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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Freshwater Wetlands Protection Act rules

Proposed Amendments: N.J.A.C. 7:7A-5.2, 5.6, 5.10, 5.10B, 5.11, 5.21, and 5.27

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: 15-08-09/693

Proposal Number: PRN 2008-

A public hearing concerning the proposal will be held on:

Monday, November 3, 2008, at 10:00 A.M.
NJ Department of Environmental Protection
Public Hearing Room
401 East State Street
Trenton, New Jersey

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

Janis Hoagland, Esq.
Attn.: DEP Docket No. 15-08-09/693
Office of Legal Affairs

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Department of Environmental Protection

PO Box 402

Trenton, New Jersey 08625-0402

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

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

Summary

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

The Freshwater Wetlands Protection Act (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):

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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.

SUBCHAPTER 5. ADOPTED GENERAL PERMITS

On September 4, 2007, the Department proposed to readopt with amendments the Freshwater Wetland Protection Act rules. At that time, the Department proposed to require mitigation for certain general permits. The Department determined not to adopt those amendments for the reasons described in the adoption published elsewhere in this issue of the New Jersey Register. Instead, the Department is proposing new mitigation requirements for the following general permits: 2 for underground utility lines, 6 for non-surface water connected wetlands, 10A and 10B for minor road crossings, 11 for outfall structures, and 21 for above ground utility lines. The Department is also proposing to amend the existing requirement for mitigation pursuant to general permit 27 for redevelopment. The proposed requirement for all of these general permits is that

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mitigation must be performed for permanent loss and/or disturbances of 0.1 acres or greater. For permanent loss and/or disturbances of less than 0.1 acres, for the same general permits, the Department will determine on a case-by-case basis whether or not to require mitigation. The Department will make its determination based upon whether the applicant can demonstrate that all activities have been designed to avoid and minimize impacts to wetlands. The Department is using a definition of “minimize” that is similar to what was proposed in the 2007 readoption for all general permits. That is, “minimize” shall mean that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are 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.

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 (ACOE) 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. The ACOE stated in its adoption of the nationwide permits that it was requiring mitigation for 0.1 acres or greater of impacts to waters of the U.S. including wetlands (see 72 Fed. Reg. 11193). Further, the District Engineer retains the discretion to require additional mitigation for lesser impacts. If the ACOE is satisfied that the applicant has taken adequate measures to avoid and minimize impacts, it does not require mitigation for impacts of less than 0.1 acres. The ACOE also only considers onsite avoidance and minimization.

Consequently, in order to reduce 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 similar requirements. The Department will continue to monitor impacts from all general permits to determine if more mitigation should be required, or if mitigation should become a standard condition of any other general permits in the future.

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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.

Finally, the proposed amendments require that the mitigation must be submitted to the Department for review and approval 120 days prior to the initiation of regulated activities authorized by the general permit. Further, the mitigation activities are required to be performed prior to or concurrently with the general permit activities.

N.J.A.C. 7:7A-5.2 General permit 2—Underground utility lines

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 of 0.1 acres or greater resulting from the installation of underground utility lines. For permanent impacts of less than 0.1 acres, the Department will determine on a case by case basis whether or not to require mitigation based upon whether the applicant can demonstrate to the Department that all

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activities have been designed to avoid and minimize impacts to wetlands. “Minimize” is defined as previously described.

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 is 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.

In addition, the Department is proposing to recodify existing N.J.A.C. 7:7A-5.2(f), as 5.2(g) with no change in text.

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

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 require mitigation.

Proposed N.J.A.C. 7:7A-5.6(d) contains a new standard condition for mitigation for impacts of 0.1 acres or greater of waters of the United States. For impacts of less than 0.1 acres, the Department will determine on a case by case basis whether or not to require mitigation based upon whether the applicant can demonstrate to the Department that all activities have been designed to avoid and minimize impacts to wetlands. “Minimize” is defined as previously described.

