waiver shall constitute a violation of the Freshwater Wetlands Protection Act and this chapter and shall be subject to enforcement action in accordance with N.J.A.C. 7:7A-16.

N.J.A.C. 7:7A-2.2 Regulated activities in freshwater wetlands and State open waters

(a) The following activities are regulated under this chapter when performed in a freshwater wetland unless excluded under (c) below:

1.-4. (No change.)

5. The placing of obstructions, including depositing, constructing, installing or otherwise situating any obstacle which will affect the values or functions of a freshwater wetland; and

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6. The destruction of plant life which would alter the character of a freshwater wetland, including killing vegetation by applying herbicides or by other means, the physical removal of wetland vegetation, and/or the cutting of trees [; and

7. Placement of any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4].

(b)-(c) (No change.)

N.J.A.C. 7:7A-2.4 Classification of freshwater wetlands by resource value

(a)-(b) (No change.)

(c) The Department identifies present or documented habitat for threatened or endangered species for purposes of (b) above using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened or endangered wildlife species. The details of this method are described in the Division of Land Use Regulation [Program's] freshwater wetlands technical manual, available from the Department's Office of Maps and Publications at the address in N.J.A.C. 7:7A-1.3. An applicant may request that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value. Such a request shall include a demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity. Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.

(d) A freshwater wetland of ordinary resource value, or an ordinary resource value wetland, is a freshwater wetland which does not exhibit any of the characteristics in (b) above, and which is:

1.-3. (No change.)

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4. A detention facility created by humans in an area that was upland at the time the facility was created regardless of the wetland resource classification of the water body or wetland to which it discharges.

(e) - (g) (No change.)

N.J.A.C. 7:7A-2.6 Regulated activities in transition areas

(a) Except as provided in (b) and (c) below, the following are regulated activities when they occur in transition areas:

1.-3. (No change.)

4. Placement of pavements; and

5. Destruction of plant life which would alter the existing pattern of vegetation[; and

6. Placement of any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4].

(b) Notwithstanding (a) above, the following activities are not regulated in transition areas and do not require Department approval under this chapter, provided that the activities are performed in a manner that minimizes adverse effects to the transition area and adjacent freshwater wetlands, and provided that the transition area is not contained within a conservation restriction or easement. If the transition area is contained in a conservation restriction or easement, none of the following activities are allowed unless explicitly stated in the conservation restriction or easement:

1. Normal property maintenance;

i. For the purposes of this paragraph, "normal property maintenance" means activities required to maintain lawfully existing artificial and natural features, landscaping and gardening. These activities include:

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(1) Mowing of existing [fields or] lawns. The conversion of a field to a lawn by planting, seeding, frequent mowing or any other means is not considered normal property maintenance and requires a transition area waiver;

(2) Maintenance of existing fields;

[(2)] (3) Pruning of trees and shrubs;

[(3)] (4) Selective cutting of trees;

[(4)] (5) Replacement of existing non-native plants with either native or non-native species that will not significantly change the character of the existing vegetational community of the transition area.;

[(5)] (6) Limited supplemental planting of non-native plant species that will not significantly change the character of the existing vegetational community of the transition area. The creation of a lawn is not considered supplemental planting;

[(6)] (7) Planting of native species, that is, plants naturally occurring in transition areas in the local region, (the county agricultural agent may be consulted to obtain information regarding these species);

[(7)] (8) Continued cultivation of existing gardens; and the development of new gardens provided that the new garden is:

(A) [no] No larger than [one quarter acre] 2,500 square feet in size;

(B) Located in a non-forested transition area; and

(C) Located in a transition area not subject to a conservation restriction or easement;
and

[(8)] (9) Maintenance of artificial features including the repair, rehabilitation, replacement, maintenance or reconstruction of any previously authorized, currently serviceable structure, lawfully existing prior to July 1, 1989, or permitted under this chapter, provided such activities do not result in additional disturbance of the transition area upon completion of the activity. Minor deviations from the existing structure due to changes in materials or construction techniques and which are necessary to make repairs,

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rehabilitation or replacements are allowed provided such changes do not result in disturbance of additional transition area upon completion of the activity.

ii. Any activity which involves or causes the substantial alteration or change of the existing characteristics of a transition area shall not be considered normal property maintenance and shall require a transition area waiver in accordance with this chapter. Activities which involve or cause substantial alteration or change of the transition area include, but are not limited to, extensive removal, alteration, or destruction of vegetation by clear cutting, cutting, mowing (except as described in (b)1i above), burning or application of herbicides, planting of ornamental plants or lawns for landscaping purposes (except as described in (b)1i above), regrading or significant changes in the existing surface contours and the placement of fill, pavement or other impervious surfaces.

2. Minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area, provided the activities do not result in adverse environmental effects on the transition area or on the adjacent freshwater wetlands, and do not continue for more than six months. For the purposes of this paragraph, minor and temporary disturbances include, but are not limited to, the placement of scaffolds or ladders, the removal of human-made debris by non-mechanized means which does not destroy woody vegetation, the placement of temporary construction supports, and the placement of utility lines over or under a previously authorized, currently serviceable paved roadway surface. Fencing will not be regulated if it is installed on the boundary between the transition area and upland area;

3. The erection of one or more temporary structures covering a combined total of 150 square feet or less of the transition area. For the purposes of this paragraph, a "temporary structure" means a shed or fence without a foundation, or a structure that remains in the transition area for no more than six months. Chain link fences are not considered temporary structures.

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(c) (No change.)

N.J.A.C. 7:7A-2.8 Activities exempted from permit and/or waiver requirement

(a) This section sets forth certain activities that are exempt from certain permit requirements in this chapter. However, even if an activity is exempt under this chapter, it may still require a permit from the Army Corps of Engineers under the Federal wetlands program, and/or a water quality certificate issued by the Department. Any activity conducted under an exemption that does not meet all standards, conditions, or limitations of the exemption shall constitute a violation of this chapter, and shall be subject to enforcement action in accordance with N.J.A.C. 7:7A-16.

(b) The farming, ranching, and silviculture exemptions in (c) and (d) below are subject to the following limits:

1. (No change.)

2. The exemptions apply only as long [at] as the area is used for the exempted activity. Therefore, if the area stops being used for farming, ranching, or silviculture, the exemption no longer applies;

3. The exemptions apply only to the portion of the property which meets all requirements for the exemption. For example, if half of a 20 acre property has been actively farmed since June 30, 1988 and half has not, the half that has [not] been actively farmed would [not] be considered to be part of an established, ongoing farming operation and would therefore [not] be eligible for the farming exemption. The remainder would not be eligible for the farming exemption;

4. [Clear cutting of a non-cultivated, wooded wetland area is not covered by the exemptions unless it is part of the] The normal harvesting of forest products, [performed in accordance with a written approval from the State Forester; and] including the clear cutting of a non-cultivated, wooded wetland area, must be part of a forest management plan that addresses wetlands, and that is reviewed and approved by the State Forester

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before the activities are undertaken. A woodland management plan prepared for tax purposes but that does not address wetlands is insufficient to qualify for the exemption; and

5. (No change.)

(c) Subject to the limitations of this section, the following activities, when part of an established, ongoing farming, ranching or silviculture operation, on properties which have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq., are exempt from the requirement of a freshwater wetlands or open water fill permit, or transition area waiver:

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or soil and water conservation practices. For the purposes of this paragraph, "minor drainage" means:

i. (No change.)

ii. The discharge of material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where [these] the farming activities and the discharge occur in wetlands and waters which are in established use for such agricultural and silvicultural wetlands crop production, and the ditching or water control facilities do not alter the bottom elevations of any watercourse;

iii. – v. (No change.)

2. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, provided that such facilities are for farming, ranching or silvicultural purposes and do not constitute a change in use. Any dredged material from pond construction or maintenance must be placed outside the freshwater wetlands unless it is needed for the structural or environmental integrity of the pond; [and]

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i. A pond constructed in an actively farmed area does not constitute a change in use. A field in which no crops or pasturing has occurred for 5 years or more is considered abandoned and is not considered an actively farmed area. Forest land is not considered an actively farmed area; however, an area that has been undergoing normal harvesting of forest products is considered an actively farmed area if it is part of a forest management plan in accordance with (d) below;

ii. To qualify for this exemption, a farm pond shall be:

(1) Located outside a watercourse;

(2) Created by excavation and not by creating an embankment within a watercourse;

(3) Not associated with development as that term is defined in the Municipal Land Use Law, N.J.S.A. 40:55D-4;

(4) Intended exclusively for agricultural purposes. The applicant shall submit a description of the purpose of the pond with any application for an exemption letter under N.J.A.C. 7:7A-2.10;

(5) Sized appropriately for the intended use under (4) above; and

(6) Part of a farm conservation plan approved by the Natural Resources Conservation Service.

3. Construction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands and State open waters are not impaired and that any adverse effect on the aquatic

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environment will be minimized. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. Roads constructed for forestry and silviculture purposes shall be constructed using temporary mats whenever practicable. [All roads employing the placement of fill shall be removed once] Once the land use changes from forestry or farming to another use, that is, once the property no longer qualifies for a farmland assessment, all roads employing the placement of fill shall be removed within 30 days[.] ;

i. Construction of a farm road shall be undertaken only in accordance with the following:

(1) The road shall be part of a farm conservation plan approved by the Natural Resources Conservation Service;

(2) The location of the road shall be selected to minimize disturbance to wetlands, transition areas and watercourses. If there is an alternative location for a farm road that will have less impact to wetlands, transition areas, and watercourses, the alternative location shall be used;

(3) The road shall be necessary to support or provide access for a farming activity. A road that supports or provides access to proposed development is not a farm road and requires a permit in accordance with this chapter;

(4) The farm road shall not exceed 14 feet in width unless it must be wider to accommodate a large piece of equipment such as a combine. In the latter case, the road shall be no wider than 20 feet;

(5) The farm road shall be built at grade. If not built at grade, the applicant shall demonstrate to the Department why fill material is necessary for the farming operation with any application for an exemption letter under N.J.A.C. 7:7A-2.10;

and

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(6) In accordance with (5) above, if fill material is necessary, it shall be no more than six inches deep and shall be limited to 0.25 acres of wetland disturbance. In addition, pipes shall be installed to maintain wetland hydrology;

ii. "Maintenance of a farm road" means:

(1) The existing road remains the same width before and after maintenance activities;

(2) The placement of all fill is entirely within the existing footprint of the existing road; and

(3) A culvert shall be used only to replace an existing culvert. If it is necessary to install a culvert for the first time, the Department will consider the project to be construction of a new road subject to the limitations in i. above.

(d) Normal harvesting of forest products in accordance with a forest management plan approved by the State Forester before the conduct of the forest management activities is exempt from the requirement of a freshwater wetlands permit, transition area waiver, or open water fill permit, subject to the limitations of this section. A woodland management plan prepared for tax purposes but that does not address wetlands is insufficient to qualify for the exemption. However, the removal of stumps results in a discharge of dredged or fill material, and a change in use and an impairment of flow or circulation. Therefore, under (b)1 above, the removal of stumps is not exempt and shall require a permit under this chapter.

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

(g) The following limits apply to the transition area exemptions at (f) above:

1.-3. (No change.)

4. For all development determined to be exempt by the Department, once the development is constructed, the exempted "project" has been built. If, for example, the owner of a commercial building decides afterward that it is necessary to construct an addition, and goes back to the municipal authority for a new or amended site plan or

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subdivision approval, the exemption has been "used up" and the addition is subject to the permitting requirements of this chapter. Similarly, for residential approvals, once the houses and any accessory structures planned along with the house (for example, detached garages, barns, storage sheds, pools) are constructed, or the certificate of occupancy is issued, the exemption has been exhausted and any later additions or structural improvements are subject to the permitting requirements of this chapter. If there is an interruption of more than one year before construction of an accessory structure claimed to have been planned along with the house, there is a rebuttable presumption that the structure constitutes a later addition and will require a permit.

(h) (No change.)

N.J.A.C. 7:7A-2.10 Exemption letters

(a) (No change.)

(b) To apply for an exemption letter for a farming, silviculture or ranching exemption under N.J.A.C. 7:7A-2.8(c), an applicant shall submit the following:

1. (No change.)

2. A site plan or other drawing, and description of [the] all activities for which the exemption is requested, including the location, total area [covered] of the existing and proposed activities, the types of farming, silviculture, or ranching, best management practices currently employed or to be employed, the site conditions in the area in which the activity would take place, the size, location, and use of all proposed dwellings or structures, and the length of time the operation has been ongoing; [and]

3. A copy of the farm conservation plan, as approved by the Natural Resource Conservation Service; and

[3.] 4. The fee specified in N.J.A.C. 7:7A-11.

(c) To apply for an exemption letter for a forest products harvesting exemption pursuant to N.J.A.C. 7:7A-2.8(d), an applicant shall submit the following:

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1. A copy of a forest management plan approved by the State Forester which includes the size of the site, the length of time required to complete the project, and a detailed description of the activities to take place in wetlands, transition areas, and/or State open waters, including the best management practices to be employed and the location and detailed plans for any proposed forest road(s); and

2. (No change.)

(d) (No change.)

N.J.A.C. 7:7A-2.11 Stormwater management

If a project or activity requires Department approval under these rules and the project in its entirety (that means the whole project, not just the portions within wetlands or transition area) meets the definition of “major development” at N.J.A.C. 7:8-1.2, then the project shall comply with the Stormwater Management rules at N.J.A.C. 7:8.

N.J.A.C. 7:7A-2.12 Conservation restrictions or easements

(a) Any transition area modified through a transition area waiver and its adjacent wetlands, and mitigation areas whether on or offsite, shall be permanently protected from any future development through the grant of a conservation restriction or easement as defined at N.J.A.C. 7:7A-1.4 in favor of the Department. A “modified” transition area is the entire transition area on a site after a transition area waiver is obtained. Wetland areas remaining on a site after the Department approves a wetland permit may be restricted in those cases where the Department determines that the restriction is necessary to protect the remaining wetland;

(b) The Department shall provide the applicant with the form of the conservation restriction or easement. The applicant shall not alter the form except in consultation with the Department and only when the Department agrees that an alteration is necessary to

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address site-specific conditions. The Department's forms are posted at www.state.nj.us/dep/landuse.

(c) The conservation restriction or easement shall require that the designated area be permanently preserved in its natural state, and shall prohibit all regulated activities as described at N.J.A.C. 7:7A-2.3 and 2.6, and any other activities that inhibit the natural succession of vegetation unless specifically authorized. In addition, the conservation restriction or easement shall include the following:

1. A requirement that each owner of the land notify the county and/or municipality of the conservation restriction or easement whenever submitting any application for a local approval involving the land;

2. A requirement that each owner of the land insert notice of the conservation restriction or easement into any deed or other legal instrument by which the owner divests either the fee simple title or possessory interest in the land; and

3. In those cases deemed appropriate by the State Historic Preservation Office in order to ensure that a proposed project will not affect a property that is listed or eligible for listing on the New Jersey or National Register of Historic Places, a historic preservation restriction or easement, with all the attendant rights, restrictions, prohibitions and limitations associated therewith.

(d) Unless the approved permit, waiver, or conservation restriction or easement states otherwise, former agricultural lands that are the subject of a conservation restriction or easement shall be allowed to revert to their natural state and shall not be subject to mowing or other practices that prevent or inhibit the natural succession of vegetation.

(e) The conservation restriction or easement shall run with the land and shall be binding upon the landowner, and all successors in interest in the land or any part of the land on which the restricted area is located. To ensure that notice of the restriction is provided to

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all present and future interested parties, applicants for mitigation banks and land donations shall follow the requirements at N.J.A.C. 7:7A-15.14. All other applicants for permits shall:

1. Provide a copy of the conservation restriction or easement to the Department within 60 days of receipt of an approved permit;

2. Record the conservation restriction or easement at the county clerk's office prior to transfer of the property, in accordance with N.J.A.C. 7:7A-14.3, or before the commencement of site preparation or regulated activities, as reported in accordance with N.J.A.C. 7:7A-13.1(a)14, whichever comes first; and

3. Ensure that a copy of the recorded conservation restriction or easement is provided to the Department and the municipal clerk with a request that it be placed in the property file for the land containing the restricted area.

(f) With the exception of upland preservation or a land donation in accordance with N.J.A.C. 7:7A-15.2(j), areas subject to the conservation restriction or easement shall be shown on a site plan, which also depicts the approved project with all approved wetland and transition area impacts, and other relevant site conditions such as encumbrances or areas of known contamination.

(g) A conservation restriction or easement shall include the deed book and page number of the recorded deed that shows that the applicant owns the subject property in fee simple, and a survey prepared in accordance with the requirements at N.J.A.C. 7:7A-10.1(q) including the metes and bounds of the entire restricted area and any approved access.

(h) Upon proper recording of a conservation restriction or easement in accordance with (e)2 above, the restriction shall not be released except in accordance with the provisions

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of the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A.13:8B-1 et seq.

(i) The Department shall allow de minimis modifications of the restricted area boundary established in a conservation restriction or easement associated with a transition area waiver or wetland permit in accordance with the following:

1. The applicant for the modification shall submit to the Department a written request that includes a request for a modification of the approved transition area waiver or wetlands permit in accordance with N.J.A.C. 7:7A-10.8, together with the reason for the requested conservation restriction or easement modification;

2. The conservation restriction or easement shall have been properly recorded;

3. The proposed modification, at a minimum, will result in an increased level of protection for the regulated resource, or will result in an equivalent area of resource protection that does not compromise in any way the original protected resource; and

4. The proposed modification is consistent with all current applicable Federal, State and local regulations.

(j) The Department shall not allow any de minimis modification of the boundary established in a conservation restriction or easement unless the conservation restriction or easement contains language that expressly reserves the right of the permittee to undertake de minimis modifications of the restricted area. If the restriction does not expressly reserve this right, then (h) above applies.

(k) The Department shall not allow any modification of the boundary established in a conservation restriction or easement associated with a mitigation site.

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(l) If the Department approves the applicant's written request to modify the boundary established in a conservation restriction or easement, the applicant shall, within 30 days of such approval, amend the conservation restriction or easement by preparing and submitting to the Department for review and approval a revised site plan and all requirements as described in (f) and (g) above revised to show the modification.

(m) Upon the Department's written approval of the amended conservation restriction or easement, the applicant shall, within 60 days, re-record the documents in accordance with the requirements in (e) above.

SUBCHAPTER 3 LETTERS OF INTERPRETATION

N.J.A.C. 7:7A-3.1 Basic LOI information

(a) (No change.)

(b) A letter of interpretation does not grant approval to conduct any regulated activities. The sole function of a letter of interpretation is to provide or confirm information about the presence or absence, boundaries, and/or resource value classification of freshwater wetlands, transition areas, and/or State open waters.

1. For planning approvals, for demonstrating compliance with ordinances, or for other purposes, a municipality or county may require an applicant to obtain an LOI as a condition of application completeness or as a condition of approval.

(c)- (h) (No change.)

