

# RULE ADOPTIONS

## ENVIRONMENTAL PROTECTION

(a)

### HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL

#### Highlands Open Space Partnership Funding Program and Highlands Development Credit Purchase Program

#### Adopted New Rules: N.J.A.C. 7:70

Proposed: August 17, 2015, at 47 N.J.R. 2025(a).

Adopted: February 18, 2016, by the New Jersey Highlands Water Protection and Planning Council, Margaret Nordstrom, Executive Director.

Filed: March 14, 2016, as R.2016 d.034, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:20-6.y.

Effective Date: April 18, 2016.

Expiration Date: April 18, 2023.

#### Summary of Hearing Officer's Recommendations and Agency's Response:

The public hearing was held on September 17, 2015 at the Highlands Council offices, 100 North Road, Chester, New Jersey. The following persons or entities offered testimony at the public hearing: Ingrid Vandegaer, New Jersey Conservation Foundation; Elliott Ruga, New Jersey Highlands Coalition; Wilma Frey, New Jersey Conservation Foundation; Stephen Shaw, New Jersey Builders Association; Kenneth Collins, Green Party; Hank Klumpp; Helen Heinrich, New Jersey Farm Bureau; William S. Kibler, Raritan Headwaters Association; Deborah Post; David Shope; and Robert Ross, New York/New Jersey Trails Conference. Executive Director of the Highlands Council, Margaret Nordstrom presided at the hearing. The hearing officer recommended that the Council adopt the proposed new rules with non-substantial changes as summarized below. The comments and responses to the testimony at the public hearing are included with the written comments below. A record of the public hearing is available for inspection in accordance with applicable law by contacting:

New Jersey Highlands Council  
Executive Director Margaret Nordstrom  
100 North Road  
Chester, New Jersey 07930

#### Summary of Public Comments and Agency Responses:

In addition to the comments received at the public hearing (as noted above), the following persons and entities submitted written comments.

1. Ingrid Vandegaer, New Jersey Conservation Foundation
2. Wilma Frey, New Jersey Conservation Foundation
3. William S. Kibler, Raritan Headwaters Association
4. Deborah Post
5. David Shope
6. Jean Public
7. Patricia Ruby, Hunterdon Land Trust
8. David Peifer, Association of New Jersey Environmental Commissions (ANJEC)
9. David K. Dech, Warren County Planning Board
10. Carol Ann Short, Esq., New Jersey Builders Association
11. Chuck Urban
12. Ryck Suydam, New Jersey Farm Bureau
13. Susan E. Payne, State Agricultural Development Committee (SADC)
14. Julia Somers, New Jersey Highlands Coalition

15. Christine Marion, Morris County Planning Board
16. David Epstein, The Land Conservancy of New Jersey and Edward Goodell, New York/New Jersey Trails Conference

1. COMMENT: Comments were submitted that the language in N.J.A.C. 7:70-3.3(d) is subject to confusion and needs to be clarified. Specifically, these comments point out that the reference in the proposed new rules to appraisals "containing values detailing the pre- and post-Highlands Act values" can be read as meaning that values will be determined as of two different time frames: one "pre-Act" (that is, 2004) and one for current market value.

RESPONSE: The comments are correct that the language could potentially be misconstrued to suggest that values will be determined as of two different time frames. This is, of course, not what is intended by the proposed new rules. The intent is to track the language of the statutes for the dual appraisal methodology. In response to these comments, the rule has been revised to clarify that the two values shall be "in accordance with N.J.S.A. 13:8C-26.j(1) or 38.j(1)." The revised language now clearly indicates that the appraisal procedure shall conform with the language of the applicable statutes. The change is not substantive in nature and was made to more clearly state the requirements of the rule.

2. COMMENT: The commenters stated that N.J.A.C. 7:70-3.3(d) should state that the "applicant" and not the "owner" is the party responsible for obtaining appraisals.

RESPONSE: The commenters are correct. It was always the intent of the rule that the "applicant" and not the "owner" will be responsible for obtaining the appraisals and the rules have been so clarified.

3. COMMENT: The Council should use Green Acres Program-approved appraisers and surveyors.

RESPONSE: The Open Space Matching Grant program will accept the use of Green Acres and SADC-approved appraisers and surveyors but will not require that they be used, provided that the appraiser is licensed by the State Real Estate Appraiser Board.

4. COMMENT: Applicants should be required to provide property owners only with the appraisal page of the appraisal, not the entire document. Applications should be required to include only a single appraisal.

RESPONSE: The Highlands Council is not certain of the intent of this comment. However, the proposed rules do not require appraisals to be submitted at the time of application and do not require that copies of appraisals be submitted to property owners. In addition, applicants are not required to submit more than one appraisal, however, the appraisal must be in accordance with N.J.S.A. 13:8C-26.j(1) or 38.j(1).

5. COMMENT: At N.J.A.C. 7:70-3.3(d), appraisers approved by the New Jersey Department of Environmental Protection (NJDEP) Green Acres Program or the State Agricultural Development Committee represent a gross conflict of interest to applicants. So-called "approved" appraisers know, without being told, that it is their job to undervalue properties if the appraiser is to maintain his or her State "approved" status. Applicants must not be incentivized to use professionals sitting on the other side of the table, akin to having the prosecutor double as one's defense attorney. Reasonable costs must be provided for all appraisers holding bona fide appraisal certifications from the Appraisal Institute (with the State appraisal license (issued to those without even a higher education degree) being insufficient appraisal qualification).

RESPONSE: The approval of appraisers by the NJDEP and SADC is beyond the scope of this rulemaking, and no response to it is required. Moreover, the Highlands Council does not require the use of NJDEP- or SADC-approved appraisers. The Highlands Council has decided that no administrative, or soft costs, associated with applications will be reimbursed, including the reimbursement of the basic appraisal costs for any appraisers. However, if the dual appraisal method under N.J.S.A. 13:8C-26.j(1) or 38.j(1) results in costs above the general appraisal costs, the Council will reimburse only those additional reasonable costs, and then only for an NJDEP- or SADC-approved appraiser. So, for instance,

if the base cost of an appraisal is \$300.00, the Council will not reimburse that \$300.00 cost. However, if the dual appraisal method under N.J.S.A. 13:8C-26.j(1) or 38.j(1) results in an increase of the cost of the appraisal from \$300.00 to \$350.00, the Council will reimburse the additional \$50.00 cost, so long as it is reasonable, and so long as the appraisal is done by an NJDEP- or SADC-approved appraiser.

6. COMMENT: Comments were submitted stating that the [dual appraisal, N.J.S.A. 13:8C-26.j(1) or 38.j(1)] statute uses the term “qualifying tax exempt nonprofit organization.” The proposed rule uses the term “charitable conservancy.” We recommend the rule be redrafted throughout to be consistent with, and use the same terminology as, the statute.

RESPONSE: The rules define “charitable conservancy” as “a corporation or trust exempt from Federal income taxation under paragraph (3) of subsection (c) of section 501 of the Federal Internal Revenue Code of 1986 (26 U.S.C. § 501(c)(3)), whose purpose includes the acquisition and preservation of lands in a natural, scenic, or other open condition,” therefore, no change is needed.

7. COMMENT: Comments were received requesting the underlying source for the following statement made within the Economic Impact statement: “It is estimated that for every \$1.00 invested in land preservation there is a \$10.00 return in economic value.”

RESPONSE: The impact statement language was based on an economic study conducted by the Trust for Public Land (TPL) for a November 2009, open space bond. The analysis referred to in the rule was based on the future economic benefits of the New Jersey land conservation bond and indicated an expected 10:1 return on the public’s investment.

8. COMMENT: Jobs Impact. The statement that the proposed new rules are not expected to cause the loss of any jobs is false. Preserved land reduces the potential of financially productive real property use (as noted in other portions of the commenter’s comment). Preserved land does not sustain business activity or promote economic growth. Land put into conservation is non-productive by definition. Simply, there is no job creation on preserved land. The jobs impact of the proposed rulemaking is harshly negative.

RESPONSE: The preservation of open space creates increased opportunities for tourism and recreation in the region and, therefore, may create a potential increase in jobs in the region.

9. COMMENT: We noticed numerous irregularities and inconsistencies within the individual impact analyses statements, including statements related to Federal funding sources.

RESPONSE: The Highlands Council believes all the impact statements to be correct. The impact statements become final upon publication of the notice of proposal.

10. COMMENT: The Economic Impact statement should include the positive benefits of eco- and agri-tourism.

RESPONSE: The rulemaking provides a summary of the economic benefits of preserving open space and providing for additional tourism related opportunities, including statements regarding that the economic return on investment and the preservation of land will, in addition, increase opportunities for outdoor and wildlife related recreation in the State of New Jersey, which accounts for an estimated \$3.1 billion in economic activity and supports approximately 37,000 jobs Statewide.

11. COMMENT: In the Federal Standards Statement, there are some incorrect statements about Federal studies proceeding enactment of the Highlands Act. The Federal 2002 update of the 1992 Highlands – New York/New Jersey Highlands regional study, led to the passage of the New Jersey Highlands Act, as well as the Federal Conservation Act.

RESPONSE: The Highlands Council agrees with this comment and will correct the Federal Standards Statement in the notice of adoption to include a reference to the year 2002 update.

12. COMMENT: Impact Analyses. There is no “Environmental Impact” discussion provided. In particular the impact on future water quality and quantity should be discussed.

RESPONSE: An Environmental Impact statement or discussion is not required as part of the rulemaking process as set forth by the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. However, the Highlands Council believes that the preservation of land under the

chapter will have a positive impact on the future water quality and quantity of the region.

13. COMMENT: Comments were received expressing concern regarding the staffing and administrative capabilities of the Highlands Council to administer this program and requesting that one staff person be designated as a point of contact.

RESPONSE: The Highlands Council has prepared this chapter with the staff and administrative capacities in mind. The program is a matching funding source and will utilize other funding programs’ review and application procedures to limit administrative demands. The Highlands Council will designate a staff person to serve as a point of contact, who will be identified on the Highlands Council’s website.

14. COMMENT: Comments were received requesting that the program provide for the applicant’s “soft costs” or administrative costs.

