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CODE. N.J.A.C. 7:38

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Highlands Water Protection and Planning Act Rules

Statutory authority: N.J.S.A. 13:20-1 et. seq.; 13:1D-1 et seq.; 13:1B-16.128 et seq.; 13:9B-1  
et seq.; 23:2A-1 et seq.; 58:1A-1 et seq.; 58:10A-1 et seq.; 58:11-23 et seq.; 58:11A-1 et seq.;  
58:12A-1 et seq.; and 58:16A-50 et seq.

Date last amended: December 7, 2009

For regulatory history and effective dates see the New Jersey Administrative Code

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## SUBCHAPTER 1. GENERAL INFORMATION

### 7:38- 1.1 Scope and authority

(a) This chapter is authorized by the Highlands Water Protection and Planning Act, N.J.A.C. 13:20-1 et seq. (Highlands Act), and statutory authorities referenced therein and establishes the environmental standards and procedures by which the Department shall review any application pursuant to the Highlands Act, for major Highlands development proposed in the preservation area of the Highlands Region, for a waiver from any requirement for a Highlands Preservation Area Approval, any resource or applicability determination or exemption from the Act, and any permit or plan reviewed by the Department in the Highlands Region. In addition, the Department anticipates that the Highlands Regional Master Plan (RMP) adopted pursuant to N.J.S.A. 13:20-8 by the Highlands Water Protection and Planning Council (Highlands Council), established pursuant to N.J.S.A. 13:20-4, will include a land use capability map and a comprehensive statement of policies for planning and managing the development and use of land in the preservation area. For the preservation area, the land use capability map and policies shall be based upon, comply with, and implement the environmental standards in this chapter and the resource assessment prepared pursuant to N.J.S.A. 13:20-11. The Department anticipates that the Regional Master Plan will address the components necessary to protect the natural, scenic, and other Highlands resources, including but not limited to, forests, wetlands, stream corridors, steep slopes, and critical habitat for fauna and flora.

(b) Information regarding standards for agricultural or horticultural development in the Highlands preservation area can be obtained by contacting the New Jersey Department of Agriculture, Division of Agricultural and Natural Resources, John Fitch Plaza, PO Box 330, Trenton, NJ 08625-0330.

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(c) The Department shall issue the following written determinations pursuant to N.J.A.C. 7:38-2, upon application and payment of a fee:

1. Whether a proposed activity meets the definition of "major Highlands development" as set forth in N.J.A.C. 7:38-1.4;
2. Whether a proposed activity is exempt from the requirements of the Highlands Act; and
3. Whether a proposed activity is consistent with the applicable areawide Water Quality Management Plan adopted in accordance with N.J.A.C. 7:15.

(d) The Department shall issue written confirmation regarding the location and extent of Highlands resource areas on a particular lot and block within a specific municipality pursuant to N.J.A.C. 7:38-4, upon application and payment of a fee.

(e) The Department shall designate a brownfield in accordance with the requirements at N.J.A.C. 7:38-6.6

(f) No person shall undertake a major Highlands development without first obtaining a Highlands Preservation Area Approval (HPAA) from the Department in accordance with N.J.A.C. 7:38-6. An application for a HPAA shall include any application for waiver of a HPAA requirement under N.J.A.C. 7:38-6.4 the applicant may decide to submit.

(g) For all decisions in or affecting the planning area or the preservation area, the Department shall give great consideration and weight to the RMP, to be incorporated by reference in (l) below, when adopted by the Highlands Council, and shall apply this in accordance with (h), (i), (j) and (k) below.

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(h) For the planning area, when consistent with its statutory and regulatory authority, the Department shall not issue any approval, authorization or permit that the Department determines, in consultation with the Highlands Council, to be incompatible with the resource protection goals in the RMP to be incorporated by reference in (l) below, when adopted by the Highlands Council.

(i) In its review of permits or approvals under this chapter in the preservation area, the Department shall apply the standards of this chapter and those in the RMP, to be incorporated by reference in (l) below, when adopted by the Highlands Council. Where the Department, in consultation with the Highlands Council, determines there is an inconsistency in the standards, the Department shall apply the Regional Master Plan standards insofar as they are:

1. Consistent with the purposes of the Highlands Act to sustain and maintain the overall ecological values of the ecosystem of the Highlands Region with special reference to surface and ground water quality and supply; contiguous forests and woodlands; endangered and threatened animals, plants, and biotic communities; ecological factors relating to the protection and enhancement of agricultural or horticultural production or activity; air quality; and other appropriate considerations affecting the ecological integrity of the Highlands Region; and

2. Based on, comply with, and implement the environmental standards set forth in N.J.S.A. 13:20-32.

(j) For both the planning area and preservation areas, the Department shall give great consideration and weight to the RMP, to be incorporated by reference in (k) below, in making permit decisions that:

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1. Provide relief from strict compliance with the standards of the applicable permit programs, such as making a determination of public benefit or hardship waiver from certain Departmental permits; or
2. Provide relief through the issuance of an HPPA with waiver under this chapter.

(k) For both the planning area and preservation areas, the Department shall review the Highlands Council regional master plan and consider amending the appropriate areawide Water Quality Management Plans to maintain consistency with the regional master plan. The Department shall approve a Water Quality Management Plan amendment only after receiving from the Highlands Council a determination of consistency with the Regional Master Plan to be incorporated by reference in (l) below, when adopted by the Highlands Council. Pending completion of the Regional Master Plan, the Department shall not approve a Water Quality Management Plan amendment for a project proposed in the planning area or preservation area without first obtaining a recommendation from the Highlands Council.

(l) The Regional Master Plan shall mean the standards established in the Regional master Plan adopted by the Highlands Council pursuant to N.J.S.A. 13:20-8, including all goals, requirements, provisions, and any municipal master plans and development regulations or county master plans and associated regulations that have been formally approved by the Highlands Council pursuant to the Highlands Act. The Regional Master Plan shall be incorporated by reference into this chapter, when adopted by the Highlands Council pursuant to N.J.S.A. 13:20-8, provided the Department does not determine such incorporation is inconsistent with the purposes of this chapter. The incorporation by reference shall include all amendments to the Regional Master Plan subsequently adopted by the Highlands Council. The Regional Master Plan will be available on the Highlands Council's website at [www.highlands.state.nj.us](http://www.highlands.state.nj.us) or may be

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reviewed at the Department or at the Highlands Council at the addresses at N.J.A.C. 7:38-1.2.

7:38-1.2 Forms and information

(a) Forms or other information related to the Highlands permitting review program may be obtained as follows:

1. Applications, form letters for notification and information relating to exemptions and determinations of applicability of these rules to specific projects or activities may be found at the Division of Watershed Management website at [www.nj.gov/dep/watershedmgt](http://www.nj.gov/dep/watershedmgt) or obtained from the Division of Watershed Management at:

Division of Watershed Management  
New Jersey Department of Environmental Protection  
PO Box 418  
401 East State Street  
Trenton, New Jersey 08625-0418  
(609) 984-0058

2. Applications and form letters for public notification related to HPAA's and waivers may be found on the Land Use Regulation Program's webpage at [www.state.nj.us/dep/landuse](http://www.state.nj.us/dep/landuse) or obtained from the Land Use Regulation Program at:

Land Use Regulation Program  
New Jersey Department of Environmental Protection  
P.O. Box 439  
Trenton, New Jersey 08625-0439

Phone: (609) 984-0194

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Fax: (609) 292-8115

i. Courier and other hand deliveries shall be delivered to:

Land Use Regulation Program  
New Jersey Department of Environmental Protection  
5 Station Plaza  
501 East State Street  
Trenton, New Jersey 08609

3. Information and forms relating to NJPDES permits and treatment works approvals may be found on the Division of Water Quality webpage at [www.state.nj.us/dep/dwq](http://www.state.nj.us/dep/dwq) or obtained from the Division of Water Quality at:

Division of Water Quality  
New Jersey Department of Environmental Protection  
P.O. Box 029  
Trenton, New Jersey 08625-0029  
Phone: (609) 292-4543  
Fax: (609) 984-7938

4. Information and forms relating to Water Allocation and Safe Drinking water may be found on the Division of Water Supply web page at [www.nj.gov/dep/watersupply](http://www.nj.gov/dep/watersupply) or obtained from the Bureau of Water Allocation or Bureau of Water Systems and Wells at:

Division of Water Supply  
  
New Jersey Department of Environmental Protection  
P.O. Box 426

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Trenton, New Jersey 08625-0426

Phone: Bureau of Water Systems and Wells (609) 292-2957

Phone: Bureau of Water Allocation (609)-292-2957

5. Information and forms relating to the Natural Heritage Program may be found on the Division of Parks and Forestry web page at [www.nj.gov/dep/parksandforests/natural/heritage](http://www.nj.gov/dep/parksandforests/natural/heritage) or obtained from the Office of Natural Lands

Management, Natural Heritage Program at:

Division of Parks and Forestry

New Jersey Department of Environmental Protection

P.O. Box 404

Trenton, New Jersey 08625-0404

Phone: (609) 984-1339

Fax: (609) 984-1427

6. For information or to contact the Highlands Water Protection and Planning Council:

New Jersey Highlands Council

100 North Road, Route 513, Chester, New Jersey 07930

Phone: 908-879-6737

Fax: 908-879-4205

7:38 - 1.3 Other Statutes and Regulations



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(a) This chapter consolidates aspects of, but does not supersede, the following statutes and any rules adopted pursuant thereto:

1. The Freshwater Wetlands Protection Act, N.J.S.A.13:9B-1 et seq.;
2. The Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq.;
3. The Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.;
4. The Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.;
5. The Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq.;
6. The Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.;
7. The Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq.; and
8. The Flood Hazard Area Control Act, N.J.S.A.58:16A-50 et seq., For the purposes of this section, the provisions of N.J.S.A.13:1D-29 et seq. shall not apply to an application for a permit pursuant to the Flood Hazard Area Control Act, N.J.S.A.58:16A-50 et seq.

(b) This chapter shall not be construed to limit, alter or eliminate the requirements of any other applicable Federal, State or local laws, rules, regulations, codes or ordinances.

(c) If any section, part, phrase, or provision of these rules or the application thereof to any person is adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the section, part, phrase, provision or application directly

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involved in the controversy in which such judgment shall have been rendered and it shall not affect or impair the validity of the remainder of these rules or the application thereof to other persons.

(d) This chapter should be liberally construed to conform with the State's obligation to stringently safeguard the State's public trust resources and "should be guided, in heart, mind, and spirit, by an abiding and generously given commitment to protecting the incomparable water resources and natural beauty of the New Jersey Highlands so as to preserve them intact, in trust, forever for the pleasure, enjoyment, and use of future generations while also providing every conceivable opportunity for appropriate economic growth and development to advance the quality of life of the residents of the region and the entire State." N.J.S.A. 13:20-2

#### 7:38-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Agricultural or horticultural development" means construction for the purposes of supporting common farmsite activities, including but not limited to: the production, harvesting, storage, grading, packaging, processing, and the wholesale and retail

marketing of crops, plants, animals, and other related commodities and the use and application of techniques and methods of soil preparation and management, fertilization, weed, disease, and pest control, disposal of farm waste, irrigation, drainage and water management, and grazing.

"Agricultural or horticultural use" means the use of land for common farmsite activities, including but not limited to: the production, harvesting, storage, grading, packaging, processing, and the wholesale and retail marketing of crops, plants, animals, and other related commodities and the use and application of techniques and methods of soil

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preparation and management, fertilization, weed, disease, and pest control, disposal of farm waste, irrigation, drainage and water management, and grazing.

“Aquatic ecosystem” means waters of the Highlands region, including wetlands, which serve as habitat for interrelated and interacting communities and populations of plants and animals.

“Capability class and subclass” is a numeric and alphabetic ranking system, respectively, provided in Soil Surveys that identifies limitations in soils for agricultural usage according to the following:

1. Class I soils have few limitations;
2. Class II soils have moderate limitations;
3. Class Ie soils have moderate limitations due to risk of erosion;
4. Class Iis soils have moderate limitations due to shallow, droughty or stony conditions;
5. Class Iiw soils have moderate limitations due to wetness; and
6. Class III through VIII soils have various severe limitations.

"Capital improvement" or "capital project" means any facility for the provision of public services with a life expectancy of three or more years, owned and operated by or on behalf of the State or a political subdivision thereof.

"Conservation restriction" means a restriction, easement, covenant, or condition, in any deed, will or other legally binding instrument, other than a lease, that is executed by or on behalf of the owner of the land, that is appropriate to retaining land or water areas predominantly in their natural, scenic or open or wooded conditions for purposes of conservation of soil or wildlife; for outdoor recreation or park use; or for creation or maintenance of suitable habitat for fish or wildlife; that grants the Department and the Highlands Council and their staff access to the property for the purpose of determining compliance with the Highlands Act and/or the terms of any HPAA, HRAD, order, decision, agreement or settlement entered pursuant to the Highlands Act, and that forbids or limits on that land any or all:

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1. Construction or placing of buildings, paved roads, signs, billboards or other advertising, or other structures on or above the ground;
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, except to replace dead or diseased mitigation plantings or as necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created;
4. Excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance, except to replace dead or diseased mitigation plantings or as necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created;
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
7. Other acts or uses detrimental to the retention of land or water areas in accordance with the Highlands Act and this chapter.

"Construction beyond site preparation" means having completed the foundation for a building or structure, and does not include the clearing, cutting, or removing of vegetation, bringing construction materials to the site, or site grading or other earth work associated with preparing a site for construction.

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"Construction materials facility" means any facility or land upon which the activities of production of ready mix concrete, bituminous concrete, or class B recycling occurs.

"Contaminated site" means, in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, all portions of environmental media at a site and any location where contamination is emanating, or which has emanated, therefrom, that contain one or more contaminants at a concentration which fails to satisfy any applicable remediation standard.

"Contamination" or "contaminant" means a discharged hazardous substance as defined in N.J.S.A. 58:10-23.11b, hazardous waste as defined in N.J.S.A. 13:1E-38 and/or a pollutant as defined in N.J.S.A. 58:10A-3.

"Contiguous" means adjacent lots, even if they are separated by human-made barriers or structures or legal boundaries such as a public road or a creek.

"Department" means the Department of Environmental Protection.

"Designated planning agency" means an agency designated by the Governor to conduct areawide WQM planning pursuant to N.J.S.A. 58:11A-4.

"Development" means the same as that term is defined in the Municipal Land Use Law, N.J.S.A. 40:55D-4.

"Development regulation" means the same as that term is defined in the Municipal Land Use Law, N.J.S.A. 40:55D-4.

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"Discharge" means an action or omission defined as such pursuant to the Technical Requirements for Site Remediation, at N.J.A.C. 7:26E-1.8.

"Disturbance" means the placement of impervious surface, the exposure or movement of soil or bedrock, or the clearing, cutting, or removing of vegetation.

"Ecological community" means an interacting assemblage of plants, animals and other organisms, their physical environment and the natural processes that affect them.

"Endangered species" means species included on the list of endangered species that the Department promulgates pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-13 et seq., and the Endangered Plant Species List Act, N.J.S.A. 13:1B-15.151 et seq., and any species or subspecies of wildlife appearing on any Federal endangered species list or any species or subspecies of plant designated as listed, proposed, or under review by the federal government pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq.

"Environmental land use or water permit" means a permit, approval, or other authorization issued by the Department of Environmental Protection pursuant to the Freshwater Wetlands Protection Act, N.J.S.A.13:9B-1 et seq., the Water Supply

Management Act, N.J.S.A. 58:1A-1 et seq., the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., The Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq., the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., the Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., or the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.

"Facility expansion" means the expansion of the capacity of an existing capital improvement in order that the improvement may serve new development.

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“Federal Act” means the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., also known as the Federal Clean Water Act, and its implementing regulations.

“Final remediation document” means a document defined as such pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C-1.3.

“Forest” means a biological community as determined by the method set forth at N.J.A.C. 7:38-3.9.

"Hazardous substance" means petroleum, petroleum products, pesticides, solvents and other substances as set forth in N.J.A.C. 7:1E-1.7.

“Highlands Act” means the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq..

“Highlands Council” means the Highlands Water Protection and Planning Council established by N.J.S.A. 13:20-4.

"Highlands open waters" means all springs, streams including intermittent streams, wetlands, and bodies of surface water, whether natural or artificial, located wholly or partially within the boundaries of the Highlands Region, but shall not mean swimming pools.

“Highlands Preservation Area Approval” or “HPAA” means a permit to engage in a regulated activity in the Highlands preservation area issued pursuant to the Highlands Act

and these regulations, including an HPAA that contains a waiver pursuant to N.J.S.A. 13:20-33b. “Highlands Preservation Area Approval” includes Highlands general permits issued pursuant to N.J.S.A. 13:20-33d and promulgated at N.J.A.C. 7:38-12. “HPAA,” when used in these rules, includes Highlands general permits unless explicitly excluded.

"Highlands Region" means that region so designated by N.J.S.A. 13:20-7.

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“Highlands resource areas” means those features of the Highlands that merit special protection pursuant to N.J.S.A. 13:20-32b such as Highlands open waters; flood hazard areas; steep slopes; forested areas; rare, threatened or endangered species habitat; rare or threatened plant habitat; areas with historic or archaeological features; and unique or irreplaceable land types.

“HUC 14” means an area within which water drains to a particular receiving surface-water body, which is identified by a fourteen-digit number, or “hydrologic unit code.”

The HUC codes were developed by the U.S. Geological Survey. In New Jersey, a HUC14 correlates to a subwatershed. There are 921 HUC 14 subwatersheds in New Jersey that range in size from 0.1 to 42 square miles. The boundaries of HUC 14 subwatersheds in New Jersey are available from the Department’s Geographic Information Systems (GIS) downloads web page, <http://www.nj.gov/dep/gis/download.htm>.

"Immediate family member" means spouse, child, parent, sibling, aunt, uncle, niece, nephew, first cousin, grandparent, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild, stepbrother, stepsister, half brother, or half sister, whether the individual is related by blood, marriage, or adoption.

"Impervious surface" means any structure, surface, or improvement that reduces or prevents absorption of stormwater into land, and includes porous paving, paver blocks, gravel, crushed stone, decks, patios, elevated structures, and other similar structures, surfaces, or improvements.

"Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife or "Landscape Maps” means the Department’s maps delineating areas used by or necessary for endangered and threatened species and other priority wildlife to sustain themselves



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successfully. The maps depict areas of contiguous habitat types (forest, grassland, forested wetland, emergent wetland and beach/dune) that are ranked based upon intersection with documented occurrences of endangered and threatened and priority wildlife species. Mapped habitat areas are classified based upon the status of the wildlife species whose presence is documented. Rank 5 is assigned to areas containing one or more documented occurrences of at least one wildlife species listed as endangered or threatened on the Federal list of endangered and threatened species. Rank 4 is assigned to areas with one or more documented occurrences of at least one State endangered species. Rank 3 is assigned to areas containing one or more documented occurrences of at least one State threatened species. Rank 2 is assigned to areas containing one or more documented occurrences of at least one non-listed State priority wildlife species. The maps also delineate, as Rank 1, habitat areas that meet habitat-specific suitability requirements, such as minimum area criteria for endangered, threatened and priority wildlife species, but that do not intersect with any documented occurrences of such species. The report entitled New Jersey's Landscape Project provides additional information on mapping methodology and is available at the website [www.nj.gov/dep/fgw/ensphome.htm](http://www.nj.gov/dep/fgw/ensphome.htm) or by contacting the address given below. The Department's Landscape Maps may be updated periodically and may be obtained via file download from [www.nj.gov/dep/fgw/ensphome.htm](http://www.nj.gov/dep/fgw/ensphome.htm) or through the Interactive ImapNJ website: [www.state.nj.us/dep/gis/imapnj/imapnj.htm](http://www.state.nj.us/dep/gis/imapnj/imapnj.htm) or by writing to the Division of Fish and Wildlife, Endangered and Nongame Species Program at:

The Landscape Project  
NJ Division of Fish and Wildlife  
Endangered and Nongame Species Program  
PO Box 400  
Trenton, NJ 08625-0400.

“Linear development” means infrastructure, utilities and the rights-of-way therefor, such as sewerage and stormwater management pipes; gas and water pipelines; electric, telephone and other transmission lines; and the rights-of-way therefor. “Infrastructure”

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includes access roads and drives. Linear development shall not include residential, commercial, office, or industrial buildings, improvements within a development such as utility lines or pipes, or internal circulation roads.

“Licensed site remediation professional” means an individual who has been issued a license pursuant to N.J.S.A. 58:10C.

"Local government unit" means a municipality, county, or other political subdivision of the State, or any agency, board, commission, utilities authority or other authority, or other entity thereof.

“Lot” means a designated parcel, tract or area of land established by a plat or otherwise, as permitted by law and to be used, developed or built upon as a unit pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

"Major Highlands Development" means, except as otherwise provided pursuant to N.J.S.A. 13:20-28a:

1. Any non-residential development in the preservation area;
2. Any residential development in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more;
3. Any activity undertaken or engaged in the preservation area that is not a development but results in the ultimate disturbance of one-quarter acre or more of forested area or that results in a cumulative increase in impervious surface by one-quarter acre or more on a lot; or
4. development but results in the ultimate disturbance of one-quarter acre or more of forested area or that results in a cumulative increase in impervious surface by one- quarter acre or more on a lot; or

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5. Any capital or other project of a State entity or local government unit in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more. Major Highlands Development shall not mean an agricultural or horticultural development or agricultural or horticultural use in the preservation area.

"Mine" means any mine, whether on the surface or underground, and any mining plant, material, equipment, or explosives on the surface or underground, which may contribute to the mining or handling of ore or other metalliferous or non-metalliferous products.

The term "mine" shall also include a quarry, sand pit, gravel pit, clay pit, or shale pit.

"Mine site" means the land upon which a mine, whether active or inactive, is located, for which the Commissioner of Labor and Workforce Development has granted a certificate of registration pursuant the Mine Safety Act, N.J.S.A. 34:6-98.4, and the boundary of which includes all contiguous parcels, except as provided below, of property under common ownership or management, whether located in one or more municipalities, as such parcels are reflected by lot and block numbers or metes and bounds, including any mining plant, material, or equipment. "Contiguous parcels" as used in this definition of "mine site" shall not include parcels for which mining or quarrying is not a permitted use or for which mining or quarrying is not permitted as a prior nonconforming use under the

Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

"Natural Heritage Database" means the manual and computerized file maintained by the Department at <http://www.nj.gov/dep/parksandforests/natural/heritage/index.html> that includes continuously updated information on the location and status of rare plant and animal species and ecological communities in New Jersey.

"New Jersey Pollutant Discharge Elimination System" or "NJPDDES" means the Department's program for the issuance of permits pursuant to the New Jersey Water

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Pollution Control Act, N.J.S.A. 58:10A-1 et seq., as amended, and its implementing rules, N.J.A.C. 7:14A.

“Non-contiguous” means a lot or lots that do not meet the definition of “contiguous” set forth elsewhere in this section.

"Oversight document" means any document that the Department or a court issues to define the role of a person participating in the remediation of a contaminated site or area of concern, and may include, without limitation, an administrative order, administrative consent order, court order memorandum of understanding, memorandum of agreement, or remediation agreement.

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

"Planning area" means that portion of the Highlands Region not included within the preservation area.

“Preliminary assessment” or “PA” means the first phase in the process of identifying areas of concern pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-3.

"Preservation area" means that portion of the Highlands Region so designated by N.J.S.A. 13:20-7b.

"Preservation Area" means that portion of the Highlands Region so designated by N.J.S.A. 13:20-7b.

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"Property as a whole" means all lots assembled as one investment or to further one development plan. The property as a whole may include more than one municipal tax block or lot. The property as a whole may also include blocks or lots that were previously sold or developed, if those blocks or lots and the remaining unsold or undeveloped blocks or lots were part of one.

"Public community water system" means a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.

"Public noncommunity water system" means a public water system that is not a public community water system and is either a "public nontransient noncommunity water system" or a "public transient noncommunity water system" as defined in this section.

"Public nontransient noncommunity water system" means a public water system that is not a public community water system and that regularly serves at least 25 of the same persons for more than six months in any given calendar year.

"Public transient noncommunity water system" means a public water system that is not a public community or a public nontransient noncommunity water system and that serves at least 25 transient individuals for at least 60 days in any given calendar year.

"Public utility" means the same as that term is defined in N.J.S.A. 48:2-13. That is, the term "public utility" shall include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, charter bus operation, special bus operation, canal, express, subway, pipeline, gas, electricity distribution, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

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"Public water system" means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves at least 25 individuals daily for at least 60 days out of the year. Such term includes any collection, treatment, storage and distribution facilities under control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. A public water system is either a "public community water system" or a "public noncommunity water system" as defined in this section.

"Rare species" means wildlife species that are not endangered or threatened wildlife species and considered by the Department to be species of special concern as determined by a panel of experts or that are ranked S1 (critically imperiled in New Jersey because of extreme rarity), S2 (imperiled in New Jersey because of rarity), S3 (rare in New Jersey), G1(critically imperiled globally), G2 (imperiled globally because of rarity) or G3 (globally very rare and local throughout its range or found locally in a restricted range) in the Natural Heritage Database, and Plant Species of Concern listed pursuant to N.J.A.C. 7:5C-3.1. "Species of special concern" means wildlife species that warrant special attention because of evidence of population decline or inherent vulnerability to environmental deterioration or habitat modification that would result in the species becoming threatened if conditions surrounding the species begin or continue to deteriorate. The term includes species for which there is little knowledge of current population status in the State.

"Recreation and conservation purposes" means the same as that term is defined in the Garden State Preservation and Trust Act, N.J.S.A. 13:8C-3.

"Regional master plan" means the standards established in the Highlands regional master plan or any revision thereof adopted by the Highlands Council pursuant to N.J.S.A. 13:20-8 including all goals, requirements, provisions, and any municipal master plans and

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development regulations or county master plans and associated regulations that are formally approved by the Highlands Council pursuant to the Highlands Act.

“Regulated activity” means an activity that is a major Highlands development, and that is regulated in any manner pursuant to the Highlands Act and/or this chapter.

"Remedial action workplan" or "RAW" means a plan for the remedial action to be undertaken at a contaminated site defined as such pursuant to the “Technical Requirements for Site Remediation”, N.J.A.C. 7:26E-6.

"Sanitary landfill facility" means a solid waste facility at which solid waste is deposited on or in the land as fill for the purpose of permanent disposal or storage for a period exceeding six months, except that it shall not include any waste facility approved for disposal of hazardous waste.

“Site investigation” or “SI” means the collection and evaluation of data adequate to determine whether or not discharged contaminants exist at a site or have migrated or are migrating from the site at levels in excess of the applicable remediation standards. A site investigation shall be developed based upon the information collected pursuant to the preliminary assessment. Site investigations are governed by the Department’s Technical Requirements for Site Remediation, N.J.A.C. 7:26E-3.

"Soil conservation district" means the same as that term is defined in N.J.S.A. 4:24-2.

“Soil Survey” means a document published by the United States Department of Agriculture and available from the Natural Resource Conservation Service or online at [www.soildatamart.nrcs.usda.gov](http://www.soildatamart.nrcs.usda.gov) that contains descriptions of soil series on a county by county basis.

"State entity" means any State department, agency, board, commission, or other entity, district water supply commission, independent State authority or commission, or bi-state entity.

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“Steep slope” means a land area with a grade greater than 10% and includes but is not limited to natural swales, ravines and manmade areas such as those created for road grading or mining for sand, gravel or fill.

“Swimming pool” means a man-made structure that impounds water where none would under natural circumstances be collected and that is regularly maintained for recreational use. “Maintained for recreational use” means the water is chemically treated on a regular basis to protect the health of users, and the structural integrity of the pool is monitored regularly. A naturally occurring lake or pond used for swimming is not a swimming pool.

“Threatened species” means an indigenous nongame wildlife species of New Jersey designated pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-13 et. seq., and its implementing rules, N.J.A.C. 7:25-4.17, as most recently amended.

“Treatment works approval” or “TWA” means an approval issued pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-6, and N.J.A.C. 7:14A-22 or 7:9A-3.9, or the former N.J.S.A. 58:12-3.

“Upland forested area” means a biological community that is a “forest” and that is not a Highlands open water.

"Waters of the Highlands" means all springs, streams including intermittent streams, and bodies of surface or ground water, whether natural or artificial, located wholly or partially within the boundaries of the Highlands Region, but shall not include swimming pools.

“WQMP” or “Water quality management plan” means a plan prepared pursuant to sections 208 and 303 of the Federal Clean Water Act, 33 U.S.C. § 1251 et seq., (33 U.S.C. § 1288 et seq and 1313 respectively) and the Water Quality Planning Act,



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N.J.S.A. 58:11A-1 et seq., including the Statewide WQMP, or areawide or county WQMP as defined under N.J.A.C. 7:15.

7:38-1.5 Requests for adjudicatory hearings

(a) Subject to the limitations of (e) below, a person may request an adjudicatory hearing to contest any of the following decisions under this chapter:

1. A Highlands applicability determination;
2. A Highlands Resource Area Determination;
3. A Highlands Preservation Area Approval;
4. A Highlands Preservation Area Approval with waiver (including when applicable, brownfield designation); and
5. A Highlands general permit authorization.

(b) A person seeking to contest any administrative order or a notice of civil administrative penalty assessment imposed pursuant to N.J.S.A. 13:20-35 and this chapter shall do so in accordance with N.J.A.C. 7:38-13.13.

(c) A request for an adjudicatory hearing shall:

1. Be in writing on a hearing request form available from the Department and shall set forth:
  - i. The name, address and daytime telephone number of the person requesting the hearing;
  - ii. When the request is submitted by someone other than the applicant, evidence that a copy of the hearing request has been mailed to the applicant;

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- iii. A copy of the Department notice or decision for which a hearing is being requested;
  - iv. The Department file number or project number on the notice or decision;
  - v. A statement requesting a hearing;
  - vi. A specific admission, denial or explanation of each fact appearing in the Department notice or decision or a statement that the person is without knowledge thereof; and
  - vii. A concise statement of the facts or principles of law asserted to constitute any factual or legal defense; and
2. Be submitted to the Department as follows:
- i. Submit the original request to:
    - Office of Legal Affairs
    - Attention: Adjudicatory Hearing Requests
    - Department of Environmental Protection
    - P.O. Box 402
    - Trenton, New Jersey 08625-0402.
  - ii. Submit a copy of the request to:
    - Land Use Regulation Program
    - Attention: Director
    - Department of Environmental Protection
    - P.O. Box 439
    - Trenton, NJ 08625-0439.

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(d) If a hearing request does not include a specific admission, denial or explanation of each fact alleged, or a statement that the person is without knowledge thereof, the facts alleged in the Department notice or decision shall be deemed to have been admitted.

(e) Nothing in this section shall be construed to provide a right to an adjudicatory hearing in contravention of N.J.S.A. 52:14B-3.1 through 3.3.

(f) To contest a Department determination or decision listed at (a) above, a person shall submit a hearing request no later than 30 days after notice of the decision or determination is published in the DEP Bulletin. If a person submits the hearing request after this time, the Department shall deny the request. The DEP Bulletin is available through the Department's website at [www.state.nj.us/dep](http://www.state.nj.us/dep).

(g) As part of a request for an adjudicatory hearing, a person may request that the Department determine whether the matter for which the adjudicatory hearing is requested is suitable for mediation by the Department's Office of Dispute Resolution. The Department shall promptly notify the requester of its determination. If the Department determines the matter is suitable for mediation, it shall also notify the requester of the procedures and schedule for mediation.

(h) A request for a hearing by a permittee shall automatically stay the effectiveness of the HPAA which is the subject of the hearing request, unless the permittee shows good cause to the Department in writing why the HPAA should continue in effect while being contested. A permittee requesting a hearing shall immediately stop all activity regulated by that permit until the matter is resolved, unless the Department grants an exception in writing. A person requesting a hearing concerning an HRAD issued to him or her shall ensure that the area containing the Highlands resource is preserved in the condition existing when the HRAD was issued. If a person other than the permittee requests a hearing, the requester may ask the Department to stay the HPAA that is the subject of the hearing request. The Department shall grant the request for a stay of the HPAA for good

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cause shown, or may allow certain regulated activities pending hearing and decision, upon such terms and conditions the Department deems appropriate.

(i) The Department shall notify the requester if the request for a hearing is granted and, if denied, the reason why. If a hearing request is granted, the Department shall refer the matter to the Office of Administrative Law for an adjudicatory hearing in accordance with the Administrative Procedure Act, N.J.S.A 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(j) If the Department and the person seeking a hearing agree to settle a matter for which a hearing request has been submitted under this section, and the settlement will result in Department approval of any regulated activity, public notice of the settlement shall be provided as follows:

1. The person who requested the hearing shall send by certified mail a "notice of intent to settle" to the following persons using the notice form available at the address in N.J.A.C. 7:38-1.3(a)1 or 2, as applicable:
  - i. Each person provided notice of the application for the HPAA or determination that was being appealed; and
  - ii. Each person who submitted a timely, written comment on the application to the Department;
2. The Department shall publish the notice of intent to settle in the DEP Bulletin, and shall accept comments on the notice for at least 30 calendar days;
3. After the 30-day comment period, the person who requested the hearing shall send a "notice of settlement" by certified mail to the following

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persons using the form available at the address in N.J.A.C. 7:38-1.3(a)1 or 2, as applicable:

- i. Each person provided a “notice of intent to settle” under (a)1 above; and
  - ii. Each person who submitted a written comment to the Department on the notice of intent to settle within the 30-day comment period provided above; and
4. If the Department thereafter determines that no good cause exists for the Department to decline the proposed settlement or to significantly modify it, the Department shall publish a “notice of the final settlement” in the DEP Bulletin.

(k) At the conclusion of any adjudicatory hearing in the Office of Administrative Law, the administrative law judge will submit an initial decision to the Commissioner. The Commissioner shall issue a final decision affirming, rejecting, or modifying the findings of fact and conclusions of law in the Initial Decision, in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules N.J.A.C. 1:1.

(l) The Commissioner’s final decision under (k) above may be appealed to the Appellate Division of the Superior Court, within the time provided by court rule.

