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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Freshwater Wetland Protection Act Rules

Flood Hazard Area Control Act Rules

Coastal Zone Management Rules

Proposed Recodifications with Amendments: N.J.A.C. 7:7A-1.4 as 1.3; 1.7 as 21.1; 2.3, 2.4, and 2.5 as 3.1, 3.2, and 3.3; 2.6 as 2.3; 2.7 as 3.4; 2.8 as 2.4; 2.9 as 2.5; 2.10 as 2.6; 2.11 as 2.7; 3.1 as 4.2; 3.2 as 4.3; 3.3 as 4.4; 3.4 as 4.5; 3.6 as 4.6; 4.1 as 5.2; 4.2 as 5.3; 4.3 as 5.7; 4.4 as 5.4; 5.1 through 5.21 as 7.1 through 7.21; 5.23 through 5.27 as 7.22 through 7.26; 6.1, 6.2, and 6.3 as 8.1, 8.2, and 8.3; 6.5 as 8.4; 7.1 and 7.2 as 10.1 and 10.2; 7.4 as 10.3; 11.1 as 18.1; 12.1 as 19.2; 12.2 as 19.5; 12.3 as 19.6; 12.5 as 19.7; 13.1 as 20.2; 13.2 as 20.3; 13.4 as 1.2; 14.3 as 20.6; 14.4 as 20.8; 14.5 as 20.9; 14.6 as 20.4; 15.1, 15.2, 15.3, and 15.4 as 11.1, 11.2, 11.3, and 11.4; 15.5 as 11.9; 15.6 as 11.10; 15.7 as 11.8; 15.9 as 11.13; 15.10 as 11.5; 15.11 as 11.6; 15.13 as 11.17; 15.15 as 11.7; 15.16 as 11.12; 15.18 as 11.16; 15.19 as 11.15; 15.20 as 11.22; 15.23 as 11.25; 15.25 as 11.26; 15.26 as 11.11; 16.1, 16.2, and 16.3 as 22.1, 22.2, and 22.3; 16.4 as 22.14; 16.5 through 16.9 as 22.4 through 22.8; 16.12, 16.13, and 16.14 as 22.11, 22.12, and 22.13; 16.15 as 22.15; 16.17 through 16.20 as 22.17 through 22.20; and 17 as 13

Proposed New Rules: N.J.A.C. 7:7A-1.5, 4.1, 4.7, 5.1, 5.5, 5.6, 6, 8.5, 9, 11.14, 11.18 through 11.21, 11.23, 11.24, 12, 14 through 17, 19.1, 19.3, 19.4, 19.8 through 19.11, 20.1, 20.5, 20.7, 21.2, 21.3, and 21.4

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Proposed Recodifications: N.J.A.C. 7:7A-1.5 as 1.6, 16.10 and 16.11 as 22.9 and 22.10, and 16.16 as 22.16

Proposed Amendments: N.J.A.C. 7:7-24.3 and 24.4; 7:7A-1.1, 1.3, 2.1, 2.2, and 15.12, and 7:7A Appendix 1; and 7:13-9.1 and 19.3

Proposed Repeals: N.J.A.C. 7:7A-1.2, 1.6, 2.12, 3.5, 4.5, 5.17, 5.22, 6.4, 6.6, 7:7A-6 Appendix, 7.3, 8, 9, 10, 12.4, 12.6, 12.7 13.3, 13.5 through 13.9, 14.1, 14.2, 15.8, 15.14, 15.17, 15.21, 15.22, and 15.24

Authorized By: Bob Martin, Commissioner, Department of Environmental Protection.

Authority: As to N.J.A.C. 7:7: N.J.S.A. 12:3-1 et seq., 12:5-3, 13:1D-1 et seq., 13:1D-9 et seq., 13:1D-29 et seq., and 13:9A-1 et seq.;

As to N.J.A.C. 7:7A: N.J.S.A. 13:9B-1 et seq., and 58:10A-1 et seq.;

As to N.J.A.C. 7:13: N.J.S.A. 13:1D-1 et seq., 13:1D-29 et seq., 13:20-1 et seq., 58:10A et seq., 58:11A-1 et seq., and 58:16A-50 et seq.

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

DEP Docket Number: 06-17-03.

Proposal Number: PRN 2017-061.

Public hearings concerning this notice of proposal will be held as follows:

Wednesday, May 24, 2017, at 6:00 P.M.

Batsto Visitor Center Auditorium

Batsto Village, Wharton State Forest

31 Batsto Road

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Hammonton, NJ 08037

AND

Thursday, June 1, 2017, at 9:30 A.M.

New Jersey Department of Environmental Protection

Public Hearing Room

401 East State Street, 1st Floor

Trenton, New Jersey 08625

Submit comments by June 30, 2017, electronically at

<http://www.nj.gov/dep/rules/comments>. The Department of Environmental Protection

(Department) encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Gary J. Brower, Esq.

Attn: DEP Docket Number

New Jersey Department of Environmental Protection

Office of Legal Affairs

Mail Code 401-04L

401 East State Street, 7th Floor

PO Box 402

Trenton, NJ 08625-0402

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This rule proposal may be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules>.

The agency proposal follows:

Summary

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

The Department of Environmental Protection (Department) is proposing comprehensive changes to the Freshwater Wetland Protection Act (FWPA) Rules, N.J.A.C. 7:7A, which implement the Freshwater Wetlands Protection Act (the Act), N.J.S.A. 13:9B-1 et seq., in order to protect the purity and integrity of the State's inland waterways and freshwater wetlands from random, unnecessary, or undesirable alteration or disturbance, and to provide predictability in the protection of freshwater wetland resources. The FWPA Rules establish the procedures by which the Department reviews applications for permits, letters of interpretation, exemptions, and mitigation proposals under the Freshwater Wetlands Protection Act. As required by the Act, the FWPA Rules govern the following activities in freshwater wetlands and transition areas: removal, excavation, disturbance, or dredging of soil, sand, gravel, or aggregate material; the drainage or disturbance of the water level or water table; dumping in, discharging to, or filling of wetlands; the driving of pilings; the placing of obstructions; and the destruction of vegetation which would alter the character of a freshwater wetland. The FWPA Rules also regulate the discharge of dredge and fill material in State open waters.

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Under Section 404 of the Federal Water Pollution Control Act (also known as the Clean Water Act and referred to as either the “Federal Clean Water Act” or simply the “Federal Act” throughout this summary), 33 U.S.C. §§ 1251 et seq., the Federal wetlands permitting program, also known as the “Federal 404 program,” implemented by the United States Army Corps of Engineers (USACE), was established. Since March 2, 1994, in accordance with Section 404(g) of the Federal Clean Water Act, 33 U.S.C. §§ 1344(g), New Jersey’s freshwater wetlands program has operated in place of the Federal wetlands permitting program in most of New Jersey. While New Jersey's freshwater wetlands program operates in place of the Federal 404 program throughout most of the State, the USACE has retained responsibility for the Federal 404 program in certain waters in New Jersey. These are all interstate and navigable waters (including adjacent wetlands), the entire length of the Delaware River within the State of New Jersey, Greenwood Lake, and areas under the jurisdiction of the New Jersey Meadowlands Commission (formerly the Hackensack Meadowlands Development Commission). Projects in these "non-delegable" waters remain subject to USACE jurisdiction, as well as to the State wetlands program. The United States Environmental Protection Agency (USEPA) oversees the Department’s wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and the USEPA. To protect waters of the United States, including wetlands, the Federal Clean Water Act requires a state assuming the Federal permitting authority to implement regulatory standards equally stringent as those currently in place for the Federal 404 program. The proposed amendments, repeals, and new rules reduce unnecessary regulatory burden; add appropriate flexibility; provide better consistency with Federal, local, and other State requirements; and address implementation issues identified

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since the readoption with amendments of the rules in October 2008. The proposed amendments, repeals, and new rules consolidate similar provisions, simplify language, and harmonize certain procedural provisions with the Department's other land use rules.

This summary is organized according to nine topic areas. The various proposed new rules and amendments to the existing rules are discussed within the context of these topic areas.

The topic areas are as follows:

- Introduction
- Framework and Applicability
- Permitting
- Mitigation
- Conservation Restrictions
- Enforcement
- Amendments to flood hazard area general permit 1
- Notice requirements for maintenance dredging and debris or sediment removal projects

INTRODUCTION

Stakeholder outreach

The Department conducted stakeholder outreach as part of this rulemaking. The Department sought input from local governments, the development community, the environmental community, and State and Federal agencies through three stakeholder meetings held on April 11, 2011, April 29, 2011, and March 24, 2014. Issues discussed with stakeholders included potential changes to the application process, the standards governing development

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within freshwater wetlands, State open waters and transition areas, and mitigation standards. In addition to local, State, and Federal agency participants, organizations, and companies participating in the stakeholder process included Evergreen Environmental, DuBois Environmental, PSE&G, the New Jersey Audubon Society, Amy Greene Environmental Consultants, EcolSciences, Inc., Sokol, Behot & Fiorenzo, Maser Consulting, and the New Jersey Builders Association. The Department also held several meetings with members of the agricultural community including representatives from the New Jersey Department of Agriculture, the New Jersey Farm Bureau, and the American Cranberry Growers Association (ACGA) in order to address amendments intended to clarify the existing exemptions of certain agricultural activities from the FWPA Rules.

Many of the amendments proposed in this rulemaking reflect the suggestions and recommendations of stakeholders provided during the stakeholder process.

Changes to the rules governing the permitting process and letter of interpretation process

This rulemaking is part of the Department's effort to transform the operations of the land use permitting programs administered by the Division of Land Use Regulation. The Division administers three permitting programs, each with its own chapter of rules. The coastal permitting program is implemented through the Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7; the flood hazard area permitting program is implemented through the Flood Hazard Area Control Act (FHACA) Rules, N.J.A.C. 7:13; and the freshwater wetlands permitting program is implemented through the FWPA Rules, N.J.A.C. 7:7A.

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The Department intends to align the rules governing the permitting processes of all three programs to the extent the respective enabling statutes allow. As part of the process to accomplish this goal, the Department has amended the CZM Rules (see 47 N.J.R. 1392(a); July 6, 2015) and the FHACA Rules (see 48 N.J.R. 1067(a); June 20, 2016). The amendments, repeals, and new rules proposed in this rulemaking represent the next step in this alignment. Following the adoption of the amendments to the FWPA Rules proposed in this rulemaking, the rules governing the process for obtaining a permit will be standardized across all three chapters as much as possible and will be organized in a uniform order and format.

In this rulemaking, the effort to align the permitting process rules involves the following topics: emergency authorizations, pre-application conferences, application requirements, requirements for an applicant to provide public notice, application review, permit conditions and changes to issued permits, and requests for adjudicatory hearings. Changes to the process to obtain a letter of interpretation (LOI) are also proposed to streamline this process and align it with the land use permitting processes as much as possible.

The transformation of the operations of the land use permitting programs also involves streamlining functions, re-engineering business processes, and leveraging technology to eliminate unnecessary paperwork, share applications and forms across the Department, and increase the use of electronic submittals. To facilitate these efforts, this rulemaking includes rules for an automated application and issuance process for general permits-by-certification and rules for an electronic application process for letters of interpretation (E-LOIs) as discussed below in this Summary.

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The Department is additionally proposing to amend the permit review timeframes contained in the rules to reduce the review time for FWPA permit applications to a period consistent with the review period under the CZM Rules and FHACA Rules, with some necessary differences, as explained in the Summary of proposed N.J.A.C. 7:7A-19, Application Review, below.

Changes to Agricultural Exemptions

The existing FWPA Rules describe certain activities that are exempt from the FWPA provided the activities meet all standards, conditions, or limitations of the exemptions. On January 9, 2015, the Freshwater Wetlands Protection Act was amended by P.L. 2014, c. 89, which further exempted certain temporary farm structures from wetland permit and transition area requirements. As a result of this statutory amendment, the Department is proposing to add to the existing list of farming, ranching, and silviculture exemptions contained in the rules, the construction of temporary farm structures, such as hoopouses and polyhouses on farmed wetlands that were actively cultivated on or before July 1, 1988, and that have been in active agricultural use at the time that the temporary farm structures were or are to be erected.

The Department is also proposing to add to the list of farming exemptions activities that would be considered normal maintenance of cranberry bogs and blueberry fields, and activities for the renewal or rehabilitation of cranberry bogs or blueberry fields, both of which are wetland dependent crops, in order to clarify that these types of activities are part of established, ongoing cranberry and blueberry operations. The Department is also proposing to clarify the meaning of “minor drainage” as it relates to established farming operations to ensure consistency between

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Federal and State rules.

General permits-by-certification

In 2011, the Division of Land Use Regulation launched, on a pilot basis, an electronic permit application (e-permitting) system modeled after the Department's air, water, and underground storage tank electronic permitting programs. The system enables the electronic application for and automated issuance of authorizations for a tightly circumscribed subset of activities that might be authorized under a general permit. The tight limitations on the activity or activities that can be authorized obviate the need for a case-by-case evaluation of the particular proposed activity provided the applicant certifies that the activity will not exceed the limitations specified in the rules. Upon successfully completing the application and certifying the truth and accuracy of the information provided, the applicant has access to the authorization from their computer.

Although the response to the application is automated, the online submission process creates a complete and certified record by the applicant regarding the activity to be conducted, including the name, address, telephone number, and e-mail address of the person responsible for conducting the activity and the property owner (if different), the specific location of the activity, and the public notice of the proposed activity that the applicant is required to provide.

Because these electronic authorizations address a subset of activities authorized under existing general permits and the electronic submission requires certification by the applicant as to the truth and accuracy of the information provided, the Department has termed this type of authorization as one under a "general permit-by-certification."

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The Department is proposing general provisions governing the issuance, duration, and conditions of general permits-by-certification at proposed N.J.A.C. 7:7A-5, and is proposing to incorporate two general permits-by-certification under this chapter. The application requirements an applicant must meet when applying for an authorization under a general permit-by-certification are set forth at proposed N.J.A.C. 7:7A-16.

Electronic LOIs (E-LOIs)

As part of the Department's transformation goal to thoroughly evaluate all of its business operations to identify ways to streamline functions, re-engineer business processes, and leverage technology, the Department is proposing to establish Electronic Letters of Interpretation (E-LOIs). LOIs indicate the presence or absence of wetlands, State open waters, or transition areas; verify or delineate the boundaries of freshwater wetlands, State open waters, and/or transition areas; and/or assign a wetland a resource value classification. The Department is proposing to allow applicants to submit all required information, except for site plans, electronically. Site plans must be mailed to the Division because they are necessary for staff to conduct a field inspection of the site. Allowing electronic submissions of most of the required materials will facilitate a more efficient review process and reduce paper use.

The provisions governing the issuance, duration, and conditions of letters of interpretation, including E-LOIs, are proposed at N.J.A.C. 7:7A-4. The application requirements an applicant must meet when applying for an E-LOI are set forth at N.J.A.C. 7:7A-16.4.

Mitigation

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Mitigation to compensate for lost functions and ecological values is required as a condition of certain permits and may be required to remedy a violation of the FWPA Rules. The existing rules at N.J.A.C. 7:7A-15 set forth requirements and procedures for mitigation.

The Department is proposing various amendments to these mitigation standards as part of this rulemaking. Many of the changes proposed serve to clarify and/or simplify existing requirements. These proposed changes will improve understanding of the requirements and support greater success of mitigation projects.

The largest change to freshwater wetlands mitigation standards is the incorporation of the In-Lieu Fee (ILF) Program. The proposed rules allow those responsible for mitigation under N.J.A.C. 7:7A to fulfill their obligation through a monetary contribution to the ILF Program as discussed in the Mitigation section of this Summary, which replaces the existing process of a monetary contribution to the Wetlands Mitigation Council. The changes proposed incorporate provisions from the ILF Program instrument as approved by the USEPA in June 2015. This ILF Instrument represents an agreement entered into by and among the Department, USEPA, and the Wetlands Mitigation Council concerning the operation, responsibilities, and goals of the ILF Program. Although the process is the same for mitigators, the rules incorporate terms of the agreement between the Department, USEPA, and the Council.

As discussed above, New Jersey's freshwater wetlands program operates in place of the Federal 404 program. The requirement imposed by the Federal Clean Water Act on a state assuming the Federal permitting authority is that the state implements equally stringent regulatory standards to those currently in place for the Federal 404 program for the protection of waters of the United States, including wetlands. The USEPA requested the development of an

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ILF Program, which necessitated the incorporation of the above-described provisions into the FWPA Rules. All mitigation requirements are set forth in proposed N.J.A.C. 7:7A-11.

Conservation Restrictions

Conservation restrictions are required in the existing and proposed rules to protect certain areas of a site from future development as a condition of several types of Department authorizations and to protect mitigation areas from development. The Department is proposing to consolidate conservation restriction requirements into new N.J.A.C. 7:7A-12 with amendments as discussed below.

Organization of the proposed FWPA Rules

The following table summarizes the proposed relocation and recodification of the Freshwater Wetland Protection Act Rules. As part of this rulemaking, numerous changes to internal cross-references are proposed and additional internal cross-references added for clarity; these changes are not further noted or explained in the summary below.

TABLE OF CITATIONS AND RECODIFICATIONS, N.J.A.C. 7:7A

Subject matter	Current citation	Proposed citation	Proposed change(s)
Scope and authority	1.1	1.1	Renamed; clarified and expanded with text from existing N.J.A.C. 7:7A-1.6

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Construction of this chapter	1.2	1.5	Renamed and simplified
Forms and information, internet web site	1.3	1.4	Renamed; recodified and amended to update website addresses, phone number, mailing address; added
Definitions	1.4	1.3	Clarified; amended; added and deleted new definitions
Severability	1.5	1.7	Recodified with no change in text
Other statutes and regulations	1.6	1.1	Renamed; recodified with no change in text
Hearings and appeals	1.7	21	Renamed; recodified with amendments
Jurisdiction; permit or waiver requirement	2.1	2.1	Renamed; clarified and simplified; deletions to reduce redundancy
Regulated activities in freshwater wetlands and State open waters	2.2	2.2	Updated terminology
Identifying freshwater wetlands	2.3	3.1	Updated terminology and added web address to access NJ freshwater wetlands maps
Classification of freshwater wetlands by resource value	2.4	3.2	Updated information concerning New Jersey's Landscape project to align with FHACA rules; reorganized

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General transition area provisions	2.5	3.3	Clarified and reorganized
Regulated activities in transition areas	2.6	2.3	No substantive changes
Transition areas due to freshwater wetlands on adjacent property	2.7	3.4	No substantive changes
Activities exempted from permit and/or waiver requirement	2.8	2.4	Added exemption for construction of temporary farm structures; clarified; added activities considered normal maintenance or rehabilitation of cranberry or blueberry operation
Geographic areas exempted from permit and/or waiver requirement	2.9	2.5	No substantive changes
Exemption letters	2.10	2.6	No substantive changes
Stormwater management	2.11	2.7	No substantive changes
Conservation restrictions or easements	2.12	8.2(f); 12	Reconstructed to align with CZM and FHACA Rules

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Basic LOI information	3.1	4.2, 16, 19	Provisions regarding LOI application requirements relocated to proposed 7:7A-19; provision regarding areas under the jurisdiction of the Pinelands Commission relocated to proposed 7:7A-16
Presence/absence LOI	3.2	4.3	No substantive changes
Line delineation LOI	3.3	4.4	No substantive changes
Line verification LOI	3.4	4.5	No substantive changes
Application for a letter of interpretation	3.5	Repealed	Repealed
Effect, duration, and extension of a letter of interpretation	3.6	4.6	Renamed with no substantive changes
Department issuance of general permits	4.1	5.2	Renamed; added general provisions for general permits-by-certification; modified to align with CZM Rules
Using a general permit to authorize specific activities	4.2	5.3	Renamed; clarified; added general permits-by-certification; modified to align with CZM Rules; deletions to reduce redundancy

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Conditions that apply to all general permit authorizations	4.3	5.3, 5.7	Renamed; added conditions for general permit-by certification; amendments for clarity and to align with FHACA Rules
Use of multiple general permits	4.4	5.4	Renamed; expanded to use of all permits on a single site
Application for authorization to act under general permits	4.5	Repealed	Repealed; application requirements relocated to proposed 7:7A-16
General permit 1 – Maintenance and repair of existing features	5.1	7.1 and 19.3	Restructured to align with FHACA Rules; amended; relocated provisions regarding review process to proposed 7:7A-19.3
General permit 2 – Underground utility repair	5.2	7.2	Restructured to align with FHACA Rules and amended timing of mitigation provision
Reserved	5.2A	Deleted	Deleted
General permit 3 – Discharge of return water	5.3	7.3	Restructured to align with FHACA Rules; amended

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General permit 4 – Hazardous site investigation and cleanup	5.4	7.4	Restructured to align with FHACA Rules; amended; removed redundancies
General permit 5 – Landfill closures	5.5	7.5	Restructured to align with FHACA Rules; clarified; amended; removed redundancies
General permit 6 – Non- tributary wetlands	5.6	7.6	Restructured to align with FHACA Rules; clarified; amended timing of mitigation provision
General permit 6A – Transition areas adjacent to non-tributary wetlands	5.6A	7.6A	Restructured to align with FHACA Rules
General permit 7 – Human-made ditches or swales in headwaters	5.7	7.7	Restructured to align with FHACA Rules and provide clarity
General permit 8 – House additions	5.8	7.8	Restructured to align with FHACA Rules and provide clarity
General permit 9 – Airport sight line clearing	5.9	7.9	Restructured to align with FHACA Rules and provide clarity

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General permit 10A – Very minor road crossings	5.10A	7.10A	Restructured to align with FHACA Rules and amended timing of mitigation provision
General permit 10B – Minor road crossings	5.10B	7.10B	Restructured to align with FHACA Rules and amended timing of mitigation provision
General permit 11 – Outfalls and intake structures	5.11	7.11	Restructured to align with FHACA Rules; clarified; amended timing of mitigation provision
Reserved	5.11A	Deleted	Deleted
General permit 12 – Surveying and investigating	5.12	7.12	Restructured and amended to align with FHACA Rules
General permit 13 – Lake dredging	5.13	7.13	Restructured to align with FHACA Rules and to provide clarity
General permit 14 – Water monitoring devices	5.14	7.14	Restructured to align with FHACA Rules and to provide clarity
General permit 15 – Mosquito control activities	5.15	7.15	Restructured to align with FHACA Rules

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General permit 16 – Habitat creation and enhancement activities	5.16	7.16	Restructured to align with FHACA Rules; clarified; added requirements
General permit 17 – Trails and boardwalks	5.17	7.17	Minor restricting to align with FHACA Rules
General permit 17A – Non-motorized, Multiple-use Paths	5.17A	7.17A	Minor restructuring to align with FHACA Rules; updated reference
General permit 18– Dam repair	5.18	7.18	Restructured to align with FHACA Rules
General permit 19 – Docks and piers	5.19	7.19	Restructured to align with FHACA Rules
General permit 20 – Bank stabilization	5.20	7.20	Restructured to align with FHACA Rules
Reserved	5.20A	Deleted	Deleted
General permit 21 – Above ground utility lines	5.21	7.21	Restructured to align with FHACA Rules and to provide clarity
Reserved	5.22	Deleted	Deleted

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General permit 23 – Expansion of cranberry growing operations in the Pinelands	5.23	7.22	Renamed GP 22; Restructured to align with FHACA Rules
General permit 24 – Spring developments	5.24	7.23	Renamed GP 23; Restructured to align with FHACA Rules
General permit 25 – Malfunctioning individual subsurface sewage disposal (septic) systems	5.25	7.24 and 19.3	Renamed GP 24; Restructured to align with FHACA Rules and to provide clarity; review process relocated to proposed 7:7A-19.3
General permit 26 – Minor channel or stream cleaning for local government agencies	5.26	7.25	Renamed GP 25; Restructured to align with FHACA Rules; clarified that if removing material from State open waters only, no permit is required
Reserved	5.26A	Deleted	Deleted
General permit 27 – Redevelopment of previously disturbed areas	5.27	7.26	Renamed GP 26; Restructured to align with FHACA Rules; added standards
General transition area waiver provisions	6.1	8.1	Expanded/amended

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Transition area averaging plan waiver	6.2	8.2	Clarified and expanded
Special activity transition area waiver	6.3	8.3	Clarified; minor deletions
Matrix type width reduction transition area waiver	6.4	Repealed	Repealed
Hardship transition area waiver	6.5	8.4	No substantive changes
Application for a transition area waiver	6.6	Repealed	Repealed
General provisions for individual permits	7.1	10.1	Restructured to align with FHACA Rules and to provide clarity
Standard requirements for all individual permits	7.2	10.2	Recodified and amended
Reserved	7.3	Deleted	Deleted
Additional requirements for a non water-dependent activity in a wetland or special aquatic site	7.4	10.3	No substantive changes

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Additional requirements for a non-water dependent activity in exceptional resource value wetlands or trout production waters	7.5	10.4	No substantive changes
Emergency permits	8.1	14.1	Restructured to align with CZM and FHACA Rules
Obtaining an emergency permit	8.2	14.2	Restructured to align with CZM and FHACA Rules
Purpose	9.1	15.1	Restructured to align with CZM and FHACA Rules
Request for a pre-application conference	9.2	15.2	Restructured to align with CZM and FHACA Rules
Basic application information	10.1	16.1	Restructured to align with CZM and FHACA Rules
Basic content requirements for all applications	10.2	16.1 and 16.2	Restructured to align with CZM and FHACA Rules; added provisions regarding E-LOIs and GPs-by-certification
Additional application requirements for a LOI	10.3	16.3	Restructured to align with CZM and FHACA Rules

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Additional application requirements for a general permit authorization	10.4	16.7 and 16.8	Restructured to align with CZM and FHACA Rules; renamed
Additional application requirements for a transition area waiver	10.5	16.7 and 16.10	Restructured to align with FHACA Rules and streamline application requirements
Additional application requirements for an individual freshwater wetlands or open water fill permit	10.6	16.7 and 16.9	Restructured to align with FHACA Rules and streamline application requirements
Additional application requirements for a modification or extension	10.7	20.9	Restructured to align with FHACA Rules
Public notice requirements for applications	10.8	17.1 through 17.5	Restructured to align with CZM and FHACA Rules

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Signatories to permit applications and reports	10.9	Repealed; content incorporated into 16.2	Concepts incorporated at proposed 16.2(c), (d), and (e)
Confidentiality	10.10	16.11	No substantive changes
Application fees	11.1	18.1	Added transfer of an approval to list of activities which do not require an application fee
Adjustment of application fees	11.2	18.2	No substantive changes
Completeness review	12.1	19.2	Restructured/amended to align with CZM and FHACA Rules concerning completeness review timeframes; clarified
USEPA review	12.2	19.5	No substantive changes
Public comment on an application	12.3	19.6	No substantive changes
Hearings on an application for an individual permit or a transition area waiver	12.4	19.2(g)	(a) and (b) relocated to proposed 19.2(g); (c) through (j) repealed

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Final decisions	12.5	19.7	Amended timeframe for review to align with FHACA and CZM Rules as statutes allow
Cancellation, withdrawal, resubmission and amendment of applications	12.6	19.8, 19.9, and 19.10	Repealed with contents distributed as follows: cancellation provisions at proposed 19.8; withdrawal provisions at proposed 19.9; and re-submittal provisions at 19.10; all restructured to align with FHACA rules
Resubmittal of a denied application	12.7	19.10 and 19.11	Repealed and replaced with proposed N.J.A.C. 7:7A-19.10 and 19.11 to align with CZM and FHACA Rules
Standard conditions that apply to all permits	13.1	20.2	Reorganized and significantly amended to align with CZM and FHACA Rules
Establishing permit conditions	13.2	20.3	Amended
Duration of permits	13.3	5.6 and 9.2	Repealed and replaced with proposed N.J.A.C. 7:7A-5.6 Duration of an authorization under a general permit and 9.2 Duration of an individual permit

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Effect of a permit	13.4	1.2	Minor amendment to reflect amended definition
General provisions for changing an issued permit	14.1	20.1	Repealed 14.1 with ideas continued in 20.1
Transfer of a permit	14.2	20.5	Amended to align with CZM and FHACA rules
Modification of a permit	14.3	20.6 and 20.7	Repealed and replaced
Suspension of a permit, waiver, or general permit authorization	14.4	20.8	Amended to align with CZM and FHACA rules
Termination of a permit	14.5	20.9	Reorganized and amended
Permit extensions	14.6	20.4	Amended and expanded to align with CZM and FHACA rules
Mitigation definitions	15.1	11.1	Added/modified definitions to align with CZM rules and FHACA rules; added/modified in-lieu fee definitions; moved definitions to proposed N.J.A.C. 7:7A-1.4 for terms used throughout the chapter

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General mitigation requirements	15.2	11.2	Restructured and amended to align with CZM Rules and FHACA Rules; clarified and expanded
Timing of mitigation	15.3	11.3	Clarified and expanded
Property suitable for mitigation and the criteria for addressing contaminated sites	15.4	11.4	Amended and expanded to align with CZM and FHACA rules; amended provisions concerning contaminated sites; clarified
Mitigation for a smaller disturbance	15.5	11.9	Renamed; amended to reflect restructured subchapter, in-lieu fee program, and to align with CZM rules
Mitigation for a larger disturbance	15.6	11.10	Renamed; amended to set forth clear hierarchy of mitigation alternatives
Mitigation for a temporary disturbance	15.7	11.8	No substantive changes
Amount of mitigation required	15.8	11.12; 11.13; 11.14; 11.15; and 11.16	Amount of mitigation for each type of mitigation relocated to the sections addressing each mitigation type
Requirements for upland preservation	15.9	11.13	No substantive changes

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Conceptual review of a mitigation area	15.10	11.5	Amendments to align with CZM rules and FHACA rules
Basic requirements for all mitigation proposals	15.11	11.6	Clarified; amended to align with CZM and FHACA Rules and address in-lieu fee program; restructured
Contents of a mitigation proposal	15.12	11.6	Amended/expanded information required for mitigation proposals
Financial assurance for a proposal to restore, create, or enhance wetlands	15.13	11.17	Renamed; expanded
Protecting a mitigation area from future development	15.14	Repealed	Conservation restrictions/easements is its own subchapter
Department review of a mitigation proposal	15.15	11.7	Amended to align with CZM and FHACA Rules
Requirements that apply after the Department approves restoration, creation or enhancement	15.16	11.12	Restructured to align with CZM Rules

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Requirements that apply after the Department approves credit purchase or uplands preservation	15.17	11.13	Updated terminology; expanded
Requirements that apply after the Department approves mitigation through a monetary contribution	15.18	11.16	Amended to address the in-lieu fee program
Requirements that apply after the Department approves mitigation through a land donation	15.19	11.15	Renamed; merged with existing 15.22; expanded
Wetlands mitigation council	15.20	11.22	Expanded
Council review of a proposed monetary contribution	15.21	11.16	Renamed; amended to address the in-lieu fee program
Council review of a proposed land donation	15.22	11.15	Renamed; merged with existing 15.19

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Mitigation banks	15.23	11.25	Clarified; amended credit release schedule to align with CZM rules and FHACA Rules
Application for Wetlands Mitigation Council approval of a monetary contribution or land donation	15.24	11.6	Clarified and expanded
Application for approval of a mitigation bank	15.25	11.26	Amended to align with FHACA Rules; expanded
Mitigation for transition area impacts in accordance with N.J.A.C. 7:7A-6.3(g), special activity transition area waivers based upon individual permit criteria	15.26	11.11	Amended to address in-lieu fee program and proposed new definitions
General provisions	16.1	22.1	Restructured and expanded to align with CZM and FHACA Rules

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USEPA review	16.2	22.2	Amended to replace references to the Freshwater Wetlands Protection Act and the New Jersey Water Pollution Control Act with the enabling statutes
Administrative order	16.3	22.3	Amended to replace references to the Freshwater Wetlands Protection Act and the New Jersey Water Pollution Control Act with the enabling statutes; reorganized and expanded
Civil action	16.4	22.14	Amended to reference enabling statutes and denote to whom recovery of damages and costs shall be paid; clarified
Civil administrative penalty	16.5	22.4	No substantive changes
Assessment, settlement and payment of a civil administrative penalty	16.6	22.5	Amended to reference enabling statutes; clarified

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Appeal of an administrative order and/or notice of civil administrative penalty assessment	16.7	22.6	Renamed; amended to reference enabling statutes; clarified; amended to align with CZM and FHACA Rules
Civil administrative penalty amount for failure to obtain a permit prior to conducting regulated activities	16.8	22.7	Restructured; simplified and clarified base penalty table; added grace period provisions from existing N.J.A.C. 7:7A-19.2; clarified expanded provisions concerning mitigating factors and adjustment of the penalty
Civil administrative penalty amount for any violation other than failure to obtain a permit prior to conducting regulated activities, submittal of inaccurate or false information, failure to allow entry, or failure to pay a civil administrative penalty	16.9	22.8	Restructured; clarified and expanded; amended to reference enabling statutes

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Civil administrative penalty amount for submitting inaccurate or false information	16.10	22.9	No substantive changes
Civil administrative penalty amount for failure to allow entry and inspection	16.11	22.10	No substantive changes
Civil administrative penalty for failure to pay a civil administrative penalty	16.12	22.11	No substantive changes
Economic benefit factor	16.13	22.13	No substantive changes
Civil penalty	16.14	22.14	Renamed; restructured; clarified
Criminal action	16.15	22.15	Renamed; amended to reference enabling statute and provide clarity
Forfeiture of conveyances	16.16	22.16	No substantive changes
Notice of violation recorded on deed to property	16.17	22.17	Renamed; clarified and expanded
“After the fact” permit	16.18	22.18	No substantive changes

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Public participation	16.19	22.19	Clarified
Grace period applicability; procedures	16.20	22.20	Clarified; table updated to reflect proposed changes throughout chapter
Reconsideration by Department of its action or inaction concerning a permit	17.1	13.1	Added provisions to align with CZM Rules; clarified
OBLIGATE AND FACULTATIVE FAUNA SPECIES FOUND IN VERNAL HABITATS	Appendix 1	Appendix 1	Updated

FRAMEWORK AND APPLICABILITY

As noted in the Introduction above, this rulemaking is part of the Department’s effort to transform the operations of its land use permitting programs, including aligning various aspects of the FHACA, CZM, and FWPA Rules to the extent the respective enabling statutes allow.

This rule alignment effort includes establishing a consistent arrangement of the elements in each set of rules. Each set of rules begins with general framework provisions (for example, purpose and scope, definitions, DEP contact information), which are followed by applicability and jurisdictional provisions explaining the activities for which a permit or authorization is necessary, and the geographic areas and activities for which a permit is not required. After the

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applicability and jurisdictional provisions, each of the chapters contain the standards applicable to the types of activities that can be approved under that chapter, followed by the requirements for issuing permits for conduct of particular types of regulated activities (and, in the case of the FWPA Rules, standards for issuing LOIs), mitigation requirements and requirements applicable to conservation restrictions, permit application and review procedures and, finally, provisions governing and requests for adjudicatory hearings and enforcement.

In order to provide context for the discussions of the substantive and procedural elements that follow, this part of the Summary discusses the rules in Subchapters 1, 2, and 3, which are the general framework provisions, the applicability and jurisdictional provisions (including exemptions), and the provisions explaining how freshwater wetlands and transition areas are identified and how the Department determines the resource value classification of freshwater wetlands. Note that if an existing provision of the rules is simply proposed to be recodified without change in substance, it is not discussed in the Summary. However, all such rule changes are listed in the Table of Citations and Recodifications that appears above.

General framework

Purpose and scope (N.J.A.C. 7:7A-1.1)

The Department is proposing to amend existing N.J.A.C. 7:7A-1.1, Scope and authority, and rename the section “Purpose and scope.” The CZM and FHACA Rules begin with a similar purpose and scope section. The existing language explaining what statutes the FWPA Rules implement is codified as N.J.A.C. 7:7A-1.1(a). The existing provisions at N.J.A.C. 7:7A-1.6, Other statutes and regulations, are proposed for repeal and are relocated as new N.J.A.C. 7:7A-

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1.1(b) through (f) with no substantive changes. Moving these provisions to N.J.A.C. 7:7A-1.1 consolidates information concerning the purpose and scope of the chapter to increase clarity and align with the organization of the CZM and FHACA Rules.

Effect of a permit (N.J.A.C. 7:7A-1.2)

The Department is proposing to recodify existing N.J.A.C. 7:7A-13.4, effect of a permit, to proposed N.J.A.C. 7:7A-1.2 with amendments. Particularly, recodified N.J.A.C. 7:7A-1.2(a) is amended to remove the phrase “including a general permit authorization” because the definition of “permit” includes a general permit authorization. Similarly, the Department is proposing to remove the phrase, “including a waiver or general permit authorization” at recodified N.J.A.C. 7:7A-1.2(b) because the definition of “permit” also includes a transition area waiver.

Definitions (N.J.A.C. 7:7A-1.3 and 7:7-1.5)

The Department is proposing several changes to the definitions section currently codified at N.J.A.C. 7:7A-1.4 and proposed to be recodified as N.J.A.C. 7:7A-1.3 and one amendment to a definition in the CZM rules at N.J.A.C. 7:7-1.5. Substantive changes to definitions (beyond minor grammatical corrections) are discussed below by topic. Additional definitions specifically applicable to mitigation are set forth at proposed N.J.A.C. 7:7A-11.1 and are discussed in the Mitigation and Conservation Restrictions section below.

Agriculture related definitions

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The definition of “abandoned” is proposed to be amended to clarify that a field will only be considered to be abandoned if it has not been maintained or improved for agricultural purposes, and has not been used to produce a crop or product for five years or more. Whether an agricultural, ranching, or silviculture operation is established and ongoing, or abandoned, affects whether conduct of activities on the property may qualify for exemptions from permitting requirements, and can also affect whether the proposed activity may qualify for certain general permits. The change to add maintenance or improvement of the field as activities that will be considered to reflect active agricultural operation, regardless of whether crops are harvested, is proposed because, under Section 404 of the Clean Water Act and implementing regulations at 40 CFR 232.3, routine maintenance activities at established, ongoing agriculture operations are exempt from permitting requirements. The proposed amendment incorporates recent amendments to the Freshwater Wetlands Protection Act at N.J.S.A. 13:9B-4.f that specifically address cranberry and blueberry farming and provides that the lack of a commercial harvest or production of a crop on or from a cranberry bog or blueberry field shall not be a determining factor as to whether the agricultural use has been abandoned.

The definition of “established, ongoing farming, ranching, or silviculture operation” is proposed to be amended to add more detail regarding how the definition applies to cranberry bogs and blueberry fields in response to amendments to the Freshwater Wetlands Protection Act at N.J.S.A. 13:9B-4 by P.L. 2015, c. 272. The Department is proposing to establish that a cranberry bog, blueberry field, or portion thereof that was used as such as of June 30, 1988, and on which the exempt agricultural activities at proposed N.J.A.C. 7:7A-2.4(c)2 and 3 have

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occurred within the last five years are considered “established and ongoing” regardless of the commercial harvest or production of a crop or lack thereof.

The Department is proposing to define the term “hoophouse” or “polyhouse” as a temporary pipe-frame structure covered with plastic sheeting, with a dirt or fabric floor, that provides for a controlled growing environment to create more favorable growing conditions for crops grown within the covered space. Because the statutory exemption is only intended to be applicable to installation of temporary farm structures and not permanent improvements, a “hoophouse” or “polyhouse” does not include the installation of permanent footings. Installation of permanent footings would constitute “placing an obstruction” and “destroying plant life” and would, therefore, require a permit under N.J.A.C. 7:7A-2.2(a)5 and 6. This definition was added to accommodate amendments to the FWPA at N.J.S.A. 13:9B-4 (P.L. 2014, c. 89), which exempted from the permit and transition area requirements of N.J.A.C. 7:7A temporary farm structures, like hoophouses and polyhouses, on farmed wetlands that were actively cultivated on or before July 1, 1988, that have continued to be actively cultivated since then, and that were in active agricultural use at the time that the temporary farm structures were or are to be erected, as discussed elsewhere in this Summary.

Consistency with CZM and FHACA Rules

Several definitions are proposed to be deleted or amended to achieve consistency with definitions found in the FHACA Rules and/or CZM Rules. The definition of “ACOE” or “Corps” is proposed to be deleted and replaced with the definition of “USACE” to be consistent

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with the abbreviation for the United States Army Corps of Engineers used in the CZM Rules.

“ACOE” is proposed to be replaced with “USACE” throughout the chapter.

The definition of “acid producing soils” is proposed to be deleted. The term is used in the existing FWPA Rules to ensure that activities under this chapter do not violate the FHACA Rules. However, the Department has deleted all standards and requirements related to acid producing soil deposits from the FHACA Rules (see 47 N.J.R. 1041(a); and 48 N.J.R. 1067(a)). Consequently, references to acid producing soils are proposed to be deleted from the FWPA Rules where they appear in existing N.J.A.C. 7:7A-4.3(b)8 and 6.1(b)5 as discussed below. As is the Department’s practice under the FHACA Rules, the Department will instead rely on local Soil Conservation Districts to mitigate potential impacts resulting from exposure of such deposits, as required under the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90. Soil Conservation District staff are trained and equipped to guide prospective developers to design projects that will avoid exposing acid producing soils.

The Department is proposing to amend the definition of “Commissioner” to mean the Commissioner of the Department or his or her designated representative in order to align the definition in the FWPA Rules with the definition in the FHACA Rules and the CZM Rules.

The definition of “conservation restriction or easement” is amended to remove “or easement” from the term to align with the FHACA rules and CZM rules and because “easement” is included within the definition.

The definition of “impervious surface” is proposed to be replaced with “a surface that is covered with a layer of material so that it is highly resistant to infiltration by water” in order to match the definition in the FHACA Rules. The examples of impervious surface in the existing

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definition that are proposed to be deleted are unnecessary. The proposed amendment of this definition will promote consistency between the Department's rules without changing the meaning or application of the term in the FWPA Rules. The Department chose to align the definition of "impervious surface" in the FWPA Rules with the definition in the FHACA Rules and not the CZM Rules because the CZM Rules consider impervious surfaces differently than the FWPA Rules. The CZM Rules prescribe a certain percentage of impervious cover for sites depending on their location and environmental sensitivity. The Department does not believe it would be appropriate to use the same definition in the FWPA Rules, when its purpose within the rules differs so significantly from the purpose of the term in the CZM Rules.

The language of the definition of "linear development" is similarly proposed to be amended to more closely match the definition of the term in the CZM Rules with no change in meaning. The examples of what will not be considered linear development are maintained in the FWPA even though they do not appear in the CZM Rules because they have proven helpful in explaining the applicability of special activity transition area waivers for linear development. The additional language in the FWPA Rules' definition of the term is not intended to imply any difference in what is or is not considered linear development under the FWPA and CZM Rules.

The Department is proposing to add the term "site plan" or "plan," defined as "a graphic depiction of land, vegetation, water, structures, and other physical features on paper, such as a blueprint, construction plan, cross-section, topographic map, architectural rendering, or other similar illustration, which is submitted to the Department to describe an existing or proposed activity or condition." This definition is consistent with definitions of the same terms in the CZM and FHACA Rules and is necessary because the terms are used throughout the chapter.

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The Department is proposing to delete the existing definition of “Soil Conservation District” and adopt a new definition to provide additional detail regarding the scope and authority of all Soil Conservation Districts and to achieve consistency with the FHACA Rules.

Substantial amendments are proposed to the definition of “temporary disturbance” in order to align the definition of the term in the FWPA Rules with the definition of “temporary disturbance” in the CZM Rules at N.J.A.C. 7:7-17.1 and the definition of “temporary” in the FHACA Rules at N.J.A.C. 7:13-1.2. “Temporary disturbance” is proposed to apply to regulated activities that occupy, persist, and/or occur on a site for no more than six months, which is similar to the existing definition. However, the proposed definition is expanded to include flexibility in the designation of an activity as a temporary disturbance for activities that are temporary, but that exceed six months in duration because of the nature of the activity (for example, hazardous substance remediation or solid waste facility closure). Activities that exceed six months in duration will only be considered “temporary disturbance” if the disturbed areas are restored to their original topography, and all necessary measures are implemented to ensure that the original vegetative cover onsite is restored to its previous (or an improved) condition.

The definition of “USGS quad map” is amended to eliminate reference to the availability of USGS quad maps from the Department’s Maps and Publications Office because this office no longer exists within the Department.

The definition of “utility line” is amended to more closely align with the definition of the same term in the FHACA Rules. The Department is proposing to specify that a tower that only transmits or receives electromagnetic waves through the air, such as for radio, television, or telephone transmission, is not considered a utility line. The Department is also retaining in the

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proposed definition the indication that a utility line does not include a stormwater pipe or a pipe that drains a wetland to aid in clarifying what activities are authorized under general permits 2 and 21. General permit 2, for underground utility lines, specifies requirements for pipes laid through wetlands, transition areas, or State open waters to ensure that wetlands hydrology is not affected and to allow free passage of surface and ground water. General permit 21, for above-ground utility lines requires activities under this general permit to not interfere with the natural hydrological characteristics of the wetland, transition area, or State open water in which the project will take place. The exclusion of stormwater pipes and pipes that drain wetlands from the definition of utility line, while not stated in the definition in the FHACA Rules, is consistent with how the term is applied in the FHACA Rules. The FHACA Rules contain different permits and, for individual permits, different riparian zone disturbance limits for utility lines and stormwater pipes.

The definition of “water dependent activity” is substantially amended to match the definition of the term “water dependent” in the CZM Rules, without changing the meaning of the term. These proposed changes clarify that uses or portions of uses that can function on sites not adjacent to the water are not considered water dependent, regardless of the economic advantages that may be gained from a waterfront location, and that only portions of activities that require direct access to the water are water dependent. The definition is proposed to contain several examples of activities that are and are not considered water dependent in order to provide clarity to readers.

The definition of “water quality certificate” is proposed to be replaced to align with the definition of the term in the CZM Rules without changing the meaning of the term. The

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proposed definition is expanded to include examples of Federal licenses and permits for which water quality certificates are issued.

Permitting process

The Department is proposing to amend the definition of “permit” to mean an “authorization or” approval to engage in a regulated activity in a freshwater wetland, State open water, or transition area, issued by the Department under this chapter. The addition of “an authorization” is proposed to make clear that authorizations, including authorizations under a general permit or general permit-by-certification, are considered permits as discussed throughout the chapter.

The Department is proposing a definition for “administratively complete” to specify that an application is considered administratively complete if every item required on the application checklist for a letter of interpretation or permit being sought is included in the application. A definition is additionally proposed for the term “technically complete,” which means that each item included in an application for an LOI or a permit provides sufficient information for the Department to declare the application complete for review. Both terms are used in the existing rules, including at N.J.A.C. 7:7A-12.1, which describes the Department’s completeness review process, with the proposed definitions not changing the meaning of the terms. The Department is also proposing to add the term “complete for review” which means that an application for an LOI or a permit is both administratively and technically complete and ready to be evaluated by the Department for compliance with the applicable requirements of this chapter. Including these

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new definitions in the FWPA Rules' definition section is part of the Department's effort to align the permitting processes of the FWPA Rules with those of the CZM and FHACA Rules.

The Department is proposing a definition for "Electronic LOI or E-LOI." This definition is proposed to accommodate the incorporation, at N.J.A.C. 7:7A-16.4, of the ability for applicants to submit an application for an LOI to the Department electronically, as discussed elsewhere in this summary.

As discussed above, the Department is incorporating general permits-by-certification into the chapter to promote the use of technology in the permitting process. Therefore, a new definition of the term "general permit-by-certification" is proposed. The requirements and processes associated with the proposed general permits-by-certification are discussed below.

The definition of "working day" is amended to match the definition in the CZM and FHACA Rules without affecting meaning.

Relocated terms

The terms "charitable conservancy," "degraded wetland" and "mitigation bank" are defined at existing N.J.A.C. 7:7A-15.1, which includes definitions specifically applicable to mitigation. Because these terms are used not only in the subchapter addressing mitigation at proposed recodified N.J.A.C. 7:7A-11, but also in other subchapters, they are proposed to be relocated to N.J.A.C. 7:7A-1.3. The definition of "mitigation bank" is proposed to be relocated with no change in text. The definition of "charitable conservancy" is proposed to be amended to be consistent with the FHACA Rules without affecting meaning. The term and definition of "degraded wetland" is already located in Subchapter 1 in the existing rules and so will be deleted

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from the mitigation subchapter to eliminate redundancy. The phrase “ecological value” in this definition is proposed to be changed to “ecological function” to align with the definition of “degraded wetland” in the CZM Rules at N.J.A.C. 7:7-17.1. The functions provided by any given wetland contribute to its ecological value and so the change in language will not change what will be considered a degraded wetland under N.J.A.C. 7:7A.

Forms, checklists, information; Department address and website (N.J.A.C. 7:7A-1.4)

Existing N.J.A.C. 7:7A-1.3, Forms and information; Internet web site, is proposed to be recodified as N.J.A.C. 7:7A-1.4, Forms, checklists, information; Department address and website. The Department is proposing to reorganize this section and update its contents to reflect current Department contact information, including the addition of the web address to be used to submit an application for authorization under one of the proposed electronic general permits-by-certification, and to update contact information. The Department is proposing to add new subsection (c), providing an additional point of Department contact for questions regarding the requirements of N.J.A.C. 7:7A or about the status of an application.

Liberal construction (N.J.A.C. 7:7A-1.5)

The Department is proposing to recodify the existing liberal construction provision at N.J.A.C. 7:7A-1.2 as 1.5 and amend the provision to simplify the expressed purpose of the rules to effectuate the legislative acts under which the rules are promulgated, without individually identifying each act. This change is consistent with the liberal construction provisions included in the CZM Rules at N.J.A.C. 7:7-1.7 and the FHACA Rules at N.J.A.C. 7:13-1.6.

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Applicability and Jurisdiction

Under the FWPA Rules, whether an activity is subject to the standards and permitting requirements contained in this chapter depends upon several factors. These factors include whether areas classified as freshwater wetlands or transition areas to freshwater wetlands are affected, what activities are proposed to be performed, the extent of activity to be performed, the area within which the activity is planned and the classification of the freshwater wetlands in the area of the proposed activity. The Department is proposing amendments to portions of the rules governing these determinations as described below.