RESPONSE: The Highlands Council has determined that, in order to maximize the purchasing power of the program, available funding should only be provided directly to the purchase of properties. However, the Highlands Council will provide for reasonable costs associated with the obtaining of any additional appraisals required under the “dual appraisal” statutes.

15. COMMENT: One comment appeared to be addressed to N.J.A.C. 7:70-1.4, Relaxation of procedural requirements, and suggests that such a provision is subject to abuse and favoritism.

RESPONSE: By its terms, N.J.A.C. 7:70-1.4 can only be exercised if it is consistent with the Act and the Regional Master Plan (RMP), and then, only for good cause shown, and it cannot be used to waive any statutory requirements, legislative mandates, or substantive requirements of the chapter.

16. COMMENT: Comments were submitted suggesting modifications to the deadlines and timeframes, both for the application and closing processes, and expressing concern that the deadlines and timeframes were too short.

RESPONSE: The Highlands Council proposed the timeframes in the new rules after a review of existing open space programs in the region. As a matching funding source, the Highlands Council expects to be involved in the acquisition process later in the process and, therefore, believes that the timeframes provided in the rules are adequate and appropriate.

17. COMMENT: N.J.A.C. 7:70-3.2(d)3. Explain what happens after the 60-day extension period ends. If the application is not deemed complete at that point, is it considered rejected?

RESPONSE: Yes, the application would be rejected. However, the applicant could reapply. In addition, the applicant may benefit from N.J.A.C. 7:70-1.4, Relaxation of procedural requirements.

18. COMMENT: Commenters recommended the adoption of timeframes for application and the designation of a point of contact to ensure the timely administration of the program.

RESPONSE: The Highlands Council intends to accept applications with deadlines. Because they are in part dependent on uncertain future funding, the number of application rounds is not set forth in the new rules, and will be adopted by the Highlands Council and the Highlands Development Credit (HDC) Bank under separate resolutions. The Transfer of Development Rights Coordinator is the point of contact for the HDC Program, and the Highlands Council will designate a single staff person to serve as the point of contact for the Open Space Matching Grant program.

19. COMMENT: Comments were received asking for the definition of mitigation.

RESPONSE: The definition of mitigation in the rule is not intended to provide a guide for what may constitute mitigation for a specific project, but rather to provide a definition as to what funding sources may be considered to have come from mitigation.

20. COMMENT: Commenters expressed concern regarding the lack of specific criteria related to the mitigation priority found in N.J.A.C. 7:70-3.3(b)5 and the priority related to future mitigation projects approved by the Highlands Council under its project review authority.

RESPONSE: The Highlands Council agrees that N.J.A.C. 7:70-3.3(b)5 is related to future mitigation programs that may result from a project review for consistency with the RMP. The impacts a specific project may have on Highlands resources cannot be known until the project has been

submitted and reviewed by the Highlands Council. Once project impacts are assessed, the Highlands Council may approve a Comprehensive Mitigation Plan (CMP) that would outline the mitigation proposed to address those impacts. As a result, mitigation criteria will be determined by the Highlands Council at the time of approval, under the Council's project review authority and shall be documented in a resolution adopted by the Highlands Council and in any CMP approved by the Council. For example, the Susquehanna-Roseland Transmission Line Project will prioritize the proximity to the project and the protection of scenic resources as a mitigation priority due to the mitigation goals outlined in the approved CMP.

21. COMMENT: The third paragraph of the Summary of the proposed new rules should be amended to include the names of the "linear development/utility projects" being used to fund the effort.

RESPONSE: The project referenced is the Susquehanna-Roseland Transmission Line Project that was reviewed and determined to be consistent with the Regional Master Plan by the Highlands Council under Resolution 2009-45.

22. COMMENT: A commenter expresses concern that the initial mitigation funding is not being used for its intended purposes.

RESPONSE: The Comprehensive Mitigation Plan for the Susquehanna-Roseland Transmission Line Project (CMP) specifically anticipates acquisition of lands with the mitigation funding. The CMP states as follows: "As part of the CMP for the Project, PSE&G would make a contribution to the Highlands Council to be used to protect the existing character of the Highlands Region ... Based upon current land values, it is estimated that the proposed contribution would support the acquisition and stewardship of over 2,500 acres of lands within the Highlands Region in the vicinity of the Project."

23. COMMENT: Numerous comments were received on the new rules that made a variety of suggestions about specific language that should be included in any easements acquired by the Highlands Council as a result of the two programs established in the new rules.

RESPONSE: The new rules do not specifically stipulate the nature, extent, or language of any easements obtained by the Highlands Council as a result of the two programs established. The Highlands Council staff will carefully review the contents of any proposed easement and consider all of the comments submitted regarding language, requirements, and preparation of deeds of easement for the Open Space Program.

A deed of easement will include the resources protected, permitted and prohibited activities, and any new activities that may be permitted, if applicable, as well as appropriate "Whereas" recital clauses, definitions, and procedural provisions. The Open Space Matching Grant Program will not have a proscribed deed format, but will include language to ensure consistency with any Highlands Council funding requirements, and the goals, policies, and objectives of the RMP. Under the HDC Program, the Highlands Council provides four types of model easements, each having been devised for a specific conservation or agricultural situation; these have been previously reviewed by the Highlands Council after public comment. The new rules do not preclude additional resource safeguards being added to the easements to realize project purposes.

24. COMMENT: A commenter requests that N.J.A.C. 7:70-3.3(c) only apply if the easement/fee is NOT being preserved through the SADC's Farmland Preservation Program (FPP); otherwise, this provision will make the Highlands Council's rules incompatible with the SADC's rules.

RESPONSE: The Highlands Council program will proceed within the legal requirements of the matching outside funding program under which the development rights are acquired and, therefore, will accept the easement language of the SADC and Green Acres. However, the program does require that the State of New Jersey be included as a party to any easement. A definition of the "State of New Jersey" has been added to the rule upon adoption, as discussed further in the Response to Comment 62.

25. COMMENT: Comments were received requesting that the acquisition of property interest in fee simple, the acquisition of a conservation easement, or the acquisition of an agricultural easement be defined.

RESPONSE: The fee simple acquisition is the complete purchase of a property, the acquisition of a conservation easement is the purchase of the development rights of a property to prevent future development to protect environmental resources, and the purpose of the acquisition of an

agricultural easement is to limit the future development and use of the property to agricultural uses only. A definition of conservation easement has been added to the chapter, the term agricultural easement is not included in the chapter. For the purposes of the chapter, the term conservation easement is inclusive of the term agricultural easement. The draft rule contained three terms related to the method of land preservation; "deed restriction," "development easement," and "conservation easement." To clarify that these terms were the same, they have been combined into the term "conservation easement."

26. COMMENT: Comments were received expressing concern that a simple development restriction may not be adequate to protect the Highlands resources present on the property. Damage to natural resources may occur from other activities. A "base-line" inventory should be produced as part of the acquisition process. This inventory should provide a full description of the property's attributes and specifically discuss the Highlands resources present.

RESPONSE: As part of the review process of any application, under either the Open Space Matching Grant Program or the HDC Purchase Program, the Highlands Council will review the existing conditions and environmental constraints on the property and will conduct a staff site inspection and create a photographic record to assist monitoring of any easements.

27. COMMENT: At N.J.A.C. 7:70-3.2, is the term "deed restrictions" intended to mean "conservation easement"?

RESPONSE: The Highlands Council is revising the language at N.J.A.C. 7:70-3.1(b)2 to replace the term "development easements" with "conservation easements" and the language of N.J.A.C. 7:70-3.2(b)2vii to replace the term "deed restriction or easement" with "conservation easement."

28. COMMENT: All entities that contribute funds towards the purchase of easements or fee simple acquisitions (that is, local, county, or State government) shall have their name on the easement or deed as a "lienholder" or legal equivalent.

RESPONSE: It is not the Highlands Council's responsibility to require that every funding source be made a lienholder on any easement or deed. To make certain that the requirements of the rules, the Highlands Act, and the RMP are met, the Highlands Council will hold the easement under the HDC Purchase Program. For the Open Space Matching Grant Program, the applicant will hold the easement or the fee simple title to the property; however, the State of New Jersey shall be included as a party to the easement.

29. COMMENT: At N.J.A.C. 7:70-4.3(a)3ii, a conservation restriction on a harmed landowner's property must never be in favor of a conservation organization. A harmed Highlands landowner must never be made the ward of the environmental extremists who control the conservancies. The harmed Highlands landowners have suffered enough without having Jeff Tittle being given full access to their private backyard. There is not one rational Highlands landowner who would execute a conservation restriction that allowed an environmental conservancy to dictate his or her care and stewardship of his or her private home and property. The proposed rule de facto ensures that no harmed landowner will receive compensation because the proposed rule sets up a program that is unacceptable and untenable.

RESPONSE: The conservation easement under HDC Purchase Program would be to the Highlands Council, not a conservation organization. In addition, the HDC Purchase Program is wholly voluntary.

30. COMMENT: At N.J.A.C. 7:70-1.2, please clarify "acquisition of land for passive recreation and conservation purposes." The intent of the rule seems to be to acquire fee simple or an easement interest in land.

RESPONSE: Acquisition of land would include the fee simple acquisition of land or the acquisition of an easement interest in the land in accordance with N.J.A.C. 7:70-3.1. Passive recreation is defined as non-motorized outdoor recreational activities, such as nature observation, hiking, biking, and canoeing or kayaking, that require a minimum of physical facilities or structures, and that have minimal environmental impact on natural resources.

31. COMMENT: Commenters stated that the Highlands Council must be sure that it has clear title in any easement closing, that existing title and survey processes used and approved by Green Acres and SADC

should be utilized, and that the title work is not conducted until funding sources are committed and landowners have accepted offers.

RESPONSE: Title searches are required under both programs established by the rulemaking. The Highlands Council will only accept the title searches that meet SADC and Green Acres program procedures. As the Highlands Council is a matching funding source, it is anticipated that most of the ground work for applications will already have been completed by the time of application.

32. COMMENT: At N.J.A.C. 7:70-3.1, Eligibility, purchase of the remaining fee interest of properties with conservation easements should be specifically allowed since fee acquisition is often necessary for effective conservation. Conservation easement purchases should include the "right of first refusal."