(i) In order to ensure that a delineated wetlands boundary can be located in the future after the LOI is issued, an LOI applicant shall provide the Department with a survey of the approved delineated wetlands and/or State open waters boundary line. The survey may be submitted as part of the LOI application, or if the applicant prefers, the survey

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may be submitted after the Department inspects the site and approves the delineation as marked on the site with flags or other markers. If the Department requires adjustments to the delineated wetlands and/or State open waters boundary after the survey is submitted, the applicant shall resurvey the delineated boundary after the adjustments are made and the Department has approved the boundary. The issued LOI will reference the approved and surveyed boundary line. The Department shall waive the survey requirement if the applicant demonstrates that the extent of wetlands and/or State open waters on the site can be easily determined in the future without a survey, so that the expense of a survey is not warranted. For example, the Department may waive the survey requirement if an entire site is covered completely with freshwater wetlands and/or State open waters .

(j)-(k) (No change.)

N.J.A.C. 7:7A-3.4 Line verification LOI

(a) (No change.)

(b) The Department shall issue a line verification LOI for the following:

1.-2. (No change.)

3. A portion of a site, if all of the following criteria are met:

i.-ii. (No change.)

iii. The portion is [one acre or smaller] no larger than 10 percent of the overall site; and

iv. (No change.)

N.J.A.C. 7:7A-3.6 Effect, duration, and extension of a letter of interpretation

(a)-(b) (No change.)

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(c) Requests for extensions shall be made in writing to the Department before the letter of interpretation has expired but no more than one year before the expiration date and shall be subject to the application requirements at N.J.A.C. 7:7A-10. Applicants will be required to submit a new application if an extension is not applied for prior to the expiration date of the letter of interpretation.

SUBCHAPTER 4 GENERAL PROVISIONS FOR GENERAL PERMITS

N.J.A.C. 7:7A-4.2 Using a general permit to authorize specific activities

(a)-(b) (No change.)

(c) Each general permit authorization shall include a limited transition area waiver to allow access to the authorized activity, in accordance with N.J.A.C. 7:7A-6.1(a)6. No fee or application is required for this waiver and the disturbance authorized under this waiver is not counted in calculating the amount of disturbance under the general permit. An access transition area waiver allows regulated activities only:

1. (No change.)

2. For an activity that the Department determines is necessary to accomplish construction, and for future use, of the activity authorized in the wetlands under the general permit. An activity not directly required in order to obtain access to the activity authorized in the wetlands under the general permit shall require a separate transition area waiver[.];

- i. If the activity authorized under the general permit eliminates the wetland in its entirety, the transition area associated with that wetland may also be eliminated in its entirety without a separate transition area waiver, except in the case where there is a second wetland with a transition area

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overlapping the first. In the latter case, a separate transition area waiver is required;

- ii. If the activity authorized under the general permit partially eliminates of the wetland, the access shall be limited to the transition area adjacent to the location of the approved wetland filling. Any additional impacts to the transition area shall require a separate transition area waiver; and
- iii. Upon conclusion of the activity authorized in the wetland under the general permit, the Department shall re-establish the wetland transition area adjacent to the new wetland boundary. Any part of the transition area that was temporarily disturbed for access only shall be allowed to revert to preconstruction condition or shall be restored if necessary to reestablish pre-construction conditions.

(d) (No change.)

(e) The Department shall deny an application for a general permit authorization and require an application for an individual permit if the Department finds that:

1. Additional permit conditions added under N.J.A.C. 7:7A-[4.1 and/or]13.2 would not be sufficient to ensure compliance with this chapter and other applicable laws; or

2. Special circumstances make an individual permit necessary to ensure compliance with the Freshwater Wetlands Protection Act, this chapter, any permit or order issued pursuant thereto, or the Federal Act.

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

(h) If a regulated activity is not covered by any general permit or combination of general permits, an individual freshwater wetlands or open water fill permit must be obtained under N.J.A.C. 7:7A-7 in order to authorize the activity under this chapter. If a regulated activity in a transition area is not covered by any general permit or combination of general permits, [an individual] a transition area waiver must be obtained under N.J.A.C. 7:7A-6 in order to authorize the activity under this chapter.

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N.J.A.C. 7:7A-4.3 Conditions that apply to all general permit authorizations

(a) (No change.)

(b) The following conditions apply to all activities conducted under the authority of a general permit:

1. Activities performed under a general permit shall be associated with a proposed project and shall be minimized in accordance with i. below. The Department shall not authorize activities under a general permit for the purpose of eliminating a natural resource in order to avoid regulation. For the purposes of this subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and all associated activities;

i. For the purposes of this subsection, “minimized” means that the project has been configured so that most or all of it is contained in the uplands on the site, or in the uplands and transition areas on the site, and that the wetlands have been avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement;

2.-4. (No change.)

5. The activity shall not adversely affect properties which are listed or are eligible for listing on the New Jersey or National Register of Historic Places unless the applicant demonstrates to the Department that the proposed activity avoids or minimizes impacts to the maximum extent practicable or the Department determines that any impact to the affected property would not impact the property's ability to continue to meet the criteria for listing at N.J.A.C. 7:4-2.3 or otherwise negatively impact the integrity of the property or the characteristics of the property that led to the determination of listing or eligibility. The Department shall not issue a conditional permit if it finds that the mitigation proposed is inadequate to compensate for the adverse affect. Any permit for an activity

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which may adversely affect a property listed or eligible for listing on the New Jersey or National Register of Historic Places shall contain conditions to ensure that any impact to the property is minimized to the maximum extent practicable and any unavoidable impact is mitigated.

i. If the permittee, before or during the work authorized, encounters a [probable] possible historic property, as described at N.J.A.C. 7:7A-12.2(l) that is or may be eligible for listing in the New Jersey or National Register, the permittee shall preserve the resource, immediately notify the Department and proceed as directed;

ii. The Department shall not issue a general permit authorization if the applicant, its consultants, engineers, surveyors and/or agents significantly adversely affect a historic property to which the general permit authorization applies, unless the Department determines that circumstances justify issuing the general permit authorization;

6.-9. (No change.)

10. If a project in its entirety, of which general permit activities are a part, [under the general permit meet] meets the definition of "major development" at N.J.A.C. 7:8-1.2, the project shall comply in its entirety with the Stormwater Management Rules at N.J.A.C. 7:8 [apply].

11. -15. (No change.)

16. With the exception of activities associated with general permits 1, 6, and 16 [Activities] activities authorized under a general permit shall not take place in a vernal habitat, as defined at N.J.A.C. 7:7A-1.4, or in a transition area adjacent to a vernal habitat.

(c)-(f) (No change.)

N.J.A.C. 7:7A-4.4 Use of multiple general permits

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(a) If an application contains more than one activity on a single site, [T] the Department may authorize the activities under one or more general permits [on a single site], provided that:

1. The individual limits of each general permit are complied with. If activities under one general permit are conducted in more than one place on a site, the total disturbance caused by all activities at all locations onsite under that general permit shall be summed in order to determine if the limits in the general permit are met. For example, if an applicant seeks authorization for more than one outfall structure under general permit 11 (N.J.A.C. 7:7A-5.11) on a site, the impacts from all of the structures shall be summed and the total must be no greater than 0.25 acres, which is the acreage limit for that general permit (see N.J.A.C. 7:7A-5.11(c)i). In a second example, if an applicant proposes a minor road crossing under general permit 10B (N.J.A.C. 7:7A-5.10B) and two outfall structures under general permit 11 on the same site, the minor road crossing cannot exceed 0.25 acres, which is the acreage limit for that general permit (see N.J.A.C. 7:7A-10B(b)2), and the combined impact of the two outfall structures cannot exceed the 0.25-acre limit for general permit 11. Other than the combination of general permits 6 and 6A, the Department shall not authorize the combination of two different general permits, or a general permit and a transition area waiver, for a single activity. For example, if an applicant seeks authorization for a road crossing that will have an impact of 0.60 acres, an individual permit will be required because the Department will not authorize 0.25 acres under general permit 10B to be combined with 0.35 acres under general permit 6, which has a one acre limit (see N.J.A.C. 7:7A-5.6(b)1) for a minor road crossing of 0.60 acres; [and]

2. The total combined area of wetlands, State open waters, and transition areas disturbed or modified on the site under general permits 2, 6, 6A, 7, 8, 10A, 10B, 11, 12, 13, 14, 17, 17A, 18, 19, 21, 22, 24, 25, and 26 does not exceed one acre with the exception of the following:

i.-iv. (No change.)

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3. Disturbance exceeding 0.5 acre under general permit 6 cannot be combined with any other general permit authorization on the same site, except with an authorization under general permit 6A, in which case the total impact to wetlands, State open waters, and transition area shall not exceed one acre. For example, 0.75 acres of disturbance of wetlands or State open waters under general permit 6 can be combined with 0.25 acres of disturbance of transition area under general permit 6A;

4. The Department shall not authorize disturbance under both general permit 10A and general permit 10B for the same site; and

5. The Department shall not authorize multiple crossings of the same wetland or State open water unless:

- i. There is no other location, design and/or configuration for the proposed crossing that would provide access to an otherwise developable lot that would reduce or eliminate the disturbance to a wetland or State open water; and
- ii. Shared driveways are used to the maximum extent possible to access multiple lots.

(b)-(d) (No change.)

[N.J.A.C.7:7A-4.6 Combined general permit authorization and flood hazard area permit

(a) An applicant may obtain a combined freshwater wetlands general permit authorization and flood hazard area permit for an activity that is in a freshwater wetlands and also in an area regulated under the Department's Flood Hazard Area Control Act rules under the following provisions:

1. N.J.A.C. 7:7A-5.2A, authorizing an underground utility line;
2. N.J.A.C. 7:7A-5.10C, authorizing a minor road crossing;
3. N.J.A.C. 7:7A-5.11A, authorizing an intake or outfall structure;

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4. N.J.A.C. 7:7A-5.20A, authorizing bank stabilization activities; and

5. N.J.A.C. 7:7A-5.26A, authorizing channel or stream cleaning activities.

(b) The combined permit issued under this section shall constitute both the general permit authorization and the flood hazard area permit for the covered activities. However, if a project includes elements other than the activities covered by the combined general permit and flood hazard area permit, those elements may require a separate flood hazard area or freshwater wetlands approval.

(c) Application requirements for combined permits are set forth at N.J.A.C. 7:7A-10.7.]

SUBCHAPTER 5 ADOPTED GENERAL PERMITS

N.J.A.C. 7:7A-5.1 General permit 1--Maintenance and repair of existing features

(a)-(b) (No change.)

(c) If the activity is the ongoing maintenance of an off-stream stormwater management facility created in uplands, including a wetland constructed in uplands for stormwater management purposes after September 4, 2001, the following shall apply:

1. The application for authorization shall be subject to the public notice requirements at N.J.A.C. 7:7A-[10.9] 10.8 but shall not be subject to the other application requirements in N.J.A.C. 7:7A-10;

2.-4.(No change.)

(d) (No change.)

(e) Activities under general permit 1 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

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

(a)-(b) (No change.)

(c) Activities under general permit 2 shall comply with the following limits:

1. Permanent above-ground disturbance of wetlands, transition area, and/or State open waters shall be no greater than [one] 0.5 acre. Anything that changes the character of the existing wetland, even if only to a different wetland type, is permanent disturbance. For example, maintained clearing over a utility line is permanent disturbance. For the purposes of this subsection, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance;

2.-6. (No change.)

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

(f) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 2 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities

[(f)] (g) Activities under general permit 2 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

[N.J.A.C. 7:7A-5.2A Combined general permit 2 and flood hazard area permit

(a) If an activity authorized under general permit 2 also requires a flood hazard area permit under N.J.A.C. 7:13, the Department shall issue a combined flood hazard area

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permit and general permit 2 authorization for the activity if all of the following requirements are met:

1. The underground utility line meets the requirements for authorization under general permit 2 at N.J.A.C. 7:7A-5.2;

2. The underground utility line meets the applicable requirements of the Department's Flood Hazard Area Rules at N.J.A.C. 7:7A-13; and

3. Either of the following criteria is met:

i. The site is covered by a valid letter of interpretation showing the boundaries of any wetlands on the site, issued by the Department under N.J.A.C. 7:7A-3; or

ii. The activities will result in disturbance of State open waters only, and will not involve regulated activities in a freshwater wetland or transition area, as described at N.J.A.C. 7:7A-2.

(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 2 and flood hazard area permit shall meet the application requirements at N.J.A.C. 7:7A-10.7.]

N.J.A.C. 7:7A-5.3 General permit 3--Discharge of return water

(a) (No change.)

(b) Activities under general permit 3 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.4 General permit 4--Hazardous site investigation and cleanup

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(a) General permit 4 authorizes activities in freshwater wetlands, transition areas, and State open waters, which are undertaken by the Department or expressly approved in writing by the Department's [Site Remediation Program] Division of Remediation Management and Response, for the investigation, cleanup or removal of:

1. -2. (No change.)

(b)-(c) (No change.)

(d) Activities under general permit 4 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.5 General permit 5--Landfill closures

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

(f) Activities under general permit 5 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

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

(a) General permit 6 authorizes regulated activities in freshwater wetlands, [transition areas adjacent to those wetlands,] and/or State open waters, if the freshwater wetlands and/or State open waters are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

(b) Activities under general permit 6 shall be limited as follows:

1. (No change.)

2. [The activities shall disturb no more than one acre of a transition area

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3.] The activities shall disturb no more than one-half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C.

7:7A-1.4. Mitigation shall be required in accordance with (d) below for freshwater wetlands and/or State open waters that are waters of the United States.

(c) Activities under general permit 6 shall not take place in any of the following[, nor in a transition area adjacent to the following]:

1.-4. (No change.)

(d) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters that are waters of the United States. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 6 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.

[(d)] (e) Activities under general permit 6 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.6A General permit 6A—Transition areas adjacent to non-tributary wetlands

(a) General permit 6A authorizes regulated activities in transition areas adjacent to freshwater wetlands and/or State open waters if the freshwater wetlands or State open waters are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream.

(b) Activities under general permit 6A shall disturb no more than one-half acre of a transition area;

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1. If the activity authorized under general permit 6 eliminates a wetland in its entirety, authorization under general permit 6A is not required for activities in the associated transition area;

(c) Activities under general permit 6A shall not take place in a transition area adjacent to the following:

1. An exceptional resource value wetland, as described at N.J.A.C. 7:7A-2.4;
2. A State open water that is a special aquatic site, as defined at N.J.A.C. 7:7A-1.4;
3. USEPA priority wetlands; or
4. A State open water that is larger than one acre.

(d) Activities under general permit 6A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.7 General permit 7--Human-made ditches or swales in headwaters

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

(e) Activities under general permit 7 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.8 General permit 8--House additions

(a) General permit 8 authorizes activities in freshwater wetlands and/or transition areas, necessary for the construction of additions or appurtenant improvements to residential

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dwelling lawfully existing prior to July 1, 1988, provided that the improvements or additions require less than a cumulative surface area of 750 square feet of fill and/or disturbance and will not result in new alterations to a freshwater wetlands outside of the 750 square foot area. General permit 8 does not authorize activities in State open waters.

1. If requested within five years of the destruction of a dwelling, this permit authorizes the replacement of a residential dwelling that was lawfully existing prior to July 1, 1988, within the same footprint of the previous dwelling with an increase of up to 750 square feet of fill and/or disturbance provided that:

i. The applicant provides documentation that the dwelling was habitable at the time of destruction. "Habitable" means that persons could legally occupy the dwelling and that the dwelling had utilities including a functioning septic system or legal connection to a sewer; and

ii. There is a foundation remaining or other evidence, such as a deed or plot plan, of the size and location of the overall building footprint.

(b) (No change.)

(c) Activities under general permit 8 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.9 General permit 9--Airport sight line clearing

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

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(f) Activities under general permit 9 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

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

(a) –(e) (No change.)

(f) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 10A until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities

[(f)] (g) Activities under general permit 10A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

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

(a) General permit 10B authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters:

1. Construction of one or more new road crossings necessary to gain access to an otherwise inaccessible, developable, upland site, including attendant features such as shoulders, sidewalks and embankments;

2.-3. (No change.)

(b)-(d) (No change.)

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(e) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 10B until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities

[(e)] (f) Activities under general permit 10B shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

[N.J.A.C. 7:7A-5.10C Combined general permit 10A and flood hazard area permit

(a) If an actively authorized under general permit 10A also requires a flood hazard area permit under N.J.A.C. 7:13, the Department shall issue a combined flood hazard area permit and general permit 10[A] for the activity if all of the following requirements are met:

1. The road crossing meets all requirements for authorization under N.J.A.C. 7:7A-5.10A;

2. The road crossing meets all requirements for authorization under the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13; and

3. Either of the following criteria is met:

i. The site of the road crossing is covered by a valid letter of interpretation showing the boundaries of any wetlands on the site, issued by the Department under N.J.A.C. 7:7A-3; or

ii. The road crossing will result in disturbance of State open waters only, and will not involve regulated activities in a freshwater wetland or transition area, as described at N.J.A.C. 7:7A-2.

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(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 10A and flood hazard area permit shall meet the application requirements for combined permits at N.J.A.C. 7:7A-10.7.]

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

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

[(f) Stormwater discharged from an outfall authorized under general permit 11 shall be managed in accordance with the Stormwater Management Rules at N.J.A.C. 7:8.]

Recodify existing (g) through (i), as (f) through (h). (No change in text.)

(i) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 11 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities

(j) Activities under general permit 11 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

[N.J.A.C. 7:7A-5.11A Combined general permit 11 and flood hazard area permit

(a) If an activity authorized under general permit 11 also requires a flood hazard area permit under N.J.A.C. 7:13, the Department shall issue a combined flood hazard area

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permit and general permit 11 authorization for the activity if all of the following requirements are met:

1. The activities meet all of the requirements for authorization under general permit 11 at N.J.A.C. 7:7A-5.11;

2. The activities meet the applicable requirements of N.J.A.C. 7:13; and

3. Either of the following criteria is met:

i. The site is covered by a valid letter of interpretation showing the boundaries of any wetlands on the site, issued by the Department under N.J.A.C. 7:7A-3; or

ii. The activities will result in disturbance of State open waters only, and will not involve regulated activities in a freshwater wetland or transition area, as described at N.J.A.C. 7:7A-2.

(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 11 and flood hazard area permit shall meet the application requirements for combined permits at N.J.A.C. 7:7A-10.7.]

N.J.A.C. 7:7A-5.12 General permit 12--Surveying and investigating

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

(d) Activities under general permit 12 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.13 General permit 13--Lake dredging

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

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(i) Activities under general permit 13 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.14 General permit 14--Water monitoring devices

(a)-(b) (No change.)