Regulated Areas

Identifying freshwater wetlands and transition areas; freshwater wetlands resource value classification (N.J.A.C. 7:7A-3)

Provisions governing the identification of freshwater wetlands, the classification of freshwater wetlands by resource value, and requirements for protection of transition areas adjacent to identified freshwater wetlands are currently codified with other provisions related to what constitutes regulated activities and general requirements regarding approvals needed to conduct activities regulated under the FWPA Rules in N.J.A.C. 7:7A-2. In general, freshwater wetlands are identified and delineated using a three-parameter method that takes into account hydrology, soils, and vegetation. Areas identified as freshwater wetlands are then classified by resource value classification as either exceptional resource value, intermediate resource value, or ordinary resource value. The width of transition areas protected adjacent to the identified

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wetlands is dependent upon the resource value classification of the particular wetlands.

The Department is proposing to recodify existing N.J.A.C. 7:7A-2.3, 2.4, 2.5, and 2.7 into a new subchapter, Subchapter 3, that sets forth the criteria for identifying freshwater wetlands and transition areas and the procedure for determining the resource value classification of a freshwater wetland.

Existing N.J.A.C. 7:7A-2.3, Identifying freshwater wetlands, is proposed to be recodified as N.J.A.C. 7:7A-3.1. The Department is proposing to amend recodified N.J.A.C. 7:7A-3.1(f) to update information concerning where the New Jersey freshwater wetlands maps may be accessed. The Department is proposing to add the web address for the freshwater wetlands maps available through NJ-GeoWeb, the State's interactive web mapping application that allows users to interact with the Department's Geographic Information System (GIS) data. The Department is proposing to delete existing N.J.A.C. 7:7A-2.3(f)3, which states that the freshwater wetlands maps are available through the Department's Maps and Publications Sales Office, because this office no longer exists. However, the freshwater wetlands maps are still available from the county clerk or registrar of deeds and mortgages in each county and the municipal clerk of each municipality.

The Department is proposing to amend existing N.J.A.C. 7:7A-2.4, Classification of freshwater wetlands by resource value (proposed new N.J.A.C. 7:7A-3.2) to achieve consistency with the procedures set forth in the FHACA Rules as explained below. The Department is proposing to amend and reorganize recodified subsection (c) and new subsection (d), which describe how the Department identifies present or documented habitat for threatened and endangered species and the procedure an applicant may follow to request that a documented

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habitat not result in the classification of a freshwater wetland as one of exceptional resource value. At recodified N.J.A.C. 7:7A-3.2(c), the Department is proposing to replace the reference to the Division of Land Use Regulation's freshwater wetlands technical manual with a reference to the report "New Jersey's Landscape Project," web addresses to access the report, and the mailing address of the Landscape Project within the Department's Division of Fish and Wildlife Endangered and Nongame Species Program. This amendment provides the most up to date information about the Department's methods in determining whether a site is present or documented habitat for threatened or endangered species and is consistent with language in the FHACA Rules.

The Department is proposing, at new N.J.A.C. 7:7A-3.2(d), to explain the process for considering occurrences of threatened or endangered species on or proximate to sites that are not mapped as threatened or endangered wildlife species habitat by the Landscape Project. Such occurrences may include sightings that have not been incorporated into the landscape mapping but are in files obtained from the Endangered and Nongame Species Program (ENSP), independent studies, scientific work, or sightings from the public vetted by ENSP. The Department will evaluate the habitat on the site to confirm that it is suitable for the species in question and, if so, will notify the applicant and determine that the wetlands are of exceptional resource value. An applicant may challenge this determination in accordance with proposed new N.J.A.C. 7:7A-3.2(e), described below. This new language is similar to the CZM Rules at N.J.A.C. 7:7-9.36(d) concerning applicability of the endangered or threatened wildlife or plant species habitats rule. The Department considers occurrences of threatened or endangered species proximate to a site, in addition to occurrences on a site, in order to be consistent with the

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Landscape Project method. Staff in the Threatened and Endangered Species Unit of the Division of Land Use Regulation review new data based on whether it would lead to the site being mapped for that particular species. For example, if a barred owl was observed 0.25 miles away from the wetland in question within a contiguous forest patch, the mapping process would place a one kilometer “home range” circle on the sighting and then map suitable habitat within the circle and contiguous with the circle. In this scenario, the site would meet mapping criteria and also be within the one kilometer home range of the particular sighting.

The procedure for an applicant to request that a documented habitat not result in the classification of a freshwater wetland as one of exceptional resource value is proposed to be deleted from subsection (c) and relocated without change as its own subsection, N.J.A.C. 7:7A-3.2(e), to improve the clarity and organization of this section.

Existing N.J.A.C. 7:7A-2.5, General transition area provisions, is proposed to be renamed and recodified as N.J.A.C. 7:7A-3.3, Identifying a transition area. The Department is proposing to combine existing subsections (d) and (e), which state the standard width of transition areas adjacent to freshwater wetlands of intermediate and exception resource values, at proposed N.J.A.C. 7:7A-3.3(d) to improve clarity and organization without affecting meaning.

Existing N.J.A.C. 7:7A-2.7, Transition areas due to freshwater wetlands on adjacent property, is proposed to be recodified to N.J.A.C. 7:7A-3.4 with amendments that do not change the meaning of the existing subsection.

Letters of Interpretation (N.J.A.C. 7:7A-4)

In addition to an applicant identifying freshwater wetlands and their related transition

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areas based upon the resource value of the identified freshwater wetlands, the rules provide a mechanism for the applicant to obtain a Department determination regarding the presence or absence of wetlands, State open waters, or transition areas; verifying or delineating the boundaries of freshwater wetlands, State open waters, and/or transition areas; or assigning a wetland a resource value classification through a “letter of interpretation” (LOI). The Department is proposing to recodify existing N.J.A.C. 7:7A-3 with amendments as N.J.A.C. 7:7A-4. This subchapter sets forth the general provisions relating to LOIs. Throughout the subchapter, references to the definitions in N.J.A.C. 7:7A-1 are proposed for deletion to eliminate redundancy. Citations are updated throughout the subchapter to reflect other proposed changes to the chapter’s organization. The application requirements at existing N.J.A.C. 7:7A-3.5 are proposed to be relocated to proposed N.J.A.C. 7:7A-16 and amended, as discussed in the summary of that subchapter. While LOIs are unique to the FWPA Rules, the structure and processes involved are amended where possible to be consistent with other documents issued under the FWPA Rules as well as the processes of the FHACA and CZM rules.

Purpose and scope (N.J.A.C. 7:7A-4.1)

This proposed new section introduces N.J.A.C. 7:7A-4 by identifying the topics covered by the subchapter, which include general provisions relating to LOIs, the types and duration of LOIs, and the conditions that apply to LOIs. It is added to enhance clarity and organization.

General provisions (N.J.A.C. 7:7A-4.2)

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The Department is proposing to recodify and amend existing N.J.A.C. 7:7A-3.1, Basic LOI information, as N.J.A.C. 7:7A-4.2, General provisions. The Department is proposing clarifying amendments to recodified N.J.A.C. 7:7A-4.2(a)3 that do not affect meaning. Existing N.J.A.C. 7:7A-3.1(d) states that the Department shall presume that an area with hydric soils that have been drained for farming purposes has wetlands hydrology for the purpose of identifying a freshwater wetland. The Department is proposing to amend this provision at recodified N.J.A.C. 7:7A-4.2(d) to state that the Department shall, in the absence of compelling scientific information that wetland hydrology has been effectively removed by factors other than the drainage structures, presume that the area maintains wetlands hydrology for the purposes of identifying a freshwater wetland. Under the existing rules, if a site is in an area having hydric soils that has been drained to allow farming to occur, the Department's process to rebut the presumption that the site retains wetlands hydrology requires that the applicant disable drainage structures and leave the area undisturbed for a minimum of one normal rainfall year. Only if analysis conducted consistent with the Federal Manual at the end of this period demonstrates that the wetlands hydrology is no longer present will the presumption be considered to be rebutted. This is a time-consuming process that, in limited circumstances, may be unnecessary. The proposed amendment is intended to accommodate the rare instance where the Department is able to make a determination that wetland hydrology has been effectively altered, such that the 1989 Federal Manual criteria for delineating wetlands will not be met, making it unnecessary to require the disabling of the existing drainage structures and the passage of time. Such a determination is consistent with the 1989 Federal Manual (Part II, Summary) which directs the user to rely on sound professional judgement in interpreting field data and observations. The

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determination as to whether compelling scientific information exists would necessarily be performed on a case-by-case basis with Department staff supplementing any information submitted by an applicant with site visits and analysis of any other available information to ensure that wetlands hydrology is not present, and would not be present, even if the drainage structures were to be removed and the site to remain undisturbed for the minimum one normal rainfall year period that would otherwise be required.

The Department is proposing to relocate the contents of existing N.J.A.C. 7:7A-3.1(f) to N.J.A.C. 7:7A-19, Application review. Application review procedures for all types of applications are proposed to be located within N.J.A.C. 7:7A-19 to enhance organization. Because this subsection sets forth the time period for the review of an LOI application, its contents belong in the application review subchapter.

Existing N.J.A.C. 7:7A-3.1(i) is proposed to be recodified as N.J.A.C. 7:7A-4.2(h) and amended to remove application requirements and simplify procedures. The amended provision requires a person who has obtained an LOI to provide the Department with a survey of the approved wetlands and State open water delineation after the LOI is issued. If there were no changes to the proposed delineation, a new survey is not required. However, if the delineation ultimately approved by the Department is different than the delineation depicted in the original survey, the delineation must be resurveyed and an updated survey submitted to the Department.

The existing option to submit a survey as part of an LOI application or, in the alternative, after the Department inspects the site and approves the delineation marked on the site and the processes to be followed in the event of adjustments to wetlands delineations and the possibility of waiving the survey requirement is proposed to be deleted. These provisions are no longer

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necessary as the Department is proposing to require applicants in proposed N.J.A.C. 7:7A-16 to provide the Department with a survey of the proposed delineated wetlands and/or State open waters boundary line as part of the LOI application (except for an application for a presence/absence LOI for an entire site) and, as summarized above, submit a survey of the final approved delineation once the LOI is issued. In addition, provisions that conflict with the application requirements proposed in N.J.A.C. 7:7A-16 are deleted in order to streamline the LOI process and add consistency.

Existing N.J.A.C. 7:7A-3.1(j), which requires an applicant to provide a survey of boundaries of the portion of the site covered by an LOI in addition to a survey of the site boundaries for LOIs that only cover a portion of a site, and existing N.J.A.C. 7:7A-3.1(k), which describes cases where a site is under the jurisdiction of the Pinelands Commission, are proposed to be relocated to the application requirements proposed at N.J.A.C. 7:7A-16.3

Application for a letter of interpretation (Existing N.J.A.C. 7:7A-3.5)

Existing N.J.A.C. 7:7A-3.5 sets forth the application requirements for an LOI. In accordance with the structure proposed through these amendments, application requirements for all forms of Department approval under the FWPA Rules are proposed to be consolidated in N.J.A.C. 7:7A-16. While many of the requirements in the existing rules will continue to be applicable, in light of the number of changes being proposed, the existing section is proposed to be repealed, with a new section containing the application requirements for an LOI proposed at N.J.A.C. 7:7A-16.3. The new section is discussed in the portion of this summary addressing proposed Subchapter 16. The requirement at existing N.J.A.C. 7:7A-3.5(c), which prescribes a

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15-day comment period for LOI applications, is inconsistent with existing N.J.A.C. 7:7A-12.3(d) (recodified as N.J.A.C. 7:7A-19.6), which establishes a 30-day public comment period for all applications and, thus, is proposed to be deleted.

Conditions that apply to an issued letter of interpretation delineation or verification (N.J.A.C. 7:7A-4.7)

The Department is proposing to add new N.J.A.C. 7:7A-4.7 with additional conditions applicable to any issued LOI delineation or verification. This section is similar to N.J.A.C. 7:13-5.6 in the FHACA rules, which contains the conditions that apply to an issued or reissued flood hazard area verification.

The Department is proposing to require recipients of an LOI delineation or verification on a privately owned lot or publicly owned lot that is not a right-of-way to submit the following information to the Office of the County Clerk or the registrar of deeds and mortgages in the county in which the site is located within 90 days of the Department's issuance of the LOI: the Department file number for the LOI; the approval and expiration date of the LOI; a metes and bounds description of the wetland boundary approved under the LOI; the width and location of any transition area approved under the LOI; and a statement that the State of New Jersey has determined that all or a portion of the lot lies in a freshwater wetland and/or transition area, that certain activities in wetlands and transition areas are regulated by the Department, and that some activities may be prohibited on the site or may first require a freshwater wetland permit. The Department is proposing these requirements to ensure that potential future owners of the property are aware of the determination and any conditions or limitations that may be applicable

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to the property as a result of the Department's determination reflected in the delineation or verification.

The Department is also proposing to require proof that the information was recorded on the deed of each lot referenced in the LOI in the form of a copy of the complete recorded document or a receipt from the clerk or other proof of recordation provided by the recording office. If the initial proof provided to the Department is not a copy of the complete recorded document, a copy must be provided to the Department within 180 calendar days of the issuance or reissuance of the LOI.

Regulated Activities and Exemptions

As referenced above, provisions related to what constitutes a regulated activity requiring Department approval under the FWPA Rules are currently codified in N.J.A.C. 7:7A-2 along with provisions related to identification of freshwater wetlands, resource value of identified wetlands, and the associated transition areas, which are proposed to be recodified to N.J.A.C. 7:7A-3. In general, a person proposing to engage in a regulated activity in a freshwater wetland or State open water is required to first obtain approval from the Department, unless a waiver is obtained or the activity is specifically excepted from permitting requirements. The Department is proposing amendments to provisions governing when a permit or waiver is required and certain exceptions from the permit/waiver requirement as summarized below.

When a permit is required (N.J.A.C. 7:7A-2.1)

Existing N.J.A.C. 7:7A-2.1, Jurisdiction; permit or waiver requirement, is proposed to be

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retained as N.J.A.C. 7:7A-2.1 and renamed “When a permit is required.” New N.J.A.C. 7:7A-2.1(a) is added to clearly indicate that an activity regulated under this chapter may only be conducted if a permit has been obtained from the Department, with failure to obtain such a permit or conducting a regulated activity beyond that specifically authorized by any permit that may have been obtained subjecting the person(s) to enforcement action. This subsection consolidates the content of existing N.J.A.C. 7:7A-2.1(f) and (g), which are proposed to be deleted.

Existing N.J.A.C. 7:7A-2.1(a), which describes the possible types of permits that may need to be obtained prior to engaging in regulated activities, is proposed to be repealed and replaced with N.J.A.C. 7:7A-2.1(b), which presents the existing information in a clear list format and includes references to where information on each type of permit is located in the rules. Added to the items referenced in the existing subsection is reference to the proposed new general permits-by-certification discussed above and acknowledgement that regulated activities may also be conducted pursuant to an emergency authorizations in accordance with recodified N.J.A.C. 7:7A-14. The statement in existing N.J.A.C. 7:7A-2.1(a) that explains that the discharge of dredged or fill material may also require a stream encroachment permit pursuant to N.J.S.A. 58:16A-50 et seq., is not continued in proposed N.J.A.C. 7:7A-2.1(b) because “stream encroachment” is a term no longer used by the Department and the idea that other permits may be required for a regulated activity is set forth at proposed N.J.A.C. 7:7A-5.6 and 10.3.

Existing N.J.A.C. 7:7A-2.1(b), which establishes that State agencies proposing to engage in regulated activities must obtain a permit but there is no application fee, is proposed to be deleted to reduce redundancy. Recodified N.J.A.C. 7:7A-18.1(b)1 also states that an application

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submitted by an agency of the State does not require an application fee.

Existing N.J.A.C. 7:7A-2.1(c) is retained with minor amendments that do not affect meaning. Existing N.J.A.C. 7:7A-2.1(d) is proposed to be amended to remove references to the definition section of Subchapter 1 and to reflect the consolidation of the Coastal Permit Program rules and Coastal Zone Management rules into a single chapter titled Coastal Zone Management Rules, N.J.A.C. 7:7, adopted on July 6, 2015.

Existing N.J.A.C. 7:7A-2.1(e) states that a permittee is responsible for ensuring that the permitted project complies with all requirements of the chapter, and that the property owner and any person who manages, oversees, or works on the project may share liability for activities not performed in accordance with this subchapter. This subsection is proposed to be deleted and its contents incorporated into proposed N.J.A.C. 7:7A-20.

Activities exempt from permit and/or waiver requirement (N.J.A.C. 7:7A-2.4)

The Department is proposing to recodify existing N.J.A.C. 7:7A-2.8 as 2.4 with amendments. recodified N.J.A.C. 7:7A-2.4(a) is proposed for amendment to make clear that the activities detailed in the subchapter are exempt from the requirement of a freshwater wetlands permit or waiver (that is, transition area waiver for activities in a transition area), unless the USEPA's regulations providing for the delegation to the State of the Federal wetlands program conducted pursuant to the Federal Act require a permit for these activities, in which case the Department shall require a permit for those activities so identified by the USEPA. This is a more inclusive statement than the existing statement that activities exempt under N.J.A.C. 7:7A may still require a permit from USACE and/or a water quality certificate. The proposed language is

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consistent with the FWPA at N.J.S.A. 13:9B-4.

Recodified N.J.A.C. 7:7A-2.4(b)5 states that the Department shall presume that an area with hydric soils that has been drained for farming purposes has wetlands hydrology for the purpose of identifying a freshwater wetland. The Department is proposing to amend this provision to state that the Department shall, in the absence of compelling scientific information that wetland hydrology has been effectively removed by factors other than the drainage structures, presume that the area maintains wetlands hydrology. This change in language allows Department staff to more fully consider if an area previously drained can be said to have wetlands hydrology and is consistent with the change proposed at N.J.A.C. 7:7A-4.2(d) as discussed in the summary and the amendments to proposed N.J.A.C. 7:9A-4, Letters of Interpretation, above.

Several changes are proposed to recodified N.J.A.C. 7:7A-2.4(c) concerning agricultural exemptions. These changes are discussed in detail in the Agricultural Exemptions section of this summary below.

Geographic areas exempted from permit and/or waiver requirement (N.J.A.C. 7:7A-2.5)

Existing N.J.A.C. 7:7A-2.9 is recodified with amendments as N.J.A.C. 7:7A-2.5. The Department is proposing to amend recodified N.J.A.C. 7:7A-2.5(a) to remove reference to the Hackensack Meadowlands Development Commission and replace it with reference to the New Jersey Sports and Exposition Authority. The New Jersey Meadowlands Commission (formerly the Hackensack Meadowlands Development Commission) merged with the New Jersey Sports and Exposition Authority in February 2015, following changes to N.J.S.A. 13:17-1 et seq. The

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Department is also proposing to delete the phrase “issued by the Department” referring to a water quality certificate because the definition of “water quality certificate” in recodified N.J.A.C. 7:7A-1.3 already specifies that a water quality certificate is issued by the Department.

Agricultural and silvicultural exemptions N.J.A.C. 7:7A-2.4

As discussed above, several amendments to provisions concerning agricultural activities exempt from the requirements of this chapter are proposed. Some of the proposed amendments reflect amendments to the FWPA at N.J.S.A. 13:9B-4 (P.L. 2014, c. 89), which exempted from the permit and transition area requirements temporary farm structures, like hoopouses and polyhouses. Other proposed amendments reflect amendments to the FWPA at N.J.S.A. 13:9B-4 (through P.L. 2015, c. 272), which exempted certain activities associated with the normal maintenance of cranberry bogs and blueberry fields and renewal or rehabilitation of cranberry bogs from the requirements of the chapter. Other amendments simply clarify existing provisions and ensure a common-sense approach to the protection of freshwater wetlands, transition areas, and State open waters in areas with important ongoing agricultural operations.

Temporary farm structures; hoopouses and polyhouses (N.J.A.C. 7:7A-2.4 and related definitions at N.J.A.C. 7:7A-1.3)

As mentioned in the introduction to this Summary, on January 9, 2015, the FWPA was amended to exempt certain temporary farm structures from wetland permit and transition area requirements of the Freshwater Wetlands Protection Act. As a result of this statutory amendment, the Department is proposing to add to the list of activities at an established, ongoing

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farming, ranching, or silviculture operation that are exempt from obtaining a freshwater wetlands or open water fill permit or transition area waiver at N.J.A.C. 7:7A-2.4(c)6, the construction of temporary farm structures, such as hoophouses and polyhouses, on farmed wetlands that were actively cultivated on or before July 1, 1988, that have continued to be actively cultivated since then, and that were in active agricultural use at the time that the temporary farm structures were or are to be erected to the list of farming, ranching, and silviculture exemptions.

As further described in the summary of agriculture related definitions above, the Department is proposing a new definition of ““hoophouse” or “polyhouse”” to clarify that the temporary structures intended to be covered by this exemption do not include structures that are permanently anchored by footings.

Normal maintenance of cranberry bogs and blueberry fields and renewal or rehabilitation of cranberry bogs (N.J.A.C. 7:7A-2.4 and related definitions at N.J.A.C. 7:7A-1.3)

The Department is also proposing to add to the list of agricultural exemptions activities that would be considered normal maintenance of cranberry bogs, provided the activities occur in wetlands and waters that are in established use for cranberry production. Consistent with the examples of maintenance activities added to the FWPA at N.J.S.A. 13:9B-4.a, the Department is proposing to add the following examples of such activities: periodic flooding; sanding; control or suppression of weeds or brush in and around the bog or field; pest control or suppression; and maintenance, repair, or cleaning of dams, ditches, underdrains, floodgates, irrigation systems, or other drainage or water control facilities.

Additionally, consistent with the previously discussed amendments to N.J.S.A. 13:9B-

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4.a, the Department is proposing to add activities for the renewal or rehabilitation of a cranberry bog to the existing agricultural exemptions at proposed N.J.A.C. 7:7A-2.4(c)3. These activities include: removal of undesirable soil or vegetation; grading and leveling; installation, reconfiguration, repair, or replacement of water control or supply systems or facilities; the removal, relocation, or construction of internal dams; and the planting of new vines in an appropriate soil layer. These and the above listed maintenance activities are normal activities in ongoing cranberry operations and, as they occur in previously modified wetlands, have a *de minimis* impact on the environment.

As discussed under the Agricultural-Related Definitions section of this summary above, the Department is proposing to amend the definition of “abandoned” at N.J.A.C. 7:7A-1.3 to clarify that a field will only be considered to be abandoned if it has not been maintained or improved for agricultural purposes, and has not been used to produce a crop or product for five years or more. As explained above, the proposed amendment is consistent with recent amendments to the Freshwater Wetlands Protection Act at N.J.S.A. 13:9B-4.f.

Minor drainage related to wetland crops (N.J.A.C. 7:7A-2.4)

The Department is proposing to clarify the definition, at recodified N.J.A.C. 7:7A-2.4(c)1, of “minor drainage” as it applies to determination of whether activities that are part of an established, ongoing farming, ranching, or silviculture operation are exempt from the requirements of N.J.A.C. 7:7A. Existing N.J.A.C. 7:7A-2.8(c)1ii includes, as a type of discharge considered to constitute “minor drainage,” the discharge of material for the purpose of installing ditching, or other water control facilities involved in the farming of rice, cranberries, or other

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wetland crop species, where the farming activities and discharge occur in wetlands and waters that are in established use for wetlands crop production, and the ditching or water control facilities do not alter the bottom elevations of any watercourse. At recodified N.J.A.C. 7:7A-2.4(c)1ii, the Department is proposing to delete the requirement that ditching or water control facilities do not alter the bottom elevations of any watercourse for the activity to be considered minor drainage because it is unclear. The Department does not require a permit for alterations to ditches within established, ongoing farming, ranching, or silviculture operations. Because “watercourse” is not defined, this requirement could be misinterpreted to mean that excavating or filling within a ditch that is entirely within an established, ongoing operation is not considered “minor drainage” and would require a permit. The Department is replacing this requirement with new language to clarify the definition of “minor drainage” by emphasizing that any discharge of materials into wetlands or waters, excavation of wetlands, or draining of wetlands or waters that are not in established use for agricultural or silvicultural wetlands crop production requires a permit. This new language has the effect of ensuring that any watercourse outside of the established agriculture operation is not altered without a permit. An illustrative example of activities that would be exempt and activities that would not be exempt, and would thus require a permit, is also included.

The Department is proposing to delete the provision at recodified N.J.A.C. 7:7A-2.4(c)1v that states minor drainage does not include the construction of any new canal, ditch, dike, or other waterway or structure, and that any discharge of dredged or fill material into wetlands or State open waters incidental to the construction of any such structure requires a permit and is not considered minor drainage. This language does not appear in the FWPA or Federal regulations

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and directly contradicts recodified N.J.A.C. 7:7A-2.4(c)1ii, as amended. The amendments to the definition of “minor drainage” create consistency between the FWPA Rules’ definition of minor drainage and the USEPA’s definition of minor drainage at 40 CFR 232.3. While the definition in the FWPA Rules does not exactly match the USEPA definition in language, the amendments ensure that the meaning of “minor drainage” in the FWPA Rules does not contradict the meaning of the term in the USEPA’s rules at 40 CFR 232.

Exemptions for silviculture activities (N.J.A.C. 7:7A-2.4 and 2.6)

Silviculture activities are generally exempt from the requirement to obtain a permit to perform work in freshwater wetlands, transition areas, or State open waters. Several amendments are proposed to clarify exemption provisions related to silviculture, which are proposed to be recodified from N.J.A.C. 7:7A-2.8 to 2.4 with the agricultural exemptions. These amendments were developed in collaboration with the Department’s Division of Forestry.

The existing rules, in describing the limits on the various farming, ranching, and silviculture exemptions, require that the “normal harvesting of forest products,” which includes clear cutting, must be part of a forest management plan that “addresses wetlands” and is approved by the State Forester. However, harvesting of forest products is not the only activity that may be exempt and use of that terminology does not capture forest stewardship activities, which are intended to enhance forest habitats. Therefore, the Department is proposing to define the scope of the provision as applicable to “normal silviculture activities” to accurately capture activities covered under the exemptions and subject to limits that follow. The definition of silviculture in the rules (recodified N.J.A.C. 7:7A-1.3) is not limited to harvesting of forest

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products and encompasses other activities that would be part of a stewardship plan. The Department is also proposing to replace the requirement that a forest management plan “addresses wetlands” with the requirement that the plan “conforms to best management practices” to clarify that conformance with forestry BMPs, which set forth practices to minimize impacts to wetlands, is a necessary component of a forest management plan for the exemption from the permit requirement to apply.

The Department is similarly proposing to amend the existing forestry exemption itself to replace “harvesting of forest products” with “silviculture activities” to clarify that all applicable silviculture activities, which includes activities necessary for forest stewardship, are exempt from the requirement to obtain a permit, subject to the limits of the section.

Finally, the Department is proposing to replace the term “forest products harvesting” with “normal silviculture activities” in the requirements for applying for an exemption letter for such activities at recodified N.J.A.C. 7:7A-2.6 for the reasons described above.

PERMITTING

If it is determined that an intended activity constitutes a regulated activity under this chapter and Department approval is needed, the rules provide various forms of approval that may be sought. Existing approvals that may be sought include authorization under a general permit, an individual permit, or a transition area waiver, and emergency authorizations, with which form of approval is required dependent upon several factors, including the extent of the activity proposed, the activity’s potential impact to freshwater wetlands resources, and the resource value of the freshwater wetlands in question.

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The Department is proposing a variety of amendments to the different forms of approval that may be obtained, including addition of a new form of approval, a general permit-by-certification. As noted in the introduction of this rulemaking Summary, one of the Department's goals for this rulemaking is to align certain aspects of the FWPA Rules with the CZM and FHACA Rules, to the extent the respective enabling statutes allow. This alignment effort encompasses substantive procedural components including permit application, review, issuance, and conditions; and adjudicatory hearings. Generally speaking, the new rules and amendments to the various sections of the existing FWPA Rules described in this part of the summary are proposed in order to make the provisions consistent in presentation, organization, and content with the rules covering the same subject matter in the CZM and FHACA Rules. Proposed amendments to specific forms of approval available under the FWPA Rules are discussed below. Proposed amendments to process requirements common to the three chapters, such as public notice requirements and application review processes are discussed in the next section of this summary with proposed changes to the standards applicable to particular approvals following the general process discussion.

Forms of FWPA Rules Approval

General provisions for general permits-by-certification and general permits (N.J.A.C. 7:7A-5)

The Department is proposing to recodify with amendments existing N.J.A.C. 7:7A-4, General Provisions for General Permits, as N.J.A.C. 7:7A-5, General Provisions for General Permits-By-Certification and General Permits. This subchapter contains provisions that apply to

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all general permits-by-certification and general permits promulgated as part of the FWPA Rules.

Purpose and scope (N.J.A.C. 7:7A-5.1)

As stated in proposed new N.J.A.C. 7:7A-5.1, this subchapter sets forth the standards for the Department to issue, by rulemaking, general permits-by-certification and general permits; the use of these permits to conduct authorized activities; the standards governing the use of more than one of these permits on a single site; the duration of authorizations under these permits; and the conditions that apply to these permits. This section is added to enhance organization and resembles comparable sections in the CZM and FHACA Rules.

Standards for issuance, by rulemaking, of general permits-by-certification and general permits (N.J.A.C. 7:7A-5.2)

Proposed N.J.A.C. 7:7A-5.2 is recodified from existing N.J.A.C. 7:7A-4.1, Department issuance of general permits, and amended to add provisions regarding general permits-by-certification. The proposed amendments to N.J.A.C. 7:7A-5.2(a) change the language of existing N.J.A.C. 7:7A-4.1(a) to match language found in the CZM and FHACA rules as much as possible without changing the meaning of the existing subsection. The amended subsection describes how the Department will promulgate each general permit-by-certification or general permit, except for general permits 6 and 7, after publication of a notice of rule proposal in the New Jersey Register and consideration of public comment, in accordance with the rulemaking provisions of the New Jersey Administrative Procedure Act.

Recodified N.J.A.C. 7:7A-5.2(b) is proposed with minor amendments. The Department is

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proposing to delete the introductory phrase “after conducting an environmental analysis” from the explanation in existing N.J.A.C. 7:7A-4.1(b)1 of the Department’s determination that activities under a new general permit (or a general permit-by-certification in the proposed rules) will have minimal environmental impact to align the rule text with the CZM and FHACA Rules. The rulemaking process includes an analysis of environmental impacts; the deletion of this phrase does not change the Department’s process. Existing N.J.A.C. 7:7A-4.1(b)3 specifies that a new general permit will only be adopted if the Department has provided public notice and an opportunity for a public hearing. At recodified N.J.A.C. 7:7A-5.2(b)3, in addition to adding reference to the applicability of this requirement to general permits-by-certification, the Department is proposing to make clear that the public hearing requirement is only applicable to promulgation of a new general permit-by-certification or general permit and that, after a general permit-by-certification or general permit has been promulgated pursuant to this subchapter, the Department will not hold public hearings on individual applications for authorization under a general permit-by-certification or general permit. The Department has determined that, because, by definition, activities authorized by general permits-by-certification and general permits will cause minimal individual and cumulative environmental impacts in accordance with both existing N.J.A.C. 7:7A-4.1(b)1 and recodified N.J.A.C. 7:7A-5.2(b)1, holding separate public hearings for applications under these permits is unnecessary.

At recodified N.J.A.C. 7:7A-5.2(c), the Department is proposing to delete an unnecessary qualifying clause that does not affect meaning. It is clear that each general permit-by-certification or general permit must meet the conditions required by the subchapter, so it is not necessary to state here.

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The Department is proposing to reword recodified N.J.A.C. 7:7A-5.2(d) to match the equivalent provision in the CZM Rules at N.J.A.C. 7:7-3.2(d). The amended subsection states that the Department will include in each general permit-by-certification or general permit promulgated through rulemaking appropriate conditions applicable to particular types of sites or development, which must be met in order for a proposed activity to qualify for authorization under the general permit-by-certification or general permit. The conditions promulgated for each general permit-by-certification or general permit will be those necessary to ensure that activities authorized are limited to the extent necessary to ensure that the activity satisfies the requirements specified at proposed N.J.A.C. 7:7A-5.2(b). This amendment expands and clarifies the existing subsection.

The Department is proposing a clarification at recodified N.J.A.C. 7:7A-5.2(e) to emphasize that the repeal of a general permit-by-certification or general permit is only achieved by undertaking rulemaking.

Use of an authorization pursuant to a general permit-by-certification or a general permit to conduct regulated activities (N.J.A.C. 7:7A-5.3)

N.J.A.C. 7:7A-5.3 is recodified with amendments from existing N.J.A.C. 7:7A-4.2, Using a general permit to authorize specific activities. Existing N.J.A.C. 7:7A-4.2(a) specifies application requirements that must be followed in order to obtain permission to utilize a general permit to authorize regulated activities. The Department is proposing to add new N.J.A.C. 7:7A-5.3(a) to specify that an activity that meets the requirements of a general permit-by-certification may be conducted when the person proposing to conduct the activity receives the automatic

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authorization resulting from completion of the application submission through the Department's electronic permitting system. Existing N.J.A.C. 7:7A-4.2(a) is proposed to be simplified and updated as recodified N.J.A.C. 7:7A-5.3(b) to establish when an activity that meets the requirements of a general permit may be conducted. The activity may be conducted when the person proposing to conduct the activity receives authorization from the Department in accordance with proposed N.J.A.C. 7:7A-19. Portions of the existing subsection referring to application requirements are not continued as those requirements are proposed to be specified in N.J.A.C. 7:7A-16.

Existing N.J.A.C. 7:7A-4.2(c) addresses the inclusion in all general permits of a transition area waiver to ensure access to the location of the authorized activity, specifies how the area of access waiver is treated for purposes of the maximum area allowed to be subject to regulated activities under the general permit, and specifies limitations on the regulated activities that will be allowed under an access transition area waiver. Portions of existing N.J.A.C. 7:7A-4.2(c) are proposed for recodification as N.J.A.C. 7:7A-5.3(d). The Department is proposing to delete the description of what regulated activities are allowed under an access transition area waiver at existing N.J.A.C. 7:7A-4.2(c) because that information is already contained in recodified N.J.A.C. 7:7A-8.1(a)6. The content of existing N.J.A.C. 7:7A-4.2(c)2iii is proposed to be deleted from the chapter entirely. While existing N.J.A.C. 7:7A-4.2(c) provides the reader with a summary of the limitations applicable to a limited transition area waiver for access, as indicated in the lead-in language of that subsection, the limited access waiver granted is provided in accordance with N.J.A.C. 7:7A-6.1(a)6. The indication in existing N.J.A.C. 7:7A-4.2(c)2iii that the Department must reestablish the wetland transition area adjacent to the new wetland

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boundary at the conclusion of activity authorized by the general permit and that any part of the transition area disturbed for access be allowed to revert to preconstruction condition or be restored to preconstruction conditions is not set forth at existing N.J.A.C. 7:7A-6.1(a)6 with the other requirements for access transition area waivers. These requirements directly contradict the lead-in language at recodified N.J.A.C. 7:7A-8.1(a)5ii, which establish that an access transition area waiver allows access to regulated activities in a transition area as necessary to both accomplish construction and allow for the future use of the activity authorized in the adjacent wetlands under a general permit.

The Department is proposing to delete existing N.J.A.C. 7:7A-4.2(d), which emphasizes that an activity may require additional approvals from the USACE and/or the Pinelands Commission, depending on the location of the activity. This information is already stated in existing and proposed N.J.A.C. 7:7A-2.1(c) and recodified N.J.A.C. 7:7A-5.3(b). Recodified N.J.A.C. 7:7A-5.3(e) is proposed for amendment to replace the term “general permit authorization” with the preferred term “authorization under a general permit.”

The Department is also proposing to amend recodified N.J.A.C. 7:7A-4.2(h) to indicate that an individual freshwater wetlands or open water fill permit must be obtained if a regulated activity is not covered by any general permit-by-certification, general permit, or combination of general permits-by-certification and/or general permits.

The Department is proposing new N.J.A.C. 7:7A-5.3(i), to declare that an authorization under a general permit-by-certification or general permit does not relieve the person conducting the authorized regulated activities from the obligation to obtain any other applicable permits or approvals. The language of this proposed subsection is consistent with that found at N.J.A.C.

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7:7-3.3(d) in the CZM Rules.

Use of more than one general permit or general permit-by-certification on a single site (N.J.A.C. 7:7A-5.4)

N.J.A.C. 7:7A-5.4 is recodified and amended from existing N.J.A.C. 7:7A-4.4, Use of multiple general permits. The Department is proposing clarifying changes that do not affect meaning at N.J.A.C. 7:7A-5.4(a). The Department is proposing substantive amendments at N.J.A.C. 7:7A-5.4(a)1 to state that the combination of general permits or general permits-by-certification with transition area waivers is prohibited, except for the combination of a transition area averaging plan, special activity transition area waiver for redevelopment, or special activity transition area waiver for linear development with a general permit. At recodified N.J.A.C. 7:7A-5.4(a)2iv, the Department is proposing to add disturbance authorized under general permit 17 on land dedicated for conservation/recreation purposes to those activities that are not subject to the one-acre combined disturbance limit set forth at N.J.A.C. 7:7A-5.4(a)2 because these activities are generally low-impact and promote public access to and enjoyment of nature. The Department seeks to encourage these activities when constructed under the requirements of general permit 17 and so is proposing to exempt them from the one-acre combined disturbance limit. The Department is proposing to add general permits-by-certification 8 and 24 to the list of approvals that are subject to the one-acre combined disturbance limit. The general permits that these general permits-by-certification complement (existing general permits 8 and 24) are already subject to this limit.

Finally, the Department is proposing to delete existing N.J.A.C. 7:7A-4.4(a)3 which

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prohibits disturbance exceeding 0.5 acres under general permit 6 from being combined with any other general permit, except with an authorization under general permit 6A, in which case total disturbance is limited to one acre. The Department has determined that this limit on general permit 6 is not necessary to protect freshwater wetlands and State open waters. General permit 6 allows impacts of up to one acre of wetlands and waters that are not part of a surface water tributary system, and not waters of the United States, as defined by the Federal government. In waters of the United States, the permit is limited to 0.5 acre of wetland or open water fill. The general permit cannot be used for activities in wetlands of exceptional resource value or USEPA Priority Wetlands. In addition, this permit cannot be used solely for the purpose of eliminating a natural resource in order to avoid future regulation. If the wetland/open water resource meets the non-surface water connection requirement, any type of development may be authorized. The Department considers connections such as stormwater pipe systems to be a surface water connection and, therefore, wetlands connected to surface waters via stormwater pipes are ineligible for this general permit. General permit 6 also requires mitigation for permanent impacts to 0.1 acres or more of wetlands or waters that are also waters of the United States as defined in the FWPA Rules. Given the existing limitations in the general permit itself, the Department does not believe it is necessary to separately limit the combination of general permit 6 with other general permits. Therefore, as proposed, the total combined area of wetlands, State open waters, and transition area disturbed or modified on a site under general permit 6 and any other permit cannot exceed one acre.

Duration of an authorization under a general permit-by-certification (N.J.A.C. 7:7A-5.5)

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The Department is proposing new N.J.A.C. 7:7A-5.5 to establish the duration of an authorization under a general permit-by-certification. Consistent with the initial duration of individual permits under proposed N.J.A.C. 7:7A-9.2, general permits under proposed N.J.A.C. 7:7A-5.6, an LOI under proposed N.J.A.C. 7:7A-4.6, and transition area waivers under proposed N.J.A.C. 7:7A-8.5, an authorization under a general permit-by-certification is valid for five years. The term of an authorization under a general permit-by-certification cannot be extended, so regulated activities being conducted pursuant to such an authorization must immediately cease when the authorization expires. If the person intends to commence or continue the regulated activities originally authorized under a general permit-by-certification, the person must obtain a new authorization under this chapter. There is no flexibility in the duration of a general permit-by-certification because the authorization is received upon the certification of the applicant that all requirements of the general permit-by-certification are met. General permits-by-certification are intended to authorize discrete, simple activities with very minimal environmental impacts. These activities should be able to be completed within the five-year duration of the authorization. To continue the activity beyond the five-year duration, a new authorization (and application fee) is required.

Duration of an authorization under a general permit (N.J.A.C. 7:7A-5.6)

The Department is proposing new N.J.A.C. 7:7A-5.6 to set forth the duration of an authorization under a general permit. This section defines the term of a general permit as five years, with a possible one-time five-year extension, and specifies the standards that will be applied if an authorization under a general permit expires and a new authorization for the

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regulated activity is sought. The initial five-year term of a general permit authorization and allowance of one extension is consistent with the existing rules at N.J.A.C. 7:7A-13.3 and 14.6.

In the event of an application for a new authorization after the original authorization has expired, the proposed section provides that whether the regulated activity may proceed based upon the requirements of this chapter that were applicable when the original authorization was obtained or must be redesigned to comply with any changed requirements applicable at the time of the new application generally depends upon whether the regulated activity was commenced under the original authorization and how far the regulated activity has proceeded towards completion prior to expiration. Where regulated activities were commenced prior to expiration of the original authorization, the section specifies, at proposed N.J.A.C. 7:7A-5.6(c)2, factors that will be considered in determining whether redesign of the regulated activity to comply with the current requirements of the general permit should be required. These factors seek to consider the hardship that would be imposed by requiring redesign of a project that has significantly progressed toward completion under the original authorization, while ensuring that allowing continued construction under the rules in effect when the general permit authorization was originally obtained will not have an unacceptable adverse impact on the environment. This provision takes a common sense approach and allows reasonable flexibility in the application of this chapter to regulated activities in freshwater wetlands, transition areas, and State open waters while ensuring appropriate protection of the environment. It is consistent with the general permit duration provisions in the CZM and FHACA Rules.

Conditions applicable to an authorization pursuant to a general permit-by-certification or a

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general permit (N.J.A.C. 7:7A-5.7)

Existing N.J.A.C. 7:7A-4.3 specifies conditions that are applicable to all general permit authorizations. The Department is proposing to recodify, with amendments, this section as N.J.A.C. 7:7A-5.7.

Throughout the section, the Department is proposing amendments to reflect that the requirements apply both to activities authorized under a general permit and those authorized under the proposed new general permit-by-certification. The Department is proposing clarifying language changes at subsection (a) that do not affect meaning. The Department is proposing new paragraph (a)6 to clarify that additional conditions required under proposed N.J.A.C. 7:7A-5.7(f), which are added on a case-by-case basis to general permit authorizations to ensure compliance with the FWPA Rules and its statutory authorities, are included in the conditions with which a person conducting regulated activities under a general permit authorization must comply.

Most of existing N.J.A.C. 7:7A-4.3(b) is proposed to be recodified with no significant changes, with some exceptions. First, the Department is proposing to delete the reference to the Pinelands Commission's regulation of activities at N.J.A.C. 7:7A-5.7(b)1 because it is redundant with proposed N.J.A.C. 7:7A-1.2(b).

The Department is proposing to delete existing N.J.A.C. 7:7A-4.3(b)8, which sets forth requirements for monitoring excavation for acid-producing soil deposits. As explained above, the requirements related to acid-producing soils are used in the existing FWPA Rules to ensure that activities under this chapter do not violate the FHACA Rules by exposing acid-producing soils. This paragraph, and other references to acid-producing soils throughout the FWPA Rules, are

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deleted for consistency because references to acid-producing soils have been deleted from FHACA Rules. As is the practice under the FHACA Rules, the responsibility of monitoring for, and controlling, acid-producing soil deposits lies with local Soil Conservation District.

Existing N.J.A.C. 7:7A-4.3(b)16 prohibits authorization of activities in a vernal habitat or in a transition area adjacent to a vernal habitat under a general permit with the exception of four specific general permits. The Department is proposing to amend recodified N.J.A.C. 7:7A-5.7(b)15) to clarify that, while activities associated with general permits 1, 6, 6A, and 16 may be authorized in a vernal habitat or in a transition area adjacent to a vernal habitat under those general permits, like all other applications for authorization under a general permit, applications for authorization of activities in these special areas under those general permits will only be approved after they are reviewed on a case-by-case basis in accordance with proposed N.J.A.C. 7:7A-5.3(e) (see discussion of Appendix 1 below for more information). Under both existing N.J.A.C. 7:7A-4.2(e) and proposed N.J.A.C. 7:7A-5.3(e), any application for authorization under a general permit is denied and an individual permit application required if the Department finds that additional permit conditions will be insufficient to ensure compliance with the FWPA Rules and other applicable laws, or special circumstances make it necessary for the individual permit process to be followed to ensure compliance with these rules, any permit issued under these rules, or either the State or Federal Acts. The Department is continuing to prohibit all other activities from occurring in vernal habitats or transition areas adjacent to vernal habitats pursuant to a general permit authorization, with the more extensive application information and analysis required through the individual permit process being required for any other activities to ensure that these important areas are adequately protected.

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The Department is proposing to delete existing N.J.A.C. 7:7A-4.3(c), Table A, which sets forth time periods during which activities that may introduce sediment into a stream, or cause the stream to become turbid are prohibited in waters with fishery resources, and replace it with new N.J.A.C. 7:7A-5.7(c), Table 5.7. Proposed new Table 5.7 is identical to Table 11.5 from the FHACA Rules, which specifies the timeframes under that chapter that specific activities are prohibited to provide similar protection of fishery resources. This proposed amendment will align the formatting and presentation of timing restrictions set forth in the FWPA Rules with those set forth in the FHACA rules, as well as adjust some existing timing restrictions. The timing restriction that applies for general game fish is proposed to be bifurcated into regions north and south of Interstate 295. A new timing restriction is proposed for regulated waters that support general game fish located north of Interstate 195. Due to the relatively colder climate north of Interstate 195, the spawning period of general game fish in this portion of the State extends through July, necessitating a longer spawning period. Regulated waters supporting general game fish in the rest of the State south of Interstate 195 will continue to be subject to the existing prohibited activity time period of May 1 through June 30. Timing restrictions for waters that support pickerel and waters that support walleye are unchanged. The timing restrictions for different portions of the Delaware River are proposed to be updated and grouped under the heading “Anadromous waters” rather than “Water bodies used by American Shad for migrations in the Delaware River” because American Shad are just one of several species that use these waters for migration. The existing timing restriction for “All unimpeded tidal waters open to the ocean” is also proposed to be moved to this section of the table. The April 1 to June 30 restriction is also proposed to be expanded to all regulated water identified as anadromous

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pathways to ensure protection of anadromous fish during their spring migration. These changes ensure consistency between the freshwater wetlands and flood hazard area permitting programs, which is especially vital because projects often require both a flood hazard and a freshwater wetlands permit. New Table 5.7 will protect New Jersey's important fishery resources from the impacts caused by sedimentation of stream channels and increase the efficiency of the permitting process.

The Department is proposing to recodify existing N.J.A.C. 7:7A-4.3(d), which specifies when timing restrictions designed to protect fishery resources may be adjusted, to N.J.A.C. 7:7A-5.7(d) with amendments to align the subsection with similar provisions found in the FHACA Rules at N.J.A.C. 7:13-11.5(e). In addition to minor language amendments to N.J.A.C. 7:7A-5.7(d) and (d)1 and 2 that align these provisions with similar provisions in the FHACA Rules without changing their meaning, the Department is proposing to add clarifying language, including a hypothetical example, at proposed N.J.A.C. 7:7A-5.7(d)2, which allows for potential modification of the timing restrictions if those restrictions would restrict regulated activities to less than 183 calendar days per year. This paragraph provides that, if such a situation exists and the applicant demonstrates that steps have been taken to minimize impacts to the fisheries resource, the seasons may be modified to allow up to 183 calendar days during which the activity may be conducted. Particularly, the proposed language makes clear that the 183 calendar-day period in which the Department will allow activities does not need to be consecutive. Timing restrictions are just one of many tools for protecting fishery resources. If the applicant demonstrates, and the Department determines, that alternate methods will be suitably protective of the resource, the timing restriction can be reduced without impact to fisheries. The proposed

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language and the example provided are consistent with the FHACA Rules and are intended to make clear that the primary focus of this subsection remains protection of the fishery resource.

At recodified N.J.A.C. 7:7A-5.7(d)3, the Department is proposing to delete the existing indication that the timing restrictions may be modified if the Department determines that regulated activities must occur during periods when local schools are not in session in order to avoid increased risks or excessive delays to school buses or vans and replace it with the broader allowance of modification if the observance of a timing restriction would adversely impact public health, safety, and/or welfare, and the applicant demonstrates that additional measures are taken where necessary to reduce adverse impacts to fishery resources to an acceptable level. While continuing to provide for consideration of student safety, the proposed provision will allow consideration of general public health, safety, and/or welfare regardless of whether school is in session or not. This amendment is consistent with the FHACA Rules and will allow the Department to apply more flexibility in order to consider protection of public health, safety, and welfare in determining whether to approve a modification of the restricted time period while continuing to ensure protection of the fishery resources.

The Department is proposing new N.J.A.C. 7:7A-5.7(f), which allows the Department to establish conditions, in addition to the conditions that apply to all general permit authorizations in a specific authorization pursuant to a general permit, on a case-by-case basis, as required to ensure the activity authorized meets all applicable requirements of this chapter and its enabling statutes. This provision recognizes the unique nature of every site on which regulated activities are proposed and provides the Department flexibility to apply conditions as necessary to ensure protection of the environment.

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Existing N.J.A.C. 7:7A-4.3(f) is proposed to be deleted because requirements for application review are proposed to be consolidated into N.J.A.C. 7:7A-19. Similarly, existing N.J.A.C. 7:7A-4.5, Application requirements for authorization to act under General Permits, is proposed to be repealed. Application requirements for all permits are proposed to be consolidated and amended at N.J.A.C. 7:7A-16.

Individual Freshwater Wetlands and Open Water Fill Permits (N.J.A.C. 7:7A-9)

The Department is proposing new N.J.A.C. 7:7A-9 to set forth general requirements applicable to all individual freshwater wetlands and open water fill permits, including the requirement to obtain an individual permit, and the duration of an individual permit. The proposed new subchapter additionally includes reference to the conditions applicable to an individual permit. While this information can be found in the existing rules, the Department is proposing to consolidate and amend these provisions in a single subchapter for clarity and consistency. Similar subchapters appear in the CZM and FHACA Rules for their respective individual permits. Further requirements that may be applicable to individual permits for specific types of activity (such as permits for a non-water dependent activity in exceptional resource value wetlands), and conditions that may be required on a case-by-case basis are set forth in proposed N.J.A.C. 7:7A-10 and 20, respectively, discussed elsewhere in this Summary.