RESPONSE: Where development potential remains on a property, the purchase of the underlying fee interest of a property by the applicant may be eligible, if the remaining development rights on the property meet the applicable requirements of the proposed rule. Where a property has been permanently preserved and there is no remaining development potential to purchase, that property would not be eligible. Regarding the "right of first refusal," the right would belong to the applicant under the Open Space Matching Grant program.

33. COMMENT: In the closing process, the Executive Director should authorize payment to the applicant rather than to the property owner. This ensures proper distribution of funds to all parties at closing.

RESPONSE: Due to the Highlands Council powers being limited to the purchase of development rights, the Highlands Council must provide payment directly to the property owner.

34. COMMENT: Deed of easement should be revised to reflect only what is being purchased, the build rights. This will make monitoring a simple municipal function.

RESPONSE: The Highlands Council and any applicant will be responsible to monitor any easements. It is not the Highlands Council's intention to require any municipality or any other party to monitor easements to which they are not a party.

35. COMMENT: Commenters requested that previously preserved properties [which have no remaining development potential] be eligible to apply for funding.

RESPONSE: Due to the limited amount of funding the Highlands Council has determined to preclude previously purchased properties at this time.

36. COMMENT: At N.J.A.C. 7:70-3.1(b)1, the fee simple acquisition of land for farmland preservation purposes should be a permitted use of the funds.

RESPONSE: An application for the fee simple acquisition of farmland limited to agricultural purposes is permitted.

37. COMMENT: Several commenters questioned why the rules state that the Highlands Council will only acquire development rights and whether an application proposing the fee simple acquisition of property would be an eligible activity.

RESPONSE: The powers granted the Highlands Council under the Highlands Act restrict the Highlands Council to the purchase of development rights. Therefore, although an application submitted under the Open Space Matching Grant program could propose the fee simple acquisition of the property by another party, the Highlands Council cannot acquire the fee simple title to the property. The Highlands Council's contribution would only be to acquire development rights.

38. COMMENT: We recommend you redraft N.J.A.C. 7:70-3.3(e)1 to read, "The Highlands Council **may** provide a maximum award of up to 50 percent of the total purchase price of the property, towards the acquisition of the development rights."

RESPONSE: A change in the language is not required because the Council's use of the word "shall" here is meant to be coterminous with the word "may" given the context of the sentence. The language states the Highlands Council "shall" provide a maximum grant award of up to 50 percent of the total purchase price of the property, for the acquisition of the development rights. An applicant may request a sum up to that amount as part of the application. However, the Highlands Council is not bound to provide all of the funding requested by the applicant, as is evidenced by the phrase of "up to 50 percent." The Council may provide less than 50 percent of the total purchase price of the property.

39. COMMENT: At N.J.A.C. 7:70-3.3(e)1, clarity is needed that the grant maximum is 50 percent of the purchase price of the fee simple value, conservation easement value, or agricultural easement value, and not simply 50 percent of the development rights.

RESPONSE: The rule clearly states that the Highlands Council intends to provide up to 50 percent of the total purchase price of the property. N.J.A.C. 7:70-3.3(e)1 states the Highlands Council will provide a "maximum award of up to 50 percent of the total purchase price of the property."

40. COMMENT: At N.J.A.C. 7:70-3.3(e)1, how will the Highlands Council determine the value upon which its cost share is based?

RESPONSE: The Highlands Council will determine the value of the property based upon qualified appraisals conducted and submitted by the applicant.

41. COMMENT: At N.J.A.C. 7:70-3.3(g), what will be the Highlands Council's role in reviewing documents for closing?

RESPONSE: As a matching funding source, the Highlands Council will ensure that the property is appropriately preserved and with clear title. Moreover, the Highlands Council will rely primarily on the requirements and reviews conducted by other State agencies.

42. COMMENT: Only when an application is approved, should the title, environmental review, and other documentation be required. These items are expensive to prepare and are only relevant once a project is approved.

RESPONSE: The Highlands Council agrees. These items are not required at the time of application, but are part of the Highlands Council's review prior to closing.

43. COMMENT: Commenters expressed concern about the lack of long-term funding for the program and encouraged the Highlands Council to continue to seek a long-term funding source for the program.

RESPONSE: The Highlands Council will continue to seek additional funding for the program. The initial Open Space Matching Grant Program funding is derived from the mitigation associated with the Susquehanna-Roseland Transmission Line Comprehensive Mitigation Plan. The Highlands Council has consistently supported a dedicated source of funding to support protection of the important watershed lands of the Highlands Region, including the possibility of a water fee (Resolutions 2005-18, 2006-22, 2008-13, 2009-51, and 2013-10).

44. COMMENT: In some cases, a partial donation, known as a "bargain sale" can prove beneficial in both the Federal income tax and estate tax. The Council should consult with and advise potential applicants of these benefits. The "pre-Act values" allowed in New Jersey may not be recognized by the I.R.S. for tax purposes, if used by an applicant to document the value of a total or partial donation of value.

RESPONSE: The donation or taxable value of any property is beyond the scope of the rulemaking, and is the owner's responsibility. Any tax impacts related to the rulemaking are beyond the authority and expertise of the Highlands Council.

45. COMMENT: A commenter expressed a concern that the rules would require increased spending and taxation.

RESPONSE: The rules do not propose added taxation or result in any added taxation.

46. COMMENT: Commenters expressed concern regarding the lack of implementation of the Highlands TDR Program and the implementation of TDR Receiving Areas.

RESPONSE: Pursuant to the Highlands statutes, the Highlands Council, and the HDC Bank continue to advocate for voluntary receiving zones where the purchased credits may be sold.

47. COMMENT: It is unclear how the proposed rules differ, supplement, or complement the existing Highlands Development Credit [Initial] Purchase Program.

RESPONSE: The Highlands Development Credit Purchase program succeeds the existing Highlands Development Credit Initial Purchase Program. The HDC Purchase Program will utilize the same administrative processes as set forth in the HDC Bank's operating procedures.

48. COMMENT: Comments were submitted regarding the allocation of Highlands Development Credits for commercial properties and expressing concern that the valuation of Highlands Development Credits is not accurate.

RESPONSE: The allocation of HDCs will continue to follow the methodology established in the RMP and the RMP Technical Reports. The value of a credit is set by the HDC Bank, and the basis for the valuation can be found in the 2008 RMP Technical Reports.

49. COMMENT: Commenters stated that individual private property owners would not be eligible to participate in the programs created by the chapter.

RESPONSE: Although the applicants for the Open Space Matching Grant program are limited to government and non-profit entities, the preserved properties are likely to be owned by private individual land owners. In addition, the HDC Purchase Program is available for individual property owners.

50. COMMENT: Commenters questioned whether land outside the Highlands Region is eligible for open space funding.

RESPONSE: Only land within the Highlands region is eligible. N.J.A.C. 7:70-3.1(b) states "Properties and activities within the Highlands region eligible for consideration of funding ... include: ..."

51. COMMENT: A diversion process similar to Green Acres should be included.

RESPONSE: As a secondary funding source, the Highlands Council will not be the primary title holder of any property. Therefore, the Highlands Council has determined that it is not necessary to include a diversion process in the new rules, as the primary title holder will be the entity responsible for any needed diversion process.

52. COMMENT: There should be some recourse for appeal to the Highlands Council for the landowner, if some aspect of the relationship with the "applicant" is unsatisfactory.

RESPONSE: The Highlands Council intends to serve as a matching funding source and does not anticipate involvement in negotiations between a property owner and the applicant.

53. COMMENT: The specific methodologies used to produce N.J.A.C. 7:70 Appendices A, B, and C and to identify "agricultural preservation priority areas," "conservation preservation priority areas," and the "special environmental zone," should be incorporated by reference.

RESPONSE: These mapped areas are taken directly from the adopted Regional Master Plan, and are referenced as such in N.J.A.C. 7:70-2.1, Definitions. The definition for these items in the rules include specific references to sections of the RMP. Agricultural preservation priority areas are those areas identified in Figure 5.3 in the RMP as agricultural priority areas. Conservation preservation priority areas are those areas identified in Figure 5.1, in the RMP as conservation priority areas. Special environmental zones are those areas identified in Figure 5.2 in the RMP as special environmental zones.

54. COMMENT: Comments were received questioning how the Highlands Council will track and publish information regarding applications, approval of applications, actions taken by the Highlands Council and HDC Bank, and any purchase of properties under the chapter.

RESPONSE: The Highlands Council currently maintains a tracking sheet of all HDC applicants and HDC purchases; the sheet is available on the Highlands Council's website. The Highlands Council will continue to update these tracking sheets and will supplement them to track all Open Space Matching Grant applications received and all actions taken. The tracking sheet will include all complete applications that are submitted. In addition, all resolutions adopted by the Highlands Council and the HDC Bank are available on the Highlands Council's website.

55. COMMENT: The Council should publish on its website a reference list of all the eligible properties by tax lot and block that are depicted on the maps of "agricultural preservation priority areas," "conservation preservation priority areas," and "special environmental zone areas," as depicted in N.J.A.C. 7:70 Appendices A, B, and C.

RESPONSE: Mapping for these designations is available at a Block and Lot level on the Highlands Council's interactive mapping tool available on the Highlands Council's website.

56. COMMENT: Property owners in the Highlands should have received mailings regarding the proposed new rules.

RESPONSE: The Highlands Council's rulemaking complies with all notice requirements under the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. In addition, the Highlands Council sent two emails to

the Highlands "list-serv" email subscribers. The Highlands Council also posted notices of the public hearing, notice of the publication of the new rules, posted a copy of the proposed open space rules on the Council's website, and provided notice of the rules to five area newspapers.

57. COMMENT: For the Landowner Equity and Land Preservation Committee or the Land Preservation Committee, the number of members and their respective qualifications should be defined.

RESPONSE: The Landowner Equity and Land Preservation Committee is a committee established by the chairperson of the Highlands Council, who is given that authority pursuant to the Council's adopted bylaws, and, as such, there is no set number of members of qualifications for the Committee because that authority is expressly given to the chairperson of the Council in the Council's bylaws. The Committee only makes recommendations; all final actions taken under the rules will be by the Highlands Council or the HDC Bank at a public meeting.