Activities approved under general permit 6 result in the greatest number of unmitigated impacts under the wetlands permitting program. For example, from 2000 through 2006, 125 acres of wetlands were lost as a result of general permit authorizations under general permit 6 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 can impose additional conditions or deny general permit 6, based on specific findings on a case by case basis that doing so is necessary to comply with the Federal 404 program or the FWPA. See In the Matter of

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Freshwater Wetlands Protection Act Rules, 180 N.J.478 (2004). Consequently, the Department is proposing mitigation for impacts of 0.1 acres or greater, and for lesser impacts on a case by case basis, 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.

In addition, the Department is recodifying existing N.J.A.C. 7:7A-5.6(d), as 5.6(e) with no change in text.

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

At N.J.A.C. 7:7A-5.10A(f), the Department is proposing to require mitigation for impacts of 0.1 acres or greater as a condition of general permit 10A. For impacts of less than 0.1 acres, the Department will determine on a case by case basis whether or not to require mitigation based upon whether the applicant can demonstrate to the Department that all activities have been designed to avoid and minimize impacts to wetlands. “Minimize” is defined as previously described.

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(f) as 5.10A(g) with no change in text.

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

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The Department is proposing to amend N.J.A.C. 7:7A-5.10B, minor road crossings to require mitigation for impacts of 0.1 acres or greater as a condition at N.J.A.C. 7:7A-5.10(e). For impacts of less than 0.1 acres, the Department will determine on a case by case basis whether or not to require mitigation based upon whether the applicant can demonstrate to the Department that all activities have been designed to avoid and minimize impacts to wetlands. “Minimize” is defined as previously described.

The impacts associated with general permit 10B are described as part of the analysis for general permit 10A.

Finally, the Department is proposing to recodify N.J.A.C. 7:7A-5.10B(e) as 5.10B(f) with no change in text.

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

At N.J.A.C. 7:7A-5.11(i), the Department is proposing to require mitigation for impacts of 0.1 acres or greater as a condition of general permit 11. For impacts of less than 0.1 acres, the Department will determine on a case by case basis whether or not to require mitigation based upon whether the applicant can demonstrate to the Department that all activities have been designed to avoid and minimize impacts to wetlands. “Minimize” is defined as previously described.

General permit 11 for outfall structures is the second most frequently used general permit. Between 2000 and 2006, the Department approved 776 outfall structures under general permit 11, affecting 29.81 acres of wetlands.

In addition, the Department is proposing to recodify existing N.J.A.C. 7:7A-5.11(i), as 5.11(j) with no change in text.

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

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 of 0.1 acres or greater resulting from the installation of above ground utility lines. For permanent impacts of less than 0.1

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acres, the Department will determine on a case by case basis whether or not to require mitigation based upon whether the applicant can demonstrate to the Department that all activities have been designed to avoid and minimize impacts to wetlands. "Minimize" is defined as previously described.

The proposed requirement for mitigation under general permit 21 for above ground utility lines is consistent with that proposed for mitigation under general permit 2 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) with no change in text.

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 impacts of 0.1 acres or greater resulting from redevelopment of previously disturbed areas instead of requiring mitigation when the impacts exceed 0.5 acres. For permanent impacts of less than 0.1 acres, the Department will determine on a case by case basis whether or not to require mitigation based upon whether the applicant can demonstrate to the Department that all activities have been designed to avoid and minimize impacts to wetlands. "Minimize" is defined as previously described.

The proposed amendment will make the general permit 27 mitigation requirements consistent with the mitigation requirements for the other general permits described above.

Social Impact

The addition of mitigation for general permits for impacts of 0.1 acres or greater, and to mitigate for impacts of less than 0.1 acres for impacts that could have been avoided or minimized, will have a positive social impact. It will further discourage and minimize development in wetlands and State open waters, and/or require replacement of

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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.

Economic Impact

The proposal to require mitigation for impacts of 0.1 acres or greater, and to mitigate for impacts of less than 0.1 acres for impacts that could have been avoided or minimized, may have a negative economic impact for those applicants whose proposed activities will impact wetlands or State open waters because they may have the added cost of mitigating for that impact. The cost of mitigation will vary depending upon the extent of the impact to the wetland and/or State open waters 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, or 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 lost as a result of the activities conducted under 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 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 purchase credits from 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, those individuals may realize a positive economic impact.