Requirement to obtain an individual permit (N.J.A.C. 7:7A-9.1)

Proposed new N.J.A.C. 7:7A-9.1 clarifies when a person must obtain an individual permit to conduct regulated activities in an area regulated under the FWPA Rules. Under this

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section, an individual permit is required to conduct an activity that does not meet the requirements of an authorization under a general permit-by-certification (proposed N.J.A.C. 7:7A-6), an authorization under a general permit (proposed N.J.A.C. 7:7A-7), or a transition area waiver (proposed N.J.A.C. 7:7A-8).

Duration of an individual permit (N.J.A.C. 7:7A-9.2)

Proposed N.J.A.C. 7:7A-9.2 relocates and amends provisions from existing N.J.A.C. 7:7A-13.3 to achieve consistency with the FHACA Rules. Under this section, with limited exception, the Department is proposing to establish a five-year duration for individual permits, with the possibility of extension of the individual permit for an additional five years if the criteria specified at N.J.A.C. 7:7A-20.4 are satisfied. Excepted from the five-year duration are linear activities or projects that are greater than 10 miles in length, flood control projects, and quarry or mining operations, with these activities being authorized for a period of 10 years from the date of issuance with no opportunity for extension.

Under the existing rules, every individual permit has a five-year term that can be extended in certain circumstances. One of the conditions that must be satisfied is that there has been no significant change in the conditions on the site between the date the permit was issued and the date the application for extension is submitted. Based on its observation that site conditions generally did not change significantly over time where activities were approved under freshwater individual permits that were subsequently extended by the Permit Extension Acts of 2008, 2010, and 2012, the Department has determined that providing for one five-year extension for most individual permits (excluding those for long linear projects, flood control projects, and

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quarry or mining operations) allows construction to continue with less burden to permittees while not undermining protections against adverse impacts to wetlands and State open water functionality. Both the existing and proposed rules preclude an extension if the requirements specified in the rules have been amended since the original approval in a manner that results in the activity no longer complying with the rules, thus ensuring that an extension does not result in a continuation of activities that have been determined subsequent to the original approval to be adverse to adequate protection of freshwater wetlands.

The existing rules do not provide a different duration for an individual permit for a linear activity or project that is greater than 10 miles in length, a flood control project, or a quarry or mining operation. The Department has found that the inherent size and scope of these projects generally preclude the completion of the projects within five years from the date of permit issuance. However, the Department has limited the duration of these permits to 10 years, without extension, as 10 years is a reasonable amount of time to complete an activity. If the activity is not completed within 10 years, a new permit is required. This provision is consistent with the duration of individual permits for these types of projects in the FHACA Rules.

In addition to specifying the initial duration of an individual permit and allowing the possibility of an extension in appropriate cases, the rules additionally set forth the procedures to be followed upon expiration of an individual permit. Upon expiration of the initial five-year period or at the conclusion of the 10-year period if an extension was obtained or the individual permit was for one of the activities which has an initial 10-year duration, all regulated activities are required to immediately stop. Similar to requirements applicable to general permits at N.J.A.C. 7:7A-5.6, discussed above, if there is a desire to proceed further with the regulated

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activity after the original authorization has expired, the rulemaking provides that conditions applicable in any new individual permit will take into account whether regulated activities were initiated under the expired permit. Except where regulated activities have been initiated prior to the expiration of the individual permit and the Department determines that it is not feasible for the project to be revised to fully comply with the requirements of this chapter in effect when the new permit application is declared complete for review, the originally approved activity must be revised, where necessary, to fully comply with the rules in effect at the time the permit application is determined to be complete for review. Again, similar to the rules applicable to general permits, where regulated activities were commenced prior to expiration of the original individual permit, the section specifies the factors that will be considered in determining whether redesign of the regulated activity to comply with the rule requirements applicable to individual permits when the new application is determined to be complete for review is necessary. These factors seek to consider both the hardship that would be imposed by requiring redesign of a project that has significantly progressed toward completion, while ensuring that allowing continued construction under the rules in effect when the original individual permit was approved will not have an unacceptable adverse impact on the environment. The analysis to be followed in reviewing a new application for an individual permit after expiration of the original individual permit is consistent with the requirements in the FHACA Rules for individual permits.

Conditions applicable to an individual permit (N.J.A.C. 7:7A-9.3)

The Department is proposing a new section to set forth the general conditions that apply to individual permits. These conditions include the conditions set forth in the permit itself and

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the conditions that apply to all permits at proposed N.J.A.C. 7:7A-20.2. The Department will also establish conditions in specific individual permits, as required on a case-by-case basis, to ensure the activity authorized under the individual permit meets all applicable requirements of this chapter and its enabling statutes.

Emergency Authorizations (N.J.A.C. 7:7A-14)

Existing N.J.A.C. 7:7A-8, Emergency Permits, is proposed for repeal with the contents of the existing subchapter relocated to N.J.A.C. 7:7A-14, Emergency authorizations, with the amendments described below. An emergency authorization is an expedited temporary authorization to undertake a regulated activity when conditions warrant immediate action to protect lives, property, and/or the environment. The Department is proposing to use the term “emergency authorization” rather than “emergency permit” to make it clear that an emergency authorization is temporary and is not a permit per se; rather, a permit must subsequently be obtained for the regulated activities that are covered by the emergency authorization. This change is consistent with the FHACA Rules on emergency authorizations, N.J.A.C. 7:13-16 and the CZM Rules at N.J.A.C. 7:7A-21.

Standards for issuance of an emergency authorization (N.J.A.C. 7:7A-14.1)

Existing N.J.A.C. 7:7A-8.1, Emergency permits, is continued and amended at N.J.A.C. 7:7A-14.1, Standards for issuance of an emergency authorization. This section is restructured to be consistent with the emergency authorization provisions in the FHACA and CZM Rules. Similar to the existing rules, an emergency authorization will be issued only in extraordinary

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circumstances when there is a need to undertake regulated activities to address a threat to life, severe loss of property, or environmental degradation exists or is imminent and the activities to address the threat, severe loss, or degradation require authorization sooner than could be accomplished in the normal course through application for a general permit or an individual permit. The requirement that the threat can only be prevented or ameliorated through undertaking a regulated activity, while implied by the existing rules, is not explicitly stated. It is proposed to be added for clarity.

Procedure to request an emergency authorization (N.J.A.C. 7:7A-14.2)

Existing N.J.A.C. 7:7A-8.2 is continued and amended at proposed N.J.A.C. 7:7A-14.2. Proposed N.J.A.C. 7:7A-14.2(a) expands the information that a person requesting an emergency authorization must provide and requires that the information be provided by telephone and by fax, email, or letter, unless the emergency is so immediate that only telephone notice is feasible. The person requesting an emergency authorization must provide the name, address, and contact information for both the owner(s) of the property upon which the regulated activity will be conducted and for owner(s) of other properties affected by the proposed activity; a demonstration that the property owner(s) has given proper permission for the activity, or in the case of a public entity undertaking activities on private property, a written statement of the public entity's intention to conduct the activity; the street address, block, lot, municipality, and county of the property; the nature and cause of the threat; the date and time at which the person requesting the emergency authorization learned of the threat; the nature and extent of the proposed regulated activity; the proposed start and completion dates for the activity; photographs of the area where

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the activity will be conducted; a site plan showing the proposed activity and anticipated impacts to freshwater wetlands, State open waters, and/or transition areas, if possible; and any other information necessary for the Department to ensure compliance with N.J.A.C. 7:7A. The more detailed information will assist the Department in making its determination as to whether a proposed activity meets the standards for issuance of an emergency authorization; the severity of the emergency; the nature and scope of the activities required to remedy the emergency; the amount of time that will be required to complete the activity; and that the owners of the property on which the activity(ies) will take place have given permission or that they have been notified of a public entity's intention to conduct activities through an emergency authorization.

Under proposed N.J.A.C. 7:7A-14.2(b), the requesting person is not required to provide public notice of the request for emergency authorization or submit an application fee. However, the requester must provide notice and submit an application fee, as applicable, at the time it applies for the general permit authorization or individual permit for the activities covered by the emergency authorization (see proposed N.J.A.C. 7:7A-14.3(f)). The Department will publish notice of the issuance of an emergency authorization in the DEP Bulletin, and will do so within 20 calendar days after it provides its verbal decision to the requester (see proposed N.J.A.C. 7:7A-14.3(b)). Existing N.J.A.C. 7:7A-8.1(f), which establishes that emergency activities in an area under the jurisdiction of the Pinelands Commission may require approval from the Pinelands Commission, is relocated as proposed N.J.A.C. 7:7A-14.2(c).

Issuance of emergency authorization; conditions (N.J.A.C. 7:7A-14.3)

Proposed N.J.A.C. 7:7A-14.3 incorporates provisions found in existing N.J.A.C. 7:7A-

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8.1 and 8.2 that set forth the requirements and procedures for the Department to issue an emergency authorization. While the existing rules do not set a timeframe for Department action on a request for an emergency permit, the Department is proposing that it will verbally approve or deny an emergency authorization within 15 calendar days after receiving a request. As under the existing rule, if the decision is to issue the authorization, the Department will provide written confirmation within five days.

Proposed N.J.A.C. 7:7A-14.3(b) continues the requirement for the Department to publish public notice of the emergency authorization currently found at N.J.A.C. 7:7A-8.1(d).

The Department's written confirmation of its decision to issue an emergency authorization must include, as proposed at N.J.A.C. 7:7A-14.3(c), a full description of the activities authorized; the timeframes within which the regulated activities must be commenced and conducted; a requirement that the person conducting the regulated activities provides regular updates of progress at the site; any limits or criteria necessary to ensure compliance with the FWPA Rules; and a requirement to provide mitigation as appropriate. This subsection incorporates and expands the requirements at existing N.J.A.C. 7:7A-8.1(c) and 8.2(f). Existing N.J.A.C. 7:7A-8.2(b), which requires the Department to notify the Regional Administrator of Region II of the USEPA before issuing an emergency permit if it receives a request for an emergency permit for a major discharge, is relocated as proposed N.J.A.C. 7:7A-14.3(d).

Proposed N.J.A.C. 7:7A-14.3(e) sets forth the timeframes within which the regulated activities authorized by the emergency authorization will be commenced and conducted. Activities authorized by an emergency authorization must be commenced within 30 calendar days of the Department's verbal approval, or an alternate timeframe as established by the

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Department in accordance with proposed N.J.A.C. 7:7A-14.3(g). If activities are not commenced within the applicable timeframe, the emergency authorization is automatically void. This provision is not currently included in the existing FWPA Rules. Incorporation of these timeframes will ensure that the activities conducted under an emergency authorization are truly related to an existing or imminent threat that must be addressed before the normal permitting process can be accommodated and will align the emergency permit process throughout the FWPA, FHACA, and CZM rules.

The existing rule, at N.J.A.C. 7:7A-8.1(c)1, prescribes a 90-day maximum timeframe in which regulated activities authorized under an emergency permit must be completed. At N.J.A.C. 7:7A-14.3(e)2, the Department is proposing to shorten that timeframe to 60 calendar days unless a different timeframe is established by the Department on a case-by-case basis. Under proposed N.J.A.C. 7:7A-14.3(g), the Department will establish a different timeframe if the prescribed timeframe cannot feasibly be met or if the Department determines that the authorized emergency activity may be completed in a shorter time. If the activities are not completed within 60 calendar days or the date otherwise established by the Department, the regulated activities must cease until a permit or another emergency authorization is obtained. This amendment is necessary to align the emergency authorization process in the FWPA rules with the process in the CZM and FHACA Rules. While the timeframe is shorter, proper flexibility is included to take into account activities that may inherently require longer than 60 days to be completed. To ensure compliance with the FWPA, an alternate date otherwise established by the Department will not exceed 90 calendar days from the commencement of activities.

Proposed N.J.A.C. 7:7A-14.3(f) requires the person to whom the emergency

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authorization is issued to submit a complete application for a permit within 90 calendar days after the Department's verbal decision is provided or by a different date established by the Department, as applicable. This requirement replaces existing N.J.A.C. 7:7A-8.2(e), which requires the person who received the emergency permit to submit as-built site plans, an application fee, and any other information necessary for the Department to ensure compliance with N.J.A.C. 7:7A within 15 days of the Department's verbal decision, and N.J.A.C. 7:7A-8.2(f), which requires the Department to review the above information in accordance with the application review procedures at N.J.A.C. 7:7A-12 and issue a permit for the activities covered by the emergency permit. Under the proposed rule, the permit application, in addition to meeting the application requirements of the specific permit, must include a demonstration that the regulated activities authorized meet the requirements of the chapter, or an explanation of why full compliance could not be achieved; and as-built site plans, signed and sealed by an engineer, surveyor, or architect, showing the regulated activities that were or are being conducted under the emergency authorization. While these requirements at proposed N.J.A.C. 7:7A-14.3(i) are similar to the existing requirements at N.J.A.C. 7:7A-8.2(e) described above, they are to be included in addition to a full permit application, rather than serve as a permit application on their own. The proposed provisions align the FWPA Rules with the CZM and FHACA Rules. The requirement of the existing rule that the activities performed under the emergency authorization must meet the requirements that would apply to the activity under the FWPA Rules in a non-emergency situation to the maximum extent practicable is continued in the new rule, as is the provision that the Department will, upon its review of the permit application, require design changes, restoration, and/or stabilization measures as necessary to ensure compliance with the

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FWPA Rules to the maximum extent practicable. This requirement is consistent with the CZM and FHACA Rules and is meant to ensure freshwater wetlands, transition areas, and State open waters are protected as fully as possible when responding to an emergency situation. The Department may also modify or terminate an emergency authorization at any time without prior notice if necessary to protect public health, safety, and welfare, and/or the environment, as proposed at N.J.A.C. 7:7A-14.3(k). This proposed provision is similar to existing N.J.A.C. 7:7A-8.1(e), but is expanded to allow modification of the emergency authorization in addition to termination, and to clarify that the Department may do so to protect public safety and welfare in addition to public health and the environment.

The Department is proposing to recodify existing N.J.A.C. 7:7A-8.2(g), which establishes that if the person to whom the emergency authorization was provided conducts any regulated activity not authorized under the emergency authorization and/or the permit obtained thereafter for the activities governed by the emergency authorization, this will constitute a violation of N.J.A.C. 7:7A-22 and will be subject to enforcement action. This provision is proposed to be relocated as N.J.A.C. 7:7A-14.3(l).

Permit Process

As indicated above, one of the goals of this rulemaking is to align, where possible, the permit processes applicable to the CZM Rules, the FHACA Rules, and this chapter. Proposed amendments to process provisions that are common to these chapters, including those designed to align these three chapters, are discussed below.

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Pre-Application Conferences (N.J.A.C. 7:7A-15)

Proposed N.J.A.C. 7:7A-15 replaces existing N.J.A.C. 7:7A-9 to describe the purpose and process of pre-application conferences. The proposed subchapter aligns the pre-application process provisions in the FWPA Rules with those in the CZM and FHACA Rules.

Purpose and scope (N.J.A.C. 7:7A-15.1)

Proposed N.J.A.C. 7:7A-15.1, Purpose and scope, replaces existing N.J.A.C. 7:7A-9.1, Purpose. The proposed rule defines a pre-application conference as a meeting between the Department and a prospective applicant to discuss the applicant's project and the application procedures and standards that will apply to the project. A prospective applicant may request a pre-application conference for any project. In appropriate cases, the Department may instead address any questions raised by a prospective applicant by telephone or in writing. A pre-application conference is not mandatory, but is recommended for large and/or complicated projects. The Department will no longer consider whether a project is controversial when it recommends a pre-application conference. A project's potential for controversy does not affect a project's complexity nor does it hinder an applicant's ability to comply with this chapter and other applicable rules and statutes.

Consistent with the existing rules, guidance provided by the Department at a pre-application meeting does not constitute a commitment to approve or deny an application. There is no fee for a pre-application conference. In addition to offering to prospective applicants the ability to discuss a potential project, and the procedures and standards that would apply to the project, the Department offers other forms of assistance to applicants. In this vein, the proposed

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section includes a new reference to the opportunity provided to prospective applicants with projects that will require approvals from several Department programs to contact the Department's Office of Permit Coordination for help coordinating the various applications, a contact the Department encourages.

Request for a pre-application conference; scheduling; information required (N.J.A.C. 7:7A-15.2)

Proposed N.J.A.C. 7:7A-15.2 continues and amends existing N.J.A.C. 7:7A-9.2 to set forth the procedure for requesting a pre-application conference. A request for a pre-application conference by e-mail is to be submitted to the Division of Land Use Regulation's technical assistance group, and a request by mail to the attention of the supervisor in the Division of Land Use Regulation of the county in which the project would be proposed. A request for a pre-application conference must include a written description of the site and the proposed development; site plans or conceptual designs depicting the proposed development, if available; the address of the site; and a copy of any letter of interpretation issued for the site. If a letter of interpretation has not been issued, the requester must provide the general location of freshwater wetlands, freshwater wetland transition areas, and State open waters.

Within 10 calendar days of receipt of the required materials, the Department will either determine that a pre-application conference is necessary and reach out to the prospective applicant to schedule a meeting, or determine that a pre-application conference is not necessary and instead address, in writing or by telephone, the questions included in the request for a pre-application conference. Where the questions will be addressed in writing or by telephone, the Department will issue its response within 20 calendar days of receipt of the required materials.

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As is the case with an in-person pre-application conference, the answers provided in writing or by phone are for guidance purposes only and are non-binding.

Purpose and scope; General application requirements (N.J.A.C. 7:7A-16.1 and 16.2)

Proposed N.J.A.C. 7:7A-16.1 sets forth the application requirements for submitting an application for a letter of interpretation, including an E-LOI, and an extension or modification of a letter of interpretation; an authorization under a general permit-by-certification; authorization under a general permit except those under general permits 1, 24, or 25; a transition area waiver; and an individual permit. The rule no longer separately lists individual open water fill permits and individual freshwater wetlands permits as separate paragraphs, but instead simply indicates that the application requirements for individual permits are specified in this subchapter as the definition of “individual permit” includes both of these forms of Department approval. The application requirements for other types of applications, including applications for exemption letters, authorizations under general permits 1, 24, and 25; mitigation proposals; emergency authorizations; and an extension, transfer, or modification of an approval, are found elsewhere in the chapter and will be discussed in those applicable sections of the Summary. The proposed section includes a cross-reference to the applicable rule sections containing the application requirements for these other forms of Department approval. While the existing rules at N.J.A.C. 7:7A-10.1(b)6 also apply the application requirements in Subchapter 10 to minor and major modifications and extensions, the Department is proposing different requirements to streamline processes by only requiring essential materials and information for modification applications, which is consistent with the procedure in the CZM and FHACA Rules. As explained in the sections of this Summary discussing extensions and modifications, the general requirements set

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forth in N.J.A.C. 7:7A-16.2 are required for modifications, but not for extensions. Other requirements of this subchapter do not apply to these types of applications.

Proposed N.J.A.C. 7:7A-16.2 contains many provisions currently located throughout N.J.A.C. 7:7A-10 with proposed amendments to achieve consistency, where appropriate, with the general application requirements in the CZM and FHACA Rules. Proposed N.J.A.C. 7:7A-16.2(a) expands on existing N.J.A.C. 7:7A-10.1(h) and establishes that the Department makes available application checklists, which identify the materials to be submitted under the rules as part of an application, and also the appropriate level of detail and the format of the information to be submitted for each type of application to ensure that the submissions are sufficient to demonstrate the proposed activity meets the requirements of the particular permit. The checklists will be available for download from the Department's website at www.nj.gov/dep/landuse or by contacting the Department.

As currently stated at N.J.A.C. 7:7A-10.1(i) and amended to align with the CZM and FHACA Rules, the level of detail and documentation required for an application is commensurate with the size and impact of the proposed regulated activity or project, its proximity to critical areas, and its potential for impacts to freshwater wetlands, transition areas, and/or State open waters. Upon request, the Department will provide the applicants with guidance regarding the appropriate level of detail for an application.

The rules limit those who may make a permit application to ensure that Department resources are only expended on applications submitted by those with the necessary authority to conduct the activity for which authorization is sought. Particularly, applications may only be filed by the person who owns the property that will be the subject of the letter of interpretation or

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where the activity will be conducted under an authorization or permit, an agent designated by the owner, a public entity proposing an activity within a right-of-way or easement, or a person that has the legal authority to perform the activities proposed in the application on the site, and to carry out all requirements of this chapter. This provision, at proposed N.J.A.C. 7:7A-16.2(c), expands upon existing N.J.A.C. 7:7A-10.1(d), which more generally states that only the property owner or someone with legal authority to conduct the proposed activities on the site may submit an application, to more closely align with the requirements in the CZM and FHACA Rules.

The proposed rules continue to require that the application be executed by either the applicant or a duly authorized representative of the applicant and specify who can sign on behalf of various entities. While the existing rules indicate that the application must be signed by specified individuals, they go on to indicate in a subsequent subsection that the person signing the application is certifying as to their knowledge of the information submitted and that the information is accurate and complete (see existing N.J.A.C. 7:7A-10.9(a) and (e)). The proposed rules eliminate any potential misconception regarding this existing requirement by indicating that the application must be certified by the specified individuals. Where the applicant is a corporation, a principal executive officer of at least the level of vice president must certify the application. Where the applicant is a partnership or sole proprietorship, a general partner or the proprietor, respectively, must certify the application. Where the applicant is a municipality, State, Federal, or other public entity, either a principal executive officer or ranking elected official must certify the application. Where the applicant is an entity other than one of these, all individual owners of record of the property must certify the application. A duly authorized representative must be designated in writing as such by the applicant, and the authorization must

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be submitted as part of the application to the Department. The duly authorized representative must be either an individual who has overall responsibility to obtain the LOI and/or operate, construct, or complete the activity, such as a contractor, construction site supervisor, or other individual of equivalent responsibility, or a person who is in a position of equivalent responsibility. These proposed subsections amend the provisions currently located at N.J.A.C. 7:7A-10.9(a) and (b) to be consistent with those in the CZM and FHACA Rules. While the language is reorganized and changed slightly, the meaning is the same as in the existing rule text.

Should a duly authorized representative be replaced, a new authorization must be submitted to the Department prior to or concurrent with any reports, information, or applications requiring certification under the FWPA Rules. This ensures that the Department is, at all times, aware of the identity of the individual or the position responsible for an LOI and/or any approved activity to whom the Department would reach out should any issues arise. This requirement is continued from existing N.J.A.C. 7:7A-10.9(c) with language amended at N.J.A.C. 7:7A-16.2(f) to align with the FHACA Rules and as much as possible with the CZM Rules. Whereas the FHACA Rules include language about the person who has responsibility to obtain a verification that is parallel to the language concerning the individual who has responsibility to obtain an LOI, there is no similar type of application in the CZM Rules. Any application under the CZM Rules would be for an approval to conduct some sort of regulated activity.

Under proposed N.J.A.C. 7:7A-16.2(g), if an application includes activities within a right-of-way or easement, the application shall include written consent for the activity from the holder(s) of the right-of-way or easement. This is a new requirement to ensure that all owners of any interest in the affected property support the application.

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The existing rules require that any survey submitted to the Department be prepared by a surveyor licensed in the State of New Jersey and additionally specify that other documents may similarly be required to be certified by a person of relevant qualifications (see N.J.A.C. 7:7A-10.9(f)). The existing rules also require that any document required to be submitted under this chapter that is prepared by a professional include a certification by the professional responsible for preparing the document (N.J.A.C. 7:7A-10.9(d)). At proposed N.J.A.C. 7:7A-16.2(h), the rules expand the requirement that surveys be prepared and signed by a licensed professional to also specifically apply to site plans, with both documents required to be prepared, signed, and sealed by an appropriately credentialed individual. However, the rules acknowledge that there will be limited circumstances in which a survey, topography information, or calculations are not necessary to demonstrate that the proposed activity complies with the requirements of the FWPA Rules. In such a case, the proposed rules allow the applicant to prepare his or her own site plan. This exception for limited applicant preparation of a site plan is similar to one incorporated in the FHACA Rules at N.J.A.C. 7:13-18.2(h). The proposed rules continue to require that any document submitted as part of the application that is prepared by a professional be certified by that individual (see proposed N.J.A.C. 7:7A-16.2(i)).

The proposed rules continue to specify the certification language that must be executed in accordance with proposed N.J.A.C. 7:7A-16.2(d) and (i). Particularly, proposed N.J.A.C. 7:7A-16.2(j) requires the person signing the application and the preparer of any professional report, survey, calculation, or other document submitted as part of the application to certify that they have personally examined and are familiar with the information submitted; that they believe the information is true, accurate, and complete; and that they are aware that there are significant

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penalties for knowingly submitting false information. This is continued from existing N.J.A.C. 7:7A-10.9(e) and modified to qualify that significant penalties exist for *knowingly* submitting false information; a knowing violation may warrant more severe consequences than an unknowing violation. While submitting false information in general warrants enforcement action, a knowing violation is potentially subject to criminal action under proposed N.J.A.C. 7:7A-22.15(c) (existing N.J.A.C. 7:7A-16.15(c)) and is, thus, emphasized here.

Under proposed N.J.A.C. 7:7A-16.2(k), the failure to provide complete and accurate information may result in denial of an application or the termination of the permit. It may also result in enforcement action. This is similar to existing N.J.A.C. 7:7A-10.1(f) with modifications to achieve consistency with the language in the FHACA Rules. Specifically, while the existing rules reference the applicant and “its consultants, engineers, surveyors or agents,” the existing rules consolidate “consultants, engineers, surveyors, or agents” to just “agents.” No change in meaning is intended.

Existing N.J.A.C. 7:7A-10.1(m), which encourages applicants applying for more than one approval under the FWPA Rules or applying for an additional approval under the CZM or FHACA Rules to submit one complete application for all approvals, is continued with amendments at N.J.A.C. 7:7A-16.2(l). The amendments remove information found elsewhere in the chapter. The proposed rule also explicitly excludes applications for general permits-by-certification because the process of obtaining an authorization under a general permit-by-certification precludes its combination with any other permit applications.

Additional application requirements for a LOI (N.J.A.C. 7:7A-16.3)

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In addition to requirements applicable to all applications for approval identified in existing N.J.A.C. 7:7A-10.1(b)/proposed N.J.A.C. 7:7A-16.1(a), both the existing and proposed subsections specify additional application requirements that are applicable to a specific type of approval subject to this subchapter. With respect to LOIs, these application requirements appear in existing N.J.A.C. 7:7A-10.3, which is proposed to be replaced by proposed N.J.A.C. 7:7A-16.3. The proposed section reorganizes and expands existing application requirements for an LOI in general, as well as requirements specific to certain types of LOI applications.

In addition to meeting the general application requirements applicable to all applications subject to this subchapter, an application for an LOI must include several documents in the number and format specified in the applicable application checklist. The application must include a completed application form that contains basic information, such as LOI type, name and address of the applicant and designated agent(s), the site or portion of the site that is the subject of the application, and certifications as to the truth and accuracy of the information provided and as to the ownership of the property. In addition, the application must include documentation that public notice of the application has been provided, the appropriate application fee, and site plans or surveys certified in accordance with proposed N.J.A.C. 7:7A-16.2(j). When a survey is required, it must be conducted and documented in accordance with all or some of the requirements at N.J.A.C. 7:36 Appendix 2, depending on the type of LOI. Specific requirements for surveys will be identified on the application checklists for each type of LOI. Surveys for a presence/absence LOI must identify the portion(s) of the site that is the subject of the application. While the existing rules allow an applicant for an LOI to choose not to submit a survey with their application and instead submit a survey depicting the final approved

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delineation once an LOI is issued, the Department is proposing to delete this option as described in the “Letter of interpretation” section of the Summary. In many cases, applications for LOIs submitted without surveys have posed difficulties for staff during site visits. Submitted materials are often not sufficient for staff to locate the proposed area of wetlands and/or transition areas, leading to wasted time in the field and a request for more information from the applicant.

Providing a survey upfront will increase the efficiency of the LOI process and reduce delays and expenditures.

The Department is also proposing to require “other visual representations, such as photographs, graphs, maps, and tables, that illustrate existing site conditions.” This may include color photographs of the site, tax maps, or other visual materials. The type, format, and number of visual materials will be described in the application checklists for each type of LOI. In accordance with N.J.A.C. 7:7A-16.3(a)5, an application for an LOI must also include consent from the owner of the site allowing the Department to enter the site in a reasonable manner and at reasonable times to inspect the site that will continue in effect for the duration of the application review and decision process, including for the duration of any appeal. The application requirements for an LOI proposed are adapted from existing requirements at N.J.A.C. 7:7A-3.1 and 10.3, with additional detail to clarify requirements for applicants and align LOI requirements with other application requirements.

An application for a line verification LOI includes several additional requirements, currently set forth at N.J.A.C. 7:7A-10.3(d) and proposed at N.J.A.C. 7:7A-16.3(b) with no substantive changes. A line verification LOI application must include a proposed delineation of all freshwater wetlands, transition areas, and State open waters on the site or portion of the site

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that is the subject of the application; soil borings and other physical indicators of the presence or absence of regulated features; and data sheets to support the delineation. These requirements expand on existing requirements to ensure that adequate information is provided for the Department to verify a proposed wetlands delineation. Additionally, if the applicant would like the Department to verify that a wetland is an isolated wetland, the Department is proposing to require that the application must include a request for that determination and supporting documentation. Consistent with existing N.J.A.C. 7:7A-10.3(d)4, if the LOI is for a portion of a site, documentation that the site and portion meet the requirements at N.J.A.C. 7:7A-4.5(b)3i, ii, and iii and information identifying the subject portion of the site in accordance with N.J.A.C. 7:7A-4.5(b)3iv are required.

The proposed section continues to provide that the Department will not issue a letter of interpretation if the site is located in an area under the jurisdiction of the Pinelands Commission because the Pinelands Commission is the lead agency in this area for determining the presence, absence, or extent of freshwater wetlands. In cases of disagreement, the Department and the Pinelands Commission retain authority to independently or jointly establish these boundaries. This provision is relocated from existing N.J.A.C. 7:7A-3.1(k) with no change in text to consolidate all application requirements for LOIs into one section.

Application requirements for an E-LOI (N.J.A.C. 7:7A-16.4)

The Division of Land Use Regulation is providing applicants with the option of submitting for a Letter of Interpretation (LOI) online (E-LOI) through the Department's E-Commerce portal rather than through traditional means as a paper application. The online

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application process differs from the paper process in that all documents, except for surveys, are exclusively submitted electronically.

Proposed N.J.A.C. 7:7A-16.4(b) sets forth the information that must be provided by an applicant submitting an application for an LOI electronically via the portal. The applicant must identify the type of LOI application being submitted; the location of the site or portion of the site that is the subject of the application, with lot and block provided as applicable; contact information for the applicant, property owner, and any designated agents; a number of certifications accomplished through entering the PIN that the applicant is assigned when first registering through the online portal; and the appropriate application fee.

An applicant submitting an LOI electronically must also upload digital documents to the portal as set forth at proposed N.J.A.C. 7:7A-16.4(c). These documents include documentation that public notice has been provided; color photographs; consent from the owner of the site allowing the Department to enter the site in a reasonable manner and at reasonable times to inspect the site throughout the duration of the application review and decision process; certification that the applicant has obtained written consent from the property owner that the application can be made on the property owner's behalf (required regardless of whether the applicant and the property owner are the same person); names and qualifications of the person(s) who prepared the materials and, if applicable, the person(s) who performed the delineation; a copy of the tax map(s) for the subject site; a digital copy of all required surveys, and a written narrative accurately describing the site, its location, existing site conditions, previous permits, and a written narrative identifying any areas of Division of Land Use Regulation jurisdiction on the site. The E-LOI requirements spell out information that is required for regular LOIs within

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the application form. Since an application form is not mailed to the Department for an E-LOI application, consent for the Department to enter the site, certification of written consent from the property owner to submit the application, names and qualifications of those who prepared the materials and performed the delineation, and a written narrative of the site are required to be provided separately on the online portal.

In addition to the normal application materials, an E-LOI submission also requires that the applicant upload one or more shapefiles depicting georeferenced polygons representing the site, specific portion(s) of the site, wetlands, and/or transition areas. The purpose of these shapefiles is to enable the application to be viewed and reviewed electronically through the use of Geographic Information Systems (GIS) software. Some of this review is done automatically via the portal application itself before the application reaches application support personnel for the initial review and project managers for the in depth analysis. In order to perform the automatic functionality required of the portal application and in order to allow for viewing the site electronically and geospatially, these shapefiles are required. When a shapefile is submitted through the portal as part of an E-LOI, these shapefiles go through an automated validation program to insure that they are the right shapefiles for the intended site.

Paper LOI applications do not require shapefiles for several reasons: First, the paper application process insures that less tech savvy applicants can still apply. Similarly, not all surveyors have the ability to create shapefiles as some still use traditional drafting methods. In addition, the submission of shapefile as part of a paper application would have to be manually validated by Department staff resulting in time cost rather than time savings. While the E-LOI process will be a time savings for some survey firms, for others there would be an additional cost

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for surveyors unfamiliar with the process if shapefiles were required for regular LOI applications.

N.J.A.C. 7:7A-16.4(e) emphasizes that, in addition to meeting the specific requirements of proposed N.J.A.C. 7:7A-16.4(c), the applicant must also submit a paper survey that meets the requirements of proposed N.J.A.C. 7:7A-16.3(a)4 in the format and number specified in the appropriate application checklist. A paper survey is required to facilitate field inspections of the site and any proposed delineation.

Application requirements for a LOI extension (N.J.A.C. 7:7A-16.5)

The Department is proposing to expand and consolidate the requirements for extending an LOI, currently described at N.J.A.C. 7:7A-3.6(c) and 10.7. At N.J.A.C. 7:7A-16.5, the Department is proposing to require a completed application form, documentation that public notice has been provided, and the appropriate application fee as set forth at proposed N.J.A.C. 7:7A-16.3(a)1, 2, and 3. An extension of a LOI must also include a copy of the original LOI that the applicant wants to extend, a copy of the survey or site plan submitted as part of the original LOI application, and any other information reasonably necessary to determine if the information in the original LOI remains correct. Consolidating the requirements for an LOI extension into one section will allow the Department to process these applications more efficiently and allow applicants to more precisely locate all requirements.

Additional application requirements for an authorization under a general permit-by-certification (N.J.A.C. 7:7A-16.6)

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As discussed above, the Department is proposing to establish two general permits-by-certification under which authorization will be granted upon the applicant's certification that the proposed activity meets the requirements of the specific general permit-by-certification through the Department's online permitting system. The web address for submission of a general permit-by-certification is specified at proposed N.J.A.C. 7:7A-16.6(a). Prior to submitting an application for a general permit-by-certification, the applicant will need a MyNewJersey account, will need to link that account to the NJDEP Online Site, and will need to obtain a certification PIN that will be used for certifying applications submitted through the NJDEP Online Site.

In order to obtain a general permit-by-certification, an applicant must submit information specified in the rules that provides basic information on the regulated activity and demonstrates that the activity meets all requirements and limitations applicable to the particular general permit-by-certification. The applicant must provide the number and subject matter of the general permit-by-certification under which the application for authorization is being submitted, the name or other identifier of the proposed project, the location of the proposed project, information specific to the proposed project related to the requirements of the general permit-by-certification (for example, the area of proposed disturbance to wetlands), and contact information for the applicant and property owner.

The applicant must additionally provide a certification as to the completion of several application requirements and the accuracy of information provided. The applicant must certify that the site identified in the application is the actual location of the project site, public notice of the application has been provided, the applicant has obtained written consent from the property owner that the application can be made on the property owner's behalf, and that conditions

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specific to the general permit-by-certification are or will be met. The applicant must also enter the certification PIN issued upon registering with the online permitting system and provide the appropriate application fee.

As set forth at N.J.A.C. 7:7A-16.6(c), once the online application process is successfully completed, the authorization will be accessible to the applicant through the Department's online permitting system.

Additional application requirements for an authorization under a general permit, for an individual permit, or for a transition area waiver (N.J.A.C. 7:7A-16.7)

In addition to the requirements set forth at proposed N.J.A.C. 7:7A-16.2, additional requirements are applicable to authorizations of a general permit, individual permit, and transition area waiver. These requirements are taken from existing N.J.A.C. 7:7A-10.2, 10.4, 10.5, and 10.6, as applicable, and modified to align the FWPA Rules' permitting process with that of the CZM and FHACA Rules, or are new requirements to achieve that alignment and streamline the permitting process. Applications for these permits must include a completed application form (currently required under existing N.J.A.C. 7:7A-10.2(b)1), documentation that public notice has been provided (currently required under existing N.J.A.C. 7:7A-10.2(b)6, and an application fee (currently required under N.J.A.C. 7:7A-10.2(b)3). These applications must also include site plans that are certified in accordance with proposed N.J.A.C. 7:7A-16.2(j), with the site plan required to include: all existing features necessary to demonstrate that the proposed regulated activity meets the requirements of N.J.A.C. 7:7A; all proposed regulated activities; details of any clearing, grading, filling, excavation, and dredging; the location and area of

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wetlands, transition areas, and State open waters that will be disturbed and the limits of disturbance; existing and proposed topography where necessary to demonstrate compliance with N.J.A.C. 7:7A; details of proposed soil erosion and sediment control measures; and State plan coordinates for a point at the approximate center of the site (except for a linear activity). A site plan is currently required under N.J.A.C. 7:7A-10.2(b)4. The Department is proposing to require site plans to be certified to hold those who prepare site plans accountable for their accuracy and is providing a list of required information to facilitate the submission of more complete applications. For linear activities less than one-half mile long, State plane coordinates must be provided for the end points of the proposed activity. For linear activities one half mile or more in length, State plane coordinates must also be provided for points located at 1,000 foot intervals along the project's entire length. These requirements are newly inserted into the FWPA Rules to facilitate the Department's initial desktop review of applications and aid staff in locating sites for field inspections.

In addition to site plans, other visual representations, including photographs, graphs, maps, and tables, are required to illustrate current conditions. Applications must also include calculations, analyses, reports, data, and supporting materials necessary to demonstrate that the proposed activity meets the requirements of N.J.A.C. 7:7A. For applications that require the applicant to comply with the Stormwater Management Rules, the application must similarly include calculations, analyses, reports, data, and supporting materials sufficient to demonstrate compliance with the requirements of N.J.A.C. 7:8.

The applicant must also provide information about the anticipated impacts of the proposed activity, including any monitoring or reporting methods to be used and information and

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certifications regarding the presence or absence of endangered or threatened species habitat, critical habitat for flora or fauna, historic or archaeological resources, or other relevant features on the site. This requirement is currently located at N.J.A.C. 7:7A-10.2(b)7. If a site is known to be, or suspected to be, contaminated with toxic substances, the Department may request a laboratory analysis of representative samples of the soil or sediment on the site, which must be included in the application. This requirement is currently located at N.J.A.C. 7:7A-10.4(a)4, 10.5(a)3, and 10.6(a)4 for a general permit, transition area waiver, and individual freshwater wetlands or open water fill permit, respectively.

Under the proposed rules, applicants must also provide any information necessary to ensure compliance with State and/or Federal law and to determine whether an application meets State and/or Federal standards, as is currently required under the existing rules at N.J.A.C. 7:7A-10.2(c). Because the State of New Jersey has assumed the Federal 404 program as discussed a, applicants must also include any other information not listed in N.J.A.C. 7:7A-16.6(a) that is necessary to ensure compliance with the Federal rules governing the Department's assumption. The requirement to provide information to ensure compliance with the Federal 404 program is carried over from existing N.J.A.C. 7:7A-10.2(b)10.

As required in LOI applications, applicants for an authorization under a general permit, individual permit, or transition area waiver must provide consent from the owner of the site allowing the Department to enter and inspect the site in a reasonable manner and at reasonable times.

If mitigation is required for any proposed activity for which an authorization under a general permit, an individual permit, or a transition area waiver is sought, proposed N.J.A.C.

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7:7A-16.7(b) establishes that the applicant may submit a mitigation proposal as part of the application. If a mitigation proposal is not submitted with the application, the applicant must submit the mitigation proposal at least 90 calendar days before the start of activities authorized by the permit. This requirement is similar to existing N.J.A.C. 7:7A-10.1(o), but the deadline to submit a proposal 90 days before activities are commenced is added to align the processes of the FWPA Rules with the processes established in the CZM and FHACA Rules (see N.J.A.C. 7:7-23.6(d) and 7:13-18.4(c)). This requirement ensures that the mitigation proposal can be reviewed and approved prior to the start of construction of the regulated activities. Permits are conditioned on providing mitigation. If the mitigation proposal is not approved within the 90-day review time prior to the planned commencement of construction, the start of the project will be delayed until a mitigation proposal is approved.

Additional requirements specific to an application for authorization under a general permit

(N.J.A.C. 7:7A-16.8)

In addition to the requirements set forth at proposed N.J.A.C. 7:7A-16.2 and 16.7, there are several additional requirements that apply only to an application for an authorization under a general permit. These requirements are currently codified at N.J.A.C. 7:7A-10.4 and are relocated, reorganized, and amended at proposed N.J.A.C. 7:7A-16.8.

As currently required at existing N.J.A.C. 7:7A-10.4(a)2, an application for an authorization under a general permit must include a line delineation LOI or a line verification LOI; a presence/absence LOI is not sufficient. If no LOI has been issued, or if only a presence/absence LOI was issued, the application must include all information required for a line

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delineation or line verification LOI covering the portion of the site that will be affected by the general permit activity. The application must also include any information specified as an application requirement in the general permit itself if not included in the application requirements at proposed N.J.A.C. 7:7A-16.2, as is currently required under N.J.A.C. 7:7A-10.4(a)1.

An application for an authorization under a general permit also requires the total area, in acres, of wetlands and State open waters on the site before the regulated activity is performed, and the total area, in acres, of wetlands and State open waters on the site that will remain after the regulated activity is performed. The total area of wetlands and State open waters can be approximated using a planimeter or other mapping technique. This information is tracked by the Department and the USEPA.

General permit authorization applications also continue to require documentation regarding when the lot that is the subject of the general permit was created by subdivision, a history of the ownership of the property from June 30, 1988, to the present, and a listing of contiguous lots that were in common ownership with the lot on which the activities are proposed including the ownership history of each lots from June 30, 1988, to the present. Existing N.J.A.C. 7:7A-10.4(a)4 regarding contamination is not proposed in this section because that requirement is proposed in N.J.A.C. 7:7A-16.7 to apply to applications for general permit authorizations, transition area waivers, and individual permits. Existing N.J.A.C. 7:7A-10.4(a)3, which requires information on any required Federal, State, or local approvals is not proposed to be included in this section because information required to determine compliance with other Federal or State requirements is required under proposed N.J.A.C. 7:7A-16.7. Information on

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local requirements is not required for the Department to decide to approve or deny a permit application and is, therefore, no longer required under the proposed rules.

Under proposed N.J.A.C. 7:7A-16.8(c), those applying for an authorization under a general permit for regulated activities in an area under the jurisdiction of the Pinelands Commission must submit their application to the Pinelands Commission, rather than to the Department, as is the current requirement under existing N.J.A.C. 7:7A-4.2(a).

Additional requirements specific to an application for an individual permit (N.J.A.C. 7:7A-16.9)

In addition to the requirements set forth at proposed N.J.A.C. 7:7A-16.2 and 16.7, there are several additional requirements that apply only to an application for an individual permit. These requirements are currently codified at N.J.A.C. 7:7A-10.6 and are relocated, reorganized, and amended at proposed N.J.A.C. 7:7A-16.9. It is noted that, while the existing section is entitled “Additional application requirements for an individual freshwater wetlands permit or open water fill permit,” by definition the term “individual permit” includes both a freshwater wetlands permit and an open water fill permit. Accordingly, both permit forms continue to be addressed by the proposed section with the changed heading.

A line delineation LOI or a line verification LOI is required for an individual permit just as it is required for an application for a general permit. If no LOI has been issued, or only a presence/absence LOI has been issued, the application must include all information required for an application for a line delineation or line verification LOI. This requirement is continued in the proposed rules from existing N.J.A.C. 7:7A-10.6(a)2.

An application for an individual permit must also include the total area, in acres, of

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wetlands and State open waters on the site before the regulated activity is performed, and the total area, in acres, of wetlands and State open waters on the site that will remain after the regulated activity is performed. The total area of wetlands and State open waters can be approximated as described in the “Additional requirements specific to an application for authorization under a general permit” section above. A copy of the deed and/or other legal documents pertaining to the site must also be included.

The Department is proposing to add a new requirement that an individual permit application include an environmental report. This environmental report must include a narrative describing the basic purpose of the proposed activity, including whether it is water-dependent; maps that provide an environmental inventory of the site, including relevant features, such as freshwater wetlands, soil types, and vegetative communities; information regarding special aquatic sites, public lands, critical habitat, and other relevant environmental features of the site; and an analysis of any potential temporary and/or permanent adverse environmental impact(s), onsite or offsite, of the proposed activity on freshwater wetlands, State open waters, transition areas, fishery resources, and threatened or endangered species and their habitat. Individual permits are required for proposed projects that are significantly large and/or complex. By requiring the submittal of a detailed environmental report, the Department will be able to make an informed judgement on the application and enhance its protection of freshwater wetlands, State open waters, transition areas, and wildlife. Applicants must describe all measures taken to reduce any potential adverse environmental impact(s) to these resources.

The Department is proposing to continue the requirement, currently located at N.J.A.C. 7:7A-10.6(b), that an alternatives analysis be submitted as part of an individual permit

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application, at N.J.A.C. 7:7A-16.9(b)4v and vi. The alternatives analysis must be included in the environmental report and must allow the Department to evaluate whether the requirements of proposed N.J.A.C. 7:7A-10.2 are met and include a description of alternatives considered, including offsite and onsite alternatives, that could minimize environmental impacts, and the reasons for rejecting each alternative. This analysis must also include information regarding the history of the property as a whole, as necessary to evaluate the cost to the property owner of various alternatives, including documents showing when the property as a whole was acquired and its purchase price, documentation of investments made to maintain and/or develop the property, and documentation of attempts by the owner to sell the property or obtain other property.

Additional requirements specific to an application for a transition area waiver (N.J.A.C. 7:7A-16.10)

In addition to the requirements set forth at proposed N.J.A.C. 7:7A-16.2 and 16.7, there are several additional requirements that apply to an application for a transition area waiver. These requirements are currently codified at N.J.A.C. 7:7A-10.5 and are relocated, reorganized, and amended at proposed N.J.A.C. 7:7A-16.10.

As currently required at existing N.J.A.C. 7:7A-10.5(a)2, and also required for general permit and individual permit applications, an application for a transition area waiver must include a line delineation LOI or a line verification LOI. If no LOI has been issued, or only a presence/absence LOI has been issued, the application must include all information required for an application for a line delineation or line verification LOI.

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Applications for special transition area waivers based on individual permit criteria must include the information required for an individual permit described in the prior section above and set forth at proposed N.J.A.C. 7:7A-16.9(b). A mitigation proposal, which is required in existing N.J.A.C. 7:7A-10.5(b)3, is not required under the proposed rules because the Department reviews a mitigation proposal separately from a permit application; the decision to approve or deny a permit is not dependent on a mitigation proposal.

An application for a hardship transition area waiver must include the information in proposed N.J.A.C. 7:7A-13.1(i)4, 5, 7, and 8i, ii, and iii, as well as a statement indicating the property owner has requested a hardship transition area waiver, as is currently required in existing N.J.A.C. 7:7A-10.5(c).

Existing N.J.A.C. 7:7A-10.5(a)2 and 3 are not proposed to be continued for the same reasons existing N.J.A.C. 7:7A-10.4(a)3 and 4 are not proposed to be continued, as summarized under the discussion of general permit authorization application requirements above.

Confidentiality (N.J.A.C. 7:7A-16.11)

N.J.A.C. 7:7A-10.10, Confidentiality, is continued at N.J.A.C. 7:7A-16.11 and establishes that any information provided in an application may be claimed as confidential, claims of confidentiality for certain information will automatically be denied, and claims of confidentiality for all other information will be denied unless the claimant can demonstrate that the information should be kept confidential under the requirements and procedures of 40 CFR Part 2.

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Requirements for an Applicant to Provide Public Notice of an Application (N.J.A.C. 7:7A-17)

Proposed N.J.A.C. 7:7A-17 sets forth the requirements to provide public notice for certain types of applications. Public notice requirements are currently located at N.J.A.C. 7:7A-10.8. These requirements are continued and amended in order to streamline requirements and align with the CZM and FHACA Rules.

Purpose and scope (N.J.A.C. 7:7A-17.1)

An applicant must provide public notice in accordance with proposed N.J.A.C. 7:7A-17 for an application for an LOI, including an extension of an LOI; an application for an authorization for a general permit-by-certification, an application for a general permit authorization, except for activities under general permit 15; an application for an individual permit; an application for a transition area waiver; a mitigation proposal; and an application for a major technical modification pursuant to proposed N.J.A.C. 7:7A-20.4. A person who requests a reconsideration of the Department's action or inaction concerning a permit under proposed N.J.A.C. 7:7A-13 must provide public notice in accordance with the requirements at proposed N.J.A.C. 7:7A-13.1(i)3.

An applicant does not need to provide public notice for a request for an exemption letter, an application for an emergency authorization, an application for an administrative or minor technical modification, or the transfer of a permit. Under existing N.J.A.C. 7:7A-2.10, public notice is not required for an exemption letter. Under existing N.J.A.C. 7:7A-8.1, notice of emergency permits must be published and comments received; however, because the emergency

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permit process is replaced by the emergency authorization process, this requirement is not continued. The permit application submitted after an emergency authorization is granted *does* require public notice in accordance with proposed N.J.A.C. 7:7A-17. The existing rules at N.J.A.C. 7:7A-10.8(b)2 exclude applications for “minor modifications” from the requirement to provide public notice while the proposed rules exclude applications for administrative modifications and minor technical modifications, which, as described below under proposed N.J.A.C. 7:7A-20, include modifications currently considered “minor.” Under existing N.J.A.C. 7:7A-14.2, transfers of permits do not require public notice.