58. COMMENT: Commenters expressed concern that the public would not have an opportunity to comment on any applications until the applications have been vetted and recommendations have been provided by the Landowner Equity and Land Preservation Committee.

RESPONSE: Highlands Council Committee meetings are not open to the public. However, the recommendations and findings of the Committee will be made available to the public and no final action is taken by any Committee. The Committee's summary of the report and findings, including its recommendation are presented to the Highlands Council or HDC Bank at a public meeting, after which there will be public comment. It is only after public comment that the Highlands Council or the HDC Bank vote on the merits of applications.

59. COMMENT: N.J.A.C. 7:70-3.3(b)5, addressing criteria for property acquisitions, would be strengthened if it included an opportunity for public comment and review.

RESPONSE: Any resolution proposing the acquisition of any property interest by the Highlands Council or HDC Bank is subject to public review and comment at Highlands Council meetings.

60. COMMENT: N.J.A.C. 7:70-3.3(a)3iii, as drafted, seems to indicate that until all other funding sources are committed, the Land Preservation Committee will not recommend Highlands Council approval. This may cause a "circular" system, whereby applicants cannot obtain funding approval from either agency (for example, SADC and Highlands) because such approvals are both conditioned on funding commitments from the other agency.

RESPONSE: Funding commitment information is not strictly required prior to approval. The funding commitment information required under the subparagraph referenced is to be utilized by the Land Preservation Committee for the purposes of meeting the criterion as set forth under N.J.A.C. 7:70-3.3(b)6, and will only be utilized during the Land Preservation Committee's review process to assist in determining the priority related to the proportion of outside matching funds.

61. COMMENT: At N.J.A.C. 7:70-3, the name of the program should be the "Highlands Open Space and Farmland Partnership Funding Program" to reflect that this program includes funding for farmland preservation as well as open space.

RESPONSE: The Highlands Council appreciates the comment, as the program does permit the preservation of farmland. However, the Council is not changing the name of the program at this time.

62. COMMENT: At N.J.A.C. 7:70-3.1(a)1, please clarify that "The State of New Jersey" includes the SADC.

RESPONSE: "The State of New Jersey" includes any State department, agency, board, commission, or other entity, district water supply commission, independent State authority or commission, or bi-state entity, including the SADC. As discussed in the Response to Comment 25, a definition has been added to the chapter to clarify this.

63. COMMENT: At N.J.A.C. 7:70-3.2(b)2ii(2), an entity's purpose for the application should include the acquisition and preservation of farmland.

RESPONSE: This sub-subparagraph does not preclude the acquisition and preservation of farmland, which is an eligible activity under the new rules.

64. COMMENT: You should revise N.J.A.C. 7:70-1.1(a)5 as follows (additions in bold, deletions in brackets) "To establish the procedures by which the Council . . . permanently remain in use for passive recreation,

[and/or] conservation [and/or] or agricultural/farmland preservation purposes.”

RESPONSE: In the context of the section, conservation purposes includes farmland preservation.

65. COMMENT: At N.J.A.C. 7:70-3.3(b)4, contiguity with preserved farmland should also be included in this additional prioritization criteria.

RESPONSE: The program is entitled the “Open Space Partnership Funding Program” and permits the preservation of farmland. The paragraph referenced includes the language “connectivity to existing open space.” The intent of this language was to include farmland under the term “open space.” The paragraph has been changed to clarify the intent by adding language that makes it clear that this includes lands contiguous to existing preserved farmland.

66. COMMENT: There appears to be no way so far for a landowner with both productive agricultural land and ecologically significant woodlands to be compensated for his total contribution to the public.

RESPONSE: The rules do not preclude an application for only a portion of a property to be preserved as either fee simple acquisition or an easement.

67. COMMENT: There should be some way for several farms to apply together, even if the properties are not contiguous.

RESPONSE: The rules do not preclude applications for multiple non-contiguous parcels.

68. COMMENT: One comment suggested that the Highlands Council adopt a program by which it would be a guarantor for farm equity loans.

RESPONSE: Whatever the merits of such a program, or the Highlands Council’s authority under its legislative mandate, this suggestion is beyond the scope of the rulemaking.

69. COMMENT: The rules do not include any guidelines for acquiring historic, cultural, and archeological resources.

RESPONSE: Due to limited funding availability, the Highlands Council has decided not to include historic, cultural, or archaeological resources as a priority at this time. Nonetheless, these properties are eligible for the program, provided all other eligibility thresholds are met.

70. COMMENT: The Highland’s Council should revise N.J.A.C. 7:70-4.2(a)1i(7) as follows (additions indicated in bold): “Location adjacent to scenic, **historic, or archaeological** resources identified in the RMP **or through the Highlands Council ‘Procedure for Nomination, Evaluation and Inventory of Highlands Regionally Significant Scenic Resources, Oct. 2008’ or by municipal historic boards or commissions or other knowledgeable entities;”**

RESPONSE: Any scenic resources nominated and added to the RMP through the Highlands Council Procedure for Nomination, Evaluation and Inventory of Highlands Regionally Significant Scenic Resources, Oct. 2008 would qualify for inclusion in this sub-subparagraph. Due to limited funding availability, the Highlands Council has decided not to include historic, cultural, or archaeological resources as a priority at this time. Nonetheless, these properties remain eligible for the program, provided all other eligibility thresholds are met.

71. COMMENT: Clarification for use of the term “greenway” at N.J.A.C. 7:70-3.3(b)1i and 2i are needed.

RESPONSE: A greenway is generally defined as a corridor of land devoted to recreational use or environmental protection.

72. COMMENT: Trails should be explicitly permitted by the conservation restrictions.

RESPONSE: The Council will accept applications that propose passive recreation, which is defined in the rules to include hiking trails.

73. COMMENT: The Program rules should allow for some minimum “development” associated with typical passive recreation activities, which should be defined in greater detail in the Program rules.

RESPONSE: The Council will accept applications that propose passive recreation; passive recreation is defined to include minimum development that is strictly associated with such recreation.

74. COMMENT: N.J.A.C. 7:70-3.3(f) would provide stronger resource protections if it included a requirement based on the Forest Stewardship Council’s certification guidelines. The commenter requested that Forest Steward Plans be filed with the Highlands Council and made available to the public.

RESPONSE: N.J.A.C. 7:70-3.3(f) requires the applicant to provide a plan for long-term stewardship. The plan may include a Forest

Stewardship Plan where applicable, but such plans are not applicable to all properties. Forest Stewardship Plans are filed with the State Forester.

75. COMMENT: The Highland’s Council should change N.J.A.C. 7:70-1.1(a)3 as follows (addition in bold, deletions in brackets): “To establish the procedures by which the Highlands Council will provide funding in partnership with the State of New Jersey, local government units, [and] charitable conservancies, **and federal government programs such as the Forest Legacy Program and the Highlands Conservation Act**, to acquire lands that further the goals of the Highlands Act and the RMP;”

RESPONSE: To the Highlands Council’s knowledge, the Federal government does not directly acquire property through the programs mentioned. The rule would permit such funding to be utilized as a matching source through any eligible applicant, such as Green Acres. As stated in the Federal Standards statement, “should funding be made available, the proposed new rules would permit funding available from the Highlands Council to be used to meet the 50 percent non-Federal share requirement of the Highlands Conservation Act, thereby extending the benefits of the program while reducing costs to the State.”

76. COMMENT: The commenter requested that N.J.A.C. 7:70-4.2(a)1i(6) be amended to include areas in the Regional Master Plan Protection Zone, Conservation Zone, Environmentally Sensitive Existing Community Zone, Environmentally Sensitive Conservation Zone, or Lake Management Zone.

RESPONSE: A change in the rules is not necessary, as the location of a property in any of the aforementioned zones includes the entire Highlands Region and, therefore, includes all of the subzones noted in the comment.

77. COMMENT: In N.J.A.C. 7:30-3.1(b), the Highlands Regional Master Plan does not specifically define the term “ecologically sensitive areas.” The RMP does define “natural resources.” If these are the “ecologically sensitive areas” referred to in the Highlands Open Space Partnership Funding Program (Program), the reference should be changed to “natural resource areas” as defined in the RMP.

RESPONSE: The terms “ecologically sensitive areas” and “natural resources” are synonymous with one another. However, the Highlands Council agrees that the language of the rule should mirror that of the RMP. Therefore, the language of the proposed regulation has been clarified to align with the language in the RMP at N.J.A.C. 7:70-3.1(b)1ii and (b)2iii.

78. COMMENT: The acquisition of floodplains in general, and more specifically, for flood mitigation, should be identified as specifically eligible under this new Program.

RESPONSE: Applications for acquisition of properties, which include areas designated as floodplains are not excluded from participation in the programs proposed under the new rules.

79. COMMENT: What is to become of the land affected by the Highlands Act that are not prioritized? Will its zoning revert to January 1, 2004?

RESPONSE: Any application that is not approved through the program may reapply during a future funding round. The rule has no effect on zoning.

80. COMMENT: Will one of the considerations for “prioritizing” be who owns it?

RESPONSE: Ownership will not be a consideration in prioritizing acquisitions.

81. COMMENT: N.J.A.C. 7:70-3.1(d) requires that the title to fee simple purchases funded with State, taxpayer, or mitigation monies be held in the name of a charitable conservancy is not prudent public policy. State monies are not to be used to fund private non-profit entities.

RESPONSE: The rule does not require land owners to work with charitable conservancies. In addition, the rule requires that the State of New Jersey be party to any easement acquired under the rule.

82. COMMENT: The proposed chapter provides a gift of property to the environmental organizations, many with lobbying arms, who have promoted harm to landowners. Additionally, the proposed rule provides no restrictions on a charitable conservancy’s future management of the property titles gifted to them. Many so-called charitable conservancies are simply land holding entities with growing portfolios of undeveloped real property, an increasingly scarce and valuable asset. These charitable

conservancies will realize the price rises in their portfolio of lands with no restrictions on future sales. The proposed rule's partnership program is a get-rich-later scheme for those individuals who control the conservancies and their lobbies. The proposed chapter is a disguised funding scheme for the environmentalist special interests.

RESPONSE: The RMP goals include the protection of natural resources through land preservation. All lands acquired under the new rules will be required to be permanently preserved. In furtherance of this, N.J.A.C. 7:70-3.3(c) requires that the State of New Jersey be included as party to any deed restriction or easement.