(c) If an applicant cannot determine at the time of application how many monitoring wells will be needed, the Department may issue a "blanket" authorization under general permit 14 for drilling of monitoring wells, such as those used in cleanups of contaminated groundwater. A "blanket" authorization allows the placement of multiple monitoring wells on a site over the term of the permit authorization, provided that the permittee reports the number and location of all wells to the Department when all of the wells have been drilled. To be eligible for a "blanket" authorization, the monitoring wells must be approved by the Department's [Site Remediation Program] Division of Remediation Management and Response or by the U.S. Environmental Protection Agency.

(d) (No change.)

(e) Activities under general permit 14 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.15 General permit 15--Mosquito control activities

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

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(f) A county agency applying for authorization under general permit 15 shall provide public notice of the application in accordance with this subsection, and shall not be subject to the public notice requirements found at N.J.A.C. 7:7A-[10.9] 10.8. The county agency shall publish a display advertisement describing the proposed general permit activities. The advertisement shall be:

1.-3. (No change.)

(g) (No change.)

(h) Activities under general permit 15 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.16 General permit 16--Habitat creation and enhancement activities

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

(f) Activities under general permit 16 shall meet the following requirements:

1. The activities shall disturb the minimum amount of freshwater wetlands, transition areas, and/or State open waters necessary to successfully implement the project plan; [and]

2. The activities shall not decrease the total combined area of freshwater wetlands, State open waters and/or transition areas on a site. However, the Department may approve such a decrease if the Department determines that the activities causing the decrease are sufficiently environmentally beneficial to outweigh the negative environmental effects of the decrease. In addition, the Department may approve conversion of wetlands to State open waters or transition area, conversion of State open waters to wetlands or transition area, or the conversion of transition area to freshwater wetlands or State open waters, if the Department determines that such conversion is environmentally beneficial[.] ; and

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3. The area of habitat enhancement or creation shall be protected from any future development by a recorded conservation restriction or easement in accordance with N.J.A.C. 7:7A-2.12.

(g)-(i) (No change.)

(j) Activities under general permit 16 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.17 General permit 17--Trails and boardwalks

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

(g) Activities under general permit 17 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.17A General permit 17A—Non-Motorized, Multiple-use Paths

(a) General permit 17A authorizes activities in freshwater wetlands, transition areas, and/or State open waters necessary for construction of a non-motorized, multiple use path for use by bicycles, skate boards, rollerblades and other non-motorized methods of transport. General permit 17A does not authorize construction of a restroom, gazebo, rain shelter, or any covered or enclosed structure. General permit 17A does not authorize construction of a roadway for use by automobiles, golf carts, motorcycles, motorized trail bikes, all-terrain vehicles, or other motor vehicles.

(b) The total area of freshwater wetlands, transition areas, and/or State open waters disturbed under general permit 17A shall not exceed one-quarter acre.

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(c) The non-motorized, multiple use path shall be designed in accordance with the American Association of State Highway and Transportation Officials (AASHTO) “guide for the development of bicycle facilities”, published 1999, as amended and supplemented.

It is available at www.communitymobility.org/pdf/aashto.pdf.

(d) The non-motorized, multiple use path shall be aligned to minimize impacts to wetlands, State open waters, and wetlands transition areas.

(e) The permittee shall take all measures necessary to ensure that activities under general permit 17A do not interfere with the natural hydrology of the area, such as installation at grade or use of cross drains to allow the passage of water. The permittee shall minimize the impact of the activities on vegetation.

(f) Activities under general permit 17A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.18 General permit 18--Dam repair

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

(e) If a dam is removed under general permit 18, and the dam owner also owns or controls any of the property containing the lake bottom, the Department may require the owner to execute and record a conservation restriction or easement in accordance with the requirements at N.J.A.C. 7:7A-2.12 covering the lake bottom area. The conservation restriction or easement shall prohibit any development or regulated activity for five years from the date the dam is removed, in order to allow the stream corridor and associated wetlands in the lake bottom area to revert to their natural state. The conservation restriction or easement shall include the land covered by the lake bottom, and all associated wetlands, as they exist at the time the dam is removed. When the conservation restriction or easement expires, the Department's jurisdiction under this chapter shall be based on existing conditions on the site.

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(f) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 18 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities

[(f)] (g) Activities under general permit 18 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.19 General permit 19--Docks and piers

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

(i) Activities under general permit 19 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.20 General permit 20--Bank stabilization

(a)-(b) (No change.)

(c) The total cumulative length of water body bank affected by bank stabilization activities under general permit 20 shall meet the applicable length limit below in this subsection. These limits apply to the total linear footage of stream bank affected, regardless of which side of the stream it is on, or whether the activities are contiguous. For example, a bank stabilization using only rip-rap could disturb one bank of a stream for a distance of 150 feet, or both banks for 75 feet. The applicable length limits are as follows:

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1. (No change.)

2. For the following bank stabilization activities, no more than 300 feet of stream bank:

i. Soil bioengineering systems for stream bank stabilization set forth at, and performed in accordance with, 650.1601(d)(2) in Chapter 16 of the NRCS Engineering Field Handbook, published December 1996, as amended and supplemented; and

ii. (No change.)

3.-4. (No change.)

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

(f) Activities under general permit 20 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

[N.J.A.C. 7:7A-5.20A Combined general permit 20 and flood hazard area permit

(a) If an activity authorized under general permit 20 also requires a flood hazard area permit under N.J.A.C. 7:13, the Department shall issue a combined flood hazard area permit and general permit 20 authorization for the activity if it meets the requirements for authorization under general permit 20 at N.J.A.C. 7:7A-5.20 and also meets the applicable requirements of the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13.

(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 20 and flood hazard area permit shall meet the application requirements for combined permits at N.J.A.C. 7:7A-10.7.]

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

(a) (No change.)

(b) Activities under general permit 21 shall comply with the following limits:

1. (No change.)

2. Permanent disturbance of freshwater wetlands, transition areas, and/or State open waters, including the area of vegetative clearing to be maintained underneath the utility line[,] . For the purposes of this subsection, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance. Permanent disturbance shall be:

i. No greater than [one] 0.5 acre; and

ii. (No change.)

(c)-(d) (No change.)

(e) Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 21 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities

[(e)] (f) Activities under general permit 21 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.23 General permit 23--Expansion of cranberry growing operations in the Pinelands

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(a)-(k) (No change.)

(l) [If an applicant proposes activities that will result in the loss and/or disturbance of more than one half acre of freshwater wetlands and/or State open waters, the applicant shall transfer Pinelands Development Credits (PDCs) to the Department in accordance with the following:

1. The applicant shall transfer PDCs in the following ratios to acres of loss and/or disturbance:

i. For Atlantic white-cedar wetlands, four tenths of a PDC for every acre of loss and/or disturbance;

ii. For forested freshwater wetlands that are not Atlantic white-cedar wetlands, fifteen one hundredths of a PDC for every acre of loss and/or disturbance;

iii. For emergent or scrub/shrub wetlands, one tenth of a PDC for every acre of loss and/or disturbance; and

iv. For wetlands that are abandoned blueberry, cranberry, or agricultural fields, or State open waters, zero PDCs;

2. Each portion of the site that is one quarter acre or larger shall be assigned its own PDC requirement, and these requirements shall be summed to calculate the PDC requirement for the entire site. A portion smaller than one quarter acre will be given the ranking of the area surrounding it. For example, an applicant may have three acres of State open waters, and one eighth acre of Atlantic white-cedar wetlands surrounded by eight and seven eighths acres of scrub/shrub wetlands. The disturbance of the State open waters requires no PDCs under (l)iv above. The one eighth acre of Atlantic white-cedar wetlands is smaller than one quarter acre and therefore is treated as part of the surrounding scrub/shrub wetlands. Under (l)iii above, nine tenths of a PDC are required for the disturbance of the scrub/shrub wetlands. This would be the total for the site; and

3. The total PDC requirement for the site shall be rounded up to the nearest one quarter PDC. Under the example at (l)2 above, the PDC requirement for the entire site is nine

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tenths of a PDC, which would then be rounded up to one PDC.] Mitigation shall be performed for all permanent loss and/or disturbances of freshwater wetlands or State open waters. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 23 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities

[(m) The applicant shall transfer any PDCs required under (l) above to the Department, or to a nonprofit or governmental agency designated by the Department, prior to beginning activities authorized under general permit 23, and no later than 90 days after receiving the general permit authorization. The Department or its designee shall convey the PDCs to the Pinelands Development Credit Bank in accordance with the MOA established under (n) below, and shall use the resulting funds to establish and/or restore Atlantic white-cedar wetlands in the Pinelands.

(n) The Department shall enter into a memorandum of agreement (MOA) with the Pinelands Commission and the Pinelands Development Credit Bank. The MOA shall include a general plan for implementing the Atlantic white-cedar restoration program required by this section, and shall:

1. Identify at least one potential site for Atlantic white-cedar restoration;
2. Include a requirement for at least one acre of Atlantic white-cedar restoration for each acre of Atlantic white-cedar wetlands lost and/or disturbed under general permit 23;
3. Include clear success criteria for the Atlantic white-cedar restoration program; and
4. Ensure that Atlantic white-cedar restoration efforts will not adversely impact existing areas of forested wetlands.]

[(o)] (m) To minimize impacts to freshwater wetlands and/or State open waters, a permittee under general permit 23 shall:

1. Follow, to the maximum extent practicable, the management practices recommended by the Rutgers Cranberry and Blueberry Experiment Station;

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2. Stabilize all disturbed areas in accordance with the New Jersey Field Office Technical Guide, 1998 edition, as amended and supplemented, issued by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS), available from the NRCS at 1370 Hamilton Street, Somerset, New Jersey 08873;

3. Use only suitable, clean, non-toxic fill material;

4. Use integrated pest management techniques; and

5. Design and carry out the activities to avoid irreversible adverse impacts on the survival of any local populations of threatened or endangered plants of the Pinelands, consistent with the Pinelands Comprehensive Management Plan at N.J.A.C. 7:50-6.27.

[(p)](n) The requirements of (c), (j), and(k), [(l), and (m)] above shall not apply to the proposed activities under general permit 23 if the Department determines that the activities:

1. Will improve water conservation or water quality; and

2. Will result in a loss and/or disturbance of one half acre or less of freshwater wetlands and/or State open waters at that cranberry growing operation during the five year term of the general permit.

[(q) Each year, the Commissioner shall make a finding as to whether the pace of impacts under the general permit is proportional to the pace of Atlantic white-cedar restoration efforts. The Commissioner shall consult with the Pinelands Commission, and shall consider, among other factors, whether restoration efforts are making reasonable progress towards the goals in the Department's overall plan for Atlantic white-cedar restoration. The Department shall publish the Commissioner's finding as a public notice in the New Jersey Register by October 31 of each year:

1. If the Commissioner finds that the pace of impacts is proportional to the pace of restoration efforts, the Department shall publish a finding of continuance of the general permit. A finding of continuance shall remain in effect until the next October 31 following the publication of the finding; or

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2. If the Commissioner finds that the pace of impacts is out of proportion to the pace of Atlantic white-cedar restoration efforts, the Department shall publish a finding of temporary hold of general permit authorizations, and shall stop issuing authorizations under general permit 23. A finding of temporary hold shall remain in effect until the Commissioner determines that the pace of impacts under the general permit has again become proportional to restoration efforts, and the Department publishes a finding of continuance.]

[(r)] (o) The Commissioner reserves the right (that is, discretion) to modify, suspend, or revoke general permit 23 authorizations. Modification means the imposition of additional or revised terms or conditions on the authorization. Suspension means the temporary cancellation of the authorization while a decision is made to either modify, revoke, or reinstate the authorization. Revocation means the cancellation of the authorization. The Commissioner may assert discretionary authority by modifying, suspending, or revoking general permit 23 authorizations for a specific geographic area or class of waters, whenever the Commissioner determines sufficient concerns for the environment under the Freshwater Wetlands Protection Act or the Federal Section 404(b)(1) Guidelines, or if the Commissioner otherwise determines that the general permit would result in more than minimal adverse environmental effects either individually or cumulatively. Whenever the Commissioner determines that a proposed specific activity covered by general permit 23 would have more than minimal individual or cumulative adverse effects on the environment, the Commissioner shall either modify the general permit 23 authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized by general permit 23 and provide instructions on how to seek authorization under an individual permit. The Commissioner shall restore authorization under general permit 23 at any time that the Commissioner determines that the reason for asserting discretionary authority has been satisfied by a condition, project modification, or new information.

[(s)] (p) An application for authorization under general permit 23 shall be submitted within 90 days after [the general permit becomes operative under (u) below] (the date this amended rule is effective). Within 180 days after [general permit 23 becomes operative,]

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(the date this amended rule is effective), the Department shall make a final decision on all applications submitted within the 90-day deadline. Thereafter, applications shall be submitted to the Department by January 1 of each year. The Department shall issue decisions on applications by March 1 of each year.

[(t)] (q) If the Department receives applications for authorization under general permit 23 which would, if approved, result in a total Statewide loss and/or disturbance of freshwater wetlands and/or State open waters that exceeds the limits at (i) above, the Department shall give priority to applications involving areas with the lowest number rankings on the list at (d) above, taking into consideration overall environmental impacts. If two or more applications involve similarly ranked land and similar environmental impacts, the Department shall give priority to the application submitted and determined complete under N.J.A.C. 7:7A-9.5(d) first.

[(u)] General permit 23 shall become operative as of the date that the Department publishes a notice in the New Jersey Register announcing that:

1. The Department has signed the Memorandum of Agreement required under (n) above; and
2. Twenty-five thousand dollars has been deposited from public sources to the fund established by the Department under the Memorandum of Agreement for the implementation of the Atlantic white-cedar restoration program.]

[(v)] (r) In order to ensure compliance with the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq., general permit 23 will be [added to the list of general permits] subject to coordination procedures with the U.S. Fish and Wildlife Service under the Department's Memorandum of Agreement regarding the Endangered Species Act and New Jersey's assumption of the Federal 404 program.

N.J.A.C. 7:7A-5.24 General permit 24--Spring developments

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

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(e) Activities under general permit 24 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.25 General permit 25--Malfunctioning individual subsurface sewage disposal (septic) systems

(a)-(b) (No change.)

(c) All activities under general permit 25 on the site shall disturb no more than one-quarter acre of freshwater wetlands and/or transition areas combined and shall be located on the same property where the malfunctioning system is located.

(d) The Department shall not authorize activities under general permit 25 if the need for repair or modification is directly or indirectly caused by an expansion of the facility the individual subsurface sewage disposal system serves, or by a change in its use, including a change from disuse or abandonment to any type of use. Any repair or modification of the system shall be limited to serve only those volumes of sanitary sewage, estimated in accordance with N.J.A.C. 7:9A-7.4, that were approved prior to the malfunction.

(e) Activities under general permit 25 are not subject to the application contents requirements at N.J.A.C. 7:7A-10, except for the public notice requirements at N.J.A.C. 7:7A-[10.9] 10.8, and there is no application fee for an authorization under general permit 25. Instead, an applicant for authorization under general permit 25 shall submit the following in writing to the Department, at least 30 days prior to starting work:

1. A description and plan of the activities;

2. The location of the site, including the county and municipality, and the block and lot, identified on both a regional map and a tax map; and

3. (No change.)

(f) (No change.)

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(g) Activities under general permit 25 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

N.J.A.C. 7:7A-5.26 General permit 26-- Minor channel or stream cleaning for local government agencies

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

(e) Activities under general permit 26 are not subject to the application requirements in N.J.A.C. 7:7A-10, except for the public notice requirements at N.J.A.C. 7:7A-[10.9] 10.8. An application for authorization under general permit 26 shall include the following:

1.-6. (No change.)

7. Documentation that the public notice requirements of N.J.A.C. 7:7A-[10.9] 10.8 have been met; and

8. (No change.)

(f) – (i) (No change.)

(j) Activities under general permit 26 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

[N.J.A.C. 7:7A-5.26A Combined general permit 26 and flood hazard area permit

(a) If an activity authorized under general permit 26 also requires a flood hazard area permit under N.J.A.C. 7:13, the general permit 26 authorization shall constitute a

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combined freshwater wetlands general permit authorization and flood hazard area permit for the project.

(b) The combined permit provided for under this section shall be subject to the conditions for combined permits found at N.J.A.C. 7:7A-4.6. An application for the combined general permit 26 and flood hazard area permit shall meet the application requirements for an authorization under general permit 26, set forth at N.J.A.C. 7:7A-10.]

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

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

(d) [If activities under general permit 27 disturb more than one-half acre of freshwater wetlands or State open waters, the] The applicant shall perform mitigation under N.J.A.C. 7:7A-15 for all [of the] permanent loss and/or disturbance of freshwater wetlands or State open waters authorized under general permit 27. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 27 until the mitigation proposal is approved. Mitigation shall be performed prior to or concurrently with general permit activities.

(f) Activities under general permit 27 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.

SUBCHAPTER 6 TRANSITION AREA WAIVERS

N.J.A.C. 7:7A-6.1 General transition area waiver provisions

(a) This section sets forth the requirements for transition area waivers. The Department issues the following types of transition area waivers:

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1.-4. (No change.)

5. A general permit transition area waiver. If a general permit authorizes disturbance of a transition area, an authorization issued under the general permit constitutes a transition area waiver for the activities covered by the general permit. This waiver is not addressed in this section, but in each general permit in N.J.A.C. 7:7A-5 that covers transition area disturbances. All general permits except for general permits 1, 6, 7, 22 and 24 authorize activities in transition areas; and

6. An access transition area waiver. Each general permit authorization, individual freshwater wetlands permit and mitigation proposal shall include a limited transition area waiver to allow access to the authorized activity. No fee or application is required for this waiver. However, an access transition area waiver will allow regulated activities only:

i. (No change.)

ii. For an activity that the Department determines is necessary to accomplish the permitted activity. An activity not directly required in order to obtain access to the permitted activity shall require a separate transition area waiver. If the activity authorized under the permit eliminates the wetland in its entirety, the transition area associated with that wetland may also be eliminated in its entirety without a separate transition area waiver. If the activity authorized under the permit partially eliminates the wetland, the access shall be limited to the transition area adjacent to the location of the approved wetland filling. Any additional impacts to the transition area shall require a separate transition area waiver.

[(b) Some transition area waivers change the shape or size of a transition area, while others do not change the transition area, but allow regulated activities in the transition area, as follows:

1. A matrix type width reduction transition area waiver reduces the width of a transition area on a site without changing its shape;

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2. An averaging plan transition area waiver changes the transition area shape without changing its size; and

3. A special activity transition area waiver, hardship transition area waiver, general permit transition area waiver, and access transition area waiver allow regulated activities within a transition area. These waivers do not reduce the size or change the shape of the transition area. The waiver merely allows the specified regulated activities to be performed in the transition area.