The Department is proposing to allow applicants proposing a regulated activity that requires more than one approval under the FWPA Rules or that requires, in addition, an approval under the CZM and/or FHACA Rules, to provide combined public notice for all applications submitted, provided the combined notice meets all requirements applicable to each application, consistent with existing N.J.A.C. 7:7A-10.8(h). These provisions are also consistent with the public notice requirements in the CZM and FHACA Rules (see N.J.A.C. 7:7-24.1 and 7:13-19.1(c)) and increase efficiency in preparing and reviewing an application. Failure to provide public notice is cause for the Department to cancel an application. The Department is proposing to add this “cancellation” provision at N.J.A.C. 7:7A-17.1(e) because public awareness and participation is essential to the permitting process. Lack of documentation of public notice under the existing rules results in an application being incomplete for review and, therefore, not able to be approved or denied. However, the proposed language clarifies the importance of providing public notice for an application and aligns the FWPA Rules with the CZM and FHACA Rules.

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Timing of public notice of an application (N.J.A.C. 7:7A-17.2)

The existing rules require that public notice requirements be satisfied prior to submission of the application, but do not limit how far in advance of application public notice can be provided. To eliminate any possibility of public notice being provided too far in advance of the actual application, diminishing the value of the public notice provided, the Department is proposing to require that applicants provide public notice for the applications listed in N.J.A.C. 7:7A-17.1(a) no more than 30 days prior to submitting the application and no later than the date the application is submitted to the Department. As indicated in the summary of application requirements above, submission of proof of fulfillment of the public notice requirements is required to be part of the application packet for many approvals under this chapter (see, for example, N.J.A.C. 7:7A-16.7(a)2, applicable to applications for a general permit, an individual permit, and a transition area waiver). This requirement is consistent with the CZM and FHACA Rules (see N.J.A.C. 7:7-24.2 and 7:13-19.2) and will ensure timely public notice of applications.

Contents and recipients of public notice of an application (N.J.A.C. 7:7A-17.3)

The requirement for an applicant to provide a copy of the entire application to the municipal clerk in each municipality in which the site is located is continued from existing N.J.A.C. 7:7A-10.8(d). Notice must be provided to the construction official of each municipality in which the site is located, the environmental commission (or government agency with similar responsibilities) of each municipality in which the site is located, the planning board of each municipality in which the site is located, and the planning board of each county in which the site is located. The Department is proposing to add a requirement to send notice to the local Soil

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Conservation District if the regulated activity will disturb 5,000 square feet or more of land, which is consistent with the CZM and FHACA Rules. The requirement to provide notice to “a Department-generated list of interested parties in the area, if such a list exists” in existing N.J.A.C. 7:7A-10.8(e)6 is not proposed to be included in new N.J.A.C. 7:7A-17.3. The proposed public notice requirements, as well as the publication of notice in the DEP Bulletin when applications are deemed administratively complete, updates on the status of applications, and publication of decisions on applications, serve as notice to interested parties of applications under consideration by the Department.

In the existing rules, applicants must provide notice to all owners of real property, including easements, within 200 feet of the regulated activity. The Department is proposing to amend this provision to require applicants to provide notice to all owners of real property (including easements) within 200 feet of the property boundary of the site in the manner set forth in the Municipal Land Use Laws at N.J.S.A. 40:55S-12.b, unless the application relates to a linear project of one-half mile or longer, a trail or boardwalk of one-half mile or longer, a public project on a site of 50 acres or more, an industrial or commercial project on a site of 100 acres or more, or a project to remove sediment or debris from a channel of one-half mile or longer. Requiring notice within 200 feet of the property boundary of the site is proposed to achieve consistency with the public notice requirements of the CZM and FHACA Rules. For a linear project of one-half mile or longer, a trail or boardwalk of one-half mile or longer, a public project on a site of 50 acres or more, an industrial or commercial project on a site of 100 acres or more, or a project to remove sediment or debris from a channel of one-half mile or longer, the applicant must provide notice by publishing a newspaper notice and sending notice in

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accordance with Municipal Land Use Laws at N.J.S.A. 40:55D-12.b as described at N.J.A.C. 7:7A-17.3(c) to all owners of real property within 200 feet of any proposed above-ground structure that is part of the proposed regulated activity or project, except for conveyance lines suspended above the ground and small utility support structures. This requirement is similar to existing N.J.A.C. 7:7A-10.8(f).

The list of activities in the CZM Rules and FHACA Rules that require notice to owners of property within 200 feet of an above-ground structure and publication of newspaper notice are also proposed to be amended as described below under the heading “Public notice for maintenance dredging and debris or sediment removal activities.” The Department is requiring this alternative notice for projects with similar impacts across the three chapters.

An applicant seeking an individual permit must also publish newspaper notice in the official newspaper of the municipality within which the activity is proposed and, if the proposed project involves more than 10 acres of fill, must further publish newspaper notice that meets the requirements of proposed N.J.A.C. 7:7A-17.4(b) in a newspaper with regional circulation in the region in which the site is located. These requirements are similar to the existing requirements of N.J.A.C. 7:7A-10.8(i).

Proposed N.J.A.C. 7:7A-17.3(e) establishes that public notice must consist of a brief description of the area the applicant wishes the LOI to cover and/or the site and proposed regulated activity; a site plan showing where the LOI will cover and/or the location of proposed regulated activities (this may be shown on a standard sheet of paper if legible and clear, rather than full site plans), and a copy of the form letter notice available from the Department’s website. This form letter explains that an application will be submitted to the Department for the

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LOI and/or the regulated activity depicted on the site plan, a complete copy may be viewed at the municipal clerk's office or by appointment at the Department's Trenton office, and comments or information may be submitted to the Department within 15 calendar days of receipt of the letter. The letter must be sent by certified mail or by delivery that results in the signature of the recipient being obtained, except that an applicant can obtain written permission from municipal or county entities to submit notice to them electronically.

Content and format of a newspaper notice (N.J.A.C. 7:7A-17.4)

As described above, certain applications require newspaper notice in addition to notice to individual property owners, and municipal and county entities. The requirements for newspaper notice are continued and modified from existing N.J.A.C. 7:7A-10.8(f)2 and (g). Newspaper notice provided to meet the requirements proposed at N.J.A.C. 7:7A-17.3(c) must be either a legal notice or a display advertisement, published in the official newspaper of the municipality where the development site is located or, if there is not an official newspaper, in a newspaper of general circulation in the municipality. These requirements differ from existing N.J.A.C. 7:7A-10.8(f), which requires notice to be a display advertisement and published in the official newspaper of the municipality and a newspaper with regional circulation. The proposed changes will reduce the costs associated with newspaper notice and align the requirements in the FWPA Rules with those in the CZM and FHACA Rules to facilitate combined notice, while continuing to keep the public informed of applications under consideration by the Department.

The newspaper notice must include the mailing address and telephone number of the Department; the name and address of the applicant; the type of approval being sought; a

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description of the proposed regulated activities; the street address of the site; a list of each lot, block, municipality, and county where the proposed activities will occur; and the standard language of the form notice letter available from the Department website. The form notice letter explains to readers that an application will be submitted to the Department for the specific activity, that a complete copy of the application is available for review at the municipal clerk's office or at the Department's Trenton office, and that comments or information on the proposed activity and site may be submitted to the Department within 15 calendar days of the date of the notice. Although existing N.J.A.C. 7:7A-10.8(g) requires a map showing the location of the project site to be published as part of newspaper notice, this requirement is not proposed to be continued because it is unnecessary to notify the public of a proposed project and inflates the cost of newspaper notice for applicants. Because the full application must be submitted to the municipal clerk, interested parties can still view site plans and any other application materials at the municipal clerk's office at a scale that provides more detail than provided in the newspaper notice.

Documenting public notice of an application (N.J.A.C. 7:7A-17.5)

As part of the application process, the applicant must demonstrate that public notice has been provided pursuant to the applicable rules. The Department is proposing provisions in this section that prescribe how notice must be documented, which will standardize documentation of public notice for CZM, FHACA, and FWPA applications. The applicant must provide, for public notice other than newspaper notice, a copy of the certified United States Postal Service white mailing receipt for each public notice mailed (or other written receipt) and a certified list of all

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owners of real property (including easements) located within 200 feet of the property boundary of the site. This list must be prepared by the municipality for each municipality in which the project is located and the date of certification cannot be earlier than one year prior to the date the application is submitted. For newspaper notice, the documentation consists of a copy of the published newspaper notice and the date and name of the newspaper in which it was published.

Application Fees (N.J.A.C. 7:7A-18)

Subchapter 18 establishes application fees for applications submitted to the Department for authorizations under N.J.A.C. 7:7A. It is recodified with amendments from N.J.A.C. 7:7A-11. On February 2, 2015, the Department promulgated amendments, repeals, and new rules concerning freshwater wetlands application fees as part of a rulemaking that also modified the application fees for the coastal (CZM) and flood hazard (FHACA) permitting programs (referred to hereafter as the “land use fees rulemaking”). See 47 N.J.R. 422(a). The land use fees rulemaking established a simplified, cohesive fee structure for the three regulatory programs, and replaced the prior fee rules at N.J.A.C. 7:7A-11 with new fee rules.

The Department now proposes amendments in N.J.A.C. 7:7A-18 that reflect the recodification of various provisions elsewhere within the FWPA Rules, as well as fee amounts for categories of applications established with this rulemaking.

Application fees are charged to applicants seeking: an exemption letter; a letter of interpretation; an authorization under a general permit (with three exceptions); a transition area waiver; a freshwater wetlands individual permit; an open water fill individual permit; a water quality certificate; a modification of an authorization under a general permit, a transition area

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waiver, or an individual permit; and an extension of a letter of interpretation, authorization under a general permit, a transition area waiver, or individual permit. The Department is proposing to add an authorization under a general permit-by-certification (with one exception) to this list to reflect the establishment of two general permits-by-certification as previously discussed in the Introduction portion of this summary.

Under recodified N.J.A.C. 7:7A-18.1(b), there is no application fee for an application submitted by an agency of the State; an authorization under general permits 16 or 25 (proposed to be recodified as general permit 24) and under general permit 17 for a project located on publicly-owned land; and an emergency authorization. The Department is proposing to add the transfer of an approval to this list. An application for the transfer of an approval does not require a significant investment of Department time and resources and, therefore, the Department is proposing that no application fee be applicable to the Department's review of such an application. The Department is also proposing to add to this list an authorization under general permit-by-certification 24 for the repair or modification of a malfunctioning individual subsurface sewage disposal system. As is the case with general permit 24, activities under this general permit-by-certification are necessary to prevent the release of sewage into wetlands and/or State open waters and, thus, have an environmental benefit. Existing Table A is proposed to be renamed Table 18.1 to reflect its location in the chapter and updated to reflect the addition of general permits-by-certification and the establishment of administrative, minor technical, and major technical modifications, and to reflect recodifications within the chapter.

Existing N.J.A.C. 7:7A-11.1(e) sets forth the circumstances under which the Department will issue a refund or credit when an application is returned, withdrawn, or cancelled. Consistent

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with the alignment of the permitting requirements in the CZM and FHACA Rules, the standards for the refund and credit of an application fee under the FWPA Rules are proposed to be relocated to N.J.A.C. 7:7A-19.11.

Application Review (N.J.A.C. 7:7A-19)

This subchapter sets forth the Department's application review procedures. The provisions set forth in this subchapter are recodified from existing N.J.A.C. 7:7A-12 and 5.1, 5.25, and 5.26, with substantial amendments to align the permitting processes under the CZM, FHACA, and FWPA Rules.

General application review provisions (N.J.A.C. 7:7A-19.1)

Proposed new N.J.A.C. 7:7A-19.1 sets forth the process for the review of applications for a letter of interpretation, an authorization under a general permit, an individual permit, a transition area waiver, and a water quality certificate. The review procedures for a request for a written determination of exemption from the permit requirements of this chapter, a mitigation proposal, a request for an emergency authorization, and a request to extend, transfer, or modify a letter of interpretation or an approval are located elsewhere in the chapter, within their specific subchapters. As an aid to users of the rules, a cross-reference to the codification of these other provisions is included in the proposed new section.

An applicant may submit a revised application at any time during the application review process. The applicant must send a copy of the revised portions of the application to the municipal clerk of each municipality and provide notice to any person listed at proposed

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N.J.A.C. 7:7A-17.3(b) who the Department determines would likely be affected by the revised application. The applicant must provide documentation that this notice was provided. This new requirement ensures that notice of the revised application is provided to those to whom notice of the initial application was provided who are likely to have an interest in and submit comment or information on the revised application. Where an applicant submits a revised application within 30 calendar days prior to the deadline for decision on the application, the revised application must state that the applicant consents to a 30-calendar-day extension, so that the Department will have sufficient time to review the revised application and render a decision.

When reviewing an application, the Department will apply the requirements of this chapter in effect at the time the application is declared complete for review. This “time of decision” provision ensures that an application for which substantial time and effort has been invested by the applicant and the Department will continue through the review process to decision and not be subject to changes brought about by amendments to the FWPA Rules that might be promulgated after the point of technical completeness.

The Department is proposing to publish notice in the DEP Bulletin of the receipt of each administratively complete application, the status of the application during review, and the Department’s decision to approve or deny the application. Publication in the DEP Bulletin constitutes notice to interested persons. Actual notice will be provided to the applicant and to persons who specifically request such notice. These procedures are similar to provisions in existing N.J.A.C. 7:7A-12.3(a) and 12.5(a) and (b), but expand the amount of information concerning the Department’s actions on permit applications that will be published for review by the public.

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In contrast to many flood hazard and coastal permit applications, if a person submits an application under the FWPA Rules and does not receive a response from the Department within the deadlines imposed in this chapter, the person *cannot* assume that the application is approved. The only exceptions are applications for authorizations under proposed general permits 1, 24, and 25. The 90-day construction permits law, N.J.S.A. 13:1D-29 et seq., which results in applications under the CZM and FHACA Rules being deemed approved if not acted on within 90 days of the date the application is considered complete for review, does not apply to approvals under the FWPA, so there is no “automatic approval” provision for most applications under this chapter. However, the FWPA itself contains “automatic approval” provisions for activities authorized by the listed general permits.

Proposed N.J.A.C. 7:7A-19.1(g) amends the requirements for public hearings on an application for an individual permit or transition area waiver currently described at N.J.A.C. 7:7A-12.4. Within 30 days after a notice of an application for an individual permit or transition area waiver is published in the DEP Bulletin, any member of the public interested in the application may request in writing that the Department hold a fact-finding meeting on the application. Requests should state the nature of the issues proposed to be raised at the meeting. While fact-finding meetings are not required to issue or deny an individual permit or transition area waiver, the Department will hold a meeting if it determines that there is a significant degree of public interest in the application as demonstrated by relevant requests for a meeting within the 30-day meeting request period, a fact-finding meeting is requested by the USEPA, or the Department determines that additional information is necessary for the evaluation of the potential impacts of the proposed project, which can only be obtained through a fact-finding meeting. The

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30-day meeting request period matches the meeting request period provided by the CZM Rules. The fact-finding meeting process replaces the public hearing process with a similar but simpler and more efficient process. The fact-finding meeting process replaced public hearings in the CZM Rules effective July 6, 2015, so the proposed amendments serve to align the FWPA Rules with the CZM Rules. The provisions for public hearings at existing N.J.A.C. 7:7A-12.4 are, therefore, proposed to be deleted. The reference to a public hearing in existing N.J.A.C. 7:7A-12.2, USEPA review (proposed to be recodified as N.J.A.C. 7:7A-12.5) is proposed to be changed to reference a fact-finding meeting to reflect this change in procedure.

Completeness review (N.J.A.C. 7:7A-19.2)

The completeness review processes for all applications for a letter of interpretation, an authorization under a general permit, a transition area waiver, an individual permit, and a water quality certificate are identical with the exception of the completeness review processes for proposed general permits 1, 24, and 25. The completeness review process for all except those three general permits is currently set forth at N.J.A.C. 7:7A-12.1, which is proposed for repeal and replaced with new N.J.A.C. 7:7A-19.2, with amendments, to align the completeness review processes between the CZM, FHACA, and FWPA Rules.

New N.J.A.C. 7:7A-19.2(a) establishes that the completeness review procedures in proposed N.J.A.C. 7:7A-19.2(b) through (g) apply to all applications for a letter of interpretation, authorization under a general permit, transition area waiver, individual permit, and water quality certification, except for those applications listed at N.J.A.C. 7:7A-19.2(a)1, 2, and 3. N.J.A.C. 7:7A-19.2(a)1 directs readers to proposed N.J.A.C. 7:7A-19.3 for the completeness review

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procedures for an application for an authorization under general permit 1 pursuant to proposed N.J.A.C. 7:7A-7.1. N.J.A.C. 7:7A-19.2(a)2 directs readers to proposed N.J.A.C. 7:7A-19.3 for the completeness review procedures for an application for an authorization under general permit 24 in accordance with proposed N.J.A.C. 7:7A-7.24. Finally, for the review procedures for an application for an authorization under general permit 25 pursuant to proposed N.J.A.C. 7:7A-7.25, proposed N.J.A.C. 7:7A-19.2(a)3 directs readers to proposed N.J.A.C. 7:7A-19.4.

Within 20 working days after receiving an application, the Department will take one of three actions. If the Department determines the application is administratively and technically complete, the Department will issue notification to the applicant that the application is complete for review. If the application is determined administratively complete but technically incomplete, such that the Department cannot continue review on the merits of the application, the Department will issue notification to the applicant requesting the necessary information and the deadline by which it must be submitted. If the application is determined to be administratively incomplete, the Department will return it to the applicant. These procedures are similar to those at existing N.J.A.C. 7:7A-12.1(a) and (b). While N.J.A.C. 7:7A-19.2(b)3 no longer specifies that the Department will provide a list of missing items, Department staff will continue to indicate the reasons an application is considered incomplete. Additionally, the fee refund procedures described in existing N.J.A.C. 7:7A-12.1(b) are proposed to be amended and relocated to N.J.A.C. 7:7A-19.11, as described below.

If the Department does not take one of the above actions within 20 working days, the application will be declared complete for review as of the date the application was received by the Department.

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Within 15 calendar days after receiving any additional information requested for a technically incomplete application, the Department will either determine the application is technically complete and notify the applicant that the application is complete for review, or determine the application remains technically incomplete and so notify the applicant, once again specifying the additional information required and the deadline by which it must be submitted. If the applicant submits the required information, the Department will declare the application complete for review as of the date the Department received the additional information. In accordance with N.J.A.C. 7:7A-19.2(e), if the applicant does not timely submit the information, the application is subject to cancellation, which means that the review of the application is ended without the Department approving or denying the application. See the summary of proposed N.J.A.C. 7:7A-19.8 below for more information on cancellation procedures. These new procedures at N.J.A.C. 7:7A-19.2(c) expand on the requirements at existing N.J.A.C. 7:7A-12.1(d). Most significantly, they establish a 15-calendar-day deadline by which the Department must review additional information that will ensure timely review of applications and align the review processes for flood hazard, coastal, and freshwater wetlands permits. If the Department does not take one of the above described actions within 15 calendar days, the application will be declared complete for review, effective as of the date the additional information was received by the Department.

Applicants must send additional information submitted to the Department to the municipal clerk of each municipality in which the project is located, provide notice to any person listed at proposed N.J.A.C. 7:7A-17.3 who may be affected by the additional information, and provide documentation of this notice. This new requirement ensures that any person likely to be

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affected by the application can review the most accurate version of the application and provide any desired input on that version of the application.

The applicant has 90 calendar days (or an alternate timeframe established by the Department) to submit the information requested for purposes of completing the application. If the applicant does not submit the information within the prescribed timeframe, the Department will cancel the application unless the applicant demonstrates good cause for not timely providing the information. In that event, the Department will extend the time to submit the necessary information. This proposed requirement amends the requirement at existing N.J.A.C. 7:7A-12.6(b), which requires applicants to submit additional information within 30 calendar days.

Department review and decision for authorization for maintenance of a stormwater management facility under general permit 1 and repair of a malfunctioning individual subsurface sewage disposal system under general permit 24 (N.J.A.C. 7:7A-19.3)

Existing general permit 1 authorizes maintenance and repair of existing features, including stormwater management facilities. Proposed general permit 24 authorizes activities in freshwater wetlands and transition areas necessary for the repair or modification of a malfunctioning individual subsurface sewage disposal system. The review process for ongoing maintenance of off-stream stormwater management facilities created in uplands under general permit 1 and for all activities under proposed general permit 24, currently located at N.J.A.C. 7:7A-5.1(d) and 5.25(f), respectively, are recodified, consolidated, and amended at proposed N.J.A.C. 7:7A-19.3.

Within 20 working days of receiving an application for an authorization for maintenance

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of a stormwater management facility under general permit 1 or for an authorization under general permit 24, the Department will either determine the application is administratively and technically complete and declare the application complete for review or determine the application is not administratively and technically complete and so notify the applicant. If the applicant is not notified within 20 working days, the application will be deemed administratively complete.

If the application is administratively complete, the Department will have 30 days to notify the applicant that the activities are not authorized under general permit 1 or 24, or that the activities may be authorized but require a full application review. If the Department does not so notify the applicant, the application is automatically approved. This provision is continued from existing N.J.A.C. 7:7A-5.1(d)2 and 5.25(f)2 and amended to clarify that the automatically approved permit issued is subject the conditions that apply to all general permits, as well as conditions that apply to all permits. The Department will provide notice of its decision on an application under general permit 1 or 24 in the DEP Bulletin and to any person who specifically requested notice of the decision on a particular application.

Department review and decision on an application for authorization under general permit 25 for minor channel or stream cleaning for local government agencies (N.J.A.C. 7:7A-19.4)

The specific review procedures for applications for an authorization under general permit 26 (proposed general permit 25), which addresses minor channel or stream cleaning by local government agencies, are currently codified at N.J.A.C. 7:7A-5.26(f), (g), and (h). The Department is proposing to relocate, clarify, and reorganize these application review

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requirements at N.J.A.C. 7:7A-19.4.

The Department must take initial action on an application for an authorization under general permit 25 within 15 calendar days for activities that do not include the removal of sediment and within 60 calendar days for activities that include the removal of sediment. Within the applicable timeframe, if the Department determines that the application is complete for review, the Department must approve or deny the application in writing. If approved, the authorization will include any conditions necessary to ensure compliance with N.J.A.C. 7:7A. If denied, the decision will include the reasons for the denial. If the application is administratively complete but technically incomplete, the Department will notify the applicant and specify the additional information required and by what deadline it must be submitted. If the application is administratively incomplete, the Department will return the application.

Similar to general permits 1 and 24, if the Department does not make a decision to approve or deny an application for an authorization under general permit 25 by the applicable deadline, the applicant is authorized to commence stream cleaning activities to the extent that the project does not violate other laws in effect. Authorizations under this subsection must include the standard conditions set forth in proposed N.J.A.C. 7:7A-20.2. An authorization issued under this subsection will not prevent the Department from taking enforcement action for any activity undertaken in violation of N.J.A.C. 7:7A.

Following the Department's decision to issue the authorization or deny the application, notice of the decision will be published in the DEP Bulletin. In addition, notice will be provided to any individual who specifically requested notice of the decision on a particular application.

Department decision on an application that is complete for review (N.J.A.C. 7:7A-19.7)

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Existing N.J.A.C. 7:7A-12.5 is recodified with substantial amendments as N.J.A.C. 7:7A-19.7 to align the review process in the FWPA Rules with those in the CZM and FHACA Rules.

The existing requirement that the Department issue or deny a permit within 180 days of submittal of a complete application is proposed to be deleted and replaced with timeframes specific to each permit type. For LOIs, the Department will issue the LOI within 30 days after receiving the application, if the Department did not request additional information, or within 45 days after receipt of additional information, if the Department requested additional information. If the applicant chooses to wait for a determination of resource value classification, the LOI will be issued as soon as the Department determines that the resource value classification can be definitively determined. If the Department conducts a site inspection, the deadline for issuance described above will be extended by 45 days. The existing explanation of the Department's imposition of addition conditions necessary to comply with the FWPA, the FWPA Rules, and the New Jersey Water Pollution Control Act is proposed to be deleted because this provision is relocated to proposed N.J.A.C. 7:7A-20.2(b).

Within 90 calendar days after an application for an authorization under a general permit, application for an individual permit, or application for a transition area waiver is declared complete for review, if the Department determines that the application meets the requirements of N.J.A.C. 7:7A, it will issue an authorization, waiver, or individual permit in writing approving the application. Any conditions necessary to ensure compliance with N.J.A.C. 7:7A will be included. If the Department determines that the application does not meet the requirements of N.J.A.C. 7:7A, it will deny the application in writing and include reasons for the denial.

This 90-calendar-day deadline may be extended for 30 calendar days by mutual

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agreement (provided by the applicant in writing) between the applicant and the Department. This 90-calendar-day review time does not apply to applications that require USEPA review.

In addition, as emphasized by proposed N.J.A.C. 7:7A-19.7(d), if the Department does not make a decision to approve or deny an application within the applicable time period, the applicant cannot assume that the application is approved. While applications under the CZM Rules and FHACA Rules can be deemed to be approved if the Department does not make a decision within the applicable timeframe, this does not apply to applications under the FWPA Rules. Applications under the FWPA Rules are not subject to the 90-day Construction Permits Law, N.J.S.A. 13:1D-29 et seq., timeframes.

The Department will send notice to the applicant if a permit is issued or denied. The proposed rules continue to indicate that any permit issued by the Department may impose conditions necessary for compliance with the FWPA, N.J.A.C. 7:7A, the Federal Act, and the New Jersey Water Pollution Control Act. Any regulated activities undertaken under any issued permit constitutes acceptance by the applicant of the entire permit, including all conditions therein. Permit decisions will be published in the DEP Bulletin and a copy of every issued individual permit that requires USEPA review will be transmitted to the USEPA. These procedures are continued without change from existing N.J.A.C. 7:7A-12.5(b), (c), and (d).

The overall effect of the above-described changes is to reduce the time it takes the Department to issue a decision on an application under the FWPA Rules, except for applications that require USEPA review. These amendments are part of the Department's transformation of the land use permitting processes and align review procedures in the FWPA Rules with those in the CZM and FHACA Rules to provide a predictable permitting process.

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Cancellation, withdrawal, and resubmission of an application (N.J.A.C. 7:7A-19.8, 19.9, 19.10, and 19.11)

The procedures for the Department's cancellation, and the applicant's withdrawal and resubmission of an application, currently codified at N.J.A.C. 7:7A-12.6 and 12.7, are proposed to be repealed and replaced with N.J.A.C. 7:7A-19.8, Cancellation of an application, 19.9, Withdrawal of an application, 19.10, Re-submittal of an application after denial, cancellation, or withdrawal, and 19.11, Fee refund. The proposed procedures are consistent with those in the CZM and FHACA Rules.

As set forth in proposed N.J.A.C. 7:7A-19.8, the Department will cancel an application in several circumstances: (1) if the applicant does not submit additional information within the timeframe prescribed by the Department for an application that has been determined to be technically incomplete; (2) if the applicant does not submit the required application fee, or the Department cannot collect the fee for any reason; or (3) if the applicant does not provide the required public notice of the application. The existing rules do not directly state that an application will be cancelled if a fee or public notice is not provided. The Department is proposing to add these to make clear that these do constitute cause for cancellation. An application fee is a necessary component of an application. Usually, lack of a fee would lead the application to be returned as administratively incomplete. However, if a fee is included in the original application, but is an incorrect amount, or cannot be collected due to insufficient funds, the application can be cancelled. Additionally, public notice is an integral component of the permitting process. If an applicant does not adequately notify the public, the Department cannot

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render a decision to approve or deny an application.

Under proposed N.J.A.C. 7:7A-19.8(b), the Department will send the applicant a written notice of its intent to cancel the application and request that the missing fee and/or information be provided within 15 calendar days of receipt of the notice. If, during this 15-calendar-day period, the applicant submits a written statement providing good cause for a delay in providing the requested fee and/or additional information, the Department will extend the time required for submittal. If the applicant does not submit the requested fee and/or information or a statement of good cause for delay, the Department will cancel the application and so notify the applicant in writing. This procedure is identical to the existing procedure set forth in N.J.A.C. 7:7A-12.6(b)

As established in proposed N.J.A.C. 7:7A-19.9, an applicant may withdraw an application in writing at any time during the Department's review of the application. The Department will acknowledge the withdrawal in writing.

As set forth in proposed N.J.A.C. 7:7A-19.10, if the Department cancels or denies an application for a letter of interpretation, an authorization under a general permit, a transition area waiver, an individual permit, or a water quality certificate, or if the application is withdrawn by the applicant, the applicant may resubmit the application in accordance with proposed N.J.A.C. 7:7A-16. The Department will treat the resubmitted application as a new application and review it accordingly.

Proposed N.J.A.C. 7:7A-19.11 establishes that the Department may fully refund a submitted application fee in certain circumstances upon the written request of an applicant. The Department will fully refund a fee if an application is returned because it is not administratively complete; the applicant withdraws the application within 60 calendar days of submitting it to the

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Department and the application is not technically complete; or the applicant withdraws the application within 20 working days of submitting it to the Department, whether or not the application is administratively or technically complete. The fee is fully refundable in these circumstances because the Department has not started its technical review of the application and has, therefore, not invested the significant time and resources necessary to review the application for compliance with the rules applicable to the proposed regulated activity or project. A fee will not be refunded where the Department has rendered a decision to approve or deny an application, or if an application fee has been previously credited.

The Department will credit an application fee toward a new application if the application is withdrawn under circumstances other than those that would result in a fee refund, as described above, or where the Department cancelled the application. The application fee will be credited toward a new application only if the new application is submitted within one year of cancellation or withdrawal, by the same applicant, and for the same site and same project. If an applicant chooses to resubmit the application more than one year from the date it was cancelled or withdrawn, the applicant must submit a new application fee.

The proposed sections reflect several differences in how application fees are handled where a permit application is either cancelled or withdrawn. In the case of Department cancellation of an application, under the existing rules at N.J.A.C. 7:7A-12.6(c), the application fee is not refunded. Further, if the applicant chooses to resubmit the application, in accordance with existing N.J.A.C. 7:7A-12.6(e)1, where the original application was cancelled by the Department, a new fee is required. In contrast, the proposed new rules allow for refund of a fee if cancellation was based upon the application having been administratively incomplete, and,

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thus, not having necessitated substantial Department review time. The new rules additionally provide that the applicant on a Department-cancelled application may apply the fee on the original application to a new application, provided the timing and project specific conditions outlined above are satisfied. With reference to applications withdrawn by the applicant, application fees are not refunded under the existing rules, but may be applied by the applicant to a new application filed within one year for a revised project on the same site (see N.J.A.C. 7:7A-12.6(d) and (e)2). In contrast, as described above, applications fees may be refunded under the proposed rules provided the applicant withdraws the application within specific timeframes. The proposed rules provide greater flexibility in refund or application of fees to a subsequent application reflective of the level of effort and time the Department was required to expend on the original application and any additional effort and time that would be involved in reviewing a subsequent application for the same site.

Permit and Waiver Conditions; Modification, Transfer, Suspension, and Termination of Authorizations and Permits (N.J.A.C. 7:7A-20)

Proposed new N.J.A.C. 7:7A-20 incorporates provisions currently codified at N.J.A.C. 7:7A-13 and 14, with amendments to align the FWPA Rules with the CZM and FHACA rules. New standards are also proposed for this purpose.

Purpose and scope; Conditions that apply to all permits (N.J.A.C. 7:7A-20.1 and 20.2)

The Department is proposing to refine the conditions in the existing FWPA Rules based on its experience implementing the freshwater wetlands permitting program and for consistency

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with the CZM and FHACA rules. The permit conditions set forth in N.J.A.C. 7:7A-20 are those that apply to all freshwater wetlands permits. This subchapter also sets forth procedures for extensions, transfers, modifications, suspensions, and terminations of waivers, authorizations, and individual permits, as discussed below.

The Department is proposing 27 conditions at N.J.A.C. 7:7A-20.2(c) that apply to all freshwater wetlands permits, which are consistent with conditions that apply to flood hazard and coastal permits, to amend and replace the conditions at existing N.J.A.C. 7:7A-13.1. The conditions and explanation of how the proposed conditions relate to existing conditions are as follows:

(1) The issuance of a permit does not expose the Department to liability for the sufficiency of the design of any structures or construction, or for any loss of life or property that may occur as a result of the activity or development. This is a new condition added to achieve consistency between Division of Land Use Regulation permitting programs. Currently, the content of this condition is true in effect, with the proposed amendment simply explicitly including it in the rules.

(2) A permit does not convey any property rights or any other exclusive privilege. This condition continues the condition at existing N.J.A.C. 7:7A-13.1(a)7.

(3) A permittee must obtain all Federal, State, and local approvals prior to commencing activities under the permit. This condition is similar to existing N.J.A.C. 7:7A-13.1(f), which states that a permit issued under the FWPA Rules does not relieve a permittee from the obligation to obtain any other permits or approvals required by law.

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(4) A permittee conducting an activity involving soil disturbance, creation of drainage structures, or changes in natural contours must obtain any necessary approvals from the Soil Conservation District. This is also similar to the concept of existing N.J.A.C. 7:7A-13.1(f).

(5) The permittee must take all reasonable steps to prevent, minimize, or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit or from noncompliance with the permit. This requirement is continued from existing N.J.A.C. 7:7A-13.1(a)4.

(6) The permittee must immediately notify the Department of any unanticipated adverse effects on the environment not described in the permit application or permit conditions. Not doing so is cause for the Department to suspend a permit pursuant to proposed N.J.A.C. 7:7A-20.8. This condition continues concepts from existing N.J.A.C. 7:7A-13.1(a)12v, vi, and viii. The existing rules provide a 12-hour window to report noncompliance that endangers health or the environment and requires any other noncompliance to be reported when monitoring reports are submitted. The Department is proposing to delete these existing timeframes because immediate notice will allow the Department and the permittee to develop a remedy for the unanticipated effects, while reducing the amount of time the adverse effects continue. This condition is separate from condition (7) below, which discusses noncompliance, because unanticipated impacts to the environment may occur even if the permittee is complying with the conditions of the permit. For example, there could be site conditions that were unknown or unanticipated that could lead activities conducted in accordance with the terms of the permit to have an unintended adverse effect.

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(7) The permittee must immediately inform the Department through the Warn DEP Hotline of any noncompliance that may endanger public health, safety, and welfare, or the environment. The permittee must inform the Division of Land Use Regulation of any other noncompliance by telephone within two working days of the time the permittee becomes aware of the noncompliance, and follow up the telephone notice with a written notice within five working days. This condition is intended to ensure that the Department becomes immediately aware of any noncompliance that may endanger health or the environment, so that actions can be taken quickly to address the immediate risk. This condition incorporates concepts from existing N.J.A.C. 7:7A-13.1(a)12v, vi, and viii. As discussed above, these timeframes differ from the existing timeframes to report noncompliance. The existing timeframes of 12 hours to report noncompliance that endangers health or the environment and the requirement to report other noncompliance in monitoring reports allow noncompliance to continue longer than necessary. Additionally, not all permits require submittal of monitoring reports. As most people carry mobile phones, requiring notice immediately or within two days of becoming aware of the noncompliance is reasonable.

(8) Noncompliance with a permit constitutes a violation and is grounds for enforcement action, as well as, in the appropriate case, suspension and/or termination of the permit. This condition is similar to existing N.J.A.C. 7:7A-13.1(a)1.

(9) In an enforcement action, the permittee cannot use as a defense that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit. This condition is continued from N.J.A.C. 7:7A-13.1(a)3.

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(10) The permittee must minimize noise during construction. This is a new condition proposed to align the FWPA Rules with the FHACA and CZM Rules.

(11) The issuance of a permit does not relinquish the State's tidelands ownership or claim to any portion of the subject property or adjacent properties. This is also a new condition that serves to align the FWPA Rules with the CZM and FHACA Rules.

(12) The issuance of a permit does not relinquish the public's right to access and use tidal waters and their shores. This new condition ensures consistency between the FWPA, CZM, and FHACA rules and ensures the Public Trust Doctrine is upheld.

(13) The permittee must allow an authorized representative of the Department, upon the presentation of credentials, to enter the site, have access to and copy any records that must be kept under the conditions of the permit, inspect at reasonable times any facilities, equipment, or operations regulated or required under the permit, and sample or monitor any substances or parameters necessary for the purposes of assuring compliance. Failure to do so will be considered a violation of the FWPA Rules and subject the permittee to an enforcement action. These conditions continue the conditions from existing N.J.A.C. 7:7A-13.1(a)9 and encompass the concept of the permittee's duty to provide information set forth at existing N.J.A.C. 7:7A-13.1(a)8.

(14) While a regulated activity is being undertaken, the permittee cannot cause or allow any unreasonable interference with the free flow of a regulated water by placing or dumping materials, equipment, debris, or structures within or adjacent to the channel. Once regulated activities have been completed, the permittee must remove and dispose of all excess materials, debris, equipment, and silt fences and other temporary soil erosion and sediment control devices

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from all regulated areas. This condition is newly added to the list of conditions that apply to all permits to align the FWPA and FHACA rules and serves to protect aquatic biota from the negative impacts of erosion, sedimentation, and obstruction of regulated waters.

(15) The permittee and its contractors and subcontractors must comply with all the conditions of the permit, including all supporting documents and site plans approved by the permit. This condition is also new to the list of conditions that apply to all permits and is intended to notify the permittee that any individual performing regulated activities under a Department permit is responsible for knowledge of, and compliance with, all conditions of the permit and must perform the regulated activity exactly as proposed in the approved permit application.

(16) Site plans, supporting documents, and conditions imposed by a permit remain in full force and in effect, as long as the regulated activity or project is in existence, unless the permit is modified. This condition is also new to the list of conditions that apply to all permits. This condition ensures that, throughout the life of a project, activities will be conducted as approved by the Department. Activities that veer from the approved size and scope could potentially have different impacts on the environment and must be reviewed by the Department.

(17) The permit must be recorded with the Office of the County Clerk in the county(ies) in which the site is located. The permit must be recorded within 30 calendar days of receipt by the permittee, except if the permit authorizes activities within two or more counties, in which case the permit must be recorded within 90 calendar days of receipt. County clerks require that the original, signed permit document be recorded and will not accept photocopies. The process of recording generally takes the clerk's office about three weeks, after which the clerk's office will

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mail the original permit back to the permittee. The proposed 30-day timeframe should accommodate the practice of most clerks' offices. The proposed 90-day timeframe for recording a permit in more than one county is intended to accommodate the three weeks (approximately) each clerk's office generally will need to accomplish recording the permit and returning it to the permittee. Upon completion of all recording, a copy of the recorded permit must be forwarded to the Department. This condition is new to the list of conditions that apply to all permits and is included to align the processes of the Division of Land Use Regulation's permitting programs. This condition also serves to put prospective purchasers of a property on notice, since some permit conditions constrain what can be done with the property or the improvements on the property.

(18) Where mitigation is required, it must be conducted in accordance with the mitigation requirements at proposed N.J.A.C. 7:7A-11. This condition continues the requirements at existing N.J.A.C. 7:7A-13.1(a)13, but removes the specific requirement that mitigation occur prior to or concurrently with regulated activities. This change recognizes that mitigation for temporary disturbances that, in accordance with existing N.J.A.C. 7:7A-15.7 and proposed N.J.A.C. 7:7A-11.8, necessarily includes restoration of the area temporarily disturbed, cannot occur until after completion of the regulated activity. The change also accounts for mitigation required after conduct of activities under an emergency authorization, which must be completed in a timeframe relative to the authorization and not to the subsequent permit.

(19) If a condition or permit is determined to be legally unenforceable, the Department may impose modifications and additional conditions as necessary to protect public health, safety, and welfare or the environment. This new condition serves to align the FWPA, CZM, and

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FHACA Rules and ensures protection of the public and the environment in cases where original permit conditions cannot be enforced.

(20) If a permit condition does not set a specific timeframe within which the condition must be satisfied, the condition must be satisfied within six months of the effective date of the permit. This condition is added to ensure consistency between the land use permitting programs and to ensure timely fulfillment of permit conditions.

(21) A copy of the permit and all site plans and supporting documents must be maintained on site and made immediately available on request of the Department or its designated agents. This requirement is continued from existing N.J.A.C. 7:7A-13.1(d). The existing requirement that a sign be posted on the property/work site with details about the project and where the permit may be viewed is not continued in the proposed rule. This requirement is not necessary for protection of public health, safety, and welfare, or freshwater wetlands, State open waters, or transition areas and is not present in the CZM or FHACA Rules.

(22) The permittee must provide monitoring results to the Department at the intervals specified in the permit. This requirement has been streamlined from existing N.J.A.C. 7:7A-13.1(a)10 and 12iv and eliminates the time required to retain records and the required detail of monitoring records. The retention time provisions in the existing rules are deleted because, although it is prudent for the permittee to retain records relating to permit compliance, the DEP will not mandate that the permittee retain records for a certain number of years, since the Department will have all records submitted by the permittee and will retain them according to Department retention policies. Detailed monitoring requirements will be provided in additional specific permit conditions as applicable to specific permits.

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(23) A permit can be transferred to another person only in accordance with the rules governing the transfer of permits (see proposed N.J.A.C. 7:7A-20.5). This condition is continued from existing N.J.A.C. 7:7A-13.1(a)12iii.

(24) A permit can be modified, suspended, or terminated by the Department for cause. This condition continues concepts from existing N.J.A.C. 7:7A-13.1(a)6.

(25) The submittal, by the permittee, of a request to modify a permit, or notification of planned changes or anticipated noncompliance, does not stay any condition of a permit. This condition is continued from existing N.J.A.C. 7:7A-13.1(a)6.

(26) If the permittee becomes aware that it did not submit relevant facts in its application, or that it submitted incorrect information in its application or in any report, the permittee must promptly submit such facts or information to the Department. The failure to submit relevant information or submission of incorrect information may result in the issuance of a permit for an activity that does not in fact meet the requirements of the FWPA Rules. This condition ensures that the Department is notified, so that it can take the appropriate steps to correct the problem, including modifying the permit or, if necessary, suspending or terminating the permit. This condition is similar to existing N.J.A.C. 7:7A-13.1(a)12vii.

(27) The permittee must notify the Bureau of Coastal and Land Use Compliance and Enforcement within the Department in writing at least three working days before the start of regulated activities. This condition amends the requirement to notify the Department seven days before the start of regulated activities at existing N.J.A.C. 7:7A-13.1(a)14. The CZM and FHACA Rules require at least three working days notice, which has proved sufficient to inform the Department of the intended commencement of activities.

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Several conditions in existing N.J.A.C. 7:7A-13.1(a) are proposed to be deleted entirely from the list of conditions that apply to all permits. Existing N.J.A.C. 7:7A-13.1(a)2 establishes a permittee's duty to reapply for a permit or to apply for an extension before the expiration date of the current permit, if they wish to continue an activity covered by the permit after the permit's expiration date. This concept is instead captured in proposed N.J.A.C. 7:7A-5.5, 5.6, 8.5, and 9.2, which establish the duration of general permits-by-certification, general permits, transition area waivers, and individual permits, respectively, including the requirement to obtain an extension or new permit, if the permittee wants to continue regulated activities after the expiration date of the permit. Proposed N.J.A.C. 7:7A-14.3(e) sets forth the duration of emergency authorizations.

Existing N.J.A.C. 7:7A-13.1(a)5, which sets forth the condition for proper operation and maintenance of facilities, is not proposed to be continued at N.J.A.C. 7:7A-20.2(c). Not all aspects of the condition are truly applicable to all permits. Many activities authorized under permits do not involve the operation or maintenance of facilities or systems of treatment and control. The portion of this condition that requires the proper execution of any approved mitigation proposal is continued in concept at proposed N.J.A.C. 7:7A-20.2(c)18 and in the specific mitigation requirements and standards set forth at proposed N.J.A.C. 7:7A-11. Should the Department feel that a condition similar to existing N.J.A.C. 7:7A-13.1(a)5 is appropriate and necessary for a particular permit, such a condition may be added under proposed N.J.A.C. 7:7A-20.3(a).

Existing N.J.A.C. 7:7A-13.1(a)8 sets forth a permittee's duty to provide information requested by the Department to determine whether cause exists for modifying, terminating, and

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reissuing, or terminating the permit, or to determine compliance with the permit. This condition is not necessary because the conditions applicable to all permits, described above, already require the permittee to inform the Department of both unanticipated adverse effects on the environment and of any noncompliance in accordance with proposed N.J.A.C. 7:7A-20.2(c)6 and 7, including situations that could constitute cause for modifying, terminating, and reissuing, or terminating the permit. Further, in addition to this information from the permittee, through site inspections and information provided through the WARN DEP hotline, the Department can assess compliance with a permit and whether cause exists to terminate or modify a permit. Finally, proposed N.J.A.C. 7:7A-20.2(c)13i and ii require a permittee to allow the Department access to any records that must be kept under the conditions of the permit, and to copy any such records.

The detailed conditions related to monitoring, recordkeeping, and reporting requirements at existing N.J.A.C. 7:7A-13.1(a)10 and 12i, ii, and iv are not continued at proposed N.J.A.C. 7:7A-20.2(c). Monitoring is most often required for mitigation projects. Monitoring and reporting requirements for mitigation projects are proposed within N.J.A.C. 7:7A-11, the subchapter devoted to mitigation (see the mitigation section of this summary for more information about specific monitoring requirements). The Department has determined that it is unnecessary to include the above detailed requirements as conditions for all permits because many permits do not require any monitoring or reporting to the Department. Under proposed N.J.A.C. 7:7A-20.3, the Department may add conditions similar to the above deleted conditions on a case-by-case basis, should the Department deem it necessary to do so. Proposed N.J.A.C.

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7:7A-20.2(c)22, therefore, more generally requires that a permittee shall provide monitoring results to the Department at the intervals specified in the permit.

The signatory requirement at existing N.J.A.C. 7:7A-13.1(a)11 is not continued at proposed N.J.A.C. 7:7A-20.2(c). The requirement that all applications, reports, or information submitted to the Department be signed and certified as required by the application requirements is not necessary for most permits. In the application context, signature and certification requirements are addressed at proposed N.J.A.C. 7:7A-16. For permits that require submitting additional reports or information, specific signatory requirements will be identified in the specific permit condition added to required submission of reports or information.

Establishing permit conditions (N.J.A.C. 7:7A-20.3)

In addition to the 27 standard conditions at N.J.A.C. 7:7A-20.2, the Department may also establish conditions in a permit on a case-by-case basis to ensure compliance with all applicable requirements of the enabling statutes, the FWPA Rules, and any other applicable rules. Existing N.J.A.C. 7:7A-13.2, which sets forth the procedure for establishing these conditions and the information that must be included in each permit issued by the Department, is recodified as N.J.A.C. 7:7A-20.3.

The Department is proposing to add the watershed management area to the information on the location and boundaries of an activity site that will be included, when applicable, in a permit at N.J.A.C. 7:7A-20.3(b)1v. The watershed management area of an activity plays a role in determining the location of any required mitigation, as detailed in the Mitigation section of this summary, and is, therefore, pertinent information for some permits.

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The Department is proposing to amend existing N.J.A.C. 7:7A-13.2(b)2, which requires applicable permits to include provisions ensuring that the regulated activity will be conducted in compliance with environmental guidelines issued under section 404(b)1 of the Federal Act, the FWPA, and this chapter to include reference to the findings of the two statutes and N.J.A.C. 7:7A and/or environmental guidelines for clarity. While in the Federal context, the term “environmental guidelines” is used, that term is not used in the FWPA or elsewhere in the rules. Additionally, the FWPA states that the Department may add special permit conditions on the basis of “findings” with respect to a specific application. The term “findings” is, therefore, added for clarity and consistency with the FWPA.

The Department is also proposing to amend this provision to state that conditions must be included to minimize impacts to “waters of the State,” in addition to waters of the United States. This is added for clarity to ensure that the Department’s authority is clear to the regulated community.

Extension of an authorization under a general permit, a transition area waiver, and an individual permit (N.J.A.C. 7:7A-20.4)

The provisions for extensions at existing N.J.A.C. 7:7A-14.6 are recodified with amendments and additions at proposed N.J.A.C. 7:7A-20.4. As noted above, with respect to the duration of authorizations under general permits (N.J.A.C. 7:7A-5.6), of transition area waivers (N.J.A.C. 7:7A-8.5), and of individual permits (N.J.A.C. 7:7A-9.2), the Department is proposing that the five-year term of these approvals, with certain exceptions, can be extended one time for another five years.

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In accordance with proposed N.J.A.C. 7:7A-20.4(b)1, the Department will issue an extension only if it receives an extension request prior to the expiration of the transition area waiver, authorization under a general permit, or individual permit. The Department will not accept a request for extension received more than one year prior to the expiration of the permit. This requirement eliminates the existing requirement to submit an extension request 60 days prior to the permit's expiration (for individual permits) or 30 days prior to the expiration (for general permit authorizations) found at existing N.J.A.C. 7:7A-14.6(b)1. Under the proposed rules, permits that are requested to be extended that have not already expired or been terminated expire when the request is denied, or if granted, five years from the original expiration date. As discussed below, the Department is proposing to allow activities to continue past the original expiration date of the permit while the Department is reviewing the extension request, and is establishing a 15- or 30-calendar-day review time, which renders the 30- or 60-day lead time in the existing rules unnecessary.

Proposed N.J.A.C. 7:7A-20.4(b)2 requires the person requesting the extension to demonstrate that there has been no significant change in the overall conditions of the site. Proposed N.J.A.C. 7:7A-20.4(b)3 requires the person requesting the extension to demonstrate that the regulated activities approved under the authorization or individual permit have not been revised or amended, unless the permittee has obtained a permit modification for the changes. Proposed N.J.A.C. 7:7A-20.4(b)4 requires that, for an individual permit, the person requesting the extension demonstrates the rules governing the regulated activities have not been amended, such that the activities do not meet the rules as amended. If the activities do not meet the amended rules, the individual permit will expire on the date specified in the permit. These

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proposed requirements reorganize and clarify the existing requirements at N.J.A.C. 7:7A-14.6(b)2, 2i, 2ii, and 2iii, while providing more detail and guidance to permittees. The provision at existing N.J.A.C. 7:7A-14.3(b)2ii that requires the person requesting the extension to demonstrate the rules governing the regulated activities have not been amended, such that the activities do not meet the rules as amended is proposed to apply only to individual permits, rather than to general permit authorizations, transition area waivers, and individual permits, as is required in the existing rules. General permits and transition area waivers generally authorize activities with minor impacts on freshwater wetlands and State open waters. While transition area waivers may at times authorize a substantial area of disturbance, the effects on freshwater wetlands are generally minimal. Individual permits, on the other hand, may authorize more substantial impacts. Therefore, the Department has determined that it is essential that these permits are not extended when they no longer meet the rules in effect, while other approvals may be extended even if the rules have changed in the period between the initial approval and extension request. The proposed changes align the extension request process in the FWPA Rules with that of the CZM and FHACA Rules.