83. COMMENT: N.J.A.C. 7:70-3.4 requires that the applicant provide a plan for enforcing, maintaining, monitoring, and providing access is egregious and overreaching. Harmed landowners are the victims of a horrendous taking and must not be required to live under a strangling set of regulations and loss of privacy for the right to be compensated for that taking. Deed restrictions must say nothing more than that the development rights have been retired and that the lands are subject to the provisions of the Highlands Act. Period. Property with easements must remain private property with all the rights of ownership, self-determination, and privacy enjoyed by the typical property owner in New Jersey.

RESPONSE: The Highlands Council acknowledges the commenter's concerns regarding easement restrictions and easement monitoring. However, to advance the goals, policies, and objectives of the RMP for the protection and preservation of natural resources, the chapter requires applicants to address the future stewardship and monitoring of preserved properties. Participation in the program is voluntary; restrictions and monitoring ensure that taxpayer-funded programs are used for these declared purposes.

84. COMMENT: Failure of Equal Protection. The proposed rules do not treat all banned Highlands landowners equally. The program focuses on properties that the politically appointed deem conservation priority, agricultural priority, and/or special environmental priority with the chapter appendices identifying these priority areas.

RESPONSE: The programs proposed under the rules are open to all eligible applicants. The priorities are based on RMP goals, policies, and objectives.

85. COMMENT: It is inappropriate to introduce new rules while Highlands Regional Master Plan is under review at the same time.

RESPONSE: The adoption of rules for the open space program is appropriate. The new rules are separate and distinct from the periodic review of the Highlands RMP required by the Highlands Act.

86. COMMENT: A number of commenters offered general criticisms of the Highlands Act. These comments fall in the nature of general criticisms of the Act and/or of the Highlands Council's implementation of the Act, and are not specifically directed to the proposed new rules.

RESPONSE: Such comments are beyond the scope of the rulemaking, as they concern the Act and not this rulemaking.

87. COMMENT: A number of commenters expressed support for the new rules.

RESPONSE: The Highlands Council acknowledges the commenters' support for this rulemaking.

88. COMMENT: Several commenters stated that the new rules need substantial revision and editing, contain inconsistencies, etc., but did not point to any specific language in the new rules.

RESPONSE: The Highlands Council believes the rules do not contain inconsistencies and do not need substantial revision.

89. COMMENT: Donations of full or partial value should have the highest priority. In many cases, an owner may be unaware of the Federal tax implications of a sale.

RESPONSE: The donation of the full or partial value of a property would be recognized as a source of matching funds and, therefore, would be provided a priority in the review of any application.

#### Summary of Agency-Initiated Changes:

1. Throughout the adopted text, internal cross-references are updated that were incorrect as published in the notice of proposal.

2. At N.J.A.C. 7:70-2.1, the definition of "Landowner Equity and Land Preservation Committee" or "Land Preservation Committee" is changed upon adoption to make grammatical changes.

3. At N.J.A.C. 7:70-3.1(b)ii and (b)iii, "ecologically sensitive areas" is replaced with "natural resources" because the terms "ecologically sensitive areas" and "natural resources" are synonymous with one another. However, the Highlands Council agrees that the language of the rule should mirror that of the RMP, therefore the language of the proposal has been clarified to align with the language in the RMP.

4. At N.J.A.C. 7:70-3.1(b)2, "development easements" is replaced with "conservation easements" as that is the purpose of paragraph (b)2.

5. At N.J.A.C. 7:70-3.3(d), the "applicant" replaces the "property owner" as the responsible party for obtaining the appraisals.

6. At N.J.A.C. 7:70-3.3(d) the section has been changed to clearly state that the appraisals shall be in accordance with N.J.S.A. 13:8C-26.j(1) or 38.j(1) [the dual appraisals statutes].

7. At N.J.A.C. 7:70-3.3(a)2iii(4) and N.J.A.C. 7:70-4.2(a)1vi(4) the language "are contiguous to existing preserved farmland" has been added to clarify that the priority given to applications that are adjacent to existing open space includes priority for adjacency to existing preserved farmland.

#### Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq., require administrative agencies which adopt, readopt, or amend any rule or regulation to which the Order and statute apply, to provide a comparison with Federal law and to provide further discussion and analysis (including a cost-benefit analysis) if the standards or requirements by the agency exceed standards or requirements imposed by Federal law.

There are two Federal acts that are related to the national Highlands Region, which includes areas in New York, Connecticut, Pennsylvania, and New Jersey. The two acts are the Food, Agriculture, Conservation, and Trade Act of 1990 (P.L. 101-624) and Highlands Conservation Act (P.L. 108-421). These two Federal acts along with the 2002 update of the 1992 Highlands - New York/New Jersey Highlands regional study, led to the passage of the New Jersey Highlands Act, as well as the Federal Conservation Act, but do not set any standards or requirements related to the subject matter covered by the adopted new rules.

Federal involvement with the Highlands Region began with the passage of the Food, Agriculture, Conservation, and Trade Act of 1990, which authorized the Secretary of Agriculture "to conduct a study of the region known as the New York-New Jersey Highlands..." in section 1244(b). Among the objectives of the study were: defining the boundaries of the region, identifying forest, ecological, and economic resources, and proposing alternative conservation strategies. As a result of the study, the United States Forest Service issued a report in 1992 that served as an impetus to reignite the effort to protect the critical natural resources of the region. [New York - New Jersey Highlands Regional Study](#), USDA Forest Service, Northeast Area State and Private Forest, Joseph A. Michaels et al. (1992). The study identified unprecedented development pressure from commercial, industrial, and residential uses in the study area and concluded that this pressure was causing the loss of natural and cultural heritage, agricultural lands, wildlife habitat, and recreational opportunities, in addition to deteriorating the air quality and the quality of the region's drinking water supplies.

The Highlands Conservation Act (P.L. 108-421) is designed to assist Connecticut, New Jersey, New York, and Pennsylvania (Highlands States) in conserving land and natural resources in the national Highlands Region through Federal assistance for land conservation projects in which a state entity acquires land or an interest in land from a willing seller to permanently protect resources of high conservation value. The Highlands Conservation Act authorizes Federal assistance to the Highlands States for land conservation partnership projects in which any Highlands State, or any agency or department of any Highlands State with authority to own and manage land for conservation purposes, including the Palisades Interstate Park Commission, acquires land or an interest in land from a willing seller to permanently protect land in the national Highlands Region. At present, the Highlands Conservation Act has no funding and no additional funding is currently anticipated. However, should funding be made available, the adopted new rules would permit funding available from the Highlands Council to be used to meet the 50 percent non-Federal share requirement of the Highlands Conservation Act, thereby extending the benefits of the program while reducing costs to the State.

Full text of the adopted new rules follows (additions to proposal indicated in boldface with asterisks \*thus\*; deletions from proposal indicated in brackets with asterisks \*[thus]\*):

## CHAPTER 70

HIGHLANDS OPEN SPACE PARTNERSHIP FUNDING PROGRAM  
AND HIGHLANDS DEVELOPMENT CREDIT PURCHASE  
PROGRAM

## SUBCHAPTER 1. GENERAL PROVISIONS

## 7:70-1.1 Purposes and objectives

(a) This chapter is promulgated for the following purposes:

1. To implement the purposes and objectives of the Highlands Water Protection and Planning Act (N.J.S.A. 13:20-1 et seq.);
2. To implement the Highlands Regional Master Plan (RMP);
3. To establish the procedures by which the Highlands Council will provide funding in partnership with the State of New Jersey, local government units, and charitable conservancies, to acquire lands that further the goals of the Highlands Act and the RMP;
4. To provide criteria for the acquisition of highlands development credits by the HDC Bank; and
5. To establish the procedures by which the Highlands Council will ensure that lands acquired with funding from the programs created herein, permanently remain in use for passive recreation and/or conservation purposes.

## 7:70-1.2 Scope

This chapter constitutes the Highlands Open Space Partnership Funding Program and Highlands Development Credit Purchase Program, governing the partnership with eligible state and local governments, and charitable conservancies for the acquisition of land for passive recreation and conservation purposes. In addition, this chapter establishes the criteria for acquisition of highlands development credits by the HDC Bank. This chapter establishes project eligibility requirements, application requirements, funding award criteria, partnership funding terms, and program administrative requirements.

## 7:70-1.3 Program information; address for submissions

Unless otherwise specified, any questions arising from, and all submissions required under this chapter, should be directed to the New Jersey Highlands Water Protection and Planning Council, 100 North Road, Chester, NJ 07930. Additional information about this program, is also available on the Highlands Council's website at: <http://www.nj.gov/njhighlands/>.

## 7:70-1.4 Relaxation of procedural requirements

The Highlands Council may, in its discretion, and if consistent with Highlands Act and the RMP, relax the strict application of any of the administrative or procedural requirements of this chapter when necessary and in the public interest, for good cause shown. Such authority does not extend to statutory requirements, legislative mandates, or substantive requirements of the chapter.

## SUBCHAPTER 2. DEFINITIONS

## 7:70-2.1 Definitions

The following terms as used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

"Agricultural preservation priority areas" means those areas identified in Figure 5.3 in the RMP as agricultural priority areas, incorporated herein by reference as N.J.A.C. 7:70 Appendix A.

"Approval for funding" means the Highlands Council's authorization for the issuance of partnership funding for a property by the adoption of a resolution at a public meeting.

"Charitable conservancy" means a corporation or trust exempt from Federal income taxation under paragraph (3) of subsection (c) of section 501 of the Federal Internal Revenue Code of 1986 (26 U.S.C. § 501 (c)(3)), which purpose includes the acquisition and preservation of lands in a natural, scenic, or other open condition.

**"Conservation easement" means a deeded transfer of an interest in real property under which the landowner permanently agrees to restrict the property from future development and to conserve and**

**protect open space, scenic, agricultural, or other natural resource values on the land covered by the easement.\***

"Conservation preservation priority areas" means those areas identified in Figure 5.1, in the RMP as conservation priority areas, incorporated herein by reference as N.J.A.C. 7:70 Appendix B.

"Executive Director" means the Executive Director of the Highlands Council.

"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 pursuant to the Highlands Act.