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Federal Standards Analysis

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.

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.

As previously discussed, in March 2007, the ACOE as part of the Federal 404 program, adopted new regulations making mitigation for 0.1 acres or greater a standard condition of all Nationwide Permits (NP), the federal equivalent of general permits (see March 1, 2007 Federal Register at 72 Fed. Reg. 11193). However, each District Engineer maintains the discretion to require mitigation for smaller impacts. 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.

The ACOE requires mitigation for each of the NPs which are the equivalent of the State's general permits for which the Department is proposing mitigation. For example, NP 12 is for utility line activities and is subject to the ACOE's standard condition for mitigation. It permits similar activities to those permitted by the Department under general permits 2 (underground utility lines) and 21 (above ground utility lines), for which mitigation is proposed. NP 7 for outfall structures and associated intake structures, and NP 14 for linear transportation projects are also subject to the standard mitigation

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condition under the Federal 404 program. NP 7 is equivalent to the State's general permit 11 for outfall structures, and NP 14 is equivalent to general permit 10A and 10B for minor road crossings. The Department is proposing a mitigation condition for general permits 10A, B, and 11. The ACOE no longer has a NP equivalent to the State's general permit 6 for impacts to non-surface water connected wetlands nor does it have a specific permit for redevelopment like the State's general permit 27. Instead, the ACOE has three NPs that would permit similar impacts to those for which New Jersey applicants tend to use general permits 6 and 27. NP 18 is for minor discharges (less than 0.1 acres), NP 29 is for residential development, and NP 30 is for commercial and institutional development. All of the NPs are subject to the ACOE's standard mitigation requirement.

Consequently, the proposed amendments that require mitigation for impacts of 0.1 acres or greater, and to mitigate for impacts of less than 0.1 acres for impacts that could have been avoided or minimized, for certain general permits are as stringent as the equivalent Federal standards.

Environmental Impact

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 requirements to mitigate for wetland impacts under general permits that have contributed to cumulative wetland impacts will help to alleviate the ongoing loss of wetlands in New Jersey, bringing the State closer to the goal of zero net wetlands loss. Reducing wetland losses 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.

Jobs Impact

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The requirements of the FWPA rules should be considered during the planning and construction of developments. The proposed requirement to mitigate for impacts to wetlands under the general permits may result in more jobs for those involved in conducting mitigation. 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.

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. Consequently, so long as exempt agricultural activities are undertaken, there will be no impact on the agriculture industry from the proposed amendments.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that some of the builders and property owners that may be affected by the proposed amendments are "small businesses" as defined by the Regulatory Flexibility Act. Because the FWPA rules apply to any person owning

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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, the proposed requirement to mitigate for impacts of 0.1 acres or greater, and to mitigate for impacts of less than 0.1 acres for impacts that could have been avoided or minimized, will apply to small businesses as it would to all other individuals proposing similar projects on similar properties.

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 some cases, the requirement to perform mitigation. Costs will 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.

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 amendments are necessary to provide continuing protection for this resource, no lesser requirements for small businesses are provided.

Smart Growth Impact

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

The proposed 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.

The proposed amendments promote 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.

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. By requiring mitigation for wetland impacts under seven general permits, the rules encourage development to locate outside wetland areas and require the replacement of these areas when impacts are permitted and/or can be avoided. This is consistent with the goals of protecting the quality of the environment, encouraging

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growth in areas suitable for growth, and promoting reinvestment in older communities where such features are not present.