## SUBCHAPTER 2. JURISDICTION, APPLICABILITY AND EXEMPTIONS

### 7:38-2.1 Jurisdiction

(a) This chapter applies geographically to the preservation area of the Highlands Region and to the planning area as provided in N.J.A.C. 7:38-1.1. As set forth in the Highlands

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Act at N.J.S.A. 13:20-7a, the Highlands Region consists of all that area within the boundaries of the following municipalities:

1. In Bergen County: Mahwah and Oakland;
2. In Hunterdon County: Alexandria, Bethlehem, Bloomsbury, Califon, Clinton Town, Clinton Township, Glen Gardner, Hampton, High Bridge, Holland, Lebanon Borough, Lebanon Township, Milford, Tewksbury, and Union;
3. In Morris County: Boonton Town, Boonton Township, Butler, Chester Borough, Chester Township, Denville, Dover, Hanover, Harding, Jefferson, Kinnelon, Mendham Borough, Mendham Township, Mine Hill, Montville, Morris Plains, Morris Township, Morristown, Mount Arlington, Mount Olive, Mountain Lakes, Netcong, Parsippany-Troy Hills, Pequannock, Randolph, Riverdale, Rockaway Borough, Rockaway Township, Roxbury, Victory Gardens, Washington, and Wharton;
4. In Passaic County: Bloomingdale, Pompton Lakes, Ringwood, Wanaque, and West Milford;
5. In Somerset County: Bedminster, Bernards, Bernardsville, Far Hills, and Peapack-Gladstone;
6. In Sussex County: Byram, Franklin, Green, Hamburg, Hardyston, Hopatcong, Ogdensburg, Sparta, Stanhope, and Vernon; and
7. In Warren County: Allamuchy, Alpha, Belvidere, Franklin, Frelinghuysen, Greenwich, Hackettstown, Harmony, Hope,

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Independence, Liberty, Lopatcong, Mansfield, Oxford, Phillipsburg, Pohatcong, Washington Borough, Washington Township, and White.

(b) As set forth in the Highlands Act at N.J.S.A. 13:20-7b, the preservation area in the Highlands Region consists of that area within the boundaries described in N.J.S.A. 13:20-7b(1).

(c) In accordance with the Highlands Act at N.J.S.A. 13:20-7b(2), the following apply regarding the preservation area:

1. Except as otherwise provided in N.J.S.A. 13:20-7b(1), any natural geographic feature, including a river, stream, or brook, used in N.J.S.A. 13:20-7b(1) for the boundary description of the preservation area shall be considered to lie totally within the preservation area.

2. Except as otherwise provided in N.J.S.A. 13:20-7b(1), any road, railroad, or railroad right-of-way used in N.J.S.A. 13:20-7b(1) for the boundary description of the preservation area shall be considered to lie outside of the preservation area.

3. The use of property block and lot designations in N.J.S.A. 13:20-7b(1) include or exclude property from the preservation area.

4. Where a survey gore exists between a property boundary depicted on a municipal tax map and the limits of a surveyed property noted in N.J.S.A. 13:20-7b(1), the surveyed property boundary description shall be considered to constitute the preservation area boundary.

5. The preservation area shall not include any land located within the boundaries of any regional center or town center designated by the State

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Planning Commission pursuant to the State Planning Act, N.J.S.A. 52:18A-196 et seq., as of August 10, 2004, except to the extent necessary as set forth in the boundary description of the preservation area in N.J.S.A. 13:20-7b(1) to reflect appropriate and nearest practicable, on-the-ground, and easily identified reference points.

(d) The planning area shall consist of all that area of the Highlands Region not within the preservation area.

7:38-2.2 "Major Highlands development" regulated by the Department

(a) No person shall commence work on a major Highlands development in the preservation area without first receiving a Highlands Applicability Determination pursuant to N.J.A.C. 7:38-2.4 and/or a Highlands Preservation Area Approval (HPAA) pursuant to N.J.A.C. 7:38-6. The following activities in the preservation area constitute major Highlands development unless excluded pursuant to N.J.A.C. 7:38-2.3:

1. Any non-residential development;
2. Any residential development that requires a Department permit, approval, or other authorization pursuant to any of the following statutes, as amended and supplemented: Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., The Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq., Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., or the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.;



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3. Any residential development that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more;
4. Any activity that is not a development but that results in the ultimate disturbance of one-quarter acre or more of forest or that results in a cumulative increase in impervious surface by one-quarter acre or more, except as provided in (b) below; or
5. Any capital or other project of a State entity or local government unit that requires one of the permits, approvals, or authorizations listed in (a)2 above or that results in the ultimate disturbance of one or more acres of land or a cumulative increase in impervious surface by one-quarter acre or more.

(b) For lots created by subdivision after August 10, 2004, ultimate disturbance and cumulative increase in impervious surface shall be calculated as follows:

1. Ultimate disturbance means the total of existing and proposed disturbance on the created lot(s) and all existing disturbance on the remainder lot. For a residential development under (a)3 above where the existing disturbance equals one acre or more, in order to reduce the ultimate disturbance below one acre the applicant may cease all disturbance in a given area, remove all impervious surface and subject that area to a conservation restriction in accordance with N.J.A.C. 7:38-6.3 so that there will be no continuing or future disturbance.
2. Cumulative increase in impervious surface means all impervious surface placed on the newly created lot(s) and all impervious surface placed on the remainder lot after August 10, 2004.

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(c) Agricultural or horticultural uses and development in the preservation area are not regulated as major Highlands development under this chapter.

(d) An HPAA issued under this chapter shall satisfy the requirements for and constitute an approval pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; Flood Hazard Control Act, N.J.S.A. 58:16A-50 et seq.; Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.; and the Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., for any activity regulated by this chapter.

(e) A person who obtains an HPAA from the Department shall be solely responsible for ensuring that the approved project or activity complies with all requirements in this chapter, regardless of whether others manage, oversee or work on the project. If a permittee sells or otherwise transfers all or part of his or her ownership of a lot prior to completion of all work authorized by an HPAA on that lot, the permittee shall notify the Department in writing by certified mail of the name and address of any new owner, the municipality, county, block and lot sold or transferred to each person, and the date the deed transferring ownership was filed with the municipality, and shall also enclose a copy of the HPAA.

(f) No person shall undertake any regulated activity unless it is specifically identified in a valid HPAA issued for the lot where the regulated activity is undertaken.

#### 7:38-2.3 Exemptions

(a) The following projects or activities are exempt from the requirements of this chapter, but are required to comply with all other Federal, state and local requirements that may apply to the proposed project. For the purposes of this section, a single family dwelling shall include those group homes, community residences, and other alternative living arrangements that are specifically authorized to be given equivalent treatment as a single family dwelling under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. and that are using or proposing to use a new individual subsurface disposal system or aggregate of

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equivalent disposal units where the sanitary wastewater design flow is 2,000 gallons per day or less:

1. Construction of a single-family dwelling, for an individual's own use or the use of an immediate family member, on a lot owned by the individual on August 10, 2004 or on a lot for which an individual has, on or before May 17, 2004, entered into a binding contract of sale to purchase that lot;
2. Construction of a single-family dwelling on a lot in existence on August 10, 2004, provided that construction does not result in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more;
3. Construction of a major Highlands development that received the following municipal and State approvals on or before March 29, 2004:
  - i. One of the following approvals issued pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.:
    - (1) Preliminary or final site plan approval;
    - (2) Final municipal building or construction permit;
    - (3) Minor subdivision approval where no subsequent site plan approval is required; or
    - (4) Preliminary or final subdivision approval where no subsequent site plan approval is required; and
  - ii. At least one of the following Department permits, if applicable to the proposed project:

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(1) A permit or certification pursuant to the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.;

(2) A water extension permit or other approval or authorization pursuant to the Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq.;

(3) A certification or other approval or authorization issued pursuant to The Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq.; or

(4) A treatment works approval pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.;

iii. If none of the Department permits in (a)3ii above are required for the proposed project, one of the following Department permits, if applicable to the proposed project, shall be required, in addition to an approval under (a)3i above:

(1) A permit or other approval or authorization issued pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.;  
or

(2) A permit or other approval or authorization issued pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.;

iv. The exemption provided in (a)3 above shall apply only to the land area and the scope of the major Highlands development addressed by the qualifying approvals applicable to the project and described in (a)3i through iii above, and shall expire:

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(1) If any of those qualifying approvals expire;

(2) If construction beyond site preparation does not commence within three years after August 10, 2004; or

(3) If construction ceases for a cumulative total of one year after August 10, 2007;

4. Reconstruction for any reason of any building or structure within 125 percent of the footprint of the lawfully existing impervious surfaces on the site on August 10, 2004, provided that the reconstruction or development does not increase the lawfully existing impervious surface by one-quarter acre or more. This exemption shall not apply to the reconstruction of any agricultural or horticultural building or structure for a non-agricultural or non-horticultural use;

5. Any improvement to a lawfully existing single-family dwelling in existence on August 10, 2004, including but not limited to an addition, garage, shed, driveway, porch, deck, patio, swimming pool, or septic system as long as the improvement maintains the use as a single-family dwelling as defined by code or ordinance in the municipality in which the dwelling is located and does not permit use of the structure as a multiple unit dwelling;

6. Any improvement, for non-residential purposes, to a place of worship owned by a non-profit entity, society or association, or association organized primarily for religious purposes, or a public or private school, or a hospital, in existence on August 10, 2004, including but not limited to new structures, an addition to an existing building or structure, a site improvement, or a sanitary facility;

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7. Any activity conducted in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-23.3, or [for public lands,] the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester;

8. The construction or extension of trails with non-impervious surfaces on publicly owned lands or on privately owned lands where a conservation or recreational use easement has been established and filed with the deed for the lots on which the easement exists;

9. The routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems by a State entity or local government unit, provided that the activity is consistent with the goals and purposes of the Highlands Act, and does not result in the construction of any new through-capacity travel lanes.

10. The construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit, provided that the activity does not result in the construction of any new through-capacity travel lanes;

11. The routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of the Highlands Act;

i. For the purposes of this exemption, installation of cellular equipment on a lawfully existing overhead utility tower and the construction of the attendant 10-foot by 20-foot pad, when located within the four footings of such tower within a Right-of-way owned or controlled by a public utility,

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constructed with the consent of the public utility is consistent with the goals and purposes of the Highlands Act and this exemption;

12. The reactivation of rail lines and rail beds existing on August 10, 2004;
13. The construction of a public infrastructure project approved by public referendum prior to January 1, 2005 or a capital project approved by public referendum prior to January 1, 2005;
14. Mining, quarrying, or production of ready mix concrete, bituminous concrete, or Class B recycling materials occurring or which are permitted to occur on any mine, mine site, or construction materials facility existing on June 7, 2004;
15. The remediation of any contaminated site pursuant to N.J.S.A. 58:10B-1 et seq.;
16. Any activities on lands of a Federal military installation existing on August 10, 2004 that lie within the Highlands Region; and
17. A major Highlands development located within an area designated as Planning Area 1 (Metropolitan), or Planning Area 2 (Suburban) as designated pursuant to the State Planning Act, N.J.S.A. 52:18A-196 et seq., as of March 29, 2004, that on or before March 29, 2004 has been the subject of a settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court, to satisfy the constitutional requirement to provide for the fulfillment of the fair share obligation of the municipality in which the development is located. This exemption shall expire if construction beyond site preparation does not commence within three years after receiving all final approvals required pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

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(b) For the purposes of this section, "lawfully existing" means that the dwelling or utility tower was constructed, or impervious surface placed, in accordance with all applicable state and Federal environmental land use and water permits and valid municipal approvals, including building permits, septic system approval, limitations on lot coverage and, where applicable, certificates of occupancy.

(c) Proposed development exempt from the Highlands Act shall comply with all Federal, and local statutes, regulations, development regulations or ordinances that may apply to the proposed activity and shall also comply with all other State laws including, but not limited to, the Freshwater Wetlands Protection Act, N.J.S.A.13:9B-1 et seq.; the Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 et seq.; the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.; the Water Pollution Control Act, N.J.S.A.58:10A-1 et seq.; the Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq.; the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.; the Safe Drinking Water Act, P.L.1977, c.224, N.J.S.A. 58:12A-1 et seq., the Flood Hazard Area Control Act, N.J.S.A.58:16A-50 et seq.), and all implementing rules.

#### 7:38-2.4 Highlands applicability determination

(a) A Highlands Applicability and Water Quality Management Plan Consistency Determination (Highlands Applicability Determination) answers the following questions:

1. Is the proposed development or activity a major Highlands development pursuant to N.J.A.C. 7:38-2.2?
2. Is the proposed development or activity a major Highlands development that is exempt from the Highlands Act, pursuant to N.J.A.C. 7:38-2.3?



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3. Regardless of the answer to (a)1 or 2 above, is the proposed development or activity consistent with the applicable areawide Water Quality Management Plan?

(b) Any person proposing to undertake any activity in the preservation area that requires any environmental land use or water permit from the Department other than, as provided at (c) below, a NJPDES permit or TWA, shall either clearly stipulate that the proposed activity is subject to the Highlands Act in an application to the Department for an HPAA, or obtain an Highlands Applicability Determination, before submitting an application for the environmental land use or water permit unless the activity is one of the following:

1. The following improvements to a lawfully existing single family dwelling in existence on August 10, 2004, provided that the lot upon which the home is situated has not been further subdivided:
  - i. Driveway, garage or shed;
  - ii. An addition for residential purposes attached to the home;
  - iii. Deck, patio or porch;
  - iv. Swimming pool; or
  - v. Septic system;
2. Routine maintenance and operations, preservation, or repair of transportation systems by a State entity or local government unit provided such activity is confined to the existing footprint of development, and does not create new travel lanes or increase the length of an existing travel lane by more than 2,640 feet, not including tapers;
3. Rehabilitation or reconstruction of transportation systems by a State entity or local government unit provided such activity:

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- i. Does not result in a cumulative increase in impervious surface by 0.5 acres or more;
  - ii. Does not involve the ultimate disturbance of 1 or more acres of land; and
  - iii. Does not create new travel lanes or increase the length of an existing travel lane by more than 2,640 feet, not including tapers.
  
4. Routine maintenance and operations, rehabilitation, preservation, reconstruction and repair of infrastructure systems by a State entity or local government unit provided such activity is confined to the existing footprint of development, and does not increase the conveyance capacity, for example, by increasing the pipe size of a sewer or water system.
  
5. The construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit provided the activity does not:
  - i. Create a new travel lane or increase the length of an existing travel lane by more than 2,640 linear feet, not including tapers;
  - ii. Result in a cumulative increase in impervious surface of one acre or more; or
  - iii. Involve the ultimate disturbance of two or more acres of land;
  
6. Any activity that is part of an agricultural or horticultural development or agricultural or horticultural use;
  
7. Any activity conducted by a landowner in accordance with an approved woodland management plan issued pursuant to the Farmland Assessment Act, N.J.S.A. 54:4-

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23.3, or [for public lands,] the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester;

8. The remediation of any contaminated site pursuant to N.J.S.A. 58:10C, provided no residential, commercial, or industrial development is undertaken concurrently with, or subsequent to, the remediation. Any concurrent or subsequent development at the site is subject to the requirements of this chapter for a Highlands applicability determination and HPAA as applicable;

9. The addition of telecommunications equipment or antennas to a telecommunication facility existing on August 10, 2004, provided the equipment is located within the existing fenced compound or on lawfully existing impervious surface so that it does not increase impervious surface; or

10. Installation of cellular equipment on a legally existing overhead utility tower and the construction of the attendant 10-foot by 20-foot pad, when located within the four footings of such tower within a right-of-way owned or controlled by a public utility, constructed with the consent of the public utility;

(c) Following submission under N.J.A.C. 7:14A of an application for a TWA or an individual NJPDES permit, or a request for authorization (RFA) under a general NJPDES permit, for an activity in the Highlands preservation area, the Department will notify the applicant whether the activity that is the subject of the application or RFA is a major Highlands development that requires a Highlands Applicability Determination under this section. This section does not apply to NJPDES permit no. NJ0088323 (see N.J.A.C. 7:38-2.6(d)).

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(d) Nothing in (b) or (c) above shall exempt any person from the obligation to obtain a formal consistency determination from the Department if required by the Water Quality Management Planning Rules at N.J.A.C. 7:15-3.

(e) If the Department determines that a proposed activity is inconsistent with the applicable areawide Water Quality Management Plan (WQMP), the Department shall not issue any permits or approvals for the activity, even if it is exempt from the Highlands Act or does not qualify as major Highlands development. The activity shall not proceed until the applicant applies for and receives an amendment to the areawide WQMP that includes the proposed activity in the WQMP and complies with all Federal, state, county or municipal requirements applicable to the proposed project.

(f) If the Department determines the proposed activity is a major Highlands development subject to the permitting requirements of the Highlands Act and consistent with the applicable areawide WQMP, the activity shall not commence until an HPAA is issued for the proposed development.

(g) If the Department determines the proposed activity is a major Highlands development subject to the permitting requirements of the Highlands Act but is inconsistent with the applicable areawide WQMP, the applicant may apply for an HPAA as long as the application also includes an administratively complete request for an amendment to the areawide WQMP pursuant to N.J.A.C. 7:38-9.6(c).

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

(a) Pursuant to N.J.S.A. 58:12A-4.1, within the preservation area, the construction of any new public water system and the extension of any existing public water system to serve development in the preservation area is prohibited except to serve development that:

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1. Is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3, and is consistent with the applicable areawide WQMP, pursuant to N.J.A.C. 7:15; or
2. Receives a HPA A pursuant to N.J.A.C. 7:38-6.

(b) Pursuant to N.J.S.A. 58:1A-5.1, this chapter applies to:

1. Any person intending to divert or proposing projects which will result in the diversion within the preservation area of more than 50,000 gallons of water per day, for any purpose, from a single source or a combination of sources;
2. Any person holding a water use registration as of March 29, 2004 for a diversion within the preservation area who diverts water in an amount that exceeds the monthly or annual limits established by the Department in that water use registration under N.J.A.C. 7:38-3.2(i)2; and
3. Any person having the capability to divert more than 50,000 gallons of water per day in the preservation area but who does not currently do so. The requirements to which such persons are subject are set forth at N.J.A.C. 7:38-3.2(i).

(c) This chapter does not apply to:

1. Diversions for agricultural, aquacultural; or horticultural purposes as defined in N.J.A.C. 7:20A-1.3; or
2. Persons who make emergency diversions of water for a period of less than 31 consecutive days. An emergency diversion includes taking water for the purpose of fire fighting, flood prevention, hazardous substance and/or waste spill response, or for other emergencies as determined by the Department;

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i. In all cases of emergency diversion, the person responsible for the diversion shall contact the Department within 48 hours of initiation of the emergency diversion. If the emergency diversion is expected to continue for more than 31 days, the person responsible for the emergency diversion shall apply for a water supply diversion permit pursuant to N.J.A.C. 7:19 within 30 days after initiating the emergency diversion.

7:38-2.6 Applicability for purposes of NJPDES-permitted discharges and wastewater facilities

(a) Pursuant to N.J.S.A. 58:11A-7.1, within the preservation area, designated sewer service areas for which wastewater collection systems have not been installed as of August 10, 2004, were revoked effective August 10, 2004, and any associated treatment works approvals in the impacted areas expired on August 10, 2004 except for sewer service areas and any associated treatment works approvals necessary to serve:

1. Development that is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3; or
2. Major Highlands development that is approved in accordance with an HPAA with a waiver in accordance with N.J.A.C. 7:38-6.

(b) Except as provided in (d) below, any application for an individual NJPDES permit, request for authorization under a general NJPDES permit, or application for treatment works approval under N.J.A.C. 7:14A for an activity in the preservation area shall be submitted to the Division of Water Quality at the address in N.J.A.C. 7:38-1.2(a)3. If the Department determines the proposed activity for which the application is submitted constitutes major Highlands development, the activity will require a Highlands Applicability Determination that the activity is exempt from the Highlands Act and consistent with the WQMP, exempt from the Highlands Act and not addressed under a WQMP, or has received an HPAA prior to the application being declared administratively complete for review under N.J.A.C. 7:14A.

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(c) For a major Highlands development not exempt from this chapter, the permits, authorizations, approvals and certifications listed below shall not be approved unless an HPAA is first obtained in accordance with N.J.A.C. 7:38-6. For applications and forms, please contact the Division of Water Quality at the address in N.J.A.C. 7:38-1.2(a)3:

1. An individual NJPDES permit or an authorization under a general NJPDES permit;
2. A treatment works approval issued under N.J.A.C. 7:14A or 7:9A for building, installing, modifying, or operating any treatment works; and
3. A certification issued pursuant to N.J.S.A. 58:11-25.1 (for 50 or more realty improvements) for any sewerage facility.

(d) Except for projects to be constructed by the New Jersey Department of Transportation (NJDOT), a request for authorization (RFA) under NJPDES Permit No. NJ0088323 (category 5G3 "construction activity" stormwater general permit) shall be submitted directly to the appropriate Soil Conservation District, from which RFA forms may also be obtained. Notwithstanding N.J.A.C. 7:38-2.4(b) and (c), requests for authorization shall not be considered complete for review under N.J.A.C. 7:14A unless accompanied by a HPAA or a Highlands Applicability Determination that the proposed activity is exempt from the Highlands Act and consistent with a WQMP, or exempt from the Highlands Act and not addressed by a WQMP.

### SUBCHAPTER 3 PRESERVATION AREA STANDARDS

#### 7:38-3.1 Scope and applicability

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(a) In accordance with the Highlands Act at N.J.S.A. 13:20-32, the Department shall issue an HPAA only if the proposed development or activity satisfies all the requirements in this subchapter and N.J.A.C. 7:38-6.2.

(b) An applicant is subject to the standards in this subchapter if any of the environmental resources described in this subchapter existed on a lot on August 10, 2004. If a resource appears on photographs from the Department's 2002 aerial overflight of the State, the Department shall assume the resource existed on the lot on August 10, 2004. An applicant may rebut this presumption by providing the Department credible proof that the resource was lawfully disturbed before August 10, 2004.

#### 7:38-3.2 Standards for water supply diversion sources

(a) Any person applying for a new or modified water supply allocation or an increased diversion under an existing water use registration as established under (i) below where at least one of the diversion sources is located within the preservation area shall obtain an HPAA including compliance with the standards and requirements in the Water Supply Allocation Permit Rules, N.J.A.C. 7:19.

(b) The Department shall not approve as part of an HPAA any new or increased diversion within the preservation area resulting in a total permitted diversion of greater than 50,000 gallons of water per day unless:

1. Individual and cumulative impacts of multiple diversions are fully assessed;
2. Existing stream base flows are maintained;
3. Depletive use within the sub-drainage basin is minimized. For the purposes of this section, sub-drainage area is defined as the HUC 14;
4. Existing water quality is maintained; and



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5. Ecological uses are protected.

(c) Any water allocation approved as part of an HPAA for a diversion located within the preservation area that impacts or has the potential to impact any Highlands open water that is a surface water body, shall include a passing flow for the affected portion of the surface water body. In establishing the passing flow, the Department shall take into account the needs of existing downstream users holding a valid water allocation permit or HPAA, aquatic and water-dependent ecological requirements, use and classification of the water body, natural seasonal flow regimes of the affected water body, and impacts to the safe yield of existing water supply systems.

1. The Department may use passing flow assessment methods to ensure that the ecological integrity of water bodies in the preservation area is protected as mandated by the Highlands Act.

(d) The Department shall not approve as part of an HPAA any new or increased diversion within the preservation area unless water conservation measures are implemented to the maximum extent practicable. Such measures include those identified at (g)2 below.

(e) The Department shall not approve as part of an HPAA any new or increased diversion that results in a diversion of greater than 50,000 gallons of water per day for a non-potable use that is greater than 50 percent consumptive unless the applicant submits documentation that the diversion will not result in a net increase in this type of use within the sub-drainage area. The Department shall approve a diversion for this type of use provided:

1. The applicant documents that, within the same sub-drainage area, there is an equivalent reduction in a non-potable use that is greater than 50 percent consumptive that is achieved by:

i. Groundwater recharge of storm water;

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- ii. Beneficial reuse of reclaimed water; or
  - iii. The permanent termination of an equivalent non-potable use that is greater than 50 percent consumptive; and
2. Water allocated in accordance with a water supply allocation to a water purveyor or other potable user shall not be used to serve new activities in the preservation area that are greater than 50 percent non-potable and greater than 50 percent consumptive.

(f) In accordance with N.J.S.A. 13:20-32d, the Department may revoke an existing unused water supply allocation approval for non-potable purposes if it determines that the permittee is not implementing demand reduction measures to the maximum extent practicable.

(g) In accordance with N.J.S.A. 13:20-32d, and pursuant to (h) below, the Department may reduce an approved water allocation to eliminate any unused portion as follows:

1. Monthly and/or annual allocations may be reduced through a Department-initiated minor permit modification, or during the review of a permit renewal or modification application, if usage is less than 80 percent of the allocation, based on records for the previous five years; or
2. If all practicable water conservation measures are not undertaken. Practicable water conservation measures include:
  - i. Implementation of best management practices to ensure maximum water use efficiency and reduction in water losses, including:
    - (1) On-going leak detection; and

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(2) State-of-the-art (industry-specific) equipment and techniques;  
and

ii. A maximum limit on unaccounted-for water of 15 percent.

(h) Before reducing an allocation pursuant to (g) above, the Department shall:

1. Consider projected water demands associated with approved water main extensions, approved water supply contracts, and facility expansions planned within the next five years;
2. Provide the permittee with an opportunity for a public hearing pursuant to N.J.A.C. 7:19-2.8, prior to final permit modification; and
3. Depending on the purpose of the diversion, allow the permittee to implement a water-use practice during the term of the renewed or modified permit that will significantly improve water conservation.

(i) Any person in the preservation area who has the capability to divert more than 50,000 gallons of water per day (1.55 million gallons of water per month), but who does not currently do so, shall submit a water use registration to the Department in accordance with these rules and N.J.A.C. 7:19 to the address listed at N.J.A.C. 7:38-1.2. The "capability to divert more than 50,000 gallons of water per day" means the ability to divert more than 35 gallons of water per minute from a single source or a combination of sources, at least one of which is located all or partly within the preservation area.

1. Any holder of a valid Water Use Registration issued under N.J.A.C. 7:19 for diversion sources in the preservation area, who was in compliance with the Water Use Registration for the period between March 29, 1999 and March 29, 2004, and whose allocation limit was established at less than 100,000 gallons per day (3.1 million gallon per month), may continue to divert water at the current diversion level under the valid Water Use Registration.

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- i. For purposes of this paragraph, the Department will determine the current diversion level to be the highest amount of water diverted in any one month for the March 29, 1999 to March 29, 2004 period. The current annual diversion level is the highest annual amount of water diverted for the March 29, 1999 to March 29, 2004 period. At no time will the current diversion level be established at less than 50,000 gallons of water per day.
2. The Department will modify existing Water Use Registrations for diversion sources in the preservation area to include as conditions the current source locations and the allowable diversion amount, based on the current diversion level. If after the effective date of such modification a registration holder exceeds the diversion amount or changes source locations and such change would not qualify as a minor permit modification under N.J.A.C. 7:19-1.5(a), an HPAA will be required.

#### 7:38-3.3 Public community water systems

(a) Construction of a new public community water system or extension of an existing public community water system to serve development in the preservation area is prohibited unless the Department determines that the development to be served:

1. Is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3 and consistent with the applicable areawide WQMP;
2. Qualifies for an emergency HPAA pursuant to N.J.A.C. 7:38-7; or
3. Qualifies for an HPAA with waiver in accordance with N.J.A.C. 7:38-6.

(b) Construction of any new public water system shall comply with the Safe Drinking Water Act rules at N.J.A.C. 7:10.

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7:38-3.4 NJPDES Permitted discharges and wastewater facilities

(a) Any new discharge to surface water or ground water, except discharges from water supply facilities, that would require an individual or general NJPDES permit and any extension of a sewer line that requires a Treatment Works Approval is prohibited within the preservation area unless the development in the preservation area that satisfies any one of the following criteria:

1. Is exempt from the Highlands Act pursuant to N.J.A.C. 7:38-2.3, and is consistent with the applicable areawide Water Quality Management Plan;
2. Receives an HPAA in accordance with N.J.A.C. 7:38-6; or
3. Is not a major Highlands development.

(b) A new individual subsurface disposal system or aggregate of equivalent disposal units where the sanitary wastewater design flow is 2,000 gallons per day or less is permitted within the preservation area as set forth at (b)1 through 4 below. Forest under this subsection shall be identified and calculated in accordance with N.J.A.C. 7:38-3.9. For the purposes of this subsection, "equivalent disposal unit" means: for residential development, one system serving one single-family home sized in accordance with the Standards for Individual Subsurface Sewage Disposal Systems, Volume of sanitary sewage, at N.J.A.C. 7:9A-7.4; or for non-residential development or residential development comprising structures other than single family homes, 500 gallons of wastewater per day generated for the development type, as determined in accordance with N.J.A.C. 7:9A-7.4:

1. On a lot that contains all forest, the applicant proposes no more than one individual subsurface disposal system or equivalent disposal unit for each 88 acres of the lot;

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2. On a lot that does not contain forest, the applicant proposes no more than one individual subsurface disposal system or equivalent disposal unit for each 25 acres of the lot;

3. For the purposes of this subsection, the acreage of a lot shall be the total area of the lot(s) on which the proposed development is located as described by deed(s) or subdivision plat(s) on file with the municipal or county clerk.

4. For a lot containing both forest and nonforest areas, the total number of allowable individual subsurface disposal systems or equivalent disposal units permitted on the lot shall be determined by calculating the number of acres of the lot that are forest (as determined in accordance with the method at N.J.A.C. 7:38-3.9) and dividing that number by 88; calculating the remaining number of acres of the lot that are not forest and dividing that number by 25; and then summing the results. If the sum results in a fraction, the number shall be rounded down to the nearest whole number in order to determine the number of permitted individual subsurface disposal systems or equivalent disposal units.

5. For purposes of this section, non-contiguous lots in existence as of August 10, 2004 may be aggregated such that the number of individual subsurface disposal systems or equivalent disposal units that would be permitted under this section on one or more of the aggregated lots is transferred to one or more of the aggregated lots provided:

i. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units complies with all Federal, State and local laws;

ii. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units does not require a waiver of any requirement of this chapter;

iii. The proposed development on the lot or lots to receive the transferred individual subsurface disposal systems or equivalent disposal units is constructed in accordance with the Highlands Act and this chapter;

iv. The lots to be aggregated under this paragraph are all located in the preservation area and within the same HUC 14; and

v. The lot or lots from which the individual subsurface disposal systems or equivalent disposal units are to be transferred are subject to a conservation restriction against future disturbance in accordance with N.J.A.C. 7:38-6.3.

(c) In addition to the requirements at (b) above, individual subsurface sewage disposal systems or equivalent disposal units shall satisfy the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A, without extraordinary measures, including replacement of disposal field soil with permeable material or mounding of a disposal field to achieve the required depth to groundwater or confining layer.

#### 7:38-3.5 Impervious surfaces

(a) The Department shall not issue an HPAA if a proposed development or activity will result in impervious surface of greater than three percent of the land area of a lot. As to lots created by subdivision after August 10, 2004, calculation of this limit shall include all impervious surface existing on the entire land area of the lot which existed on August 10, 2004. For example, if a lot in existence as of August 10, 2004 currently has two percent impervious surface within its August 10, 2004 boundary, only one percent additional impervious surface will be permitted within that boundary, assuming the new impervious surface is placed in accordance with the Highlands Act and this chapter and any other applicable Federal, state and local law. Thus, if that lot is further subdivided, the newly created lot(s) could only receive an HPAA for a cumulative total of additional

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impervious surface equal to one percent of the area of the original lot that existed on August 10, 2004.

1. No impervious surface shall be permitted on a lot created by subdivision after August 10, 2004, if the lot of which the lot was a part as of August 10, 2004 contains three percent or more impervious surface.

2. For purposes of this subsection, non-contiguous lots in existence as of August 10, 2004, that contain less than three percent impervious surface may be aggregated such that the percentage of impervious surface that would have otherwise been permitted under this subsection on one or more of the aggregated lots is transferred to one or more of the aggregated lots, provided:

i. The proposed development on the lot or lots to which the percentage impervious surface is transferred complies with all Federal, State and local law;

ii. The proposed development on the lot or lots to which the percentage impervious surface is transferred does not require a waiver of any requirement of this chapter;

iii. The septic density standards of this chapter as set forth at N.J.A.C. 7:38-3.4(b) are met;

iv. The non-contiguous lots to be aggregated under this paragraph are all located in the Highlands Preservation Area and within the same HUC 14; and

v. The lot or lots from which the percentage impervious surface is transferred are permanently subject to a conservation restriction against future disturbance in accordance with N.J.A.C. 7:38-6.3.

(b) For purposes of this section, the calculation of the land area of a lot shall exclude Highlands open waters.



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(c) An applicant for an HPAA shall calculate impervious surface area based upon the impervious surface existing on the date the HPAA application is submitted to the Department.

(d) Where impervious surface on a lot in existence as of August 10, 2004 exceeds three percent of the area of the lot, all lawfully existing impervious surface may remain but no additional impervious surface shall be permitted.

#### 7:38-3.6 Highlands open waters

(a) There shall be a 300-foot buffer adjacent to Highlands open waters in which no disturbance is permitted, except as provided in this chapter.

(b) All new major Highlands development is prohibited within a Highlands open water and its adjacent 300-foot buffer except for linear development, which shall be permitted provided that there is no feasible alternative for the linear development outside the Highlands open water or Highlands open water buffer.

1. In order to demonstrate "no feasible alternative for linear development" the applicant shall demonstrate that there is no other location, design and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to a Highlands open water or the adjacent buffer. The additional limitations at (b)1i and ii below apply for proposed linear development that would provide access to an otherwise developable lot.

i. The proposed linear development is the only point of access for roadways or utilities to an otherwise developable lot;

ii. Shared driveways are used to the maximum extent possible to access multiple lots, especially in areas containing steep slopes, Highlands open water or Highlands open water buffers; and

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2. For a driveway, the applicant shall, in addition, demonstrate that:

i. The applicant has made a good faith effort to transfer development rights for the lot pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;

ii. The lot has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the lot, and to the land conservancies, environmental organizations, the Highlands Council and all other government agencies on a list provided by the Department, at an amount determined in compliance with N.J.S.A. 13:8C-26j or N.J.S.A. 13:8C-38j, as applicable by letter sent by certified mail, return receipt requested, with a copy to the Highlands Council, using the form provided by the Department, disclosing the location on the lot of all Highlands resource areas as defined in N.J.A.C. 7:38-1.4 and stating that an application to develop the lot has been filed and enclosing a copy of a fair market value appraisal, in accordance with (b)2iv(5) below, performed by a State-licensed appraiser based on the minimum beneficial economically viable use of the property allowable under local law; and

iii. No reasonable offer for the lot has been received; and

iv. Documentation for (b)2i through iii above shall include:

(1) A copy of each letter that the applicant sent under this paragraph;

(2) A copy of all responses received. Each response shall be submitted to the Department within 15 days after the applicant's receipt of the response;

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(3) A list of the names and addresses of all owners of real property within 200 feet of the lot, as certified by the municipality, including owners of easements as shown on the tax duplicate;

(4) Receipts indicating the letters were sent by certified mail;

(5) For submittal to all property owners within 200 feet, a copy of the fair market value appraisal required under (b)2ii above; and

(6) A copy of a written response or a resolution from the Highlands Council demonstrating that it has considered and rejected the offer.