"Highlands development credit" or "HDC" means the transfer of development rights credit for the Highlands Transfer of Development Rights Program that may be bought, sold, or transferred in accordance with the Highlands Act and the State Transfer of Development Rights Act (N.J.S.A. 40:55D-137 et seq.).

"Highlands development credit allocation" or "HDC allocation" means the number of credits a property located in the Highlands Region qualifies for based on the methodology established in the RMP.

"Highlands development credit allocation letter" or "HDC allocation letter" means the letter indicating how many HDCs a property qualifies for, issued by the Highlands Council to a property owner that has applied for an HDC allocation.

"Highlands development credit bank" or "HDC bank" means the transfer of development rights bank created by the Highlands Council pursuant to the Highlands Act.

"Highlands Development Credit Bank Board" means the nine member board of directors comprised of those members as established by the Highlands Council pursuant to the Highlands Act.

"Highlands development credit certificate" means the document issued by the Executive Director, upon authorization by the HDC Bank Board, that gives the holder of the certificate the right to the number of highlands development credits indicated on the certificate.

"Highlands development credit certificate application" means the application prepared by the applicant for the purposes of obtaining HDC credits from a property that has been issued an HDC allocation letter.

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

"Highlands Regional Master Plan" or "Highlands RMP" or "RMP" means the Regional Master Plan, adopted by the Highlands Council, pursuant to the Highlands Act.

"Landowner Equity and Land Preservation Committee" or "Land Preservation Committee" means the committee established by the chairperson of the Highlands Council \*[for the]\* **\*and which\*** review\*s\* \*[of]\* applications pursuant to this chapter.

"Mitigation" means methods for the alleviation of negative impacts to and loss of Highlands resources identified in the RMP. Such methods include, but are not limited to, the provision of physical restoration of resources (such as scenic or environmental resources) or financial compensation for impacts to the resources.

"Partnership entity" or "partnership entities" means those entities entitled to apply for partnership funds under the Highlands Open Space Partnership Funding Program as set forth in N.J.A.C. 7:70-3.1(a).

"Passive recreation" means non-motorized outdoor recreational activities, such as nature observation, hiking, biking, and canoeing or kayaking, that require a minimum of facilities or development and that have minimal environmental impact on natural resources.

"Planning area" means that area of the Highlands Region defined at N.J.S.A. 13:20-3.

"Preservation area" means that area of the Highlands Region defined at N.J.S.A. 13:20-3.

"Special environmental zone" means those areas identified in Figure 5.2 in the RMP as a special environmental zone, incorporated herein by reference as N.J.A.C. 7:70 Appendix C.

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

## SUBCHAPTER 3. HIGHLANDS OPEN SPACE PARTNERSHIP FUNDING PROGRAM

## 7:70-3.1 Eligibility

(a) The following partnership entities are eligible to apply for partnership funds:

1. The State of New Jersey, in accordance with the State funding source requirements;
2. Any of the seven counties located in the Highlands Region;
3. Any of the 88 municipalities located in the Highlands Region; and
4. Charitable conservancies.

(b) Properties and activities within the Highlands Region eligible for consideration for funding from the Highlands Open Space Partnership Funding Program, that are submitted by partnership entities as defined in (a) above, include:

1. The fee simple acquisition of land for conservation and/or passive recreation purposes, including, but not limited to:
  - i. Parkland, natural areas, and/or greenways; or
  - ii. The protection of \*[ecologically sensitive areas]\* **\*natural resources\*** as identified in the Highlands Regional Master Plan; and
2. The acquisition of \*[development]\* **\*conservation\*** easements for conservation purposes, including, but not limited to:
  - i. Parkland, natural areas, and/or greenways;
  - ii. Farmland preservation; and
  - iii. The protection of \*[ecologically sensitive areas]\* **\*natural resources\*** and/or agricultural preservation priority areas.

(c) The following properties and activities are ineligible for funding under the Highlands Open Space Partnership Funding Program:

1. Properties to be held in fee simple title by the Highlands Council;
2. Properties which require condemnation;
3. Properties containing significant environmental contamination, including, but not limited to, former landfill sites, sites having a history of operating as a facility with substantial likelihood for on-site contamination, and sites listed on the New Jersey Department of Environmental Protection's Known Contaminated Sites List;
4. Properties already preserved or acquired during the application process by municipalities, counties, the State, or a qualified charitable conservancy;
5. Administrative or operational costs of the applicant or current or former owners;
6. Construction or development projects, including capital improvements, recreation improvements, infrastructure projects, and the restoration, rehabilitation, or reconstruction of any structure (however, this shall not preclude the purchase of the eligible underlying lands);
7. Maintenance, care, custodial, or policing expenditures, including, but not limited to, grounds maintenance, restoration, or reconstruction;
8. Ceremonial or publicity expenses;
9. Interest, bonding expenses, or other financing costs;
10. Fundraising or lobbying expenses; and
11. Interpretive activities, such as displays or signs.

(d) The partnership entity may propose either a fee simple acquisition or the acquisition of the development rights through a conservation easement.

1. Under the Highlands Open Space Partnership Funding Program, the Highlands Council will not hold fee simple title to a property. Only the partnership entity or its designee shall hold fee simple title.

2. The property shall be restricted in perpetuity from future development to protect any existing resources located on the property in accordance with requirements of the conservation easement.

## 7:70-3.2 Application process

(a) The Executive Director shall prepare an outreach program. The outreach program shall, at a minimum:

1. Provide information and training on the availability of the Highlands Open Space Partnership Funding Program to: all municipalities and counties within the Highlands Region, all State agencies, and to charitable conservancies that are known to operate or have funding assigned to be expended within, or immediately adjacent to, the Highlands Region.

2. Provide notice of each application round through publication in the Highlands Council's official newspapers posted on the Highlands Council's website <http://www.nj.gov/njhighlands/>.

(b) Requirements for acceptance of applications are as follows:

1. Partnership entities shall complete and sign an application form, prepared by the Executive Director, which includes the submission requirements in (b)2 below.

2. The following information must be submitted with any application for partnership funding under this chapter:

- i. Name and address of the applicant;
- ii. Where the applicant is a charitable conservancy:

(1) Documentation indicating that the entity is exempt from Federal income taxation under paragraph (3) of the subsection (c) of section 501 of the Federal Internal Revenue Code of 1986 (26 U.S.C. § 501 (c)(3)); and

(2) Documentation indicating that the entity's purpose includes the acquisition and preservation of lands in a natural, scenic, or other open condition;

iii. Where the applicant is a county or local government, a copy of an adopted resolution authorizing the submission of the application for the property in question;

iv. A description of property including:

- (1) Tax block(s) and lot(s);
- (2) Street address;
- (3) Acreage of the property;
- (4) List of any structures or other improvements on the property;
- (5) If the acquisition of part of a lot is proposed, both the area (in acres) of the part to be acquired and the area of the remainder shall be denoted;

(6) Any significant environmental, recreational, structures, or other resources, and/or access issues;

(7) The location and area of all known existing easements, road right-of-ways, encroachments, and similar features, with the source of such information identified, and any proposed area(s) to be excepted from the property; and

(8) Any adjacent properties proposed for preservation;

v. Current owner's name and mailing address;

vi. List of all proposed funding sources including:

- (1) Commitment letters or other available proof of these sources;
- (2) Any adopted resolutions from government entities authorizing or approving funding; and
- (3) Any time limits or other restrictions related to the specific funding sources;

vii. A copy of the proposed \*[deed restriction or]\* **\*conservation\*** easement language; and

viii. Valuation of the property as follows:

(1) Where appraisals have already been prepared, copies of such must be submitted;

(2) Where no appraisals have been prepared, an estimated total cost must be submitted;

(3) Where a specific valuation has already been negotiated, that valuation must be submitted; or

(4) Where a contract of sale has been agreed upon, copies of the contract must be submitted.

(c) The Highlands Council shall approve deadlines for the submission of applications.

(d) Completeness reviews of applications shall be performed as follows:

1. The Executive Director shall conduct a completeness review for each application which shall be deemed complete upon receipt of all information required pursuant to (b)2 above. The Executive Director shall provide written notice to the applicant when an application is deemed complete.

2. If the application is not deemed complete, the Executive Director shall provide written notice to the applicant. Applicants shall have 60 days after notification of an incomplete application to provide any missing information to complete the application.

3. The Executive Director may provide an additional 60-day extension to the applicant to supply the necessary information where deemed appropriate by the specific conditions of the application.

## 7:70-3.3 Review of applications

(a) Once an application is deemed complete by the Executive Director, the application will be forwarded for review to the Land Preservation Committee as follows:

1. The Executive Director shall prepare a complete report on eligibility to the Land Preservation Committee for each application. The report on eligibility shall include:

i. Physical details of the property including:

- (1) Size;
- (2) Location;
- (3) Current owner;
- (4) Structures present;
- (5) Municipal zoning;
- (6) Location in the preservation area or planning area;
- (7) Location adjacent to scenic resources identified in the RMP;
- (8) Adjacency to any existing preserved lands;
- (9) Environmental resources present as identified in the RMP;
- (10) Areas of conservation preservation priority;
- (11) Areas of agricultural preservation priority; and
- (12) Areas of special environmental zone;

ii. Confirmation of the current owner's title to the property, including a title search;

iii. Review of the following environmental records:

- (1) New Jersey Known Contaminated Sites List (<http://www.state.nj.us/dep/srp/kcsnj/>);
- (2) New Jersey Department of Environmental Protection Mapping (DGS03-2 - Abandoned Mines of New Jersey); and
- (3) New Jersey Department of Environmental Protection site records for environmental contamination or violations ([http://datamine2.state.nj.us/dep/DEP\\_OPRA/adv\\_search.html](http://datamine2.state.nj.us/dep/DEP_OPRA/adv_search.html));

iv. Staff site inspections and photographic record; and

v. Summary of priority ranking against other complete applications based on the standards in (b) below.

\*[3.]\* \*2.\* The Land Preservation Committee shall:

i. Review the information provided in the report on eligibility from \*[a2]\* \*(a)1\* above, and make a decision on the eligibility of the project based on the standards in N.J.A.C. 7:70-3.1 and 3.2, and the priority of the project based upon the standards in (b) below;

ii. Prepare a summary of the report on eligibility and the findings, including a final recommendation, and provide it to the Highlands Council; and

iii. Upon receipt of final appraisal and funding commitment information, prepare an updated report on eligibility on each property and provide it to the Highlands Council.