Under proposed N.J.A.C. 7:7A-20.4(c), the extension request must include a completed application form, the appropriate application fee, and a narrative demonstrating, as noted above, that the site conditions have not significantly changed, the regulated activities have not been revised, and, for individual permits, that the applicable rules have not been amended, such that the activities do not meet the rule requirements as amended. This proposed subsection expands existing N.J.A.C. 7:7A-14.3(e) by providing more detail concerning the materials that must be

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submitted for an extension request and adding the requirement to include a narrative demonstrating that the requirements of proposed N.J.A.C. 7:7A-20.4(b) are met.

Within 15 calendar days of receiving an extension request for an authorization under a general permit or within 30 calendar days of receiving a request for an individual permit, the Department will either determine the request meets the requirements and issue the extension, or deny the extension request. These deadlines for Department action are new to the proposed rule and will ensure timely processing of permit extension requests. As mentioned above, the proposed rules provide that permits that are requested to be extended that have not already expired or been terminated expire when the request is denied. If an extension request is approved, the permit will expire five years from its original expiration date. The Department is proposing to allow regulated activities to continue past the original expiration date pending a decision on an extension because the need to extend a permit is not always known well in advance of the permit's expiration. The extension processes proposed for the FWPA Rules align the processes of the freshwater wetlands permitting program with the coastal and flood hazard area permitting processes to create a streamlined and predictable process.

The Department will deny an extension request if it is for an authorization or individual permit that cannot be extended under the rules (for example, an individual permit issued for an activity identified in N.J.A.C. 7:7A-9.2(b), such as a flood control project, which has an initial duration of 10 years, but, in accordance with that subsection, may not be extended), is received more than one year prior to the expiration date of the authorization or permit; or is received after the expiration date of the authorization or permit. The Department will also deny a request for extension if the authorization or permit has been extended before; the applicant fails to make the

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required demonstrations regarding site conditions, the regulated activities and the applicable rules noted above; the request did not include all information required to be submitted; or the authorization or individual permit has been terminated. These new provisions expand on the more general provision for denial of an extension request in the existing rules at N.J.A.C. 7:7A-14.6(c). While the existing rules also indicate that an extension request would be denied if the Department determines in reviewing the extension request that good cause for termination is present, this is not continued in the proposed rule. If cause for termination exists, the Department will terminate the permit, making the extension request moot. This change in language is not meant to imply that a permit that should be terminated could be extended, but is intended to more accurately reflect the processes of the Department.

If the Department denies a request for extension, the authorization or individual permit will expire on its original expiration date, and all regulated activities must stop and cannot resume unless and until a new permit is obtained. This provision is continued in the proposed rules at N.J.A.C. 7:7A-20.4(f) from existing N.J.A.C. 7:7A-14.6(d) with additional clarifying language and detail.

Under proposed N.J.A.C. 7:7A-20.4(g), any approved extension will be for one five-year period, beginning on the original expiration date of the authorization or permit. The extension will be in writing and will include any conditions necessary to ensure continued compliance with the FWPA Rules.

Transfer of an emergency authorization, authorization under a general permit, or an individual permit (N.J.A.C. 7:7A-20.5)

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The procedure for transferring ownership of a site and/or ownership of permitted activities on a site at existing N.J.A.C. 7:7A-14.2 is proposed to be repealed and replaced with N.J.A.C. 7:7A-20.5. The existing rules require transfers to be achieved through the permit modification process. The proposed rules, however, set forth a separate process for transferring ownership of a site for which the Department has issued an emergency authorization, authorization under a general permit, a transition area waiver, or an individual permit. If the site is transferred to a new owner, the emergency authorization, general permit authorization, or individual permit, including all conditions, is automatically transferred, provided the authorization or permit is valid on the date the site is transferred to the new owner. To ensure that the Department will continue to have accurate information as to the owner and the activities being conducted on the site to which the transferred waiver, authorization, or permit applies, the new owner must submit, within 30 calendar days of the transfer, the new owner's name, address, and contact information, and documentation that the transfer will neither alter a condition upon which the original approval was based nor otherwise circumvent any requirement of the FWPA Rules.

General permits-by-certification cannot be transferred through this process. Because application and approval of a general permit-by-certification are accomplished via the online permitting portal, no paper file is maintained in the Department's offices. Therefore, if a site on which regulated activities under a general permit-by-certification are occurring is transferred to a new owner, a new general permit-by-certification must be obtained by the new owner to continue the regulated activities.

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Modification of an authorization under a general permit, a transition area waiver, or an individual permit (N.J.A.C. 7:7A-20.6)

The procedures and requirements for the modification of a permit, currently located at N.J.A.C. 7:7A-14.3, are proposed to be recodified with significant amendments, as proposed N.J.A.C. 7:7A-20.6 to align the FWPA Rules with the CZM and FHACA Rules.

The proposed amendments to this section include several proposed new subsections. The new rules more clearly establish what types of Department authorizations may be modified and by whom. An authorization under a general permit-by-certification cannot be modified, since it is processed electronically and there is no individual review of the regulated activity or project by the Department. If a person receives authorization under a general permit-by-certification and then decides to alter the design of the project, the person can apply electronically for a new authorization, provided the project, as modified, meets the requirements of the general permit-by-certification and the person so certifies. However, if the modification is such that the project as modified will not meet the requirements of the general permit-by-certification, then the person must proceed by applying for the appropriate general permit authorization or individual permit, depending upon the extent and type of regulated activity planned. Valid transition area waivers, authorizations under general permits, and individual permits, however, may be modified in accordance with this proposed section. The duration of a waiver, an authorization under a general permit, or an individual permit cannot be extended via a modification; extensions must be requested through the process set forth at proposed N.J.A.C. 7:7A-20.4, as discussed above. The ability for the Department to modify a permit on its own initiative is continued from the existing rules.

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The Department is proposing to establish three categories of modifications: administrative modifications, minor technical modifications, and major technical modifications. These three categories replace the existing categories of minor modifications, major modifications, and general permit modifications in order to align the permit modification processes of the Department's land use permitting programs. Existing N.J.A.C. 7:7A-14.3(b) through (e), which contain provisions for minor, major, and general permit modifications, are, thus, proposed to be deleted and replaced with proposed N.J.A.C. 7:7A-20.6(c) through (g) as described below.

As proposed at N.J.A.C. 7:7A-20.6(c), an administrative modification applies to a change to a site plan or other document on which the original authorization, individual permit, or waiver was based, but which does not alter the design or layout of the project or affect the wetlands limits. An administrative modification may include, for example, correcting a drafting or typographical error on a plan or report; improving topographical data in order to make the permit or waiver more accurately reflect the site, regulated areas, and/or permitted activities; or adding notes, labels, or other clarifying information to the approved site plan if required by the Department or another government entity. Administrative modifications encompass some of the changes considered "minor modifications" under the existing rules at N.J.A.C. 7:7A-14.3(c).

Proposed N.J.A.C. 7:7A-20.6(d) defines the scope and requirements of a minor technical modification. A minor technical modification applies to a change in the design or layout of a project or the wetland or transition area limits, including any associated changes to an approved site plan or other document, provided the applicant demonstrates that the change does not result in new or additional impacts to freshwater wetlands or transition areas. Minor technical

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modifications may include, for example, changes in materials or construction techniques; a reduction in the amount of development on the site, such as the elimination of a permitted structure or activity; or a reduction in the footprint of the regulated activities or project. The proposed rules differentiate between administrative modifications and minor technical modifications to allow for efficient processing of modification requests and align the modification processes of the Division of Land Use Regulation's permitting programs.

Any change in regulated activities authorized pursuant to the waiver, general permit authorization, or individual permit that does not meet the criteria for an administrative modification or a minor technical modification is considered a major technical modification, unless the change requires a new permit. The determination that a new waiver, authorization, or individual permit must be obtained, instead of a modification, depends on analysis of the factors identified in proposed N.J.A.C. 7:7A-20.6(f), discussed below.

The provisions at existing N.J.A.C. 7:7A-14.3(e) that detail the process for a general permit modification are not continued in proposed N.J.A.C. 7:7A-20.6. Modifications that do not meet the criteria for an administrative or minor technical modification to a general permit are instead covered under the major technical modification process; there is no longer a separate process to make a major modification to a general permit authorization.

Proposed N.J.A.C. 7:7A-20.6(f) establishes that a new authorization, waiver, or individual permit is required for the following: a change to the basic purpose or use of a regulated activity or project, such as a change from the construction of a hospital to an apartment complex; an expansion of the regulated activity or project beyond that which was described in the public notice of the permit application; a substantial redesign of the regulated activity or

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project, which requires a new engineering analysis of the site and/or the regulated activity or project; a significant change in the size or scale of the regulated activity or project, such as the addition of structures; a significant change in the impact of the regulated activity or project on any wetland or transition area; or a change that would result in impacts to a site not owned or controlled by the permittee.

The proposed rules require that the person to whom the modified waiver, modified authorization, or modified individual permit has been issued must record the modified approval with the Office of the County Clerk or the Registrar of Deeds and Mortgages, as applicable, in the county(ies) in which the site is located within 30 calendar days of receipt of the modification, or within 90 calendar days if the site is located within two or more counties. This new requirement will ensure that there is a clear public record of the Department's actions relating to a specific property for any potential future purchaser of the site or any interest in the site.

Existing N.J.A.C. 7:7A-14.3(f) is proposed to be recodified with amendments as N.J.A.C. 7:7A-20.6(h). This subsection sets forth causes for the Department to modify an authorization under a general permit, a transition area waiver, or an individual permit on its own initiative. The causes for the Department to make a modification are continued from the existing rules with minor amendments to reflect the reorganization of this chapter and to refer to the permit transfer process as described above.

Existing N.J.A.C. 7:7A-14.3(g) is proposed to be recodified as N.J.A.C. 7:7A-20.6(i). This subsection describes how the Department will notify a permittee of its intention to modify a permit. The Department is proposing to amend recodified N.J.A.C. 7:7A-20.6(i)3 to state that the Department will notify the permittee of the right to request a meeting with the Department within

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10 days of receipt of the Department's notice. The reference to a public hearing is proposed to be removed because the public hearing process is not continued in the proposed rules. Fact-finding public meetings are proposed, as discussed above and below, in certain cases associated with permit applications, but are not appropriate in this situation. If the permittee disagrees with the Department's decision to modify a permit, they may seek an appeal of the decision under proposed N.J.A.C. 7:7A-21.

Application for a modification (N.J.A.C. 7:7A-20.7)

Proposed new N.J.A.C. 7:7A-20.7 sets forth requirements for an application to modify a transition area waiver, an authorization under a general permit, or an individual permit in addition to the general application requirements at proposed N.J.A.C. 7:7A-16.2. The information required as part of an application for an administrative modification of a transition area waiver, authorization under a general permit, or individual permit includes: a description of the proposed change; the site plans approved as part of the waiver, authorization, or permit revised to illustrate the proposed change; a copy of the previously issued waiver, authorization, or individual permit; and any other information necessary to ensure compliance with State and/or Federal law. Due to the minor nature of this type of modification, public notice and an application fee are not required.

For a minor technical modification to a waiver, authorization, or permit, the information to be submitted includes a completed application form; the appropriate application fee; a description of the scope and purpose of the proposed change, the site plans approved as part of the waiver, authorization, or individual permit revised to illustrate the proposed change; a copy

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of the previously issued waiver, authorization, or individual permit; and other visual representations, such as photographs, graphs, and tables, that illustrate the proposed change to the regulated activity or project. For individual permits, a revised environmental report that addresses the aspects of the regulated activity or project that are proposed to be changed is also required. This revised report must demonstrate that the regulated activity or project continues to comply with all requirements of the FWPA Rules. For all applications, any other information necessary to ensure compliance with State and/or Federal law must also be included. Because the changes authorized under a minor technical modification are, by definition, minor, public notice of the application is not required.

For a major technical modification, the information that must be submitted is the same as required for a minor technical modification with additional requirements that reflect the larger scope of a major technical modification. In addition to the previously discussed requirements, applications for major technical modifications must also include documentation that public notice of the application for the major technical modification was provided and calculations, analyses, data, and supporting materials necessary to demonstrate that the delineation and/or regulated activity or project as proposed to be changed meets the requirements of the FWPA Rules.

Suspension of a transition area waiver, an authorization under a general permit, an individual permit, or an emergency authorization (N.J.A.C. 7:7A-20.8)

The bases for Department suspension of a general permit authorization, individual permit, or transition area waiver, as well as the procedures to be followed by the Department in

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suspending a permit, and by a permittee wishing to challenge a suspension, are currently located at N.J.A.C. 7:7A-14.4. The Department is proposing to recodify, amend, and expand these provisions at N.J.A.C. 7:7A-20.8 with the proposed section to apply to emergency authorizations in addition to waivers, authorizations under general permits, and individual permits.

The current rule specifies that suspension will occur if the Department determines that immediate suspension would be in the public interest or cause exists for termination of the approval under existing N.J.A.C. 7:7A-14.5, but the Department determines that suspension is more appropriate than termination. Rather than referring to criteria for termination, the proposed section incorporates the existing criteria for termination and specifies additional examples of situations that will be considered to constitute good cause for Department suspension of an approval that are consistent with the CZM and FHACA Rules. The proposed examples of bases for an approval to be suspended, including those added to achieve consistency with the CZM and FHACA Rules, are described below.

Proposed N.J.A.C. 7:7A-20.8(a)1 continues existing N.J.A.C. 7:7A-14.5(a)3 by providing that a permit may be suspended if the waiver, authorization, or individual permit was based on false or inaccurate information. Proposed N.J.A.C. 7:7A-20.8(a)2 continues existing N.J.A.C. 7:7A-14.5(a)1 that establishes that a permittee or person to whom an emergency authorization was issued not complying with a condition of a waiver, authorization, or individual permit is cause for suspension. The existing language is modified to be concise and remove the unnecessary example of noncompliance.

Under proposed N.J.A.C. 7:7A-20.8(a)3, a permittee or person to whom an emergency authorization was issued undertaking activities that violate N.J.A.C. 7:7A is also specified to

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constitute good cause for suspension of a permit. The suspension of the permit would prevent adverse impacts that may be caused by the violation. The violation would also subject the permittee to enforcement action in accordance with proposed N.J.A.C. 7:7A-22.

Under proposed N.J.A.C. 7:7A-20.8(a)4, good cause to suspend an approval exists if the permittee or person to whom an emergency authorization was issued has misrepresented or failed to fully disclose all relevant facts pertaining to the waiver, general permit authorization, individual permit, or emergency authorization. This is continued with minor amendments that do not change meaning from existing N.J.A.C. 7:7A-14.5(a)2.

Good cause to suspend additionally exists under proposed N.J.A.C. 7:7A-20.8(a)5 if the permittee fails to fully and correctly identify impacts of the regulated activity or project in the original application. This is a new provision that is consistent with the FHACA and CZM Rules. Impacts not identified in the original application have not been evaluated by the Department for their compliance with the FWPA Rules and possible adverse effects. The suspension of a permit, waiver, or authorization in this circumstance is thus necessary to protect the environment and public health, safety, and welfare.

Existing N.J.A.C. 7:7A-14.5(a)4 establishes that a permit may be terminated or, through existing N.J.A.C. 7:7A-14.4(b)2, suspended if the permit has unanticipated negative environmental impacts including excessive erosion and siltation, destruction of vegetation not covered under the permit, or a die-off of aquatic biota, which become apparent during the performance of the permitted activities. Proposed N.J.A.C. 7:7A-20.8(a)6 continues this as a basis for suspension of an approval without the listed examples of environmental impacts.

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Under proposed N.J.A.C. 7:7A-20.8(a)7, the Department may suspend a waiver, permit, or authorization if the permittee has made a change in the project that would require a modification to the waiver, authorization, or individual permit, but the permittee did not first obtain the required modification. This is cause for suspension because a proposed modification to an approved project must first be evaluated by the Department for compliance with the FWPA Rules and for potential adverse impacts.

Proposed N.J.A.C. 7:7A-20.8(a)8 provides that the Department may suspend a waiver, permit, or authorization if the Department determines doing so is necessary for emergency reasons or to protect public health, safety, and welfare, or the environment. This is similar to existing N.J.A.C. 7:7A-14.4(b)1, which allows the Department to suspend a permit if it determines that doing so would be in the public interest. The proposed language more completely defines the circumstances in which suspending a permit would be in the public interest.

As is required in the existing rules, the Department will provide written notice of a suspension. Under proposed N.J.A.C. 7:7A-20.8(b), if the transition area waiver, authorization under a general permit, emergency authorization, or individual permit is suspended for emergency reasons, the Department will contact the permittee by phone or any other practical method, and will follow up with written notice.

The required contents of a notice of suspension in the existing rules are proposed to be deleted and replaced with similar contents that are consistent with those in the CZM and FHACA Rules. Under the proposed rules, the notice of the suspension will state that the approval is suspended upon the receipt of the notice by the permittee; include the reasons for the suspension;

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state that all regulated activities authorized under the suspended approval must stop immediately upon the permittee's receipt of the notice; and notify the permittee of the right to, within 10 calendar days after receiving the notice, either request a meeting with the Department to discuss the suspension and/or request an adjudicatory hearing.

Under proposed N.J.A.C. 7:7A-20.8(d), the permittee must offer a plan to remedy the violations that prompted the suspension notice and a timeframe for its implementation within 30 days after receiving a notice of suspension. The written strategy must describe how the strategy will remedy the cause(s) of the suspension; demonstrate that the strategy will bring the regulated activity or project into compliance with the FWPA Rules; and identify a timeframe within which the permittee will execute the strategy.

As set forth in proposed N.J.A.C. 7:7A-20.8(e), within 30 calendar days of receiving a written strategy from the permittee, the Department will: (1) accept the strategy, reinstate the suspended approval, and require the permittee to implement the strategy within the prescribed timeframe; (2) determine that the strategy is insufficient and request additional information and/or changes to the strategy; or (3) determine that the strategy is unacceptable and notify the permittee of the Department's intent to terminate the approval. Where the permittee provides additional information or changes to the strategy in response to the Department's determination that the strategy is insufficient, the Department will, within 15 calendar days of receipt of the additional information, either accept the strategy, reinstate the suspended approval, and require the permittee to implement the strategy within the prescribed timeframe, or determine that the strategy is unacceptable and/or insufficient and notify the permittee of its intent to terminate the permit. This procedure is proposed to align the processes of the FWPA Rules with those of the

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CZM and FHACA Rules while providing an opportunity for permittees to adjust their activities to bring them into compliance with the FWPA Rules and avoid the termination of their permits.

Existing N.J.A.C. 7:7A-14.4(d), which establishes the procedures to be implemented if a permittee requests a public hearing regarding the suspension, is proposed to be deleted. As discussed above, the public hearing process is proposed to be deleted from the FWPA Rules. As summarized below, if the permittee does not take adequate action, the suspended permit will be terminated. A permittee may request an adjudicatory hearing to contest the termination of the permit. This process is consistent with the procedures in the CZM and FHACA Rules.

Existing N.J.A.C. 7:7A-14.4(e) is also proposed to be deleted. This subsection, which establishes the Department's actions after suspending a permit, is no longer necessary because the Department is proposing a more comprehensive procedure for permit suspensions as described above.

Termination of an authorization under a general permit, an individual permit, a transition area waiver, or an emergency authorization (N.J.A.C. 7:7A-20.9)

The causes and procedures for the Department to terminate a permit, including a waiver or general permit authorization, currently located at N.J.A.C. 7:7A-14.5, are proposed to be recodified and significantly amended at N.J.A.C. 7:7A-20.9 to be consistent with the CZM and FHACA Rules. Similar to the changes to suspension provisions discussed above, the proposed section is additionally expanded to specifically address termination of emergency authorizations in appropriate circumstances. While the current rules set forth a process whereby a permit may either be suspended or terminated based on the same criteria, the proposed rules set forth a

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process in which an authorization or permit will first be suspended and the permittee given the opportunity to remedy the cause of the suspension. As described below, only after the permittee has been given this opportunity and not remedied the situation will an authorization or permit be terminated.

The Department will terminate a suspended authorization under a general permit, individual permit, transition area waiver, or emergency authorization for good cause. Three examples of good cause are provided in the proposed new subsection (a). Particularly, examples specified of situations that will constitute good cause for termination are: if the permittee has not ceased all regulated activities authorized by the suspended approval as required; if the permittee has not submitted a written strategy to remedy the causes of suspension as required; or if the Department has determined that the strategy to remedy the cause of suspension is unacceptable. These replace existing N.J.A.C. 7:7A-14.5(a)1 through 4, which are proposed to be incorporated into N.J.A.C. 7:7A-20.8(a) as discussed above.

Proposed N.J.A.C. 7:7A-20.9(b) through (e) reorganize and expand the termination procedures currently found at N.J.A.C. 7:7A-14.5(b) through (e). Under proposed N.J.A.C. 7:7A-20.9(b), the Department will provide notification by certified mail of its intent to terminate an authorization under a general permit, individual permit, transition area waiver, or emergency authorization. Proposed N.J.A.C. 7:7A-20.9(c) continues to provide that an adjudicatory hearing may be requested within 10 calendar days after receipt of the notice of intent to terminate. Under proposed N.J.A.C. 7:7A-20.9(d), if the permittee does not request a hearing, or if the hearing request is denied, the transition area waiver, authorization under a general permit, individual

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permit, or emergency authorization will automatically terminate, effective 10 calendar days after the permittee received the notice.

As set forth in proposed N.J.A.C. 7:7A-20.9(e), should the Department terminate an authorization, individual permit, transition area waiver, or emergency authorization, the permittee must remedy any changes to the site made in violation of the FWPA Rules; remedy any adverse impacts to wetlands and the environment; and restore, to the maximum extent practicable, the site to its condition prior to the start of the regulated activities. Failure to take these actions will constitute a violation and subject the permittee to enforcement action.

Reconsideration by Department of its Action or Inaction Concerning a Permit (N.J.A.C. 7:7A-13)

Existing N.J.A.C. 7:7A-17 specifies potential Department actions should issuance, modification, or denial of an individual freshwater wetlands permit constitute a taking without just compensation. The Department is proposing to recodify existing N.J.A.C. 7:7A-17 as 13 with amendments to align the procedures and requirements within this subchapter with the equivalent section in the CZM Rules (N.J.A.C. 7:7-19.2). Throughout the subchapter, small clarifying amendments and minor amendments to align the language of the subchapter with the equivalent provisions in the CZM Rules are proposed that do not affect meaning. In instances where the rules provide that some action is to be taken within a specific number of days, the Department is proposing to clarify, through use of the term “calendar days” rather than simply “days,” that these time periods include days that the Department is closed, including weekends and holidays. More substantial changes are described below.

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Reconsideration by Department of its action or inaction concerning a permit (N.J.A.C. 7:7A-13.1)

Recodified N.J.A.C. 7:7A-13.1(b) sets forth the circumstances in which the Department will reconsider the application of an FWPA rule or rules to minimize adverse effects to the property provided specific circumstances are shown to exist. In addition to requirements that the Department has rendered a decision on a permit application under the rules in this chapter as strictly applied, and that all administrative and judicial appeals of the permit decision have been concluded, the existing rules provide that the Department may reconsider and modify its action or inaction if either: (1) a court has determined that the permit decision would constitute a taking and the property owner has submitted a request for reconsideration of the permit action or inaction; or (2) a takings complaint has been filed with the court or the court has determined the permit decision would constitute a taking, and the Department initiates the reconsideration. The Department is proposing to expand circumstances in which reconsideration may be granted to provide that the Department may also reconsider and modify its action or inaction concerning a permit if the issuance, modification, or denial of an individual freshwater wetlands permit is for a single-family home or duplex and the Department initiates the reconsideration prior to the filing of a takings complaint. This option, which is consistent with the equivalent provision in the CZM Rules at N.J.A.C. 7:7-19.2(a)3iii, will allow both the property owner and the Department to avoid the time and financial costs of a court proceeding and give the Department flexibility to work with the property owner to provide appropriate relief in this limited circumstance.

Consistent with the existing rules, the proposed rules require public notice to be provided

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when making a request to the Department to reconsider and modify its action or inaction concerning a permit. At proposed N.J.A.C. 7:7A-13.1(i)3, a cross-reference to the requirements at proposed N.J.A.C. 7:7A-17, Requirements for an applicant to provide public notice of an application, is added to direct readers to the detailed public notice requirements. A person requesting a reconsideration under this subchapter must include in the public notice letter an indication that a request for reconsideration has been submitted to the Department, that it can be reviewed at the municipal clerk's office or the Department, and that comments may be submitted to the Department within 15 calendar days of receipt of the notice. This amendment is proposed to align the procedures within the FWPA Rules with the procedures set forth in the CZM Rules, and will further ensure that proper public notice is provided.

Under proposed N.J.A.C. 7:7A-13.1(i)7, the Department is proposing to amend the language of the requirement for a request that documentation that the property has been offered for sale in a letter to all owners of property within 200 feet of the property as a whole and to land conservancies, environmental organizations, and government agencies on a list supplied by the Department to include owners of easements as shown on the tax duplicate within 200 feet of the property. While owners of easements are included in the existing language "owners of all property," this additional language is proposed for clarity. The Department is also proposing to amend N.J.A.C. 7:7A-13.1(i)7iii to specify that the required list of property owners certified by the municipality must not be more than one year old. This provision is consistent with the CZM Rules and ensures that the information received in the request and used to send notice of the request is accurate.

At N.J.A.C. 7:7A-13.1(i)14ii, the Department is proposing an amendment to clarify that

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the referenced final decision by the Commissioner is the final decision rendered if the permit decision was contested through the administrative hearing process. This amendment is consistent with the CZM Rules at N.J.A.C. 7:7-19.2(h)1ii.

At proposed new N.J.A.C. 7:7A-13.1(n), the Department establishes that owners or any others with a particularized property interest who are aggrieved by the Department's determination on a reconsideration of its action or inaction concerning a permit may request an adjudicatory hearing pursuant to procedures set forth at N.J.A.C. 7:7A-21.1.

Requests for Adjudicatory Hearings (N.J.A.C. 7:7A-21)

A person may request an adjudicatory hearing to contest a Department decision to approve or deny an application under N.J.A.C. 7:7A. The procedures for requesting a hearing, currently located at N.J.A.C. 7:7A-1.7, are proposed to be recodified with amendments as N.J.A.C. 7:7A-21. The term "administrative hearing," used throughout the existing section, is replaced with "adjudicatory hearing" to be consistent with the CZM and FHACA Rules. The proposed rules are generally organized according to the flow of the processing of a hearing request, from submittal through eventual resolution, including steps for dispute resolution, stays of the permit appealed, and notice of settlements.

Procedure to request an adjudicatory hearing; decision on the request (N.J.A.C. 7:7A-21.1)

Existing N.J.A.C. 7:7A-1.7 is recodified at proposed N.J.A.C. 7:7A-21.1, with amendments.

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The list of applications for which a person may request an administrative hearing at existing N.J.A.C. 7:7A-1.7(a) is proposed to be deleted and replaced with N.J.A.C. 7:7A-21.1(a), which sets forth the scope of the subchapter in a more concise way. The proposed subchapter sets forth the process to request an adjudicatory hearing to contest a Department decision to approve or deny an application under this chapter; a person seeking to contest an administrative order and/or penalty assessment resulting from an enforcement action must follow the process set out in proposed N.J.A.C. 7:7A-22.

A hearing request must be submitted within 30 calendar days of publication of notice of the Department's decision in the DEP Bulletin. If a hearing request is not submitted within this period, it will be denied. This requirement is continued from existing N.J.A.C. 7:7A-1.7(d).

The hearing request must be submitted to the Department's Office of Legal Affairs with a copy sent to the Division of Land Use Regulation. The request must include the requester's name and address, as well as the name and address of the requester's representative, if any. The hearing request must include a copy of the decision being appealed and specific admissions, denials, or explanation of the facts in the decision, or else a statement that the requester is without knowledge thereof. This proposed provision replaces and expounds upon existing N.J.A.C. 7:7A-1.7(c)3 and 4, which require the requester to explain how the Department has acted improperly and explain what issues will be raised at the hearing. The request must also include a concise statement of the facts or principles of law asserted to constitute any factual or legal defense. If the person requesting the hearing is not the person to whom the decision being contested was issued, the hearing request must include evidence that a copy of the hearing

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request was provided to that person to ensure that all parties potentially affected by the hearing request are aware of the request and have an opportunity to provide input.

The information required to be submitted in the hearing request is identified on the adjudicatory hearing request form, which is available on the Division of Land Use Regulation's website at www.nj.gov/dep/landuse.

Existing N.J.A.C. 7:7A-1.7(c)5, which contains the requirement to submit the hearing request to the Department's Office of Legal Affairs and to submit a copy to the Division of Land Use Regulation, as well as the mailing address of the Office of Legal Affairs, is proposed to be relocated as N.J.A.C. 7:7A-21.1(d) with amendments. Particularly, the proposed amendments make clear that the hearing request rules are not to be construed to provide a right to an adjudicatory hearing in contravention of the provisions in the Administrative Procedure Act (APA) that prohibit an agency from promulgating a rule that would allow a third-party to appeal a permit decision, except as required by Federal law or by a statute that specifically allows a third-party appeal. This provision is continued from existing N.J.A.C. 7:7A-1.7(k).

Similar to existing N.J.A.C. 7:7A-1.7(g), the proposed rules provide that the Department will notify the requester if the hearing request is granted or denied. If the hearing request is denied, the denial will include the reason(s) for the denial of the request. If the hearing request is granted, the Department will refer the matter to the Office of Administrative Law for proceedings consistent with the APA and the Uniform Administrative Procedure rules, N.J.A.C. 1:1, which are promulgated by the Office of Administrative Law. The existing subsection is amended to make clear that notification of the Department's decision will occur regardless of whether the request is granted or denied.

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After a hearing, the administrative law judge will submit an initial decision to the Commissioner. Within 45 days of receiving the initial decision, the Commissioner shall affirm, reject, or modify the decision, in accordance with the APA and the Uniform Administrative Procedure Rules. The Commissioner's action is considered final agency action for purposes of the APA, and is appealable to the Superior Court, Appellate Division, in accordance with the Court rules.

Existing N.J.A.C. 7:7A-1.7(f), which describes the effect a request for a hearing will have on a permit, is proposed to be deleted with its contents incorporated into proposed N.J.A.C. 7:7A-21.3 as discussed below. Existing N.J.A.C. 7:7A-1.7(h), which describes settlement procedures, is incorporated into proposed N.J.A.C. 7:7A-21.4 as also described below.

Procedure to request dispute resolution (N.J.A.C. 7:7A-21.2)

Existing N.J.A.C. 7:7A-1.7(e), which describes the process for requesting dispute resolution, is relocated to proposed N.J.A.C. 7:7A-21.2, with amendments. A person requesting an adjudicatory hearing may also request that the Department determine whether the matter is suitable for mediation by the Department's Office of Dispute Resolution. If the Department determines that the matter is suitable for mediation, the Department will notify the requester of the procedures and schedule for mediation. The Department's Office of Dispute Resolution facilitates the resolution of disputes by informal collaborative problem-solving, which, in an appropriate case, can obviate the need for potentially lengthy formal legal proceedings and the attendant costs.

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Effect of request for hearing on operation of permit or authorization (N.J.A.C. 7:7A-21.3)

Existing N.J.A.C. 7:7A-1.7(f) is relocated to N.J.A.C. 7:7A-21.3 with amendments.

Requesting an adjudicatory hearing may or may not stay the operation of a permit, depending upon who requested the hearing. If the hearing request is filed by the permittee, the operation of the permit or authorization is automatically stayed in its entirety, and all permitted activities must cease unless the Department issues an exception to the stay for good cause as supported by the permittee in writing. The automatic stay prevents a permittee from undertaking activities while permit conditions, which are integral to the Department's finding that the permit application meets the standards for approval under the rules, are contested. If a hearing request is filed by a person other than the applicant, the operation of the permit or authorization is not automatically stayed; however, the Department will stay operation of the permit or authorization if it determines good cause to do so exists.

Notice of settlement agreement (N.J.A.C. 7:7A-21.4)

Existing N.J.A.C. 7:7A-1.7(h), which sets forth the notice requirements for a settlement between the requester and the Department for settlements that result in the Department's approval of an activity, is relocated to N.J.A.C. 7:7A-21.4 with amendments. If the Department and the person requesting an adjudicatory hearing agree to a settlement that may result in the issuance of a permit or authorization for a regulated activity, the person who requested the hearing must send notice of the intent to settle by certified mail to each person who was sent specific notice of the original permit application and to each person who commented on the application for an authorization or permit while it was under Department review. The

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Department will publish notice of the intent to settle in the DEP Bulletin and will accept public comment on the notice for at least 30 calendar days. Upon closure of the comment period, if the settlement is finalized, the Department will publish a notice of the final settlement in the DEP Bulletin. The requirement for the person who requested the hearing to send a notice of settlement after the close of the public comment period at existing N.J.A.C. 7:7A-1.7(h)3 is proposed to be deleted. A notice of final settlement published in the DEP Bulletin is sufficient notice to interested parties on the outcome of the settlement.

PERMIT STANDARDS

The Department is proposing several changes to permit standards to align the FWPA Rules with the CZM and FHACA Rules, where applicable, and to promote a common sense approach to the management of freshwater wetlands, transition areas, and State open waters. As mentioned above, the Department is proposing two general permits-by-certification for a tightly circumscribed subset of activities that might be authorized under proposed general permits 8 or 24 (existing general permits 8 or 25). The specific standards applicable to these new general permits-by-certification are discussed below. Additionally, amendments to general permit, individual permit, and transition area requirements and conditions are proposed to align the processes of the Division of Land Use Regulation's permitting programs where possible, increase efficiency, and better protect the environment.

General Permits by Certification (N.J.A.C. 7:7A-6)

N.J.A.C. 7:7A-6 sets forth the standards for activities authorized under proposed general

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permits-by-certification 8 and 24. While these two proposed general permits-by-certification are the only two general permits-by-certification that would be applicable in the FWPA Rules at this time, rather than being identified as general permits-by-certification 1 and 2, the proposed general permits-by-certification are designated with numbers that correspond to general permits that authorize similar types of activities for ease of reference. The standards applicable to the proposed general permits-by-certification are a more restricted subset of the standards that must be met for conduct of the same type of activities authorized under general permits 8 and 24. Activities that satisfy these more restrictive standards do not require the case-by-case evaluation that activities authorized under general permits or individual permits require.

General permit-by-certification 8—Construction of an addition to a lawfully existing residential dwelling (N.J.A.C. 7:7A-6.1)

General permit-by-certification 8 authorizes construction of an addition to a lawfully existing residential dwelling in freshwater wetlands and/or transition areas, provided the conditions applicable to all authorizations under a general permit-by-certification or general permit, at proposed N.J.A.C. 7:7A-5.7, are met and the addition meets the criteria set forth in this section. Particularly, construction of a house addition may be authorized under this general permit-by-certification only if the dwelling to which the addition will be attached was lawfully constructed prior to July 1, 1988 (the effective date of the Freshwater Wetlands Protection Act); if the addition is attached to or an extension of the dwelling; and if the proposed activities do not involve the disturbance of State open waters.

Additionally, in order for a proposed addition to qualify for the proposed general permit-

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by-certification, the total area of disturbance, including freshwater wetlands, transition areas, and non-regulated areas, cannot be more than 750 square feet, the footprint of the existing building cannot have increased by more than 750 square feet cumulatively since July 1, 1988, and the addition cannot result in a cumulative 750-square-foot increase in combination with previous additions. For example, if a previous addition subsequent to July 1, 1988, increased the footprint of the dwelling by 500 square feet, a 250-square-foot addition could be authorized under general permit-by-certification 8. However, a 300-square-foot addition could not be authorized under this general permit-by-certification because it would result in a cumulative increase in the footprint of the dwelling of 800 square feet. An applicant seeking to construct an addition that would exceed the cumulative 750-square-foot limit would need to apply for an individual permit.

General permit-by-certification 24—Repair or modification of a malfunctioning individual subsurface sewage disposal (septic) system (N.J.A.C. 7:7A-6.2)

General permit-by-certification 24 authorizes activities in freshwater wetlands and transition areas necessary for the repair or modification of a malfunctioning individual subsurface sewage disposal system, provided the conditions applicable to all authorizations under a general permit-by-certification or general permit, at proposed N.J.A.C. 7:7A-5.7, are met and the repair or modification meets the criteria set forth in this section.

The repair or modification cannot result in more than one-quarter acre of disturbance to freshwater wetlands, transition areas, and non-regulated areas. All disturbance authorized under this general permit-by-certification must be limited to the same property on which the malfunctioning septic system is located. The activities may not include disturbance of State open

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waters.

The repair or modification of the septic system authorized under general permit-by-certification 24 must be limited to serve only the volume of sanitary sewage that was approved prior to the malfunction; this general permit-by-certification cannot be used to modify a septic system to increase its capacity to serve a greater volume of sewage than originally intended. Additionally, before applying for general permit-by-certification 24, an applicant must obtain a letter from the local board of health with jurisdiction over the system stating that: the proposed activities are authorized under, and comply with, the Department's Standards for Individual Subsurface Sewage Disposal Systems at N.J.A.C. 7:9A; the proposed activities are not directly or indirectly caused by an expansion of the facility the system serves, or a change in its use; and there is no alternative location on the site that has a seasonal high water table deeper than 1.5 feet below the existing ground surface that can be used for a subsurface sewage disposal system.

General Permits (N.J.A.C. 7:7A-7)

Existing N.J.A.C. 7:7A-5, Adopted General Permits, is proposed to be recodified with amendments as N.J.A.C. 7:7A-7, General Permits. The Department is proposing several amendments that affect more than one general permit. These deletions result in a renumbering of several general permits, as summarized in the recodification table above. The Department is proposing to amend the introductory subsection for each general permit to specify that all applicable requirements of proposed N.J.A.C. 7:7A-5.7, Conditions applicable to an authorization pursuant a general permit-by-certification or a general permit, and proposed N.J.A.C. 7:7A-20.3, Establishing permit conditions, must be met in addition to the requirements

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specific to each general permit in order for activities to be authorized under the general permit; with this change, a similar provision that currently exists at the end of each general permit is proposed for deletion.

The Department is proposing amendments to general permits that require mitigation for permanent disturbance of 0.1 acres or more of freshwater wetlands or State open waters. In the existing rule, a mitigation proposal must be submitted to the Department no later than 120 days prior to the initiation of regulated activities. The Department is proposing to change this requirement in the applicable general permits to 90 calendar days prior to the initiation of regulated activities, as discussed in the summary of proposed N.J.A.C. 7:7A-11, Mitigation. The Department is also proposing to delete from general permits requiring mitigation, the requirement that mitigation be performed prior to or concurrently with general permit activities. The existing requirement would be impossible to comply with where mitigation is required for temporary disturbance, which cannot be mitigated in this timeframe since, as previously discussed above, mitigation of a temporary disturbance in accordance with proposed N.J.A.C. 7:7A-11.8 includes, at minimum, restoration of the area temporarily disturbed. Additionally, as mitigation must comply with N.J.A.C. 7:7A-11 and proposed N.J.A.C. 7:7A-11.3(a) addresses the required timing of mitigation, including mitigation required under a general permit authorization, reiteration of this requirement within each general permit requiring mitigation is unnecessary. These changes apply to the general permits 2, 4, 5, 6, 10A, 10B, and 21.

Proposed amendments to specific general permits are discussed in the following sections of this summary.

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General permit 1–Maintenance and repair of existing features (N.J.A.C. 7:7A-7.1)

This general permit authorizes activities in freshwater wetlands and State open waters required to repair, rehabilitate, replace, maintain, or reconstruct a previously authorized and currently serviceable structure, fill, roadway, utility line, active irrigation or drainage ditch, or stormwater management facility that lawfully existed before July 1, 1988, or has been permitted under N.J.A.C. 7:7A. The current indication that the activities addressed by this general permit are not regulated in transition areas in accordance with existing N.J.A.C. 7:7A-2.6 is proposed for deletion. As this general permit is specifically limited to activities in freshwater wetlands and State open waters, reiteration of how such activities are treated in transition areas elsewhere in the rules is unnecessary. The Department is proposing to reorganize and amend existing N.J.A.C. 7:7A-5.1(b) as proposed N.J.A.C. 7:7A-7.1(a)1 and 2 to enhance clarity without affecting meaning.

The Department is proposing to update the application requirements for ongoing maintenance of an off-stream stormwater management facility created in uplands that may be authorized under general permit 1, currently codified at N.J.A.C. 7:7A-5.1(c). In addition to specifying that the application must be submitted to the Department in hardcopy by mail, application requirements have also been updated to be more specific and align with other permit application requirements. An application for authorization for this activity under general permit 1 must include: a completed application form; a copy of the permit, if any, which authorized the original construction of the stormwater management facility; a USGS quad map; documentation that public notice of the application has been provided; and the appropriate application fee. The Department is proposing to delete existing N.J.A.C. 7:7A-5.1(c)3 and (d), which refer to and

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detail the review process for such an application, as the review process has been relocated to Subchapter 19, Application Review.

General permit 2–Underground utility lines (N.J.A.C. 7:7A-7.2)

In addition to changing the due date of mitigation proposals to 90 calendar days prior to the initiation of regulated activities, as mentioned in the general summary of changes to general permits above, the Department is reorganizing general permit 2 to include the limitations applicable to activities under this general permit from existing N.J.A.C. 7:7A-5.2(c) to be part of proposed N.J.A.C. 7:7A-7.2(a) with no change in meaning.

General permit 3–Discharge of return water (N.J.A.C. 7:7A-7.3)

The Department is proposing to reorganize existing N.J.A.C. 7:7A-5.3, which authorizes the discharge of return water from an upland, contained, dredged material management area into State open waters and the placement of a pipe above ground for the discharge through freshwater wetlands and/or transition areas. The Department is proposing to change the term “dredged material disposal area” to the term “dredged material management area” to reflect the Department’s promotion of the beneficial use of dredged material. The proposed amendments to reorganize this general permit do not affect meaning, but serve to better highlight that dredging may require other State and Federal permits by relocating this provision to its own subsection.

General permit 4–Hazardous site investigation and cleanup (N.J.A.C. 7:7A-7.4)

General permit 4 authorizes activities related to hazardous site investigation and cleanup.

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The existing general permit specifies that the permit authorizes activities undertaken by the Department or expressly approved pursuant to the Administrative Requirements for Remediation of Contaminated Sites, N.J.A.C. 7:26C. The general permit is proposed to be amended to instead specify that it authorizes activities undertaken by the Department or by a licensed site remediation professional (LSRP) pursuant to N.J.A.C. 7:26C. This amendment recognizes the role of LSRPs in contaminated site cleanup and more narrowly defines who may engage in activities authorized under this general permit. The Department is also proposing to amend the description of activities to which this general permit may apply to clarify that the permit includes activities for remediation of contaminated sites, in addition to activities for the investigation, cleanup, and removal of hazardous substances or pollutants under this general permit. The Department is also proposing to remove the existing reference to the New Jersey Water Pollution Control Act implementing rules to instead reference directly the name of those implementing rules, the New Jersey Pollutant Discharge Elimination System (NJPDES) rules.

The Department is proposing to delete existing N.J.A.C. 7:7A-5.4(b), which requires minimization of disturbance and mitigation for activities authorized under general permit 4, and replace it with proposed N.J.A.C. 7:7A-7.4(a)1 and 2. The proposed requirements are more specific than the existing requirements to ensure proper remediation techniques are implemented and to recognize the role of LSRPs. Under the proposed rule, the applicant must demonstrate, or provide a certification from a licensed site remediation professional pursuant to N.J.A.C. 7:26C, that the area of freshwater wetlands, State open waters, and/or transition areas disturbed is the minimum necessary to comply with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, and with N.J.A.C. 7:26C. The demonstration or certification must include an exploration

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of all feasible alternative remediation methods and identification of any remediation methods that would result in less area of freshwater wetlands, State open waters, and transition area disturbance with an explanation of why these remediation methods were not chosen.

Consistent with existing N.J.A.C. 7:7A-5.4(b), the Department is proposing to require mitigation for the total area of freshwater wetlands or State open waters disturbed. The existing exception to the mitigation requirement for disturbance to wetlands or State open waters that have formed as a direct result of the permitted remediation activities is continued.

General permit 5–Landfill closures (N.J.A.C. 7:7A-7.5)

General permit 5 authorizes activities in freshwater wetlands, transition areas, and/or State open waters undertaken by the Department’s Division of Solid and Hazardous Waste or authorized through a solid waste facility closure and post-closure plan or disruption approval issued by the Department. The Department is proposing to reorganize this general permit with minimal change in meaning. The proposed rule specifies that the Department must make the determination that the proposed activities that will cause the disturbance are necessary to properly close the solid waste facility with proper maintenance and monitoring after closure. The Department is similarly proposing to specify that the applicant must demonstrate that the amount of disturbance is the minimum necessary to adequately close and/or maintain the landfill.

General permit 7–Human-made ditches or swales in headwaters (N.J.A.C. 7:7A-7.7)

General permit 7 authorizes activities in freshwater wetlands that are human-made ditches or in freshwater wetlands that are swales. The Department is proposing to reorganize the

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provisions of this general permit to enhance clarity. The Department is also proposing to delete the reference to the definition of “swale” to reduce redundancy; it is assumed that readers are aware of the location of definitions for terms used throughout the chapter.

General permit 8–House additions (N.J.A.C. 7:7A-7.8)

General permit 8 authorizes activities in freshwater wetlands and/or transition areas necessary for the construction of additions or appurtenant improvements to residential dwellings legally existing before July 1, 1988. The requirements for this general permit have been reorganized to enhance clarity. The Department is proposing to specify, at proposed N.J.A.C. 7:7A-7.8(a), that activities will be authorized if they require no more than 750 square feet of fill and/or disturbance. This amends existing N.J.A.C. 7:7A-5.8(a), which initially indicates that activities under the general permit must involve less than 750 square feet of fill and/or disturbance, but then goes on to specify that there can be no alterations to a freshwater wetland outside of the allowed 750 square foot area and further specifies that, in the case of destruction of a dwelling, any replacement of the dwelling within five years may include an increase of up to 750 square feet of fill and/or disturbance provided certain conditions are met. The proposed requirement serves to clarify that the limit of fill and/or disturbance allowed by this general permit is 750 square feet or less both for additions or appurtenant structures to an existing residential dwelling, and for an increase in the footprint of a previously lawfully existing dwelling that is being replaced within five years of the destruction of that dwelling.

General permit 11–Outfalls and intake structures (N.J.A.C. 7:7A-7.11)

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General permit 11 authorizes activities in freshwater wetlands, transition areas, and State open waters necessary for the construction of outfall structures, intake structures, wells, conveyance structures, and energy dissipation structures. The Department is proposing minor language changes to enhance clarity throughout this general permit. Additionally, at proposed N.J.A.C. 7:7A-7.11(f)3, the Department is clarifying that the requirement to replant the area above any excavated area in freshwater wetlands, transition areas, or State open waters associated with general permit 11 activities only applies to areas that are freshwater wetlands or transition areas, as it is not applicable to State open waters. The Department is additionally proposing to replace the requirement to replant the area with indigenous wetlands species with the requirement to replant the area with “appropriate indigenous species.” This amendment recognizes the fact that permittees are required to replant excavated areas in the transition area, as well as in wetlands.

General permit 13–Lake dredging (N.J.A.C. 7:7A-7.13)

General permit 13 authorizes up to one acre of dredging in palustrine emergent freshwater wetlands as necessary to restore or maintain a lake, pond, or reservoir to its original bottom contours. The requirements at existing N.J.A.C. 7:7A-5.13(a), (c), and (d) are proposed to be consolidated and reorganized as N.J.A.C. 7:7A-7.13(a)1 through 4 with minor language changes that do not affect meaning. Existing N.J.A.C. 7:7A-5.13(e) is proposed to be recodified and reorganized as N.J.A.C. 7:7A-7.13(c) without changes to the substance of the requirements.

At proposed N.J.A.C. 7:7A-7.13(d) (recodified from existing N.J.A.C. 7:7A-5.13(f)), the Department is proposing to clarify that the application requirements specified there are in

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addition to the application requirements applicable to all general permits at proposed N.J.A.C.

7:7A-16. The application requirements currently specified at N.J.A.C. 7:7A-5.13(f) and continued at N.J.A.C. 7:7A-7.13(d) provide the Department with additional information specific to dredging projects that would not otherwise be included in an application solely meeting the application requirements applicable to all general permits.

General permit 16—Creation, restoration, and enhancement of habitat and water quality functions and values (N.J.A.C. 7:7A-7.16)

Existing N.J.A.C. 7:7A-5.16, Habitat creation and enhancement activities, is proposed to be renamed and recodified with amendments as N.J.A.C. 7:7A-7.16. At proposed N.J.A.C. 7:7A-7.16(a), the Department is proposing to reword provisions and delete the requirement that the plan for the creation, restoration, or enhancement of habitat for which activities are authorized under general permit 16 must be sponsored or substantially funded by a Federal or State agency or other approved entity. Instead, the plan must only be approved by one of several agencies or a charitable conservancy as discussed below.