3. An alternative shall not be excluded from consideration under this subsection merely because it includes or requires an area not owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed linear development.

4. After consideration of the information required in (b)1 through 3 above, the Department shall not issue an HPAA under this section if an applicant has refused a fair market value offer to purchase the property for which the driveway linear development is sought or if the Department finds that there is an alternative to the proposed linear development.

(c) An applicant shall provide mitigation in accordance with N.J.A.C. 7:7A for each Department-approved linear development proposed within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4.

(d) Structures or land uses in a Highlands open water buffer existing on August 10, 2004 may remain, provided that the area of disturbance is not increased.

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(e) Nothing in this section shall be construed to limit the authority of the Department to establish buffers of any size or any other protections for Category One waters designated by the Department pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., or any other law, or rule or regulation adopted pursuant thereto for major Highlands development or for other development that does not qualify as major Highlands development.

#### 7:38-3.7 Flood hazard areas

(a) A flood hazard area is any land in a flood plain as defined under the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and its implementing rules, N.J.A.C. 7:13.

(b) A major Highlands development in a flood hazard area shall meet the requirements of either (b)1 or 2 below:

1. The proposed activities, both individually and cumulatively, displace no flood storage volume whatsoever onsite, as calculated according to (c) and (d) below, based on site conditions as of August 10, 2004; or

2. The proposed activities, both individually and cumulatively, displace no more than 20 percent of the flood storage volume onsite, as calculated according to (c) and (d) below, based on site conditions as of January 31, 1980, and an equal or greater volume of flood storage is created offsite in accordance with (e) below.

(c) The flood storage volume of a site is the volume of space outside the floodway, as defined at N.J.A.C. 7:13-1.2, between the ground surface and the flood plain elevation as determined under N.J.A.C. 7:13. Additional flood storage can be created either by excavating material from below the surface of the ground and removing the material to outside of the flood plain so that floodwaters can freely enter and exit the excavated area, and/or by removing fill or structures that have been previously and lawfully placed within the flood plain and outside the floodway.

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(d) Flood storage volume can be created onsite to compensate for regulated activities that displace flood storage provided the onsite compensation:

1. Is created within or adjacent to the flood plain of the same water as the proposed fill, or a tributary to the same water as the proposed fill if the flood plain of both waters connect on site;
2. Is not created in a floodway, as defined at N.J.A.C. 7:13-1.2;
3. Is not created within 300 feet of a Highlands open water, unless the area where the compensation will be created has been subject to previous, lawful disturbance; and
4. Would not have other significant adverse environmental consequences, that is, shall not merely substitute the adverse effects of the proposed activities with adverse impacts upon other Highlands resource areas.

(e) Flood storage volume can be created offsite to compensate for regulated activities that displace flood storage as described in (b)2 above provided the offsite compensation:

1. Is of equal or greater volume than the flood storage displaced by the regulated activities onsite;
2. Is created within or adjacent to the flood plain of the same water as the proposed fill, or a tributary to the same water as the proposed fill if the flood plain of both waters connect on site;
3. Is situated within the same HUC 14 watershed as the proposed fill;

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4. Is not separated from the proposed fill by a water control structure, such as a bridge, culvert or dam, unless the applicant demonstrates that the water control structure causes no significant change in the flood plain elevation;
5. Is not created in a floodway, as defined at N.J.A.C. 7:13-1.2;
6. Is not created within 300 feet of a Highlands open water, unless the area where the compensation will be created has been subject to previous, lawful disturbance;
7. Would not have other significant adverse environmental consequences, that is, shall not merely substitute the adverse effects of the proposed activities with adverse impacts upon other Highlands resource areas;
8. Is agreed to in writing by the owners of the land on which the offsite compensation is proposed; and
9. Is proposed on land that is subject to a conservation restriction against future flood storage volume displacement in accordance with N.J.A.C. 7:38-6.3.

#### 7:38-3.8 Steep slopes

(a) A major Highlands development on a steep slope shall meet the requirements of this section.

(b) The percent of slope (rise in feet per horizontal distance) shall be established by measurement of distance perpendicular to the contour of the slope. The percent of slope shall be calculated for each two-foot contour interval. For example, any location on the site where there is a one-foot rise over a 10-foot horizontal run constitutes a 10 percent slope; a 1.5 foot rise over a 10-foot horizontal run constitutes a 15 percent slope; a two-foot rise over a 10-foot horizontal run constitutes a 20 percent slope.

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(c) Linear development as defined at N.J.A.C. 7:38-1.4 shall be permitted on a slope with a grade of 20 percent or greater provided that there is no feasible alternative for the linear development outside the steep slope. In order to demonstrate “no feasible alternative for linear development,” the applicant shall demonstrate that there is no other location, design and/or configuration for the proposed linear development that would reduce or eliminate the disturbance to a slope with a grade of 20 percent or greater. The additional limitations at (c)1 and 2 below apply for proposed linear development that would provide access to an otherwise developable lot.

1. The proposed linear development is the only point of access for roadways or utilities to an otherwise developable site;
2. Shared driveways are used to the maximum extent possible to access multiple lots, especially in areas containing steep slopes, Highlands open water or Highlands open water buffers;
3. For a driveway, the applicant shall, in addition, demonstrate that:
  - i. The applicant has made a good faith effort to transfer development rights for the lot pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;
  - ii. The lot has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the lot, and to the land conservancies, environmental organizations, the Highlands Council and all other government agencies on a list provided by the Department, at an amount determined in compliance with N.J.S.A. 13:8C-26j or N.J.S.A. 13:8C-38j, as applicable by letter sent by certified mail, return receipt requested, with a copy to the Highlands Council, using the form provided by the Department, disclosing the

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location on the lot of all Highlands resource areas as defined in N.J.A.C. 7:38-1.4 and stating that an application to develop the lot has been filed and enclosing a copy of a fair market value appraisal, performed by a State-licensed appraiser based on the minimum beneficial economically viable use of the property allowable under local law; and

iii. No reasonable offer for the lot has been received; and

iv. Documentation for (c)4i through iii above shall include:

- (1) A copy of each letter that the applicant sent under this paragraph;
- (2) A copy of all responses received. Each response shall be submitted to the Department within 15 days after the applicant's receipt of the response;
- (3) A list of the names and addresses of all owners of real property within 200 feet of the lot, as certified by the municipality, including owners of easements as shown on the tax duplicate;
- (4) Receipts indicating the letters were sent by certified mail;
- (5) For submittal to all property owners within 200 feet, a copy of the fair market value appraisal required under (c)4ii above; and
- (6) A copy of a written response or a resolution from the Highlands Council demonstrating that it has considered and rejected the offer.

4. An alternative shall not be excluded from consideration under this provision merely because it includes or requires an area not owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed linear development and



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5. After consideration of the information required in (c)1 through 4 above, the Department shall not issue an HPAA under this section if an applicant has refused a fair market value offer to purchase the property for which the driveway linear development is sought, or if the Department finds that there is an alternative to the proposed linear development.

(d) For a steep slope with a grade greater than 10 percent but less than 20 percent:

1. If the steep slope is a forest as defined at N.J.A.C. 7:38-1.4, linear development as defined at N.J.A.C. 7:38-1.4 shall be permitted if there is no feasible alternative for the linear development outside the steep slope;
2. If the steep slope is not a forest and the appropriate Soil Survey for the onsite soil series and percent slope states that the soil capability class of the soil is III or higher or the soil capability class and subclass are IIe or IIs, linear development shall be permitted provided that there is no feasible alternative for the linear development outside the steep slope; or
3. If the steep slope is not a forest and the appropriate Soil Survey for the onsite soil series and percent slope states that the soil capability class is I or the soil capability class and subclass is IIw, major Highlands development shall be permitted provided:
  - i. The proposed development meets all other standards in this chapter; and
  - ii. The applicant demonstrates that there is no other location, design and/or configuration for the proposed development that would reduce or eliminate the disturbance to steep slopes and still fulfill the basic purpose of the proposed development.

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7:38-3.9 Upland forested areas

(a) A major Highlands development in an upland forested area shall meet the requirements of this section.

(b) The applicant shall identify on a site plan submitted to the Department all forest in existence on the lot as of August 10, 2004 as well as those forest areas that have subsequently developed. A forest area shall be determined in accordance with the following method:

1. The limit of the forest shall be identified using aerial photographs obtained from the Department, free of charge, at [www.state.nj.us/dep/gis/](http://www.state.nj.us/dep/gis/); and
2. If the aerial photograph contains areas of sporadic coverage that have not been identified as forest by the applicant, the applicant shall lay a one-half acre grid system over the photograph. A standard 142 foot square grid block provided by the Department at its website shall be used. Any grid block containing 33 percent or greater forest cover, shall be considered as forest for the purposes of this chapter, unless the applicant demonstrates otherwise using the procedure established in (c) below.

(c) If the Department identifies forest areas on a lot that have not been so identified by the applicant, the Department shall require an applicant to measure the trees and determine density of the trees on the lot using the following method:

1. Select two 25-foot by 25-foot plots in every acre of the site suspected of being a forest.

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i. The plots shall be located in the portion of each acre with the highest density of trees as determined by a visual inspection.

ii. If the tree size and density are very uniform over some or all of the site, one plot may be selected in the area of uniformity.

However, the point total from the one plot shall be doubled to determine the total point value for the sampled acre under (c)5 below.

2. In each plot, measure the diameter of each tree at four and one-half feet above ground (dbh).

3. Score each tree as follows:

Diameter of tree	Points
One to three inches	2
>Three to seven inches	4
Seven to 12 inches	6
>12 inches	8

4. Add together the scores for all of the trees in each plot.

5. If the total score for both plots is equal to or greater than 16, the sampled acre is regulated as a forest under this chapter. For example, if the two 25-foot by 25-foot plots contain a total of three trees which are two inches in diameter, two trees which are six inches in diameter, and one tree which is 15 inches in diameter, the score for the sampled area would be:  $(3 \times 2) + (2 \times 4) + (1 \times 8) = 22$ , and the sampled acre is considered a forest.

6. If a sampled acre is a forest, the Department shall assume that a half-acre of

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ground surrounding all sides of the sampled acre is also forest except for the surrounding areas that are sampled by the applicant and score under 16. In that case, a sufficient number of plots in the surrounding area shall be sampled by the applicant to delineate the forest portion of the surrounding area.

7. For a newly planted or regenerating forest, an area shall be considered forest if there are 408 seedlings or saplings per sampled acre, that is, the total number of seedlings or saplings in the two sample plots is 12 or more. For the purposes of this section, a tree will be considered a seedling or sapling if it has a caliper (diameter) of less than one-inch.

8. Orchards, Christmas tree farms and nurseries are not considered forest under this section. As agricultural or horticultural uses, they are not regulated under this chapter. See N.J.A.C. 7:38-2.2(b).

(d) The limit of the forest shall be the outermost edge of the canopy of the forest area identified in (a) through (c) above.

(e) The Department shall not issue an HPAA for an activity that would result in disturbance to an upland forest located on a slope greater than 10 percent, except for linear development which meets the criteria in N.J.A.C. 7:38-3.6(b)1 and 2.

(f) The Department shall issue an HPAA for an activity that would result in disturbance to an upland forest if:

1. The proposed activity complies with all of the other standards of this chapter;

2. There is no alternative that:

i. Would have less adverse impact on the upland forest or could be located outside the upland forest. To minimize impact,

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disturbance shall be located outside the drip line of a tree canopy and at least 100 feet away from all trees of four inches or greater dbh; shall not result in a significant increase in the amount of forest edge; and shall avoid mature specimens; and

- ii. Would not merely substitute adverse consequences to other Highlands resource areas for those caused by the proposed activity;

3. The disturbance to the upland forested area is limited to:

- i. Twenty feet directly next to a lawfully constructed structure or the perimeter of a septic disposal bed; or
- ii. Ten feet on each side of a driveway width that is required by municipal code; and

4. The total acreage of upland forested area to be removed or damaged as a result of an activity approved under an HPAA is mitigated in accordance with (g) below.

(g) Mitigation for upland forested areas shall comply with all other standards of this chapter and replace upland forest with forest of equal ecological value and function. The Department will require mitigation in accordance with the following hierarchy:

1. Planting trees onsite;
2. If planting trees onsite is not feasible, planting trees offsite in the preservation or planning area, provided that the mitigation site is in the same HUC 14 as the site where upland forest was removed or damaged by the activity approved under the HPAA;

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3. If (g)1 and 2 are not feasible, planting trees offsite in the preservation area;  
or

4. If (g)1 through 3 are not feasible, paying into a fund dedicated to the purchase of upland forested areas in the Highlands Region.

(h) In order to be considered successful, an 85 percent survival rate of the planted trees shall be demonstrated at the end of three years. Tree planting as described in (g)1, 2 and 3 above shall be conducted in accordance with the following:

1. The replacement of trees shall be determined by a tree replacement factor (TRF) resulting in 204 trees per acre of tree cover;

2. In implementing the TRF, the following number of stems shall be calculated for seeding, caliper and whip/container trees. TRF equals:

i. 204 (two inch to 2.5-inch) caliper trees per acre; or

ii. 408 whip/container (four foot to six foot) trees per acre;

3. Trees shall be planted in a cluster, spaced from six to 10 feet apart, and shall be planted in a staggered, non-linear pattern;

4. All trees shall be native and adapted to the substrate and other environmental conditions of the site. More than one species shall be included in the planting;

5. Two thirds of the trees planted shall be:

i. Canopy or dominant tree species, which typically grow taller than 50 feet at maturity; and

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- ii. A minimum of two inches in diameter at the base;
6. The remaining one third of the trees planted shall be:
- i. Understory or subcanopy tree species, which typically grow to a height of less than 50 feet at maturity; and
  - ii. A minimum of four to six feet in height;
7. Newly planted trees shall be monitored by the applicant for a period of two years in accordance with the following:
- i. Trees shall be weeded, watered and protected from deer grazing and deer rubs;
  - ii. If a tree has lost more than 50 percent of its canopy at the end of two years, it shall be replaced with another tree as large as the first tree when planted;
  - iii. Trees shall be supported by staking with guy wires, that shall be removed after two years;
8. The boundaries of the tree cluster shall be clearly marked with permanent, visible markers such as concrete blocks or posts, metal stakes, or other easily seen, permanent, immovable markers;
9. The tree cluster shall be protected from any future development by a recorded conservation restriction; and

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10. An annual post-planting monitoring report shall be submitted to the Department each year for a period of three years following the planting. The monitoring report shall include:

i. A brief description of the tree planting that was approved, when it was completed, and the types of maintenance activities that have been conducted;

ii. A statement whether the mitigation has successfully achieved the required survival rate and if not, the remedial actions that will be taken to accomplish the survival rate; and

iii. For the final report, an analysis of the mitigation, and whether it has successfully achieved the required 85 percent survival rate. If it has not, the Department will require additional planting and additional years of monitoring until the 85 percent survival rate is achieved.

(i) If the applicant is proposing mitigation in accordance with (g)4 above, the applicant shall specify the total area for which mitigation is required, the number and size of trees that would be required using the TRF in (h) above, and an estimate of the cost to purchase and plant trees at the required TRF, including a cost quotation from a tree farm or nursery.

#### 7:38-3.10 Historic and archaeological areas

(a) Historic and archaeological areas are those historic or archaeological properties that are listed or are eligible for listing on the New Jersey or National Register of Historic Places pursuant to N.J.A.C. 7:4-2.3.

(b) An HPAA application for a proposed regulated activity as described at (b)1 through 4 below shall include an intensive-level architectural survey completed by an



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architectural historian whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and related guidance as part of the larger Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation as referenced at 36 CFR 61, incorporated herein by reference. Guidance regarding intensive-level architectural surveys is available at the State Historic Preservation Office's website at [www.state.nj.us/dep/hpo/1identify/gaspart1.pdf](http://www.state.nj.us/dep/hpo/1identify/gaspart1.pdf):

1. A proposed regulated activity within or adjacent to a site or sites containing known historic or archaeological properties, based upon information contained within the application, or as identified on copies of historic property maps on file at the Department's Historic Preservation Office;
  2. A proposed regulated activity on a site for which available maps, photographs, or other information, or observations made during a site visit indicate the presence of buildings, structures, or ruins over 50 years old within the project area;
  3. A proposed regulated activity including new, replacement, reconstructed, or rehabilitated bridges or culverts; and/or
  4. A proposed regulated activity on a site where citizens, local units of government, historic preservation organizations, or others have indicated the possible presence of historic or archaeological properties.
- (c) An HPAA application for a proposed regulated activity as described at (c) 1 through 5 below shall contain a Phase I (identification of resources) archaeological survey completed by an archaeologist whose qualifications meet the Secretary of the Interior's Professional Qualifications Standards and related guidance as part of the larger Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation as referenced in 36 CFR 61, incorporated herein by reference:

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1. A proposed regulated activity within or adjacent to a site containing known historic or archaeological properties, based upon information contained within the HPAA application or as identified on copies of property maps on file at the Department's Historic Preservation Office or the New Jersey State Museum;
  
2. A proposed regulated activity on a site situated wholly or partially within the floodplain as defined at N.J.A.C. 7:13 or wholly or partially within 1,000 feet of the following waterways, whichever is greater:

- i. Pompton River;
- ii. Pequannock River;
- iii. Wanaque River;
- iv. Ramapo River;
- v. Whippany River;
- vi. Rockaway River;
- vii. Musconetcong River;
- viii. Delaware River;
- ix. Wallkill River;
- x. North Branch of the Raritan River;
- xi. South Branch of the Raritan River;
- xii. Lamington River;
- xiii. Lopatcong Creek;
- xiv. Pohatcong Creek; or
- xv. Raritan River;

3. A proposed regulated activity on a site that includes a permanent Highlands open water (for example, a wetland, pond, lake, river or perennial stream) or that is located wholly or partially within 500 feet of a permanent Highlands open water, except when the waterway is listed at (c)2 above, in which case (c)2 above governs;

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4. A proposed regulated activity on a site for which available maps, photographs, or other information, or observations made during a site visit indicate the presence of buildings, structures, or ruins over 100 years old that could potentially be affected by the proposed regulated activity; or
5. A proposed regulated activity or site about which citizens, local units of government, historic preservation organizations, or others entities have indicated the possible presence of archaeological properties or sites within or adjacent to the regulated activity or its site.

(d) If an archaeological property or site is identified in the Phase I archaeological survey under (c) above, a Phase II (evaluation of resource eligibility) archaeological survey shall be submitted as part of the application for an HPAA.

(e) Phase I and II surveys and accompanying reports submitted for the purposes of this section shall conform with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, 48 C.F.R. 44716, incorporated herein by reference.

(f) A proposed regulated activity shall be deemed to not have an impact to an historic property if the Department determines the regulated activity conforms with the Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 CFR 68 et seq., incorporated herein by reference. The Standards are available at [www.state.nj.us/dep/hpo](http://www.state.nj.us/dep/hpo) or [www.nps.gov](http://www.nps.gov).

(g) A proposed regulated activity shall be deemed to not have an impact to an archaeological area identified in a Phase II survey under (d) above if the Department determines:

1. The proposed regulated activity does not involve ground excavation; or

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2. The proposed regulated activity involves ground excavation or disturbance but will not physically disturb or intrude upon archaeological deposits on or eligible for inclusion in the New Jersey or National Register of Historic Places.

(h) If the Department determines that a proposed regulated activity will have an impact on historic or archaeological properties, the Department shall not issue an HPAA unless the applicant demonstrates that the proposed regulated activity would result in minimal practicable degradation of the historic or archaeological property. In order to demonstrate minimal practicable degradation, the applicant shall explore the following alternatives:

1. For an historic property:

2. For an historic feature:

i. Rehabilitation, according to the Secretary of the Interior's Standards for the Treatment of Historic Properties;

ii. Modified rehabilitation (preserving the character-defining elements of the property while introducing significant changes beyond those allowed by the Secretary of the Interior's Standards for the Treatment of Historic Properties);

iii. Transfer of development rights, if such program has been instituted by the municipality in which the historic property is located; and

iv. Any other mechanism that would preserve the historic property while accommodating the proposed regulated activity;

3. For an archaeological property or site:

i. A narrative description of existing conditions; and

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- ii. Photographs with captions keyed to an elevation plan of the entire site, including all buildings, structures, and site features;
- 4. A clear statement of each alternative and the reasons for rejecting it, including each of the factors in (i)5 through 7 below as applicable;
- 5. If engineering concerns such as structural stability or load bearing capacity are a factor in an applicant's request to affect historic or archaeological properties, the applicant shall include engineering reports, prepared by a New Jersey licensed engineer with demonstrated experience working with similar historic resources;
- 6. For proposed regulated activities involving roads, culverts, and historic bridges that may affect historic and archaeological properties, the applicant shall submit the following data, as applicable:
  - i. Existing road limitations (for example, capacity, lane widths, geometry);
  - ii Traffic counts/studies;
  - iii. Road classification;
  - iv. Design speeds;
  - v. Design hourly volume;
  - vi. Predicted levels of service; and
  - vii. Specific references to the applicable American Association of State Highway and Transportation Officials design tables;
- 7. If the poor physical condition of a historic building makes rehabilitation too expensive or technically impracticable, the applicant shall submit an evaluation of conditions and costs documented by an architect or engineer whose qualifications meet the Secretary of the Interior's Professional Qualification Standards and related guidance as part of the larger Secretary of the Interior's

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Standards and Guidelines for Archaeology and Historic Preservation as referenced in 36 CFR 61, incorporated herein by reference. The applicant shall include the following information, as applicable:

i. The specific section of the New Jersey Uniform Construction Code that affects the treatment of historic features or spaces, and a statement from the applicant regarding whether flexible application of the code for historic buildings has been sought or granted from the Construction Code official;

ii. If economic factors related to the protection of historic properties affect an aspect of the regulated activity or its whole design, a detailed and documented breakdown of the costs involved;

iii. A detailed explanation of any other regulatory requirement affecting aspects of the regulated activity's design, such as zoning; and

iv. Written comments received from interested parties including municipal historic preservation commissions, historical societies, and organizations that have a statewide interest in the protection and preservation of cultural areas or a specialized interest in the specific historic or archaeological area being affected by the proposed regulated activity;

8. The public benefit and need for the proposed regulated activity;

9. A recommended finding of either "no adverse effect," or, "adverse effect;"

i. If the recommended finding is "adverse effect," the applicant shall describe all proposed mitigation measures including, but not limited to:

(1) A proposal for data recovery;

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(2) Public outreach or interpretative information; and

(3) Documentation of buildings and/or structures prior to removal;

10. Communications from local officials and citizens expressing concerns and/or opinions regarding the project;

11. The resumes of all persons who prepared the materials and information required under this section; and

12. Any government agency correspondence related to the proposed regulated activity.

(j) The Department shall review any HPAA application containing Phase I and Phase II surveys in accordance with N.J.A.C. 7:4-8.1 through 8.3.

(k) If the Department finds that the regulated activity will have an impact on a historic or archaeological property but the proposed regulated activity is designed and implemented to achieve the minimum practicable degradation, the Department shall condition the HPAA upon the applicant providing mitigation in accordance with the provisions at (i)9 above adequate to compensate for the project's impact.

(l) If the Department finds that a proposed regulated activity will result in more than the minimum practicable degradation or impact to a historic or archaeological property, the HPAA application shall be denied. Demolition of a historic building or archaeological property solely to increase the available percentage of developable area on a lot constitutes more than minimum practicable degradation.

7:38-3.11 Rare, threatened or endangered plant and animal species

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The Department shall not issue a HPAA unless it determines that the proposed activity will not jeopardize the continued existence of, or result in the likelihood of the destruction or adverse modification of habitat for, any rare, threatened or endangered species of animal or plant.

7:38-3.12 Unique or irreplaceable land types and existing scenic attributes

(a) Unique or irreplaceable land types include vernal habitats as defined in (b) below, and those ecological communities that are identified in the Natural Heritage Database.

(b) "Vernal habitat" means a water of the Highlands or Highlands open water that meets all of the criteria at (b)1 through 4 below. Evidence of breeding by an obligate species under (b)2i below creates a rebuttable presumption that the criteria at (b)3 and 4 below are met:

1. Occurs in 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 the Freshwater Wetland Protection Act (FWPA) regulations, N.J.A.C. 7:7A, Appendix 1. The following shall constitute evidence of breeding by such a species:

i. One or more obligate species listed in N.J.A.C. 7:7A, Appendix 1, or evidence of such a species, is found in the area of ponded water; or

ii. Two or more facultative species listed in the N.J.A.C. 7:7A, Appendix 1 or evidence of the presence of such a species, are found in the area of ponded water;



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3. Maintains ponded water for at least two continuous months between March and September of a normal rainfall year. For the purposes of this section, "normal rainfall year" means a 12 month period in which the precipitation at a location is within 10 percent of the average annual precipitation for that location, calculated using the standard averaging period for "normals," established by the World Meteorological Organization, except that the Department may determine normal rainfall on a case-by-case basis in unusual situations, such as where the sampling period begins immediately following prolonged drought conditions. As of September 4, 2001, the World Meteorological Organization has defined the standard averaging period as 1961 through 1990. Information regarding the standard averaging period can be found in the USDA's Natural Resources Conservation Service website at [www.nrcs.usda.gov/water/climate](http://www.nrcs.usda.gov/water/climate); and

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

(c) "Existing public scenic attributes" are any Federal, State, county or municipal parks, forests, wildlife management areas and natural areas, any areas acquired for recreation and conservation purposes with Green Acres funding, program or a non-profit conservation organization, any lands preserved as open space by a non-profit conservation organization and other areas as identified by the Highlands Council.

(d) The Department shall not issue an HPAA unless the proposed activity would result in the minimum practicable degradation to a unique or irreplaceable land type or existing scenic attributes on the site or within the immediate area of the proposed project.

#### SUBCHAPTER 4 HIGHLANDS RESOURCE AREA DETERMINATIONS

##### 7:38-4.1 Highlands Resource Area Determinations

(a) A person may apply to the Department for a Highlands Resource Area Determination (HRAD) by which the Department determines one or more of the following:

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1. The location of any Highlands Resource Area on a site or a portion of a site; or
2. The location of all Highlands open waters and their buffers on a site. The Department shall locate Highlands open waters and their buffers on an entire site but not on a portion of a site.

(b) An HRAD is not a permit or approval to conduct any regulated activity on a site. An HRAD confirms the presence or absence of a Highlands Resource Area on a site, and the location and, as applicable, the boundary of each Highlands Resource Area. A person may apply for an HRAD only, or in connection with an application for an HPAA.

(c) The Department issues the following three types of HRADs:

1. A Footprint of Disturbance HRAD, in which the Department verifies the boundaries of all Highlands open waters and their buffers present on the site as plotted by the applicant and determines whether any other Highlands Resource Area exists inside the footprint of disturbance proposed on a site. For a Footprint of Disturbance HRAD, the applicant must submit all of the information required at N.J.A.C. 7:38-9.3 and 9.4(b) and (c);

- i. An applicant may apply for a Footprint of Disturbance HRAD for more than one portion of a site, provided that:

- (1) Each portion is no larger than one acre;

- (2) The applicant submits a separate fee for each portion; and

- (3) No more than three Footprints of Disturbance HRADs are sought for a single site;

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2. A Boundary Delineation HRAD, in which the Department itself delineates the boundaries of all Highlands open waters, their buffers, and upland forest on a site of one acre or less total area and determines the presence, absence and location of all other Highlands Resource Areas on that site. For a boundary delineation HRAD, the applicant shall submit all of the information required in N.J.A.C. 7:38-9.3 and 9.4(b) and (d). The Department will issue boundary delineation HRADs only for an entire site; and

3. A Boundary Verification HRAD, in which the Department confirms and modifies, as appropriate, the applicant's delineation of Highlands open waters, buffers and upland forest on an entire site and confirms or modifies, as appropriate, the applicant's conclusions as to the presence, absence or location of all other HRAs on the site. For a boundary verification HRAD, the applicant shall submit all of the information required in N.J.A.C. 7:38-9.3 and 9.4(b) and (e).

(d) Each HRAD issued by the Department will address the presence, absence, or location, as specified in (c) above, of Highlands resource areas as follows:

1. Highlands open waters and the applicable buffers, as described at N.J.A.C. 7:38-3.6;

i. Each HRAD will identify the location of Highlands open waters on or adjacent to the applicant's site;

ii. Highlands open waters that are freshwater wetlands shall be identified and delineated as set forth at N.J.A.C. 7:7A-2;

iii. Highlands open waters that are forest shall be identified and used in the forest calculation required in N.J.A.C. 7:38-3.4.

2. Steep slopes, as described at N.J.A.C. 7:38-3.8;

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3. Rare, or threatened and/or endangered wildlife habitat, as described at N.J.A.C. 7:38-3.11;

i. Each HRAD issued by the Department will identify the location of any area on or adjacent to the site that is suitable habitat for any rare, threatened or endangered animal species or species of special concern. "Suitable habitat" means habitat featuring ecological characteristics that may provide for the breeding, feeding, resting or sheltering of any rare, threatened and/or endangered species. Ecological characteristics may include, but are not limited to, seasonal wetland or dry land, roost sites, nesting grounds, spawning sites, feeding sites, vegetative community size, age, structure, or diversity; waterway or pond water quality, size, or substrate; and soil types or hydrologic characteristics;

ii. Each applicant shall submit with the application for an HRAD or HPAA, a letter from the Department's Natural Heritage Program, obtained at the address listed at N.J.A.C. 7:38-1.2, stating if (d)3ii(1) and/or (d)3ii(2) below applies to the site. If the letter states that (d)3ii(1) and/or (d)3ii(2) does apply to the site, the Department shall presume the site constitutes rare, or threatened and/or endangered animal or plant species habitat unless a habitat evaluation by the applicant pursuant to N.J.A.C. 7:38-5 provides evidence sufficient for the Department to issue a written determination to the contrary;

(1) The presence of rare, threatened or endangered wildlife habitat ranked 3, 4, or 5 according to the Landscape Maps;

(2) The presence of a rare, threatened or endangered wildlife species.

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iii. In addition to the information provided under (d)3ii above, the Department may consider other pertinent information in determining the existence of rare, or threatened and/or endangered wildlife habitat including, but not limited to, records of documented species occurrences, public comments, and the results of any available species surveys or scientific information related to the life history characteristics and habitat needs of rare, or threatened and/or endangered wildlife species;

iv. In some cases, seasonal conditions make it difficult to determine habitat suitability. For example, if there has been a past sighting of a bog turtle (an endangered species) in the area, and an HRAD application is submitted in December when the early successional habitat needed by bog turtles is under snow and cannot be identified, Department staff will not issue an HRAD until the snow melts and appropriate investigation is concluded. In such a case, the Department will notify the applicant that seasonal conditions do not permit an accurate assessment of habitat, explain the seasonal conditions involved, and give the applicant the option of either accepting a finding that the site constitutes suitable habitat for that species, or waiting until the Department can determine the suitability of habitat and issue an HRAD;

4. Rare or Endangered Plant Species Habitat, as described at N.J.A.C. 7:38-3.11;

i. Each HRAD issued by the Department will identify the location of any area on or adjacent to the site that is habitat for rare or endangered plant species;

ii. Each applicant shall submit with the application for an HRAD or HPAA a letter from the Department's Natural Heritage Program stating if any plant listed in the Natural Heritage database exists on or near the site or footprint of disturbance. If the letter states that any listed plant exists on or near any portion of the site or footprint of disturbance, the Department

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shall presume the site is rare or endangered plant species habitat unless a subsequent habitat evaluation by the applicant pursuant to N.J.A.C. 7:38-5 provides evidence sufficient for the Department to issue a written determination to the contrary;

iii. In addition to the information provided under (d)4ii above, the Department may consider other pertinent information in determining the existence of rare or endangered plant habitat including, but not limited to, any records of documented occurrences, public comments, and the results of any available species surveys or scientific information related to the life history characteristics and habitat needs of rare or endangered plant species;

iv. In some cases, seasonal conditions make it difficult to determine the presence of rare or endangered plant species habitat. In such a case, the Department will notify the applicant that seasonal conditions do not permit an accurate assessment of habitat, explain the seasonal conditions involved, and give the applicant the option of either accepting a finding that the site constitutes habitat for that species, or waiting until the Department can determine the presence of habitat;

5. Upland forest area, as described at N.J.A.C. 7:38-3.9;

6. Unique or irreplaceable land types, as described at N.J.A.C. 7:38-3.12;

i. Each applicant shall submit with the application for an HRAD or HPAA a letter from the Department's Natural Heritage Program identifying any unique and irreplaceable ecological community on or adjacent to the site; and

7. Historic and archaeological areas, as described at N.J.A.C. 7:38-3.10.

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(e) The Department shall not issue an HRAD if it determines that the information in the application is inaccurate. In such a case, the applicant may provide corrected information upon the Department's request or may apply directly for a HPAA and provide complete and correct information regarding Highlands resource areas as a part of that application.

(f) Each applicant shall submit a survey of Highlands open water boundaries on the site either as part of the HRAD application, or if the applicant prefers, 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 Highlands open waters boundary after the survey is submitted, the applicant shall re-survey the delineated boundary after the adjustments are made. An HRAD will carry a notation referring to the approved and surveyed boundary line. The Department shall waive the survey requirement if an entire site is covered by Highlands open waters and/or their buffers.

(g) If an HRAD is sought only for a footprint of disturbance, the applicant shall provide a survey of the boundaries of the footprint of disturbance covered by the HRAD, in addition to the survey required at (f) above.

#### 7:38-4.2 Application for an HRAD

(a) An applicant for an HRAD shall follow the application procedures and information requirements at N.J.A.C. 7:38-9.3 and 9.4.

(b) The Department shall review an application for an HRAD in accordance with N.J.A.C. 7:38-11.

#### 7:38-4.3 Effect, duration, and extension of an HRAD

(a) The person to whom an HRAD is issued is entitled to rely on the determinations contained therein for a period of five years from the date of issuance of the HRAD unless

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extended in accordance with (b) and (c) below. Until such time as an HPAA is obtained for a project on the site for which the HRAD was issued, an HRAD may be revoked if the Department determines that the HRAD or any portion of it was based on inaccurate or incomplete information [as of the date the HRAD was issued]. In this case, the Department shall issue the HRAD holder written notice revoking the HRAD, or any inaccurate portion, for specified reasons. An HRAD applicant may request that the Department, at the applicant's expense, inspect the site for which the HRAD was issued and issue a new HRAD reflecting the actual conditions on the site. The new HRAD shall supersede the earlier HRAD for that site and shall expire five years from the date it is issued.

(b) The term of an HRAD may be extended, provided that the information upon which the original determination was based remains valid, but the extension shall not exceed five years from the original expiration date.