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

Housing Affordability Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments and new rules at N.J.A.C. 7:7A-16 for purposes of determining their impact, if any, on the affordability of housing. The Department has determined that the proposed rules will impose an insignificant impact because there is an extreme unlikelihood that the rules will evoke a change in the average costs associated with housing. The proposed amendments require mitigation for the impacts to wetlands resulting from activities conducted with the Department's authorization under seven general permits. The activities authorized under these general permits may or may not be associated with housing developments. If a housing development includes impacts to wetlands using one of the seven general permits for which mitigation is proposed, mitigation will be required. The costs to mitigate for wetlands impacts under the general permits are variable, as explained in the economic impact analysis. However, the general permits for which mitigation is proposed all permit only minimal impacts to wetlands. General permits 2, 6 and 27 allow 0.5 acres of impacts, while the remainder of general permits for which mitigation is proposed limit impacts to 0.25 acres. Consequently, an applicant disturbing the maximum of 0.5 acres of wetlands, and choosing to use a contribution for mitigation would be required to contribute \$150,000 (0.5 acre multiplied by \$300,000 per acre) for mitigation for the overall project. However, the Department anticipates that applicants will minimize the activities for which approval is sought under the general permits, and if the applicant minimizes activities such that impacts are less than 0.1 acres, no mitigation will be necessary. Therefore, the Department believes there is an extreme unlikelihood that the proposed rules would evoke a change in the average costs associated with housing.

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Smart Growth Development Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments and new rules at N.J.A.C. 7:7A-16 for purposes of determining their impact, if any, on smart growth development. The Department has determined that the proposed rules will impose an insignificant impact because there is an extreme unlikelihood that the rules will evoke a change in housing production within Planning areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The proposed amendments require mitigation for the impacts to wetlands resulting from activities conducted with the Department's authorization under seven general permits. The activities authorized under these general permits may or may not be associated with housing developments. If a housing development includes impacts to wetlands using one of the seven general permits for which mitigation is proposed, mitigation will be required. The costs to mitigate for wetlands impacts under the general permits are variable, as explained in the economic impact analysis. However, the general permits for which mitigation is proposed all permit only minimal impacts to wetlands. General permits 2, 6 and 27 allow 0.5 acres of impacts, while the remainder of general permits for which mitigation is proposed limit impacts to 0.25 acres. Consequently, an applicant disturbing the maximum of 0.5 acres of wetlands, and choosing to use a contribution for mitigation would be required to contribute \$150,000 (0.5 acre multiplied by \$300,000 per acre) for mitigation for the overall project. However, the Department anticipates that applicants will minimize the activities for which approval is sought under the general permits, and if the applicant minimizes activities such that impacts are less than 0.1 acres, no mitigation will be necessary. In addition, planning areas 1 and 2, and designated centers tend to be more developed and disturbed than other areas. Consequently, there are fewer wetlands in such areas for which general permit authorizations, and any potential mitigation for impacts, would be needed. Therefore, the Department believes there is an extreme unlikelihood that the proposed rules would evoke a change in housing production within Planning areas 1 or 2 or within Designated Centers.

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

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

SUBCHAPTER 5 ADOPTED GENERAL PERMITS

N.J.A.C. 7:7A-5.2 General permit 2--Underground utility lines

(a)-(e) (No change.)

(f) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for all permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are 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.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

[(f)] (g) (No change.)

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

(a) (No change.)

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(b) Activities under general permit 6 shall be limited as follows:

1. (No change.)

2. 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 for permanent loss and/or disturbances to wetlands and/or State open water that are waters of the United States in accordance with (d) below.

(c) (No change.)

(d) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters that are also waters of the United States. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters that are also waters of the United States unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are 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.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

[(d)] (e) (No change.)

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 disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State

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open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are 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.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

[(f)] (g) (No change.)

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

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

(e) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are 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.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

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[(e)] (f) (No change in text.)

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

(a)-(h) (No change.)

(i) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are 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.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

[(i)] (j) (No change in text.)

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

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

(e) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State

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open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are 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.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

[(e)] (f) (No change in text.)

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 applicant shall perform mitigation under N.J.A.C. 7:7A-15] Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters [authorized under general permit 27]. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are 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.

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1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5 and shall be submitted to the Department for review and approval 120 days prior to the initiation of regulated activities authorized by this general permit. Mitigation shall be performed prior to or concurrently with general permit activities.

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

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Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994), permit the public to understand accurately and plainly the purpose and expected consequences of these proposed amendments. I hereby authorize this proposal.

Date

LISA P. JACKSON
Commissioner