The Department is proposing to clarify and expand the activities that may be authorized under general permit 16. The existing rules list the alteration of hydrology to restore or create wetlands conditions as an activity that may be authorized under general permit 16. This provision is being expanded to clarify that the alteration of hydrology to enhance wetlands conditions can also be approved under this permit. The existing rules allow the placement of fish habitat enhancement devices or fish habitat improvement structures; the proposed rules instead refer to any aquatic habitat enhancement devices or habitat improvement structures to recognize

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that in-water habitat enhancement/improvement do not only benefit fish species, and may be placed to benefit other aquatic species. The existing rules also include cutting, burning, or otherwise managing vegetation in order to increase habitat diversity or control nuisance flora; this activity is proposed to be expanded to include removing and planting vegetation to properly capture the range of appropriate activities necessary to implement the specific plan for the creation, restoration, or enhancement of habitat and to specify “invasive” rather than “nuisance” flora.

Existing N.J.A.C. 7:7A-5.16(b) is proposed to be reorganized and simplified as N.J.A.C. 7:7A-7.16(b). Rather than specify what particular types of projects approved by various agencies are acceptable under general permit 16, the Department is proposing to list only the agencies that must approve a plan before activities associated with that plan may be authorized under general permit 16. A plan must be approved by the Department’s Division of Fish and Wildlife, the Department’s Office of Natural Resource Restoration, the U.S. Fish and Wildlife Service, the USDA Natural Resources Conservation Service, a government resource protection agency, such as a parks commission, or a charitable conservancy. Otherwise, the plan must be required or approved by a government agency, such as the Department and/or the U.S. Army Corps of Engineers, under a mitigation plan. Mitigation plans submitted to the Department to satisfy the conditions or requirements of a permit do not require the submittal of a separate application.

Existing N.J.A.C. 7:7A-5.16(c) is proposed to be amended for clarity and merged with N.J.A.C. 7:7A-15.6(b) as 7.16(b). The requirement that the proposed project is part of a plan for the restoration, creation, or enhancement of habitat and water quality functions of wetlands, transition areas, and/or State open waters is deleted because this requirement is already stated

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earlier in this section. As previously discussed, the proposed project does not need to be sponsored or partially funded by one of the listed entities under the proposed rule.

At proposed N.J.A.C. 7:7A-7.16(b)5 and 6, the Department is proposing to relocate and amend (without affecting meaning) the provisions at existing N.J.A.C. 7:7A-5.16(f)1 and 2 that require the proposed project under general permit 16 to limit disturbance to the minimum amount of freshwater wetlands, transition areas, and/or State open waters necessary to successfully implement the project plan, and require that the activities do not decrease the total combined area of freshwater wetlands, State open waters, and/or transition areas on a site, unless the activities causing the decrease will result in an environmental benefit that outweighs the negative environmental effects of the decrease. As is allowed under the existing rules, the Department may also approve conversion of wetlands to State open waters or transition area, conversion of State open waters to wetlands or transition area, or the conversion of transition area to freshwater wetlands or State open waters, if the Department determines that doing so is environmentally beneficial. The requirement to protect the habitat enhancement or creation area from future development by recording a conservation restriction or easement at existing N.J.A.C. 7:7A is not proposed to be continued. In many instances, the types of activities for which this general permit is authorized are voluntary projects for the sole purpose of increasing the ecological benefits of a site. This requirement is, thus, unnecessary and may even discourage beneficial projects from proceeding. A similar provision in the coastal general permit for habitat creation and enhancement activities was deleted in the emergency rulemaking after Superstorm Sandy (adopted May 6, 2013 and readopted July 15, 2013; see 45 N.J.R. 1141(a); 1696(a)) to encourage living shorelines and other habitat restoration, creation, and enhancement activities.

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Existing N.J.A.C. 7:7A-5.16(d), which states that general permit 16 does not authorize activities whose sole purpose is not habitat creation or enhancement, is continued at proposed N.J.A.C. 7:7A-7.16(c) with amendments to reference restoration activities in addition to creation and enhancement activities, as well as minor stylistic language changes.

General permit 20—Bank stabilization (N.J.A.C. 7:7A-7.20)

General permit 20 authorizes activities in freshwater wetlands, transition areas, and/or State open waters necessary to stabilize the bank of a water body in order to reduce or prevent erosion. The Department is proposing to remove the examples of bank stabilization activities at existing N.J.A.C. 7:7A-5.20(a) because they are unnecessary, as examples of acceptable bank stabilization methods are provided in proposed N.J.A.C. 7:7A-7.20(a)1 and 2.

The Department is proposing to delete the reference to the Division of Watershed Management and the “action now” list that was previously prepared by that Division in existing N.J.A.C. 7:7A-5.20(c)3i because the Division of Watershed Management no longer exists within the Department. The Department is replacing this outdated reference with a reference to the Bureau of Environmental Analysis, Restoration, and Standards, which is the currently applicable bureau within the Department that may fund bank stabilization activities. The remaining requirements are reworded and reorganized without affecting meaning.

General permit 24—Malfunctioning individual subsurface sewage disposal (septic) systems (N.J.A.C. 7:7A-7.24)

General permit 24 (existing general permit 25) authorizes activities in freshwater

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wetlands and transition areas necessary for the repair or modification of a malfunctioning individual subsurface sewage disposal system. The Department is proposing to amend the requirements at existing N.J.A.C. 7:7A-5.25(c) and (d) (proposed N.J.A.C. 7:7A-7.24(c)) to enhance organization without affecting meaning, including incorporating existing subsection (d) into proposed paragraphs (c)2 and 3. The Department is additionally proposing minor language changes at N.J.A.C. 7:7A-7.24(d) (existing N.J.A.C. 7:7A-5.25(e)) to improve clarity without affecting meaning.

At proposed N.J.A.C. 7:7A-7.24(d)3ii, the Department is proposing to clarify that a change from disuse or abandonment of the facility an individual subsurface sewage disposal system serves to any type of use constitutes a change in its use that would prevent activities to repair the systems from being authorized under general permit 24. There have been cases where a person purchases a home in the middle of wetlands that has been vacant and abandoned for some time and attempted to make it into a functional home. Attempting to take a home from disuse to use within wetlands is currently considered by the Department to be a change in use and, therefore, not covered under this general permit. This clarifying language is not intended to change any requirement, but to clarify that the purpose of this general permit is to repair a malfunctioning septic system that serves an existing and functional use.

The application requirements for an application for an authorization under general permit 24, currently codified at N.J.A.C. 7:7A-5.25(f), are proposed to be relocated with amendments as N.J.A.C. 7:7A-19.3, as discussed above.

General permit 25–Minor channel or stream cleaning for local government agencies (N.J.A.C.

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7:7A-7.26)

General permit 25 (existing general permit 26 at N.J.A.C. 7:7A-5.26) is proposed to be substantively amended to achieve consistency with flood hazard area general permit 1 at N.J.A.C. 7:13-9.1 (see 47 N.J.R. 1041(a) and 48 N.J.R. 1067(a)) and amendments to the Stream Cleaning Act by P.L. 2015, c. 210, effective January 11, 2016. Further, as discussed elsewhere in this Summary, the Department is also proposing to amend flood hazard area general permit 1 to reflect the legislative changes to the Stream Cleaning Act and to maintain consistency between these two similar permits.

General permit 25 authorizes a county, municipality, or a designated agency thereof, to conduct activities in freshwater wetlands and transition areas within their jurisdiction necessary to desnag a channel or stream and/or remove accumulated sediment, debris, and garbage that are obstructing flow in the channel or stream. The Department is proposing to reword the description of activities authorized under this general permit to align with flood hazard general permit 1 and to remove activities in State open waters from the list of activities authorized under this general permit. Removal of debris from State open waters is not a regulated activity and, thus, does not require Department approval under this general permit as detailed at proposed N.J.A.C. 7:7A-7.25(b).

Throughout the general permit, the term “activities” is proposed to be replaced with “project” to make clear that the activities authorized under general permit 25 are part of a stream cleaning project undertaken by a local government agency. The Department is proposing to relocate existing N.J.A.C. 7:7A-5.26(b)4, which requires that activities under this general permit do not alter the natural banks of the stream, to proposed N.J.A.C. 7:7A-7.25(d) with no change in

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text.

At proposed N.J.A.C. 7:7A-7.25(a)3i, the Department is proposing to add accumulated silt to the list of material that may be removed from the channel or stream under general permit 25 and is replacing the provision that this general permit does not authorize removal of material below the natural bottom with the requirement that the removal of material does not alter the natural bed or banks of the channel. These requirements appropriately reflect the scope of material that may need to be removed under general permit 25 and ensure the natural contours of the channel or stream are preserved, which will reduce the risk of erosion of the bank and sedimentation of the water body. Because this change and the additional protection provided to natural stream banks at proposed N.J.A.C. 7:7A-7.25(d) ensure protection of stream beds and banks, the Department is not proposing to continue existing N.J.A.C. 7:7A-5.26(b)3, which requires the activities to only disturb the channel or stream bed, not the bank, except where necessary for access in which case disturbance must be the minimum necessary.

The Department is proposing to consolidate the requirements at existing N.J.A.C. 7:7A-5.26(a)6 and 8 into one paragraph as N.J.A.C. 7:7A-7.25(a)4, which requires the project to be conducted from only one bank where possible and requires that the existing tree canopy on the more southerly or westerly bank is preserved in order to shade the channel or stream. Existing N.J.A.C. 7:7A-5.26(a)8, which requires the use of heavy machinery within the stream channel to be avoided to the maximum extent practicable, is proposed for deletion and replaced with N.J.A.C. 7:7A-7.25(a)5, which requires that the use of heavy equipment in the channel is avoided completely. This strengthening of the requirement will ensure that the stream bed and aquatic habitat are protected throughout the stream cleaning project. If the applicant believes it is

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necessary for heavy equipment to enter the channel, more complete Department analysis is needed via an application for an individual permit.

Existing N.J.A.C. 7:7A-5.26(c) is proposed to be recodified as N.J.A.C. 7:7A-7.25(a)6 to consolidate the technical requirements for authorization under this general permit into one subsection. The language is proposed to be amended to align with flood hazard general permit 1 and to incorporate amendments to the Stream Cleaning Act at N.J.S.A. 58:16A-67. These statutory amendments included changes to provisions of the stream cleaning law that allow a county or municipality, or a designated agency thereof, to undertake certain stream cleaning projects that include sediment removal. Proposed N.J.A.C. 7:7A-7.25(a)6i through vi are additional requirements for projects that involve sediment removal from a channel with a natural bed. N.J.A.C. 7:7A-7.25(a)6i requires a project undertaken by a municipality or designated agency to be located wholly within that municipality. N.J.A.C. 7:7A-7.25(a)6ii requires a project undertaken by a county or designated agency to be located wholly within one municipality, or, if located within more than one municipality, the channel reach is less than 500 feet in length. These requirements replace existing N.J.A.C. 7:7A-5.26(c)1, which limits sediment removal projects to a portion of a stream or channel less than 500 feet long and are incorporated to comply with the January 2016 amendments to the Stream Cleaning Act effectuated by P.L. 2015, c. 210.

Under the Stream Cleaning Act amendments, the limitation on the average width of the channel subject to the channel cleaning was increased from 15 to 30 feet. Existing N.J.A.C. 7:7A-5.26(c)2 is proposed to be recodified as N.J.A.C. 7:7A-7.25(a)6iii and amended to reflect the increased width. Existing N.J.A.C. 7:7A-5.26(c)3, which requires the

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channel to be cleaned to have a documented history of severe flooding, is proposed to be deleted. The requirement in the Stream Cleaning Act to demonstrate a history of severe flooding was deleted by P.L. 2015, c. 210.

At proposed N.J.A.C. 7:7A-7.26(b), the Department is proposing to add language consistent with existing and proposed general permit 13 (lake dredging). Particularly, the Department is proposing to specify that, in accordance with N.J.A.C. 7:7A-2.2(b), Department approval under this chapter is not required for projects that: disturb only State open waters and not wetlands located in the channel or stream; do not disturb wetlands or transition areas adjacent to the channel or stream; and do not involve the discharge of dredge or fill material in the State open water. If all of these criteria are met, the project may proceed without approval under N.J.A.C. 7:7A. It is important to note, however, that meeting these criteria does not relieve a person from the obligation to obtain other necessary approvals under other rules, regulations, or statutes.

Existing N.J.A.C. 7:7A-5.26(d) is proposed to be recodified as N.J.A.C. 7:7A-7.25(c) with amendments to align the FWPA Rules with the FHACA Rules without changing meaning. The Department is proposing to change the requirement to dispose of dredged material outside of regulated areas to a requirement to place this material outside of regulated areas. This small change in language reflects that dredged material need not be “disposed of,” but may be beneficially used, consistent with a long-standing policy promoted by the Department.

Proposed N.J.A.C. 7:7A-7.25(d) clarifies that activities that alter that natural banks of a stream are not authorized under general permit 25. These activities may be authorized under general permit 20, which covers bank stabilization activities. Further, this subsection also

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clarifies that general permit 25 does not authorize the straightening or realignment of a channel.

These activities have major potential impacts and, therefore, must be reviewed under an application for an individual permit in accordance with proposed N.J.A.C. 7:7A-9.

The application requirements at N.J.A.C. 7:7A-5.26(e) are proposed to be amended at N.J.A.C. 7:7A-7.25(e) to align with the requirements in the FHACA Rules. The Department is proposing to require applications for authorization under general permit 25 to include a completed application form; two sets of plans prepared by an engineer depicting the segments of the channel or stream to be cleaned and the limit of wetlands and/or transition areas to be impacted; and the location of the affected portion of the channel including county, municipality, block(s), and lot(s). The requirement in the existing general permit to provide a copy of a USGS quad map showing the affected portion of the stream is proposed to be continued.

The Department is also proposing to continue the requirement to submit color photographs and a description of the affected portion of the channel or stream, including access points, and is proposing to add that the description must include the wetlands and/or transition areas to be impacted by the activities. This ensures that all information needed by the Department to evaluate the proposed project's impact on freshwater wetlands and transition areas will be included in the initial application. The existing requirements to provide the classification of the affected portion of the channel or stream under the Surface Water Quality Standards and to provide a description of the nature of the projects and methods to be used are continued without change.

The Department is proposing to reword existing N.J.A.C. 7:7A-5.26(e)6 as proposed N.J.A.C. 7:7A-5.25(e)8 to align with the FHACA Rules and reflect the Department's policy of

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beneficial use of dredged material. The Department is also proposing to add, at N.J.A.C. 7:7A-7.25(e)9, that an application for an authorization under general permit 25 must include the appropriate application fee, in accordance with proposed N.J.A.C. 7:7A-18. This general permit requires an application fee under the existing and proposed FWPA Rules; this proposed amendment serves to clarify that requirement.

The existing requirements for the certification that must be submitted with an application are proposed to be deleted and replaced at N.J.A.C. 7:7A-7.25(e)11. This new provision reorganizes the existing provision to be consistent with the FHACA Rules.

The application review procedures at existing N.J.A.C. 7:7A-5.26(f), (g), and (h) are proposed to be relocated with amendments as N.J.A.C. 7:7A-19.4 to consolidate application review provisions into one subchapter.

Existing N.J.A.C. 7:7A-5.26(i) is recodified with amendments as N.J.A.C. 7:7A-7.25(f). The Department is proposing a 15-calendar-day deadline by which the permittee must submit a written notice that the project has been completed and a certification signed by the county or municipal engineer to the Department. The Department is proposing to reword the requirements for the certification to align the FWPA Rules with the FHACA Rules.

General permit 26—Redevelopment of previously disturbed areas (N.J.A.C. 7:7A-7.26)

General permit 26 (existing general permit 27) authorizes the disturbance of certain degraded freshwater wetlands, transition areas, and/or State open waters necessary for redevelopment of an area previously significantly disturbed by industrial or commercial activities. The Department is proposing to delete unnecessary references to the definitions in

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Subchapter 1 within this general permit and is proposing to merge the requirements at existing N.J.A.C. 7:7A-5.27(b) and (c) with the existing requirements at N.J.A.C. 7:7A-5.27(a) as proposed N.J.A.C. 7:7A-7.26(a).

The requirements for authorization under general permit 26 are generally not proposed to be substantively amended with some exceptions. Under the existing rules at N.J.A.C. 7:7A-5.27(b)3, three criteria are listed with it being required that at least one of the criteria must be satisfied for the proposed project to qualify for the general permit; the area must be an identified brownfield site, must be subject to a redevelopment agreement or must have been identified as an environmental opportunity zone. The Department is proposing to add an additional subparagraph that would allow a proposed project to qualify for this general permit if the area on which a project is proposed has been identified as an area of redevelopment by the municipality and formally designated as such by the New Jersey Department of Community Affairs (DCA). In order to be formally designated under the DCA program, a municipality must designate the area as an Area in Need of Redevelopment or Rehabilitation after the Planning Board recommends doing so. If the area meets the statutory criteria for this designation, the DCA will approve the designation and the designation as an area of redevelopment will be effective.

As is the case with other general permit mitigation provisions, the Department is proposing to require a mitigation proposal for activities disturbing more than 0.1 acre of freshwater wetlands or State open waters to be submitted to the Department no later than 90 calendar days prior to the start of regulated activities authorized by the general permit. This amends the existing requirement, which allows the mitigation proposal to be submitted no later than 120 days before beginning regulated activities.

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Transition Area Waivers (N.J.A.C. 7:7A-8)

Existing N.J.A.C. 7:7A-6 is proposed to be recodified with amendments as N.J.A.C. 7:7A-8. This subchapter sets forth the requirements applicable to each type of transition area waiver issued by the Department and the duration of transition area waivers. The Department issues transition area waivers to authorize regulated activities within the transition areas adjacent to freshwater wetlands. The Department is additionally proposing several substantive changes to the types of transition area waivers that are issued and the requirements for those waivers.

All provisions related to the matrix type width reduction transition area waiver are proposed for deletion. The Department is proposing to cease issuing these types of waivers. The matrix type width reduction transition area waiver is a very seldom used and needlessly complex transition area waiver. The Department has concluded that the remaining types of transition area waivers (averaging plan, special activity, hardship, general permit, and access transition area waivers) are sufficient to address proposed regulated activities within transition areas.

Several other substantive changes are proposed; these changes are discussed in the following sections of this summary.

General provisions for transition area waivers (N.J.A.C. 7:7A-8.1)

This section, proposed to be recodified from existing N.J.A.C. 7:7A-6.1, sets forth general provisions that apply to transition area waivers. The Department is proposing to amend recodified N.J.A.C. 7:7A-8.1(a)5, which addresses access transition areas associated with general permit authorizations, individual freshwater wetlands permits, and mitigation proposals. These

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transition area waivers are included with each of the previously mentioned permits and proposals to allow limited disturbance of transition areas to access the regulated activity. The Department is proposing to add that the disturbance authorized under this waiver is not counted in calculating the amount of disturbance under the permit or mitigation proposal. This is an important distinction as there are often prescribed limits of disturbance included within permits. The strictly limited types of activities authorized by an access transition area waiver result in only minor and oftentimes temporary impacts to transition areas and thus are not counted in the overall amount of disturbance of the regulated activity.

The Department is proposing to amend recodified N.J.A.C. 7:7A-8.1(a)5ii to specify that an access transition area waiver will authorize an activity that the Department determines is necessary to accomplish construction, and for future use, of the activity authorized in the wetlands under the permit. This proposed language is more specific than the existing language that allows activities “necessary to accomplish the permitted activity” and clarifies the Department’s concept of “access.” Similar language was adopted in 2008 at existing N.J.A.C. 7:7A-4.2(c) to specify that the Department considers access to include activities necessary to accomplish construction, and for future use, of the activity authorized in the wetlands (see 39 N.J.R. 3587(a)).

The Department is proposing to reword and clarify recodified N.J.A.C. 7:7A-8.1(b). The Department is proposing minor language changes to make clear that the existing indication that the Department will include a list of additional conditions in an access transition area waiver as necessary and that such conditions “shall” include requirements included in a list of examples provided in that subsection is only intended to reflect that additional conditions will only be

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imposed when necessary to ensure that an activity does not result in a substantial impact of the adjacent freshwater wetlands and does not impair the functions of the transition area; such conditions will not necessarily be required in all cases.

The Department is proposing, at recodified N.J.A.C. 7:7A-8.1(b)3, substantial amendments to the condition that requires the marking of a modified transition area. Existing N.J.A.C. 7:7A-6.1(b)3 requires a transition area and/or wetland to be fenced prior to construction, in order to prevent people from disturbing the transition area and/or wetland. The Department is proposing to include flexibility in the method of marking. The modified transition area must be permanently marked in a manner determined appropriate by the Department, which may include fencing, concrete monuments, and boulders. The Department is also proposing to remove reference to the marking preventing people from entering the transition area/wetland, as walking in a transition area or wetland is not a regulated activity. The intent of marking a modified transition area is only to prevent disturbance.

To address the added flexibility in the method of marking modified transition areas, the Department is proposing new N.J.A.C. 7:7A-8.1(b)3i and ii to indicate factors that will be taken into account in determining appropriate marking of the modified transition area. To determine the appropriate type of marker, the Department will consider the type of project proposed, wildlife that may be present, and the likelihood of people disturbing the transition area. If the Department determines that it is appropriate to mark the boundary of the modified transition area with monuments, boulders, or similar markers, the number of markers and spacing between markers that will be necessary to clearly identify the modified transition area.

The existing condition at N.J.A.C. 7:7A-6.1(b)4 requiring recordation of a conservation

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restriction is proposed to be amended to specify that the conservation restriction, when required, will apply to the remaining undisturbed transition area. Rather than require a conservation for all transition area waivers, as is implied by the existing condition, the Department will evaluate each transition area waiver on a case-by-case basis to determine if it is necessary to record a conservation restriction. The possibility of requiring the wetlands to be included in a conservation restriction is proposed to be deleted. The Department considers restricting further regulated activities within the transition area to be protective of the wetlands. Should a regulated activity be proposed within the wetlands, its impacts will be evaluated at that time. This condition will be applied on a case-by-case basis for all transition area waivers, except for averaging plan waivers. As discussed below, the Department is proposing to require a conservation restriction for all averaging plan waivers to restrict activities in the compensation area.

Existing N.J.A.C. 7:7A-6.1(b)5 is proposed for deletion. This condition requires monitoring for acid producing soil deposits. As discussed above, all references to acid producing soils are proposed for deletion. It is the role of the local Soil Conservation District to guide people engaging in regulated activities to prevent the exposure of acid producing soil deposits and mitigate any impacts resulting from the exposure of such deposits. As the standards related to acid producing soil deposits were removed from the FHACA rules, they are similarly proposed for deletion in the FWPA Rules to ensure consistency.

Recodified N.J.A.C. 7:7A-8.1(d) allows an applicant whose application does not meet the requirements for any of the transition area waivers previously listed in the subchapter to obtain a transition area waiver through scientifically documenting that the proposed activity will have no

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substantial impact on the adjacent wetlands and is proposed for amendment. The Department is proposing to add that an applicant is not eligible for this type of waiver if the applicant's ineligibility is a result of the applicant's own action. For example, if the applicant removed trees or other vegetation outside of the transition area and, as a result, the area could not be used in a transition area averaging plan, the applicant's action would be the cause of the ineligibility. In this case, a transition area waiver would not be granted under subsection (d), regardless of the scientific documentation provided.

The Department is proposing amendments to existing N.J.A.C. 7:7A-6.1(e), which contains detailed conservation restriction requirements. Under proposed N.J.A.C. 7:7-8.1(b)4 as described above, not all transition area waivers will require the recording of a conservation restriction. A transition area averaging plan waiver will always require the recording of a conservation restriction to restrict activities in the compensation area, but other types of waivers may or may not be conditioned on recording a conservation restriction, as evaluated on a case-by-case basis by the Department. Therefore, this subsection is proposed to be amended to clarify that the conservation restriction provisions apply if a transition area waiver is conditioned on the recording of a conservation restriction. Amendments are also proposed to reference new Subchapter 12, which contains all conservation restriction form and recording requirements and procedures for modification, and to delete reference to a conservation restriction restricting activities in wetlands adjacent to the transition area being required. As explained in the summary of amendments to N.J.A.C. 7:A-8.1(b)4 above, recording of a conservation restriction covering the wetlands itself will no longer be required.

The Department is proposing to amend recodified N.J.A.C. 7:7A-8.1(h) to expand the

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types of transition area waivers that may be combined with a general permit to expand the general permit activity beyond the limits set forth in the general permit. In addition to the currently-allowed access transition area waiver and special activity waiver for redevelopment, the Department is proposing to allow the combination of a general permit with a transition area averaging plan waiver or with a special activity waiver for linear development. Consequently, the Department is proposing to delete the example of a combination that is not allowed, as it is no longer applicable to the rule. General permits are limited in size and scope, as are these particular transition area waivers, and so the Department has determined allowing their combination when the respective limits of these approvals are observed will not have a significant adverse impact on freshwater wetlands.

Transition area averaging plan waiver (N.J.A.C. 7:7A-8.2)

This type of transition area waiver, set forth at recodified N.J.A.C. 7:7A-8.2, modifies the shape of a transition area without reducing its total square footage. The Department is proposing several changes to these provisions.

At proposed N.J.A.C. 7:7A-8.2(a), the Department is deleting an outdated reference to Appendix A, which is no longer part of the FWPA Rules. The Department is proposing to amend recodified N.J.A.C. 7:7A-8.2(b)1 to include the method for establishing the percent slope when determining if the modified transition area under an averaging plan waiver would have a slope greater than 25 percent, which would preclude the issuance of the waiver. The language proposed is relocated from existing N.J.A.C. 7:7A-6.4(g). As indicated above, the matrix type transition area waiver, codified at existing N.J.A.C. 7:7A-6.4, which currently includes the

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methodology for determining slope percentage, is not proposed to be continued.

The Department is proposing to clarify recodified N.J.A.C. 7:7A-8.2(e)4. The amendment makes clear that, if an applicant is proposing to expand a transition area to compensate for a reduction elsewhere, the expanded portion must have the same ecological characteristics as the reduced area or have characteristics that are equivalent to or better than those of the reduced portion in regards to the area's ability to serve the functions of a transition area listed at proposed N.J.A.C. 7:7A-3.3. This provision ensures that an averaging plan waiver does not reduce the functions of the transition area.

The Department is proposing to establish, at N.J.A.C. 7:7A-8.2(f), that all transition area averaging plan waivers will be conditioned on the recording of a Department-approved conservation restriction in accordance with proposed N.J.A.C. 7:7A-12 to restrict future activities in the expanded portion of the modified transition area, called the compensation area. The recording of a conservation restriction is a requirement for all averaging plan waivers, rather than an optional condition to be added by the Department on a case-by-case basis, because the compensation area is an area that is, until included in an averaging plan, not regulated under the FWPA Rules. To ensure that this area adequately compensates for the transition area lost under the averaging plan waiver, it must always be restricted from future activities.

Special activity transition area waiver (N.J.A.C. 7:7A-8.3)

Special activity transition area waivers authorize regulated activities in transition areas associated with stormwater management, linear development, redevelopment, or individual permits. The provisions concerning these waivers at existing N.J.A.C. 7:7A-6.3 are proposed to

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be recodified as N.J.A.C. 7:7A-8.3.

The Department is proposing a substantive amendment to recodified N.J.A.C. 7:7A-8.3(f)1. This provision describes the conditions that must be met for the issuance of a special activity transition area waiver for redevelopment of a significantly disturbed site. This type of waiver is only issued when the area of proposed activity is significantly disturbed, so that it is not fully functioning as a transition area at the time of application. The Department is proposing to delete the example of a lawn as an area that does not meet this condition. This example has caused confusion in the past and does not address various site-specific nuances, such as the type and intensity of preexisting development and the configuration of existing and proposed development. While there are situations where such a redevelopment waiver cannot be issued, there are other situations where a waiver could be approved with the ultimate determination depending upon the Department's evaluation of the level of disturbance and whether or not the transition area is functioning as such.

Duration of a transition area waiver (N.J.A.C. 7:7A-8.5)

The Department is proposing new N.J.A.C. 7:7A-8.5 to clarify that transition area waivers have a five-year duration that may be extended once for an additional five years. This is consistent with the existing rules, but places the duration limit, which is currently divided between two sections, into one provision.

Requirements For All Individual Freshwater Wetlands and Open Water Fill Permits (N.J.A.C. 7:7A-10)

Existing N.J.A.C. 7:7A-7 is proposed to be recodified with amendments as N.J.A.C.

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7:7A-10. This subchapter sets forth the substantive requirements for activities authorized by an individual freshwater wetlands or open water fill permit. The Department is proposing minor changes to align the language and style of the FWPA Rules with the CZM and FHACA Rules. Throughout the section, the term “non water-dependent” is replaced with “non-water dependent” and the term “water-dependent” replaced with “water dependent” to align with the CZM Rules.

The Department is proposing minor amendments at recodified N.J.A.C. 7:7A-10.1(a) to enhance clarity and align the organization of requirements for freshwater wetlands/open water fill individual permits with the organization of requirements for flood hazard individual permits. These amendments do not change meaning. At recodified N.J.A.C. 7:7A-10.1(c), the Department is proposing to clarify the provision that prohibits applicants from segmenting a project by separately applying for individual permits for different portions of the same project by qualifying that this also applies to attempting to obtain separate individual permits for the same project on a particular site.

MITIGATION

Mitigation refers to activities carried out to compensate for the loss or disturbance of freshwater wetlands or State open waters. In 2002, the Department published on its website, at <http://www.nj.gov/dep/dsr/wetlands/final.pdf>, the results of a study conducted by Amy S. Greene Environmental Consultants Inc., entitled, “Creating Indicators of Wetland Status (quantity and quality): Freshwater Wetland Mitigation in New Jersey,” March 2002. This study concluded that, based on an evaluation of 90 freshwater wetland mitigation sites in New Jersey between 1988 and 1999, wetland mitigation practices in New Jersey were not effective in meeting the Department’s goal of increasing wetland quantity and quality in the State. To address the

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concerns raised by the study, the Department amended the mitigation standards in the FWPA Rules in order to better ensure the long-term success of mitigation projects. (See 39 N.J.R. 3587(a); 40 N.J.R. 5581(a), effective October 6, 2008.)

In 2008, the USEPA and USACE adopted regulations, known as “Compensatory Mitigation for Losses of Aquatic Resources” (hereafter referred to as the “Federal Mitigation Rule”), after a national wetland mitigation study published conclusions similar to those of New Jersey’s study. The Federal Mitigation Rule contains the same standards for both freshwater and tidal wetlands.

In light of these changes, the Department adopted, as part of the consolidation of the Coastal Permit Program and Coastal Zone Management Rules, amendments to the coastal wetland mitigation requirements at N.J.A.C. 7:7-17 modeled after the freshwater mitigation requirements at N.J.A.C. 7:7A-15. While the amendments were modeled after the FWPA Rules, the structure of the subchapter was reorganized, so that the subchapter followed a similar format to the entire CZM chapter. Therefore, the Department is proposing similar amendments to the freshwater wetland mitigation requirements in the FWPA Rules to achieve consistency with the CZM Rules in both organization and standards.

In 1993, the Department entered into an assumption agreement with the USEPA to administer the permit program established pursuant to Section 404 of the Federal Clean Water Act. The assumption agreement obligates the State to maintain program compatibility, which means the States freshwater regulatory program must be as strict as the Section 404 Federal Program. In 2008, the Federal Mitigation Rule established payment of an in-lieu fee (ILF) as an acceptable form of mitigation under the Federal regulations. At the request of USEPA and in

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order to remain as stringent as the USEPA, the Department has developed an ILF Program in which those responsible for mitigation under this chapter may fulfill their obligation through a monetary contribution to the ILF Program. These monies will be distributed by the Wetlands Mitigation Council to fund mitigation activities. While monetary contributions to the Wetland Mitigation Council is a mitigation alternative under the existing rules, the proposed rules incorporate the ILF Program, as approved by USEPA on June 5, 2015, into the FWPA Rules to replace the existing process. The approved ILF Program instrument represents an agreement entered into between the Department, the USEPA, and the Wetlands Mitigation Council. The ILF Program Instrument sets forth guidelines and responsibilities for the establishment, use, operation, protection, monitoring, and maintenance of the ILF Program to ensure the work associated with the ILF Program produces the necessary compensatory mitigation credits to compensate for unavoidable impacts to waters of the United States, including wetlands, that result from activities authorized under the chapter and N.J.A.C. 7:7. The ILF Program will accomplish these objectives by creating, restoring, enhancing, and preserving in perpetuity both freshwater and coastal wetlands habitats throughout New Jersey within the ILF Program service area. The amendments proposed within this subchapter incorporate the provisions of the ILF Instrument into the FWPA Rules.

Mitigation is required as a condition of several permits (depending on the area of freshwater wetlands and/or State open waters disturbed) and may be required to remedy a violation of N.J.A.C. 7:7A. The standards for mitigation are currently located at N.J.A.C. 7:7A-15 and are proposed for recodification with amendments at N.J.A.C. 7:7A-11. As discussed below, the Department is proposing to reorganize, modify, and expand the mitigation provisions

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to align the mitigation requirements in the FWPA Rules with those in the CZM and FHACA Rules. These amendments are intended to increase flexibility in mitigation options, which will ensure the functions and values of freshwater wetlands and State open waters lost to disturbance are properly mitigated.

Mitigation definitions (N.J.A.C. 7:7A-11.1)

Several terms are used only in the mitigation subchapter and are, thus, defined at recodified N.J.A.C. 7:7A-11.1 (existing N.J.A.C. 7:7A-15.1) rather than in N.J.A.C. 7:7A-1.3. The terms “charitable conservancy,” “degraded wetland,” “mitigation,” and “mitigation bank” are proposed to be deleted from this subchapter and relocated to N.J.A.C. 7:7A-1.3, since the terms are used throughout the chapter.

The definition of “credit purchase” is proposed to be amended to reflect changes to the organization of the chapter, correct grammar, provide clarity, and reflect the expansion of mitigation provisions in proposed N.J.A.C. 7:7A-11. Rather than refer to purchase of credits by the “purchaser” of credits, the Department is proposing to refer to “a permittee” to clarify that purchasing credits can be used as a mitigation option to mitigate permitted impacts to freshwater wetlands and/or State open waters. The Department is proposing to change the statement that “each credit counts for a certain acreage amount of restoration, creation, or enhancement” to “each credit counts for a certain acreage amount of mitigation type.” This change reflects that credits are based on the ecological uplift performed by the banker, which can be provided through a variety of mitigation types.

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The Department is proposing a definition of “fee simple,” which means absolute ownership in land, unencumbered by any other interest or estate. This term is used throughout the subchapter; a definition will improve a reader’s understanding of the provisions in this subchapter. The definition matches the definition of the term in the FHACA Rules, the CZM Rules, and in the Green Acres Program Rules at N.J.A.C. 7:36-2.1.

The definition of “in-kind mitigation” is proposed to be amended to mean mitigation that provides similar “or higher” values and functions as the area disturbed. The addition of “or higher” clarifies that mitigators need not be limited to providing only equal functions and values as the area disturbed as providing higher functions and values will have a greater positive environmental effect. For example, if a wetland dominated by invasive species is impacted, the mitigator could purchase credits from a bank that contained wetlands with native plant species, with the purchased credits representing a higher ecological value than the impacted wetland.

Two definitions are proposed related to the implementation of the Department’s ILF Program (discussed in detail below). The Department is proposing to define “in-lieu fee program” or “ILF Program” as a program approved by the Department and the USEPA that involves the restoration, creation, enhancement, and/or preservation of wetland and State open water habitats through funds paid to a government or non-profit entity to satisfy compensatory mitigation requirements. An ILF Program sells compensatory mitigation credits to permittees whose obligation to provide mitigation is transferred to the ILF Program. The Department is proposing to define “In-lieu fee program instrument” or “ILF Instrument” as the legal document for the establishment, operation, and use of an in-lieu fee mitigation program.

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The Department is proposing a minor amendment to the definition of “mitigation area.” The term is currently defined as the portion of a site, right-of-way, or piece of property upon which mitigation is proposed. The Department is proposing to remove the reference to a right-of-way because the definition of “site” at proposed N.J.A.C. 7:7A-1.3 includes a right-of-way. The Department is proposing a similar change to the term “mitigation bank site” for the same reasons. The term “mitigation bank site” is proposed to be further amended by replacing “created” in the existing definition with “developed” because “developed” more accurately captures the process of establishing a mitigation bank.

The Department is proposing a minor clarifying amendment to the definition of “mitigation banking instrument.” The Department is proposing to replace the term “remedial” in the existing phrase “contingency and remedial actions and responsibilities” with “corrective” to avoid confusion with site remediation activities for contaminated sites.

The Department is proposing to amend the definition of “monetary contribution” to also include and define “monetary contribution to the in-lieu fee program.” The Department is also proposing to replace “Wetlands Mitigation Fund” with “Wetlands Mitigation Council.” The addition of the term “monetary contribution to the in-lieu fee program” acknowledges that the process for a monetary contribution to the Wetlands Mitigation Council has been replaced with the process for a monetary contribution to the ILF Program. The replacement of “Wetlands Mitigation Fund” with “Wetlands Mitigation Council” clarifies that the Wetlands Mitigation Council is the entity that has the responsibility for overseeing monetary contributions, the ILF Program, and management of the Wetlands Mitigation Fund.

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The term “restoration” is amended to remove the specification that restoration activities apply to freshwater wetlands only, rather than wetlands in general. The Department is also proposing to delete the example of restoration provided, as the example is not necessary.

“Service area,” which means the geographic area within which impacts can be mitigated at a specific mitigation bank, is a new term proposed to replace the deleted term “mitigation bank service area.” This definition is identical to the definition of “service area” in the CZM Rules.

The term “Watershed Management Area” is amended to delete the reference to the Department’s Division of Watershed Management and associated contact information. This Division no longer exists in the Department.

General mitigation requirements (N.J.A.C. 7:7A-11.2)

Recodified N.J.A.C. 7:7A-11.2 contains the standard requirements that apply to all mitigation proposals under the FWPA Rules. This section contains provisions at existing N.J.A.C. 7:7A-15.2, which is proposed to be recodified, reorganized, and amended. Existing N.J.A.C. 7:7A-15.2(a), which establishes that the Department will not consider a mitigation proposal in determining whether to approve a permit for a project, is proposed to be deleted (with its contents relocated and expanded upon at proposed N.J.A.C. 7:7A-11.2(b)). New N.J.A.C. 7:7A-11.2(a) establishes that out-of-kind mitigation will only be considered if the mitigation meets the goals and objectives of this subchapter and would result in equal ecological functions and values as compared to those of the resource(s) prior to loss or impact. Otherwise, only in-kind mitigation is acceptable. The mitigator must provide current scientific literature, survey the conditions on the site of disturbance and mitigation area, document the existing

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conditions on the site and the proposed conditions on the mitigation area, and detail how the mitigation proposal will replace the ecological values of the wetland resource(s) lost or disturbed if the mitigator proposes a mitigation area smaller than the full acreage required under this subchapter. The required information to demonstrate equal ecological value is the same as that currently enumerated at existing N.J.A.C. 7:7A-15.8(j), which specifies the demonstration an applicant must make to show that a smaller mitigation project than would otherwise be required under the rules will result in mitigation provides equal functions and values as those lost.

Proposed N.J.A.C. 7:7A-11.2(b) specifies that the Department will not consider a mitigation proposal when determining whether to approve an application for a permit (as stated in existing N.J.A.C. 7:7A-15.2(a)). A mitigation proposal may be reviewed during the permit review process; however, the Department's decision on the mitigation proposal will not have any bearing on the Department's decision to approve or deny the permit. If mitigation is required for an approvable project, but no mitigation proposal is submitted as part of the permit application, the Department will place a condition on the permit issued, which requires submission and Department approval of a mitigation proposal before the permittee commences regulated activities under the permit.

Proposed N.J.A.C. 7:7A-11.2(c) continues concepts currently codified at N.J.A.C. 7:7A-15.8(j), referenced above, which is proposed for deletion. This proposed subsection requires a mitigator to carry out the full acreage amount of mitigation required under this subchapter unless the mitigator demonstrates that a smaller mitigation area will result in replacement wetland resources of equal ecological value to those lost or disturbed. The mitigation ratio, however, cannot be less than 1:1. This provides flexibility while simultaneously ensuring mitigation

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sufficiently replaces lost or disturbed ecological value. The specific information required to demonstrate equal ecological value is set forth in proposed N.J.A.C. 7:7A-11.2(a), as discussed above.

Proposed N.J.A.C. 7:7A-11.2(d) establishes that mitigation is not required in cases where the Department determines that environmental impacts to freshwater wetland resources are *de minimis* and the applicant demonstrates avoidance and minimization of impacts. For example, an applicant proposes to replace an existing bridge, which will impact 0.50 acres of freshwater wetlands through the installation of support pilings. Once construction of the new bridge is completed, the old bridge and supporting pilings will be removed, resulting in the restoration of 0.498 acres of freshwater wetlands. In this instance, the Department would determine the remaining 0.002 acres of disturbance is *de minimis* and, therefore, not require mitigation for that impact. This subsection only applies to very small impacts authorized under an individual permit that are unavoidable.

Existing N.J.A.C. 7:7A-15.2(b) is recodified with amendments as N.J.A.C. 7:7A-11.2(e). The existing subsection lists what types of regulated activities may require mitigation. The Department is proposing to amend the subsection to establish that when mitigation is required for any regulated activity, the Department will authorize regulated activities required to perform the mitigation through: an authorization under a general permit, a freshwater wetlands individual permit, an open water fill individual permit, a special activity transition area waiver, approval of a mitigation proposal submitted to comply with a condition of a permit, an enforcement document specifying mitigation requirements, or approval of a mitigation proposal submitted to comply with the requirements of an enforcement document.

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Existing N.J.A.C. 7:7A-15.2(c), which specifies the criteria that must be met for mitigation to be determined to fully compensate for ecological impacts of the disturbance, is proposed to be deleted. In its place, the rules include, at proposed N.J.A.C. 7:7A-11.2(o), a list that provides a roadmap for where specific requirements for each type of mitigation project are set forth in this subchapter, which accomplishes the same function as existing N.J.A.C. 7:7A-15.2(c).

The Department is proposing to recodify existing N.J.A.C. 7:7A-15.2(d) with amendments as N.J.A.C. 7:7A-11.2(f). The proposed amendments modify the existing provisions for approval of a mitigation proposal for clarity and organization without affecting meaning. The amendments serve to align the language and organization of the provisions in this chapter with those in the CZM rules at N.J.A.C. 7:7A-17.2(h).

Proposed new N.J.A.C. 7:7A-11.2(g) specifies that mitigation cannot commence until the Department has approved the mitigation proposal. Additionally, mitigation through a monetary contribution to the ILF Program or through a land donation must also be approved by the Wetlands Mitigation Council. This subsection restates the provisions in existing N.J.A.C. 7:7A-15.2(e), which is proposed for deletion. Existing N.J.A.C. 7:7A-15.2(f), which provides the contact information for Division of Land Use Regulation mitigation staff is proposed to be deleted, as contact information for the Department is identified at N.J.A.C. 7:7A-1.4.

The Department is proposing N.J.A.C. 7:7A-11.2(h) to establish that mitigation approved under the FWPA Rules may also require additional State or Federal permits or approvals. Mitigation cannot commence until all necessary permits or approvals are obtained. This provision simplifies existing N.J.A.C. 7:7A-15.2(g), which is proposed for deletion.

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Recodified N.J.A.C. 7:7A-11.2(i) describes the Department's procedure for establishing how much mitigation is required as part of a remedy for a violation under N.J.A.C. 7:7A. As set forth in the existing rule, the proposed rule establishes that the Department will determine the amount of mitigation necessary and the alternative required by considering the area and severity of the violation and the functions and values provided by the mitigation. Existing N.J.A.C. 7:7A-15.2(h) and 15.11(d) both specify that a larger mitigation area than would be required under a permit may be required to remedy a violation in order to compensate for the time elapsed between the disturbance and completion of mitigation. This concept is incorporated into proposed N.J.A.C. 7:7A-11.2(i) with language in the existing provisions reworded for clarity and for consistency with the language in the CZM Rules at N.J.A.C. 7:7-17.2(k).

Recodified N.J.A.C. 7:7A-11.2(j) specifies that a conservation restriction must be recorded to protect a mitigation area from future development. The reference to existing N.J.A.C. 7:7A-2.12 is deleted because all conservation restriction requirements are proposed in N.J.A.C. 7:7A-12.

The Department is proposing to delete existing N.J.A.C. 7:7A-15.2(j). This subsection sets forth the requirement to transfer all rights in the mitigation area to a government agency or charitable conservancy when mitigation is performed through uplands preservation or land donation and also requires a mitigation banker to similarly transfer a mitigation bank to a government agency or charitable conservancy after the bank is successfully completed. While these requirements are proposed to continue, they are set forth in the separate sections of the subchapter that establish the requirements for each of these mitigation alternatives (see proposed N.J.A.C. 7:7A-11.13, 11.15, and 11.26).

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Proposed new N.J.A.C. 7:7A-11.2(k) establishes that mitigation may consist of one or more mitigation alternatives set forth in N.J.A.C. 7:7A-11. This is similar to existing N.J.A.C. 7:7A-15.2(m) (proposed for deletion) with language simplified for clarity.

Proposed new N.J.A.C. 7:7A-11.2(l) replaces existing N.J.A.C. 7:7A-15.2(k) (which is proposed for deletion) to set forth requirements for aggregating multiple disturbances into a single mitigation project. This new subsection is similar to existing subsection (k) and establishes that mitigation for multiple disturbances by a single permittee may be aggregated into a single mitigation project upon Department approval. However, such an aggregated mitigation project cannot be used as mitigation for disturbances by any person except the permittee, unless the permittee obtains approval of the mitigation project as a mitigation bank in accordance with proposed N.J.A.C. 7:7A-11.

Existing N.J.A.C. 7:7A-15.2(l) is recodified with amendments as N.J.A.C. 7:7A-11.2(m). The existing subsection specifies that mitigation provided in order to satisfy a mitigation requirement of a Federal or local law or another State law cannot substitute for, or preempt any, mitigation requirement under the FWPA Rules. The Department is proposing to continue that provision (modifying language to match the CZM rules at N.J.A.C. 7:7-17.2(o)) and is also proposing to add that such mitigation may be used to satisfy a mitigation requirement of the FWPA Rules if it also meets all requirements of N.J.A.C. 7:7A-11. This provision is implied by the example provided in the existing rule, but is clarified in the proposed rule. The existing example of the application of this subsection is proposed for deletion and is replaced with the example illustrating that a mitigation project proposed to meet a requirement of the CZM rules

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will only be considered to satisfy a mitigation requirement of the FWPA Rules if the proposed project additionally meets all of the requirements of N.J.A.C. 7:7A-11.

Existing N.J.A.C. 7:7A-15.2(n), which allows a permittee to aggregate mitigation for multiple small wetland disturbances resulting from the same project that spans several Watershed Management Areas, is proposed to be deleted. The aggregation of mitigation for multiple wetland disturbances is covered under proposed N.J.A.C. 7:7A-11.2(l). Proposed new N.J.A.C. 7:7A-11.2(n), instead, provides that if a mitigator encounters a possible historic property that is or may be eligible for listing in the New Jersey or National Register, the mitigator must preserve the resource, immediately notify the Department, and proceed as directed by the Department. This provision ensures that mitigation to restore ecological values will not negatively impact cultural and historic values and is consistent with the CZM rules at N.J.A.C. 7:7-17.2(p).

As discussed above, proposed new N.J.A.C. 7:7A-11.2(o) identifies the location of specific requirements for each type of mitigation project set forth in this subchapter.

Timing of mitigation (N.J.A.C. 7:7A-11.3)

The requirements for the timing of mitigation, currently located at existing N.J.A.C. 7:7A-15.3, are proposed to be recodified and amended as N.J.A.C. 7:7A-11.3. Recodified N.J.A.C. 7:7A-11.3(a)1 establishes the timeframe for performing mitigation for disturbance (other than temporary disturbance) required under a permit, and is proposed for amendment to specify that the timeframe applies to mitigation required under a general permit authorization, an individual permit, or a special activity transition area waiver. The indications in the existing subsection that no regulated activities may occur before the Department has approved a

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mitigation proposal and that mitigation must be continued to completion according to the approved mitigation schedule are proposed for deletion as these requirements are stated elsewhere in the chapter.

Recodified N.J.A.C. 7:7A-11.3(a)2 and 3 are proposed for amendment to improve clarity with no change in meaning. Proposed new N.J.A.C. 7:7A-11.3(b) makes it clear that all mitigation must continue until completion according to the schedule in the approved mitigation proposal. This requirement was relocated from existing N.J.A.C. 7:7A-15.3(a)1.

Property suitable for mitigation (N.J.A.C. 7:7A-11.4)

Existing N.J.A.C. 7:7A-15.4 is proposed to be recodified with amendments as N.J.A.C. 7:7A-11.4, Property suitable for mitigation. This section identifies properties on which mitigation may be conducted. Proposed new N.J.A.C. 7:7A-11.4(a) continues the content of existing N.J.A.C. 7:7A-15.4(e) (which is proposed to be deleted) with amendments. This provision establishes that the Department will only approve mitigation on property that is owned in fee simple and under legal control of the person responsible for performing the mitigation unless the person responsible for performing the mitigation can demonstrate that they have legal rights to the property sufficient to enable compliance with all requirements of the FWPA Rules. The Department is amending this subsection to simplify the language to not discuss specific encumbrances and instead generally require legal rights sufficient to carry out the mitigation requirement.

The Department is proposing to simplify recodified N.J.A.C. 7:7A-11.4(b) to state that any offsite mitigation in general must be carried out on private property, instead of specifying

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mitigation alternatives. Existing N.J.A.C. 7:7A-15.4(b), which establishes that improvement to a public facility intended for human use (such as a ball field, nature trail, or boardwalk) does not constitute mitigation, is proposed to be recodified and amended at N.J.A.C. 7:7A-11.4(c). The Department is proposing to expand this subsection to establish that installation or improvement to a public facility or a stormwater management facility (such as a basin) does not constitute mitigation under this subchapter. This amendment consolidates existing N.J.A.C. 7:7A-15.4(b) and (i) into one clear subsection to improve understanding of what does not constitute mitigation to ensure mitigation proposals reflect proper compensation for the habitat values and other natural functions lost through a disturbance.