(c) Requests for extensions shall be made in writing to the Department before the HRAD has expired and shall be subject to the application requirements at N.J.A.C. 7:38-9.7. Applicants will be required to apply for a new HRAD if an administratively complete application for an extension is not received by the Department prior to the expiration date of the HRAD.

(d) If an application for an HPAA is submitted, the Department reserves the right to re-examine any and all information upon which an HRAD was based and revise the HRAD to reflect conditions at the time of the HPAA application.

## SUBCHAPTER 5 RARE, THREATENED AND ENDANGERED SPECIES HABITAT EVALUATIONS

### 7:38-5.1 Rare, or Threatened or Endangered Species Habitat Evaluations



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This subchapter sets forth the standards for conducting a Rare, or Threatened or Endangered Animal Species Habitat Evaluation or a Rare or Endangered Plant Species Habitat Evaluation. A completed Habitat Evaluation shall be submitted by any HRAD or HPAA applicant seeking to rebut a presumption pursuant to N.J.A.C. 7:38-4.1(d)3 or 4 that a portion of a site or footprint of disturbance constitutes suitable habitat for any rare, threatened or endangered animal species and/or rare or endangered plant species. The standards for conducting a Habitat Evaluation for animal species are found at N.J.A.C. 7:38-5.2; the standards for plant species are found at N.J.A.C. 7:38-5.3. Submittal requirements for all Habitat Evaluations are found at N.J.A.C. 7:38-5.4.

#### 7:38-5.2 Rare, or Threatened or Endangered Animal Species Habitat Evaluation

(a) An applicant for an HRAD or HPAA seeking to rebut a presumption pursuant to N.J.A.C. 7:38-4.1(d) 3 that all or part of a site constitutes suitable habitat for a rare, or threatened or endangered animal species shall submit a rare, or threatened or endangered animal species Habitat Evaluation to the Department.

(b) The Department shall consider as suitable habitat any area that, based on the best available scientific information, provides all of the components necessary to sustain any rare, or threatened or endangered animal species, including, but not limited to, nesting or breeding areas, foraging or feeding areas, resting or roosting areas, hibernacula or denning areas; or any area that is a part of a larger habitat area that provides all of the components necessary to sustain the rare, or threatened or endangered animal species in question based upon evaluation of the following :

1. The information provided by the applicant under N.J.A.C. 7:38-5.4 and any other information available to the Department identifying which, if any, rare, threatened or endangered animal species may have suitable habitat on the site. Such information includes, but is not limited to, the Landscape Maps, Natural Heritage Database, records of documented species occurrences and public comment;

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2. The results of any animal species surveys done in consultation with the Department and in accordance with the survey procedures at N.J.A.C. 7:7E-3C.4 (a) and (b) (Coastal Zone Management);
3. Scientific information related to the life history characteristics and habitat needs of the species; and
4. The extent to which the site or footprint of disturbance contains the characteristics of suitable habitat for each species identified in (b)1 and 2 above, including onsite and adjacent vegetation structure and composition, soil characteristics, wetland characteristics and hydrologic conditions, surrounding land use and disturbance levels, and any other factor that may affect the habitat suitability for any rare, or threatened or endangered animal species that are identified as part of on-site inspection(s) or in the HRAD or HPAA application.

#### 7:38-5.3 Rare or Endangered Plant Species Habitat Evaluation

- (a) An applicant for an HRAD or HPAA seeking to rebut a presumption pursuant to N.J.A.C. 7:38-4.1(d)4 that all of a site, or a footprint of disturbance, constitutes suitable habitat for a rare or endangered plant species shall submit a rare or endangered plant species Habitat Evaluation to the Department.
- (b) The Department shall consider as habitat any area identified in the Natural Heritage Database as habitat for any rare or endangered plant species that provides all of the components necessary to sustain the plant species in question, based upon evaluation of the following :
  1. The information provided by the applicant under N.J.A.C. 7:38-5.4 and any other information available to the Department identifying which, if any, rare or endangered plant species are documented on the site or footprint of disturbance. Department information includes, but is not limited to, the Natural Heritage

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- Database, records of documented occurrences, public comments and other pertinent information;
2. The results of any plant species surveys conducted in consultation with the Department following the survey procedures at N.J.A.C. 7:7E-3C.4 (a) and (b) (Coastal Zone Management);
  3. Scientific information related to the life history characteristics and habitat needs of the rare or endangered plant species; and
  4. The extent to which the site or footprint of disturbance contains the characteristics of the documented habitat for each species identified in (b)1 and 2 above including onsite and adjacent vegetation structure and composition, soil characteristics, wetland characteristics and hydrologic conditions, surrounding land use and disturbance levels, that are identified as part of on-site inspection(s) or in the HRAD or HPAA application, and any other factor that may affect the rare or endangered plant species.

7:38-5.4 Submittal requirements for Habitat Evaluations

(a) Each Habitat Evaluation submitted to the Department shall include:

1. An introduction describing the goals of the Habitat Evaluation;
2. A description of the habitat requirements for each species identified in the Natural Heritage Program letter pursuant to N.J.A.C. 7:38-4.1(d)3 or 4, including citations to appropriate literature and studies; and

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3. The names, addresses and professional qualifications of all persons who performed habitat evaluations, and/or species surveys relied upon to support any conclusion reached in the Habitat Evaluation.

(b) Animal habitat evaluations pursuant to N.J.A.C. 7:38- 5.2, shall include three copies of the following:

1. A description of the site or footprint of disturbance (as applicable), including, but not limited to:

i. Vegetation, elevation, slope and aspect, and a description of any important topographic features such as cliffs, bluffs and sinkholes on or within 0.5 mile of the boundary of the site or footprint;

ii. The geology on the site or within the footprint as described in the most current U.S.Geological.Survey (U.S.G.S.) bedrock geologic maps, a description of bedrock and surficial deposits and location and description of any important geologic features such as talus and caves within 0.5 mile from the boundary of the footprint or site;

iii. The soil types on the site or within the footprint as most currently classified and mapped by the U.S. Department of Agriculture (U.S.D.A.) Natural Resources Conservation Service and the location and description of any important soil features present within 0.5 miles of the boundary of the footprint or site;

iv. The location and description of all hydrologic features on the site or within the footprint, such as rivers, streams, lakes, ponds, springs, seeps, vernal pools and waterfalls as well as those located within 0.5 mile from the boundary of the footprint or site;

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- v. The location and description of all evidence of natural or man-made disturbance both on the site or footprint and within 0.5 mile from the boundary of the footprint or site;
  
- vi. The location and description of all upland, wetland, and aquatic ecological vegetative communities on the site or within the footprint, based on quantitative data collected during optimal time(s) of year using appropriate, scientifically accepted terms of description and analysis techniques. Guidance with regard to appropriate classification systems and techniques may be found in Guidelines for Describing Associations and Alliances of the U.S. National Vegetation Classification by Jennings et al. (2003), The Ecological Society of America -- Vegetation Classification Panel, available at: [www.esa.org/vegweb/NVC\\_guidelines\\_v3.pdf](http://www.esa.org/vegweb/NVC_guidelines_v3.pdf); Ecological Systems of the United States: A Working Classification of U.S. Terrestrial System by Comer et al. (2003), NatureServe, available at: [www.natureserve.org/library/usEcologicalsystems.pdf](http://www.natureserve.org/library/usEcologicalsystems.pdf); and Classification of Vegetation Communities of New Jersey: Second Iteration by Breden et al. (2001), Association for Biodiversity Information and New Jersey Natural Heritage Program, available at: <http://njedl.rutgers.edu/njdlib>, Record ID#1980. For each ecological community identified on the site or within the footprint, the evaluation shall include physiognomy, species composition with a list of the most abundant plant species by strata (canopy tree, subcanopy tree, shrub, vine, herbaceous, bryophyte), a description of successional stage, slope degrees and aspect, geologic substrate (as indicated in the most recent U.S.G.S. bedrock geologic maps), soil texture and pH (as indicated in the most recent Soil Survey and verified by field sampling), depth to water table (as indicated in the most recent Soil Surveys), and hydrologic influences;
  
- vii. A map showing the location and composition of ecological communities on the site or within the footprint and the location of

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important topographical, geological and hydrological features identified in (b)liv above;

viii. The results of rare, or threatened or endangered animal species surveys for the purpose of supplementing scientific data regarding the suitability of a particular habitat for a particular species that were conducted in consultation with the Department and in accordance with all Federal and State laws and regulations, including for each species surveyed: the survey method, the surveyor's name(s), dates and times surveys were performed, number of samples, and number of replications;

ix. A copy of any other relevant animal survey or report to which the HPAA or HRAD applicant or their agent has access; and

x. Any other information relevant to assessing the suitability of habitat on the site or footprint of disturbance for any rare, or threatened or endangered animal species.

(c) Plant habitat evaluations pursuant to N.J.A.C. 7:38-5.3 shall include three copies of the following:

1. A description of the site or footprint of disturbance (as applicable), including, but not limited to:

i. Vegetation, elevation, slope and aspect, and a description of any important topographic features such as cliffs, bluffs and sinkholes within the footprint or on the site and as well as those located within 0.5 mile from the boundary of the site or footprint;

ii. The geology on the site or within the footprint as described in the most current U.S.G.S. bedrock geologic maps and field sampling, a description

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of bedrock and surficial deposits and the location and description of any important geologic features such as talus and caves, as well as such features on or within 0.5 mile from the boundary of the site or footprint;

iii. The soil types on the site or within the footprint as most currently classified and mapped by the U.S.D.A. Natural Resources Conservation Service and the location and description of any important soil features present on and within 0.5 mile from the boundary of the site or footprint;

iv. The location and description of all hydrologic features on the site or within the footprint such as rivers, streams, lakes, ponds, springs, seeps, vernal pools, and waterfalls present as well as those located within 0.5 mile from the boundary of the site or footprint;

v. The location and description of natural or anthropogenic disturbance both on the site or within the footprint as well as within 0.5 mile from the boundary of the footprint or site;

vi. The location and description of all upland, wetland, and aquatic ecological vegetative communities on the site or within the footprint, based on quantitative data collected during optimal time(s) of year using appropriate, scientifically accepted terms of description and analysis techniques. Guidance with regard to appropriate systems and techniques may be found in: Guidelines for Describing Associations and Alliances of the U.S. National Vegetation Classification, by Jennings et al. (2003), The Ecological Society of America -- Vegetation Classification Panel, available at: [www.esa.org/vegweb/NVC\\_guidelines\\_v3.pdf](http://www.esa.org/vegweb/NVC_guidelines_v3.pdf); Ecological Systems of the United States: A Working Classification of U.S. Terrestrial System, by Comer et al. (2003), NatureServe, available at: [www.natureserve.org/library/usEcologicalsystems.pdf](http://www.natureserve.org/library/usEcologicalsystems.pdf); and Classification

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of Vegetation Communities of New Jersey: Second Iteration, by Breden et al. (2001), Association for Biodiversity Information and New Jersey Natural Heritage Program, available at: <http://njedl.rutgers.edu/njdlib>, Record ID#1980. For each identified ecological community on the site or footprint, the applicant shall submit data describing physiognomy, species composition with a list of the most abundant plant species by strata (canopy tree, subcanopy tree, shrub, vine, herbaceous, bryophyte), a description of successional stage, slope degrees and aspect, geologic substrate (as indicated in available U.S.G.S. bedrock geologic maps), soil texture and pH (as indicated in available U.S.D.A. Natural Resources Conservation Service Soil Surveys and verified by field sampling), depth to water table (as indicated in available U.S.D.A. Natural Resources Conservation Service Soil Surveys), and hydrologic influences;

vii. A map identifying the location of the rare or endangered plant species habitat on the site or within the footprint of disturbance as well as within 0.5 miles of the boundary of the site or footprint, along with a list of the plant species documented in the Department's Natural Heritage Database;

viii. The results of rare or endangered plant surveys for the purpose of supplementing scientific data regarding the suitability of a particular habitat for a particular species that were conducted in consultation with the Department and in accordance with all applicable Federal and State laws and regulations, including for each species surveyed: the survey method, the surveyor's name(s), dates and times surveys were performed, number of samples, and number of replications; literature citations for the methodology used and a description of how the methodology was applied to the survey, giving the following information: surveyor's name(s), dates and times surveys were performed, number of samples, and number of replications. This information shall be provided for each species surveyed;



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ix. A copy of any other relevant plant survey or report to which the HPAA or HRAD applicant or their agent has access; and

x. Any other information relevant to assessing rare, or endangered plant species habitat at the site or within the footprint of disturbance.

## SUBCHAPTER 6 HIGHLANDS PRESERVATION AREA APPROVAL

### 7:38-6.1 General provisions

- (a) No person shall undertake any regulated activity without first obtaining a Highlands Preservation Area Approval from the Department pursuant to this subchapter.
- (b) To be authorized under an HPAA, a person shall demonstrate that the proposed regulated activity will comply with the following requirements:
1. N.J.A.C. 7:38-3, and N.J.A.C. 7:38-6.2 and 6.3, except to the extent a waiver of any one or more requirements of this chapter is requested in accordance with N.J.A.C. 7:38-6.4;
  2. The Safe Drinking Water Act rules, N.J.A.C. 7:10-1, in cases where proposed activity requires construction of a public community, public noncommunity, or nonpublic water system; and
  3. In cases where a New Jersey Pollutant Discharge Elimination System (NJPDES) permit or treatment works approval (TWA) is required, the NJPDES and/or TWA rules, N.J.A.C. 7:14A, applied to Highlands open waters in accordance with the antidegradation provisions of the Surface Water Quality Standards at N.J.A.C. 7:9B and the Stormwater Management rules at N.J.A.C. 7:8 applicable to Category One waters.

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(c) Each HPAA applies to the entire site upon which regulated activities occur. An applicant shall not segment a project or its impacts by applying for an HPAA for one portion of the project at one time and later applying for an HPAA for to undertake another portion of the same project. Similarly, an applicant shall not segment a project or its impacts by separately applying for an HPAA for different portions of the same project.

(d) The Department shall not issue an HPAA for any regulated activity in an area identified in the Regional Master Plan pursuant to N.J.S.A. 13:20-6n as a special area within which development shall not occur in order to protect water resources and environmentally sensitive lands.

(e) The Department shall not issue an HPAA unless the project complies with Stormwater Management rules, N.J.A.C. 7:8.

#### 7:38-6.2 Standard requirements for all HPAAAs

- (a) The Department shall issue an HPAA only if it determines, based upon the information provided by the applicant, that the proposed major Highlands development:
1. Meets all of the requirements at N.J.A.C. 7:38-3;
  2. Would result in de minimus impacts on water resources and would not cause or contribute to a significant degradation of surface or ground waters. In making this determination, the Department shall consider the extent of any impacts on water resources resulting from the proposed major Highlands development including, but not limited to, the regenerative capacity of aquifers or other surface or ground water supplies, increases in stormwater generated, increases in impervious surface, increases in stormwater pollutant loading, changes in land use, and changes in vegetative cover;

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3. Would cause the minimum feasible interference with the natural functioning of animal, plant, and other natural resources at the site and within the surrounding area, and the minimum feasible individual and cumulative adverse impacts to the environment both onsite and offsite of the major Highlands development;
4. Will result in the minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources, and aquatic circulation of a freshwater wetland;
5. Will not jeopardize the continued existence of species listed pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A.23:2A-1 et seq., the Endangered Plant Species List Act, N.J.S.A. 13:1B-15.151 et seq.), or which appear on the Federal endangered or threatened species list, and will not result in the likelihood of the destruction or adverse modification of habitat for any rare, threatened, or endangered species of animal or plant;
6. Is located or constructed so as to neither endanger human life or property nor otherwise impair public health, safety or welfare;
7. Would result in the minimum practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes at the site and within the surrounding area; and
8. Meets all other applicable Department standards, rules, and regulations and State and Federal laws.

(b) Each HPAA issued by the Department shall expire, along with any associated waiver, within five years of the date of issuance unless construction has commenced, in which case the HPAA and waiver shall continue in effect until such time as

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construction ceases. In no case shall a HPAA remain in effect for longer than 10 years.

(c) An HPAA shall be valid only for the development appearing in the plans approved by the Department. Any change in the plans affecting the number of dwelling units, percentage of impervious surface or commercial square footage, water consumption or wastewater treatment must be approved in writing by the Department prior to commencement of construction.

#### 7:38-6.3 Protecting Highlands preservation area resources from future development

(a) Every HPAA shall require a binding conservation restriction as defined in N.J.A.C. 7:38-1.4 on any area of the lot not authorized for development or disturbance under the HPAA that shall permanently preserve the undeveloped and undisturbed portion of the lot in its natural state, except for those activities necessary to maintain the conservation restriction to accomplish the purpose for which the conservation restriction was created.

(b) The conservation restriction shall run with the land on which the approved project is located, shall apply to all lots subdivided from that land and sold or transferred to other persons, and shall be binding upon the landowner and his or her successors in interest. To ensure that notice of the conservation restriction is provided to all present and future interested parties, the landowner or contract purchaser receiving the HPAA shall:

1. Record the conservation restriction(s) at the county clerk's office within 10 days after commencement of any work authorized under the HPAA; and
2. Ensure that a copy of the conservation restriction is provided to the Highlands Council and to the municipal clerk with a request that it be placed in the file for the lot containing the approved project.

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(c) A conservation restriction shall be enforceable by the Department, by the Highlands Council, their designated representatives, by a local government unit, or by a charitable conservancy whose trustees have no other interest in the land that is the subject of the restriction.

(d) The conservation restriction(s) shall describe and include all regulated features on the property, including all Highlands Resource Areas, stormwater management facilities, any required mitigation and relevant site conditions such as encumbrances or known contamination.

(e) A conservation restriction shall include a survey and a metes and bounds description of the entire restricted area.

#### 7:38-6.4 Waivers

(a) As provided in the Highlands Act at N.J.S.A.13:20-33b, or in accordance with the Fair Housing Act, N.J.S.A.52:27D-301 et seq., the Department may, in its discretion, waive any provision contained in this chapter on an individual, case-by-case basis:

1. To protect public health and safety;
2. For redevelopment in certain previously developed areas in the preservation area identified by the Council pursuant to N.J.S.A. 13:20-9b or N.J.S.A. 13:20-11 (a)(6)(h);
3. To avoid the taking of property without just compensation; or
4. To permit the construction of a 100 percent affordable housing development as defined by the Council on Affordable Housing pursuant to N.J.A.C. 5:93-5.5 and N.J.A.C. 5:94-4.6.

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(b) A request for a waiver of any requirement of this chapter shall be submitted along with an HPAA application, as set forth in N.J.A.C. 7:38-6.1. Any waiver approved pursuant to this chapter shall be considered a waiver only of the particular requirement(s) that is identified by the Department in the written approval of the waiver as part of the HPAA.

(c) A person requesting a waiver shall first submit a written request for a pre-application meeting in accordance with N.J.A.C. 7:38-8. Upon completion of the pre-application meeting, the person may submit an application for an HPAA with waiver as set forth at N.J.A.C. 7:38-9.

(d) Any waiver approved pursuant to this chapter shall be conditioned on the Department's determination that the proposed development meets the requirements in N.J.A.C. 7:38-6.2(a) to the maximum extent possible.

(e) The Department shall determine whether a proposed activity is eligible for a waiver for health and safety in accordance with the standards set forth at N.J.A.C. 7:38-6.5.

(f) The Department shall determine whether a proposed activity is eligible for a waiver for redevelopment purposes in accordance with the standards set forth at N.J.A.C. 7:38-6.6 or 6.7.

(g) The Department shall determine whether a proposed activity is eligible for a waiver to avoid a taking without just compensation in accordance with the standards set forth in N.J.A.C. 7:38-6.8.

(h) The Department shall determine whether a proposed activity is eligible for a waiver for the construction of 100 percent affordable housing in accordance with the standards set forth in N.J.A.C. 7:38-6.9.

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(i) In cases where the Department determines to approve a waiver in accordance with this chapter, the approval will include specific conditions to restrict any activities that might otherwise occur as a result of the waiver. These conditions include but are not limited to conservation restrictions, resolutions from a municipal utilities authority restricting sewage flows, physical limitations on sewer lines and/or pump stations and other mechanisms necessary to preclude secondary impacts that may otherwise result from the approved activities.

#### 7:38-6.5 Waiver for the protection of public health and safety

(a) If an activity is necessary to protect public health and safety and the anticipated threat or loss may occur before the Department can review an application for an HPAA, an applicant shall follow the procedure to obtain an emergency HPAA at N.J.A.C. 7:38-7.

(b) For the purposes of this section, an activity is necessary to protect public health and safety if there is no other practicable means to meet the established public need and the activity:

1. Will correct or avoid a threat to life or health, severe loss of property, or severe environmental degradation that is occurring or will occur if the activity is not permitted;
2. Will serve an essential health or safety need or correct severe environmental degradation; and
3. Is required to serve existing public health and safety needs or to correct existing severe environmental degradation and is not intended or designed to support future development.

(c) Examples of activities that satisfy the requirement of protecting public health and safety include, but are not limited to:

1. The construction of new or expanded police, fire and first aid facilities to serve an

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existing community;

2. The replacement of failing septic systems with new septic systems or other sewage treatment facilities sized specifically to serve only the existing development currently served by the failing systems; and

3. The replacement of wells or other water supplies serving legally existing development with new wells or water sources when such replacement is necessary for the protection of human health.

(d) An applicant shall not be eligible for a waiver under this section unless he or she demonstrates that a proposed activity:

1. Is necessary to protect public health and safety as described in (b) above;

2. Has no practicable alternative that:

i. Would have less or no adverse impact on all Highlands resource areas on the site for which the HPAA is sought; and

ii. Would not have other significant adverse environmental consequences, that is, will not merely substitute other significant environmental consequences for those attendant on the original purpose;

3. Is designed to comply with all of the preservation area standards contained at N.J.A.C. 7:38-3 to the maximum extent feasible while still addressing the identified health and safety need; and

4. Has been designed to meet the requirements at N.J.A.C. 7:38-6.2 to the maximum extent possible.



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(e) In addition to meeting the requirements at (a) through (d) above, an applicant proposing a regulated activity within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4, shall provide mitigation in accordance with N.J.A.C. 7:7A in order to compensate for impacts to a freshwater wetland or State open water resulting from the approval of a waiver under this section.

7:38-6.6 Waiver for redevelopment in certain previously developed areas in the Highlands preservation area: Department-designated Highlands Brownfields

(a) In accordance with N.J.S.A. 13:20-33b(2), the Department may, on a case by case basis, waive any of the provisions for a HPAA if such waiver is necessary for redevelopment of certain previously developed areas in the Preservation area identified by the Council pursuant to N.J.S.A. 13:20-9b and N.J.S.A. 13:20-11a(6)(h). A waiver under this section shall apply only to Department-designated Highlands brownfield sites designated pursuant to (b) below, and identified as an area appropriate for redevelopment by the Council. For the purposes of this section only, "site" means a parcel designated by a block and lot, or several contiguous parcels if owned or controlled by the applicant so long as all parcels meet the criteria in (b) below.

(b) For the purposes of this section, a site that meets the criteria in one of the following three Tracks is eligible for designation by the Department as a Highlands brownfield, provided that the contamination onsite is not the result of a current or previous agricultural use:

1. Track One: A sanitary landfill facility;
2. Track Two: A former or current commercial or industrial site for which;

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- i. Prior to the issuance of a final remediation document, a remedial action report was completed confirming the presence of contamination onsite, and documenting the current or previous use as a commercial or industrial site;
- ii. The Department or a licensed site remediation professional has issued a final remediation document for the entire site for which the brownfield designation is sought as of July 1, 1993, or later, pursuant to N.J.A.C. 7:26C-6; and
- iii. No discharge of a contaminant has occurred on the site since the date of the final remediation document. Sites where a discharge of a contaminant has occurred on the site since the Department or a licensed site remediation professional has issued a final remediation document must apply for designation through Track Three; or

3. Track Three: A former or current commercial or industrial site with suspected or confirmed contamination onsite for which neither the Department nor a licensed site remediation professional has issued a final remediation document.

(c) For a Track One site, the Department may designate as a Highlands brownfield:

1. The limit of the waste; or
2. Areas legally disturbed as of August 10, 2004.

(d) For a Track Two site, the Department may designate as a Highlands brownfield only that portion of a site that meets one or both of the following:

1. Areas on which remediation has been approved by either the Department or a licensed site remediation professional and for which the Department or a licensed site remediation professional has issued a final remediation document; or
2. Areas legally disturbed as of August 10, 2004.

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(e) For a Track Three site for which only a Preliminary Assessment and Site Investigation have been completed confirming the suspected existence of contamination onsite, the Department may designate as a Highlands brownfield only that portion of the site legally disturbed as of August 10, 2004.

(f) For a Track Three site for which remedial activity, in addition to a Preliminary Assessment and Site Investigation confirming the existence of contamination onsite has occurred, the Department may designate as a Highlands brownfield only that portion of a site that meets one or more of the following:

1. Areas for which a Department-approved or licensed site remediation professional-approved delineation of soil contamination has been completed, pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E;
2. Areas legally disturbed as of August 10, 2004; or
3. Areas disturbed for remediation activities, (but not new residential, commercial or industrial development), in accordance with a Department or licensed site remediation professional approved Remedial Action Workplan, pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-6.

(g) The Department shall not include a Highlands open water in a Highlands brownfield designation.

(h) A person seeking the designation of a site as a Highlands brownfield shall submit to the Department documentation that the site meets the criteria for the applicable track at (b) above, using the appropriate Department application form, accompanied by the fee set forth at N.J.A.C. 7:38-10.

(i) The Department may modify a Highlands brownfield designation to include an area identified by the Council after notice and public comment and submittal to the Department for consideration, provided the documentation and public record

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developed by the Council is sufficient for the Department to conclude that such modification will not result in a significant impact to any Highlands resource area.

(j) The Department may expand the area included in a Highlands brownfield designation at any time based upon new information obtained during remediation that was not available during the designation process.

(k) Once the Department designates a site as a Highlands brownfield, and the Council has identified all or part of the brownfield as appropriate for redevelopment in accordance with N.J.S.A. 13:20-9b and N.J.S.A. 13:20-11a(6)(h), an applicant shall be eligible for a HPAA with a waiver for redevelopment under this section if the applicant demonstrates that:

1. The proposed redevelopment meets the requirements at N.J.A.C. 7:38-6.2 to the maximum extent possible, taking into consideration cost and existing technology;
2. The remediation conducted onsite is in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E;
3. For a Track One Highlands brownfield:
  - i. As of May 9, 2005, the applicant is or was remediating or closing, or has completed remediation or closure of a landfill that ceased operation before January 1, 1982 in accordance with:

(1) A Closure Plan approved by the Department, and issued pursuant to the Solid Waste rules, N.J.A.C 7:26-2A.9; and

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(2) A Remedial Action Workplan approved by the Department or by a licensed site remediation professional, and pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-6; or

ii. The applicant is currently implementing an approved Closure and Post-Closure Care Plan, or has completed an approved Closure and Post-Closure Care Plan, for a landfill that ceased operation on January 1, 1982, or later, pursuant to the Solid Waste Rules, N.J.A.C 7:26-2A.9;

4. For a Track Two Highlands brownfield, the applicant demonstrates that no discharge of a contaminant has occurred on the site since the final remediation document was issued;

5. For a Track Three Highlands brownfield, the applicant is remediation the sure pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C, or the Industrial Site Recovery Act rules, N.J.A.C. 7:26B, as applicable.

6. The proposed redevelopment satisfies the requirements in (c), (d), (e) or (f) above as applicable, and:

i. If the redevelopment is located in the footprint of existing impervious surface, the existing stormwater treatment system removes 50 percent or greater total suspended solid (TSS). If the existing system removes less than 50 percent TSS or there is no existing treatment system, the existing system is upgraded to remove at least 50 percent TSS or a new stormwater treatment system that removes at least 50 percent TSS is installed; or

ii. If the proposed redevelopment is located outside the footprint of existing impervious surface, a new stormwater treatment system that removes at least 80 percent TSS is installed;

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7. The proposed redevelopment includes, wherever feasible the removal of impervious surfaces not used for the redevelopment project and the planting of indigenous vegetation that is beneficial for the protection of water quality, and the recording of a binding conservation restriction preserving the newly revegetated area from future development; and
  8. The proposed redevelopment includes mitigation in accordance with N.J.A.C. 7:7A for any activity proposed within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A-1.4.
- (l) Any waiver approved in accordance with this section shall be conditioned upon the receipt of a final remediation document, or equivalent approval for sanitary landfills issued by the Department with respect to the area of the site designated as a Highlands brownfield and identified by the Council as appropriate for redevelopment.

7:38-6.7 Waivers for redevelopment in certain previously developed areas in the Highlands Preservation Area: 70 percent impervious surface

- (a) In accordance with N.J.S.A. 13:20-33b(2), the Department may, on a case by case basis, waive any of the provisions for a HPAA if such waiver is necessary for redevelopment of certain previously developed areas in the preservation area identified by the Highlands Council. A waiver under this section shall apply only to an area if and when the Highlands Council identifies a site at which at least 70 percent of the area thereof is covered with impervious surface.
- (b) An applicant shall be eligible for an HPAA with a waiver for redevelopment under this section, if the applicant demonstrates that:

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1. The proposed redevelopment meets the requirements at N.J.A.C. 7:38-6.2 to the maximum extent possible while still addressing the identified redevelopment need; and
2. The proposed redevelopment meets the requirements in N.J.A.C. 7:38-6.6(k)6, 7 and 8.

7:38-6.8 Waiver to avoid the taking of property without just compensation

(a) In accordance with N.J.S.A. 13:20-33b, the Department may, on a case by case basis, waive any requirement for a HPAA if necessary to avoid the taking of property without just compensation.

(b) A waiver under this section shall apply only after the Department determines that the proposed development does not meet all the requirements in this chapter as strictly applied, all the applicant's administrative and legal challenges to that determination as set forth in (b)1 below have concluded, and the HPAA applicant meets the requirements in (g) below.

1. An applicant may challenge any Department HPAA decision under the rules as strictly applied if the applicant disputes the Department's findings of facts or application of the rules to those facts. Following an administrative hearing, the Commissioner shall issue a Final Decision approving or denying a HPAA under the rules as strictly applied. The applicant may appeal a Final Decision which denies the HPAA or approves it with conditions to the Appellate Division of Superior Court. If a court finds that the applicant is not entitled to an HPAA under the rules as strictly applied, the Department shall review and decide the applicant's request for a waiver to avoid a taking of property. The applicant may challenge the Department's final agency action on the waiver application after any hearing in the OAL.

(c) In determining whether to waive any requirement of this chapter to avoid an alleged taking of property without just compensation, the Department shall consider:

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1. The investments the property owner made in the property as a whole on which regulated activities are proposed and whether the investments were reasonable, in accordance with (d) below;
2. The minimum viable and economically beneficial use of the property as a whole, in accordance with (e) below; and
3. The environmental impacts of the minimum viable and economically beneficial use for the property as a whole, and the consistency of these impacts with the goals of the Highlands Act, in accordance with (f) below.

(d) In determining whether the property owner's investments in the property as a whole were reasonable, the Department shall consider:

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 as a whole, 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 N.J.A.C. 7:7A, it would not be reasonable for that owner to assume 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. Existing zoning and other regulatory requirements and conditions;
- ii. Historic landmarks or other historic or cultural resources on the property that would be adversely impacted by the proposed development;



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iii. The likelihood the proposed development could obtain other necessary approvals such as wastewater treatment approvals or approvals from other local, state or Federal agencies;

iv. Terrain and other site conditions, and/or environmental constraints, which could affect the potential uses of the property as a whole;

v. The existence of, or likelihood of obtaining, services to the property such as sewers or electricity; and

vi. Compatibility with and adverse effects upon land uses located on adjacent properties and in the area where the property is located;

2. Costs actually incurred by the property owner in pursuit of development of the property as a whole that were reasonable in amount, related to the development, and unavoidable. For example, if the property owner began construction without the necessary permits or approvals, the owner's costs defending a prosecution or enforcement action for this violation or the payment of fines and penalties would not constitute reasonable investment costs; and

3. Any other factor affecting the property or the property owner, which is related to the reasonableness of the investments claimed and/or the proposed use of the property.

(e) In assessing the minimum beneficial economically viable use of the property as a whole, a use shall not be excluded from consideration merely because it does not result in a profit, reduces the marketability of the property as a whole, or does not allow the property owner to recoup all investments identified under (c) above.

(f) In determining the environmental impacts of the minimum beneficial economically viable use of the property as a whole and the consistency of those impacts with the goals

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of the Highlands Act under (c) above, the Department shall evaluate whether the use would, to the maximum extent possible:

1. Have a de minimis impact on water resources and would not cause or contribute to a significant degradation of surface or ground waters. In making this determination, the Department shall consider the extent of any impacts on water resources resulting from the proposed major Highlands development, including, but not limited to, the regenerative capacity of aquifers or other surface or ground water supplies, increases in stormwater generated, increases in impervious surface, increases in stormwater pollutant loading, changes in land use and changes in vegetative cover;
2. Cause the minimum feasible interference with the natural functioning of animal, plant, and other natural resources at the site and within the surrounding area, and the minimum feasible individual and cumulative adverse impacts to the environment both onsite and offsite of the proposed major Highlands development;
3. Result in the minimum feasible alteration or impairment of the aquatic ecosystem including existing contours, vegetation, fish and wildlife resources, and aquatic circulation of a freshwater wetland;
4. Not jeopardize the continued existence of species listed pursuant to the Endangered and Nongame Species Conservation Act, N.J.S.A.23:2A-1 et seq. or the Endangered Plant Species List Act, N.J.S.A.13:1B-15.151 et seq., or which appear on the Federal endangered or threatened species list, and will not result in the likelihood of the destruction or adverse modification of habitat for any rare, threatened or endangered species of animal or plant;
5. Not be located or constructed so as to endanger human life or property or otherwise impair public health, safety or welfare;

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6. Result in the minimum practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes at the site and within the surrounding area; and
  7. Meet all other applicable Department standards, rules, and regulations and State and Federal laws.
- (g) An applicant for an HPAA may request that the Department waive a requirement of this chapter under (a) above only after the Department has rendered a decision on an HPAA application under the rules as strictly applied, all legal challenges to the decision that the applicant chooses to bring have concluded pursuant to (b)1, above, and the applicant satisfactorily demonstrates the following to the Department:

1. No alternative to the proposed major Highlands development exists;
2. That the applicant has made a good faith effort to transfer development rights for the subject site pursuant to N.J.S.A. 13:20-13, and has not obtained a commitment from the Highlands Council or a receiving zone municipality to purchase said development rights;
3. The property has been offered for sale at an amount no greater than the specific fair market value to all property owners within 200 feet of the property as a whole, and to the land conservancies, environmental organizations, and the Highlands Council and all other government agencies on a list provided by the Department, at an amount determined in compliance with N.J.S.A. 13:8C-26j or N.J.S.A. 13:8C-38j, as applicable by letter sent by certified mail, return receipt requested, using the form provided by the Department, disclosing the location of all Highlands resource areas on the property and stating that an application for a waiver of the requirements of this chapter to permit development on the property has been filed and enclosing a copy of a fair market value appraisal, that was

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performed by a State-licensed appraiser and that assumed that the minimum beneficial economically viable use of the property is allowable under local law; and

4. That no reasonable offer based upon the minimum beneficial, economically viable use for the property has been received;

i. Documentation for (g) 3 and 4 above shall include the following:

(1) A copy of each letter that the applicant sent under this subsection;

(2) All responses received. Each response shall be submitted to the Department within 15 days after the applicant's receipt of the response;

(3) A list of the names and addresses of all owners of real property within 200 feet of the property as a whole, as certified by the municipality, including owners of easements as shown on the tax duplicate;

(4) Receipts indicating the letters were sent by certified mail; and

(5) A copy of the fair market value appraisal required under (g)3 above.