(b) Property acquisitions shall be based on the following applicable criteria, in no specific order:

1. Designation as an identified special environmental zone area in the RMP.

2. Designation as a high conservation and/or high agricultural preservation priority area in the RMP.

3. Designation as a moderate conservation and/or moderate agricultural preservation priority area in the RMP.

4. Additional priority will be given to properties that, when purchased together, provide or improve connectivity to existing open space\*, **are contiguous to existing preserved farmland\***, or otherwise improve access to existing open space and/or recreational facilities.

5. Any specific criteria that has been approved by the Highlands Council, in a Highlands Council resolution on any project review where funding is received as part of mitigation for the project.

6. Applicants that provide for a higher proportion of outside matching funds will be provided with a higher priority than those that do not.

(c) Applicants shall submit draft conservation easement language to the Highlands Council for review. The State of New Jersey will be included as Grantee in any deed restriction or easement.

(d) In accordance with N.J.S.A. 13:8C-26,j(1) or 38,j(1), the \*[property owner]\* **\*applicant\*** shall obtain appraisals containing **\*the two\*** values \*[detailing the pre- and post-Highlands Act values]\* **\*determined in accordance with the aforementioned laws\***. The \*[owner]\* **\*applicant\*** shall have the opportunity to negotiate the sale price of the property based on these values. The Highlands Council will

provide for reasonable costs related to these additional appraisals, provided the appraiser has been approved by New Jersey Department of Environmental Protection Green Acres Program or the State Agriculture Development Committee (SADC).

(e) Commitment and partnership funds will be determined as follows:

1. The Highlands Council shall provide a maximum award of up to 50 percent of the total purchase price of the property, for the acquisition of the development rights.

2. All applicants shall supply commitment letters from any other partnership entities providing funding.

3. An applicant may use as its matching share of the cost of acquisition, its own funds, any grant, contribution, donation, or reimbursement from State or Federal programs, and/or any other public or private funding source.

(f) The applicant must provide a summary of a plan for the long-term stewardship of the property, including enforcement, monitoring, ownership, access, and any maintenance or proposed restoration.

(g) At a public meeting of the Highlands Council, the summary of the report and the findings, including the final recommendation of the Land Preservation Committee, will be presented. The Highlands Council shall, based upon the findings of the updated report of eligibility pursuant to \*[b3iii]\* \*(a)2iii\* above, adopt a resolution issuing an approval for funding and authorization to proceed at that meeting. The effective date of the approval shall be the date of the adoption of the resolution following the expiration of the Governor's statutory period of review.

## 7:70-3.4 Closing process

(a) Partnership entities shall have 12 months to complete the closing on the property from the effective date of the Highlands Council's adoption of a resolution approving issuance of an approval for funding.

1. All partnership entities can obtain up to two six-month extensions, if it is shown that there are circumstances that inhibit the property's acquisition within the initial 12-month deadline, provided there is a reasonable expectation of closing within the extended deadline, as follows:

i. The Executive Director shall have the ability to grant a first extension upon showing of good cause.

ii. The Executive Director shall have the ability to grant a second extension upon showing of good cause and the submission of a fully executed contract with the owner.

2. Should the partnership entity fail to close on the property within these time frames, the partnership entity shall forfeit the funding, but may reapply in any subsequent rounds.

(b) The partnership entity shall provide notice to the Highlands Council that the closing or final acquisition is ready to proceed and shall request issuance of payment to the property owner.

1. After review by the Executive Director that the release of funding is consistent with the approval of funding, the Executive Director shall authorize payment to the property owner at the closing for the acquisition of development rights.

2. The partnership entity shall provide the Executive Director with copies of the filed deed or deed of easement.

3. The Executive Director shall provide a report to the Highlands Council upon the final completion of each acquisition. A summary of the completed acquisitions shall be posted to the Highlands Council's website.

(c) Closing requirements are as follows:

1. A title search update shall be required prior to the filing of any deed or deed of easement on a property indicating that the property owner has the authority to deed restrict the land.

2. The final form of any deed or deed of easement shall be submitted for approval to the Highlands Council prior to the final release of funds.

## SUBCHAPTER 4. HIGHLANDS DEVELOPMENT CREDIT PURCHASE PROGRAM

## 7:70-4.1 Application contents and completeness reviews

(a) An application for the Highlands Development Credit Purchase Program shall include the following:

1. Owner's name and address;
2. Tax block(s) and lot(s);

3. Street address;
4. Completed and signed HDC certificate application with relevant attachments which include the following information:
  - i. The applicant's name and mailing address;
  - ii. The property owner's name and address, if different from the applicant's, and a signed consent to the filing of the application;
  - iii. A copy of the deed to the property to which highlands development credits are allocated;
  - iv. The municipal tax block and lot number and a copy of the municipal tax map sheet(s) showing the property to which highlands development credits are allocated;
  - v. An HDC allocation letter from the Highlands Council attesting to the number of highlands development credits allocated to the property;
  - vi. A title search, by a duly licensed title insurance producer, of the property to which highlands development credits are allocated which covers at least the 60 years preceding the date of application;
  - vii. A certification from the property owner that he or she has marketable title to the property to which highlands development credits are allocated and is legally empowered to restrict the use of this property;
  - viii. A copy of a draft conservation restriction on the deed to the property agreed to by the applicant that is in accordance with the conservation restriction adopted by the Highlands Council; and
  - ix. Such other information as the Executive Director may determine is necessary in order to issue a highlands development credit certificate.

(b) Completeness reviews of applications shall be performed as follows:

1. The Executive Director shall conduct a completeness review for each application and shall deem it complete upon receipt of all information required in (a) above. The Executive Director shall provide written notice to the applicant when an application is deemed complete.
2. If the application is not deemed complete, the Executive Director shall provide written notice to the applicant, who shall have 60 days after notification of an incomplete application to provide any missing information to complete the application.
3. The Executive Director may provide an additional 60-day extension to provide the necessary information where deemed appropriate by the specific conditions of the application.

#### 7:70-4.2 Application review process

(a) Once an application is deemed complete by the Executive Director, the application will be forwarded for review to the Land Preservation Committee. The Land Preservation Committee review process is as follows:

1. The Executive Director shall prepare and submit a complete report on eligibility to the Land Preservation Committee for each application. The report on eligibility shall include:
  - i. Physical details of the property including:
    - (1) Size;
    - (2) Location;
    - (3) Current owner;
    - (4) Structures present;
    - (5) Municipal zoning;
    - (6) Location in the preservation area or planning area;
    - (7) Location adjacent to scenic resources identified in the RMP;
    - (8) Adjacency to any existing preserved lands;
    - (9) Environmental resources present as identified in the RMP;
    - (10) Areas of conservation preservation priority;
    - (11) Areas of agricultural preservation priority; and
    - (12) Areas of special environmental zone;
  - ii. Confirmation of the current owner's title to the property, including a title search;
  - iii. A copy of any HDC allocation letter;
  - iv. Review of the following environmental records:
    - (1) New Jersey known contaminated sites list (<http://www.state.nj.us/dep/srp/kcsnj/>);
    - (2) New Jersey Department of Environmental Protection Mapping (DGS03-2 - Abandoned Mines of New Jersey); and
    - (3) New Jersey Department of Environmental Protection site records for environmental contamination or violations ([http://datamine2.state.nj.us/dep/DEP\\_OPRA/adv\\_search.html](http://datamine2.state.nj.us/dep/DEP_OPRA/adv_search.html));

- v. Staff site inspections and photographic record;
- vi. Summary of priority ranking against other complete applications based on the following, in no specific order:

- (1) Designation as special environmental zone property in the RMP.
- (2) Designation as high conservation and high agricultural priority area in the RMP.
- (3) Designation as moderate conservation and moderate agricultural priority area in the RMP.
- (4) Additional priority will be given to properties that, when purchased together, may provide or improve connectivity to existing open space\*, **are contiguous to existing preserved farmland,\*** or otherwise improve access to existing open space and/or recreational facilities.

(5) Project specific criteria for a highlands project review that has been approved by the Highlands Council, in a Highlands Council resolution, where public comment was provided.

#### 2. The Land Preservation Committee shall:

- i. Review the information provided in the report on eligibility, and make a decision on the eligibility of the property based on (a)1vi above; and
- ii. Provide a summary of the report on eligibility and the findings, including a final recommendation, to the HDC Bank Board.

3. The HDC Bank Board shall review the findings of the Land Preservation Committee in the summary in (a)2ii above at a public meeting. The HDC Bank Board may provide authorization to proceed with the purchase of HDCs at that meeting.

#### 7:70-4.3 Highlands Development Credit Bank Board authorization process

(a) The HDC Bank Board shall, after considering the recommendation of the Land Preservation Committee in N.J.A.C. 7:70-4.2\*[(a)1]\*(a)2\*, determine whether or not to authorize the purchase of all or a portion of the highlands development credits proposed for sale. The HDC Bank Board may authorize a purchase of highlands development credits to further the objectives of the Highlands Act and the Highlands Regional Master Plan if:

1. Adequate funds are available for the purchase;
2. The expenditure of funds does not substantially impair the HDC Bank Board's ability to carry out its duties and responsibilities with respect to guarantees which have already been extended; and
3. The purchase will result in one or more of the following:
  - i. The protection of property which is of significant ecological or agricultural importance;
  - ii. The protection of property which serves to complement or buffer publicly owned and managed conservation lands;
  - iii. The highlands development credits which the HDC Bank Board purchases are likely to be resold, transferred, or conveyed for redemption in a residential development project that satisfies compelling public need or that will result in the protection of other properties which satisfy (a)3i or ii above; and/or
  - iv. The transaction otherwise furthers the purposes of the Highlands Act and the Highlands Regional Master Plan.