(c) Placement of a building or structure immediately adjacent to a transition area inevitably results in regulated activities occurring in the transition area during construction and use of the building, resulting in a substantial adverse impact on the freshwater wetland. Therefore, the Department shall not issue a transition area matrix type width reduction transition area waiver or averaging plan transition area waiver that will result in the following, unless the requirements of (d) below are met:

1. Construction of a non-residential building or structure within 20 feet of the outside boundary of a transition area; or

2. Placement of a residential development project, as defined at N.J.A.C. 7:7A-1.4, within a transition area or wetland.

(d) To satisfy the requirements of (c) above, the applicant shall demonstrate that:

1. Construction activities will be conducted in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit, as defined at N.J.A.C. 7:7A-1.4;

2. The structure is designed and will be used in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit, as defined at N.J.A.C. 7:7A-1.4. To demonstrate this in regard to a single family or duplex dwelling, the applicant shall demonstrate that any transition area or wetland within the area covered by the residential development project will not be owned or controlled by the resident(s) of the dwelling;

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3. The transition area and/or wetland is fenced prior to construction of the structure (including site preparation), and the fence is permanently maintained, so as to clearly delineate its boundary and to prevent people from entering and/or disturbing the transition area and/or wetland; and

4. Prior to beginning activities authorized by a permit, the applicant executes and records a conservation restriction, as defined at N.J.A.C. 7:7A-1.4, which prohibits any regulated activities in the transition area.]

[(e)] (b) The Department shall include in a transition area waiver additional conditions as necessary to ensure that an activity does not result in a substantial impact on the adjacent wetlands, and does not impair the purposes and functions of transition areas as set forth in N.J.A.C. 7:7A-2.5. Such conditions shall include but are not limited to the following:

1. Construction activities shall be conducted in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit, as defined at N.J.A.C. 7:7A-1.4;

2. The structure is designed and shall be used in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit, as defined at N.J.A.C. 7:7A-1.4;

3. The transition area and/or wetland is fenced, using a type of fencing that protects and maintains all functions and values of the resources, prior to construction of the structure (including site preparation), and the fence is permanently maintained, so as to clearly delineate its boundary and to prevent people from entering and/or disturbing the transition area and/or wetland;

4. The permittee shall execute and record a conservation restriction or easement, in accordance with the procedures at N.J.A.C. 7:7A-2.12, which prohibits any regulated activities in the transition area and wetlands as appropriate; and

5. During construction activities, all excavation must be monitored for the presence of acid-producing deposits. If any such deposits are encountered, the permittee shall

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implement the mitigation and disposal standards in the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13 and shall establish an annual post-planting monitoring program to ensure the reestablishment of vegetation in temporarily disturbed areas. The plantings shall have a minimum 85 percent plant survival and coverage rate after two complete growing seasons. If the plantings fail to achieve this survival rate, the Department will require the permittee to implement additional corrective measures.

(f) is recodified as (c) (No change in text.)

[(g)] (d) An applicant whose application does not meet the requirements for any of the transition area waivers listed in (a) above may obtain a transition area waiver through scientifically documenting that a proposed activity will have no substantial impact on the adjacent wetlands. This documentation may include, but is not limited to, nutrient or sediment transport models, buffer models [such as "The Wetlands Buffer Delineation Method," prepared by Rogers, Golden and Halpern, Inc., the "Buffer Delineation Model for New Jersey Pinelands Wetlands," prepared by Charles T. Roman and Ralph E. Good], or wildlife habitat suitability studies. An application submitted under this subsection shall address the following, as they relate to the adjacent wetlands:

1.-3. (No change.)

[(h)] (e) [Each matrix type width reduction] With the exception of a waiver for redevelopment or access, all transition area waivers [and averaging plan transition area waiver] shall be conditioned on the recording of a Department-approved conservation restriction or easement, as defined at N.J.A.C. 7:7A-1.4, and in accordance with the requirements at N.J.A.C. 7:7A-2.12, restricting future activities in the entire transition area and adjacent wetlands on the site. [The conservation restriction shall be executed and recorded prior to the beginning of activities authorized under the transition area waiver, or prior to the transfer of the site, whichever is sooner. The conservation restriction shall clearly show the boundaries of the transition area as modified from the standard transition area by the waiver. The conservation restriction shall meet the requirements for protecting mitigation sites from future disturbance, set forth at N.J.A.C. 7:7A-15.14,

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except that the restriction shall allow later regulated activities in the transition area, or a later reduction of the transition area, if the applicant demonstrates that:

1. There is a compelling public need for the activity, which is greater than the need to protect the transition area; and

2. The activity has no practicable alternative which would not involve a transition area, or which would involve a transition area but:

- i. Would have less adverse impact on the transition area and adjacent wetland; and
- ii. Would not merely substitute other significant environmental consequences for those attendant on the original proposal.]

1. If the permittee does not conduct regulated activities before the transition area waiver expires, the following apply with regard to the transition area:

i. If no activities have been conducted, regardless of whether or not the conservation restriction or easement was recorded, the permittee shall obtain a new transition area waiver to conduct regulated activities in the transition area; or

ii. If no activities have been conducted and the conservation restriction or easement was properly recorded, but the permittee wants to reconfigure the project to use portions of the property contained within the restriction or easement, the permittee shall apply for a new transition area waiver, together with a request for a modification of the conservation restriction or easement in accordance with the procedures at N.J.A.C. 7:7A-2.12(i);

2. In the case of a subdivision for which a transition area waiver was approved, if one or more lots remain undeveloped when the transition area waiver expires, the following shall apply with regard to the transition area:

i. If no activities have been conducted on a lot which was part of a larger subdivision, regardless of whether or not the conservation restriction or easement was recorded, the permittee shall apply for a new transition area waiver for the lot, using the same plan that was used to obtain the transition area waiver for the subdivision as a whole. That is, if a transition area waiver averaging plan was obtained for the subdivision

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as a whole and that transition area waiver averaging plan expires, the individual lot owner shall apply for a transition area averaging plan for the individual lot using the original averaging plan for the subdivision as a whole. The Department shall consider proposed changes to the originally approved plan only if the conservation easement or restriction was recorded and the changes meet the standards for a de minimis modification at N.J.A.C. 7:7A-2.12(i);

3. If the permittee does not properly record the required conservation restriction or easement, he or she shall be in violation of the Freshwater Wetlands Protection Act and this chapter.

[~~(i)~~] [~~f~~] The process at N.J.A.C. 7:7A-[7.3] 17 [for requesting that the Department evaluate whether denial of a permit could result in a taking] is also available to applicants for [~~an individual~~] a transition area waiver.

(j) is recodified as (g). (No change in text.)

[~~(k)~~] [~~h~~] With the exception of a transition area waiver for access in accordance with N.J.A.C. 7:7A-6.1(a)6 and a special activity waiver for redevelopment in accordance with N.J.A.C. 7:7A-6.3(f), [The] the Department shall not issue [an individual] a transition area waiver under this section and a general permit authorization for the same site and for the same activity, if the combined effect of the [individual] transition area waiver and general permit authorization would be to expand the general permit activity beyond the limits set forth in the general permit. For example, if an applicant proposes one road crossing on a site, the Department will not permit the combination of a general permit 10 authorization with an averaging plan for the same road crossing because to do so would cause the crossing to exceed the 0.25 acre limit of general permit 10.

(i) With the exception of an transition area waiver for access approved in accordance with (a)6 above or a transition area waiver meeting the requirements for an individual permit at N.J.A.C. 7:7A-6.3(g), transition area waiver shall not be approved to allow encroachment within 75 feet of an exceptional resource value wetland.

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N.J.A.C. 7:7A-6.2 Transition area averaging plan waiver

(a) (No change.)

(b) The Department shall issue a transition area averaging plan waiver only if the transition area, as modified, will continue to serve the purposes of a transition area set forth in N.J.A.C. 7:7A-2.5. The Department shall presume that the following will result in a transition area that will not serve the purposes set forth in N.J.A.C. 7:7A-2.5, and shall not issue a transition area averaging plan waiver, unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-6.1[(g)] (d):

1.-3. (No change.)

4. [The project involves a building or structure that meets the criteria in N.J.A.C. 7:7A-6.1(c)1 or 2 and the requirements of N.J.A.C. 7:7A-6.1(d) are not met.] The proposed averaging compensation area is separated from the wetland by an intervening structure.

(c) In addition to the presumptions at (b) above, the Department shall also presume that, for a transition area adjacent to an intermediate resource value wetland, the following will result in a substantial impact on the adjacent freshwater wetlands, and the Department shall not issue a transition area averaging plan waiver unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-6.1[(g)] (d):

1. (No change.)

2. The transition area averaging plan proposes to:

i.-ii. (No change.)

iii. Reduce a transition area to 10 feet wide for a continuous distance of 100 linear feet or more along the freshwater wetlands boundary, resulting in an average transition area width that is less than 25 feet;

iv.-v. (No change.)

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

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N.J.A.C. 7:7A-6.3 Special activity transition area waiver

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

(f) The Department shall issue a special activity transition area waiver for redevelopment of a significantly disturbed area if all of the following conditions are met:

1. The area of proposed activity is significantly disturbed so that it is not functioning as a transition area at the time of application, for example, the area is covered by an impervious surface such as pavement, [or] by gravel or paver blocks, or by a deck that is less than 5 feet off the ground. For example, a lawn is not considered to be so significantly disturbed that it is not functioning as a transition area;

2.-3. (No change.)

4. Where practicable, any remaining disturbed portion of the transition area shall be planted with indigenous plants that are beneficial to the wetland, and protected from future development by a conservation restriction or easement that meets the requirements at N.J.A.C. 7:7A-[15.14] 12.2.

(g) The Department shall issue a special activity transition area waiver for an activity if the applicant demonstrates that, if the activity were instead proposed in a freshwater wetland, it would meet the standards for a freshwater wetlands individual permit at N.J.A.C. 7:7A-[7] 7.2 and 7.4, and mitigation in accordance with N.J.A.C. 7:7A-15.26.

N.J.A.C. 7:7A-6.4 Matrix type width reduction transition area waiver

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

(g)) [To determine the slope of the transition area for use in the applicable matrix at (e) above, an applicant shall:

1. Measure the percent change in ground elevation from the outside boundary of the standard transition area to the inner (closest to the wetlands) edge of the area to be disturbed;

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2. Repeat the measurement in (g)1 above at representative intervals along the outside transition area boundary, covering all of the transition area proposed to be reduced; and

3. Determine the arithmetic mean of the slope measurements taken under (g)2 above as the average slope for use in the applicable transition area matrix at (e) above]

The percent slope of the transition area for use in the applicable matrix at (e) above shall be established by measuring the distance perpendicular to the contour of the slope on the plan. The percent slope shall be calculated for each two-foot contour interval at 10-foot intervals. For example, any location in the transition area where there is a one-foot rise over a 10-foot horizontal run constitutes a 10 percent slope; a two-foot rise over a 10-foot horizontal run constitutes a 20 percent slope.

(h)-(i) (No change.)

N.J.A.C. 7:7A-6.5 Hardship transition area waiver

(a) (No change.)

(b) The Department shall presume that a hardship under (a) above exists and shall issue a hardship transition area waiver that reduces the transition area in an amount determined under (c) below, provided that the applicant demonstrates that all of the following criteria are met:

1.-6. (No change.)

7. The applicant has offered the site for sale at fair market value as determined by a fair market value appraisal, performed by a State-licensed appraiser and using a form letter provided by the Department, to adjacent property owners and the offer was refused or is not reasonable, assuming a minimum beneficial economically viable use, in accordance with N.J.A.C. 7:7A-17, to alleviate the hardship; [and]

8. The applicant has offered the site for sale at fair market value as determined by a fair market value appraisal, performed by a State-licensed appraiser, and using a form letter provided by the Department, to interested public and/or private conservation

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organizations on a list provided by the Department, and the offer was refused or is not reasonable, assuming a minimum beneficial economically viable use, in accordance with N.J.A.C. 7:7A-17, to alleviate the hardship;

9. The form letter of sale under (b)7 and 8 above shall be sent by certified mail and shall:

i. Indicate that the offer is open for a period of at least 90 days;

ii. Include a copy of a fair market value appraisal, performed by a State-licensed appraiser; and

iii. Include a full disclosure that the property is contained within a wetland transition areas that restricts its use.

(c) (No change.)

SUBCHAPTER 7 INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

N.J.A.C. 7:7A-7.1 General provisions for individual permits

(a) To be authorized under an individual permit, an activity shall meet the following requirements:

1. (No change.)

2. In addition to the requirements at N.J.A.C. 7:7A-7.2, a non water-dependent activity, as defined at N.J.A.C. 7:7A-1.4, shall meet the requirements at [N.J.A.C. 7:7A-7.3] N.J.A.C. 7:7A-7.4, except if the activity disturbs only State open waters that are not special aquatic sites as defined at N.J.A.C. 7:7A-1.4; and

3. In addition to the requirements at N.J.A.C. 7:7A-7.2 [and N.J.A.C. 7:7A-7.3], a non water-dependent activity in an exceptional resource value wetland or trout production water shall meet the requirements at [N.J.A.C. 7:7A-7.4] N.J.A.C. 7:7A-7.5.

(b)-(d) (No change.)

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N.J.A.C. 7:7A-7.2 Standard requirements for all individual permits

(a) This section sets forth requirements that apply to all activities to be covered by an individual permit, including both water-dependent activities, as defined at N.J.A.C. 7:7A-1.4, and non water-dependent activities. Additional individual permit requirements that apply only to non water-dependent activities are found in N.J.A.C. 7:7A-[7.3 and] 7.4.

(b) The Department shall issue an individual freshwater wetlands or open water fill permit only if the regulated activity:

1.-8. (No change.)

9. Will not adversely affect a property which is listed or is eligible for listing on the New Jersey or National Register of Historic Places unless the applicant demonstrates to the Department that the proposed activity avoids or minimizes impacts to the maximum extent practicable or the Department determines that any impact to the affected property would not impact the property's ability to continue to meet the criteria for listing at N.J.A.C. 7:4-2.3 or otherwise negatively impact the integrity of the property or the characteristics of the property that led to the determination of listing or eligibility. The Department shall not issue a conditional permit if it finds that the mitigation proposed is inadequate to compensate for the adverse affect. Any permit for an activity which may adversely affect a property listed or eligible for listing on the New Jersey or National Register of Historic Places shall contain conditions to ensure that any impact to the property is minimized to the maximum extent practicable and any unavoidable impact is mitigated[.];

i. If the permittee, before or during the authorized work, encounters a [probable] possible historic property, as described at N.J.A.C. 7:7A-12.2(1), that [has not been listed or determined eligible for listing on the New Jersey or National Register, but which] is or may be eligible for listing on the New Jersey or National Register, the permittee shall preserve the resource, immediately notify the Department and proceed as directed by the Department;

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10.-12. (No change.)

13. Will not involve a discharge of dredged material or a discharge of fill material, unless the material is clean, suitable material free from toxic pollutants in toxic amounts, which meets Department rules for use of dredged or fill material; [and]

14. Is consistent with the applicable approved Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., unless the activities are not subject to the Department's Water Quality Management Planning rules at N.J.A.C. 7:15[.] ; and

15. Is part of a project that in its entirety complies with the Stormwater Management rules at N.J.A.C. 7:8.

(c) (No change.)

N.J.A.C. 7:7A-7.3 (Reserved)

N.J.A.C. 7:7A-7.4 Additional requirements for a non water-dependent activity in a wetland or special aquatic site

(a)-(b) (No change.)

(c) In order to rebut the presumption established in (b) above, an applicant must demonstrate all of the following:

1.-4. (No change.)

5. If any portion of the proposed activity will take place in an exceptional resource value wetland or in trout production waters, that the requirements of N.J.A.C. 7:7A-[7.4] 7.5 are met.

SUBCHAPTER 8 EMERGENCY PERMITS

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N.J.A.C. 7:7A-8.1 Emergency permits

(a) (No change.)

(b) An emergency permit may be approved orally by the Director of the Department's Division of Land Use Regulation [Program] or issued in writing, except that if it is approved orally, the Department shall issue a written authorization within five days after the oral approval.

(c)–(f) (No change.)

SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURE

N.J.A.C. 7:7A-10.1 Basic application information

(a) (No change.)

(b) This subchapter applies to an application for all of the following:

1. (No change.)

2. Authorization to act under a general permit, except that the following activities are subject to application requirements in the general permits listed below, and are not subject to any of the application requirements in this subchapter except for the public notice requirements at N.J.A.C. 7:7A-[10.9] 10.8:

i.-ii. (No change.)

iii. Minor channel or stream cleaning performed by a local government agency under general permit 26;

3. [A combined flood hazard area permit and general permit authorization;

4. An individual] A transition area waiver;

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5. 6. and 7. are recodified at 4. 5. and 6. (No change in text.)

(c) (No change.)

(d) An application shall be submitted by the owner of the site which is the subject of the application, or by a person who has the legal authority to perform the activities proposed in the application on the site, and to carry out all requirements of this chapter. Others may assist the owner in preparing an application, and may submit reports or other information in accordance with N.J.A.C. 7:7A-[10.10] 10.9.

(e)-(g) (No change.)

(h) Application checklists and application forms for the Division of Land Use Regulation [Program] approvals can be downloaded and/or printed from the Division of Land Use Regulation [Program] website at www.state.nj.us/dep/landuse, or they can be obtained by contacting the Department at the address in N.J.A.C. 7:7A-1.3.

(i)-(l) (No change.)

(m) If a project requires approvals from the Division of Land Use Regulation [Program] under other chapters, the Department encourages, but does not require, the applicant to submit one application for all project approvals. If an application covers more than one Division of Land Use Regulation [Program] approval, the application shall:

1.-2. (No change.)

3. Include a comprehensive environmental plan, showing all activities on the site that are regulated by the Division of Land Use Regulation [Program].

(n)-(p) (No change.)

(q) When a survey is required, it shall be conducted and the documentation provided in accordance with the requirements at N.J.A.C. 7:36 Appendix 2, specifically scope of work: property surveys at 3.4.2; corner markers at 3.5.2.10.1, deed description at 3.5.4, metes and bound description and reduced survey plan at 3.6.6, and digital files at 3.6.7.

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N.J.A.C. 7:7A-10.2 Basic content requirements for all applications

(a) This section includes basic information required for every approval covered by this subchapter (see N.J.A.C. 7:7A-10.1(b)). Each application checklist will require this information and in addition will require information specific to the type of approval sought. The additional information required for each specific approval is set forth below at N.J.A.C. 7:7A-10.3 through [10.8] 10.7.

(b) The application checklist for every application covered by this subchapter shall require the following:

1. An application form, including a certification of truth and accuracy that meets the requirements at N.J.A.C. 7:7A-[10.10] 10.9, completed as directed in the instructions and/or application checklist. The application form will include basic information regarding the site, the applicant, and the activities proposed;

2.-3. (No change.)