(h) After consideration of the information required in (g) above, the Department shall not approve a waiver under this section if an applicant has refused a fair market value offer to purchase the property for which the waiver is sought or if there is an alternative to the proposed project that constitutes a minimum beneficial economically viable use for the property.

(i) Upon written notice from the Department advising a person that the conditions in (g) have been satisfied, the person may request a waiver under this section in accordance with N.J.A.C. 7:38-9.

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(j) The Department shall complete a written analysis of the factors it considers under (c) above, which shall incorporate its decision on the request for a waiver under this section no later than 180 days from the Department's receipt of a complete request under (h) above.

(k) An HPAA with a waiver to avoid a taking of property without just compensation shall:

1. Allow only the minimum relief necessary to enable the property owner to realize the minimum beneficial economically viable use of the property as a whole, designed and built in a manner that will conserve the resources of the Highlands to the maximum extent possible; and
2. Ensure that any part of the property that the Department does not allow to be developed is protected from future development by a recorded conservation restriction containing those terms deemed necessary by the Department to preserve the undeveloped property and the mitigation plantings thereon, if any.

#### 7:38-6.9 Waiver for the construction of a 100 percent affordable housing development

(a) In order to afford Bloomsbury, Califon or Glen Gardner Boros in Hunterdon County, and Ringwood Boro and West Milford Township in Passaic County reasonable opportunity to include housing for low and moderate income households in their Fair Share plans as required by the Mount Laurel Doctrine (67 N.J. 151(1975), the Fair Housing Act (N.J.S.A. 52:27D-301 et seq.), and Council on Affordable Housing (COAH) regulations (N.J.A.C. 5:91-1 et seq.), the Department may, in its discretion, waive any provision contained in this chapter on an individual case by case basis to permit the construction of housing in these towns that is exclusively comprised of low and moderate income dwelling units, as defined by COAH pursuant to N.J.A.C. 5:93-5.5 and N.J.A.C. 5:94-4.6.

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(b) To be eligible for this waiver, an applicant shall demonstrate that the project meets the criteria in (a) above, and that there is no other practicable means to meet the municipality's affordable housing requirements as calculated pursuant to COAH regulations and that the proposed project:

1. Has no practicable alternative that:

i. Would have less or no adverse impact on all Highlands resource areas on the site for which the HPAA is sought; and

ii. Would not have other significant adverse environmental consequences, that is, will not merely substitute other significant environmental consequences for those attendant on the original proposal;

2. Is designed to comply with the preservation area standards contained at N.J.A.C. 7:38-3 to the maximum extent feasible while still addressing the affordable housing need; and

3. Has been designed to meet the requirements at N.J.A.C. 7:38-6.2 to the maximum extent possible.

(c) In addition to meeting the requirements at (a) and (b) above, an applicant who proposes a regulated activity within a Highlands open water that is also a freshwater wetland or State open water, as defined in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-1.4, shall provide mitigation in accordance with N.J.A.C. 7:7A.

## SUBCHAPTER 7. EMERGENCY PERMITS

7:38 - 7.1 Emergency permits

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(a) The Department may issue a temporary, emergency HPAA only if it determines that:

1. An unacceptable threat to human life, a severe loss of property, and/or severe environmental degradation will occur if an emergency HPAA is not issued; and
2. The anticipated threat or loss will likely occur before an HPAA can be issued using the ordinary procedures of this chapter.

(b) The Department shall grant or deny a written request for an emergency HPAA made pursuant to N.J.A.C. 7:38-7.2(a), no later than 10 business days following the day the Department receives a written request for an emergency HPAA. While requests may be faxed to the Director of the Land Use Program, the time within which the Department is obligated to grant or deny the request shall commence on the day the Department receives a mailed or hand-delivered copy of the request.

(c) The permittee shall comply with any condition or requirement contained in an emergency permit issued pursuant to this subchapter. Work under an emergency HPAA may commence upon the permittee's receipt of a written emergency HPAA or upon oral authorization by the Director of the Land Use Regulation Program or the Director's designee. The Department shall fax a letter memorializing the oral authorization to the applicant, who shall post it at the work site until receipt of the written emergency HPAA which shall be issued no later than ten business days after the oral authorization is given.

(d) Any emergency HPAA the Department issues shall include, to the greatest extent practicable under the emergency:

1. The normal application criteria and performance standards of this chapter including mitigation for damage to freshwater wetlands;
2. "As-built" drawings, showing all activities conducted under the emergency permit, including all excavation, grading, structures, and other regulated activities;

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3. A complete analysis of compliance with each of the standards contained in N.J.A.C. 7:38-3 and 6.2;
4. The applicable fee specified at N.J.A.C. 7:38-10; and
5. Any other conditions necessary for the Department to ensure compliance with this chapter;

(e) Application review procedures at N.J.A.C. 7:38-11 shall apply to requests for emergency HPAA's to the extent possible, given the gravity of the emergency as documented by the applicant.

(f) The Department may, in its discretion, make the issuance of an emergency HPAA conditional upon the applicant submitting an application for a regular HPAA by a deadline specified by the Department.

(g) An emergency HPAA shall expire:

1. Upon the date stipulated by the Department in the permit;
2. Upon completion of the authorized activity; or
3. Upon the 90th calendar day from the date of the written authorization, whichever shall occur first.

(h) An emergency HPAA shall fully describe the activities authorized by the Department, state the procedures the permittee must follow under N.J.A.C. 7:38-7.2, and any other conditions attached to the issuance of the permit, such as written submissions corroborating oral statements about the emergency made to the Director or his or her staff by professional engineers, consultants or other persons with personal knowledge of the emergency.



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(i) A permittee shall post a copy of the written emergency HPAA at a publicly accessible portion of the work site and remove it when the permit expires.

(j) The Director of the Land Use Regulation Program shall provide notice of the issuance of any emergency HPAA:

1. To the clerk of the municipality in which the work is being done to avoid unnecessary complaints of illegal work;
2. To the Highlands Council;
3. To the Coastal and Land Use Enforcement Program so that appropriate site inspections can be made; and
4. If the work authorized pursuant to an emergency HPAA affects a Highlands open water that is also a freshwater wetland or State open water pursuant to N.J.A.C. 7:7A, the Director shall also provide notice to the Regional EPA Administrator.

(k) The Department may immediately terminate any emergency HPAA if necessary to protect human health or the environment, or if it determines that the authorized work no longer meets the criteria for permit issuance under (a) above. The Department shall provide notice of any early termination of an emergency HPAA to the municipal Clerk, the Highlands Council, the Coastal and Land Use Enforcement Program, and if applicable, the U.S. Environmental Protection Agency.

(l) The Department may extend an emergency HPAA only for the purpose of allowing the permittee to complete mitigation under NJAC 7:7A.

N.J.A.C. 7:38-7.2 Obtaining an emergency permit

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(a) A person applying for an emergency HPAA shall provide the following information to the Department:

1. The lot, block, street address and municipality of the proposed project, and the name and address of the land owners;
2. The exact nature of the emergency, and why the applicant believes it constitutes an unacceptable threat to human life, a severe loss of property, and/or severe environmental degradation;
3. The reasons why the emergency cannot be controlled or eliminated pending submission and review of a normal HPAA application;
4. The extent of work to be performed, and the names of the contractors performing the work, if known;
5. The extent of work in freshwater wetlands or state open waters and the proposed mitigation for that activity;
6. The number of days within which the proposed work, including mitigation, will be completed;
7. A general description of additional work that will be undertaken after completion of the mitigation and emergency work;
8. Plans depicting the emergency work and mitigation;
9. Photographs of the site depicting the emergency, to the extent possible;

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10. The names and contact numbers of persons with factual knowledge of the emergency condition, and a written statement from those persons which documents the existence of the emergency;

11. The names and contact numbers of all professional engineers, consultants, or others with personal knowledge of the emergency condition, and a written statement from those persons as necessary to document the existence of the emergency;

12. When available, "as-built" drawings, showing all activities conducted under the emergency permit, including all excavation, grading, structures, and other regulated activities and a complete analysis of compliance with each of the standards contained in N.J.A.C. 7:38-3 and 6.2;

13. The applicable fee for an HPAA specified at N.J.A.C. 7:38-10; and

14. Any other information necessary for the Department to ensure compliance with this chapter.

(b) Persons performing work pursuant to an emergency HPAA shall speak directly with Department staff by telephone at least once per week to discuss the emergency situation at the site and shall be responsible for advising the Department of any additional work that may be required to address the existing emergency or any new emergency that arises on the site.

(c) No person shall perform any activity regulated under this chapter unless specifically authorized in the emergency HPAA.

## SUBCHAPTER 8 PRE-APPLICATION PROCEDURES

7:38-8.1 Procedure for determining when a pre-application meeting is required

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(a) Activities described in applications for an HPAA may require the review of several regulatory programs within the Department. In accordance with N.J.S.A. 20-33a, the Department shall not issue an HPAA unless the Department determines that the proposed activity either complies with the requirements of these other regulatory programs or that the activity meets the requirements for a waiver pursuant to N.J.A.C. 7:36-6. The regulatory programs which are included in the HPAA permit review program are:

1. The Freshwater Wetlands Protection Act, N.J.S.A.13:9B-1 et seq., as implemented by the Land Use Regulation Program;
2. The Endangered and Nongame Species Conservation Act, N.J.S.A.23:2A-1 et seq., as implemented by the Land Use Regulation Program;
3. The Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., as implemented by the Water Allocation Program;
4. The Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., as implemented by the Water Quality Program;
5. The Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq., as implemented by the Water Quality Program;
6. The Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., as implemented by the Watershed Management Program;
7. The Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., as implemented by the Water Allocation Program; and

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8. The Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq. as implemented by the Land Use Regulation Program.

(b) To the extent possible, the Department will strive to consolidate all of the reviews at (a) above so that projects obtaining HPAA's shall require no additional permits or approvals from the Department.

(c) An applicant for an HPAA must request a pre-application meeting when:

1. The applicant completes the Department checklist for a Highlands Applicability Determination and it indicates that the proposed project requires review by two or more of the regulatory programs listed in (a) above; or
2. The applicant is requesting any of the waivers at N.J.A.C. 7:38-6.4.

(d) An applicant shall request a pre-application conference in writing to the Land Use Regulation Program at the address listed at N.J.A.C. 7:38-1.2(a)2, and shall include:

1. A project description and a list of each regulatory programs that will need to review the project;
2. A plan view of the project;
3. The tax lot and block of the site on which the project is located;
4. The location of the project site, including the municipality, county and street address;
5. A United States Geological Survey quadrangle map showing the site;

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6. The completed Highlands Applicability determination application and a copy of the Highlands Applicability determination letter issued pursuant to N.J.A.C. 7:38-2.4, or in cases where the applicant stipulates under N.J.A.C. 7:38-2.4(a) that the proposed activity is subject to the Highlands Act, adequate information for the Department to determine the applicability of the Highlands Act and WQMP consistency as provided on the Department's HPAA pre-application meeting checklist;
  7. A copy of any Highlands Resource Area Determination (HRAD) issued for the site. If no HRAD has been issued, the general location of Highlands open waters and buffers, upland forest areas and steep slopes on the site in relation to the proposed project;
  8. A copy of the appropriate Soil Conservation Service map(s) on which the project location is marked; and
  9. A fee in accordance with N.J.A.C. 7:38-10.2(a).
- (e) The Department encourages the applicant to obtain an HRAD and a Natural Heritage Program letter listing of rare, threatened and endangered animal species and rare or endangered plant species pursuant to N.J.A.C. 7:38-4.1(d)3ii on or near the site prior to the pre-application conference.
- (f) The Department shall contact the applicant within 15 days after receiving a completed request to schedule the pre-application conference.

## SUBCHAPTER 9 APPLICATION CONTENTS

### 7:38-9.1 Basic application information

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(a) This subchapter describes the application contents for:

1. A Highlands Applicability Determination (that includes an evaluation of exemption eligibility, when applicable);
2. An HRAD, including an extension or modification of an existing HRAD;
3. An HPAA;
4. An HPAA with waiver;
5. A minor modification, major modification, or extension of an HPAA; and
6. A Highlands general permit.

(b) Any person engaging in major Highlands development without the required Highlands Applicability Determination, HPAA, or a modification or extension to an HPAA shall be in violation of the Highlands Act and subject to penalty as set forth in N.J.S.A. 13:20-35.

(c) An application shall be signed by the person or persons specified below:

1. For a corporation, by a principal executive officer of at least the level of vice president;
2. For a partnership or sole proprietorship, by a general partner or the proprietor, respectively;
3. For a municipality, State, Federal, or other public entity, by either a principal executive officer or ranking elected official; or

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4. For an entity not covered at (a)1 through 3 above, by all individual owners of record.

(d) All reports and other information requested by the Department shall be signed by a person described in (c) above, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

1. The authorization is made in writing by a person described in (c) above;
2. The authorization designates either a named individual or any individual occupying a specified position who has been given overall responsibility for the proposed construction and/or completion of the regulated project or activity, such as the general contractor, construction site supervisor, or someone with equivalent responsibility; and
3. The written authorization is submitted with the application to the Department.

(e) The person who applies for and receives an HPAA shall be solely responsible for ensuring that the permitted activity complies with all requirements in this chapter, regardless of whether other persons manage, oversee or work on the activity.

(f) It is a violation of the Highlands Act for any person to engage in any regulated activity that is not specifically authorized by the Highlands Applicability Determination, HPAA, or a modification or extension to an HPAA.

(g) A person applying for an HPAA (with or without waiver) or a modification or extension thereof shall describe all planned activities that relate or associated with any phase of the proposed project.

(h) The Department may deny any application or revoke any permit previously issued under this chapter in the event it finds the applicant, its consultants, or agents failed to



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provide the Department any required information or information affecting the truth of statements appearing in an previously submitted application; and may also seek penalties pursuant to N.J.A.C. 7:38-13.10.

(i) An applicant shall provide all information necessary for the Department to determine if the requirements of this chapter are met. The Department will provide an application form or checklist setting forth the information required for a complete application. The form or application checklist will vary depending on the type of approval sought.

(j) Application forms for a Highlands Applicability Determination can be downloaded and/or printed from the Highlands website at [www.nj.gov/dep/highlands](http://www.nj.gov/dep/highlands), or they can be obtained by contacting the Department at the address in N.J.A.C. 7:38-1.2(a)1.

(k) Application checklists and application forms for an HRAD, Highlands Applicability Determination (with or without waiver), HPAA, or a modification or extension to an HPAA can be downloaded and/or printed from the Land Use Regulation Program website at [www.nj.gov/dep/landuse](http://www.nj.gov/dep/landuse) or they can be obtained by contacting the Department at the address in N.J.A.C. 7:38-1.2(a)2. Application forms for new or modified water supply diversion projects pursuant to the Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., if applicable to an HPAA (with and without waiver), or a modification or extension of same can be obtained from the Bureau of Water Allocation at the address in N.J.A.C. 7:38-1.2(a)4. Application forms for NJPDES permits, treatment works approvals or septic approvals for 50 or more realty improvements can be obtained from the Division of Water Quality in the address at N.J.A.C. 7:38-1.2(a)3 or at [www.state.nj.us/dep/dwq](http://www.state.nj.us/dep/dwq) . Applications for septic approvals for 50 or more realty improvements should be directed to the Bureau of Nonpoint Pollution Control.

(l) In general, the level of detail and documentation required for an application is commensurate with the size and environmental impact of the proposed project and its proximity and/or potential impact upon Highlands resource areas. The Department will,

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upon request, provide applicants with guidance regarding the appropriate level of detail for any portion of an application.

(m) An applicant shall supply the Department with the number of document copies specified in the application checklist. In some cases, the application checklist will also specify the document sheet size or material (such as mylar), and may require the submission to be folded for easier handling.

(n) To minimize Department processing time, applicants should carefully review the application form and/or checklist, as applicable, prior to submission to ensure all required information has been provided.

(o) An applicant shall keep copies of all documents and supporting data used to complete an application, as well as any documents submitted to the Department during the application review process, for three years after the application is submitted to the Department, or for the duration of the permit, approval or determination if one is issued, whichever is longer.

(p) A person proposing any regulated activity in a state open water, freshwater wetland or buffer pursuant to N.J.S.A.13:9B et seq. shall either describe in the Highlands application a mitigation proposal complying with the mitigation requirements at N.J.A.C. 7:7A-15 , or shall submit the mitigation proposal during the Department application review process. Regardless of when the mitigation proposal is submitted, regulated activities shall not begin on a site for which mitigation is required until the Department approves the mitigation proposal and mitigation has commenced.

(q) If mitigation includes tree planting in accordance with N.J.A.C. 7:38-3.9, a mitigation plan shall describe the number, type and size of trees to be planted and the location and size of the planting area. Planting shall be done during the appropriate season.

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(r) The knowing and willful submission of false, inaccurate, or incomplete information, or the failure to provide information regarding the presence or absence of Highlands resource areas as identified at N.J.A.C. 7:38-3.4 through 3.10, or as otherwise required in any application, record, or other document required to be filed or maintained under the Act, or that is in any way pertinent to determining the site's current or future compliance with the requirements of this Chapter or other land use regulations, is a violation of the Highlands Act. Failure to accurately and completely provide all such information may subject the applicant, its consultants, engineers, surveyors, or agents, to penalties under N.J.A.C. 7:38-13.10 and the Highlands Act.

#### 7:38-9.2 Application requirements for a Highlands Applicability Determination

(a) All applicants seeking a Highlands Applicability Determination shall provide the information listed at (b) and (c) below on a Highlands Applicability Determination form. In addition, if an applicant is claiming an exemption from the Highlands Act in accordance with N.J.A.C. 7:38-2.3, the applicant shall submit the information required at (d) below. If an applicant is claiming that a project or activity is not regulated by the Department because it is an agricultural or horticultural development or use, applicants shall submit the information required at (e) below. A person applying for a Highlands Applicability Determination shall provide:

1. Information relating to the applicant, project site and proposed project or activity as described at (b) below, a fee in accordance with N.J.A.C. 7:38-10, and a certification of accuracy;
2. Detailed information about the proposed method of wastewater treatment and water supply for the proposed project or activity, as described at (c) below;
3. Additional information about the project or activity necessary to assess exemption status, as described at (d) below; and

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4. If an activity is supposed to be agricultural or horticultural, information as described at (e) below.

(b) In order for the Department to determine whether a proposed activity is a major Highlands development subject to regulation under the Highlands Act, an applicant shall provide the following:

1. Two completed copies of the Highlands Applicability Determination application form, and all associated attachments as required and described in (b)3 through 9 and (c) through (f), completed in accordance with the directions on the form;
2. The required application review fee, set forth at N.J.A.C. 7:38-10, together with documentation regarding the cost of the proposed development, paid by personal check, certified check, attorney check, government purchase order, or money order; made payable to "Treasurer, State of New Jersey" and marked with the name of the applicant and an indication that the fee is for a "Highlands Applicability Determination;"
3. The name and location of the proposed project or activity including:
  - i. The address of the project or activity location;
  - ii. The lot and block numbers where the proposed project or activity will occur;
  - iii. The municipality and county where the proposed project or activity will occur;
  - iv. The total land area in acreage of both the proposed project and the site on which the activity is located;

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v. A copy of the municipal tax map(s) delineating the project or activity site by lot(s) and block(s); and

vi. The approximate boundaries of the project or activity site clearly delineated on a USGS quadrangle map, including title-name of Quad, or GIS coverage and the State Plane coordinates in NAD 1983 for a point at the approximate center of the site. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects or activities, the applicant shall provide State plane coordinates for the endpoints of those projects, which are 1,999 feet or less, and for those projects which are 2,000 feet or longer, additional coordinates at each 1,000-foot interval. For assistance determining State Plane Coordinates for a site see the iMAP webpage at [nj.gov/dep/gis/depsplash.htm](http://nj.gov/dep/gis/depsplash.htm);

4. A folded site plan, certified by a licensed New Jersey Professional Engineer clearly showing:

i. All proposed site improvements;

ii. The total area of proposed disturbance including the supporting calculation;

iii. The total area of existing impervious surface at the site and total area of additional impervious surface to be added to the site as a result of the project or activity including all supporting calculations;

iv. A delineation of all forest on the site. If the proposed activity will disturb any forest area, the area calculations for the proposed disturbed portions of forest; and

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v. A copy of the official proof of filing for the site plan(s) or subdivision plat(s) that includes a county signature and stamp;

5. Proof that the public notice requirements at (b)5i through iii below have been met. To prove that a document has been sent to a person, the applicant shall submit either the white postal receipt bearing the recipient's name, address, the date material was sent by certified mail and the cost to the sender, or the green certified mail return receipt card. If a project is located in more than one municipality or county, the notice requirements below must be met for each municipality and county in which the site is located. The applicant shall submit the following to the Department:

i. Proof that the municipal clerk was sent a copy of the entire application and supporting documentation submitted to the Department;

ii. Proof that the Highlands Council was sent a copy of the entire application and supporting documentation that was submitted to the Department; and

iii. Proof that a completed copy of the notice letter (Attachment A on the application form) was sent to:

(1) The municipal environmental commission (if one exists);

(2) The municipal planning board;

(3) The municipal construction official;

(4) The county planning board; and

(5) The county environmental commission (if one exists).

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6. A statement whether or not the applicant considers the project or activity a Capital Improvement as defined in N.J.A.C. 7:38-1.4;
7. A statement whether or not the applicant considers the proposed project or activity solely an agricultural or horticultural development or use pursuant to N.J.A.C. 7:38-1.4;
8. A statement by the applicant indicating what, if any, Department permits or approvals are sought; and
9. A statement whether the proposed development or activity is required as part of an administrative order, court order, administrative consent order (ACO) with the Department, or a judicial consent order (JCO), along with a legible copy of the complete order.

(c) In addition to the information required in (b) above, an applicant shall provide the following information regarding the proposed method of wastewater treatment and water supply:

1. A description of the type of proposed development or activity:

- i. If residential development:

- (1) The type of dwelling units;

- (2) The number of dwelling units; and

- (3) The number of bedrooms per unit; or

- ii. If commercial, institutional or industrial development:

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(1) The type of establishment and a statement whether the development is commercial, institutional or industrial;

(2) The total square footage of the structures;

(3) The maximum building occupancy; and

(4) The anticipated population of the development (for example, total number of employees or employees per shift, students, or residents); or

iii. If the development does not fall into the categories listed under (c)1i or ii above:

(1) The type of establishment;

(2) The total square footage of the structures; and

(3) The anticipated population of the development (for example, total number of employees or employees per shift, students, or residents);

2. A determination of the projected amount of wastewater planning flow to be generated in gallons per day, for the development or activity, calculated as follows:

i. Except for individual subsurface sewage disposal systems, current wastewater flows shall be determined based on metered data, where available. Where metered data is unavailable, flows shall be calculated from the most recent 12 month period available, unless the Department approves another time period; and



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ii. The average flow from future development, exclusive of industrial flows, shall be calculated using the projected flow criteria at N.J.A.C. 7:14A-23.3 or 7:9A-7.4, as applicable for the type of wastewater facilities proposed. A rationale shall be provided for the calculation of future industrial flows. Since the flow criteria at N.J.A.C. 7:14A-23.3 includes allowances for inflow and infiltration, additional future infiltration and inflow shall not be projected;

3. After calculating the projected wastewater planning flow in (c)2 above, the applicant shall:

i. State the proposed method of wastewater treatment (that is, individual subsurface sewage disposal system(s), or an existing or proposed domestic or industrial treatment works, requiring a New Jersey Pollutant Discharge Elimination System permit under N.J.A.C. 7:14A);

ii. Indicate which projected flow criteria was used as the basis to calculate the wastewater planning flow;

iii. State the projected amount of wastewater planning flow from the development or activity;

iv. If a new domestic or industrial treatment works is proposed, state the name(s) of the owner and operator of the treatment works, its proposed location, and the proposed discharge location;

v. If wastewater is proposed to be conveyed to an existing wastewater treatment facility:

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- (1) State the name and location of the existing wastewater treatment facility;
- (2) State the New Jersey Pollutant Discharge Elimination System permit number;
- (3) State the type of wastewater disposal and whether the wastewater treatment facility discharges to surface or ground water;
- (4) State the actual flow, committed flow, design flow and permitted capacity of the wastewater treatment facility;
- (5) Provide a letter from the owner of the wastewater treatment facility verifying that wastewater collection infrastructure (sewer lines) were existing on August 10, 2004 and their location; that the wastewater treatment facility has existing, available capacity to serve the proposed project; and that the owner of the facility is willing to provide a connection to serve the development; and
- (6) Provide a copy of a site plan certified by a licensed New Jersey Professional Engineer or other appropriately scaled map showing the point of connection to the wastewater collection system as it existed on August 10, 2004;

4. A statement indicating whether the project or activity will be served by an individual well, public community well, non-public community well or identify the existing or anticipated water supply franchise area including name of purveyor; and

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- i. If an existing purveyor currently possessing a water allocation permit or registration is proposed as the water supply source, identify the amount of source water authorized by the allocation permit or registration and the amount of the allocation or registration already connected to this source;
- ii. If a new water supply franchise area is proposed, identify the proposed water purveyor and the proposed location and type of water supply;
- iii. If the water supply is to be provided by residential, commercial or industrial wells, state the number of residential, commercial or industrial wells that the proposal will require;
- iv. If water is to be provided by irrigation wells, state the number of wells the proposal will require; and

5. Calculate the projected water supply demand for the proposed development or activity in gallons per day in accordance with the following:

- i. Present water supply demands shall be determined based on metered data, where available. Where metered data is available, demand shall be determined based upon the most recent 12-month period available unless the Department approves or requires another time period; and
- ii. The average water supply demand from future development shall be calculated using the average daily water demand criteria at N.J.A.C. 7:10-12.6, Table 1, unless an alternative method is approved or required by the Department.

(d) In addition to providing all the information required at (b) and (c) above, the following information shall be provided if an applicant is seeking a letter of exemption from the requirements of the Highlands Act:

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1. For the construction of a single family dwelling pursuant to N.J.A.C. 7:38-

2.3(a)1:

- i. A copy of a deed, closing or settlement statement, title policy, tax record, mortgage statement or any other official document showing that the lot was legally owned by the applicant on or before August 10, 2004 and indicating the lot, block, municipality and county in which the lot is located, along with any street address;
- ii. If the applicant does not own the lot, a copy of the binding contract of sale executed by the seller and the applicant on or before May 17, 2004 for the lot on which the house is to be constructed;
- iii. A certification by the applicant stating that the single family dwelling proposed for construction on the lot, block, municipality, county and street address described by the applicant in the certification is intended for the applicant's own use or the use of an immediate family member identified in the certification by name and relationship to the applicant; and
- iv. A site plan certified by a licensed New Jersey Professional Land Surveyor showing what structures currently exist on the lot;

2. For the construction of a single family dwelling for use by a person other than the property owner or immediate family member pursuant to N.J.A.C. 7:38-

2.3(a)2:

- i. A copy of the recorded deed or plat showing that the lot was created on or before August 10, 2004;
- ii. A site plan certified by a licensed New Jersey Professional Engineer showing all existing and proposed development, including all structures, grading, clearing, impervious surface and disturbance;

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iii. The calculations supporting the claim that impervious surfaces and areas of disturbance are within the limits necessary for this exemption; and

iv. A metes and bounds description of the area of the lot to be disturbed, limited to less than one acre and a draft conservation restriction to cover the balance of the lot.

3. For the construction of a major Highlands development with certain municipal and state approvals pursuant to N.J.A.C. 7:38-2.3(a)3:

i. A copy of a resolution by the local authority, granting one of the following approvals on or before March 29, 2004:

(1) Preliminary or final site plan approval;

(2) Preliminary or final subdivision approval, as applicable, where no subsequent site plan approval or proof of filing is required;

(3) Minor subdivision approval where no subsequent site plan approval is required; or

(4) A copy of a final municipal building or construction permit;

ii. Proof that the project has obtained at least one of the following DEP permits, on or before March 29, 2004, if applicable to the proposed development:

(1) A permit or certification pursuant to the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.;

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(2) A water extension permit or other approval or authorization pursuant to the Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq.;

(3) A certification or other approval or authorization pursuant to the Realty Improvement Sewerage and Facilities Act (1954), N.J.S.A. 58:11-23 et seq.; or

(4) A treatment works approval pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq.; or

(5) If none of the approvals at (d)3ii(1) through (4) above are required for the project or activity, proof that at least one of these following DEP permits has been obtained on or before March 29, 2004, if applicable to the proposed major Highlands development:

(A) A permit or other approval or authorization issued pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; or

(B) A permit or other approval or authorization issued pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.;

iii. A folded copy of the preliminary site plan or subdivision plat, including proof of filing in the case of a subdivision plat or deed or if the subdivision plat was not filed and the subdivision has expired, a copy of the resolution or a court order extending the subdivision approval prior to the date of its expiration;

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iv. A copy of a letter from the local governing body, verifying that the use and zoning of the site have not changed since the approval specified in (d)3i above and stating the municipal approval is still valid, or stating the use and zoning have changed, but that the change does not require:

(1) Submission of a new or amended application for the proposed project; or

(2) Approval of a new or amended application by local authorities; and

v. Any other information that the applicant may provide that he/she believes is necessary to demonstrate that an activity qualifies for an exemption;

4. For reconstruction of any building or structure for any reason within 125 percent of the footprint of the lawfully existing impervious surfaces on the site provided that the reconstruction does not increase the lawfully existing impervious surface by one-quarter acre or more, pursuant to N.J.A.C. 7:38-2.3(a)4:

i. A site plan certified by a licensed New Jersey Professional Engineer depicting:

(1) All existing impervious surfaces, including all structures, grading, clearing, impervious surface and limits of disturbance, existing on the site on August 10, 2004; and

(2) All proposed development including all structures, impervious surfaces, clearing limits, and limits of disturbance, including grading;

ii. Photographs keyed to the site plan; and

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iii. A copy of any official documentation indicating the original date of construction of the building or otherwise establishing the lawfulness of existing impervious surfaces;

5. For improvements to a legally existing single-family dwelling in existence on August 10, 2004 pursuant to N.J.A.C. 7:38-2.3(a)5:

i. A copy of any official documentation proving the single-family dwelling was in existence on August 10, 2004;

ii. A certification from the town clerk that the municipality considers the dwelling lawfully constructed and occupied;

iii. A description of the proposed improvement; and

iv. A certification from the applicant that the property and all improvements will continue to be used for a single-family dwelling purposes;

6. For any improvement, for non-residential purposes, to a place of worship owned by a non-profit entity, society or association, or association organized primarily for religious purposes, or a public or private school, or a hospital, in existence on August 10, 2004 pursuant to N.J.A.C. 7:38-2.3(a)6:

i. A copy of any official documentation indicating that the place of worship, public or private school or hospital was in existence on August 10, 2004;



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ii. For improvements to a place of worship, documentation showing that the entity, society or association, or association organized primarily for religious purposes has non-profit status;

iii. A site plan certified by a licensed New Jersey Professional Engineer depicting:

(1) All existing impervious surfaces, including all structures, grading, clearing, impervious surface and limits of disturbance, existing on the site on August 10, 2004; and

(2) All proposed development including all structures, impervious surfaces, clearing limits, and limits of disturbance, including grading; and

iv. A certification of occupancy for any existing buildings or structures on the property;

7. For any activity conducted by a landowner in accordance with an approved woodland management plan, or [for public lands,] the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester pursuant to N.J.A.C. 7:38-2.3(a)7:

i. For a private landowner with an approved woodlot management plan:

(1) A copy of the applicant's tax bill showing that the site has farmland assessment tax status under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq., if applicable;

(2) A brief description of the total area of woodlands that is the subject of the approved woodland management plan;

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(3) A brief description of the length of time that the area to be managed has been in use for woodland management; and

(4) A copy of the approved woodland management plan; or

ii. For a forest management plan approved by the State Forester:

(1) A brief description of the total area where the normal harvesting of forest products occurs;

(2) A brief description of the length of time that the area to be managed has been in use for normal harvesting of forest products; and

(3) A copy of a forest management plan approved by the State Forester;

8. For the construction or extension of trails with non-impervious surfaces on publicly owned lands or on privately owned lands with conservation or recreational use easements pursuant to N.J.A.C. 7:38-2.3(a)8:

i. A site plan certified by a licensed New Jersey Professional Engineer showing the proposed trail construction with details including the location, and width of existing and proposed trails and those off-site trails to which they connect, if any;

ii. A written description of the non-impervious materials to be used; and

iii. For privately owned property, a copy of a deed for the property, including the language establishing the conservation or recreational use easement on the property;

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9. For the routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems by a State entity or local government unit, provided that the activity is consistent with the goals and purposes of the Highlands Act, and does not result in the construction of any new through-capacity travel lanes pursuant to N.J.A.C. 7:38-2.3(a)9:

- i. A site plan certified by a licensed New Jersey Professional Engineer showing the existing and proposed transportation or infrastructure system;
- ii. A written description of the work to be conducted, the purpose of the activity and how that purpose is consistent with the goals and purposes of the Highlands Act; and
- iii. A brief description of the State entity or local government unit sponsoring and overseeing the proposed activities;

10. For the construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit, provided that the activity does not result in the construction of any new through-capacity travel lanes of pursuant to N.J.A.C. 7:38-2.3(a)10:

- i. A site plan certified by a licensed New Jersey Professional Engineer showing the proposed transportation safety project, bicycle or pedestrian facility;
- ii. A written description of the proposed work and the purpose of the project; and
- iii. A brief description of the State entity or local government unit sponsoring and overseeing the proposed activities;

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11. For routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights-of-way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of the Highlands Act pursuant to N.J.A.C. 7:38-2.3(a)11:

- i. A site plan certified by a licensed New Jersey Professional Engineer showing the existing and proposed public utility lines, rights of way, or systems;
- ii. A written description of the work to be conducted, the purpose of the activity and how that purpose is consistent with the goals and purposes of the Highlands Act; and
- iii. The identity of the public utility that is sponsoring the proposed activities; or, for the placement of cellular equipment on a legally existing overhead utility tower and the construction of the attendant 10- foot by 20- foot pad, when located within the four footings of such tower, a letter from the public utility that owns or controls the right-of-way giving permission to place the cellular equipment on the utility tower and to place the attendant pad within the footings.