Existing N.J.A.C. 7:7A-15.4(d) is proposed to be recodified with amendments as N.J.A.C. 7:7A-11.4(e). The Department is proposing to modify this subsection to clarify that it is the Department that will determine if an area is currently of high ecological value, which would preclude the approval of mitigation through creation, restoration, or enhancement in that area. This clarification establishes the Department as the authority for the determination of ecological value and provides more clarity and predictability for applicants. The example of a State open water that supports fish as an area that is currently of high ecological value is proposed to be deleted because it is too broad. The presence of fish in general does not necessarily mean that a water is so ecologically valuable as to preclude mitigation through creation, restoration, or enhancement. The Department is also proposing to relocate the provision relating to significant cultural or historic resources to new N.J.A.C. 7:7A-11.4(f). By relocating this provision to its own provision, the Department intends to clarify that the Department shall not approve creation, restoration, or enhancement in an area that the Department has determined is a significant

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cultural or historic resource and emphasize that the Department routinely coordinates with the State Historic Preservation Office.

At recodified N.J.A.C. 7:7A-11.4(h) the Department proposes to reorganize the subsection for clarity without changing meaning. Recodified N.J.A.C. 7:7A-11.4(i) is proposed with amendments to delete the statement that the Department will not approve mitigation in a contaminated area unless all areas of contamination are identified and all remediation completed so that there is no potential for the reintroduction of contamination to ecological communities, human exposure to contamination, or belated discovery of contamination. This provision is proposed to be replaced with the requirement that the Department will not approve mitigation in an area where the proposed mitigation poses an ecological risk, which is defined in the subsection to include situations where the mitigation may result in the reintroduction of contamination to ecological communities, the exposure of humans to contamination, or the contamination of the mitigation site by subsequent exposure to new areas of contamination requiring remediation.

The Department is proposing new N.J.A.C. 7:7A-11.4(i)1 and 2 to replace existing N.J.A.C. 7:7A-15.4(h)1 and 2. Proposed new N.J.A.C. 7:7A-11.4(i)1 provides that if the Department determines that the mitigation site characterization and assessment demonstrates that the proposed mitigation activities will not pose an ecological risk, the Department will continue to complete its review of the proposed site to determine whether the proposed mitigation satisfies the requirements of Subchapter 11. Proposed N.J.A.C. 7:7A-11.4(i)2 provides that if the Department determines, based on the characterization and assessment, that the proposed mitigation activities do pose an ecological risk, the mitigator must remediate the site pursuant to

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the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-4.8, 5.1, and 5.2. The Department is updating the citation for remediation standards to refer to the Technical Requirements rather than the Administrative Requirements for Site Remediation at N.J.A.C. 7:26C, to more accurately identify the substantive remediation requirements. The mitigator must demonstrate to the satisfaction of the Department that the remediation and/or mitigation activities will fully address the ecological risk on the site in order to proceed with mitigation on the site. The proposed requirements are similar to the existing requirements but serve to align the processes and terminology of the FWPA Rules with the processes and terminology of the CZM Rules.

Existing N.J.A.C. 7:7A-15.4(i) is relocated as N.J.A.C. 7:7A-11.4(c)2, as discussed above. Proposed new N.J.A.C. 7:7A-11.4(j) specifies that properties where a substantial amount of soil must be removed in order to achieve suitable wetland hydrology are not acceptable mitigation sites. These sites are not suitable for mitigation purposes because the substrate is unstable and unsuitable for planting and it is questionable if the hydrology would support a wetland in perpetuity.

Amount of mitigation required (Existing N.J.A.C. 7:7A-15.8)

Existing N.J.A.C. 7:7A-15.8 is proposed for repeal. The amount of mitigation required under this subchapter is adequately discussed in proposed N.J.A.C. 7:7A-11.2 and within the sections that establish the requirements for each mitigation alternative. N.J.A.C. 7:7A-15.8(a) is deleted from the subchapter entirely. The contents of existing N.J.A.C. 7:7A-15.8(a) are unnecessary because proposed N.J.A.C. 7:7A-11.2(o) establishes where the specific

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requirements for each mitigation alternative are located, which include the amount of mitigation required under each of those alternatives. Existing N.J.A.C. 7:7A-15.8(b), which establishes transition areas for mitigation areas involving restoration or creation of wetlands, is proposed to be relocated to N.J.A.C. 7:7A-11.12(c) with no substantive changes in order to consolidate all restoration and creation requirements into one section of the subchapter.

Existing N.J.A.C. 7:7A-15.8(c), which establishes the amount of mitigation required for restoration, is proposed to be deleted. The amount of restoration required is instead set forth in proposed N.J.A.C. 7:7A-11.12(b) as discussed below. Existing N.J.A.C. 7:7A-15.8(d), which sets forth the amount of mitigation required for creation, is relocated to proposed N.J.A.C. 7:7A-11.12(b) and amended to require the same amount of mitigation for both creation and restoration as discussed below. Existing N.J.A.C. 7:7A-15.8(e), which sets forth the required amount of mitigation for enhancement, is relocated to proposed N.J.A.C. 7:7A-11.12(d) with amendments as discussed in that section of this Summary.

Existing N.J.A.C. 7:7A-15.8(f) describes the amount of mitigation required for credit purchase. The language from this subsection is modified and relocated to proposed N.J.A.C. 7:7A-11.14(a). Existing N.J.A.C. 7:7A-15.8(g), which identifies the location of provisions for the amount of mitigation required for upland preservation, is unnecessary to retain because proposed N.J.A.C. 7:7A-11.2(o) directs the reader to the location of requirements for each mitigation alternative.

Existing N.J.A.C. 7:7A-15.8(h) sets forth the procedure to determine the amount of a monetary contribution. This procedure is relocated to proposed N.J.A.C. 7:7A-11.16 with amendments as discussed below.

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Existing N.J.A.C. 7:7A-15.8(i), which sets forth the amount of mitigation required for land donation, is proposed to be deleted. The requirements for land donation as a mitigation alternative are set forth at proposed N.J.A.C. 7:7A-11.15 as discussed below.

The provisions of existing N.J.A.C. 7:7A-15.8(j) are incorporated into proposed N.J.A.C. 7:7A-11.2(a) and (c) as discussed above. Existing N.J.A.C. 7:7A-15.8(k) is proposed to be deleted and not relocated. Proposed N.J.A.C. 7:7A-11.4, Property suitable for mitigation, adequately explains what properties may be used for mitigation, including the level of legal control necessary to establish a mitigation project on a site.

The content of existing N.J.A.C. 7:7A-15.8(l) is identical to existing N.J.A.C. 7:7A-15.2(h) (proposed to be recodified with amendments as N.J.A.C. 7:7A-11.2(i)) and is not continued in the proposed rule to prevent redundancy.

Conceptual review of a mitigation area (N.J.A.C. 7:7A-11.5)

Existing N.J.A.C. 7:7A-15.10 is proposed to be recodified with amendments as N.J.A.C. 7:7A-11.5. This section, as stated in proposed new N.J.A.C. 7:7A-11.5(a), establishes the requirements for a prospective applicant to obtain conceptual review of a mitigation area that is not proposed to be used as a mitigation bank site. Separate requirements for approval of a mitigation bank site are set forth at proposed N.J.A.C. 7:7A-11.26(a) and (b).

Recodified N.J.A.C. 7:7A-11.5(b) encourages applicants to obtain conceptual review of land being considered a potential mitigation area prior to purchase of the land for mitigation purposes and/or submittal of a mitigation proposal. This subsection consolidates the provisions

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of existing N.J.A.C. 7:7A-15.10(a) and (b) to be more concise and to be consistent with language in the CZM rules.

Recodified N.J.A.C. 7:7A-11.5(c) sets forth the requirements for a request for a conceptual review. The requirement that the applicant submit a map showing Department staff how to find the mitigation area at N.J.A.C. 7:7A-15.10(c)2 is amended to require submittal of a map showing the location and extent of the prospective mitigation area, including topography, where available. This amendment ensures that applicants provide the Department with meaningful information about the site that will also allow staff to find the area to perform site inspections.

Recodified N.J.A.C. 7:7A-11.5(c)5 is amended to match the language proposed at N.J.A.C. 7:7A-16.3(a)5 for consistency. This clarification assures applicants that the Department will conduct site inspections reasonably.

Existing N.J.A.C. 7:7A-15.10(d) is proposed to be deleted and replaced with amendments as N.J.A.C. 7:7A-11.5(d). The Department is proposing to delete the description of a site inspection from the subsection, including the indication that any discussions during the site inspection is not intended to be binding, and instead state simply that the Department's guidance (which includes, but is not limited to, any conversations occurring during site inspections) on a proposed mitigation area is not binding and should not be relied upon by the applicant in purchasing a proposed mitigation area. Due to the limited nature of the information supplied, the guidance provided by the Department cannot be considered binding in any way. However, through the mechanism of a conceptual review, an applicant can avoid committing resources unnecessarily to the purchase of, or development of a proposed mitigation plan on, a property

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that could not support an approvable mitigation project in accordance with this subchapter. This provision is similar to the existing provision but is amended to align the language with similar language in the FHACA Rules.

Basic requirements for mitigation proposals (N.J.A.C. 7:7A-11.6)

Existing N.J.A.C. 7:7A-15.11 is proposed for recodification with amendments at N.J.A.C. 7:7A-11.6, Basic requirements for mitigation proposals. Proposed N.J.A.C. 7:7A-11.6(a) and (b) recodify and amend existing N.J.A.C. 7:7A-15.11(a)1, 2, and 3. The proposed amendments reorganize the existing provisions so that existing paragraph (a)3 is recodified as subsection (b). The Department is proposing to specify that the provisions set forth in this section apply to mitigation proposals required under N.J.A.C. 7:7A. The Department is proposing to simplify these provisions by requiring a mitigation proposal required by an individual permit and a general permit to be submitted at least 90 days prior to the commencement of regulated activities, rather than the existing requirement that proposal for mitigation required under a general permit be submitted 120 days prior to the start of activities. This proposed change is reflected in the deletion of existing N.J.A.C. 7:7A-15.11(a)2. The Department is proposing to delete the statement in existing N.J.A.C. 7:7A-15.11(a)1 that activities authorized by a permit must not begin until the mitigation proposal is approved and the mitigation has begun to avoid conflicting with other requirements of this chapter and to prevent redundancy.

Proposed N.J.A.C. 7:7A-11.6(b) (existing N.J.A.C. 7:7A-15.11(a)3) is amended to improve clarity without changing the content of the requirement to submit a mitigation proposal to remedy a violation by the deadline set forth in the specific enforcement document.

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Existing N.J.A.C. 7:7A-15.11(b) is recodified as N.J.A.C. 7:7A-11.6(c) with amendments for clarity. Information about the mitigation proposal checklist is proposed to be deleted and relocated. The statement that information required for each mitigation alternative is set forth in a mitigation proposal checklist available from the Department is continued at proposed N.J.A.C. 7:7A-11.6(e) and (f).

The requirement at existing N.J.A.C. 7:7A-15.11(b)1 to provide notice for mitigation involving creation, restoration, or enhancement is recodified as N.J.A.C. 7:7A-11.6(d) and amended to specify that notice is required only if mitigation occurs on a site that is not the site of the permit activity. If the mitigation is to occur on-site, notice to adjacent property owners occurs through the process required as part of application submission. The notice required by proposed N.J.A.C. 7:7A-11.6(d) ensures that the mitigation site is properly noticed and that the public has an opportunity to provide comments.

Proposed new N.J.A.C. 7:7A-11.6(e) establishes that the information required to be submitted in a mitigation proposal for restoration, creation, and/or enhancement, uplands preservation, and land donation is set forth in the appropriate mitigation proposal checklist, which is available on the Department's website and described in proposed N.J.A.C. 7:7A-11.6(h) and (i).

Proposed new N.J.A.C. 7:7A-11.6(f) establishes that the information required to be submitted in a mitigation proposal for a monetary contribution to the Department's in-lieu fee program is set forth in a separate checklist, which requires the applicant to include a copy of the permit authorizing the impacts being mitigated (as applicable) and a demonstration that the

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contribution amount addresses the factors set forth in proposed N.J.A.C. 7:7A-11.16,

Requirements for a monetary contribution.

The Department is proposing, at new N.J.A.C. 7:7A-11.6(g), to require a mitigation proposal for the purchase of bank credits to consist of a description of the type and quantity of wetland resource disturbance for which mitigation is being proposed, a copy of the permit authorizing the disturbance being mitigated (as applicable), and the mitigation bank from which credits will be purchased. This provision is relocated from existing N.J.A.C. 7:7A-15.12(c) with amendments to be consistent with the requirements for mitigation proposals for the purchase of bank credits set forth in the FHACA Rules.

Existing N.J.A.C. 7:7A-15.11(c), which describes the demonstration required to show that an offsite mitigation alternative is not feasible, is proposed to be recodified as both proposed N.J.A.C. 7:7A-11.9(f) and 11.10(f) with amendments for context and clarity that do not affect meaning. Existing N.J.A.C. 7:7A-15.11(d) is proposed to be deleted as the concept contained in this subsection is addressed at proposed N.J.A.C. 7:7A-11.2(h), as discussed above. The requirement at existing N.J.A.C. 7:7A-15.11(e) that a mitigation proposal must include as many copies of each item as required by the checklist is proposed to be deleted to prevent redundancy.

Existing N.J.A.C. 7:7A-15.12, Contents of a mitigation proposal, is proposed to be incorporated into recodified N.J.A.C. 7:7A-11.6 with amendments. The introductory language at N.J.A.C. 7:7A-15.12(a) is proposed to be deleted to facilitate this organizational change.

Existing N.J.A.C. 7:7A-15.12(b), which sets forth the required information for mitigation proposal checklists, is proposed to be recodified as N.J.A.C. 7:7A-11.6(h) with substantial amendments. Existing N.J.A.C. 7:7A-15.12(b) and (b)1 are amended for clarity at N.J.A.C.

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7:7A-11.6(h) and (h)1. Recodified N.J.A.C. 7:7A-11.6(h)1 is amended to require that the application include not only basic information on the permit or other source of the mitigation requirement, but instead include a copy of the permit “(if issued)” or the “enforcement document” that is the source of the mitigation requirement. This amendment specifies the only two documents that would impose a mitigation requirement as opposed to the more general requirement to include basic information on the permit or “other item” that is the source of the requirement.

Recodified N.J.A.C. 7:7A-11.6(h)7, which requires the submittal of a certification of truth and accuracy, is proposed to be amended to add the location of the text of the required certification. In addition to the above requirements, under recodified N.J.A.C. 7:7A-11.6(h)8, the applicant must provide consent from the owner of the proposed mitigation area allowing the Department to enter the property in a reasonable manner and at reasonable times to inspect the proposed mitigation area. This requirement recodifies existing N.J.A.C. 7:7A-15.12(b)8 with amendments for clarity that are consistent with amendments to the application requirements for other approvals set forth at proposed N.J.A.C. 7:7A-16.

Existing N.J.A.C. 7:7A-15.12(c), which requires certain additional information for applicants proposing mitigation through credit purchase, is proposed to be deleted. The application requirements for credit purchase are instead set forth at proposed N.J.A.C. 7:7A-11.6(g) as discussed above. Similarly, existing N.J.A.C. 7:7A-15.12(d) is proposed to be deleted because these requirements are proposed at N.J.A.C. 7:7A-11.6(h)1 and 8 with additional new requirements for proposals to restore, create, or enhance wetlands proposed at N.J.A.C. 7:7A-11.6(i). The Department is not proposing additional requirements for proposals for land donation

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or uplands preservation; the proposed requirements for all mitigation proposals at N.J.A.C. 7:7A-11.6(h) are sufficient for the Department to review these types of mitigation proposals.

Existing N.J.A.C. 7:7A-15.12(d)3 and 4, which set forth some additional requirements for proposals to restore, create, or enhance wetlands, to preserve uplands, or to donate land are recodified and expanded as proposed N.J.A.C. 7:7A-11.6(h)9 to be included in the requirements for all mitigation proposals. The proposed provisions require specific information and materials to be submitted as a part of all mitigation proposals to explain and illustrate the existing and proposed conditions at the site. This includes visual materials like maps, site plans, planting plans, topography, delineations, and/or photographs and a narrative describing the existing conditions and proposed mitigation which includes supporting soil or vegetation samples. These two requirements at proposed N.J.A.C. 7:7A-11.6(h)9i and ii expand the requirements at existing N.J.A.C. 7:7A-15.12(d)3 and 4 to include items such as soil and vegetation samples, which will provide the Department with more complete information to establish existing conditions of the proposed mitigation site, so that it can determine both the likelihood of success of the proposed mitigation and the value of the mitigation to be provided as compared to values already provided by the proposed mitigation site. The Department is proposing a new requirement at N.J.A.C. 7:7A-11.6(h)9iii to also include a requirement that the rule include a preventative maintenance plan detailing how invasive or noxious vegetation will be controlled and how predation of the mitigation plantings will be prevented. This requirement will increase the likelihood of the mitigation being successful in achieving the goal of fully compensating for lost wetlands functions and values.

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The Department is proposing a new requirement at N.J.A.C. 7:7A-11.6(h)10 to include in a mitigation proposal a specific breakdown of each resource for which mitigation is being proposed and the type and quantity of the proposed mitigation for each resource.

Existing N.J.A.C. 7:7A-15.12(d)5, which requires information concerning the presence of endangered or threatened species habitat or archaeological resources, is proposed to be recodified as N.J.A.C. 7:7A-11.6(h)11. The Department is proposing to amend this provision to require information concerning the presence or absence of endangered and/or threatened wildlife and plant species habitat or other features relevant to determining compliance with this chapter. This broader provision removes the specific reference to archaeological resources because they are covered under the phrase “other features.” The statement of consequences for not providing all such information, including denial or termination of the permit and potential penalties is proposed to be deleted because the consequences of failure to provide such information is specified elsewhere in the proposed rules, including at proposed N.J.A.C. 7:7A- 20.8(b)2 and in the enforcement subchapter at proposed N.J.A.C. 7:7A-22.

Proposed new N.J.A.C. 7:7A-11.6(h)12 requires a certification that the proposed mitigation will not adversely affect historic resources listed or eligible for listing on the New Jersey or National Register of historic places. Existing N.J.A.C. 7:7A-15.12(d)6, which requires information regarding whether the proposed mitigation activities require approval by other Federal, interstate, State or local agencies, is proposed to be recodified as N.J.A.C. 7:7A-11.6(h)13 with no change in text.

Existing N.J.A.C. 7:7A-15.12(d)7 is proposed to be recodified with clarifying amendments that do not affect meaning as N.J.A.C. 7:7A-11.6(h)14. This paragraph requires the

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applicant to submit information regarding relevant features of other properties near the mitigation area.

Existing N.J.A.C. 7:7A-15.12(d)8, 9, and 10 are proposed to be deleted. Existing N.J.A.C. 7:7A-15.12(d)8 requires the submission of scientific information concerning factors relevant to the functions and values of the proposed mitigation area and activities. This requirement is no longer necessary because proposed N.J.A.C. 7:7A-11.6(h)2 requires the same information. Existing N.J.A.C. 7:7A-15.12(d)9 requires information to enable the Department to determine the functions and values of the proposed mitigation area, and its potential to be a successful mitigation area, including narrative information, maps, photographs, soil or vegetation samples, delineations, and/or other visual materials, describing and/or showing the mitigation area. This information is also included in proposed N.J.A.C. 7:7A-11.6(h)2. Existing N.J.A.C. 7:7A-15.12(d)10 is proposed to be deleted because the requirement to provide past correspondence between the Department and applicant/permittee is covered under proposed N.J.A.C. 7:7A-11.6(h)5.

Existing N.J.A.C. 7:7A-15.12(d)11 is proposed to be recodified as N.J.A.C. 7:7A-11.6(h)15 with no change in text. This paragraph requires schedules describing in detail the sequence of mitigation activities and estimated dates for completion for each mitigation activity.

Existing N.J.A.C. 7:7A-15.12(d)12 is proposed to be recodified as N.J.A.C. 7:7A-11.6(h)16 and amended to be more concise without affecting meaning.

Existing N.J.A.C. 7:7A-15.12(d)13 and 14 are proposed to be deleted. Existing N.J.A.C. 7:7A-15.12(d)13 requires the submittal of draft documents for protection and transfer of the mitigation area after successful completion of mitigation, in accordance with N.J.A.C. 7:7A-

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15.14, 15.17(c), and 15.19(c). This requirement is already covered by recodified N.J.A.C. 7:7A-11.6(h)5, which requires the submittal of all documents necessary to ensure compliance with this subchapter, including executed documents and draft documents.

Existing N.J.A.C. 7:7A-15.12(d)14 is replaced by proposed new N.J.A.C. 7:7A-11.6(h)17. This new provision requires a preliminary characterization and assessment of the site in accordance with proposed N.J.A.C. 7:7A-11.4(h) to allow the Department to determine if contamination is present and if the proposed mitigation poses an ecological risk. The new provision replaces the function of existing N.J.A.C. 7:7A-15.12(d)14, which prescribes additional information required for potentially contaminated sites. The provision refers to proposed N.J.A.C. 7:7A-11.4(h) rather than listing the required information that makes the requirement clearer and the language consistent with mitigation proposal requirements in the CZM rules.

The Department is proposing new N.J.A.C. 7:7A-11.6(h)18 to require the applicant to submit a description of post-construction activities, including schedules for monitoring, maintenance, and reporting. This requirement will allow the Department to review the likelihood of long-term success of the mitigation proposal. Proposed new N.J.A.C. 7:7A-11.6(h)19 requires the applicant to provide contingency measures should the project fail or show indications of failing. Thorough contingency measures will allow the mitigator to react to a failing mitigation project and ensure that the functions and values lost as a result of the original disturbance are adequately replaced.

Existing N.J.A.C. 7:7A-15.12(e) is proposed to be deleted because the substance of the subsection is included within proposed N.J.A.C. 7:7A-11.6(h), including the requirement to

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provide a letter of credit or other financial assurance, which would be a document required to demonstrate compliance with this subchapter under proposed N.J.A.C. 7:7A-11.6(h)5, as described above.

The Department is proposing new N.J.A.C. 7:7A-11.6(i), which requires proposals to create, restore, or enhance wetlands to include a projected water budget for the proposed mitigation site in addition to the previously discussed required information. Achieving the proper hydrology on a site significantly increases the likelihood of success of a project. The projected water budget must detail the sources of water and water losses; document that an ample supply of water is available; show that the mitigation area will have sustained wetland hydrology indefinitely into the future; and include information concerning proposed and existing regional conditions.

The Department is proposing to delete existing N.J.A.C. 7:7A-15.12(f), which sets forth additional requirements for a proposal for a monetary contribution. These specific requirements included in the checklist for this mitigation alternative are instead set forth by proposed N.J.A.C. 7:7A-11.6(f) as discussed above. Similarly, the Department is proposing to delete existing N.J.A.C. 7:7A-15.12(g), which sets forth additional required information for a land donation proposal. Requirements for land donation proposals are sufficiently addressed by the previously described requirements in this section.

Department review and approval of a mitigation proposal (N.J.A.C. 7:7A-11.7)

Existing N.J.A.C. 7:7A-15.15, Department review of a mitigation proposal, is proposed to be recodified with amendments as N.J.A.C. 7:7A-11.7, Department review and approval of a

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mitigation proposal. The Department is proposing to amend recodified N.J.A.C. 7:7A-11.7(a) to specify that the Department will review a mitigation proposal submitted to comply with a condition of a permit within 30 “calendar” days. The Department will either request additional information or declare the proposal complete “for further review.” The amendments to this subsection are necessary because the permit for which the mitigation proposal is required may have a review period longer than 30 days, which would make it inappropriate to declare a mitigation proposal complete after 30 days. Furthermore, the Department, through its review of the proposed impact to wetlands, may modify the scope of the project, which would require modification of the scope of the mitigation needed. It is, therefore, premature to render a decision on the mitigation before the review of the permit application is completed. Declaring the proposal “complete for further review” allows the permit and the mitigation proposal to be reviewed concurrently.

Mitigation hierarchy for a smaller disturbance (N.J.A.C. 7:7A-11.9)

The Department is proposing to recodify existing N.J.A.C. 7:7A-15.5, Mitigation for a smaller disturbance, as N.J.A.C. 7:7A-11.9, Mitigation hierarchy for a smaller disturbance, with amendments. Figure 4 and any references to Figure 4 throughout this section are proposed for deletion because the figure no longer accurately represents the mitigation hierarchy set forth in this section. Reference to N.J.A.C. 7:7A-15.8 is proposed to be deleted because the Department is proposing to repeal N.J.A.C. 7:7A-15.8, as discussed above.

The Department is proposing to amend existing N.J.A.C. 7:7A-15.5(c) at proposed N.J.A.C. 7:7A-11.9(c) to provide more clarity and detail concerning the purchase of credits from

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a mitigation bank to mitigate a smaller disturbance. Under recodified N.J.A.C. 7:7A-11.9(c)2, the Department is proposing to delete the requirement that offsite restoration, creation, or enhancement occur within the same HUC-11 or an adjacent HUC-11 as the disturbance. “HUC-11s” are discrete drainage basins, each assigned an 11-digit Hydrologic Unit Code, developed by the USGS and modified by the Department, that are aggregated into larger areas called watershed management areas. Under the proposed rules, the mitigation must occur in the same watershed management area as the disturbance. By allowing the offsite mitigation site to be located within the same watershed management area rather than the same HUC-11 or an adjacent HUC-11, the Department is providing greater flexibility in locating a potential mitigation site that will provide for in-kind mitigation. HUC-11s and watershed management areas all drain into the same estuary. Therefore, the effects and benefits to the estuary system as a whole are the same wherever the mitigation is performed as long as it is in the same watershed management area as the disturbance. As with any mitigation that is not performed at the site where the impact occurs, the site does experience a loss; however, the overall ecosystem benefits from the mitigation. Existing N.J.A.C. 7:7A-15.5(e) is proposed to be recodified with amendments to become part of proposed N.J.A.C. 7:7A-11.9(c). The proposed amendments are for clarity and do not affect meaning. The Department is, however, proposing to add an additional factor that must be met in order to determine the feasibility of a site for mitigation. At proposed new N.J.A.C. 7:7A-11.9(c)5, the Department is proposing to add that the availability of a parcel is also a factor in determining the feasibility of mitigation.

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The requirements for mitigation through credit purchase at existing N.J.A.C. 7:7A-15.5(d) are proposed to be deleted because the requirements for this mitigation alternative are proposed at N.J.A.C. 7:7A-11.14.

The Department is proposing to amend recodified N.J.A.C. 7:7A-11.9(d) to reorganize the existing provisions to establish that if credit purchase and onsite or offsite mitigation are not feasible as described at N.J.A.C. 7:7A-11.9(c), mitigation must be in the form of a monetary contribution to the in-lieu fee program and/or upland preservation as determined in consultation with the Department. Only if mitigation is not feasible through these means may mitigation be in the form of a land donation. In the existing rules, land donation was at an equal position with a monetary contribution and uplands preservation in the mitigation hierarchy. The Department has determined that land donation is the least favorable mitigation alternative, as it does not necessarily result in the creation, restoration, or enhancement of wetlands on the ground. Preserving uplands is more desirable than land donation because the uplands must be valuable for the protection of wetlands and therefore provide more environmental benefit than land donation.

At proposed new N.J.A.C. 7:7A-11.9(f), the Department is relocating existing N.J.A.C. 7:7A-15.11(c) with minor changes to mirror the requirements in the CZM Rules at N.J.A.C. 7:7-17.14(e). N.J.A.C. 7:7A-11.9(f) identifies the criteria the Department will use to determine that offsite mitigation is not feasible. The applicant must provide a list of six potential areas within the same watershed management area on which mitigation could be performed. With respect to each potential site, the applicant must explain why it is not located at a practical elevation suitable for a wetland; does not have an adequate water supply; is not available for purchase; and does not meet the

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requirements of N.J.A.C. 7:7A-11.4(i) regarding ecological risk. These criteria will narrow potential sites to those that are reasonably likely to be suitable for mitigation.

Mitigation hierarchy for a larger disturbance (N.J.A.C. 7:7A-11.10)

Existing N.J.A.C. 7:7A-15.6, Mitigation for a larger disturbance, is proposed to be recodified with amendments as N.J.A.C. 7:7A-11.10, Mitigation hierarchy for a larger disturbance. Figure 5 and any references to Figure 5 throughout this section are proposed for deletion because the figure no longer accurately represents the mitigation hierarchy set forth in this section. Reference to N.J.A.C. 7:7A-15.8 is proposed to be deleted because the Department is proposing to delete N.J.A.C. 7:7A-15.8, as discussed previously in this summary.

Existing subsections N.J.A.C. 7:7A-15.6(c) through (f) are proposed to be deleted. The mitigation hierarchy set forth in these subsections is proposed to be simplified in proposed new N.J.A.C. 7:7A-11.10(c), (d), and (e).

Proposed new N.J.A.C. 7:7A-11.10(c) requires mitigation for a larger disturbance to be performed through onsite restoration, creation, or enhancement. This is continued from the existing rules. However, proposed new N.J.A.C. 7:7A-11.10(c) further establishes the next options in the hierarchy as mitigation through offsite restoration, creation, or enhancement, or through the purchase of credits from a mitigation bank with a service area that includes the area of disturbance. Provisions requiring offsite mitigation to occur in the same HUC 11 as the disturbance at existing N.J.A.C. 7:7A-15.6(d)1, 2, and 3 are not continued in the proposed rules for the reasons discussed under “Mitigation hierarchy for a smaller disturbance (N.J.A.C. 7:7A-11.9)” above. Existing N.J.A.C. 7:7A-15.6(e) and (f) are proposed for deletion to reflect the

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changing hierarchy as described below. The Department is proposing to incorporate in proposed new N.J.A.C. 7:7A-11.10(c) criteria that will be considered by the Department in determining the feasibility of a mitigation site. The criteria to be considered are similar to those applicable to smaller disturbances under proposed N.J.A.C. 7:7A-11.9(c), which will ensure that the determination of the feasibility of a potential mitigation option is based upon the same criteria, regardless of whether mitigation is related to a large or small disturbance.

Existing N.J.A.C. 7:7A-15.6(g) is recodified with amendments as proposed N.J.A.C. 7:7A-11.10(d) and (e). These proposed subsections establish the same mitigation hierarchy applicable to mitigation for smaller disturbances set forth in proposed N.J.A.C. 7:7A-11.9(e) and (f); if on or offsite restoration, creation, or enhancement or credit purchase are not feasible, mitigation must be performed through a monetary contribution to the Department's in-lieu fee program or upland preservation or, if those are not feasible, through a land donation.

The Department is additionally proposing new N.J.A.C. 7:7A-11.10(f), identifying information that must be submitted by the applicant to demonstrate that offsite mitigation is not feasible. The proposed provision is the same as that proposed to be applicable to smaller disturbances at proposed N.J.A.C. 7:7A-11.9(f), and is added for the same reasons as described in the summary of that section above.

Mitigation for transition area impacts for special activity area waivers based upon individual permit criteria (N.J.A.C. 7:7A-11.11)

Existing N.J.A.C. 7:7A-15.26 is proposed to be recodified with amendments as N.J.A.C. 7:7A-11.11. Recodified N.J.A.C. 7:7A-11.11(b) removes the requirements that offsite mitigation

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occurs in the same HUC 11 or in an adjacent HUC 11 as the disturbance, with it instead being required that the mitigation bank from which credits are purchased include within its service area the area of disturbance. In accordance with proposed N.J.A.C. 7:7A-11.26(c)8 (as described in the “Application for a mitigation bank” section of this proposal summary), the mitigation bank service area must give priority to mitigation for impacts in the same watershed management area as the proposed bank. This change is consistent with other changes in this chapter, which require mitigation to take place in the same watershed management area as the disturbance, as described above. Existing N.J.A.C. 7:7A-15.26(c) and (d) are proposed for deletion because recodified N.J.A.C. 7:7A-11.11(b) requires offsite mitigation to occur in the same watershed management area, which makes N.J.A.C. 7:7A-15.26(c) repetitive and existing N.J.A.C. 7:7A-15.26(d) offers the option for performing offsite mitigation in the same drainage basin as the disturbance, if other alternatives are not feasible. This is deleted to simplify the mitigation requirements and ensure the functions and values lost as a result of the disturbance are appropriately restored.

Existing N.J.A.C. 7:7A-15.26(e) is proposed to be recodified as N.J.A.C. 7:7A-11.11(c) with amendments to reflect new definitions and reorganization proposed in this subchapter.

Requirements for restoration, creation, or enhancement (N.J.A.C. 7:7A-11.12)

Existing N.J.A.C 7:7A-15.16 is proposed to be recodified with amendments as N.J.A.C 7:7A-11.12. Proposed new N.J.A.C. 7:7A-11.12(a) establishes that the purpose of this section is to set forth the requirements that apply to a creation, restoration, or enhancement mitigation project. Proposed new N.J.A.C. 7:7A-11.12(b) sets forth the amount of mitigation required for creation or restoration mitigation projects. This provision incorporates the standards of existing

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N.J.A.C. 7:7A-15.8(d) and (j). Wetlands must be created or restored at a creation or restoration to lost or disturbed ratio of 2:1, unless the applicant can demonstrate that a ratio of less than 2:1 will provide equal ecological functions and values. In no case will the creation or restoration to lost or disturbed ratio be reduced to less than 1:1. To demonstrate equal ecological value, surveys and documentation concerning the existing soil, vegetation, water quality functions, flood control functions, and wildlife habitat conditions, and a detailed explanation of how the proposed mitigation plan will replace the ecological values of the wetland to be lost or disturbed must be provided.

Wetlands created or restored must also contain an appropriate transition area that is not counted in the acreage of mitigation provided by the creation or restoration. As described above, existing N.J.A.C. 7:7A-15.8(b) is proposed to be relocated as N.J.A.C. 7:7A-11.12(c) with no substantive changes.

Proposed new N.J.A.C. 7:7A-11.12(d) establishes that the amount of enhancement required will be determined by the Department on a case-by-case basis. This provision incorporates the standards of N.J.A.C. 7:7A-15.8(e) with amendments that clarify that the mitigation must result in wetlands of equal or better functions and values to those that were lost. This allows an invasive species dominated wetland to be replaced with native species rather than invasive species, which would result in better functions and values than those lost. The requirement to execute and record a conservation restriction or easement covering the mitigation area at existing N.J.A.C. 7:7A-15.16(a) is proposed to be deleted. The requirement to record a conservation restriction for a mitigation area is included in proposed N.J.A.C. 7:7A-11.2(j).

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Existing N.J.A.C. 7:7A-15.16(b) is recodified with amendments as proposed N.J.A.C. 7:7A-11.12(e). The requirement in the existing rules to submit a construction completion report within 30 days after construction of a restoration, creation, or enhancement project is amended to require the submittal of this construction completion report within 60 calendar days after construction is completed. A construction completion report requires an as-built plan of the completed area including grading. It is difficult in many projects to complete construction and then conduct the survey work necessary to complete the grading plans within 30 days. Additional changes are proposed to improve clarity and make language consistent with the CZM Rules. The requirement at existing N.J.A.C. 7:7A-15.16(b)4 to include any other information for the Department to determine if the mitigation is successful is proposed to be deleted. The three previous requirements at proposed N.J.A.C. 7:7A-11.12(b)1, 2, and 3, in conjunction with the requirement at proposed newly codified subsection (g) that post-construction monitoring reports include information demonstrating the mitigation project is successful, provide the Department with sufficient information to assess the progress and ultimate success of the mitigation project.

Existing N.J.A.C. 7:7A-15.16(c) is recodified with amendments as proposed N.J.A.C. 7:7A-11.12(f). This provision describes the requirement to submit a post-construction monitoring report. In the existing rules, this report is called an “annual post-planting report.” The name change reflects the possible scope of creation, restoration, and enhancement projects beyond planting. This subsection is further amended to reflect this change in term, provide clarity, and achieve consistency with the CZM and FHACA Rules. The Department is proposing to add that post-construction monitoring will begin the first full growing season after the mitigation project is completed.

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The Department is proposing to recodify the remaining portion of existing N.J.A.C. 7:7A-15.16(c) and paragraphs (c)1, 2, and 3 as N.J.A.C. 7:7A-11.12(g). This subsection describes the requirements for post-construction monitoring reports. The existing provisions are clarified and amended to be consistent with the language in the CZM and FHACA Rules without changing meaning.

The Department is proposing to add several new requirements for post-construction monitoring reports to align the mitigation requirements of the FWPA Rules with those of the CZM and FHACA Rules. For mitigation that has not achieved the goals of the approved mitigation proposals, the report must include a list of corrective actions (as required in the existing rules) and additionally a timeframe for completion. Requiring the submittal of a timeframe for the implementation of corrective actions ensures the mitigation project will meet its goals in a timely manner to compensate for lost functions and values.

Post-construction monitoring reports must additionally contain the information required by the wetlands mitigation monitoring project checklist, which includes a USGS quad map and aerial photograph clearly showing the limits of the mitigation site and all proposed access points; and photographs of the mitigation site with a location map indicating the location and direction of the photograph. An assessment of the success of planted vegetation, a separate assessment of species naturally colonizing the site, and an overall assessment of plant coverage, including invasive or noxious plant species, are required. Additionally, as required in the existing rules, an assessment of the hydrology of the site; a field delineation of wetlands at the project site; and a plan showing the flagged wetlands delineation and GPS data points are required. The existing

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and additional information will ensure that the goal to create, restore, and/or enhance wetlands is accomplished.

The Department is proposing to recodify existing N.J.A.C. 7:7A-15.16(d) as 11.12(h) with amendments. The introductory language in this subsection is proposed for deletion and replacement to be more clear and concise. The requirement to demonstrate that the post-planting monitoring period has been completed and that monitoring data show the requirements of the mitigation proposal are met is proposed to be deleted and replaced with the requirement that the mitigator demonstrate that the goals of the approved mitigation proposal have been achieved. The requirement that the mitigator demonstrates that the areas designated for freshwater wetlands are in fact freshwater wetlands is deleted and replaced with the requirement that the mitigator demonstrates that the mitigation site is a wetland as documented through monitoring well data, stream gauge data, relevant tidal data, photographs, and field observation notes collected throughout the monitoring period. This information will provide the Department with data necessary to confirm that the mitigation area is indeed appropriately classified as freshwater wetlands.

Existing N.J.A.C. 7:7A-15.16(d)3 is proposed to be deleted and replaced with N.J.A.C. 7:7A-11.12(h)3, 4, and 5. The proposed additional success criteria require that the permittee demonstrate that the wetland community comprised of the planted vegetation or targeted hydrophytes as detailed in the approved mitigation plan has achieved, or is on track to achieve the desired wetland community; that the mitigation meets all applicable requirements of this subchapter; and that the permittee has executed and recorded a conservation restriction for the mitigation area that meets the requirements of proposed N.J.A.C. 7:7A-12. The proposed new

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paragraphs expand upon and clarify the requirements specified in the existing paragraph, with both the existing and proposed provisions intended to ensure that all mitigation requirements have been satisfied and that the mitigation is permanently protected.

Existing N.J.A.C. 7:7A-15.16(e), which explains that if the mitigator demonstrates their mitigation requirement has been satisfied the Department will declare the project successful, is proposed to be deleted and replaced with N.J.A.C. 7:7A-11.12(j). This new provision mirrors the language in existing N.J.A.C. 7:7A-15.16(e) to require the Department to make a declaration that the mitigation project is successful, which ensures the wetland functions and values have been replaced.

Existing N.J.A.C. 7:7A-15.16(f), which explains what will be required if a mitigator does not make the appropriate demonstrations of success of the mitigation project, is proposed to be deleted and replaced with N.J.A.C. 7:7A-11.12(i). This new provision establishes that, where a mitigation project is not meeting the requirements specified in proposed N.J.A.C. 7:7A-11.12(h), the Department will determine, after consultation with the mitigator, appropriate corrective actions that the mitigator must implement, so that the standards at proposed subsection (h) can be met. This may include regrading or replanting the mitigation site, relocation of the mitigation project to a more suitable site, and/or extending the monitoring period. The new provision provides more specificity and detail for how to remedy unsuccessful mitigation projects, which will ensure the functions and values lost as a result of the original disturbance will be replaced. As indicated above, proposed N.J.A.C. 7:7A-11.12(j) provides that the Department will issue a declaration that the mitigation is successful if the mitigator makes the demonstrations required by proposed N.J.A.C. 7:7A-11.12(h).

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Requirements for upland preservation (N.J.A.C. 7:7A-11.13)

The Department is proposing to recodify existing N.J.A.C. 7:7A-15.9, Requirements for upland preservation, as N.J.A.C. 7:7A-11.13 with amendments. Extraneous and/or inaccurate citations are deleted where applicable throughout the section. Existing N.J.A.C. 7:7A-15.9(b)3, which establishes that the Department will consider whether uplands to be preserved to fulfill a mitigation requirement are in the same HUC 11 as the disturbance, is proposed to be amended to state that the Department will consider whether the uplands are in the same watershed management area as the disturbance for consistency throughout the subchapter and to provide greater flexibility to permittees.

The Department is proposing to amend recodified N.J.A.C. 7:7A-11.13(d) to combine existing N.J.A.C. 7:7A-15.9(d) with those portions of existing N.J.A.C. 7:7A-15.17(b) and (c) relating to uplands preservation with amendments for clarity and to assist in the reorganization. The Department is proposing to delete the requirement currently specified at N.J.A.C. 7:7A-15.17(c) that the required transfer of the mitigation area to a government agency or charitable conservancy and provision of a maintenance fund to that entity occur no later than 60 days after the Department declared mitigation through uplands preservation successful. The Department is instead proposing to require transfer of ownership and the maintenance fund to the government agency or charitable conservancy prior to Department sign off on the success of the uplands preservation. These actions are needed to ensure the project will be successful in the long-term and, therefore, must occur prior to the Department declaring the mitigation has been successfully completed.

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

The Department is proposing to repeal existing N.J.A.C. 7:7A-15.14. The requirement to record a conservation restriction on mitigation areas is set forth throughout the proposed subchapter where appropriate. The requirements for the form and recording of a conservation restriction are proposed in N.J.A.C. 7:7A-12, Conservation restrictions. The existing provisions to protect a mitigation area from future development with a conservation restriction are, therefore, unnecessary.

Requirements for credit purchase from an approved mitigation bank (N.J.A.C. 7:7A-11.14)

The Department is proposing new N.J.A.C. 7:7A-11.14 that replaces and expands the existing requirements for credit purchase found throughout the existing subchapter. If the Department determines that credit purchase is the appropriate mitigation alternative, the Department will determine the number of credits required to ensure that mitigation results in wetlands, State open waters, or transition areas of equal functions and values as those lost. While the number of credits required will vary depending on the individual circumstances of the impacts, in all cases the credits required will be the number determined to ensure that there is no loss in functions and values. The Department does not specify any price, but anticipates that bank operators will set prices taking into account factors, such as the costs involved in establishing and operating the mitigation bank, as well as market forces. The person responsible for providing mitigation to compensate for an impact resulting from disturbance must prepare

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and execute all documents necessary to ensure that the credits have been purchased from a Department-approved mitigation bank with available credits.

As set forth in existing N.J.A.C. 7:7A-15.17(b)2 and proposed at N.J.A.C. 7:7A-11.14(c), mitigation through credit purchase will be deemed successful upon receipt of documentation from the permittee that the credit purchase was made as required. Documentation shall include a written certification from the mitigation bank operator, indicating the number of credits purchased and the Department permit number.

Requirements for a land donation (N.J.A.C. 7:7A-11.15)

The Department is proposing to recodify existing N.J.A.C. 7:7A-15.19, Requirements that apply after the Department approves mitigation through a land donation, as N.J.A.C. 7:7A-11.15, Requirements for a land donation, with amendments. Recodified N.J.A.C. 7:7A-11.15(a), which requires approval of a land donation by the Wetlands Mitigation Council, is continued with minor amendments that do not change meaning. Proposed new N.J.A.C. 7:7A-11.15(b) continues, with amendments, the requirement currently codified at existing N.J.A.C. 7:7A-15.22(b) that the Council will only approve a land donation if the amount of land donated is sufficient to ensure that the functions and values provided by the donated land will fully compensate for the loss of functions and values caused by the disturbance.

Proposed N.J.A.C. 7:7A-11.15(c) continues existing N.J.A.C. 7:7A-15.22(c). This subsection establishes that, in cases where the proposed parcel to be donated is also being donated or otherwise restricted in order to satisfy requirements of another government agency,

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the Council will not approve the donation, unless the applicant also enhances or restores wetlands on the parcel.

Proposed new N.J.A.C. 7:7A-11.15(d) sets forth the criteria the Council will use to evaluate the proposed land donation's potential to be a valuable component of a wetland or surface water ecosystem. These criteria are continued from existing N.J.A.C. 7:7A-15.22(d) with minor changes in text that do not affect meaning.

Existing N.J.A.C. 7:7A-15.19(b) is recodified with amendments and consolidated with existing N.J.A.C. 7:7A-15.19(c) as proposed N.J.A.C. 7:7A-11.15(e). This recodified subsection sets forth the criteria the Department will use to declare mitigation through a land donation successful. The contents of existing N.J.A.C. 7:7A-15.19(b) and (c) are not substantively changed. The applicant must demonstrate that: the Council has approved the donation and that the donation has been completed in accordance with the Council resolution approving the contribution; the land donation has been transferred to a government agency or a Department approved charitable conservancy and the transfer has been recorded with each county in which the preserved land is located; the mitigator has provided the governmental agency or charitable conservancy with a maintenance fund; and that a conservation restriction has been recorded.

The Department is proposing to change the requirements for mitigation via land donation to be deemed successful. A mitigation project is only complete when transfer, funding, and filing of the conservation restriction have occurred, ensuring that the mitigation project will continue to provide the designed functions and benefits in perpetuity. Accordingly, rather than deem a project a success prior to assurance of the long-term protection of the mitigation, the Department is requiring that the actions currently addressed in subsection (c) are completed prior

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to the Department declaring the project to be a success. Therefore, the requirement at existing N.J.A.C. 7:7A-15.19(c) that these actions take place within 60 days of the Department declaring mitigation through land donation successful is proposed to be deleted.

Requirements for a monetary contribution to the Department's in-lieu fee program (N.J.A.C. 7:7A-11.16)

Existing N.J.A.C. 7:7A-15.18, Requirements that apply after the Department approves mitigation through a monetary contribution, is recodified with substantial amendments as N.J.A.C. 7:7A-11.16, Requirements for a monetary contribution to the Department's in-lieu fee program. Amendments are proposed to reflect the establishment of the in-lieu fee program through the State of New Jersey In-Lieu Fee Mitigation Program Instrument made and entered into by and among the Department, the USEPA, and the Wetlands Mitigation Council. The ILF Program replaces the existing procedures for accepting monetary contributions as a mitigation alternative. Additionally, content from existing N.J.A.C. 7:7A-15.21, Council review of a proposed monetary contribution, is incorporated as noted below.

As set forth at proposed new N.J.A.C. 7:7A-11.16(b), the mitigator must first obtain Department authorization to use monetary contribution as the mitigation alternative. After the Department has determined that monetary contribution is the appropriate alternative, the mitigator must obtain approval from the Council for the amount of the monetary contribution (for an individual permit) or calculate the amount of the monetary contribution in accordance with proposed N.J.A.C. 7:7A-11.16(e).

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Proposed new N.J.A.C. 7:7A-11.16(c) establishes that the Council will approve the amount of a monetary contribution for an individual permit only if the contribution is equal to the lesser of: the cost of buying, enhancing, and/or restoring existing degraded freshwater wetlands and/or State open waters, resulting in an area that will provide equal functions and values to the land disturbed under the permit; or the cost of buying uplands and creating freshwater wetlands and/or State open waters, resulting in an area that will provide equal functions and values to the land disturbed. This procedure is continued from existing N.J.A.C. 7:7A-15.21(b).

Existing N.J.A.C. 7:7A-15.21(c) is continued at proposed new N.J.A.C. 7:7A-11.16(d) with the only change in text being a change in the reference to the codification of the factors used to determine the amount of the monetary contribution in the proposed section. The Council will consider cost estimates submitted by the applicant and the Department, information obtained from experts in the field of mitigation, and any other information available to the Council in determining the costs discussed in the previous subsection.

Proposed N.J.A.C. 7:7A-11.16(e) incorporates and updates existing N.J.A.C. 7:7A-15.21(d). This subsection sets forth the analysis used to determine the amount of a monetary contribution when mitigating for general permit impacts. For single family property owners, the amount of monetary contribution is the acreage of wetlands/State open water impacts multiplied by \$42,300, adjusted periodically using the Consumer Price Index for Urban Consumers published by the U.S. Department of Labor. This is the same procedure in the existing rules, with the dollar amount adjusted using the CPI for 2016. For property owners that are not single family property owners, the monetary contribution is the acreage of wetlands/State open water impacts

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multiplied by \$334,000 adjusted periodically using the CPI as detailed above. This calculation is similar to the existing rules with the dollar amount adjusted using the CPI for 2015. However, the Department is proposing to delete the requirement that the amount of the monetary contribution be adjusted annually. Instead, the Department is proposing to update the codified monetary contribution amount when the Consumer Price Index adjustment either solely or cumulatively since the last adjustment results in a change of \$500.00 or more above the currently codified amount. This change is proposed to achieve greater administrative efficiency. For example, if application of the consumer price index for 2018 were to increase the codified monetary contribution amount by \$420.00, the Department would not make an adjustment. If application of the 2019 consumer price index results in a further increase of \$80.00 or more, because the total increase would be \$500.00 or more cumulatively for 2018 and 2019, the Department would adjust the monetary contribution amount through the publication of a notice of administrative change in the New Jersey Register.

Existing N.J.A.C. 7:7A-15.21(e) is relocated as N.J.A.C. 7:7A-11.16(f) with no substantive changes. This subsection establishes that, when the Department determines to adjust the amount of a monetary contribution using the CPI, the Department will publish a notice of administrative change in the New Jersey Register to announce the adjustment and the amount of the adjusted contribution.

Existing N.J.A.C. 7:7A-15.18(a), which provides cross-references to the procedures a mitigator must follow after monetary contribution is determined to be the appropriate alternative, is proposed to be deleted, as the procedures for calculating monetary contribution amounts are proposed to be incorporated into proposed N.J.A.C. 7:7A-11.16. Existing N.J.A.C. 7:7A-

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15.18(b) is recodified as proposed N.J.A.C. 7:7A-11.16(g). This subsection defines how the Department will determine if mitigation through a monetary contribution to the ILF Program is successful. The existing subsection is amended to reference the ILF Program and to require documentation from the ILF Program administrator that the monetary contribution has been received in full.