4. Visual materials, including, but not limited to, maps, plans, surveys, diagrams, or photographs as necessary to accurately portray the site, existing conditions on the site, all areas of Department land use regulatory jurisdiction, and any activities proposed on the site;

5. Written narrative information and/or reports as necessary to accurately describe the site, its location (including State plane coordinates), site conditions including areas of Department land use regulatory jurisdiction, and any planned activities, including schedules for performing regulated activities, if appropriate;

6. Documentation that the applicable requirements at N.J.A.C. 7:7A-[10.9] 10.8, Public notice requirements for applications, have been met;

7. Information and [/or] certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources or other features on the site that are relevant to determining compliance with the requirements of this chapter. [Failure to provide all such information of which the applicant, its consultants, or agents is aware may result in denial or termination of the permit under

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N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9];

8. Information necessary to demonstrate compliance with the stormwater management requirement at N.J.A.C. 7:7A-2.11;

Recodify existing 8. and 9. as 9. and 10. (No change in text.)

(c)-(d) (No change.)

(e) Failure to provide all information of which the applicant, its consultants, engineers, surveyors, or agents are or should be aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant, its consultants, engineers, surveyors, or agents to penalties for submittal of false information under N.J.A.C. 7:7A-16.10.

N.J.A.C. 7:7A-10.3 Additional application requirements for an LOI

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

(d) The application checklist for a line verification LOI issued under N.J.A.C. 7:7A-3.4 shall require the following:

1. A proposed delineation of all freshwater wetlands, transition areas, and State open waters on the site, or portion thereof, which is the subject of the application. The delineation shall be clearly marked in the field as required by the application checklist. When delineating a State open water one to five feet in width measured from top of bank, with no wetland boundary, the delineation shall indicate the centerline of the State open water with several data points numbered and shown on the plans. When delineating a State open water that is greater than five feet in width, the delineation shall include two survey lines, with numbered points, depicting the top of bank on both sides of the State open water;

2.-4. (No change.)

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N.J.A.C. 7:7A-10.4 Additional application requirements for a general permit authorization

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a general permit authorization shall require:

1. (No change.)

2. A line delineation LOI issued under N.J.A.C. 7:7A-3.3, or a line verification LOI issued under N.J.A.C. 7:7A-3.4, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-3.2 is not sufficient. If no LOI has been issued, or if only a presence/absence LOI has been issued, the application checklist shall require all information required for an application for a line delineation LOI or line verification LOI, covering the portion of the site that will be affected by the general permit activities. In addition, the application checklist shall require the total area, in acres, of wetlands and State open waters on the site before the regulated activity is performed, and the total area, in acres, of wetlands and State open waters, on the site that will remain after the regulated activity is performed. The total area of wetlands and State open waters on the site can be approximated using a planimeter or other mapping technique;

3. Information regarding whether other approvals are required for the activities by Federal, interstate, State and local agencies for the activity; information regarding whether any such approvals or denials have been received; and information regarding whether the proposed activities are consistent with the rules, plans, or policies of other Federal, interstate, State and local agencies; [and]

4. If a site is known or suspected to be contaminated with toxic substances, and if the Department requests it, a laboratory analysis of representative samples of the soil or sediment on the site[.];

5. Documentation regarding when the lot that is the subject of the general permit was created by subdivision;

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6. A history of the ownership of the property beginning June 30, 1988 to present; and

7. A listing of contiguous lots that were in common ownership with the lot on which the activities are proposed and the ownership history of each lot beginning June 30, 1988 to present.

N.J.A.C. 7:7A-10.5 Additional application requirements for [an individual] a transition area waiver

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, an application checklist for [an individual] a transition area waiver, as defined at N.J.A.C. 7:7A-1.4, shall require the following:

1.-3. (No change.)

(b) In addition to the information required at (a) above, the application checklist for a special activity transition area waiver based upon an individual permit criteria under N.J.A.C. 7:7A-6.3(g) shall require:

1. The applicable fee for a transition area waiver set forth at N.J.A.C. 7:7A-11;

2. The information required for an individual freshwater wetlands permit application at N.J.A.C. 7:7A-10.6(b); and

3. A mitigation proposal in accordance with the requirements at N.J.A.C. 7:7A-15.26.

[(b)] (c) In addition to the information required at (a) above, the application checklist for a hardship transition area waiver under N.J.A.C. 7:7A-6.5 shall require [the information required for an Individual freshwater wetlands permit application at 10.6(b).] the information contained in N.J.A.C. 7:7A-17.1(i)4, 5, 7, 8i-iii, and a statement indicating that the property owner has requested a hardship transition area waiver.

N.J.A.C. 7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

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(a) In addition to the basic information required for all applications in N.J.A.C. 7:7A-10.2, the application checklist for an individual freshwater wetlands or open water fill permit shall require the following information:

1. (No change.)

2. A line delineation LOI issued under N.J.A.C. 7:7A-3.3, or a line verification LOI issued under N.J.A.C. 7:7A-3.4, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-3.2 is not sufficient. If no LOI has been issued for the site, or if only a presence/absence LOI has been issued, the application checklist shall require all information required for an application for a line delineation LOI or line verification LOI. In addition, the application checklist shall require the total area of wetlands and State open waters, in acres, on the site before the regulated activity is performed, and the total area, in acres, of wetlands and State open waters on the site that will remain after the regulated activity is performed. The total area of wetlands and State open waters on the site can be approximated using a planimeter or other mapping technique;

3.-7. (No change.)

(b) (No change.)

[N.J.A.C. 7:7A-10.7 Additional application requirements for a combined flood hazard area permit and general permit authorization

(a) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 2 authorization and flood hazard area permit authorizing an underground utility line shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 2; and

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2. Any additional information necessary to demonstrate compliance with N.J.A.C.

7:7A-5.2A.

(b) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 10A authorization and flood hazard area permit authorizing a very minor road crossing shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 10A; and

2. Any additional information required under N.J.A.C. 7:13 to demonstrate compliance with the Department's Flood Hazard Area Control Act rules.

(c) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 11 authorization and flood hazard area permit shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 11; and

2. Any additional information required under N.J.A.C. 7:13 to demonstrate compliance with the Department's Flood Hazard Area Control Act rules.

(d) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a combined freshwater wetlands general permit 20 authorization and flood hazard area permit shall require both of the following:

1. All information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 20; and

2. Any additional information required under N.J.A.C. 7:13 to demonstrate compliance with the Department's Flood Hazard Area Control Act rules.

(e) The application checklist for a combined general permit 26 authorization and flood hazard area permit shall require either of the following:

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1. The basic information required for all applications under N.J.A.C. 7:7A-10.2, and in addition all information required under N.J.A.C. 7:7A-10.4 for an application for authorization under general permit 26; or

2. The information required for approval of a project for cleaning, clearing, or de-snagging a channel under the Flood Hazard Area Control Act rules at N.J.A.C. 7:7A-13.]

N.J.A.C. 7:7A-[10.8] 10.7 Additional application requirements for a modification or extension

(a) (No change.)

(b) An application checklist for a minor modification shall require the following:

1. For a change in ownership or operational control of a permitted site or activity under N.J.A.C. 7:7A-14.3(c)3:

i. (No change.)

ii. [A written agreement, signed by the current and the new permittees, containing a date for transfer of responsibility, coverage, and liability between the current and new permittees; and] A written request to transfer the approval, which includes all of the following:

(1) The notarized signature of each original owner of the site, or any legal designee thereof;

(2) The name and address of each new owner (or contract purchaser) of the site;

(3) A list of any adjacent property already owned by the new owner;

(4) The date the property will be or has been transferred to the new owner;

(5) A statement by the new owner (or contract purchaser), signed and notarized, accepting the permit and all conditions; and

(6) A copy of a recorded conservation restriction or easement, if required as a condition of the approval being transferred; or

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2. (No change.)

(c) An application for a minor modification does not require [a fee under N.J.A.C. 7:7A-11, or] public notice under N.J.A.C. 7:7A-[10.9] 10.8.

(d)-(f) (No change.)

N.J.A.C. 7:7A-[10.9] 10.8 Public notice requirements for applications

(a)-(i) (No change.)

(j) An applicant proposing to create, enhance or restore wetlands to satisfy a mitigation requirement in accordance with N.J.A.C. 7:7A-15.11 shall comply with (c) through (e) and (g) above except that the notice required in accordance with (e) above shall be sent to municipal and county officials and all owners of land within 200 feet of the proposed mitigation project site.

(j) and (k) are recodified as (k) and (l). (No change in text.)

N.J.A.C. 7:7A-10.10, Signatories to permit applications and reports, is recodified as 10.9. (No change in text.)

N.J.A.C. 7:7A-10.11, Confidentiality, is recodified as N.J.A.C. 7:7A-10.10. (No change in text.)

SUBCHAPTER 11 FEES

N.J.A.C. 7:7A-11.1 General fee provisions

(a) (No change.)

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(b) The following applications shall not require an application fee:

1. (No change.)

2. An application for authorization under general permit 16 or general permit 25, found at N.J.A.C. 7:7A-5.16 and 5.25, respectively; and

3. An application for authorization of activities on public land under general permit 17, found at N.J.A.C. 7:7A-5.17[; and

4. An application for a minor modification under N.J.A.C. 7:7A-14.3(c)].

(c) (No change.)

(d) If proposed activities require approval under this chapter and in addition require one or more other Division of Land Use Regulation [Program] permits (such as a CAFRA permit, waterfront development permit, coastal wetlands permit, or flood hazard area permit), the application fee shall be the sum of the following:

1. The highest single application fee of all the permits required for the project; and

2. Seventy-five percent of the application fee for each additional approval required.

For example, if an applicant has a two acre site and is applying for a freshwater wetlands letter of interpretation line verification (\$600 + \$84/acre= \$768), general permit (\$600), and a transition area waiver (\$600 + \$48/acre=\$696), together with a Flood Hazard Area Control Act permit (major=\$4,000) and two Waterfront Development general permits (\$600 each), the combined fee shall be determined as follows:

Freshwater wetlands fee: \$768+\$600+\$696=\$2,064

Flood Hazard Area Control Act fee: \$4,000

Waterfront: \$600x2= \$1,200

Total Fee= \$4,000 (the highest fee) + (75% of 2,064) + (75% of \$1,200) =

\$4,000+\$1,548+\$900 = \$6,448.

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

(g) In some cases, an applicant's act or omission makes it necessary for Department staff to perform more than one site visit during the review of an application. In such a

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case, the Department shall assess an additional fee of up to \$ 1,000 for each additional site visit. No permit, waiver, or letter of interpretation shall be issued until this fee has been paid.

FEE TABLES

Application fees for LOIs (N.J.A.C. 7:7A-3):

Type of LOI	Fee
Presence/absence LOI--whole site	\$ 240.00
Presence/absence LOI under N.J.A.C. 7:7A-3.2--portion of a site or footprint of disturbance	\$ 480.00
Line delineation LOI under N.J.A.C. 7:7A-3.3--site smaller than one acre	\$ 600.00
Line verification LOI under N.J.A.C. 7:7A-3.4--site smaller than one acre	\$ 600.00
Line verification LOI under N.J.A.C. 7:7A-3.4--site one acre or larger	\$ 600.00 plus \$ 84.00 per acre n1, up to \$ 60,000
LOI extension under N.J.A.C. 7:7A-3.6	\$ 240.00, or 25 percent of original fee, whichever is greater
LOI (any type) and a transition area waiver, (any type) if The site is one acre or smaller.	\$ 840.00 Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.

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LOI (any type) and a transition area waiver, (any type) if The site is larger than one acre.	\$ 1,080.00 plus \$ 96.00 per acre n1 Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.
--	--

LOI (any type) and a general permit authorization	Sum of applicable LOI and general permit authorization fees
---	---

LOI (any type) and an individual permit	Applicable individual permit fee
---	----------------------------------

Application fees for general permit authorizations (N.J.A.C. 7:7A-5):

Type of general permit	Fee
Any general permit authorization, except:	\$ 600.00

1. General permit 16 (wildlife management);
2. General permit 25 (septic repair);

Or

- | | |
|--|------|
| 3. General permit 17 (trail/boardwalk) on public land. | None |
|--|------|

Authorization under any of the following:	None
---	------

1. General permit 16 (wildlife management);
2. General permit 25 (septic repair);

Or

3. General permit 17 (trail/boardwalk)

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on public land.

Multiple general permit authorizations for one site	\$ 600.00 plus \$ 240.00 for each additional general permit
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General permit authorization extension	\$ 240.00
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[Combined general permit 2 authorization and flood hazard area Permit]	[\$1,170.00]
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[General permit 10A, 11, or 20 authorization combined with a major flood hazard area permit]	[\$ 5,250.00]
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[General permit 10A, 11 or 20 combined with a minor flood hazard area permit]	[\$ 1,070.00]
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[Combined general permit 26 authorization and flood hazard area Permit]	[\$ 600.00]
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Application fees for transition area waivers (N.J.A.C. 7:7A-6):

Type of transition area waiver	Fee
Any transition area waiver, if:	\$ 240.00

1. The entire site is covered by a valid line delineation or line verification LOI; and
2. The site is one acre or smaller.

Any transition area waiver, if:	\$ 600.00 plus \$ 48.00 per
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1. The affected portion of the site is _____ acre affected n2

covered by a valid line delineation or

Line verification LOI; and

2. The site is over one acre.

Any transition area waiver, if: \$ 840.00

1. The site is not covered by a valid LOI, or has a presence/absence LOI only; and

Note: this application fee is for a combined transition area waiver and LOI, since the

2. The site is one acre or less.

wetlands must be delineated before the review of the transition area waiver application.

Any transition area waiver if: \$ 1,080.00 plus \$ 96.00 per

1. The site is not covered by a valid LOI, or has a presence/absence LOI only; and

acre [affected n3]

2. The site is larger than one acre.

Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application.

Multiple transition area waivers (unless all are special activity transition area waivers)

Sum of all fees for all of the applicable transition area waivers

Multiple special activity transition area waivers for a single site

\$ 600.00 plus \$ 240.00 for each additional special activity waiver

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Transition area waiver (any type) and an individual freshwater wetlands or open water fill permit	Either the applicable transition area waiver fee or the individual permit fee, whichever is higher
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Transition area waiver (any type) and one or more general permit authorizations	The applicable transition area waiver fee, plus \$ 600.00 for the first general permit authorization, and \$ 240.00 for each additional general permit authorization
---	--

Transition area waiver extension	\$ 240.00
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Application fees for exemption letters (N.J.A.C. 7:7A-2.10):

Type of approval	Fee
Exemption letter	\$ 240.00

Application fees for individual permits (N.J.A.C. 7:7A-7):

Type of approval	Fee
Individual freshwater wetlands or open water fill permit	\$ 2,400 plus \$ 240.00 per 1/10 acre affected n4

Individual permit extension	\$ 1,200.00
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Application fees for modifications (N.J.A.C. 7:7A-14):

Type of approval	Fee
Minor modification	[None] <u>\$240.00</u>

General permit authorization modification	\$ 240.00
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Major modification	25 percent of the application fee originally charged for the approval
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that is being modified, or \$ 240.00,
whichever is higher.

Application fees for Water Quality Certifications (N.J.A.C. 7:7A-2.1(d)):

Type of approval	Fee
Water Quality Certificate	\$ 2,400 plus \$ 240.00 per 1/10 acre affected

Water Quality Certificate extension	\$ 1,200
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n1 When these fee tables refer to a cost "per acre," this means the cost is per acre or fraction thereof. For example, an area of one and one third acres would have the same fee as an area of two acres. When these fee tables refer to a cost "per 1/10 acre," this means the cost is per tenth of an acre or fraction thereof, such that an area of 0.12 acres would have the same fee as an area of 0.2 acres. When these fee tables refer to an "acre affected," this means an acre of freshwater wetlands, State open waters, or transition area that will be affected by a regulated or prohibited activity.

n2 See note 1 above.

n3 See note 1 above.

n4 See note 1 above.

Additional Fees for Major Developments pursuant to N.J.A.C. 7:8-1.2 (N.J.A.C. 7:7A-4.3(b)10, N.J.A.C. 7:7A-5.11 and N.J.A.C. 7:7A-7.2):

Qualifier	<i>Area of Impact</i>	<i>Fee</i>
Base fee for any major development	Any size project	\$2,000
Additional fee for the review of groundwater recharge calculations (pursuant to N.J.A.C. 7:8-5.4(a)2) per area of land disturbed by the project	Up to 3 acres	\$500
	More than 3 acres and up to 10 acres	\$1,000

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	More than 10 acres and up to 100 acres	\$2,000
	More than 100 acres	\$4,000
Additional fee for the review of runoff quantity calculations (pursuant to N.J.A.C. 7:8-5.4(a)3) per area of land disturbed by the project	Up to 3 acres	\$500

SUBCHAPTER 12 DEPARTMENT REVIEW OF APPLICATIONS

N.J.A.C. 7:7A-12.1 Completeness review

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

(d) If the Department requests additional information under (c)4 above, the applicant shall provide copies of the additional information to the persons who received a copy of the initial application under N.J.A.C. 7:7A-[10.9] 10.8, and to the reviewing agencies who received a copy under (c)2 above.

(e) If an application is returned for incompleteness under (b) above, the applicant may submit a new application without repeating the public notice requirements of N.J.A.C. 7:7A-[10.9] 10.8 if the new application:

1.-2. (No change.)

(f) (No change.)

N.J.A.C. 7:7A-12.2 USEPA review

(a) –(j) (No change.)

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(k) The Department shall submit an application to the U.S. Fish and Wildlife Service for review of the potential for impacts on Federally listed threatened or endangered species [if the application is for an individual permit, or for authorization under general permit 2, 4, 5, 6, 7, 10A, 10B, 11, 13, 15, 17, 18, 20, 22, 23, 24, 26 or 27, and the site is located in a municipality that has documented occurrences of threatened or endangered species, or critical habitat, as defined in the Federal Endangered Species Act, 16 U.S.C. §§ 1531 et seq. If an application is submitted for such review, the time required for a final decision on the application will be extended as necessary to complete the review in accordance with the time limits set forth] in accordance with the 1993 Memorandum of Agreement between the Department and the U.S. Fish and Wildlife Service, and all modifications, addenda, and clarifications thereto, executed in order for the Department to assume responsibility for the Federal 404 program.

(l) The Department shall identify all wetland permit applications for proposed projects that may affect properties which are listed, or are eligible for listing, on the New Jersey or National Register of Historic Places. In accordance with N.J.A.C. 7:4-8.1(a), an "effect" on "property which is listed or is eligible for listing on the New Jersey or National Register of Historic Places" can be direct or indirect and occurs whenever any aspect of the project causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archaeological, or cultural characteristics that qualified a historic property to meet the criteria of evaluation for inclusion in the New Jersey or National Register. Applications reflecting any of the following characteristics shall be deemed to present a high probability of the presence of historic and archaeological resources, requiring assessment and shall require, with the wetlands permit application, the submittal of a Phase IA historical and archaeological survey, and an architectural survey, defined at N.J.A.C. 7:7A-1.4:

1.-5. (No change.)