#### 7:70-4.4 Highlands development credit issuance and purchase

- (a) The Executive Director shall issue a HDC certificate provided:
  1. The highlands development credit allocation set forth in the Highlands Council's HDC allocation letter has not changed;
  2. The property owner has marketable title and is legally empowered to restrict the use of his property in a manner consistent with the Highlands Act, the New Jersey Department of Environmental Protection's Highlands Rules at N.J.A.C. 7:38, and the Highlands Regional Master Plan; and
  3. The conservation restriction prohibits the future development of the property in perpetuity. The conservation restriction shall:
    - i. Not prohibit or limit uses which are otherwise permitted pursuant to the Highlands Act, the New Jersey Department of Environmental Protection's Highlands Rules at N.J.A.C. 7:38, and the Highlands Regional Master Plan; and
    - ii. Be in favor of a public agency or not-for-profit incorporated conservation organization and shall be specifically and expressly enforceable by the Highlands Council. In no case, however, shall the restrictions be in favor of the HDC Bank Board.

(b) A title search shall be required prior to the issuance of any credit certificate confirming that the owner has sufficient rights to grant an easement to the Highlands Council. In the event that the Executive Director determines that a question exists as to marketable title or the legal ability of the property owner to impose the necessary restrictions on the use of the property, the applicant may elect to conduct a more extensive search of the title or secure insurance which guarantees that the owner has an interest in the property sufficient to meet the standards set forth in (a)2 above. If the Executive Director then determines that the title questions are resolved, he or she shall issue the certificate. If the Executive Director determines that the standards are not met, he or she shall notify the applicant in writing of the reasons which prevent the issuance of a HDC certificate.

(c) The HDC certificate shall, at a minimum, specify the following:

1. The owner(s) of the highlands development credits;
2. The number of highlands development credits owned; and
3. The municipality, block, and lot of the property to which the highlands development credits are allocated.

(d) The highlands development credit certificate purchase process is as follows:

1. All the HDC certificates allocated to a property are issued at one time after the placement of a development easement on the entire property.

2. The highlands development credit certificate shall be signed over to the HDC Bank by the owner; and

3. The Executive Director shall approve final payment for the number of credits approved for purchase by the HDC Bank.

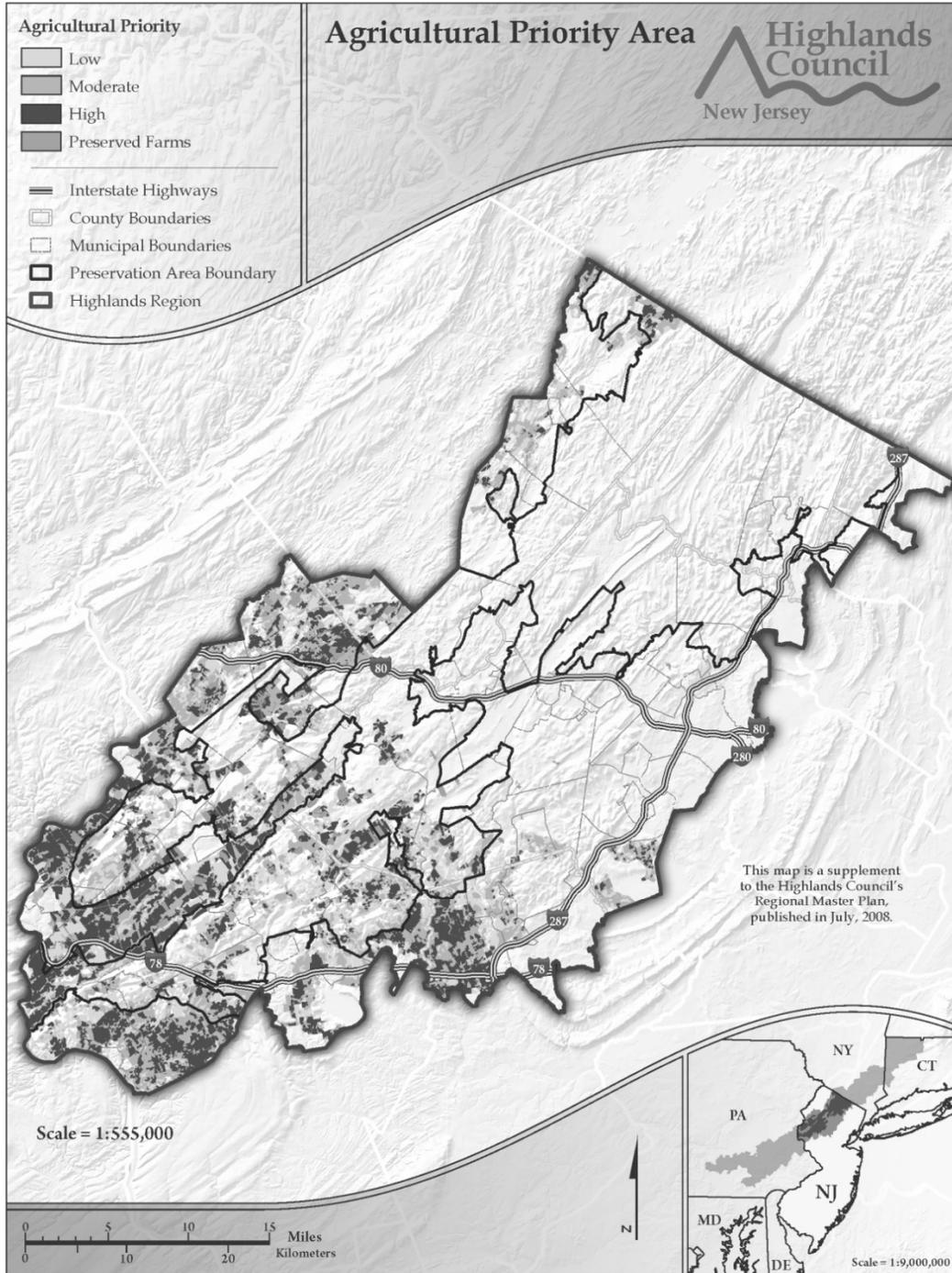
(e) The process for partial highlands development credit purchases is as follows:

1. An applicant may apply to the HDC bank for the purchase of all or part of the HDC certificates issued to an owner.

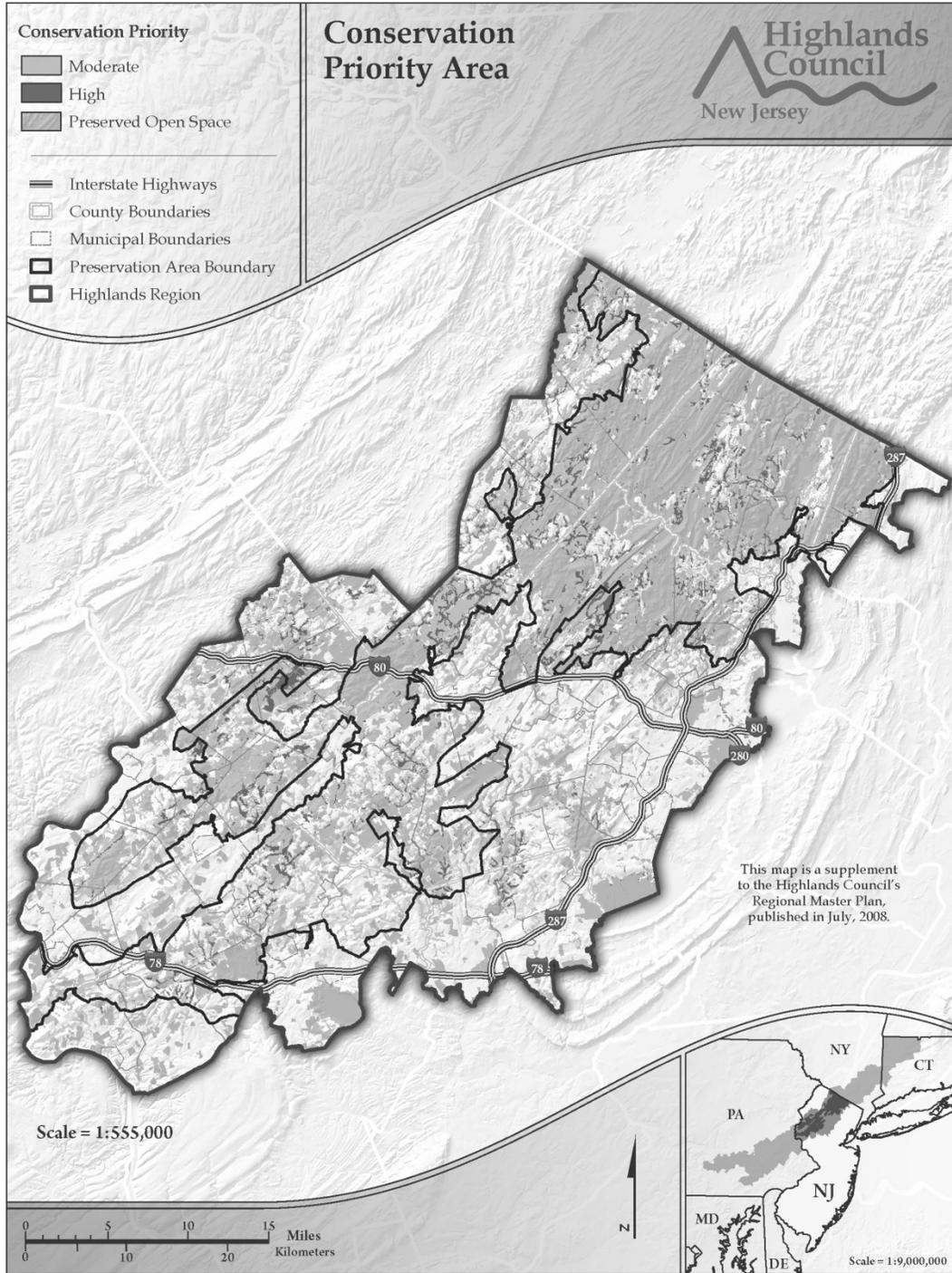
2. A partial purchase of HDC certificates shall be based upon the priority review in N.J.A.C. 7:70-4.2\*[(a)1iv]\*\*(a)1vi\* of the entire property.

3. In the event that only a portion of the highlands development credits specified in the certificate are redeemed, the Executive Director shall re-issue a certificate for the highlands development credits not so redeemed.

APPENDIX A



APPENDIX B



APPENDIX C