12. For the reactivation of rail lines and rail beds existing on August 10, 2004 pursuant to N.J.A.C. 7:38-2.3(a)12:

- i. A site plan certified by a licensed New Jersey Professional Engineer showing the location of the existing rail lines and rail beds; and
- ii. A brief description of the project for reactivation, including the identity of the sponsoring entity, a description of the proposed project, and an estimated schedule for completion;

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13. For the construction of a public infrastructure project approved by public referendum prior to January 1, 2005 or a capital project approved by public referendum prior to January 1, 2005 pursuant to N.J.A.C. 7:38-2.3(a)13:

- i. A copy of the public referendum as it appeared on the official ballot;
- ii. Documentation showing that the referendum was approved; and
- iii. A resolution from the municipal or county governing body or certification by an official in the relevant state department, as the case may be, that describes the proposed project and its location and affirms that the proposed project is the same as that approved in the referendum;

14. For mining, quarrying, or production of ready mix concrete, bituminous concrete, or Class B recycling materials occurring or which are permitted to occur on any mine, mine site, or construction materials facility existing on June 7, 2004 pursuant to N.J.A.C. 7:38-2.3(a)14:

- i. A site plan certified by a licensed New Jersey Professional Engineer showing the location of existing and proposed activity and development;
- ii. Official documentation including, but not limited to, tax records, local or state permits, and bills of sale or lading demonstrating that the mine or facility was in existence and operating on June 7, 2004, and included the land on which the proposed activity or development will occur; and
- iii. A copy of a Certificate of Registration issued by the Commissioner of Labor pursuant to N.J.S.A. 34:6-98.4;

15. For the remediation of any contaminated site pursuant to N.J.S.A. 58:10C-1 et seq. pursuant to N.J.A.C. 7:38-2.3(a)15:

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- i. A copy of a site plan certified by a licensed New Jersey Professional Engineer indicating the lot and block, municipality and county of the remediation site and the area above or below ground where contamination shall be removed or remediated;
- ii. A brief description of the remediation activity to be conducted in the area described in (d)15i above; and any structures, impervious surfaces, clearing of vegetation or water diversion being proposed;
- iii. A copy of a letter, application, order, memorandum of approval or remedial action workplan approved by the Department, or any other documentation demonstrating that the remediation activities are required in accordance with N.J.S.A. 58:10B-1 et seq.; and
- iv. The name of the DEP case manager or licensed site remediation professional assigned to the case, if any;

16. For any activities on lands of a Federal military installation existing on August 10, 2004 that lie within the Highlands Region pursuant to N.J.A.C. 7:38-2.3(a)16:

- i. A site plan certified by a licensed New Jersey Professional Engineer showing the general location of the proposed activities as being within the borders of the federal military installation and the activity's location with respect to Highlands Region boundaries; and
- ii. A letter briefly describing the proposed activities signed by an official of the installation; and

17. For a major Highlands development, located within an area designated as of March 29, 2004 as Planning Area 1 (Metropolitan), or Planning Area 2

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(Suburban) pursuant to the State Planning Act, N.J.S.A. 52:18A-196 et seq., that on or before March 29, 2004 was the subject of a settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court, to satisfy the constitutional requirement to provide for the fulfillment of the fair share obligation of the municipality in which the development is located pursuant to N.J.A.C. 7:38-2.3(a)17:

- i. A copy of the settlement agreement and stipulation of dismissal filed in the Superior Court, or builder's remedy issued by the Superior Court;
- ii. A copy of any site plans certified by a licensed New Jersey Professional Engineer, maps or other documentation clearly indicating the location of the fair share housing to be provided in accordance with the settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court and the location of all proposed structures, service or access roads, and infrastructure with respect to the boundaries of Planning Area I or II, as the case may be;
- iii. A copy of all municipal approvals obtained for the project, or the schedule for applying and obtaining such approvals; and
- iv. A proposed schedule for completion of the entire project including township approvals, site preparation, installation of utilities and roads, and construction of all buildings.

(e) In addition to the information required at (b) above, the following information shall be provided by applicants requesting a Highlands Applicability Determination for a project or activity believed to be agricultural or horticultural and unregulated by the Department pursuant to N.J.A.C. 7:38-2.2(b):

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1. A copy of the applicant's tax bill showing that the site has farmland assessment tax status under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq.; and

2. A brief description of the activities for which the exemption is claimed, including:

i. The types of farming or horticulture that will be pursued;

ii. Best management practices currently employed and/or to be employed;

iii. The length of time that the area proposed for disturbance has been in use for farming or horticulture; and

iv. The square footage or acreage of the entire site, of the impervious surfaces already existing on the site, and the total amount of impervious surface on the site if the proposed activity is permitted. If the proposed activity will result in more than three percent of the site being covered by impervious surface, applicants should contact the local soil conservation district for additional assistance.

(f) In addition to the information required at (b) through (e) above, the Department may require any information necessary to clarify information previously submitted, to ensure compliance with State and/or Federal law, or to determine whether an application meets State and/or Federal standards.

7:38-9.3 Basic application requirements for all Highlands Resource Area Determinations, Highlands general permits and Highlands Preservation Area Approvals with or without waivers including modifications and extensions



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(a) This section describes information required for every application listed in N.J.A.C. 7:38-9.1(a)2 through 6. Additional information required for each specific application is set forth below at N.J.A.C. 7:38-9.4 through 9.8.

(b) Every application listed at N.J.A.C. 7:38-9.1(a)2 through 6 shall require the following:

1. An application form, completed as directed in the instructions and/or application checklist. The application form requests basic information regarding the site, the applicant, the activities proposed, any previous or other required applications to the Department, and a truth and accuracy certification;
2. Unconditional written consent from the owner of the site, as defined at N.J.A.C. 7:38-9.1(c), for Department representatives to enter the site to conduct site inspections;
3. The appropriate application review fee, as set forth at N.J.A.C. 7:38-10, paid as follows:
  - i. The fee shall be paid by personal check, certified check, attorney check, government purchase order, or money order;
  - ii. The fee shall be made payable to "Treasurer, State of New Jersey"; and
  - iii. Each check, purchase order, or money order must be marked with the name of the applicant;
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, such as topography and amount of impervious cover, and any activities proposed on the site, including but not limited to, calculations of the area of

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proposed disturbance to Highlands Resource Areas and the amount of existing and proposed impervious cover;

5. The approximate boundaries of the project or activity site clearly delineated on a USGS quadrangle map, including title-name of Quad, or GIS coverage and the State Plane coordinates in NAD 1983 for a point at the center of the site. The accuracy of these coordinates should be within 50 feet of the actual point. For linear projects, the applicant shall provide State plane coordinates for the endpoints of those projects, which are 1,999 feet or less, and for those projects that are 2,000 feet or longer, additional coordinates at each 1,000-foot interval. For assistance in determining the State plane coordinates for a site, see the iMAP webpage at [nj.gov/dep/gis/depsplash.htm](http://nj.gov/dep/gis/depsplash.htm);

6. Two copies of a recent county road map or local street map, with the site clearly marked;

7. Two sets of original color photographs, mounted on 8½ by 11-inch paper, sufficient to show the conditions on the site, and immediately surrounding areas, as well as the area of disturbance for the proposed activities. A minimum of 10 photographs is required;

8. A copy of the municipal tax map(s) delineating the project or activity site by lot(s) and block(s);

9. The separate depiction and labeling on any plan submitted pursuant to (b)4 above, of all slopes greater than 20 percent and slopes between 10 percent and 20 percent, as calculated pursuant to N.J.A.C. 7:38-3.8(b);

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10. Written narrative and/or reports that accurately describe the site, its location (including State plane coordinates), site conditions, and any planned activities, including schedules for performing regulated activities, if appropriate;
11. Documentation that the applicable public notice requirements at N.J.A.C. 7:38- 9.4(b)2 or 9.5(a)3 have been met;
12. Information and/or certifications regarding the presence or absence of rare, threatened or endangered species habitat, ecological communities, historic or archaeological resources, or other features on the site relevant to determining compliance with the requirements of this chapter. This information shall include but not be limited to a letter from the Natural Heritage Program indicating the presence or absence of any rare, threatened or endangered species or ecological communities listed in the Natural Heritage Database on or near the site;
13. When an applicant intends to rebut the presumption of rare, threatened or endangered species habitat on the applicant's site as set forth at N.J.A.C. 7:38-5.1(a), all habitat evaluation information pursuant to N.J.A.C. 7:38-5.1(b);
14. Any relevant information regarding previous submissions to the Department;
15. The names and addresses of all consultants, engineers, and other persons providing technical assistance in preparing the application; and
16. Any other information not listed in this subsection, that the applicant or the Department deems necessary to demonstrate compliance with this chapter or the Federal rules governing the Department's assumption of the Federal 404 program at 40 CFR §233.30.

(c) In addition to the information required at (b) above, the Department may require any information necessary to clarify information previously submitted, to ensure compliance

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with State and/or Federal law, or to determine whether an application meets State and/or Federal standards.

(d) Whenever the Department requires a construction plan or other visual depiction of proposed activities, the Department may require that certain information pertinent to the construction work be placed directly on the plan in order to provide notice of Department construction requirements to the workers who will carry out the permitted activities.

#### 7:38-9.4 Additional application requirements for a Highlands Resource Area Determination (HRAD)

(a) In addition to the basic information required for all applications under N.J.A.C. 7:38-9.3, a person applying for an HRAD shall provide the information specified in this section. All delineations, mapping data and site plans shall be in paper form as well as digital GIS data that conforms with "New Jersey Department of Environmental Protection Geographic Information System: Mapping and Digital Data Standards" dated July 1, 2002 and as provided at N.J.A.C. 7:1D, Appendix A. This document can be found at <http://www.nj.gov/dep/gis/njdepstandards02.pdf>.

(b) All HRAD applications under N.J.A.C. 7:38-4 shall require the following:

1. A completed copy of the HRAD checklist; and
2. Proof that the public notice requirements below have been met. To prove that a document has been sent to a person, the applicant shall submit either the white postal receipt bearing the recipient's name, address, the date material was sent by certified mail and the cost to the sender, or the green certified mail return receipt card. If a project is located in more than one municipality or county, the notice requirements below must be met for each municipality and county in which the site is located. The applicant shall submit the following to the Department:

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- i. Proof that the municipal clerk has been sent a copy of the entire application that was submitted to Department;
  
- ii. Proof that the Highlands Council has been sent a copy of the entire application that was submitted to Department;
  
- iii. Proof that a completed copy of the notice letter (Attachment A on the application form) has been sent to each of the following:
  - (1) The municipal environmental commission (if one exists);
  
  - (2) The municipal planning board;
  
  - (3) The municipal construction official;
  
  - (4) The county planning board; and
  
  - (5) The county environmental commission (if one exists); and
  
- iv. Proof that neighboring landowners within 200 feet of the boundary of the site have been notified. The application shall also submit a certified list of all landowners within 200 feet of the boundaries of the site, that is less than 90 days old and obtained from the municipality. If the proposed project is a linear development, as defined at N.J.A.C. 7:38-1.4, which is greater than one-half mile long, an applicant may satisfy this requirement to notify neighboring landowners by sending a notice complying to all owners of land within 200 feet of any proposed above surface structure (not including conveyance lines suspended above the ground or small utility support structures such as telephone poles) related to the linear facility, such as an access road, power substation, grade separated

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interchange or similar structure and publishing a display advertisement.

The advertisement shall be:

- (1) At least four column inches in size;
- (2) Published in the newspaper of record for each municipality in which the site is located; and
- (3) Published in a newspaper with regional circulation in the region in which the site is located.

(c) In addition to the information required in (b) above, an application for a footprint of disturbance HRAD for a portion of a site, under N.J.A.C. 7:38-4.1(c)1 shall require a site plan that depicts the location of and that separately labels the following:

1. The proposed delineation of all Highlands open waters and the associated 300-foot buffers on the site in its entirety. The delineation shall be clearly marked in the field. If the applicant has a currently valid approved Freshwater Wetlands letter of interpretation (LOI), issued by the Department for the site under N.J.A.C. 7:7A-3, this may be submitted instead of the proposed delineation. If the site contains no Highlands open waters, no delineation or other information is required;
2. Soil borings and/or other physical indicators of the presence or absence of Highlands open waters;
3. Data sheets or other materials that explain and support the delineation of Highlands open waters;
4. The general location of all upland forest areas on the portion of the property which is the subject of the application. The general area shall be clearly marked in the field together with the outer perimeter of the sample plots used to define the

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forest areas, if such sampling plots were used. Forest areas that do not overlap with Highlands open waters must be clearly labeled as upland forest;

5. Any relevant data sheets or other materials that explain the determination of the area as forest. See N.J.A.C. 7:38-3.9(b) for more information on determining whether an area is considered forest;

6. Slopes:

- i. Of greater than 20 percent; and
- ii. Slopes ranging from 10 to 20 percent;

7. The location and description of all ecological communities and rare, or threatened and/or endangered wildlife species habitat, and rare or endangered plant species habitat;

8. If an applicant seeks to rebut a presumption of suitable habitat as set forth in N.J.A.C. 7:38-4.1(d)3 or (d)4, a Habitat Evaluation pursuant to N.J.A.C. 7:38-5.2 or 5.3, as applicable;

9. Information, as detailed in N.J.A.C. 7:38-3.10, regarding the potential or known historic or archaeological areas on the site; and

10. Flagging in the field and a delineation on the site plans of the footprint of disturbance that is the subject of the HRAD.

(d) An applicant seeking a boundary delineation HRAD, in accordance with N.J.A.C. 7:38-4.1(c)2, shall submit all information required in (b) above.

(e) An applicant seeking a boundary verification HRAD issued under N.J.A.C. 7:38-4.1(c)3 shall submit all information required in (b) above, and all information required in (c) above for the entire property.

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7:38-9.5 Additional application requirements for a Highlands Preservation Area Approval (HPAA)

(a) In addition to the basic information required for all applications under N.J.A.C. 7:38-9.3, to be deemed administratively complete, an application for a Highlands Preservation Area Approval (HPAA) shall include all of the following:

1. A completed copy of the Highlands Preservation Area Approval checklist;
2. A completed LURP-1 application form, completed in accordance with the directions on the form;
3. Proof that the public notice requirements below have been met. To prove that a document has been sent to a person, the applicant shall submit either the white postal receipt bearing the recipient's name, address, the date material was sent by certified mail and the cost to the sender, or the green certified mail return receipt card. If a project is located in more than one municipality or county, the notice requirements below must be met for each municipality and county in which the site is located:
  - i. Proof that the municipal clerk was sent a copy of the entire application and supporting documentation submitted to the Department;
  - ii. Proof that the Highlands Council was sent a copy of the entire application and supporting documentation submitted to the Department;
  - iii. Proof that a completed copy of the notice letter (Attachment A on the application form) has been sent to:
    - (1) The municipal environmental commission (if one exists);



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- (2) The municipal planning board;
- (3) The municipal construction official;
- (4) The county planning board;
- (5) The county mosquito control agency (if proposing encroachment in a Highlands open water); and
- (6) The county environmental commission (if one exists);

iv. Proof that neighboring landowners within 200 feet of the boundary of the site have been notified. The application shall also submit a certified list of all landowners within 200 feet of the boundaries of the site, that is less than 90 days old and obtained from the municipality. If the proposed project is a linear development, as defined at N.J.A.C. 7:38-1.4, which is greater than one-half mile long, an applicant may satisfy this requirement to notify neighboring landowners by sending a notice complying to all owners of land within 200 feet of any proposed above surface structure (not including conveyance lines suspended above the ground or small utility support structures such as telephone poles) related to the linear facility, such as an access road, power substation, grade separated interchange or similar structure and publishing a display advertisement. The advertisement shall be:

- (1) At least four column inches in size;
- (2) Published in the newspaper of record for each municipality in which the site is located; and
- (3) Published in a newspaper with regional circulation in the region in which the site is located.

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v. For proposed activities in a Highlands open water that is also a flood hazard area as defined at N.J.A.C. 7:38-3.7(a), notification shall also be provided to:

(1) The Municipal Engineer;

(2) The County Engineer;

(3) The local County Soil Conservation District; and

(4) The municipal clerk, planning board, and construction official for the municipality on the other side of the watercourse from the site and within one mile downstream on both sides of the waterway; and

vi. For proposed activities in a Highlands open water that is also a freshwater wetland in accordance with N.J.A.C. 7:7A:

(1) Proof that a display advertisement has been published in the newspaper of record for the municipality in which the site is located. The advertisement shall be at least four column inches in size and shall include all of the information required in the notice letter in Attachment B. The applicant shall provide the Department with a copy of the advertisement and an affidavit of publication from the newspaper, identifying the dates on which the advertisement was published; and

(2) If the project involves more than 10 acres of disturbance, an affidavit of publication proof that the notice in Attachment B was published in a newspaper with regional circulation;

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4. A copy of the Highlands Applicability Determination issued by the Department, or, in the case where an applicant does not have an applicability determination because he or she stipulated under N.J.A.C. 7:38-2.4(a) that the proposed activity is subject to the Highlands Act, the information required at N.J.A.C. 7:38-9.2(b)3 and 4, and 9.2(c);

5. The following information on the location of Highlands resource areas (HRAs) on the site:

i. An HRAD, if one has been issued for the site; or

ii. If no HRAD has been issued, and the site is larger than one acre, the applicant shall submit all of the information required for an application for a boundary verification HRAD. The delineation of Highlands open waters with 300-foot buffers, forests, slopes between 10 and 20 percent and those greater than or equal to 20 percent required by the HRAD application checklist shall be drawn onto the site plan required in N.J.A.C. 7:38-9.4(a). A formal boundary report is not required. However, the application must include the data sheets and supporting information used to record the information on soils and vegetation which formed the basis for the boundary determination. In addition, if the method at N.J.A.C. 7:38-3.9(c) was used to identify forest, all data sheets shall be provided;

(1) If the applicant has a currently valid approved Freshwater Wetlands letter of interpretation (LOI), issued by the Department for the site under N.J.A.C. 7:7A-3, this may be submitted instead of an HRAD so long as the applicant also provides information regarding any additional Highlands resource areas not previously identified in the LOI;

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(2) If no Freshwater wetlands LOI or HRAD has been issued and the site does not contain Highlands open waters, no delineation or other information is required;

6. Six copies of a detailed project description including:

- i. The purpose and intended use of the proposed project;
- ii. A description of the regulated activities necessary to complete and operate or occupy the proposed project;
- iii. A description of any structures to be erected, and how they will be used;
- iv. A schedule for the progress and completion of the proposed project;
- v. The total area of Highlands open waters and Highlands open waters buffers proposed to be disturbed (if any);
- vi. The total area of upland forest area on the site and the total area of upland forest area that will be disturbed or destroyed as a result of the proposed activities;
- vii. The amount of pre-development impervious surface on the site and the total aggregate amount of impervious surface on the site following completion of the proposed activities;
- viii. A description of slopes between 10 and 20 percent and 20 percent or greater present on the site and all proposed activities that will disturb these slopes;

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ix. An evaluation of whether and how rare, threatened or endangered animal or plant species or ecological communities will be affected by the proposed activities;

x. An architectural or Phase I archaeological survey for applicants proposing work that will impact historic structures in accordance with N.J.A.C. 7:38-3.10(c) or archaeological resources in accordance with N.J.A.C. 7:38-3.10(d);

xi. A Phase II archaeological survey for applicants that discover archaeological features resources as a result of the Phase I archaeological survey as described at N.J.A.C. 7:38-3.10(e); and

xii. The name, address and professional qualifications of the used to prepare the detailed project description or any other portion of the application; and

7. A compliance statement and the basis for the findings describing how the proposed project meets all standards set forth at N.J.A.C. 7:38-3 and N.J.A.C. 7:38-6.

(b) In addition to the information required in (a) above, an application for new or modified water supply diversion privileges that would result in a diversion of greater than 50,000 gallons of water per day under N.J.A.C. 7:38-2.5 shall provide the following:

1. For all applicants:

i.. All information required in N.J.A.C. 7:19-2, as applicable to the intended use;

ii. Well locations (as applicable) reported in Global Positioning System (GPS), the GPS location of the well head or intake opening, or if GPS

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coordinates cannot be collected at one of those locations, at another location on the subject property, as close as possible to the well head or intake opening. GPS data shall be obtained in accordance with Department standards set forth at N.J.A.C. 7:1D, Appendix A, and shall include a notation of which location was used;

iii. Surface water intake locations (as applicable) reported in GPS, the GPS location of the well head or intake opening, or if GPS coordinates cannot be collected at one of those locations, at another location on the subject property, as close as possible to the well head or intake opening. GPS data shall be obtained in accordance with Department standards set forth at N.J.A.C. 7:1D, Appendix A, and shall include a notation of which location was used; and

iv. Estimated water demand for each area delineated (b)2ii through iv below as calculated pursuant to N.J.A.C. 7:10-12.6(b) and a statement identifying the percentage of water that is a consumptive or depletive use;

2. For public water systems, in addition to the information at (b)1 above:

i. The franchise area boundary for investor owned utilities;

ii. The existing water service area boundary (that area currently served by existing water infrastructure, that is, the area service by "lines in the ground");

iii. The approved water service area boundary: those areas identified to be served by the already approved allocations, but currently not served. This area should include areas for which water main extensions have been approved, but no construction certification has been obtained;

iv. The proposed water service area boundary (those areas identified to be served by the additional allocation requested in the subject permit application);  
and

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3. For non-public water supply uses and/or public water supplies where distinct project(s) or development can be identified at the time of application, a property boundary delineation.

(c) Location information in (b) above shall be provided in GIS format, as noted in (d) below, and paper copy in order to be considered "administratively complete."

(d) Mapping shall be submitted in the form of digital GIS data, in addition to a paper copy. All digital data submitted to the Department must conform with "New Jersey Department of Environmental Protection Geographic Information System: Mapping and Digital Data Standards" dated July 1, 2002 and as provided at NJAC 7:1D, Appendix A. This document can be found at <http://www.nj.gov/dep/gis/njdepstandards02.pdf>.

(e) Persons receiving approval to divert water as part of a HPAA shall apply to the Bureau of Water Allocation as proscribed in N.J.A.C. 7:19-2 to renew the approval at least 90 days prior to the expiration of the HPAA.

(f) If a person submits a complete water supply allocation permit renewal application in accordance with (e) above, the existing approval shall remain in force until such time that the Department issues the water supply allocation permit, or until an approval is revoked because the applicant fails to comply with the water supply conditions in the HPAA.

7:38-9.6 Additional application requirements for a Highlands Preservation Area Approval with waiver

(a) Before submitting an application for an HPAA with waiver, all applicants shall request and attend a pre-application meeting conducted in accordance with N.J.A.C. 7:38-8.

(b) An administratively complete application for an HPAA with waiver shall contain:

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1. All of the information required in N.J.A.C. 7:38-9.5;
2. An analysis describing all alternatives to the proposed project which would reduce each impact of the project as listed in N.J.A.C. 7:38-6.2(a) and the reasons the applicant did not adopt that alternative;
3. A description of the source of water or waste water disposal that would be used by development if the waiver is granted;
4. A request for a specific waiver in accordance with N.J.A.C. 7:38-6.4(a);
5. A detailed explanation why the proposed activity meets the criteria for a waiver in N.J.A.C. 7:38-6.4(a);
6. A detailed description of the specific HPAA requirement for which a waiver is sought, and a comparison of the HPAA standard with the level of compliance the proposed development provides (for example, "N.J.A.C. 7:38-3.5 limits a development to a maximum of three percent impervious coverage whereas the proposed project requires a total of four percent");
7. An explanation how the proposed activity satisfies each of the remaining HPAA standards at N.J.A.C. 7:38-3;
8. A detailed explanation why the proposed activity satisfies the standards at N.J.A.C. 7:38-6.2(a); and
9. Documents showing the conclusion of an applicant's legal challenges, if any, to the Department's decision on the application for an HPAA under the rules as strictly applied, including:



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i. The Department decision on the HPAA application made in accordance with the rules as strictly applied;

ii. The Commissioner's Final Decision granting or denying the HPAA application following the applicant's administrative challenge to the Department's findings of fact and/or application of the rules; and

iii. All court orders, consent orders, and decisions concerning the Commissioner's Final Decision including, but not limited to, orders summarily dismissing the appeal.

(c) In addition to the requirements listed in (b) above, applicants with proposed projects determined inconsistent with a Water Quality Management Plan (WQMP) as a result of the Highlands Applicability Determination or through a review of the information submitted under N.J.A.C. 7:38-9.5(a)4 for an HPAA , shall submit:

1. A request for an areawide WQMP amendment;
2. A copy of the Highlands Applicability Determination application or of the information required under N.J.A.C. 7:38-9.2(b)3 and 4 and 9.2(c);
3. The name of the areawide WQMP to be amended and a list of the provisions of the WQMP that require amendment;
4. New or revised text, tables and maps to replace or augment text, tables and maps that are in the currently adopted areawide WQMP that will be affected as a result of the amendment; and
5. Adequate copies of the updated materials to revise areawide WQMPs in the possession of the Department, designated planning agencies, and wastewater management planning agencies.

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(d) In addition to the requirements listed in (b) above, an application for new or modified water supply diversion privileges that would result in a diversion of greater than 50,000 gallons of water per day under N.J.A.C. 7:38-2.4 shall provide the information required at N.J.A.C. 7:38-9.5(b) through (f).

(e) In addition to the requirements listed in (b) above, an applicant for a waiver of a requirement for an HPAA to project public health and safety in accordance with N.J.A.C. 7:38-6.5 shall submit:

1. Information describing the exact nature of the proposed project;
2. A statement describing how or why the proposed project will satisfy the requirements for a health and safety waiver; and
3. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands and/or State open waters if they comprise any of the Highlands open water on the site that will be affected by the proposal.

(f) In order to obtain Department-designation of a brownfield in accordance with N.J.A.C. 7:38-6.6, all applicants shall provide an HRAD obtained in accordance with the requirements at N.J.A.C. 7:38-9.4. In addition, the following information is required:

1. For a designation in accordance with N.J.A.C. 7:38-6.6(b)1:
  - i. A site plan certified by a licensed New Jersey Professional Land Surveyor showing the limit of the waste and buffers, as required by the Solid Waste Management Act, N.J.S.A. 13:1E-1, and areas legally disturbed as of August 10, 2004;
  - ii. Documentation that the site meets the definition of sanitary landfill facilities as defined at N.J.S.A. 13:1E-1 in accordance with the following:

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- (1) For landfills that ceased operation on May 6, 1970 or later, a copy of a registration or permit issued by the Department; or
  - (2) For landfills that ceased operation prior to May 6, 1970 that were not issued a permit by the Department:
    - (A) Copies of approvals from the local government evidencing the operation of the landfill; or
    - (B) Copies of landfill inspection reports from the health department; or
  - (3) For landfills lacking the above documentation, an investigation report prepared by a licensed professional engineer documenting the presence of the landfill through the performance of test pits;
2. For a designation in accordance with N.J.A.C. 7:38-6.6(b)2:
- i. A copy of the final remediation document for the entire site;
  - ii. A summary of the remedial action report completed prior to the issuance of the final remediation document that confirms the presence of contamination onsite and documents the current or previous use as a commercial or industrial site;
  - iii. Certification that no discharge of a hazardous substance has occurred onsite since the date of the final remediation document issued pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rule, N.J.A.C. 7:26C-1.6;
  - iv. A site plan certified by a licensed New Jersey Professional Land Surveyor showing areas legally disturbed as of August 10, 2004, and areas disturbed due to remediation activities;
3. For a designation in accordance with N.J.A.C. 7:38-6.6(b)3:

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- i. A Preliminary Assessment and Site Investigation (PA/SI) confirming the presence of contamination on the site and documenting the current or previous use as a commercial or industrial site, or certification from the applicant of their intent to conduct a PA/SI, and a proposed schedule and SI workplan;
  - ii. A site plan certified by a licensed New Jersey Professional Land Surveyor showing:
    - (1) Areas legally disturbed as of August 10, 2004;
    - (2) The extent of confirmed soil contamination known at the time of application; and
    - (3) Areas disturbed due to remediation activities;
4. For a change in designation in accordance with N.J.A.C. 7:38-6.6(i), the applicant shall provide:
  - i. Documentation that the Highlands Council has provided notice and the opportunity for public comment on the proposed change in designation; and
  - ii. A document and/or copy of the public record where the Highlands Council considered the impacts of the proposed change on each Highlands resource area and made the determination that the proposed modification would not result in a significant impact to any Highlands resource area.
5. For expansion of a Highlands brownfield designation in accordance with N.J.A.C. 7:38 6.6(j):
  - i. Documentation from the Department confirming designation of the site as a Highlands brownfield and the boundaries of the designated site; and
  - ii. Documentation obtained during the remediation process confirming contamination in areas of the site not known during the designation

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process and verified by the Department in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

(g) In order to obtain a waiver for redevelopment based upon a Department-designated brownfield, in accordance with N.J.A.C. 7:38-6.6, all applicants shall provide:

1. The requirements listed in N.J.A.C. 7:38-9.6(b);
2. Documentation from the Department confirming designation of the site as a Highlands brownfield;
3. Documentation from the Highlands Council that the site has been designated for redevelopment;
4. A stormwater management plan in accordance with N.J.A.C. 7:8 that satisfies the requirements at N.J.A.C. 7:38-6.6(k)6;
5. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands and/or State open waters if they comprise any or all of the Highlands open water on the site to be affected by the proposal; and
6. Compliance with the requirements at N.J.A.C. 7:38-6.6(k)7, if applicable, and a binding conservation restriction that satisfies the requirements at N.J.A.C. 7:38-6.3.

(h) In addition to the requirements at N.J.A.C. 7:38-9.6(g), the following information is required to obtain a waiver for redevelopment based upon a Department-designated brownfield:

1. For a waiver based upon a designation in accordance with N.J.A.C. 7:38-6.6(b)1 for a landfill that ceased operation prior to January 1, 1982:
  - i. A Closure Plan approved by the Department, pursuant to the Solid Waste Rules, N.J.A.C. 7:26-2A.9; and

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ii. A Remedial Action Workplan approved by the Department or a licensed site remediation professional, pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-6;

2. For a waiver based upon a designation in accordance with N.J.A.C. 7:38-

6.6(b)1 for a landfill that ceased operation on January 1, 1982 or later, a Closure and Post-Closure Plan approved by the Department, pursuant to the Solid Waste Rules, N.J.A.C. 7:26-2A.9;

3. For a waiver based upon designation in accordance with N.J.A.C. 7:38-6.6(b)2, certification that no discharge of a hazardous substance has occurred on the site since the date of the final remediation document, pursuant to the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C-1.6;

4. For a waiver based upon a designation in accordance with N.J.A.C. 7:38-6.6(b)3, evidence documenting that remediation is being conducted pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules, N.J.A.C. 7:26C, or the Industrial Sites Recovery Act rules, N.J.A.C. 7:26B, as applicable, necessary to obtain a final remediation document pursuant to N.J.A.C. 7:26C-6.

(i) In addition to the requirements listed in (b) above, an applicant for a waiver of a requirement for an HPAA to permit redevelopment of a site comprised of 70 percent or more impervious surfaces, in accordance with N.J.A.C. 7:38-6.7, shall provide the following information:

1. A site plan certified by a licensed New Jersey Professional Land Surveyor depicting the scope of the impervious cover in relation to the proposed project;

2. Documentation from the Highlands Council confirming that the site contained 70 percent impervious coverage on August 10, 2004;

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3. Documentation from the Highlands Council that the site has been designated for redevelopment;
  4. A stormwater management plan in accordance with N.J.A.C. 7:8 that satisfies the requirements at N.J.A.C. 7:38-6.6(k)6;
  5. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands and/or State open waters if they comprise any or all of the Highlands open water on the site to be affected by the proposal; and
  6. Compliance with the requirements at N.J.A.C. 7:38-6.6(k)7, if applicable, and a binding conservation restriction that satisfies the requirements at N.J.A.C. 7:38-6.3.
- (j) In addition to the requirements listed in (b) above, an applicant for a waiver of a requirement for an HPAA to avoid taking of property without just compensation, in accordance with N.J.A.C. 7:38-6.8, shall provide the following information:
1. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:38-1.4, was acquired, the purchase price of the property as a whole and the instrument which documents the applicant's real property interest;
  2. Document(s) showing the amount, nature, and date of any investments made to maintain and/or develop the property as a whole, other than the purchase price;
  3. A zoning study prepared and certified by a New Jersey licensed professional including a statement that the development plan was permissible under municipal land use codes in effect at the time of purchase and those currently in effect;

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4. A development plan depicting the project which the applicant claims provides a minimum beneficial economically viable use;

5. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, steep slopes, Highlands open waters or other features on the site relevant to determining compliance with the requirements of this chapter;

6. A proposed conservation restriction that meets the requirements of N.J.A.C. 7:38-6.3;

7. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands and/or State open waters if they comprise any or all of the Highlands open water on the site that will be affected by the proposal;

8. Documentation that the proposed project will cause the minimum possible environmental impact to Highlands resources, while providing a minimum beneficial economically viable use of the property; and

9. Documents showing the conclusion of any appeals of the Department's HPAA decision under the rules as strictly applied including:

i. The Department decision on the HPAA application made in accordance with the rules as strictly applied;

ii. The Commissioner's Final Decision granting or denying the HPAA application following an administrative challenge to the Department finding of facts or application of the rules; and



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iii. All court orders and decisions concerning the Commissioner's Final Decision including, but not limited to, orders summarily dismissing the appeal.

(k) In addition to the requirements listed in (b) above, an applicant for a waiver of a requirement for an HPAA to construct a 100 percent affordable housing development, in accordance with N.J.A.C. 7:38-6.9, shall provide a letter from the township attorney certifying that the proposed development is comprised of 100 percent affordable housing and is included in the municipality's Fair Share Plan.

#### 7:38-9.7 Application requirements for modification or extension of an HPAA or HRAD

(a) An applicant may request a modification of an HPAA or the Department may modify a HPAA on its own initiative.

(b) The following changes are minor modifications to an HPAA:

1. Correction of a typographical error that does not materially affect the terms of the HPAA;
2. An increase in the frequency of monitoring or reporting by the permittee;
3. A change in ownership or operational control of a project, where no other change in the original HPAA is necessary. If any other change in the HPAA is necessary, the change shall not be a minor modification, except as in (b)4 below; and
4. A Department approved change in materials, construction techniques, or the minor relocation of an activity on a site, if the change is required by another Department, permitting program or Federal agency. However, this change is not a minor modification if the change would disturb additional Highlands

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Resource Areas, or increase impervious surface on the site from the amount originally approved.