(m) In order to demonstrate due diligence in identifying historic sites that may be affected by a wetlands permit application, as well as provide the Department with

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information regarding sites with historic or potentially historic resources, the applicant shall submit with each permit application:

1. Clear color photographs of all buildings, structures, ruins of buildings and structures, and burial grounds on the site;

2. A key map of the site locating all photographs provided in 1. above; and

3. All information and copies of correspondence, known, received or in the possession of project representatives or the applicant, regarding historic districts, buildings, structures, ruins, burial grounds, and archaeological sites on or near the project site.

[(m)] (n) Applicants who are or will be pursuing Federal financial assistance, permits, licenses, or other approvals for the project that is the subject of the freshwater wetlands permit application, shall supply a copy of the consultation comments provided by the Department's Historic Preservation Office (HPO) in its role as staff to the Federally designated State Historic Preservation Officer (SHPO) under Section 106 of the National Historic Preservation Act (16 U.S.C. § 470(f)), together with a statement detailing how the comments have been incorporated into the project, with the State freshwater wetlands permit application. The Department will consider that information as a part of its review under this chapter.

1. If an applicant is not and will not be pursuing Federal financial assistance as described in [(m)] (n) above, the applicant shall provide the Department with a statement to that effect.

[(n)] (o) Public entities that are or will be pursuing a project authorization application, pursuant to N.J.A.C. 7:4-7, for the project that is the subject of the freshwater wetlands permit application shall comply with either [(n)] (o)1 or 2 below. For the purposes of this subsection, "public entities" means the State, county, municipality, or an agency or instrumentality thereof:

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1.-2. (No change.)

(p) At sites where activities require a freshwater wetlands and/or State open water permit, the demolition of buildings or structures potentially over 50 years of age, or the disturbance of soils, shall not be undertaken prior to receipt of such permit. Undertaking such activities without a permit shall be considered a violation of this chapter.

N.J.A.C. 7:7A-12.3 Public comment on an application

(a) The Department shall publish notice in the DEP Bulletin of each administratively complete application in accordance with N.J.A.C. 7:7A-12.1, except for an application for a minor modification. This notice shall constitute notice of the application to all interested persons except those who must be notified by the applicant under N.J.A.C. 7:7A-[10.9] 10.8.

(b) (No change.)

(c) The applicant shall transmit a copy of each application to the clerk of the municipality in which the project is located in accordance with N.J.A.C. 7:7A-[10.9] 10.8, to be made available for public inspection.

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

N.J.A.C. 7:7A-12.4 Hearings on an application for an individual permit or [individual] transition area waiver

(a) Within 30 days after a notice of an application for an individual permit or [individual] transition area waiver is published in the DEP Bulletin, interested persons may request in writing that the Department hold a public hearing on the application. Requests shall state the nature of the issues proposed to be raised at the hearing.

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(b) The Department may issue or deny an individual permit or [individual] transition area waiver without a public hearing. However, the Department will hold a public hearing if:

1.-3. (No change.)

(c)-(d) (No change.)

(e) The applicant shall give public notice of the public hearing by doing the following, at least 30 days before the hearing:

1. Sending a completed public hearing notice form, obtained from the Department at the address in N.J.A.C. 7:7A-1.3 or the Division of Land Use Regulation [Program] website at www.state.nj.us/dep/landuse, to the following:

i. All persons to whom a complete application must be sent under N.J.A.C. 7:7A-[10.9] 10.8(d);

ii. All persons to whom a notice of an application must be sent under N.J.A.C. 7:7A-[10.9] 10.8 (e); and

iii. (No change.)

2. Publishing a display advertisement containing the completed hearing notice form, in accordance with N.J.A.C. 7:7A-[10.9] 10.8 (h).

(f)-(j) (No change.)

N.J.A.C. 7:7A-12.5 Final decisions

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

[(f) Whenever possible, the Department shall make a final decision on an application for a combined general permit authorization and flood hazard area permit within the deadlines that apply to flood hazard area permits under the Flood Hazard Area Control Act rules at N.J.A.C. 7:13 and the 90-day construction permit rules at N.J.A.C. 7:1C.

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However, if the Department does not make a final decision on such an application within those deadlines, only the portion of the application that is governed by the substantive standards in N.J.A.C. 7:13 shall be deemed approved. The portion of the application that is governed by the substantive standards in this chapter shall not be deemed approved until the Department issues a written general permit authorization for the regulated activities.]

N.J.A.C. 7:7A-12.6 Cancellation, withdrawal, resubmission and amendment of applications

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

(f) An applicant may choose to amend an application at any time as part of the permit review process. If an applicant amends an application:

1. The applicant shall provide a copy of the new or changed information to the same persons who received a complete copy of the initial application under N.J.A.C. 7:7A-[10.9] 10.8, Public notice requirements for applications. The information need not be provided to persons who received only a notice of the application, unless the Department determines that the change will increase the environmental impact of the project; and

2. (No change.)

SUBCHAPTER 13 CONTENTS OF PERMITS AND WAIVERS

N.J.A.C. 7:7A-13.1 Standard conditions that apply to all permits

(a) The following conditions apply to all permits issued under this chapter, including all waivers and general permit authorizations:

1.-10. (No change.)

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11. Signatory requirement: All applications, reports, or information submitted to the Department shall be signed and certified as required in N.J.A.C. 7:7A-[10.10] 10.9; and

12. (No change.)

13. Duty to mitigate: The permittee shall perform any mitigation required under the permit prior to or concurrently with regulated activities in accordance with N.J.A.C. 7:7A-15.3(a). If a permittee performs permitted activities without performing required mitigation, the acreage of mitigation required shall be increased by 20 percent each year in accordance with N.J.A.C. 7:7A-15.3(b)[.] ; and

14. Construction notification: The permittee shall submit written notification to the Bureau of Coastal and Land Use Compliance and Enforcement, NJDEP, P.O. Box 422, 401 East State Street, Trenton, NJ 08625-0422, seven days prior to the commencement of site preparation or of regulated activities, whichever comes first. The notification shall contain proof of recording of a conservation restriction or easement, if one was required as part of the permit.

(b)-(f) (No change.)

SUBCHAPTER 14 CHANGES TO ISSUED PERMITS OR WAIVERS

N.J.A.C. 7:7A-14.2 Transfer of a permit

N.J.A.C. 7:7A-14.2 Transfer of a permit

If a permittee wishes to transfer ownership of a site to another person [, or to transfer] operational control] or ownership of permitted activities on a site to another person, the permittee shall submit an application for a modification, which meets the requirements at N.J.A.C. 7:7A-14.3 prior to transferring the permit. If all permitted activities are completed, including any required mitigation, a modification is not required. Unless a permit modification has been issued to the new permittee, only the original permittee may conduct regulated activities on the site.

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N.J.A.C. 7:7A-14.3 Modification of a permit

(a) With the exception of a modification due to a change in ownership or operational control of a project, as described in (c)3 below, which is mandatory, [A] a modification of a permit, including a transition area waiver or general permit authorization, may be requested by a permittee or, in the cases set forth at (f) below, the Department may modify a permit on its own initiative.

(b) (No change.)

(c) The following changes are minor modifications that may be made to any permit or in the case of a change in ownership or operational control shall be made to any permit, including a general permit authorization or transition area waiver:

1.-2. (No change.)

3. A change in ownership or operational control of a project, where no other change in the original permit or waiver is necessary. If any other change in the permit is necessary, the change shall be made through a major modification; [and]

i. A permit may be transferred to another person, provided:

(1) The permit is valid;

(2) The permit is not an emergency permit;

(3) The permit is transferred to a person who currently owns the site, or who is under contract to purchase the site, on which activities authorized under the permit are to be conducted. A transfer of a permit to a contract purchaser shall become valid only upon the actual transfer of the site to the new owner;

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(4) The Department determines that the transfer will not alter a basic condition upon which the original permit was granted or otherwise circumvent a requirement of this chapter as described in (A) below;

(A) The Department shall not approve the transfer of a permit if doing so would alter a basic condition or premise upon which the original permit was granted or would otherwise circumvent a requirement of this chapter. For example, a permit issued to a public entity may be granted in consideration of the fact that the public entity has powers of eminent domain or is acting in the public interest. Since such factors would not exist if the applicant were a private party, the basic premise upon which the permit was approved may be invalid and therefore the Department would not approve the transfer. In another example, if an applicant receives a permit based upon the Department's finding of no alternative to the proposed activity, but the person to whom the permittee proposes to transfer the site has an alternative, the basic premise upon which the permit was approved no longer exists. In such cases, the Department would not approve the transfer of the permit to the new owner; and

(5) The permittee to whom the permit was transferred notifies the Department before conducting site preparation or regulated activities, in accordance with N.J.A.C. 7:7A-13.1(a)14; and

(6) The original permittee, who wants to transfer the permit, provides to the Department proof of recording of any conservation restriction or easement that was a requirement of the permit being transferred.

4. (No change.)

(d)-(g) (No change.)

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(h) An applicant for a modification shall follow the procedures at N.J.A.C. 7:7A-[10.8] 10.7. An application for a modification to a general permit authorization does not require public notice in accordance with N.J.A.C. 7:7A-[10.9] 10.8. An application for a minor modification does not require a fee under N.J.A.C. 7:7A-11, or public notice under N.J.A.C. 7:7A-[10.9] 10.8.

(i) (No change.)

N.J.A.C. 7:7A-14.6 Permit extensions

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

(e) An application for an extension of a permit shall meet the application requirements at N.J.A.C. 7:7A-10, including the public notice requirements at N.J.A.C. 7:7A-[10.9] 10.8.

SUBCHAPTER 15 MITIGATION

N.J.A.C. 7:7A-15.1 Mitigation definitions

In addition to the terms defined at N.J.A.C. 7:7A-1.4, the following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

...

"Enhancement" means the improvement of the ability of an existing, degraded wetland or State open water to support natural aquatic life, through substantial alterations to the soils, vegetation and/or hydrology. Improvement of a wetland or water that is not degraded does not constitute enhancement. Conversion of a State open water to a wetland does not by itself constitute enhancement, although the Department may approve a mitigation proposal that includes this in some cases as part of a larger mitigation project.

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The addition of human-made habitat improvement devices such as duck boxes does not constitute enhancement nor does the removal of trash or debris.

...

“Mitigation Banking Instrument” means documentation of Department approval of the objectives and administration of the bank including, as appropriate:

1. Bank goals and objectives;

2. Ownership of bank lands;

3. Bank size and classes of wetlands and/or other aquatic resources proposed for inclusion in the bank, including a site plan and specifications;

4. Description of baseline conditions at the bank site;

5. Geographic service area;

6. Wetland classes or other aquatic resource impacts suitable for compensation;

7. Methods for determining credits and debits;

8. Accounting procedures;

9. Performance standards for determining credit availability and bank success;

10. Reporting protocols and monitoring plan;

11. Contingency and remedial actions and responsibilities;

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12. Financial assurances;

13. Compensation ratios; and

14. Provisions for long-term management and maintenance.

...

"Upland preservation" means the permanent protection of transition areas or other uplands from disturbance or development, through transfer of the property to a charitable conservancy as defined in this section, and the execution of legal instruments to prevent development, such as a conservation restriction or easement.

N.J.A.C. 7:7A-15.2 General mitigation requirements

(a) (No change.)

(b) The Department may require mitigation in accordance with this chapter in order to compensate for impacts to a freshwater wetland [and/or], State open water and/or transition areas resulting from the following:

1. Regulated activities authorized under an individual or general freshwater wetlands or open water fill permit; [and]

2. Certain violations of the Freshwater Wetlands Protection Act and/or this chapter[.]; and

3. Regulated activities approved in accordance with a special activity transition area waiver at N.J.A.C. 7:7A-6.3(g).

(c) (No change.)

(d) To be approved under this subchapter, mitigation must have a high probability of long term success. At a minimum, this requires the following:

1.-2. (No change.)

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3. The hydrology in and around the mitigation area must be adequate to support wetland conditions year round and indefinitely into the future. The hydrology for a proposed wetland mitigation site shall not include discharged stormwater;

4.-5. (No change.)

(e) (No change.)

(f) All correspondence with the Department and/or the Mitigation Council, including requests for application forms and checklists, and applications for Council approval or funding, shall be addressed to:

Mitigation Staff

NJDEP Division of Land Use Regulation [Program]

PO Box 439

Trenton, New Jersey, 08625

(609) 984-0194

lurweb@dep.state.nj.us

(g) When the Department requires mitigation, the permit, approval or enforcement document under which the mitigation is required shall authorize any regulated or prohibited activities, as defined at N.J.A.C. 7:7A-1.4, necessary to accomplish the mitigation. When mitigation is required for a disturbance that is not subject to a Department-issued permit, for example, when mitigation is required by the ACOE, the mitigation itself must be authorized through a permit or enforcement document issued by the Department under this chapter. In some cases, mitigation also involves activities that require approval through one or more other Division of Land Use Regulation [Program] permits, such as a flood hazard area, CAFRA, or Waterfront Development permit; or through other State or Federal permits. In such a case, mitigation shall not begin without these approvals.

(h) (No change.)

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(i) A mitigation area shall be permanently protected from future development in accordance with N.J.A.C. 7:7A-15.14 and in accordance with N.J.A.C. 7:7A-2.12.

(j)-(m) (No change.) .

(n) Upon approval of the Department, a permittee may aggregate onto one site the mitigation for multiple small (less than 0.5 acre in size), wetland disturbances resulting from the same project but that span several Watershed Management Areas.

N.J.A.C. 7:7A-15.3 Timing of mitigation

(a) Mitigation shall be performed within the applicable time period below:

1. Mitigation for a disturbance authorized by a permit, other than a temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, shall be performed prior to or concurrently with the permitted activity except that no regulated activities shall occur before the Department has approved a mitigation proposal, and shall be continued to completion according to the schedule in the approved mitigation proposal;

2.-3. (No change.)

(b)-(c) (No change.)

N.J.A.C. 7:7A-15.4 Property suitable for mitigation and the criteria for addressing contaminated sites

(a) Any offsite restoration, creation, enhancement, land donation, or upland preservation shall be carried out on private property, except that a government agency, as defined at N.J.A.C. 7:7A-1.4, may create, restore, or enhance on public land in accordance with this subchapter, as mitigation for a project funded solely with public monies, if the land was not acquired with Green Acres funding, as defined at N.J.A.C. 7:36-2.1, and [either] any one of the following criteria is met:

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1. The land is obtained or held by the government agency for mitigation; [or]

2. The land is obtained by the government agency by default or operation of law, through a tax lien or other similar circumstance[.]; or

3. The land obtained or held by the government agency is, or was formerly a wetland and the government agency is proposing to restore and/or enhance the wetland for mitigation.

(b)-(c) (No change.)

(d) The Department shall not approve mitigation through creation, restoration, or enhancement in an area that is already highly ecologically valuable, for example if the area contains a mature, well developed, ecologically desirable natural community; a State open water that supports fish; a forested habitat; or significant cultural or historic resources, as identified in accordance with N.J.A.C. 7:7A-12.2.

(e) The Department shall approve mitigation through creation, restoration, or enhancement only on property that is owned in fee simple and under the full legal control of the person responsible for performing the mitigation, or the person responsible for performing the mitigation shall demonstrate that the person has legal rights to the property sufficient to enable compliance with all requirements of his chapter. If a property is affected by an easement or other encumbrance, the person responsible for performing the mitigation shall ensure that the encumbrance is extinguished [or shall demonstrate that the encumbrance will not inhibit compliance with the mitigation requirements of this chapter].

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

(h) The Department shall not approve mitigation in an area that contains contamination [, unless the mitigator obtains a No Further Action letter for the mitigation area from the Department's Site Remediation Program, and in addition demonstrates that the mitigation activities will not pose a risk of exposing contaminants or reintroducing them into the environment] until all potential contaminated areas have been identified, and all remediation of the area(s) is completed so that there is no potential for the mitigation activities to result in the reintroduction of contamination to ecological

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communities or exposure of humans to contamination, and there is no potential for the mitigation site to be contaminated by the belated discovery of new areas of contamination requiring remediation. The Department will determine on a case by case basis whether it is feasible on a site containing contamination to conduct onsite mitigation;

1. If the Department determines that there is reason to suspect contamination on the proposed mitigation area, the site must be properly characterized and assessed to ensure there is no ecological risk associated with the proposal. To obtain this characterization, the mitigator shall establish a memorandum of agreement with the Department's Division of Remediation Management and Response in accordance with N.J.A.C. 7:26C in order to obtain a review of the submitted data;

2. The applicant shall not submit a proposed mitigation bank containing known or suspected contamination to the Department for conceptual approval in accordance with N.J.A.C. 7:7A-15.25(a) until the site has been fully characterized in accordance with 1. above.

(i) Stormwater management facilities designed to treat stormwater shall not constitute mitigation.

N.J.A.C. 7:7A-15.5 Mitigation for a smaller disturbance

(a)-(b) (No change.)

(c) The Department presumes that onsite mitigation for a smaller disturbance is not feasible. Therefore, mitigation for a smaller disturbance shall be performed through credit purchase in accordance with (d) below, unless the applicant demonstrates under (e) below that one of the following will be more environmentally beneficial:

1. (No change.);

2. Offsite restoration, creation, or enhancement, [or upland preservation,] which is performed in the same HUC 11, as defined at N.J.A.C. 7:7A-1.4, as the disturbance, or

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performed in an adjacent HUC 11 within the same watershed management area as the disturbance.

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

(f) If credit purchase under (d) above [is not feasible], and onsite or offsite mitigation under (c) above [is] are not feasible, mitigation shall be performed through a monetary contribution in accordance with N.J.A.C. 7:7A-15.21 or, if the Department determines that no other mitigation alternative is practicable or feasible, mitigation shall be performed through upland preservation, in accordance with N.J.A.C. 7:7A-15.9, or a land donation approved by the Wetlands Mitigation Council, in accordance with N.J.A.C. 7:7A-15.22.

N.J.A.C. 7:7A-15.6 Mitigation for a larger disturbance

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

(d) If onsite restoration, creation, or enhancement is not feasible, mitigation shall be performed through any of the following, at the applicant's option:

1.-2. (No change.)

3. Offsite restoration, creation, or enhancement, [or upland preservation,] in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area as the disturbance.

(e) If mitigation under (d) above is not feasible, mitigation shall be performed through either of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank [which includes the disturbance site in its bank service area] in the same watershed management area as the disturbance; or

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2. Restoration, creation, or enhancement, [or upland preservation] in the same watershed management area as the disturbance.

(f) If mitigation is not feasible under (c), (d) or (e) above, mitigation shall be performed through [a monetary contribution or, if the Department determines that no other mitigation alternative is not practicable or feasible, through a land donation approved by the Wetlands Mitigation Council in accordance with N.J.A.C. 7:7A-15.22.] :

1. The purchase of credits from a mitigation bank which includes the disturbance site in its bank service area; or

2. Restoration, creation or enhancement in the same drainage basin.

(g) If mitigation is not feasible under (c), (d), (e) or (f) above, mitigation shall be performed through:

1. A monetary contribution in accordance with N.J.A.C. 7:7A-15.21;

2. Upland preservation, in accordance with N.J.A.C. 7:7A-15.9; or

3. A land donation approved by the Wetland Mitigation Council in accordance with N.J.A.C. 7:7A-15.22.

N.J.A.C. 7:7A-15.10 Conceptual review of a mitigation area

(a)-(b) (No change.)

(c) To obtain the Department's conceptual review of a mitigation area, the applicant shall submit a written request, including:

1.-3. (No change.)

4. A county soil survey showing the soils in the mitigation area and identifying all potential, suspected and/or known contamination on the site; and

5. (No change.)

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(d) (No change.)

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

(a) (No change.)

(b) The mitigation proposal shall provide all information necessary for the Department to determine if the requirements of this subchapter are met. The information required for each mitigation alternative is set forth in a mitigation proposal checklist, provided by the Department. To obtain the mitigation proposal checklist for a particular mitigation alternative, contact the Department at the address in N.J.A.C. 7:7A-15.2(f)[.];

1. The applicant shall also provide notification in accordance with N.J.A.C. 7:7A-10.8(j) for all mitigation proposals that include creation, enhancement or restoration (except restoration for a temporary disturbance).

(c)-(e) (No change.)

N.J.A.C. 7:7A-15.12 Contents of a mitigation proposal

(a) (No change.)

(b) The application checklist for every mitigation proposal shall require the following:

1. Basic information regarding the applicant, the disturbance for which the mitigation is required, and the permit or other item which is the source of the mitigation requirement;

2. Information to enable the Department to determine the loss of functions and values caused by the disturbance for which the mitigation is required, including scientific information such as scientific literature, models or other studies concerning wetlands, soils, vegetation, hydrology, wildlife habitat and any other factors relevant to the

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functions and values of the site of the disturbance for which mitigation is required; previous Department approvals or correspondence regarding the disturbance; maps, photographs; soil or vegetation samples; delineations and/or other visual materials relating to the site of the disturbance;

3. Information demonstrating that the proposed mitigation alternative complies with N.J.A.C. 7:7A-15.5 or 15.6, as applicable, including information on the feasibility or practicability of other mitigation alternatives;

4. The names and addresses of all consultants, engineers, and other persons providing technical assistance in preparing the mitigation proposal;

5. Any letters, contracts, agreements, conservation restrictions or easements, or other draft or executed documents necessary to ensure compliance with this subchapter;

6. Any information necessary to ensure compliance with the Federal rules governing the Department's assumption of the Federal 404 program at 40 CFR 233.30; [and]

7. A certification of truth and accuracy[.] ; and

8. Unconditional written consent from the owner of the proposed mitigation area allowing the Department to enter the property and inspect the proposed mitigation area.

(c) (No change.)

(d) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to restore, create, or enhance wetlands, to preserve uplands, or to donate land shall also require the following information:

1.-4. (No change.)

5. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, or archaeological resources, as described at N.J.A.C. 7:7A-12.2, or other features on the proposed mitigation area that are relevant to determining compliance with this chapter. Failure to provide all such information of which the applicant, its consultants, or agents is aware may result in denial or termination of the

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permit under N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9;

6.-12. (No change.)

13. Draft documents for protection and transfer of the mitigation area after successful completion of mitigation, in accordance with N.J.A.C. 7:7A-15.14, 15.17(c) and 15.19(c); [and]

14. If the Department determines that there is reason to suspect contamination on the proposed mitigation area, [a No Further Action letter covering the proposed mitigation area, obtained from the Department's Site Remediation Program in accordance with N.J.A.C. 7:26C] a copy of the characterization and other information obtained from the Department's Division of Remediation Management and Response, as required at N.J.A.C. 7:7A-15.4(h). In addition, in order for the Department to protect the health and safety of the employees who will inspect the potential mitigation site, the applicant shall provide the following:

- i. The applicable human health and ecological effect thresholds for each contaminant identified in the characterization as provided by the Site Remediation Program or the EPA;
- ii. The method of exposure for each contaminant listed in the characterization, for example inhalation, ingestion, dermal contact, or explosive potential;
- iii. The method of transmission of the contaminant identified in the characterization, for example through soil particles, dust particles, vapor or liquid;
- iv. The potential to transmit health risks and or known contaminants off site, for example by way of soil or liquids on footwear, clothing or skin; and
- v. The current status of the cleanup of the site with the Site Remediation Program or the EPA, the name(s) and contact number(s) of the project manager, and all applicable case or file numbers.

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(e) In addition to the basic information required for all mitigation proposals under (b) above, and the information required at (c) above, an application checklist for a proposal to restore, create, or enhance wetlands shall require the following information:

1.-5. (No change.)

6. A certification that the proposed mitigation will not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places in accordance with N.J.A.C. 7:7A-12.2. If the mitigator, before or during approved mitigation, encounters an historic property on the mitigation site that may be eligible for listing in the National Register, the mitigator shall immediately notify the Department and proceed as directed by the Department.

(f) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to make a monetary contribution shall require the following:

1. Information demonstrating to the Department that a monetary contribution is acceptable under N.J.A.C. 7:7A-15.5 or 15.6[;] and requirements at either i or ii:

[2.] i. For a monetary contribution to satisfy mitigation requirements for approved individual permits, [C]cost estimates, appraisals, and other information necessary to demonstrate compliance with the requirements for monetary contribution at N.J.A.C. 7:7A-15.21[.] ; or

ii. For a monetary contribution to satisfy mitigation requirements for approved general permits, the calculation demonstrating compliance with N.J.A.C. 7:7A-15.21(d).

(g) (No change.)

N.J.A.C. 7:7A-15.13 Financial assurance for a proposal to restore, create, or enhance wetlands

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(a)-(b) (No change.)

(c) The letter of credit or other financial assurance shall be in an amount sufficient for the Department to hire an independent contractor to complete and maintain the mitigation project or mitigation bank should the mitigator default. At a minimum, the financial assurance shall be in the following amounts:

1. (No change.)

2. A maintenance assurance to assure the success of the mitigation through the completion of the monitoring period, equal to [30] 115 percent of the estimated cost of [completing the creation, restoration, or enhancement] monitoring and maintaining the site, including the cost to replant the mitigation area.

(d) (No change.)

(e) The Department shall require additional financial assurance if additional construction and/or monitoring is required [under N.J.A.C. 7:7A-15.23(h)].

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

N.J.A.C. 7:7A-15.14 Protecting a mitigation area from future development

(a) Every mitigation area, whether onsite or offsite, shall be permanently protected from any future development through one or more binding conservation restrictions or easements, as defined at N.J.A.C. 7:7A-1.4, and in accordance with N.J.A.C. 7:7A-2.12, except if the mitigation is restoration of a temporary disturbance on the site of the disturbance.

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[(b) The conservation restriction(s) shall require that the mitigation area be permanently preserved in its natural state, and shall prohibit any future regulated activities as described at N.J.A.C. 7:7A-2.3 and 6.2.]

(c) and (d) are being recodified as (b) and (c). (No change in text.)

[(e)] (d) If the mitigation area is donated land or a mitigation bank, the conservation restriction(s)/easement shall require approval by both the Department and the Wetlands Mitigation Council.

[(f) The conservation restriction(s) shall describe and include all regulated features, including all wetlands and all transition areas and relevant site conditions such as encumbrances or contamination.

(g) A conservation restriction shall include a survey and a metes and bounds description of the entire mitigation area, including any transition area required to be included under this subchapter.]

N.J.A.C. 7:7A-15.16 Requirements that apply after the Department approves restoration, creation or enhancement

(a) After the Department approves mitigation through restoration, creation, or enhancement, the mitigator shall execute and record a conservation restriction or easement covering the mitigation area. The conservation restriction or easement shall meet the requirements of N.J.A.C. 7:7A-[15.14] 2.12, and shall be executed and filed for recording prior to the start of mitigation activities.

(b) (No change.)

(c) In addition to the construction completion report required under (b) above, the mitigator shall submit to the Department an annual post-planting monitoring report each year for five years after the completion of planting and construction, or for a different

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time period if specified in the approved mitigation proposal. The Department may at any time modify the frequency and/or duration of reporting required. The post-planting monitoring report shall be submitted by [November 15] December 31 of each year, and shall include:

1.-3. (No change.)

(d)-(f) (No change.)

N.J.A.C. 7:7A-15.17 Requirements that apply after the Department approves credit purchase or uplands preservation

(a) (No change.)

(b) The Department shall declare mitigation through credit purchase or uplands preservation successful upon:

1. (No change.)

2. Submittal to the Department of documents demonstrating that the credit purchase or uplands preservation has occurred as required. Examples of such documents include, but are not limited to:

i. (No change.)

ii. For uplands preservation, a conservation restriction or easement, documentation that the property has been transferred and a maintenance fund established in accordance with (c) below, and that the transfer and restriction have been recorded with the county or other appropriate agency.

(c) (No change.)

N.J.A.C. 7:7A-15.18 Requirements that apply after the Department approves mitigation through a monetary contribution

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(a) After the Department determines under N.J.A.C. 7:7A-15.5 or 15.6 that monetary contribution is the appropriate mitigation alternative, the mitigator shall either:

1. If mitigating for an Individual permit, apply to the Wetlands Mitigation Council for approval of the amount of the monetary contribution under the standards at N.J.A.C.

7:7A-15.21[.] (a) through (c); or

2. If mitigating for a general permit, calculate the amount of the monetary contribution under the standards at N.J.A.C. 7:7A-15.21(d).

(b) The Department shall declare mitigation through a monetary contribution successful upon a demonstration that:

1. For a monetary contribution for an individual permit:

i. The Wetlands Mitigation Council has approved the amount of the monetary contribution; and

[2.] ii. The monetary contribution has been completed in accordance with the Council resolution approving the contribution, all applicable permit conditions, requirements of this subchapter, and requirements of the approved mitigation proposal[.] or

2. For a monetary contribution for a general permit:

i. The amount has been properly calculated in accordance with N.J.A.C. 7:7A-5.21(d); and

ii. The monetary contribution has been approved by the Department and completed in accordance with the general permit checklist for monetary contributions.

N.J.A.C. 7:7A-15.19 Requirements that apply after the Department approves mitigation through a land donation

(a)-(b) (No change.)

(c) Within 60 days after the Department declares mitigation through land donation successful under (b) above, a mitigator shall:

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1. (No change.)

2. Provide the government agency or charitable conservancy with [a] an adequate maintenance fund for maintenance and supervision of the mitigation area. The amount of the maintenance fund shall be determined by agreement between the mitigator and the agency or conservancy; and

3. Ensure that the transfer and a conservation restriction or easement, in accordance with N.J.A.C. 7:7A-2.12 and 15.14 are recorded with the county or other appropriate agency and that a copy is sent to the Department.

N.J.A.C. 7:7A-15.20 Wetlands Mitigation Council

(a) The Wetlands Mitigation Council's duties and functions include:

1. Reviewing the following:

i. Proposed monetary contributions;

ii. Proposed land donations; and

[iii. Mitigation bank proposals; and

iv.] iii. Proposed county mitigation inventories;

2.-4. (No change.)

5. Conducting research to monitor the success [on] of mitigation as part of a Council-funded and approved creation, restoration or enhancement project;

6.-7. (No change.)

(b) If the Council transfers funds or land, the Council shall first execute and record a conservation restriction or easement or other legally binding document that meets all applicable requirements at N.J.A.C. 7:7A-15.14, and that ensures that the funds or land will be used only for mitigation and freshwater wetlands conservation.

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(c) Council meetings are open to the public. A schedule of Council meetings and other information relating to specific Council meetings can be obtained by contacting Council staff at the address in N.J.A.C. 7:7A-15.2(f).

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

N.J.A.C. 7:7A-15.21 Council review of a proposed monetary contribution

(a) For mitigation through a monetary contribution, the mitigator shall first obtain the Department's authorization under N.J.A.C. 7:7A-15.5 or 15.6 to use monetary contribution as the mitigation alternative. For an individual permit, [T]the mitigator shall then obtain approval from the Wetlands Mitigation Council for the amount of the monetary contribution. For a general permit, the amount of the monetary contribution shall be determined in accordance with (d) below.

(b) The Wetlands Mitigation Council shall approve the amount of a monetary contribution only if the contribution is equal to the lesser of the following:

1. The cost of buying [and], enhancing and/or restoring existing degraded freshwater wetlands and/or State open waters, resulting in an area that will provide equal functions and values to that disturbed; or

2. The cost of buying uplands and creating freshwater wetlands, and/or State open waters, resulting in an area that will provide equal functions and values to that disturbed.

(c) In determining the costs at (b)1 and 2 above, the Council may consider cost estimates submitted by the applicant and the Department, information obtained from experts in the field of mitigation (including Council members), and any other information available to the Council.

(d) The following analysis shall be used to determine the amount of a monetary contribution when mitigating for general permit impacts at N.J.A.C. 7:7A-5:

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1. For single family property owners, the acreage of wetlands/State open water impacts multiplied by \$38,000, adjusted annually using the Consumer Price Index for Urban Consumers (CPI-U) as published by the United States Department of Labor; or

2. For all other property owners, the acreage of wetlands/State open water impacts multiplied by \$300,000, adjusted annually using the Consumer Price Index for Urban Consumers (CPI-U) as published by the United States Department of Labor.

(e) When the Department determines under (d)1 or 2 above to adjust the amount of a monetary contribution using the Consumer Price Index for Urban Consumers, the Department shall publish in the New Jersey Register a notice of administrative change announcing the adjustment and the amount of the adjusted monetary contribution.

N.J.A.C. 7:7A-15.22 Council review of a proposed land donation

(a) (No change.)

(b) The Council shall approve the proposed parcel of land to be donated only if the amount of land to be donated is sufficient to ensure that the functions and values provided by the donated land will fully compensate for the loss of functions and values caused by the disturbance, in accordance with N.J.A.C. 7:7A-15.2(c).

(c) If a proposed parcel to be donated is also being donated or otherwise restricted in order to satisfy requirements of another government agency, the Council shall not approve the donation unless the applicant also enhances or restores wetlands on the parcel. For example, if land is required by a county to be preserved as open space, the Council shall only approve the parcel for a land donation if the applicant also performs wetlands restoration or enhancement in accordance with this subchapter. If restoration or enhancement cannot be performed on the parcel, the Council shall not accept the parcel as a land donation.

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[(b)] (d) The Council shall approve the proposed parcel of land to be donated only if the applicant demonstrates that the land has the potential to be a valuable component of a wetland or surface water ecosystem. The Council shall evaluate each parcel to determine its potential on a case by case basis, taking into consideration the following:

1.-3. (No change.)

4. The parcel shall meet at least one, and preferably [many] several, of the following criteria:

i.-vi. (No change.)

[(c) The Council shall approve the proposed parcel of land to be donated only if the amount of land to be donated is sufficient to ensure that the functions and values provided by the donated land will fully compensate for the loss of functions and values caused by the disturbance, in accordance with N.J.A.C. 7:7A-15.2(c). If a proposed parcel is affected by an easement or other encumbrance, the portion of the parcel affected by the encumbrance will not be considered in calculating the total amount of mitigation provided, unless the applicant demonstrates that the encumbrance will not inhibit compliance with the mitigation requirements of this chapter.

(d) If a proposed parcel to be donated is also being donated or otherwise restricted in order to satisfy requirements of another government agency, the Council shall not approve the donation unless the applicant also enhances or restores wetlands on the parcel. For example, if land is required by a county to be preserved as open space, the Council shall only approve the parcel for a land donation if the applicant also performs wetlands restoration or enhancement in accordance with this subchapter. If restoration or enhancement cannot be performed on the parcel, the Council shall not accept the parcel as a land donation.]

N.J.A.C. 7:7A-15.23 Mitigation banks

(a) A mitigation bank requires approval by the [Wetlands Mitigation Council] Department prior to the sale of any mitigation credits. “Approval” for the purposes of this section means final approval in accordance with N.J.A.C. 7:7A-15.25; [A mitigation bank

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may be approved by the Council prior to its construction, or after the bank is partially or completely constructed.]

(b) (No change.)

(c) Once the [Council] Department has approved a mitigation bank, the bank operator shall carry out all requirements of the [resolution] banking instrument approving the bank, regardless of whether or when credits are sold.

(d) The [Council] Department shall determine how many mitigation credits each mitigation bank operator may sell, based on the increase in wetland values and functions created as a result of the proposed mitigation bank, as well as how the increase in functions and values will interact with the regional wetland and aquatic resources. The [Council] Department shall evaluate each mitigation bank to determine its functions and values on a case by case basis, considering the following factors:

1.-10. (No change.)

(e) The [Council] Department shall include in [the resolution] the banking instrument approving the bank a schedule under which a bank operator may sell credits. The schedule shall be as set forth at (e)1 through 6 below. The [Council] Department shall adjust the amount of credits within the ranges at (e)2 through 6 below to reflect the degree of progress the bank has shown toward meeting the goals and performance standards in the approved mitigation proposal:

1. Ten percent of the credits shall be released upon completion of both of the following:

- i. Signing of the [Council resolution] banking instrument approving the bank; and
- ii. Compliance with all pre-release credit sale conditions in the [resolution] banking instrument approving the bank, such as securing all construction permits, posting adequate and effective financial assurance in accordance with N.J.A.C. 7:7A-15.13, and completing the conservation restriction or easement and the agreement providing for transfer of the bank site at completion;

2. (No change.)

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3. Up to 10 percent of the credits shall be released upon completion of planting as required in the [resolution] banking instrument approving the bank;

4. Up to 20 percent of the credits shall be released when monitoring indicates that the performance standards in the [resolution] banking instrument approving the bank have been met for an entire one-year period;

5. Up to 15 percent of the credits shall be released when monitoring indicates that the performance standards in the [resolution] banking instrument approving the bank have been met for three consecutive years;

6. Up to 25 percent of the credits shall be released when monitoring in accordance with the [resolution] banking instrument approving the bank indicates that the performance standards in the [resolution] banking instrument have been met for five consecutive years.

(f) The mitigation bank operator shall execute and record a restriction on the mitigation bank site prior to the sale of any credits. The conservation restriction or easement shall meet the requirements for protecting mitigation sites from future disturbance, set forth at N.J.A.C. 7:7A-15.14 and 2.12.

(g) The mitigation bank operator shall monitor the bank during and after construction until such time that the last credit is sold, the final inspection is conducted, or the bank is transferred to a charitable conservancy, whichever occurs last, in order to ensure its success. The bank operator shall submit progress reports to the [Council] Department at least annually during and after construction, and more often if required by the [resolution] banking instrument approving the bank.

(h) If the bank falls more than one year behind the schedule for completion specified in the [resolution] banking instrument approving the bank, the [Council] Department may amend the [resolution] banking instrument approving the bank, and may require remedial action to ensure the successful completion of the bank. The [Council] Department may reduce the number of credits that may be sold based on the approved remedial action, in order to reflect the change in wetlands values and functions that will result from the changes to the bank.

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(i) Upon completion of the monitoring period and all other requirements in the [resolution] banking instrument approving the bank, the mitigation bank operator shall:

1.-3. (No change.)