(c) Any change not listed at (b) above shall constitute a major modification.

(d) In order to obtain a minor modification to an HPAA, the following information shall be submitted:

1. For a change in ownership or operational control of a permitted site or activity :

i. A certification that no other change in the original permit is necessary;  
and

ii. A written agreement, signed by the current and the proposed new permittees, containing a date for transfer of responsibility, coverage, and liability between the current and new permittees and a copy of any deed on which the agreement is based; and

2. For a minor modification not covered at (b)1 above, a copy of the permit condition proposed for modification, a description of the proposed modification, and information demonstrating that the modification sought is a minor modification as described in (b)2 through 4 above.

(e) An application for a minor modification does not require a fee under N.J.A.C. 7:38-10, or public notice.

(f) An application for a major modification shall meet the same substantive and procedural requirements as an application for a new HPAA, except that the application need only address the portions of the existing approval affected by the proposed modification. Portions of the existing approval that are not affected by the proposed

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modification are not subject to public notice, public hearing, Department review or other procedures that would apply to a new application.

(g) In addition to the basic information required for all applications under N.J.A.C. 7:38-9.3, the application for an HPAA extension shall include information reasonably necessary for the Department to evaluate whether the project or activities will comply with this chapter if extended as proposed.

(h) In addition to the basic information required for all applications under N.J.A.C. 7:38-9.3, the application for extension of an HRAD shall include any information the Department shall determine is necessary to confirm if the information in the original HRAD remains correct.

#### 7:38-9.8 Application requirements for Highlands general permits

(a) In addition to the basic information required for all applications under N.J.A.C. 7:38-9.3 above, a person applying for a Highlands General Permit (GP) in accordance with N.J.A.C. 7:38-14 shall provide:

1. Any specific information required in the general permit if not already provided in accordance with N.J.A.C. 7:38-9.3 above;
2. Information regarding whether other approvals are required for the activities by Federal, interstate, State and local agencies for the activity, whether any such approvals or denials have been received, and whether the proposed activities are consistent with the rules, plans or policies of other Federal, interstate, State and local agencies; and
3. A statement whether a site is known or suspected to be contaminated with hazardous substances, and if the Department requests it, a laboratory analysis of representative samples of the soil or sediment on the site.

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SUBCHAPTER 10 FEES

7:38-10.1 General fee provisions

(a) Each application submitted to the Department under this chapter shall include a fee unless otherwise specified. An application that does not include the fee required under this subchapter shall be considered administratively incomplete, and shall be handled accordingly pursuant to N.J.A.C. 7:38-9. The fees for each application are set forth in the fee tables in N.J.A.C. 7:38-10.2.

(b) In accordance with the applicable application checklist, personal check, certified check, attorney check, government purchase order, or money order shall pay all fees.

(c) An application fee is refundable if the Department returns the application as administratively incomplete under N.J.A.C. 7:38-11.2. An application fee is not refundable once the application has been declared administratively complete.

(d) 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 case, the Department shall assess an additional fee of up to \$1,000 for each additional site visit. No HRAD or HPAA shall be issued until the fee has been paid.

(e) An HPAA may be comprised of several components. Not all applications require review under all components. The applicant shall only be required to pay the base fee, plus any per acre fee as applicable, and the fee for each review component contained within an application.

7:38-10.2 Fee tables

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(a) The fee for a pre-application meeting, pursuant to N.J.A.C. 7:38-8, shall be \$500.00, except that there is no fee required for the New Jersey Department of Transportation.

(b) The application fee for Highlands Applicability Determinations (including exemptions) shall be:

1. \$100.00 for individual applicants proposing development costing \$100,000 or less;
2. \$100.00 for municipalities;
3. \$100.00 for applicants seeking a determination for any of the activities contained at N.J.A.C. 7:38-2.4(b);
4. No fee for applications submitted by the New Jersey Department of Transportation; and
5. \$750.00 for all applicants who do not meet the requirements in (b)1 through 4 above.

(c) The fee for the review of an HRAD pursuant to N.J.A.C. 7:38-4 shall be:

1. For a footprint of disturbance under N.J.A.C. 7:38-4.1(c)1, \$500.00 plus \$50.00 per acre for the entire site;
2. For a boundary delineation under N.J.A.C. 7:38-4.1(c)2, \$500.00;
3. For a boundary verification under N.J.A.C. 7:38-4.1(c)3, \$750.00 plus \$100.00 per acre for the entire site.

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(d) The fee for an HPAA pursuant to N.J.A.C. 7:38-6 shall be:

1. For projects with a completed HRAD, \$2,500 plus \$50.00 per acre, or any fraction thereof of Highlands resource areas to be affected;
2. For projects without a completed HRAD, the fee is \$3,250 plus \$100.00 per acre, or any fraction thereof, for the entire property.

(e) In addition to the fee in (d) above, the fee for a Highlands Preservation Area Approval that requires a stormwater review in accordance with N.J.A.C. 7:38-6.1(d) shall be:

1. For all projects requiring review of stormwater calculations: \$2,000;
2. Additional fee for the review of groundwater recharge calculations, pursuant to N.J.A.C. 7:8-5.4(a)2, per land area disturbed by the project:
  - i. Less than three acres: \$500.00;
  - ii. Three to 10 acres: \$1,000;
  - iii. More than 10 to 100 acres: \$2,000;
  - iv. More than 100 acres: \$4,000;
3. Additional fee for the review of runoff quantity calculations, pursuant to N.J.A.C. 7:8-5.4(a)3, per land area disturbed by the project:
  - i. Less than three acres: \$500.00;
  - ii. Three to 10 acres: \$1,000;
  - iii. More than 10 to 100 acres: \$2,000;
  - iv. More than 100 acres: \$4,000; and

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4. Additional fee for the review of water quality calculations, pursuant to N.J.A.C. 7:8-5.5, per area of added impervious surface (including any previously-unconnected impervious surfaces that are proposed to be connected):

- i. Less than one acre: \$500.00;
- ii. One to three acres: \$1,000;
- iii. More than three to 10 acres: \$2,000;
- iv. More than 10 acres: \$4,000;

(f) In addition to the fee in (d) above, the fee for a Highlands Preservation Area Approval that includes disturbance within the areas regulated under the Flood Hazard Area Control Act rules (N.J.A.C. 7:13) shall be calculated in accordance with the stream encroachment fee table at N.J.A.C. 7:1C-1.5(a)4.

(g) In addition to the fee at (d) above, the fee for an HPAA that includes a water supply review shall be:

1. For any person with the capability to, but who does not, divert more than 50,000 gallons per day, an initial registration fee of \$400.00; each person who holds a valid water use registration shall pay an annual fee of \$200.00;
2. For any person who applies for a new permit or a major modification of an existing permit, the applicable initial or modification fee based on the class of the allocation listed below. An applicant for a permit shall be placed in the appropriate class based on the total amount of the approved monthly allocation, and a 31 day month:

Initial Application, Major Modification, and Annual (water purveyor, remediation activity, or allocation less than or equal to 50 percent Consumptive Use) Permit Fee Classes

- i. Class 1: 1.55 million gallons per month (mgm) to less than 15.5 mgm;
- ii. Class 2: 15.5 mgm to less than 31.0 mgm;

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- iii. Class 3: 31.0 mgm to less than 62.0 mgm;
- iv. Class 4: 62.0 mgm to less than 155 mgm;
- v. Class 5: 155.0 mgm to less than 310.0 mgm; and
- vi. Class 6: 310.0 mgm and above.

Annual (Non purveyor allocation >50 percent Non-potable and >50 percent Consumptive) permit fee

- i. Class 1C: 1.55 mgm to less than 6.2mgm;
- ii. Class 2C: 6.2 mgm to less than 9.3 mgm;
- iii. Class 3C: 9.3 mgm to less than 12.4 mgm;
- iv. Class 4C: 12.4 mgm to less than 15.5 mgm;
- v. Class 5C: 15.5 mgm to less than 18.6 mgm; and
- vi. Class 6C: 18.6 mgm and above;

3. For the purpose of assessing the fees, the following shall apply:

i. If any ground water diversion in excess of 1.55 million gallons per month is included in a permit, the initial application or major modification fee for the permit shall be computed using the ground water schedule set forth in at (d)3vi below, accounting for the total monthly allocation from all sources within the scope of the permit. Except as provided in (d)3iii below, the annual fee shall be computed using the groundwater schedule set forth in (d)3vii below.

ii. A diversion from a pond fed primarily by ground water is considered a ground water diversion.



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iii. For a non-purveyor allocation, of which more than 50 percent is approved for non-potable purposes and of which more than 50 percent is a consumptive use, the annual fee for the permit shall be based upon the source of the largest component of the monthly allocation, accounting for the total allocation from all sources within the scope of the permit, and computed using the fee schedule set forth below at (d)3viii.

iv. The applicant shall pay in full, upon issuance of the permit, any hearing costs. If the application has been withdrawn after the public hearing or if the application is denied, the hearing costs shall be paid by the applicant on or before the specified due date of the invoice.

v. The successful applicant shall refer to N.J.A.C. 7:19-3 for annual fee requirements.

vi. Initial application and permit modification fees in dollars (\$):

	<u>Class 1</u>	<u>Class 2</u>	<u>Class 3</u>	<u>Class 4</u>	<u>Class 5</u>	<u>Class 6</u>
(1) Surface water diversions	5,745	6,470	8,345	14,385	15,715	17,050
(2) Ground water diversions	7,190	8,070	10,425	17,980	19,585	20,915
(3) Ground and surface water diversions in which waters are returned undiminished to the source	3,430	4,590	5,745	6,905	7,970	9,040
(4) De-watering diversions	6,985	6,985	6,985	17,850	17,850	17,850

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vii. Annual fees (\$) for water purveyor, remediation activity, or allocation less than or equal to 50 percent consumptive:

	<u>Class 1</u>	Class 2	<u>Class 3</u>	<u>Class 4</u>	<u>Class 5</u>	<u>Class 6</u>
(1) Surface water diversions	2,770	3,245	5,560	9,585	12,250	14,915
(2) Ground water diversions	3,725	4,305	6,945	11,990	14,655	17,320
(3) Ground and surface water diversions in which waters are returned undiminished to the source	1,215	1,990	3,830	4,605	5,380	6,145
(4) Dewatering diversions	3,620	3,620	3,620	11,900	11,900	11,900

viii. Annual fees (\$) (non-purveyor allocation greater than 50 percent non-potable and >50 percent consumptive use):

	<u>Class 1C</u>	<u>Class 2C</u>	<u>Class 3C</u>	<u>Class 4C</u>	<u>Class 5C</u>	<u>Class 6C</u>
(1) Surface Water Diversions						
(A) Storm water capture	3,300	3,630	3,995	4,395	4,830	5,315
(B) Stream, high-flow skimming	3,960	4,355	4,790	5,270	5,795	6,375
(C) Direct surface water	8,420	9,265	10,190	11,210	12,330	13,565
(2) Ground Water Diversions						
(A) Unconfined/semi-confined aquifer	8,420	9,265	10,190	11,210	12,330	13,565

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(B) Confined aquifer 10,105 11,115 12,225 13,450 14,795 16,275

(3) In addition to the annual fees applicable for Class 6C in (d)3viii(1) and (2) above, an additional consumption fee of \$2,500 for each 3.1 mgm increment in allocation over 18.6 mgm shall be charged; however, in no case shall the annual fee for any one permit in Class 6C exceed \$35,000.

(h) In addition to the fee at (d) above, the fee for a HPAA that includes a waiver in accordance with N.J.A.C. 7:38-6 shall be:

1. For a waiver in accordance with N.J.A.C. 7:38-6.6:

- i. For a brownfield designation, \$500.00;
- ii. For a waiver for redevelopment, \$250.00;

2. For a waiver in accordance with N.J.A.C. 7:37-6.7 and 6.9, \$500.00;

3. For a review of taking without just compensation in accordance with N.J.A.C. 7:38-6.8, \$2,000; and

4. For a Water Quality Management Plan amendment, \$1,000.

(i) The application fee for Highlands general permits shall be as follows:

1. No fee for Highlands general permit 1 at N.J.A.C. 738-14.1;

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2. \$500 for Highlands general permit 2 at N.J.A.C. 7:38-14.2.

(j) To renew an HRAD, the fee shall be 25 percent of the original fee or \$250.00 whichever is larger.

(k) To renew an HPAA, the fee shall be \$1,000.

## SUBCHAPTER 11 REVIEW OF APPLICATIONS

### 7:38-11.1 Procedure for review of applications

This subchapter contains the procedures by which the Department will process and review each application described in this chapter. For the standards applicable to substantive review of a Highlands Applicability Determination, see N.J.A.C. 7:38-11.2. For the standards applicable to substantive review of an HRAD, Highlands general permit and HPAA see N.J.A.C. 7:38-11.3. For the standards applicable to substantive review of an HPAA with waiver, see N.J.A.C. 7:38-6.

### 7:38-11.2 Completeness review of Highlands Applicability Determinations

(a) Within 20 working days after the day of receipt of an application, the Department shall review the application as follows:

1. If all items required by the application checklist and/or application form are provided, the Department shall declare the application administratively complete.
2. If an item submitted to the Department is obviously deficient, the item shall be deemed missing from the application and the Department shall declare the application administratively incomplete.

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(b) If the application is not administratively complete, the Department shall return a copy of the application to the applicant with a list of the missing and deficient items. If the applicant does not submit the listed information within 30 days of the date of request or obtain an extension pursuant to (b)2 below, the Department shall deem the application administratively closed and shall so notify the applicant in writing.

1. If the application is resubmitted within 30 days of the date the Department returns the deficient application, the original application fee will be credited toward the resubmitted application. If the applicant does not resubmit an application, the applicant has 30 days to request a fee refund upon request. If the Department does not receive a resubmitted application or a request for a fee refund within the 30 days, the Department shall deem the application administratively closed, and so notify the applicant in writing.

2. If, within 30 days of a Department return of a deficient application, the applicant submits a letter providing good cause for an extension, the Department shall extend the deadline for submission of the information an additional 15 days or as it deems appropriate.

3. The applicant may submit the revised application without repeating the public notice requirements of N.J.A.C. 7:38-9.2(b)5 if the revised application is:

i. Submitted within 30 days after the date the Department returned the original submittal; and

ii. Sufficiently similar to the original submittal that the original public notice provides reasonable notice of the nature and extent of the new submittal to potential interested parties.

(c) If the application is deemed administratively complete, the Department shall:

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1. So notify the applicant in writing;
  
2. Publish notice of the application in the DEP Bulletin; and
  
3. Review the application for technical completeness:
  - i. If each application item is adequate to allow the Department to determine if the proposed project complies with this chapter, the Department shall declare the application technically complete.
  
  - ii. If the application is not technically complete, the Department shall request any additional information necessary for technical completeness.

(d) If the Department requests additional information under (c)3(ii) 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. 9.2(b)5 (public notice requirements for Highlands Applicability Determinations).

(e) If a person submits an application and does not receive a response from the Department within the deadlines imposed in this subchapter, the application shall not be deemed approved.

#### 7:38-11.3 Completeness review for HRADs, Highlands general permits and HPAAAs

(a) Within 20 working days after receiving an application, the Department shall review the application as follows:

1. If all items required by the application checklist and/or application form are provided, the Department shall declare the application administratively complete. However, if an item submitted to the Department is clearly deficient, the item shall be considered missing from the application and the Department shall declare the application administratively incomplete; and

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2. If each application item is adequate to allow the Department to determine if the proposed project complies with this chapter, the Department shall declare the application technically complete.

(b) If the application is not administratively complete, the Department shall return the application to the applicant with a list of the missing or deficient items. The applicant may resubmit the application at any time. If the application is resubmitted within one year of the date of original submission, the original application fee will be credited toward the resubmitted application. If the application is not resubmitted, the applicant may obtain a fee refund upon request.

(c) If the application is administratively complete, the Department shall:

1. Notify the applicant that the application is administratively complete;
2. Transmit a copy of the application to other agencies if required under this chapter. For example, an application involving a Highlands open water that is also a freshwater wetland or State open water may need to be transmitted to EPA for comment under N.J.A.C. 7:7A-12.2, or an application involving a federally-listed threatened or endangered species may be transmitted to the U.S. Fish and Wildlife Service for comment;
3. Publish notice of the application in the DEP Bulletin; and
4. If the application is not technically complete under (a)2 above, request any additional information necessary for technical completeness.

(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. 9.2(b)5 (public notice requirements for Highlands

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Applicability Determinations), N.J.A.C. 7:38-9.4(b)2, (public notice requirements for HRADs) or N.J.A.C. 7:38-9.5(a)3 (public notice requirements for HPAAAs), 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. 7:38-9.2(b)5, 9.4(b)2, or 9.5(a) if the new application:

1. Is submitted within 60 days after the date the Department returned the original submittal; and
2. Is sufficiently similar to the original submittal that the original public notice would provide reasonable notice of the characteristics of the new submittal to potential interested parties.

(f) If a person submits an application and does not receive a response from the Department within the deadlines imposed in this subchapter, the person shall not be entitled to assume that the application is approved.

#### 7:38-11.4 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. 7:38-11.2(c)2 and 11.3(c)3 . 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. 7:38-9.2(b)5, 9.4(b)2, or 9.5(a).

(b) The Department shall make copies of all applications available for public inspection by appointment in the Trenton, New Jersey offices of the Department (see N.J.A.C. 7:38-1.2 for address) during normal business hours.



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(c) The public shall have 30 days to comment on an application for a Highlands applicability determination and 45 days to comment on all HRAD or HPAA application after the Department publishes notice of the application in the DEP Bulletin under (a) above. The Department shall consider all written public comments submitted within this time. The Department may, in its discretion, consider comments submitted after this date if a decision has not yet been made on an application.

#### 7:38-11.5 Hearings on an application for an HPAA

(a) Within 30 days after a notice of an application for an HPAA 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.

(b) The Department may issue or deny an HPAA without a public hearing. However, the Department is more likely to hold a public hearing if:

1. There is a significant degree of public interest in the application, as manifested by written requests for a hearing within the 30 day hearing request period set forth in (a) above. In considering the degree of public interest, the Department will consider whether the issues raised in the hearing requests are relevant to the application review;
2. The application involves a waiver of a requirement for an HPAA;
3. A public hearing is requested by the U.S. Environmental Protection Agency;  
or
4. The Department determines that the public interest would be served by holding a hearing.

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(c) If a hearing is to take place, the Department shall, within 30 days after the end of the 30-day hearing request period set forth in (a) above:

1. Set a date and time for the public hearing;
2. Choose a location for the hearing;
3. Notify the applicant; and
4. Publish a notice announcing the date, place, and time of the public hearing in the DEP Bulletin.

(d) A public hearing held under this section shall be a non-adversarial proceeding, conducted solely to provide information to the public and the Department regarding the application under review.

(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. 7:38-1.2 or the Land Use Regulation Program website at [www.nj.gov/dep/landuse](http://www.nj.gov/dep/landuse), to the following:

- i. All persons to whom a complete application must be sent under N.J.A.C. 7:38-9;

- ii. All persons to whom a notice of an application must be sent under N.J.A.C. 7:38-9; and

- iii. All persons who submitted comments on the application during the hearing request period set forth in (a) above; and

2. Publishing a display advertisement of a least four inches containing the completed hearing notice form, in accordance with (f) below.

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(f) The applicant shall submit a certification or affidavit of publication from the newspaper in which the advertisement appeared as proof that public notice of the hearing has been provided in accordance with this section. This proof of publication shall be submitted to the Department at least three days prior to the public hearing. If proof of publication cannot be obtained three days prior to the hearing, the applicant shall submit to the Department prior to commencement of the public hearing a notarized affidavit stating that the copy of the notice attached to the affidavit is a true copy of the notice as it appeared on the specific dates identified in the affidavit in the specific newspaper identified by name in the affidavit. Once the notice of hearing is published pursuant to (a)1 above, the applicant shall not make any changes to its application, which would be considered a major modification pursuant to N.J.A.C. 7:38-9.7(c).

(g) The applicant shall pay for a court reporter to record the proceedings at the public hearing and shall provide the Department with a verbatim transcript free of charge.

(h) The Department shall maintain a copy of the verbatim transcript of the hearing and all written comments received. The transcript and written comments shall be made part of the official record on the application and shall be available for public inspection in the Department's Trenton Office. See N.J.A.C. 7:38-1.2 for address.

(i) The presiding official at the non-adversarial public hearing shall have broad discretion with respect to oral and written presentations by interested persons. This discretion shall be exercised to allow every person the opportunity to speak, to reasonably limit the length of individual testimony, and to ensure the maintenance of an orderly forum. At the conclusion of statements by interested persons, the applicant shall be afforded the opportunity to speak on the statements offered by interested persons.

(j) Any interested person may submit information and comments concerning the application. The information and/or comments must be submitted in writing within 15 days after the hearing.

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7:38-11.6 Procedures for review of an HPAA with waiver

(a) The applicant shall demonstrate to the Department that the proposed project or activity meets the requirements for all waivers at N.J.A.C. 7:38-6.4(e) and complies with the special standards applicable to the waiver being sought: N.J.A.C. 7:38-6.5 (health and safety), 6.6 (brownfields redevelopment), 6.7 (70 percent impervious surface redevelopment), 6.8 (taking without just compensation) or 6.9 (construction of 100 percent affordable housing).

(b) If the Department determines that the project or activity satisfies the criteria for a waiver in accordance with (a) above, the Department shall process the Water Quality Management Plan (WQMP) amendment request that applies to the project, if applicable, in accordance with the procedures at (c) through (i) below.

(c) Once the Department decides to proceed with a request to amend a WQMP, the Department shall advise the applicant and the applicable designated planning agency, if any, in writing of its decision. This notification shall include a public notice that shall be given for the proposed amendment. This public notice shall announce a non-adversarial public hearing, shall provide at least 30 days notice of the hearing and will be published in the New Jersey Register. The public comment period will be extended until 15 days after the hearing.

(d) At the applicant's expense, the applicant shall:

1. Mail the public notice and request written statements of consent under (e) below;
2. Provide a copy of the public notice to each affected municipality;
3. Provide for publication of the public notice in two newspapers of general circulation in the affected area;

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- i. The newspaper notices shall be published on a date to coincide with the publication of the New Jersey Register;
- ii. The Department shall maintain a list identifying at least one of the newspapers in general circulation that shall be used for publication of the public notice in each Water Quality Management planning area; and
- iii. The applicant shall provide proof of publication of the notice in the newspapers to the Department. The Department shall not act on the amendment decision until such proof of publication is received;

4. Secure a court stenographer; and

5. Provide three copies of a verbatim transcript of the hearing to the Division of Watershed Management within 30 days of the hearing.

(e) The following requirements concern written statements of consent for plan amendments:

1. The Department shall provide a list to an applicant identifying the governmental entities, sewerage agencies and BPU-regulated sewer or water utilities that may be affected by, or otherwise have a substantial interest in, approval of the proposed WQMP amendment in accordance with (c) above. Within 15 days of receiving the list, the applicant shall submit by certified mail (return receipt requested) a copy of the proposed amendment to these parties, asking each entity on the list to issue written consent to the proposed WQMP amendment within 60 days of receipt of the request;

2. A written statement of consent shall include a statement that the party concurs with, or does not object to, the proposed WQMP amendment. Failure to reply or tentative, preliminary, or conditional approval shall not be considered consent. A statement of consent by a governmental unit shall be in the form of a resolution

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by that unit's governing body. Resolutions older than one year shall not be accepted. If the party objects to the proposed WQMP amendment, the party shall state all reasons for objection in writing;

3. The applicant shall promptly forward to the Division of Watershed Management a copy of all written statements of consent and other written responses received, and a copy of all requests for consent (with return receipts) sent to parties that did not respond at all; and

4. Where a party denies a request for a written statement of consent or does not reply, the reasons therefore, if known on the basis of reasonably reliable information, shall be considered in making decisions under (g) below.

(f) Interested persons, including, but not limited to, those from whom written consent is requested under (e)1 above, may submit written comments on the proposed WQMP amendment to the Division of Watershed Management within 15 days after the date of the public hearing.

(g) The Department shall prepare a written summary of public comments and responses to those comments including the Department's decision. The Department shall either:

1. Adopt the amendment, in whole or in part, as proposed in the New Jersey Register or with changes that do not effectively destroy the value of the public notice; or

2. Deny the proposed amendment, in whole or in part.

(h) The Department shall provide written notification of the decision to the applicant and

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the designated planning agency, where applicable. Notice of the final decision shall also be published in the New Jersey Register and the DEP Bulletin.

(i) Applicants with projects requiring NJPDES permits will be advised at the time of public notice, in accordance with (c) above whether or not to submit an application for a NJPDES permit to the Division of Water Quality.

#### 7:38-11.7 Final decisions

(a) The Department shall approve or deny an application for a Highlands general permit within 120 days, or for an HPAA or HPAA with waiver within 180 days of receipt of a complete application, or for good cause, within such additional period of time as the Department shall notify the applicant in writing is required to complete its review under this chapter. However, if an application requires coordination with U.S. Environmental Protection Agency (USEPA) in accordance with N.J.A.C. 7:7A-12.2, a WQMP amendment, or a Safe Drinking Water, NJPDES or treatment works review the HPAA will not be approved until all requirements have been satisfied. If an applicant does not receive a response from the Department within this time, the application shall not be deemed approved.

(b) When the Department issues a decision under this chapter, the Department shall send notice thereof to the applicant.

(c) The Department may issue an HPAA imposing conditions necessary for compliance with the Highlands Act, this chapter, and all statutes listed at N.J.A.C. 7:38-1.3(a). Any regulated activities undertaken under the authority of any issued approval shall constitute an acceptance by the applicant of the entire approval including all conditions therein.

(d) Decisions by the Department shall be published in the DEP Bulletin. A copy of every HPAA or HPAA with waiver that requires USEPA review under N.J.A.C. 7:38-11.3 shall

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be transmitted to USEPA. Decisions by the Department on approval or denial of a WQMP amendment shall be published in the New Jersey Register and the DEP Bulletin.

7:38-11.8 Cancellation, withdrawal, resubmission and amendment of applications for HPAAAs, Highlands general permits, HPAAAs with waiver, HRADs or Highlands Applicability Determinations

(a) The Department shall be entitled to cancel an application if the Department submits a request to the applicant in writing for additional information and the applicant does not submit that information within 30 days of the date of the request. Before canceling an application, the Department shall send the applicant a letter stating that the application will be cancelled. If, within 15 days of the date of the Department's letter, the applicant submits the information, or a letter providing good cause for the delay, the Department shall extend the time required for submission of the information as it deems appropriate. If the applicant does not submit the information or a letter providing good cause, the application shall be deemed cancelled as of the date of the Department's last letter to the applicant.

(b) If the Department cancels an application, the application fee will not be refunded. A new application, including a new application fee, will be required if the applicant wishes to pursue the project.

(c) An applicant may withdraw an application at any time in the application review process. For all applications other than a Highlands Applicability Determination, if an application is withdrawn, the application fee will not be refunded. However, if the requirements of (e)2 below are met, the fee may be credited toward a future application.

(d) If the Department cancels an application, or if the applicant withdraws an application, the applicant may resubmit an application for a revised project on the same site. The Department will treat the submission as a new application. The fees for the resubmitted application shall be as follows:



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1. If the Department cancelled the original application under (b) above, a new fee under N.J.A.C. 7:38-10 will be required;

2. If the applicant withdrew the original application under (d) above, and resubmits the application within one year of the date of withdrawal, the original application fee will be credited to the new application.

(e) An applicant may choose to amend an application as part of the review process. If an applicant amends an application:

1. The applicant shall provide a copy of the new or amended information to the same persons who received a complete copy of the initial application under N.J.A.C. 7:38-9.2(b)5 (public notice requirements for Highlands Applicability Determinations), N.J.A.C. 7:38-9.4(b)2 (public notice requirements for HRADs) or N.J.A.C. 7:38-9.5(a)3 (public notice requirements for HPAs). The information need not be provided to persons who received only a notice of the application, unless the Department determines that the new or amended information will increase the environmental impact of the project; and

2. The amendments shall constitute a new submission and the Department may, at its discretion, require reinitiation of the entire application and review process, particularly if the amendments are significant and/or a public hearing has already been held.

(f) If the Department denies an application, the applicant may resubmit an application for a revised project on the same site. The Department will treat this submission as a new application requiring a fee in accordance with N.J.A.C. 7:38-10.

SUBCHAPTER 12 CONTENTS OF APPROVALS

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7:38-12.1 Standard conditions that apply to all orders, decisions, approvals or determinations issued pursuant to the Highlands Act and its implementing regulations

(a) The following standard conditions apply to all HPAA's, Highlands general permits, HPAA's with waiver, HRADs and orders issued under this chapter:

1. Duty to comply: The permittee shall comply with any order, decision, approval, determination or authorization issued pursuant to the Highlands Act, including all permit programs incorporated into the HPAA, their implementing rules and the approved site plan or subdivision, if any. Failure to comply constitutes a violation of the Highlands Act and this chapter, and shall authorize the Department to bring an enforcement action against the permittee and, with notice to the permittee, issue such orders or decisions as necessary to protect the Highlands environment from unlawful destruction or degradation. In some cases, noncompliance may also constitute a violation of the Water Pollution Control Act and/or the Federal Clean Water Act and subject the permittee to prosecution, fines and penalties under those laws or their implementing regulations;

2. Duty to reapply: If the permittee wishes to continue an activity regulated by an HPAA (including an HPAA with waiver) after the expiration date of the approval, the permittee must apply for and obtain an extension or a new approval, prior to the expiration of the approval;

3. Duty to halt or modify activity: If the Department approves an HPAA that results in unanticipated consequences that violate Federal or state law or regulation, the permittee shall immediately halt or modify the activity to eliminate or cure the violation, notify the Department of the action taken, and, if necessary, apply for an emergency HPAA or a modified HPAA. A permittee who fails to take such action shall be subject to penalty as provided by the relevant law or regulation;

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4. Duty to minimize environmental impacts: The permittee shall prevent, minimize or correct any adverse impact on the Highlands environment resulting from activities conducted pursuant to the HPAA, or from noncompliance with an HPAA. Mitigation consistent with N.J.A.C. 7:7A-15 will also be required for disturbance to freshwater wetlands or State open waters;

5. If the permittee, before or during the work authorized under an HPAA, encounters a probably historic and/or archaeological area, the permittee shall immediately notify the Department and proceed as directed;

6. Duty to assure proper operation and maintenance: The permittee shall at all times properly operate and maintain all facilities and systems for pollution, wastewater, stormwater treatment and control which are installed or used to achieve compliance with the HPAA. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the permit. This provision requires the proper execution of any approved mitigation proposal designed to mitigate losses caused by the permitted activity. The permittee shall maintain the authorized work areas in good condition and in accordance with the permit;

7. Duty to provide information: The permittee shall furnish to the Department within a reasonable time, any information which the Department requests to determine whether cause exists for modifying, terminating and reissuing, or terminating the HPAA or HRAD, or to determine compliance with an HPAA, a Department order or decision or a court order. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by the approval;

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8. Duty to permit entry and inspection: The permittee shall allow the Department, or an authorized representative, upon the presentation of credentials, to:

i. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the HPAA or order;

ii. Have access to and copy, at reasonable times, any records that must be kept under the conditions of the HPAA or order;

iii. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the HPAA or order; and

iv. Sample or monitor at reasonable times any substances or parameters at any location for the purposes of assuring compliance with an order or approval or authorization issued pursuant to the Highlands Act or its implementing regulations or as otherwise authorized by the Federal Clean Water Act, by the Highlands Water Protection and Planning Act, or by any rule or order issued pursuant thereto, any substances or parameters at any location;

9. Duty to maintain records:

i. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity;

ii. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the HPAA or HRAD, and records of all data used to

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complete the application for the HPAA or HRAD, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by the Department at any time;

iii. Records of monitoring information shall include:

- (1) The date, exact place, and time of sampling or measurements;
- (2) The individual(s) who performed the sampling or measurements;
- (3) The date(s) analyses were performed;
- (4) The individual(s) who performed the analyses;
- (5) The analytical techniques or methods used; and
- (6) The results of such analyses;

10. Duty to report:

i. Planned changes: The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted project or activity;

ii. Anticipated noncompliance: The permittee shall give advance notice to the Department of any planned changes in the permitted project or activity which may result in noncompliance with permit requirements and shall not undertake the change in work until after receiving Department approval;

iii. Transfers: An HPAA is not transferable to any person except after notice to the Department;

iv. Monitoring reports: Monitoring results shall be reported at the intervals specified in the HPAA;

v. Twelve-hour reporting: the permittee shall report any noncompliance with an HPAA which may endanger health or the environment. This

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information shall be provided to the Department orally within 12 hours from the time the permittee or the designated supervisor of the construction site becomes aware of the potentially dangerous circumstances. The permittee or its agent shall also provide the Department a written description of the information no more than five days after the permittee becomes aware of the potentially dangerous circumstances. The written submission shall contain a description of the noncompliance and its known or suspected cause; the period of noncompliance, including exact dates and times, and, if the noncompliance has not been corrected, the anticipated length of time it is expected to continue; and actions already taken or planned in order to reduce, eliminate, and prevent recurrence of the noncompliance;

vi. Other noncompliance: The permittee shall report all instances of noncompliance not reported pursuant to (a)9i, iv, and v above, at the time monitoring reports are submitted. The reports shall contain the information listed in (a)9v above; and

vii. Omitted or incorrect information: Whenever the permittee becomes aware that it omitted any relevant fact from an application, communication or report to the Department, or that the information provided the Department in an application, communication or report was inaccurate at the time of its submission or is currently inaccurate, the permittee shall promptly advise the Department of the omission or inaccuracy and provide the accurate information, if known. Failure to do so shall constitute a violation of the Highlands Act and this chapter and subject the permittee to the fines and penalties thereunder;

11. Duty to mitigate: The permittee shall perform any wetland or State open water mitigation required under the approval prior to or concurrently with regulated activities in accordance with N.J.A.C. 7:7A-15.3(a). If a permittee performs

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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). If a project requires tree planting mitigation in accordance with N.J.A.C. 7:38-3.9, planting shall occur prior to or concurrently with regulated activities so long as it is the appropriate season for tree planting;

12. Duty to Display State and Local Approvals: A permittee shall maintain on the site of regulated activities a complete copy of all state and local approvals, building permits, the HRAD, if any, the HPAA and any approved site plan or construction plan and shall have these records available for public inspection during regular business hours and whenever work is being conducted on the site. All activity or projects authorized by an HPAA shall be posted with a sign, prominently displayed at the main entrance to the property or work site, at all times from commencement to completion of the permitted activity. The sign shall contain at least the following information:

1. The work authorized by the Department;
2. The type of approval that authorized the work, and the Department's file number;
3. A Department phone number for verification; and
4. The location on the site at which the approval and plans may be inspected;

13. Signatory requirement: All applications, reports, or information submitted to the Department shall be signed and certified as required at N.J.A.C. 7:38-9.1(c);

14. An HPAA runs with the land and is binding upon the permittee and the permittee's successors in interest in the land or in any part thereof. Permittees shall notify the Department of any changes in ownership or control of the site as required pursuant to N.J.A.C. 7:38-9.7;

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15. An approval issued under this chapter does not relieve a permittee from the obligation to obtain any other permits or approvals required by law;

16. A permittee shall be excused from compliance with conditions of an HPAA only to the extent specified in an emergency permit issued by the Department pursuant to N.J.A.C. 7:38-7;

17. Permit actions: No HPAA, determination or HRAD shall be modified, suspended, or terminated except by action of the Department or a court of competent jurisdiction. A permittee's submission to the Department of a request to modify an HPAA or of a notice of anticipated noncompliance does not alter any condition of an HPAA or HRAD. In such cases, the permittee is responsible for taking those actions necessary to ensure continued compliance with an existing HPAA or HRAD while the Department evaluates the permittee's submissions; and

18. Property rights: An HPAA or HRAD does not convey any property right of any sort.

#### 7:38-12.2 Establishing conditions to an HPAA (with or without waiver)

(a) In addition to the standard conditions set forth in N.J.A.C. 7:38-12.1, the Department shall impose those special conditions on individual HPAA's as required to ensure the proposed activity complies with any judgment, court order or applicable law including, but not limited to, the Highlands Act, the State Water Pollution Control Act, the Federal Clean Water Act and their implementing rules and regulations.

(b) In addition to the standard requirements in N.J.A.C. 7:38-12.1, each HPAA shall include the following information, as applicable:

1. A specific identification and description of the authorized activity, including:



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- i. The name and address of the permittee and the HPAA identification number;
- ii. The use or purpose of the major Highlands development authorized in the HPAA;
- iii. The type and quantity of the materials to be discharged or used as fill;
- iv. A description of the structures to be erected;
- v. The location and boundaries of the activity site(s), including a detailed sketch and the name and description of affected Highlands Resource areas; and
- vi. Identification of the specific site plans depicting the approved regulated activity(ies);

2. For activities permitted in freshwater wetlands or State open waters as defined at N.J.A.C. 7:7A, provisions ensuring that the regulated activity will be conducted in compliance with the Highlands Act, its implementing rules and the environmental guidelines issued under section 404(b)(1) of the Federal Act (40 C.F.R. Part 230), including conditions to ensure that the regulated activity shall be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration or mitigation;

3. Any requirements necessary to comply with water quality standards established under applicable Federal or State law. If an applicable water quality standard is promulgated or modified after an HPAA is issued, the Department shall modify the HPAA to include the new standard if appropriate. In assessing whether

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HPAA modification to include new water quality standards is appropriate, the Department shall consider:

- i. Whether the permittee has obtained preliminary or final site plan or subdivision approval;
  - ii. Whether construction has commenced;
  - iii. The estimated cost to the permittee of complying with the new water quality standard;
  - iv. Whether the development can meet the new water quality standard if constructed as originally approved;
  - v. Pertinent provisions of the permittee's acquisition or purchase agreement and mortgage financing, if any; and
  - vi. Any other information the Department deems relevant;
4. Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of the Federal Act or applicable State or local law. If an applicable toxic effluent standard or prohibition is promulgated or modified after the HPAA is issued, the HPAA shall be modified as provided in (b)3 above;
5. A specific date on which the HPAA shall automatically expire if the authorized work has not been commenced; and
6. Reporting of monitoring results. All HPAA's shall specify:

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- i. Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);
- ii. Required monitoring including type, intervals, and frequency sufficient to yield data representative of the monitored activity including, when appropriate, continuous monitoring 24-hours a day; and
- iii. Any additional reporting requirements the Department determines are justified based upon the actual or potential adverse impact of the regulated activity.

(c) The Department may, in its discretion, require a preconstruction meeting at the location of the proposed development and shall specify how many days prior to construction the permittee must notify the Department so that the preconstruction meeting can be scheduled.

(d) Some HPAA conditions may be incorporated into a permit by reference, and shall appear in the permit as a specific citation to the applicable regulations or requirements.

#### 7:38-12.3 Duration of Highlands Preservation Area Approvals (HPAA)

(a) An HPAA shall be effective for a fixed term not to exceed five years from the date the Department issues the HPAA. One five-year extension may be available if the applicant provides the information at N.J.A.C. 7:38-9.7(g) and the Department determines that all proposed activities continue to comply with the Highlands Act, including all other Department programs incorporated into the permitting review process, and this Chapter.

(b) The duration and extension of HRADs are described in N.J.A.C. 7:38-9.7(h).

#### N.J.A.C. 7:38-12.4 Effect of an HPAA

Compliance with all standards for an HPAA with or without a waiver during its term constitutes compliance, for enforcement purposes, with sections 301, 307, and 403 of the

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Federal Act, with the Highlands Act, and with this chapter. However, an HPAA may be modified, terminated and reissued, suspended, or terminated during its term for cause as set forth in this chapter.

## SUBCHAPTER 13 ENFORCEMENT

### 7:38-13.1 General provisions

For the purposes of this subchapter, the term "rule and/or condition" refers to the provisions of the Highlands Water Protection and Planning Act N.J.S.A. 13:20-1 et seq. (Highlands Act), the rules promulgated thereunder, and any permit, approval, determination, authorization, waiver, order, exemption or requirement, issued pursuant thereto by the Department or by a court of competent jurisdiction.

### 7:38-13.2 Enforcement powers of the Department

- (a) Whenever, on the basis of available information, the Department finds a person in violation of any rule and/or condition, the Department may:
1. Issue an order requiring any such person to comply in accordance with (b) below;
  2. Bring a civil action in accordance with N.J.A.C. 7:38-13.4;
  3. Levy a civil administrative penalty in accordance with N.J.A.C. 7:38-13.5;
  4. Bring an action for a civil penalty in accordance with N.J.A.C. 7:38-13.4; or
  5. Petition the Attorney General to bring a criminal action in accordance with N.J.A.C.13:20-35a(5).
- (b) Any penalty established pursuant to this subchapter may be imposed and collected with costs in a summary proceeding pursuant to the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq. The Superior Court and the municipal court shall have jurisdiction to enforce the provisions of the Penalty Enforcement Law in connection with N.J.S.A. 13:20-1 et seq.

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(c) For all violations under this subchapter, each day during which each violation continues shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(d) Each violation of any rule and/or condition under this subchapter shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(e) The Department's pursuit of any of the remedies available under this subchapter shall not preclude the Department's pursuit of any of the other remedies for the same or another violation. Compliance with any Department enforcement order, including payment of a penalty, shall not preclude the Department from pursuing any of the other remedies available under this subchapter in connection with the violation for which the order was issued.

#### 7:38-13.3 Administrative order

(a) Whenever, on the basis of available information, the Department finds a person in violation of any law and/or condition, the Department may issue an order:

1. Specifying each provision of the law and/or condition of which the person is in violation;
2. Describing the facts which constitute each violation;
3. Requiring compliance with the provision violated;
4. Requiring restoration of the area of the violation; and
5. Providing notice to the person of the right to a hearing on the matters contained in the order.

#### 7:38-13.4 Civil action

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

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1. A temporary or permanent injunction;
2. Assessment against the violator of the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing and bringing legal action under this section;
3. Assessment against the violator for any costs incurred by the State in removing, correcting, or terminating the adverse effects to the Highlands resulting from any unauthorized regulated activity for which legal action under this section may have been brought;
4. Assessment against the violator for compensatory damages for any loss or destruction of wildlife, fish or aquatic life, and for any other actual damages to the Highlands Region caused by an unauthorized regulated activity;
5. A requirement that the violator restore the site of the violation to the maximum extent practicable and feasible;
6. Assessment against the violator for recovery of any economic benefit accruing to the violator; and
7. Assessment against the violator of a civil penalty of up to \$10,000 per day pursuant to this subchapter.

(b) Any penalty established pursuant to this section may be imposed and collected with costs in a summary proceeding pursuant to the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq. The Superior Court and the municipal court shall have jurisdiction to enforce the provisions of the Penalty Enforcement Law in connection with N.J.S.A. 13:20-1 et seq.

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7:38-13.5 Civil administrative penalty assessment

(a) Whenever, on the basis of available information, the Department finds a person in violation of any rule and/or condition the Department may assess a civil administrative penalty of not more than \$25,000 for each violation of this chapter. The amount of the civil administrative penalty shall be determined pursuant to N.J.A.C. 7:38-13.7 and 13.8 below.

(b) Each day during which a violation continues shall constitute an additional, separate and distinct offense.

(c) Each violation of any rule and/or condition shall constitute an additional, separate and distinct violation.

(d) Where any requirement of the Highlands Act incorporates the requirements of any law, regulation, permit, approval, or authorization, the failure to comply with each such requirement shall constitute an additional, separate and distinct violation.

7:38-13.6 Civil administrative penalty procedures

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

1. Identify each portion of the rule and/or condition violated;
2. State the facts alleged to constitute the violation;

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3. State the amount of the civil penalties to be imposed; and
4. Advise the violator of the right to request an adjudicatory hearing under N.J.A.C. 7:38-13.12.

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

1. If no hearing is requested pursuant to N.J.A.C. 7:38-13.13, a notice of civil administrative penalty assessment becomes a final order on the 21st day after the violator receives the notice;
2. If the Department denies a hearing request under N.J.A.C. 7:38-13.13, a notice of civil administrative penalty assessment becomes a final order upon the violator's receipt of the denial; or
3. If the Department grants a hearing, and the Commissioner finds that a violation has occurred, the Commissioner issues a final order assessing the amount of the civil administrative penalty.

7:38-13.7 Civil administrative penalty amount

(a) To determine the civil administrative penalty for regulated activities conducted prior to the issuance of a Highlands Preservation Area Approval, the Department shall use the procedures in N.J.A.C. 7:38-13.8. To determine the civil administrative penalty for all other violations of the Act, except for those described at N.J.A.C. 7:38-13.10 through 12, the Department shall use the procedures identified in this section.



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(b) The Department may, in its discretion, adjust the civil administrative penalty amount determined pursuant to this section to an amount no greater than the maximum amount nor less than the minimum amount in the range described in N.J.A.C. 7:38-13.8 and 13.9, on the basis of any or a combination of the factors listed in (b)1 through 5 below and as otherwise identified in this subchapter. No such factor constitutes a defense to any violation:

1. The compliance history of the violator with respect to the Highlands Act as well as any other statute or regulation that would have prohibited the same type of conduct had it occurred outside the Highlands Region;
2. The type, number and frequency of these violation(s) by the violator;
3. The measures taken by the violator to mitigate the effects of the current violation;
4. The deterrent effect of the penalty; and/or
5. Any other extenuating, mitigating or aggravating circumstances.

7:38-13.8 Civil administrative penalty amount for failure to obtain a HPAA prior to conducting regulated activities pursuant to the Act.

(a) To assess a civil administrative penalty pursuant to this section, the Department shall identify the civil administrative base penalty from Table A at (c) below by determining the number of points pursuant to (b) below. The civil administrative penalty shall be the amount within Table A at (c) below, unless adjusted pursuant to N.J.A.C. 7:38-13.7 or this section.

(b) The Department shall determine the number of points assigned to each violation by totaling the points according to (b)1 through 3 below.

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1. Conduct of violator:

i. Major: Four points. Major conduct shall include any intentional, deliberate, purposeful, knowing or willful act or omission by the violator. Violations committed by persons who have applied for a permit, authorization, or approval pursuant to a land use statute or rule, or members of the professional community including, but not limited to, builders, developers, nurserymen, consultants, who knew or should have known about the adoption of the Act due to the nature of their profession, or who otherwise meet the criteria identified in this Section, shall be considered Major conduct;

ii. Moderate: Two points. Moderate conduct shall include any unintentional but foreseeable act or omission by the violator; or

iii. Minor: One point. Minor conduct shall include any other conduct not included in (b)1i or ii above;

2. Area of disturbance or impact in square feet (sf) shall be assigned points as follows in (b)2i through vii below. The Department shall determine the area of disturbance as that area in which impervious surface was placed, soil was exposed, moved or cleared, and vegetation and/or trees were cut or removed;

i. Less than or equal to 750 sf: one point;

ii. 751sf to 2,000 sf: two points;

iii. 2,001sf to 5,000 sf: three points;

iv. 5,001sf to 10,000 sf: four points;

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v. 10,001 sf to 20,000 sf: five points;

vi. 20,001 sf to 40,000 sf: six points;

vii. Greater than 40,000 sf: seven points;

3. Unauthorized activity conducted in a special resource area:

i. The Department shall assess one point for each of the following, including, but not limited to those areas identified or defined at N.J.A.C. 7:38-3.4 through 3.10 in which the unauthorized activity occurred or which was adversely affected by the violation:

(1) Waters of the Highlands (which includes groundwater);

(2) Septic systems;

(3) Impervious surface;

(4) Highlands open waters (surface waters & wetlands);

(5) Flood hazard area;

(6) Steep slopes;

(7) Upland forest area;

(8) Historical or archeological site;

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(9) Rare, threatened and endangered plant or animal species; and

(10) Unique or irreplaceable land types.

(c) Table A: Base penalty based upon total points from (b) above:

<u>Total Points</u>	<u>Penalty Amount Per Day</u>
2	\$500
3	\$1,000
4	\$2,000
5	\$3,000
6	\$6,000
7	\$8,000
8	\$10,000
9	\$15,000
Greater than 10	\$25,000

(d) The Department shall adjust the amount of the daily base penalty assessed pursuant to (c) above based upon the mitigating penalty component as calculated in this subsection, if applicable.

1. The Department shall multiply the daily base penalty dollar amount from Table A at (c) above by the multiplier for either of the applicable mitigating factors in (d) i and/or ii below to obtain the mitigating penalty component. Where neither mitigating factor applies, the civil administrative penalty shall be the civil administrative daily base penalty determined pursuant to Table A at (c) above, unless adjusted pursuant to N.J.A.C. 7:38-13.7;

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i. Where the nature, timing and effectiveness of any measures taken by the violator to remove the violation and to restore the site to its predisturbance condition or to otherwise mitigate the effects of the violation for which the penalty is being assessed results in compliance within 30 days of receipt of the notice of violation from the Department, the mitigating factor multiplier is 0.50; or

ii. Where a complete application for an HPAA is submitted within 30 days of receipt of the notice of the violation from the Department and an HPAA is subsequently obtained for the unauthorized development without the need of any modification of the project or restoration of the violation, the mitigating factor multiplier is 0.25.

2. To calculate the civil administrative penalty, the Department shall subtract the mitigating penalty component calculated pursuant to (d) above, if any, from the base penalty.

(e) The total civil administrative penalty shall be the amount obtained from Table A at (c) above, as adjusted pursuant to (d) above, multiplied by the number of days during which the violation existed.

7:38-13.9 Civil administrative penalties for other than failure to obtain an HPAA prior to conducting regulated activities

(a) The Department will assess a daily civil administrative penalty for violations described in this section other than those violations addressed in N.J.A.C. 7:38-13.8 and except for those described at N.J.A.C. 7:38-13.10 through 12 on the basis of the seriousness of the violation and the conduct of the violator pursuant to Table B below, unless adjusted pursuant to N.J.A.C. 7:38-13.7 or this section.

Table B

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SERIOUSNESS

		MAJOR	MODERATE	MINOR
CONDUCT	MAJOR	\$25,000	\$15,000	\$10,000
	MODERATE	\$15,000	\$7,500	\$5,000
	MINOR	\$10,000	\$5,000	\$1,000

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

1. "Major" seriousness applies to any violation which has caused or has the potential to cause serious harm to human health, safety, and/or the environment, and/or seriously deviates from any critical or especially significant requirement of the Act or any rule and/or condition;
2. "Moderate" seriousness applies to any violation which has caused or has the potential to cause substantial harm to human health, safety and/or the environment and/or partially deviates from any other requirement of the Act or any rule and/or condition; or
3. "Minor" seriousness shall apply to any violation not included in (b)1 or 2 above.

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(c) The conduct of the violator shall be determined 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. Violation of a permit, authorization, or application shall be construed by the Department as knowing or Major. This would include, but not be limited to, builders, developers, nurserymen, consultants, who knew or should have known about the adoption of the Act;
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 (f)1 or 2 above.

(d) The total civil administrative penalty assessed shall be the daily penalty amount obtained from the Table B matrix multiplied by the number of days during which the violation has continued.

#### 7:38-13.10 Civil administrative penalty for submitting inaccurate or false information

(a) The Department may assess a civil administrative penalty pursuant to this section against each violator who knowingly, recklessly, or negligently makes a false or inaccurate statement, representation, or certification in any application, record, or other document filed or required to be maintained under this Act.

(b) Each day, from the day of receipt by the Department of the false or inaccurate statement, representation, or certification until the day of receipt by the Department of a written correction by the violator, shall constitute an additional, separate and distinct violation.

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(c) The Department shall assess a civil administrative penalty for violations described in this section based on the conduct of the violator at the mid-point of the following ranges, except as adjusted pursuant to (d) below:

1. For each knowing false statement, representation, or certification by the violator, the civil administrative penalty per act or omission shall be not less than \$5,000 and not more than \$10,000 per act or omission; and
2. For each reckless or negligent false statement, representation, or certification, the civil administrative penalty, per act or omission, shall be not less than \$1,000 and not more than \$2,500 per violation.

(d) The Department may adjust the amount determined pursuant to (c) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range described in (c) above, on the basis of the following factors:

1. The compliance history of the violator; with respect to the Highlands Act and any other statute or regulation that would have prohibited the same type of conduct had it occurred outside the Highlands Region;
2. The impact the violation had on the environment or any regulatory decisions made by the Department;
3. The nature, timing and effectiveness of any measures taken by the violator to mitigate the effects of the violation and/or to formally correct the errant submission for which the penalty is being assessed; and
4. The impact of the violation upon other parties and their property.



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(a) The Department may assess a civil administrative penalty pursuant to this section against any person who refuses, obstructs, or impedes immediate entry to any site, land, premises, building or facility by any Department representative seeking to conduct any inspection, sampling, or to otherwise determine compliance with the Act or any approval, permit, determination, court order or administrative order issued pursuant to this Act or its implementing rules.

(b) Each day that a violator refuses, obstructs or impedes immediate lawful entry by a Department representative to any site, land, premises, area, building, facility or property shall be an additional, separate and distinct violation.

(c) The Department shall assess a civil administrative penalty for violations described in this section except as adjusted pursuant to (d) below, as follows:

1. For refusing, obstructing or impeding immediate entry and inspection of any site, land, premises, area, building, facility or property for which an administrative order, permit, approval, application, or other operating authority requirement exists or is required under the Act, the civil administrative penalty shall be \$10,000 per act or omission; and

2. For any other refusal, obstruction, or prohibition of immediate Department entry and inspection, the civil administrative penalty shall be \$5,000 per violation.

(f) The Department may adjust the amount determined pursuant to (c) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range described in (c) above, on the basis of the following factors:

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1. The compliance history of the violator with respect to the Highlands Act and any other statute or regulation that would have prohibited the same type of conduct had it occurred outside the Highlands Region;
2. The impact the inability to inspect or sample has had on the environment, other persons or property, or any regulatory decisions made by the Department; and/or
3. The nature, timing and effectiveness of any measures taken by the violator to mitigate the effects of the violation or to allow subsequent Department entry for inspection.

#### 7:38-13.12 Economic benefit

(a) The Department may add to a civil administrative penalty assessed under this subchapter the amount of economic benefit in dollars that the violator has realized as the result of not complying, or by delaying compliance with, a rule and/or order. However, the total penalty assessed against the violator shall not exceed the maximum allowable amount pursuant to N.J.A.C. 7:38-13.5.

(b) If a violator's economic benefit was derived from more than one violation, the Department shall apportion the total economic benefit among the violations from which it was derived, so as to increase each civil administrative penalty to an amount no greater than the maximum allowed at N.J.A.C. 7:38-13.5.

#### 7:38-13.13 Appeal of an administrative order and/or notice of civil administrative penalty assessment

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

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writing to the Department at the address in (b) below if none is specified on the order and/or assessment:

1. The name, address, and telephone number of the violator requesting a hearing and his or her attorney or other authorized representative;
2. The violator's defenses to each of the findings of fact in the order and/or notice of civil administrative penalty assessment, stated in short plain terms;
3. An admission or denial of each finding of fact asserted in the order and/or notice of civil administrative penalty assessment. If the violator is without knowledge or information sufficient to form a belief as to the truth of a finding, the violator shall state this and this shall have the effect of a denial. A denial shall address the substance of the finding being denied. When the violator intends in good faith to deny only a part of a finding, or certain qualifying language contained in a finding, the violator shall specify so much of it as is true and deny the remainder. The violator may not generally deny all the findings but must address each finding and itemize his response to each. For each finding the violator denies, the violator shall allege the fact or facts as the violator believes them to be;
4. Copies of all documents, maps or recordings upon which the violator relies to request a hearing and make any denial, defense or assert any fact;
5. An estimate of the time required for the hearing (in days and/or hours); and
6. A statement whether a barrier-free hearing location will be needed to accommodate any physically disabled person attending the hearing.

(b) A request for an adjudicatory hearing under this subchapter shall be addressed to:

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Office of Legal Affairs

ATTENTION: Adjudicatory Hearing Requests

Department of Environmental Protection

P.O. Box 402

Trenton, New Jersey 08625-0402

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

(d) If the violator fails to include all of the information required by (a) above, the Department may deny the hearing request.

(e) Any adjudicatory hearing shall be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

#### 7:38-13.14 Settlement of an administrative penalty

(a) The Department may, in its discretion, settle any civil administrative penalty assessed pursuant to this subchapter, based on an evaluation of the factors at (a)1 through 7 below:

1. Mitigating or extenuating circumstances not previously considered in the assessment of penalties;
2. The violator's timely implementation of measures leading to compliance, which measures were not previously considered in the assessment of penalties, including measures to aggressively restore, reverse or repair environmental damage caused by the violation, or to remove or mitigate for the violation;

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3. The violator's full payment of a specified part of a civil administrative penalty, if payment is made within a time period established by the Department in an administrative order, and if the violator waives the right to request an adjudicatory hearing on the civil administrative penalty;
4. Whether the settlement amount provides a sufficient deterrent to future violations;
5. The past compliance history of the violator with respect to the Highlands and any other statute or regulation that would have prohibited the same type of conduct had it occurred outside the Highlands Region; and
6. The cost to the violator to comply; and
7. Any other terms, conditions, or consideration acceptable to the Department.

#### 7:38-13.15 Notice of violation recorded on property deed

In addition to the penalties prescribed in this section, a notice of violation issued pursuant to this act shall be recorded on the deed of the property wherein the violation occurred, on order of the commissioner, by the clerk or register of deeds and mortgages of the county wherein the affected property is located and with the clerk of the Superior Court and shall remain attached thereto until such time as the violation has been remedied and the commissioner orders the notice of violation removed.

#### 7:38-13.16 Duty to provide information

The Department may require an applicant or permittee to provide any information the Department deems necessary to determine compliance with any provision of this Act, a Highlands Preservation Area Approval, or any rule and/or condition.

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7:38-13.17 Penalty collection

All penalties collected pursuant to this section shall either be used, as determined by the Council, by the Department for the acquisition of lands in the preservation area or by any development transfer bank used or established by the Council to purchase development potential in the preservation area.

7:38-13.18 Civil penalty

(a) A person shall be subject to civil penalty upon order of a court if the person:

1. Violates the Highland Water Protection and Planning Act, or this chapter;
2. Violates an administrative order or a court order issued pursuant to the Highlands Water Protection and Planning Act, or this chapter; or
3. Fails to pay in full a civil administrative penalty assessed under this chapter.

(b) A civil penalty imposed under this section shall not exceed the maximum allowed at N.J.A.C. 7:38-8 and 9.

(c) A civil penalty imposed under this section may be collected, with costs, in a summary proceeding pursuant to the Penalty Enforcement Law, N.J.S.A. 2A: 58-1 et seq. The Superior Court shall have jurisdiction to enforce the penalty enforcement law in conjunction with the Highlands Water Protection and Planning Act, and this chapter.

7:38-13.19 Criminal action

(a) Pursuant to N.J.S.A. 13:20-35, the Department may petition to the Attorney General to bring a criminal action against any person who:

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1. Purposely or negligently violates any provision of N.J.S.A. 13:20-32, a Highlands Preservation Area Approval issued pursuant to N.J.S.A. 13:20-34, or any rule or regulation adopted pursuant to the Act;
2. Commits such an offense under (a)1 above a second time; or
3. Knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under the Act.

#### SUBCHAPTER 14 ADOPTED GENERAL PERMITS

##### 7-38-14.1 Highlands General Permit 1 - Habitat Creation and Enhancement Activities

(a) Highlands general permit 1 authorizes habitat creation and enhancement activities in Highlands open waters, which is sponsored or substantially funded by a Federal or State agency or other entity described in (b) below and that are necessary to implement a plan for the restoration, creation or enhancement of the habitat and water quality functions and values of Highlands open waters. For the purposes of this general permit, a "sponsor" shall be an active participant in or substantial financial contributor to the activities, and shall approve the activities in writing.

(b) Highlands general permit 1 authorizes any of the following:

1. A fish and/or wildlife management plan created or approved by the Department's Division of Fish and Wildlife;
2. A project plan approved under the Partners for Fish and Wildlife program, administered by the U.S. Fish and Wildlife Service;

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3. A project plan created by the U.S. Department of Agriculture's Natural Resources Conservation Service under the Wetlands Reserve program, the Conservation Reserve program, the Conservation Reserve Enhancement program, the wildlife habitat incentive program (WHIP), or a similar program, and approved by the local Soil Conservation District;
4. A plan approved by the Department's Office of Natural Resource Damages for the restoration, creation or enhancement of natural resources injured as the result of an oil spill or release of a hazardous substance;
5. A mitigation project required by and approved by a government agency, such as the U.S. Army Corps of Engineers;
6. A habitat creation or enhancement plan carried out by the New Jersey Water Supply Authority;
7. A habitat creation or enhancement plan carried out by one of the Federal or State agencies at 1 through 6 above or by a government resource protection agency such as a parks commission; or
8. A habitat creation or enhancement plan carried out by a charitable conservancy, as defined at N.J.A.C. 7:7A-15.1, provided that the plan is part of a program listed at 2 through 5 above.

(c) To be eligible for authorization under Highlands general permit 1, an applicant shall demonstrate that the proposed project:

1. Is part of a comprehensive plan for the restoration, creation or enhancement of the habitat and water quality functions and values of Highlands open waters and their buffers;



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2. Is sponsored or partially funded by an appropriate entity in accordance with (b) above;
3. Is consistent with the goals of the Highlands Act;
4. Will improve the values and functions of the ecosystem; and
5. Will have a reasonable likelihood of success.

(d) Highlands general permit 1 does not authorize an activity unless the sole purpose of the activity is habitat creation or enhancement. For example, general permit 1 does not authorize construction of a detention basin in wetlands for stormwater management, even if the detention basin or the project of which the basin is a part will also result in habitat creation or enhancement. Similarly, Highlands general permit 1 does not authorize a flood control project that may also result in creation or enhancement of some wildlife habitat.

(e) Habitat creation and enhancement activities that are authorized by Highlands general permit 1 include, but are not limited, to the following:

1. Altering hydrology to restore or create wetlands conditions, such as by blocking, removing, or disabling a human-made drainage ditch or other drainage structure such as a tile, culvert or pipe;
2. Breaching a structure such as a dam, dike or berm in order to allow water into an area;
3. Placing habitat improvement structures such as:
  - i. Nesting islands;

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ii. Fencing to contain, or to prevent intrusion by, livestock or other animals; and

iii. Fish habitat enhancement devices or fish habitat improvement structures such as placed boulders, stream deflectors, or brush piles;

4. Regrading to provide proper elevation or topography for wetlands restoration, creation, or enhancement; and

5. Cutting, burning or otherwise managing vegetation in order to increase habitat diversity or control nuisance flora.

(f) Activities under Highlands general permit 1 shall meet the following requirements:

1. The activities shall disturb the minimum amount of Highlands open waters and buffers necessary to successfully implement the project plan and shall result in an improvement to aquatic habitat or buffer quality above existing conditions. The removal of a dam to relocate or alter the character of a Highlands open water is permitted so long as there are net gains in habitat functions and values;

2. The activities shall not decrease the total combined area of Highlands open waters and/or buffers 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 different types of Highlands open waters such as wetlands to open water areas or buffer, conversion of open water areas to wetlands or buffers, or the conversion of buffers to freshwater wetlands or open water area, if the Department determines that such conversion is environmentally beneficial;

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3. The area of habitat enhancement or creation shall be protected from any future development by a recorded conservation restriction;
4. The activities shall not disturb upland forested areas as described at N.J.A.C. 7:38-3.9;
5. The activities shall not reduce the stability of any steep slopes as described in N.J.A.C. 7:38-3.8;
6. The activities shall meet all of the applicable standards at N.J.A.C. 7:38-3.7;
7. The activities shall not disturb or degrade unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes as set forth in N.J.A.C. 7:38-3.12;
8. The activities shall not result in the likelihood of the destruction or adverse modification of rare, threatened or endangered animal or plant species habitat; and
9. If the activities involve the removal of a dam:
  - i. The activities shall be conducted in accordance with a permit issued pursuant to N.J.A.C. 7:20 by the Department's Dam Safety Section in the Division of Engineering and Construction;
  - ii. If a dam is removed 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 covering the lake bottom area. The conservation restriction 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 shall include the land covered by the lake bottom, and all

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associated wetlands, as they exist at the time the dam is removed. When the conservation restriction expires, the Department's jurisdiction under this chapter shall be based on existing conditions on the site;

(g) There is no fee for an application for authorization under Highlands general permit 1.

(h) If a project complies with Highlands general permit 1 and also includes an activity covered under another Highlands general permit, the entire project shall be authorized through Highlands general permit 1 and shall not require authorization under the other general permit, provided that each activity covered by another general permit complies with that general permit's requirements and limits. For example, if a habitat creation project includes bank stabilization activities, and meets all requirements of Highlands general permit 2, the Department may authorize the project under Highlands general permit 1 alone.

(i) If an activity is exempt under this chapter pursuant to N.J.A.C. 7:38-2.3, it shall not require authorization under Highlands general permit 1 solely by virtue of being conducted as part of a program included in (b) above. For example, if a farmer proposes a habitat enhancement project that is eligible for authorization under Highlands general permit 1, but some of the proposed activities meet the definition of agricultural or horticultural use and are thereby not considered major Highlands development, those activities do not lose their exempt status merely by virtue of being part of a project authorized under Highlands general permit 1.

#### 7-38-14.2 Highlands General Permit 2 - Bank Stabilization

(a) Highlands general permit 2 authorizes activities in Highlands open waters and/or their buffers that are necessary to stabilize the bank of a water body in order to reduce or prevent erosion through the use of bioengineering techniques. Examples of bank stabilization activities using bioengineering are the placement of root wads, tree revetments, or vegetative geogrids along a stream bank. Highlands general permit 2 does

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not authorize stabilization that involves hard structures such as gabions or rip-rap, the channelization of a stream, construction of an entirely new stream channel or the stabilization of the bottom of the stream. Projects involving these activities require an HPA.

(b) The applicant shall use vegetative or bioengineering stabilization methods.

(c) The total cumulative length of water body bank affected by bank stabilization activities under Highlands general permit 2 shall meet the applicable length limit below. 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 soil bioengineering could disturb one bank of a stream for a distance of 300 feet, or both banks for 150 feet. The applicable length limits are as follows:

1. 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. The document can be obtained at [www.info.usda.gov/CED/ftp/CED/EFH-Ch16.pdf](http://www.info.usda.gov/CED/ftp/CED/EFH-Ch16.pdf). For the purposes of this chapter, rip-rap joint plantings do not qualify as soil bioengineering; and
- ii. Soil bioengineering systems not included in (c)2i above but approved by the Department in writing, which are appropriate to the site and which provide environmental benefits similar to those provided by the measures in (c)2i above. Examples of such measures are the placement of coconut fiber rolls or sand filled textile containers parallel to the shoreline of a stream bank;

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2. For bank stabilization activities that involve bioengineering in association with a Watershed Restoration plan approved by the Department's Division of Watershed Management, the length limit shall be no more than 500 feet of stream bank. A list of approved plans is available from the Division of Watershed Management; or

3. There is no length limit for vegetative planting measures for stream bank stabilization set forth at, and performed in accordance with, 650.1601(d)(1) in Chapter 16 of the NRCS Engineering Field Handbook, published December 1996 and as amended and supplemented.

(d) The bank stabilization activities described in (c) above may be combined. For example, a bank stabilization project might involve 100 feet authorized under (c)1 or 2 above, and 400 feet of vegetative planting measures authorized under (c)3 above.

(e) Activities under a Highlands general permit 2 shall meet the following requirements:

1. The activities shall not result in the likelihood of the destruction or adverse modification of rare, threatened or endangered animal or plant species habitat;

2. Activities shall not impair surface water flow into or out of any wetland area;

3. If Highlands open waters or buffer must be disturbed to provide access to stabilization activities, the area disturbed shall be the minimum necessary, and shall be no wider than 20 feet at any point;

4. The Department shall allow replacement of previously eroded material as part of the bank stabilization only if the applicant demonstrates that such replacement would be environmentally beneficial;

5. Activities shall comply with the Standards for Soil Erosion and Sediment

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Control in New Jersey at N.J.A.C. 2:90;

6. The activity shall be a single and complete project, not associated with any other regulated activity that does not qualify for a general permit. For example, the bank stabilization activity cannot be conducted at the same location as a linear development;

7. The amount of stabilization material placed shall be the minimum necessary to prevent erosion, and shall not exceed 150 cubic yards of fill below the top of bank or high water mark, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90;

8. The activities shall not result in the permanent loss of any upland forested areas as described at N.J.A.C. 7:38-3.9;

9. The activities shall not reduce the stability of any steep slopes as described in N.J.A.C. 7:38-3.8;

10. The activities shall meet with all of the applicable standards at N.J.A.C. 7:38-3.7;

11. The activities shall not disturb or degrade unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes as set forth in N.J.A.C. 7:38-3.12;

12. All vegetation planted as a part of stabilization activities shall be native, non-invasive plant species; and

13. All proposed activities shall be consistent with the goals of the Highlands Act.