4. Ensure that the transfer, and the conservation restriction or easement required under (h) above, are recorded with the county or other appropriate agency.

(j) A mitigation bank approval shall be valid for five years, or until any Department permit required to conduct the bank activities expires. The [Council] Department shall approve a single [one] five year extension if the permit is extended for five years and only if the mitigation bank operator demonstrates that:

1.-2. (No change.)

3. Bank construction has continued uninterrupted in accordance with the [resolution] banking instrument approving the bank;

4.-5. (No change.)

(k) If a bank approval expires and is not extended under (j) above, the [Council] Department shall determine whether the amount of mitigation completed at the bank site is commensurate with the number of credits already sold. If the [Council] Department determines that the amount of mitigation completed is not commensurate with the number of credits already sold, the banker shall be considered in default and the [Council] Department shall assert its rights to the financial assurance provided under this subchapter.

N.J.A.C. 7:7A-15.24 Application for Wetlands Mitigation Council approval of a monetary contribution or land donation

(a) (No change.)

(b) Except for a monetary contribution for a general permit, which shall be submitted to the Department in accordance with N.J.A.C. 7:7A-15.21(d), an [An] application for approval of a monetary contribution or land donation shall first be submitted to Council

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staff at the address in N.J.A.C. 7:7A-15.2(f). Council staff shall notify the applicant of any additional information required to make the application complete and of the schedule for Council meetings. The applicant shall then submit 10 copies of the complete application to the Council staff. These copies shall be submitted at least 30 days before the Council meeting at which the application will be discussed.

(c) (No change.)

N.J.A.C. 7:7A-15.25 Application for [Wetlands Mitigation Council] approval of a mitigation bank

(a) [The Department recommends that a] A prospective mitigation bank operator shall obtain conceptual review of a proposed mitigation bank before investing in buying land or preparing a detailed mitigation bank proposal. Through a conceptual review, [Council] Department staff shall candidly discuss the apparent strengths and weaknesses of the proposed mitigation bank, but all guidance provided shall be non-binding on the Department. A [Council] Department decision on a proposed mitigation bank is binding only if it is incorporated into an approval obtained in accordance with this subchapter. A conceptual review does not grant any property or other rights, and does not authorize mitigation activities or sale of credits. The findings provided by the Department as part of the conceptual review shall be valid for a period of three years or until the rules governing conceptual review are amended in a way that would render the conceptual review inconsistent with the new requirements, whichever occurs sooner. Once expired, a new conceptual review shall be required. To obtain conceptual review of a proposed mitigation bank, an applicant shall submit the following to the [Council] Department:

1. (No change.)

2. Information on previous uses of the site, including possible contamination and/or historic or archaeological resources, identified in accordance with N.J.A.C. 7:7A-12.2;

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i. If contaminated, the applicant shall provide a copy of the characterization and other information obtained from the Department's Division of Remediation Management and Response, as required at N.J.A.C. 7:7A-15.4(h)1;

ii. To address historic or archaeological resources, if applicable, the applicant shall comply with the provisions at N.J.A.C. 7:7A-12.2;

3.-4. (No change.)

5. Maps, photographs, diagrams, delineations and/or other visual materials necessary for the [Council] Department to generally evaluate the proposed mitigation bank;

6. (No change.)

7. Unconditional written consent from the owner of the proposed mitigation bank site, allowing [Council and] Department representatives to enter the property and inspect the site.

(b) To obtain final [Council] Department approval of a proposed mitigation bank, an applicant shall submit the information required by the application checklist, available from [Council] Department staff at the address in N.J.A.C. 7:7A-15.2(f). The checklist shall require the following types of information:

1. (No change.)

2. All past correspondence between the mitigation bank operator and the Department [and/or the Council] regarding the proposed mitigation bank site, including any correspondence regarding conceptual review under (a) above;

3. (No change.)

4. Information on the following items, sufficient for the [Council] Department to determine if the mitigation bank is consistent with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, published jointly by EPA and other Federal agencies in the November 28, 1995 Federal Register at 60 Fed. Reg. 58605:

i.-iv. (No change.)

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v. The service area within which the mitigation bank credits may be used to compensate for a disturbance. The service area shall be designated to give priority to mitigation for impacts occurring:

(1) In the same HUC 11 as the proposed bank;

(2) Adjacent to and within the same watershed management area as the proposed bank;

(3) In the same watershed management area as the proposed bank;

vi.-viii. (No change.)

ix. Performance standards to enable the [Council] Department to determine when credits may be released under N.J.A.C. 7:7A-15.23(e);

x.-xv. (No change.)

5. (No change.)

6. Draft legal instruments necessary to meet the requirements of this chapter, including a conservation restriction or easement, financial assurance, property transfer, or agreement with a charitable conservancy to maintain the site; and

7. (No change.)

(c) An application for approval of a mitigation bank shall be submitted to [Council] Department staff at the address in N.J.A.C. 7:7A-15.2(f). [Council] Department staff shall notify the applicant of any additional information required to make the application complete [and of the schedule for Council meetings.] The applicant shall then submit [10] 5 copies of the complete application to the [Council] Department staff. [These copies shall be submitted at least 60 days before the Council meeting at which the application will be discussed.]

(d) Each [Council] Department approval shall incorporate conditions as necessary to ensure that the requirements of this chapter are met.

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N.J.A.C. 7:7A-15.26 Mitigation for transition area impacts

(a) This section governs the mitigation alternative required and the location of mitigation in relation to the disturbance for a transition area impact in accordance with N.J.A.C. 7:7A-6.3(g). Mitigation for a transition area disturbance shall be performed through restoration or enhancement carried out on the site of the disturbance to the maximum extent feasible.

(b) If onsite restoration or enhancement is not feasible, mitigation shall be performed through any of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank located in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area;

2. The purchase of credits from a mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999, which includes the disturbance site in its bank service area; or

3. Offsite restoration or enhancement in the same HUC 11 or in an adjacent HUC 11 within the same watershed management area as the disturbance.

(c) If mitigation under (b) above is not feasible, mitigation shall be performed through either of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank in the same watershed management area as the disturbance; or

2. Restoration, enhancement, or upland preservation in the same watershed management area as the disturbance.

(d) If mitigation is not feasible under (b), or (c) above, mitigation shall be performed through:

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1. The purchase of credits from a mitigation bank which includes the disturbance site in its bank service area; or

2. Restoration or enhancement in the same drainage basin.

(e) If mitigation is not feasible under (b), (c), or (d) above, mitigation shall be performed through:

1. A monetary contribution in accordance with N.J.A.C. 7:7A-15.21;

2. Upland preservation, in accordance with N.J.A.C. 7:7A-15.9; or

3. A land donation approved by the Wetland Mitigation Council in accordance with N.J.A.C. 7:7A-15.22.

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, waiver, order, settlement agreement, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto.

(b)-(c) (No change.)

(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) (No change.)

(f) (No change.)

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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-16.5 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, waiver, letter of interpretation, order, settlement agreement, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than \$ 10,000 for each violation. 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, waiver, order, settlement agreement, 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-16.7 Appeal of an administrative order and/or notice of civil administrative penalty

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(a) No change.

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

i. 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

ii. Submit a copy of the request to:

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

(c)-(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 to freshwater wetlands and/or freshwater wetland transition areas, except if the violation is listed at N.J.A.C. 7:7A-16.9, 16.10, [or] 16.11, 16.12, or 16.13 in which case the penalty amount shall be determined under whichever of those sections applies. For the purposes of this section, a permit shall mean a permit, waiver, authorization, or other approval issued pursuant to the Freshwater Wetlands Protection Act.

(b) (No change.)

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(c) The Department shall use the three factors described below to determine the amount of a 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 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 acreage of wetlands and/or transition areas impacted factor shall be assigned points as follows:

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

ii. A violation impacting one to three acres of wetlands and/or transition areas is assigned two points; and

iii. A violation impacting less than one acre of wetlands and/or transition areas is assigned one point; and

3. The resource value classification factor shall be assigned points as follows:

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

ii.-iii. (No change.)

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

Table D

Penalty points table

Penalty Amount

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Total Points	Per Day
[9] <u>10-15</u>	\$ 10,000
[8] <u>9</u>	9,000
<u>8</u>	<u>8,000</u>
7	[7,500] <u>7,000</u>
6	6,000
5	[4,500] <u>5,000</u>
4	3,000
3	1,500

(e) The total civil administrative penalty assessed shall be the daily penalty amount obtained from Table D above multiplied by the number of days during which the violation has continued.

N.J.A.C. 7:7A-16.9 Civil administrative penalty amount for violations other than failure to obtain a permit for regulated activities

(a) For violations other than the failure to obtain a permit prior to conducting regulated activities as described in N.J.A.C. 7:7A-16.8 above or those violations addressed in N.J.A.C. 7:7A-16.10, 16.11, and 16.12, the Department shall assess a civil administrative penalty pursuant to this section of not more than \$10,000 per day for each violation of the applicable law and/or condition pursuant to this chapter.

(b) The Department shall assess a civil administrative penalty for violations described in this section on the basis of the seriousness of the violation and the conduct of the violator by applying the seriousness and conduct factors to determine the appropriate daily penalty amount to the Table E matrix below.

Table E

SERIOUSNESS		
<u>MAJOR</u>	<u>MODERATE</u>	<u>MINOR</u>

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	<u>MAJOR</u>	<u>\$10,000</u>	<u>\$7,500</u>	<u>\$3,500</u>
<u>CONDUCT</u>	<u>MODERATE</u>	<u>\$7,500</u>	<u>\$5,000</u>	<u>\$2,500</u>
	<u>MINOR</u>	<u>\$3,500</u>	<u>\$2,500</u>	<u>\$500</u>

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

1. “Major” seriousness shall include any violation which has caused or has the potential to cause harm to human health, safety, the Freshwater Wetlands Protection Act regulatory program, or the environment, or seriously deviates from the applicable law and/or condition. “Serious” deviations include, but are not limited to those violations which are in complete contravention of the law, requirement and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement or condition. Violations of “major” seriousness include, but are not limited to, any activities that negatively affect water quality; the clearing, grading, or filling of freshwater wetlands; the clearing grading or filling of transition areas when done in conjunction with such activities in freshwater wetlands; the clearing, grading, filling or disturbance of freshwater wetlands and/or transition areas in excess of that authorized by a permit or plan; the failure to timely record a required conservation restriction or easement; the failure to report the presence of a historic resource during construction and/or the destruction of a historic resource without Department approval; and the failure to comply with a historic or mitigation requirement;

2. “Moderate” seriousness shall include 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 substantially deviates from the

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applicable law and/or condition. "Substantial deviation" shall include, but not be limited to violations which are in substantial contravention of the law, requirement and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement and/or condition. The Department will consider a violation, if limited solely to the transition area not associated with a permit or plan, to be of moderate seriousness. Violations of "moderate" seriousness also include, but are not limited to, failure to notify the Department of commencement of construction, failure to transfer a permit as required in this chapter, and failure of an applicant or permittee to provide information upon request to determine compliance with provisions of the Act pursuant to N.J.S.A. 13:9B-21(l);

3. "Minor" seriousness shall include any violation not included in (c)1 or 2 above.

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

1. "Major" conduct shall include any intentional, deliberate, purposeful, knowing, or willful act or omission by the violator. The Department presumes all violations of Department permits or authorizations to be knowing violations as well as violations by persons who have previously applied for or received Freshwater Wetlands Protection Act permits or waivers;

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 total civil administrative penalty assessed shall be the daily penalty amount obtained from the Table E matrix multiplied by the number of days during which the violation has continued.

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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, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, 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 the site, the Department shall use the procedures in this section to determine the amount of the civil administrative penalty.

(b)-(f) (No change.)

N.J.A.C 7:7A-16.10 through 16.18 are recodified as N.J.A.C. 7:7A- 16.11 through 16.19. (No change in text.)

N.J.A.C. 7:7A-16.[19]20 Grace Period Applicability; Procedures

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:

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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 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.

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.

Table [E]F

Rule Citation	Violation Description	Type of Violation
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N.J.A.C.7:7A-2.1(a), 2.2(a-b), 2.5(f), 2.6(a)	Conducting regulated or prohibited activities in a freshwater wetland, transition area and/or State open water without prior Department approval	NM
N.J.A.C. 7:7A-4.3	Failure to comply with conditions of a Department permit or authorization not related to submission of documentation to the Department.	NM
N.J.A.C. 7:7A- 4.3	Failure to submit to the Department documentation as required by a permit condition.	M
N.J.A.C. 7:7A- 6.1[(h)] (b) and (e)	Failure to execute and record the required conservation restriction prior to the beginning of activities authorized under a transition area waiver, or transfer of the site.	NM
N.J.A.C. 7:7A-10.1(f)	Failure to provide in the application all information required in this chapter of which the applicant, its consultants, engineers, surveyors, or agents is or should be aware	NM
N.J.A.C. 7:7A-[10.9] 10.8	Failure to provide appropriate public notice during the permit application process	NM
N.J.A.C. 7:7A-13.1	Failure to comply with conditions of a Department permit or authorization not related to submission of documentation to the Department.	NM
N.J.A.C. 7:7A-13.1	Failure to submit to the Department documentation as required by a permit condition.	M
N.J.A.C. 7:7A-14.4(a)	Failure to comply with a permit suspension order	NM
N.J.A.C. 7:7A-14.5(b)	Failure to comply with a permit termination order	NM
N.J.A.C. 7:7A-15.2(b),	Failure to conduct mitigation as required by a Department approval or administrative order	NM
N.J.A.C. 7:7A-15.3(a)	Failure to conduct mitigation as required by a Department approval or administrative order	NM
N.J.A.C. 7:7A-15.11(a),	Failure to submit a mitigation proposal to the Department as required by a Department approval or order	NM

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N.J.A.C. 7:7A-15.16(a)	Failure to execute and record the conservation restriction that meets the requirements of N.J.A.C. 7:7A-15.14 prior to the start of mitigation activities	NM
N.J.A.C. 7:7A-15.16(b)	Failure to submit a construction completion report within the required timeframe of completion of construction and planting of a restoration, creation or enhancement project	M
N.J.A.C. 7:7A-15.16(c)	Failure to submit an annual post-planting report at the required intervals following the completion of the construction and planting associated with mitigation	M
N.J.A.C. 7:7A-15.16(d)	Failure to demonstrate to the Department at the end of the post-planting monitoring period that the mitigation project is successful	M
N.J.A.C. 7:7A-15.17(c) 1	Failure to transfer the mitigation area in fee simple to a government agency or charitable conservancy within 60 days after the Department declares mitigation through upland preservation successful	NM
N.J.A.C. 7:7A-15.17(c) 2	Failure to provide the government agency or charitable conservancy with a maintenance fund for the mitigation area transferred to the government agency or charitable conservancy	NM
N.J.A.C. 7:7A-15.18(a)	Failure to apply to the Wetlands Mitigation Council for approval of the amount of monetary contribution following the Department's determination that monetary contribution is an appropriate mitigation alternative	NM
N.J.A.C. 7:7A-15.19(a)	Failure to apply to the Wetlands Mitigation Council for approval of the particular parcel of land to be donated following the Department's determination that land donation is appropriate mitigation alternative	NM

SUBCHAPTER 17 Reconsideration by Department of its action or inaction concerning a permit

N.J.A.C 7:7A-17.1 Reconsideration by Department of its action or inaction concerning a permit

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

(d) In determining whether the property owner's investments in the property as a whole were reasonable, and reflected reasonable expectations, the Department shall evaluate the following information:

1. Conditions at the time of the investment. That is, the investment shall have been made in pursuit of development that would likely have been legally and practically possible on the property, considering all constraints existing and reasonably ascertainable at the time of the investment. For example, if a property owner bought property containing freshwater wetlands regulated under this chapter, it would not be reasonable to expect that the property could be developed without constraints. In determining conditions at the time of the investment, the Department shall consider, at a minimum, the following:

i. (No change.)

ii. Historic landmarks or other historic or cultural resources, as described at N.J.A.C. 7:7A-12.2;

iii.-vi. (No change.)

2.-5. (No change.)

(f) In determining the environmental impacts of any minimum beneficial economically viable uses of the property and the consistency of those impacts with the goals of the Freshwater Wetlands Protection Act, in accordance with (c) above, the Department shall evaluate whether the minimum beneficial economically viable use would:

1. (No change.)

2. Adversely affect other protected resources, for example, historic or cultural resources, as described at N.J.A.C. 7:7A-12.2, ecologically unique areas or critical wildlife habitat;

3.-4. (No change.)

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(g)-(h) (No change.)

(i) A complete request for the Department to reconsider and modify its action or inaction concerning a permit under (a) above shall include the following items:

1.-2. (No change.)

3. Documentation that public notice has been given pursuant to the requirements at N.J.A.C. 7:7A-[10.9] 10.8 (c), (d), (e) and (g). This notice may be combined with the offer to sell the property required under (i)7 below;

4.-5. (No change.)

6. The language of a proposed conservation restriction or easement that meets the requirements of (m)2 below;

7.-9. (No change.)

10. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, as described at N.J.A.C. 7:7A-12.2, or other features on the site relevant to determining compliance with the requirements of this chapter;

11.-15. (No change.)

(j) In the case where the Department initiates the reconsideration of whether to modify its action or inaction concerning a permit under (a) above, the Department shall, upon initiation of the reconsideration process follow all steps described in (j)1 through 3 below. In the case where the property owner is requesting that the Department reconsider and modify its action or inaction concerning a permit, the Department shall, upon initiation of the reconsideration process, follow the steps described in (j)1i, 1iii, 2 and 3 below:

1. Provide the following notifications:

i. (No change.)

ii. In accordance with the requirements at N.J.A.C. 7:7A-[10.9] 10.8 (c), (d), and (e)1 through 4 and 6; and

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iii. (No change.)

2.-3. (No change.)

(k)-(m) (No change.)

APPENDIX 1

OBLIGATE AND FACULTATIVE FAUNA SPECIES FOUND IN VERNAL HABITATS

Obligate Species

Marbled Salamander

Blue-spotted Salamander*

Jefferson Salamander

Eastern Tiger Salamander*

Wood Frog

Spotted Salamander

Eastern Spadefoot Toad

Jefferson x Blue-spotted

Salamander*

Fairy shrimp (order Anostraca)

Facultative Species

Snapping Turtle

Eastern Mud Turtle

Spotted Turtle

Eastern Painted Turtle

Red-spotted Newt

American Toad

Fowler's Toad

Pine Barrens Treefrog*

Northern Gray Treefrog

Southern Gray Treefrog*

Upland Chorus Frog

Northern Cricket Frog

New Jersey Chorus Frog

Bull Frog

Green Frog

Southern Leopard Frog

Four-toed Salamander

Northern Spring Peeper

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Long-tailed Salamander**

Wood Turtle**

*Listed as a New Jersey State endangered species

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 readoption with amendments. I hereby authorize this readoption with amendments.

Date

LISA P. JACKSON
Commissioner