Financial assurance for mitigation projects; general provisions (N.J.A.C. 7:7A-11.17)

Existing N.J.A.C. 7:7A-15.13, Financial assurance for a proposal to restore, create, or enhance wetlands, is recodified with amendments as N.J.A.C. 7:7A-11.17, Financial assurance for mitigation projects; general provisions. The financial assurance requirements for creation, restoration, and enhancement projects are in general expanded and several options for financial assurance are added. This section is consistent with the CZM and FHACA Rules for financial assurance for mitigation projects.

Existing N.J.A.C. 7:7A-15.13(a), which establishes that the Department will approve a proposal for restoration, creation, or enhancement only if a letter of credit or other financial assurance is provided unless the mitigator is a government agency, is deleted and replaced with proposed new N.J.A.C. 7:7A-11.17(a). The proposed subsection requires financial assurance in accordance with this section for mitigation projects involving restoration, creation, or enhancement activities, except for mitigation or mitigation bank proposals submitted by government agencies and other entities that are exempt from the requirement to provide financial assurance under Federal law. This proposed subsection clarifies the existing provision and ensures it is compliant with Federal law.

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The contents of existing N.J.A.C. 7:7A-15.13(b), which requires financial assurance to be obtained from a firm licensed to provide such services in New Jersey, is proposed to be deleted and replaced. Requirements about the firms from which financial assurance may be obtained are instead incorporated into the provisions specific to each financial assurance instrument proposed at N.J.A.C. 7:7A-11.18 through 11.21, summarized below. Proposed new N.J.A.C. 7:7A-11.17(b) identifies the person responsible for establishing and maintaining financial assurance. For mitigation required pursuant to a permit, this person is the permittee or the mitigation bank sponsor of a mitigation project or bank. For mitigation required as part of a penalty for a violation, this person is the person designated to provide mitigation in the enforcement document.

Under proposed new N.J.A.C. 7:7A-11.17(c), the appropriate person responsible must establish and maintain financial assurance in the amount specified at recodified N.J.A.C. 7:7A-11.17(f) until the Department determines that the mitigation site or mitigation bank is fully compliant with all applicable conditions and requirements and a successful project ensuring the functions and values of the disturbed area are replaced is in place.

Proposed new N.J.A.C. 7:7A-11.17(d) identifies the various financial assurance instruments that may be used by the person responsible for providing financial assurance. Templates for each type of financial assurance are available from the Department. Forms of financial assurance acceptable are: a fully funded trust fund; a line of credit; a letter of credit; a surety bond; and other forms of financial assurance, other than self-insurance or self-guarantee, as determined by the Department to meet the requirements of this section. The specific requirements for each type of financial assurance are proposed at N.J.A.C. 7:7A-11.18, 19, 20,

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and 21, as discussed below. Proposed new N.J.A.C. 7:7A-11.17(e) requires financial assurance to be provided at least 30 calendar days prior to undertaking mitigation activities to ensure that the Department has sufficient time to review the submitted financial assurance and confirm it complies with all requirements prior to any actual mitigation related disturbance, should it be necessary for the financial assurance to be amended or replaced.

Existing N.J.A.C. 7:7A-15.13(c) is proposed to be recodified with amendments as N.J.A.C. 7:7A-11.17(f). The proposed subsection establishes that the amount of financial assurance will be based on an itemized estimate provided by an independent contractor and must include construction costs equal to 115 percent of the estimated cost of completing the creation, restoration, or enhancement; and maintenance costs equal to 115 percent of the estimated cost of monitoring and maintaining the site, including the cost to replant the mitigation area. These provisions are similar to the existing provisions but are simplified and clarified for ease of use.

Existing N.J.A.C. 7:7A-15.13(d) is recodified as N.J.A.C. 7:7A-11.17(g). Amendments are proposed to clarify that the Department is responsible for adjusting the amount of financial assurance, if necessary, to reflect current economic factors. Existing N.J.A.C. 7:7A-15.13(e) is recodified as N.J.A.C. 7:7A-11.17(h) and amended to clarify that the Department will require additional financial assurance if additional construction and/or monitoring is required for the purpose of ensuring success of the mitigation project. Existing N.J.A.C. 7:7A-15.13(f) is proposed to be recodified as N.J.A.C. 7:7A-11.17(i) with clarifying amendments. Existing N.J.A.C. 7:7A-15.13(g) is recodified as N.J.A.C. 7:7A-11.17(j) with clarifying amendments and grammatical corrections that do not change meaning.

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Proposed new N.J.A.C. 7:7A-11.17(k) establishes the procedures applicable when a person responsible for conducting mitigation and providing financial assurance has failed to perform a mitigation project or bank as required. In this circumstance, the Department will provide written notice of its determination that the responsible party has failed to perform mitigation as required and require that the mitigation project or bank be brought into conformance with the permit, mitigation banking instrument, enforcement document, or settlement agreement within 30 calendar days of receipt of the notice from the Department, unless the timeframe is extended in writing by the Department. Under proposed new N.J.A.C. 7:7A-11.17(l), after the 30-day timeframe for bringing the mitigation project or bank into conformance has passed, the Department may perform the mitigation project or bank by drawing on the funds available in the financial assurance.

Requirements that apply after the Department approves credit purchase or uplands preservation

(N.J.A.C. 7:7A-15.17)

Existing N.J.A.C. 7:7A-15.17, Requirements that apply after the Department approves credit purchase or uplands preservation, is proposed for repeal. Its contents are included elsewhere in this subchapter as discussed above.

Financial assurance; fully funded trust fund requirements (N.J.A.C. 7:7A-11.18)

This proposed new section sets forth the requirements for using a fully funded trust fund as financial assurance required under this subchapter. This section is consistent with N.J.A.C. 7:26C-5.5 in the Administrative Requirements for the Remediation of Contaminated Sites and

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with the financial assurance provisions in the CZM and FHACA Rules. Proposed N.J.A.C. 7:7A-11.18(a) requires submission of the original fully funded trust fund agreement to the Department. The trust fund must be executed by an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a New Jersey or Federal agency. The trust fund agreement is required to include any applicable Department file number and information concerning the location of the mitigation site, specify that the fully funded trust fund cannot be revoked or terminated without the prior written approval of the Department, specify that the trustee may only disburse funds with the Department's written approval, specify that funds shall be utilized solely for the purposes of conducting the mitigation project or mitigation bank as approved by the Department, specify that the Department may access the fully funded trust fund to pay for the cost of the mitigation project or bank, and identify the Department as the sole beneficiary of the fully funded trust fund.

Proposed N.J.A.C. 7:7A-11.18(b) requires the submission of a written statement from the trustee of the trust fund confirming that the value of the trust matches the amount that the Department has approved and confirming that the trust will continue for the next consecutive 12-month period. This statement must be submitted to the Department on an annual basis, at least 30 calendar days prior to the anniversary date of when the mitigator was obligated to establish a financial assurance.

Financial assurance; line of credit requirements (N.J.A.C. 7:7A-11.19)

This new section sets forth the requirements for financial assurance in the form of a line of credit and is consistent with N.J.A.C. 7:26C-5.6 in the Administrative Requirements for the

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Remediation of Contaminated Sites and with the financial assurance provisions in the CZM and FHACA Rules.

N.J.A.C. 7:7A-11.19(a) requires submission of the original line of credit to the Department. A line of credit must be issued by an entity that is licensed by the New Jersey Department of Banking and Insurance to transact business in New Jersey, or by a Federally regulated bank; include any applicable Department file number and information concerning the location of the mitigation site; specify that the line of credit shall be issued for a period of one year and will be automatically extended for a period of at least one year; specify that, if the issuer of the line of credit decides not to extend the line of credit after its expiration, the issuer will notify both the Department and mitigator by certified mail of such decision at least 120 calendar days before the current expiration; specify that the lender shall disburse only those funds that the Department approves in writing; specify that the funds in the line of credit will be utilized solely for the purposes of conducting the mitigation project or bank; and specify that the Department may access the line of credit to pay for the cost of the mitigation project or bank. The automatic extension of the letter of credit ensures that, as the project is completed and monitoring commences, the financial assurance can continue to cover the project through the project monitoring period.

Lines of credit do not typically restrict the use of the funds. By requiring that the line of credit must specify that disbursement requires the Department's written approval and that the funds will be utilized solely for the purpose of conducting the mitigation project or bank, the rule ensures that the funds will be available, as necessary, solely for the approved mitigation project or bank.

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Similar to financial assurance provided by a fully funded trust fund, proposed N.J.A.C. 7:7A-11.19(b) requires the annual submission of a statement concerning the value of the line of credit and that the financial assurance will be in place for the next consecutive 12-month period.

Financial assurance; letter of credit requirements (N.J.A.C. 7:7A-11.20)

This new section sets forth the requirements for financial assurance in the form of a letter of credit and is consistent with N.J.A.C. 7:26C-5.7 in the Administrative Requirements for the Remediation of Contaminated Sites and with the financial assurance provisions in the CZM and FHACA Rules.

N.J.A.C. 7:7A-11.20(a) requires submission of the original letter of credit to the Department. A letter of credit must be issued by an entity that is licensed by the New Jersey Department of Banking and Insurance to transact business in New Jersey, or by a Federally regulated bank; include any applicable Department file number and information concerning the location of the mitigation site; specify that the letter of credit shall be issued for a period of one year and will be automatically extended for a period of at least one year; specify that if the issuer of the letter of credit decides not to extend the letter of credit after its expiration, the issuer will notify both the Department and mitigator by certified mail of such decision within 120 calendar days before the current expiration; and indicate that the Department may access the letter of credit to pay for the cost of the mitigation project or bank.

Financial assurance; surety bond requirements (N.J.A.C. 7:7A-11.21)

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Proposed new N.J.A.C. 7:7A-11.21 sets forth the requirements for financial assurance in the form of a surety bond and is consistent with the financial assurance provisions in the CZM and FHACA Rules. N.J.A.C. 7:7A-11.21(a) requires that the person responsible for posting the financial assurance complete and submit the surety bond. The surety bond must: be issued by an entity that is licensed by the New Jersey Department of Banking and Insurance to transact business in the State of New Jersey, or is listed as acceptable surety on Federal bonds in Circular 570 of the U.S. Department of the Treasury; include any applicable Department file number and information concerning the location of the mitigation site; indicate that if the issuer of the surety bond decides not to extend the surety bond after its expiration, the issuer will notify both the Department and mitigator by certified mail of such decision at least 120 calendar days before the current expiration (with the date of notification being the date of receipt by the Department as shown on the signed return receipt); and specify that the Department may access the surety bond to pay for the cost of the mitigation project or mitigation bank.

Wetlands Mitigation Council (N.J.A.C. 7:7A-11.22)

Existing N.J.A.C. 7:7A-15.20 is proposed to be recodified as N.J.A.C. 7:7A-11.22 with amendments to incorporate provisions relating to the ILF Program. Existing N.J.A.C. 7:7A-15.20(a)3 through 7 are proposed to be deleted and replaced with proposed N.J.A.C. 7:7A-11.22(a)3, which addresses management of the ILF Program in accordance with the ILF Instrument as one of the Council's duties and functions.

As the ILF Program Administrator, the Council has several responsibilities to manage the Department's ILF Program in accordance with the ILF Instrument and proposed N.J.A.C.

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7:7A-11.23 and 11.24. As stated in proposed N.J.A.C. 7:7A-11.22(a)3, the Council is responsible for: accepting approved monetary contributions to the Wetlands Mitigation Fund; disbursing funds from the Wetlands Mitigation Fund to finance purchase of land to conduct mitigation or preserve wetlands, transition areas, uplands, and/or State open waters, enhancing or restoring wetlands on public lands, and conducting research to monitor the success of mitigation as part of a Council-funded and approved creation, restoration, or enhancement project. As part of monitoring the success of a Council-funded and approved mitigation project, the Council may request proposals for ILF grant applications; review grant applications and manage grant contracts; and establish and maintain Accounting Reports for the ILF Program.

Existing N.J.A.C. 7:7A-15.20(a)4 identifies as a Council duty/function the ability to contract with a charitable conservancy or appropriate agency to carry out its responsibilities. This Council function is continued at proposed new N.J.A.C. 7:7A-11.22(c) with further identification of the types of entities the Council may contract with. The proposed new subsection also makes clear that any such contract is subject to review and approval by the USEPA.

Existing N.J.A.C. 7:7A-15.20(b), which requires the Council to execute and record a conservation restriction, easement, or other legally binding document prior to a transfer of funds or lands, is proposed to be continued with minor amendments for consistency and to refer to new proposed Subchapter 12 for conservation restriction requirements.

The Department is proposing to add new N.J.A.C. 7:7A-11.22(d) to direct readers to proposed N.J.A.C. 7:7A-11.24 for ILF granting procedures. Existing N.J.A.C. 7:7A-15.20(d), which states that the Wetlands Mitigation Fund will not be used to aid a permittee or violator in

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locating a mitigation area required as a condition of a permit, or required in order to resolve a violation, is proposed for deletion. The activities that can receive funding from the Council are set forth at proposed N.J.A.C 7:7A-11.23 and 11.24.

Existing N.J.A.C. 7:7A-15.21, 15.22, and 15.24, which describe Council review procedures for monetary contributions and land donations, are proposed to be repealed with contents incorporated into the proposed sections that set forth the requirements for monetary contributions to the ILF Program and for land donation at proposed N.J.A.C. 7:7A-11.15 and 11.16, as discussed above.

New Jersey In-Lieu Fee Mitigation Program (N.J.A.C. 7:7A-11.23)

This proposed new section establishes the New Jersey ILF Program. The provisions of this section summarize the duties, obligations, and procedures set forth in the ILF Instrument. As discussed above in the introduction to the mitigation portion of this Summary, the ILF Program was developed at the request of the USEPA and provides those responsible for mitigation under this chapter with an additional option to fulfill their obligation through a monetary contribution to the ILF Program. These monies will be distributed by the Wetlands Mitigation Council (Council) to fund mitigation activities. The Wetlands Mitigation Council was chosen to administer the ILF fund taking into account the Council's many years of successful management of the current mitigation option provided under the existing rules of mitigation through a monetary contribution. Working with charitable conservancies and other entities, the Council has been able in many cases to leverage monetary contributions with the resulting mitigation projects producing improvements to wetland functions and benefits far in

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excess of those necessary to compensate for the disturbance the monetary contribution offset. Mechanisms utilized that have resulted in this success vary. Some of these successes have been achieved through economies resulting from the partnering conservancy entity's ownership of the land on which mitigation projects are conducted, eliminating acquisition costs, while in other cases additional benefits have been attained by combining contributions from many small disturbances into a larger mitigation project, which has a far greater return than would numerous small individual projects that would otherwise occur.

The agreement entered into by and among the Department, the USEPA, and the Wetlands Mitigation Council to establish this new option is memorialized in the ILF Program Instrument. The ILF Program Instrument sets forth guidelines and responsibilities for the establishment, use, operation, protection, monitoring, and maintenance of the ILF Program to ensure that the program produces compensatory mitigation credits necessary to compensate for unavoidable impacts to waters of the United States and waters of the State, including wetlands, that result from authorized activities. Compensation for these unavoidable impacts is achieved by creating, restoring, enhancing, and preserving in perpetuity both freshwater and coastal wetlands habitats throughout New Jersey within the ILF Program service area. The ILF Program Instrument is intended to ensure New Jersey's Wetland Mitigation Fund complies with the EPA's 2008 regulations governing ILF programs (40 CFR 230.98). Proposed N.J.A.C. 7:7A-11.23(a), (b), and (c) introduce the ILF Program, explain its purposes, and identify the contents and significance of the ILF Program Instrument.

Federal regulations guide what is included in the ILF Program Instrument and what is, therefore, reflected in the proposed rule. Consistent with the allowance of administrative fees

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under 33 CFR 332.8(i), proposed N.J.A.C. 7:7A-11.23(d) provides that the Council will receive 10 percent of each monetary contribution when contributions are deposited into the ILF Program account as an administrative fee. This administrative fee will be used for reasonable overhead and related costs of administering the ILF Program.

As part of its charge under the ILF Program, the Council will sell credits to satisfy compensatory mitigation requirements only if all of the terms of the ILF Instrument are satisfied. As established by proposed N.J.A.C. 7:7A-11.23(e), the Council will disburse mitigation fund dollars for ILF projects within primary and secondary service areas of the State. The primary service area will be the service area where the impact occurs and which the monetary contribution is collected, and is the preferred location for mitigation to occur. The secondary service area will be the adjacent water region where the impact may be mitigated for if, after three years, there are no credits available within the primary service area. When a monetary contribution has been collected and cannot be assigned to an approved project within the primary service area after three years, the Program Administrator shall utilize a secondary service area in order to provide compensation. These service areas are defined in the ILF Program Instrument, which may be reviewed on the Department's website at http://www.nj.gov/dep/landuse/download/mit_040.pdf.

Under proposed N.J.A.C. 7:7A-11.23(f), the Council is authorized to sell credits to provide mitigation for impacts authorized by the Department if the Council collects monetary contributions in accordance with the ILF Instrument. The credits sold by the Council represent mitigation credits to offset impacts from the disturbance proposed to be created by the person purchasing the credit/making the contribution. As indicated above, the Council has been administering mitigation projects for many years with great success, many times shepherding mitigation projects that end up producing wetland functions and benefits far in excess of the

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disturbances the project was designed to compensate for. These successes have resulted in the Council amassing credits in many regions of the State that may be immediately sold to satisfy mitigation requirements for a proposed current project. The ILF Program Instrument approved by the USEPA recognizes and quantifies the excess credits accumulated as a result of these past mitigation projects. For example, the ILF Instrument states that the Raritan region has 14.639 credits of mitigation completed. As recognized by the ILF Instrument, the Council has more than mitigated for the impacts in that region. Therefore, if the Council takes in money in the Raritan region, they are not required to immediately spend it because the Council has previously funded projects that generated the credits to which the current monetary contribution was assigned to. However, should the Council sell credits resulting in a remaining balance of 10 credits, which is the minimum balance that must be maintained in accordance with N.J.A.C. 7:7A-11.23(g), summarized below, the Council would need to fund completion of additional mitigation projects in its service area before any further credits could be sold.

Under proposed N.J.A.C. 7:7A-11.23(f)2, if a project funded by the Council fails to be successfully completed, and the Council fails to timely fund an alternative mitigation project to offset the functions and benefits there were anticipated to be achieved by the original mitigation project, the Council must deduct the amount of credits that had been anticipated to be achieved by the failed project from its pool of mitigation credits available for sale.

As set forth by proposed N.J.A.C. 7:7A-11.23(g), the Department will consider the Council a feasible mitigation alternative if the Council maintains a minimum balance of 10 credits and if the Department is satisfied the Council is accurately accounting for its mitigation obligations.

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Under proposed N.J.A.C. 7:7A-11.23(h), if the Council does not perform in accordance with the ILF Program Instrument or this subchapter, the Department will reevaluate whether the ILF Program with the Council continuing to act as administrator is a feasible mitigation alternative. Under proposed N.J.A.C. 7:7A-11.23(i), if the Department determines that the Council is no longer an appropriate administrator of the ILF Program, the Department will ensure that all outstanding wetland mitigation obligations are met in accordance with this subchapter.

New Jersey In-Lieu Fee Mitigation Program grant funding procedures (N.J.A.C. 7:7A-11.24)

This new section sets forth the grant funding procedures of the ILF Program. As required at proposed N.J.A.C. 7:7A-11.24(a), the Council, as Program Administrator, will publish on the Department's website a request for grant proposals for water regions in which funding is available through the Wetland Mitigation Fund in accordance with the ILF Instrument. In response to the request for proposals, interested applicants must submit a conceptual ILF grant proposal in order to be eligible for funding as set forth at proposed N.J.A.C. 7:7A-11.24(b). A conceptual proposal must be prepared in accordance with the ILF Instrument and identify the location of the project, identify the amount of wetlands to be preserved, enhanced, created, or restored; identify the amount of money requested for the project; include a detailed explanation of the proposed budget; identify the amount of proposed credits to be generated; and include a summary of the proposal.

Under proposed N.J.A.C. 7:7A-11.24(c), if the Council determines that a conceptual proposal is eligible to be submitted as a full proposal, the full proposal must be submitted within

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90 days after conceptual approval. The full proposal must include all of the information required in the appropriate restoration, creation, and/or enhancement mitigation proposal checklist as applicable to the proposed project. The full proposal must also include the following, prepared in accordance with the ILF Program Instrument: a cover page; a scope of work; a project implementation schedule; detailed budget narratives justifying all proposed expenses; and an appendix that includes any prior permits or LOIs issued for the property, visual materials concerning the project, a map of known contaminated sites, and a landscape map for the project area. This information is necessary to allow the Council to evaluate the proposed project and make a decision whether to enter into a grant contract with the applicant.

Proposed N.J.A.C. 7:7A-11.24(d) requires that, prior to the Council and the grantee entering into a contract, the Council must send the approved proposal to the USEPA for review and consultation. The USEPA will have 15 business days to review the proposed project. The USEPA may or may not provide comments on the project. If no response from USEPA is received by the Council, the Council will assume the USEPA has no objections and will proceed with the contracting process. The grantee must address any comments or concerns raised by the USEPA should any be received by the Council.

Following the initial approval and USEPA comment process, the Council and the grantee will sign a project contract agreement. Under proposed N.J.A.C. 7:7A-11.24(e), each project must have such a contract. The grantee and the Council will be held to the terms and conditions of the project contract agreement.

As required at proposed N.J.A.C. 7:7A-11.24(f), if the grantee fails to perform in accordance with the approved proposal, contract, or permit issued to authorize activities related

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to the approved project, the Council can take the steps necessary to terminate the contract. Any unused money will be returned to the Wetland Mitigation Fund to be allocated to another wetland mitigation project.

Mitigation banks (N.J.A.C. 7:7A-11.25)

Existing N.J.A.C. 7:7A-15.23 is recodified with amendments as proposed N.J.A.C. 7:7A-11.25. This section sets forth general requirements for mitigation banks, including a credit release schedule.

At recodified N.J.A.C. 7:7A-11.25(b), the Department is proposing to amend the existing text to refer to the “establishment” of a mitigation bank, rather than the “creation” of a bank to more accurately reflect the process of beginning a mitigation banking operation. This makes it clear that a bank is “established” and wetlands are “created.” Additionally, the Department is proposing to require the bank operator to obtain all necessary approvals from the Department prior to undertaking regulated activities required to establish the mitigation bank. This requirement replaces the requirement to obtain a freshwater wetlands permit, open water fill permit, and/or transition area waiver. The Department is proposing this change because mitigation banks may require other approvals not limited to approvals under this chapter; for example, if the mitigation bank is to be established in a flood hazard area, an approval under N.J.A.C. 7:13 may be required.

The Department is proposing to amend recodified N.J.A.C. 7:7A-11.25(c). In addition to the bank operator being required to carry out all requirements of the banking instrument approving the bank regardless of whether or when credits are sold, this subsection is proposed to

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establish that construction of the approved bank must begin no later than one year after the date of the first credit transaction. Within one year of the date of the first credit transaction, the mitigation bank operator must begin construction of the wetland creation, enhancement, and restoration components of the approved mitigation bank. This provision ensures that mitigation banks approved under this subchapter are consistent with the Federal Mitigation Rule. In addition, this provision ensures that a mitigation bank operator that also has a preservation component to the bank does not receive and sell all the preservation credits and then abandon the bank without completing the creation, restoration, and/or enhancement components of the bank.

The Department is proposing to amend recodified N.J.A.C. 7:7A-11.25(d) to establish that the Department will determine how many mitigation credits each bank operator may receive or sell, not just how many credits the operator may sell. This amendment more appropriately covers the operations of a mitigation bank, as a mitigation bank operator will receive credits in accordance with the credit release schedule. Credit releases are based on mitigation bank performance. Additional clarifying and editorial amendments are proposed at N.J.A.C. 7:7A-11.25(d) that do not affect meaning. Recodified N.J.A.C. 7:7A-11.25(d)5 is proposed for amendment to state that the potential for the completed site to be a valuable component of the ecosystem in general, rather than just the aquatic ecosystem, will be considered in determining how many credits may be received or sold. The deletion of “aquatic” captures the consideration of both terrestrial and aquatic ecosystems in determining the appropriate number of credits for a bank.

Recodified N.J.A.C. 7:7A-11.25(e) explains that the banking instrument approved by the Department includes a schedule for the release of credits. The Department is proposing to allow

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credit release in years two and four, provided performance standards as set forth in the banking instrument have been met. The Department has determined this is appropriate since the FWPA Rules regulate unmapped tidal wetlands. Tidal wetlands mitigation projects are more predictable and occur at a faster rate and have a reduced risk of failure over freshwater wetlands projects.

While the credit release schedule will apply to both freshwater wetlands and tidal wetlands, the Department is proposing to maintain the existing indication that credit release will occur “up to” the percentage of credits indicated for accomplishment of the specified milestone making clear that the percentage release figure referenced for that milestone represents the maximum number of credits the Department may release; it is not guaranteed that the maximum amount of credits allowable under the schedule will be released. For example, under proposed N.J.A.C. 7:7A-11.25(e)2, the Department may release up to 10 percent of the credits upon successful establishment of the approved hydrologic regime. Depending on the complexity of the mitigation project the Department may for ecological reasons approve the release of less than 10 percent of the total credits at this stage.

In order to incorporate a credit release for years two and four, the amount of credits released at other milestones has been modified. A mitigation banker can receive up to 10 percent of approved credits for completion of the signing of the banking instrument and compliance with all pre-release credit sale conditions. In addition, up to 10 percent of the credits can be released for each of the following: the successful establishment of approved hydrologic regime, completion of planting as required in the banking instrument, completion of year one performance standards, and completion of year two performance standards. Up to 15 percent of credits can be released upon completion each of year three and year four performance standards.

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For year five performance standards and release of credits, the Department is proposing to delete the “up to 25 percent” requirement. Since credits can be released over time and it is possible that not all credits will be released in their entirety, it is possible that more than 25 percent of the credits can remain at year five. Therefore, the standard has been revised to say that the remainder of credits will be released upon successfully achieving performance standards.

Proposed new N.J.A.C. 7:7A-11.25(f) establishes when preservation credits will be released. Preservation credits may be released in their entirety when the conditions set forth at recodified N.J.A.C. 7:7A-11.25(e)1 are met. All credits will be released upon completion of the following: signing of the banking instrument approving the bank; and compliance with all pre-release credit sale conditions in the banking instrument approving the bank, including securing all construction permits, posting adequate and effective financial assurance, and filing the conservation restriction. This is appropriate, since once all the pre-release credit sale conditions are completed, the preservation component of the mitigation bank has already achieved success and does not have to be monitored further. Therefore, there is no reason to withhold credit release based on success criteria. Recodified N.J.A.C. 7:7A-11.25(g) is proposed with minor amendments to reflect the updated definition of “conservation restriction” and the establishment of proposed N.J.A.C. 7:7A-12.

Recodified N.J.A.C. 7:7A-11.25(h) is proposed with a minor amendment to establish that the bank operator must submit monitoring more frequently (instead of “more often”) if required to do so by the banking instrument. Recodified N.J.A.C. 7:7A-11.25(i) is proposed to be amended for clarity without changing the meaning of the existing subsection. The Department is proposing to clarify that the provision applies specifically to a mitigation bank, and to replace

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references to “remedial” action that may be required to ensure successful completion of the bank with reference instead to “corrective” action to avoid confusion with site remediation activities.

At recodified N.J.A.C. 7:7A-11.25(j), the Department is proposing to slightly reorganize this subsection, so that it presents a list of requirements that must be met by the bank operator for the Department to determine the mitigation bank is successful. At N.J.A.C. 7:7A-11.25(j)1, the Department is proposing amendments to require the bank operator to demonstrate that the bank is successful as set forth within the applicable banking instrument and permit, rather than by the proposed to be deleted criteria for successful restoration, creation, or enhancement, or for successful upland preservation. The mitigation banking instrument will include more relevant and specific measures of success for each particular bank.

Recodified N.J.A.C. 7:7A-11.25(j)2 is proposed for amendment to specify that the mitigation bank site must be transferred in fee simple to a government agency or Department-approved charitable conservancy. Department approval is necessary to ensure that the mitigation area will remain protected under the ownership of the charitable conservancy.

Recodified N.J.A.C. 7:7A-11.25(j)3 is proposed for amendment to specify that the maintenance fund required to be provided to the government agency or charitable conservancy must be sufficient to support monitoring to ensure proper upkeep. Recodified N.J.A.C. 7:7A-11.25(i)4 is amended, consistent with the proposed definition of the term “conservation restriction,” to eliminate reference to easements as easements are included within the definition of “conservation restriction.”

Existing N.J.A.C. 7:7A-15.23(j) is proposed for deletion. This subsection establishes that a banking instrument is valid for five years with a single five-year extension. The duration of

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each banking instrument is set forth in the instrument itself and is based on when the bank is successful in accordance with proposed N.J.A.C. 7:7A-11.25(h). In addition, the banking instrument does not authorize the construction of a wetland mitigation bank. This authorization is in the form of the appropriate permit, which has its own expiration date. All permits issued for a mitigation bank will be subject to the requirements of this chapter. This is reflected in the FHACA Rules, which makes the deletion of this subsection appropriate to establish consistency between riparian zone mitigation procedures and freshwater wetlands mitigation procedures.

Recodified N.J.A.C. 7:7A-11.25(k) is amended to reflect the deletion of the five-year duration of a mitigation banking instrument. Under this proposed subsection, if the Department determines that the bank operator is in default of any provision of the mitigation instrument, the Department will determine if the amount of mitigation completed at the bank site is commensurate with the number of credits already sold. Further adjustments are proposed to simplify and clarify the remaining language in the subsection. If the Department determines that the amount of mitigation completed is less than the number of credits already sold, the Department may assert its rights to the financial assurance provided.

Application for a mitigation bank (N.J.A.C. 7:7A-11.26)

Existing N.J.A.C. 7:7A-15.25 is proposed to be recodified with amendments as N.J.A.C. 7:7A-11.26. The existing rule states that a prospective mitigation bank operator “shall” obtain conceptual review of a proposed mitigation bank before investing in buying land or preparing a proposal. While the Department encourages prospective mitigation bank operators to seek conceptual review, the Department is proposing to make conceptual review of a mitigation bank

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optional. Several amendments to the language in this section are proposed to make the optional nature of a conceptual review clear. The Department is also proposing to emphasize that guidance provided through a conceptual review is not binding on the Department and cannot be relied upon by the applicant in purchasing a proposed mitigation area. A conceptual review does not grant any property or other rights or in any way imply that the Department has authorized, or will authorize, any mitigation activities at the proposed mitigation area or issue any other approval. The provision establishing the duration of a conceptual review is proposed for deletion because obtaining a conceptual review is optional and non-binding.

A portion of existing N.J.A.C. 7:7A-15.25(a) is proposed to be recodified as N.J.A.C. 7:7A-11.26(b) to enhance organization. This proposed newly codified subsection establishes the information that must be submitted to obtain a conceptual review of a proposed mitigation bank. At proposed N.J.A.C. 7:7A-11.26(b)2, the Department is proposing to amend existing N.J.A.C. 7:7A-15.25(a)2 to delete the reference to the Department's Division of Remediation Management and Response and simply refer to N.J.A.C. 7:7A-11.4(h) to ensure consistency and provide applicants with accurate information. Several other amendments to language are proposed for clarity and consistency with the rest of this chapter without changing meaning.

Existing N.J.A.C. 7:7A-15.25(b), which establishes the criteria for Department approval of a mitigation bank, is recodified with amendments as N.J.A.C. 7:7A-11.26(c). The Department is proposing to reference the wetlands mitigation bank proposal checklist to avoid confusion with other application checklists. The Department is proposing to require the subsequently listed information to be included within a draft mitigation banking instrument, which must be submitted with the application for a mitigation bank. The Federal rule requires a "prospectus"

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before the approval of a mitigation bank. This draft banking instrument serves as that prospectus and, thus, satisfies Federal requirements.

The Department is proposing to delete existing N.J.A.C. 7:7A-15.25(b)2, which requires the submittal of all past correspondence between the mitigation bank operator and the Department as part of an application for a mitigation bank. These materials are not necessary because the Department keeps records of such pertinent correspondence as part of its recordkeeping requirements.

Existing N.J.A.C. 7:7A-15.25(b)3 is proposed to be recodified as N.J.A.C. 7:7A-11.26(c)2 with amendments. The Department is proposing to remove the language that states the functional assessment of the bank site must include a discussion of how the proposed bank will interact with regional wetland and aquatic resources. The statement is unnecessary and may mislead applicants into thinking that the functional assessment can only include such a discussion and result in applicants not including other relevant information.

Existing N.J.A.C. 7:7A-15.25(b)4i and ii is proposed to be recodified as N.J.A.C. 7:7A-11.26(c)3 and 4. These provisions require the applicant to include the goals and objectives of the bank and the ownership of the bank site within the draft banking instrument to be provided as part of an application for a mitigation bank.

Existing N.J.A.C. 7:7A-15.25(b)4iii and vi are proposed to be deleted with the concepts of these provisions combined into N.J.A.C. 7:7A-11.26(c)5. This proposed provision requires the prospective mitigation bank operator to include the size of the bank site and the type and amount of resources for which credits from the bank could serve as suitable compensation.

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Existing N.J.A.C. 7:7A-15.25(b)4iv, which requires the bank operator to submit a description of baseline conditions on the mitigation bank site, is recodified with amendments at N.J.A.C. 7:7A-11.26(c)6. The language is proposed to be simplified and made more general to fully encompass all possible factors that could affect the proposed mitigation bank, which could include things, such as the presence of historic or cultural resources or threatened or endangered species habitat.

The Department is proposing to add N.J.A.C. 7:7A-11.26(c)7 to provide a projected water budget for bank proposals that include creation, restoration, and/or enhancement of wetlands or waters. This is consistent with proposed N.J.A.C. 7:7A-11.6(i) and will allow the Department to determine if the proposed bank will maintain proper hydrology necessary to ensure the long-term sustainability of the proposed mitigation project.

The Department is proposing to delete existing N.J.A.C. 7:7A-15.25(b)4v, which describes the service area requirements for a mitigation bank. Proposed N.J.A.C. 7:7A-11.26(c)8 replaces this existing provision to require the bank service area to give priority to mitigation for impacts in the same watershed management area as the proposed bank rather than the same HUC 11. This change is consistent with other changes in this chapter as described earlier in this summary.

Existing N.J.A.C. 7:7A-15.25(b)4vii, viii, ix, and xi are proposed to be recodified as N.J.A.C. 7:7A-11.26(c)9, 10, 11, and 13, respectively, with no substantive changes. Existing N.J.A.C. 7:7A-15.25(b)4x is proposed to be recodified as N.J.A.C. 7:7A-11.26(c)12 and amended to identify that the Department will determine, based on performance standards provided under this paragraph, if and when the mitigation bank is successful, not the Council.

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Existing N.J.A.C. 7:7A-15.25(b)4xii is proposed to be recodified as N.J.A.C. 7:7-11.26(c)14 with amendments for clarity. “Remedial action” is proposed to be instead referred to as “corrective action,” consistent with previously discussed proposed amendments to avoid confusion with site remediation activities. Examples of such activities are deleted for brevity, and language is proposed to be added to specify that such actions would be taken by the bank operator in case the mitigation bank fails. Existing N.J.A.C. 7:7A-15.25(c)4xiii is proposed to be recodified as N.J.A.C. 7:7A-11.26(c)15 with no substantive changes.

The requirement for the mitigation bank operator to provide proposed compensation ratios at existing N.J.A.C. 7:7A-15.25(b)4xiv is proposed to be deleted. The number of credits will be determined in accordance with this subchapter. In addition, this information will now be submitted under proposed N.J.A.C. 7:7A-11.26(c)2, 3, 4, and 5.

The requirement to provide draft legal instruments necessary to meet the requirements of this chapter is continued from existing N.J.A.C. 7:7A-15.25(b)6 as 11.26(c)18 with amendments for clarity and to reflect the change in definition of “conservation restriction” discussed above.

Existing N.J.A.C. 7:7A-15.25(b)7, which requires the applicant to identify the people responsible for constructing, operating, and maintaining the mitigation bank, is recodified as N.J.A.C. 7:7A-11.26(c)19 with the phrase “debit and credit” removed to make this requirement more concise.

The Department is proposing a new requirement at N.J.A.C. 7:7A-11.26(c)20, which will require the applicant to provide documentation to the Department that public notice of the proposed mitigation was provided in accordance with proposed N.J.A.C. 7:7A-17. Similar to a

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mitigation site, public notice of an application for a mitigation bank must be provided and documented in accordance with N.J.A.C. 7:7A-17.

Existing N.J.A.C. 7:7A-15.25(c) directs applicants to submit applications for approval of a mitigation bank to the Department. The Department will review the application and can request additional information. At this point, the applicant will then submit five copies of the complete application to the Department. Proposed N.J.A.C. 7:7A-19 sets forth application review procedures, and proposed N.J.A.C. 7:7A-11.26(a) directs applicants to submit their application to the Department's address, so this subsection is deleted to avoid redundancy.

Existing N.J.A.C. 7:7A-15.25(d) is proposed to be recodified as N.J.A.C. 7:7A-11.26(d). The language is amended to clarify that the Department's approval referenced is approval of a mitigation bank. Further, because all mitigation requirements are proposed to be incorporated in proposed N.J.A.C. 7:7A-11, the subsection is updated to reflect that any conditions incorporated will ensure that the requirements of N.J.A.C. 7:7A-11 are met.

CONSERVATION RESTRICTIONS (N.J.A.C. 7:7A-12)

As discussed above, the Department is proposing to amend the conservation restriction requirements found at existing N.J.A.C. 7:7A-2.12, which is proposed for repeal, and relocate them to their own subchapter at N.J.A.C. 7:7A-12. Amendments are proposed to reduce redundancy throughout the chapter and align the conservation restriction requirements in the FWPA Rules with those in the CZM and FHACA Rules. Existing N.J.A.C. 7:7A-2.12(a), which establishes when a conservation restriction is required, is not continued in the new rule. This information is included throughout the chapter associated with the types of authorizations that

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require a conservation restriction to be recorded and would be redundant to include within this subchapter.

Conservation restriction form and recording requirements (N.J.A.C. 7:7A-12.1)

The form and recording requirements for conservation restrictions, as well as the required forms of proof that must be provided to the Department, are proposed at new N.J.A.C. 7:7A-12.1, Conservation restriction form and recording requirements. The existing requirements are replaced with this proposed section in order to achieve consistency between land use permitting programs. Some of the existing requirements are continued as discussed below.

Proposed N.J.A.C. 7:7A-12.1(a) modifies the content of existing N.J.A.C. 7:7A-2.12(e) and sets forth the form requirements for conservation restrictions. A conservation restriction required under N.J.A.C. 7:7A must conform to the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq., run with the land, and be binding in perpetuity. For mitigation areas, it must be binding upon the land owner and successors in interest to any interest in the land or any part of the land covered by the mitigation areas. For conservation restrictions that do not include a mitigation area, the conservation restriction must be binding on the land owner and successors in interest to any interest in the land or part of the land.

Conservation restrictions required under this chapter must also be recorded in accordance with the New Jersey Recording Act, N.J.S.A. 46:15-1.1 et seq., in the chain of title for all properties affected by the restriction. This recording requirement is consistent with the New Jersey Supreme Court case *Island Venture Associates v. NJDEP*, 179 N.J. 485 (2004), and is

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necessary to ensure that the restrictions provide notice to perspective purchasers and are enforceable against successors in title.

As currently required at existing N.J.A.C. 7:7A-2.12(b), proposed N.J.A.C. 7:7A-12.1(a)3 requires the conservation restriction to be in the form and include terms specified by the Department. The applicant cannot alter the form (available on the Department's website), except in consultation with the Department and only when the Department agrees that an alteration is necessary to address site-specific conditions. By continuing this provision, the Department ensures predictability within the permitting process while using common sense by allowing case-by-case flexibility for unique sites.

The requirement currently codified at N.J.A.C. 7:7A-2.12(c)3 that requires a historic preservation restriction or easement to be recorded in cases deemed appropriate by the State Historic Preservation Office is continued with no change in text at proposed N.J.A.C. 7:7A-12.1(a)4.

Proposed N.J.A.C. 7:7A-12.1(b) sets forth the requirements for recording a conservation restriction. The conservation restriction must be recorded in the Office of the County Clerk or the registrar of deeds and mortgages of the county in which the regulated activity, project, or mitigation area is located. For a permit that authorizes the establishment of a mitigation bank, proof that the restriction was recorded must be provided prior to the release of any credits. For any other permit, proof must be provided prior to the start of any site disturbance or 90 calendar days after the issuance of the permit or approval of a mitigation plan, whichever is sooner.

As set forth by proposed N.J.A.C. 7:7A-12.1(c), proof of the recordation of the conservation restriction must be either a copy of the complete recorded document or a receipt

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from the clerk or other proof of recordation provided by the recording office. If the latter option is chosen, a copy of the complete recorded document must be provided to the Department within 180 days of the issuance of the permit or approval of the mitigation plan.

The conservation restriction must include a requirement that each owner of any interest in the land subject to the restriction notify the county and/or municipality of the conservation restriction whenever an application for a local approval involving the land subject to the conservation restriction is submitted and insert notice of the conservation restriction into any subsequent deed or other legal instrument by which the owner divests either the fee simple title or any interest in the land subject to the conservation restriction. This provision is continued from existing N.J.A.C. 7:7A-2.12(c)1 and 2 at proposed N.J.A.C. 7:7A-12.1(d).

Proposed N.J.A.C. 7:7A-12.1(e) establishes that any conservation restriction under this subchapter is enforceable by the Department. The Department may also direct that the restriction be made enforceable by a government agency or charitable conservancy whose trustees have no other ownership interest in the land.

Proposed N.J.A.C. 7:7A-12.1(f) addresses cases where the mitigation area for which the conservation restriction is required is donated land or a mitigation bank that requires the approval of the Wetland Mitigation Council. In such cases, the conservation restriction must be approved by both the Department and the Wetland Mitigation Council.

Property owners' reservation of rights (N.J.A.C. 7:7A-12.2)

Proposed N.J.A.C. 7:7A-12.2 reserves certain rights of the property owner to allow modification or removal of a conservation restriction in certain limited circumstances.

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Proposed N.J.A.C. 7:7A-12.2(a) continues the provisions of existing N.J.A.C. 7:7A-2.12(i) with modifications to improve clarity and prevent redundancy. Under this subsection, the property owner may request approval from the Department to undertake a *de minimis* modification of the area subject to the conservation restriction recorded under N.J.A.C. 7:7A-12. The Department will only approve the modification if it determines that the modification will result in an equivalent level of protection of the regulated resource or if the modification will result in an equivalent area of resource protection and will not compromise the original protected resource. Modifications will not be approved for conservation restrictions associated with a mitigation site. The modified conservation restriction must be recorded in accordance with the provisions at proposed N.J.A.C. 7:7A-12.1 summarized above.

Under proposed N.J.A.C. 7:7A-12.2(b), a property owner may reserve the right to abandon a project and seek approval from the Department to remove a conservation restriction at any time prior to the start of any site disturbance, provided the property owner or grantor informs the Department in writing that it is abandoning the project and requests that the Department void the permit. Upon Department confirmation that no site disturbance has occurred, the Department will provide the permittee or grantor an executed release of the conservation restriction, which the permittee or grantor may then record. The removal of the conservation restriction in this case will leave the site in the same condition as it was before the Department approved a regulated activity. Any new regulated activities will require a new approval from the Department with any need for mitigation to be determined based upon the activities proposed in that new application.

ENFORCEMENT (N.J.A.C. 7:7A-22)

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Existing N.J.A.C. 7:7A-16, Enforcement, is proposed to be recodified as N.J.A.C. 7:7A-22, with the amendments described below. As explained previously, the Department is proposing to align the enforcement provisions of the freshwater wetland permitting program with the coastal permitting and flood hazard area permitting programs to the extent the respective enabling statutes allow. In addition to reorganization to accomplish that goal and a corresponding update of cross-references included in the subchapter, the Department is proposing to remove references to the Freshwater Wetlands Protection Act and the New Jersey Water Pollution Control Act and instead reference the appropriate citations for the statutes throughout the subchapter. Similarly, the phrase “any applicable law and/or condition” is replaced with “any provision of N.J.S.A. 13:9B-1 et seq., or 58:10A-1 et seq., or any regulation, rule, permit, or order adopted or issued by the Department pursuant thereto.” No increase or decrease in penalties is proposed. Substantive changes to specific enforcement provisions are detailed below.

General provisions (N.J.A.C. 7:7A-22.1)

The remedies specified in proposed N.J.A.C. 7:7A-22.1(a)1 through 5 may be pursued separately or jointly to remedy a violation, and that pursuit of any of the remedies does not preclude the Department from seeking any other remedy. The list of remedies is proposed to be reorganized and clarified without changing meaning. To remedy a violation, the Department may issue an order requiring the person found in violation to comply, levy a civil administrative penalty, bring an action for a civil penalty, bring a civil action for injunctive and other relief, or petition the Attorney General to bring a criminal action. The pursuit of remedies for violations

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will be performed in accordance with the grace period provisions at proposed N.J.A.C. 7:7A-22.20.

Proposed new N.J.A.C. 7:7A-22.1(b) reflects the Department's statutory authority to enter and inspect any property to investigate any potential noncompliance with the law. Existing N.J.A.C. 7:7A-16.1(g), which requires a permit applicant or a permittee to provide, upon request, information to the Department in order to determine the applicant's or permittee's compliance with N.J.S.A. 13:9B-1 et seq., and 58:10A-1 et seq., or any rule or regulation adopted, or permit or order issued pursuant thereto, is relocated as proposed new N.J.A.C. 7:7A-22.1(c) with amendments that provide a more complete description of the sources of compliance requirements and the location of the related provisions within the subchapter. Under proposed N.J.A.C. 7:7A-22.1(d), a "permit" means an authorization under a general permit-by-certification, authorization under a general permit, individual permit, emergency authorization, letter of authorization, memorandum of agreement, or other written authorization, or other approval issued pursuant to the FWPA. Existing N.J.A.C. 7:7A-16.1(b), which establishes that the burden of proof and degrees of knowledge or intent required to establish a violation of the FWPA or any permit, order, rule, or regulation promulgated pursuant thereto, will be no greater than the burden of proof or degree of knowledge or intent which the USEPA must meet in establishing a violation of the Federal Act, or implementing regulations, is relocated as N.J.A.C. 7:7A-22.1(e) with minor amendments discussed above. Existing N.J.A.C. 7:7A-16.1(d), which establishes that each day during which a violation continues constitutes an additional, separate, and distinct violation for which a penalty may be assessed, and existing N.J.A.C. 7:7A-16.1(e), which establishes that each violation of any applicable law and/or condition constitutes an additional,

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separate, and distinct violation which may warrant a separate penalty, are relocated as proposed N.J.A.C. 7:7A-22.7(b) and (c) and 22.8(b) and (c), as discussed below.

Issuance of an administrative order (N.J.A.C. 7:7A-22.3)

Provisions for the issuance of an administrative order at existing N.J.A.C. 7:7A-16.3 are proposed to be recodified as N.J.A.C. 7:7A-22.3 with amendments.

The amended section provides that, if the Department finds that a person has violated any provision of N.J.S.A. 13:9B-1 et seq., or 58:10A-1 et seq., or any regulation, rule, permit, or order adopted or issued pursuant thereto, the Department may issue an order specifying the provision(s) that the person cited has violated, and ordering abatement of the violation. The order will give notice to the person of the right to a hearing on the matters contained in the order. The Department is proposing to incorporate into this section the time within which a hearing must be requested. Particularly, the proposed addition specifies that the person(s) to whom the order is issued has 35 calendar days from receipt of the order to request a hearing. If no hearing is requested, then the order will become final on the 36th calendar day after the person receives the order. However, a request for a hearing will not automatically stay the effect of the order and the potential for the Department to seek penalties for continuing non-compliance. While the person subject to the order for immediate compliance may request a stay, the Department will review any such request on a case-by-case basis, considering the potential environmental consequences of not requiring immediate action. Because of the broad range of violations that may be addressed through issuance of an administrative order and the corresponding broad range of

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potential impacts of continuing non-compliance, provision of a stay automatically in all cases would be inappropriate.

Assessment, settlement, and payment of a civil administrative penalty (N.J.A.C. 7:7A-22.5)

Provisions regarding the assessment, settlement, and payment of civil administrative penalties, currently codified at N.J.A.C. 7:7A-16.6, are proposed to be recodified with amendments at N.J.A.C. 7:7A-22.5. Throughout this section, the Department is proposing to replace “hearing” with “hearing request.” Consistent with existing N.J.A.C. 7:7A-16.6(a), in assessing a civil administrative penalty, the Department will notify the violator by certified mail or by personal service, citing the section of the statute, rule, administrative order, or permit violated, stating the facts constituting the violation, as well as the basis for the amount of the civil administrative penalty, and advising the violator of the right to request an adjudicatory hearing. To these existing requirements, the Department is proposing to include in the notice of civil administrative penalty assessment a cross-reference to the fact that interest may be incurred if payment of the assessed civil administrative penalty is not made in accordance with the timeframes specified in N.J.A.C. 7:7A-22.5(c).

Payment of the civil administrative penalty is due when the notice of civil administrative penalty becomes a final order. If a hearing on the penalty is not requested, payment is due when the notice of civil penalty assessment becomes a final order on the 36th calendar day following receipt of the notice by the violator. Where the Department denies a hearing request because all required information was not included, payment is due when the notice of civil administrative penalty becomes a final order upon receipt of notice of such denial. Finally, where the

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Department grants the hearing request, payment is due when the notice of civil administrative penalty assessment becomes a final order upon receipt by the violator of the final order in the contested case. In addition to the amount of civil administrative penalty, the violator must also pay interest on the amount of the penalty if the penalty is not timely paid when the civil administrative penalty order becomes final, or if the penalty is not timely paid in accordance with any penalty payment schedule entered into with the Department. This requirement reorganizes and clarifies existing N.J.A.C. 7:7A-16.6(c)

Procedures to request and conduct an adjudicatory hearing to contest an administrative order and/or notice of civil administrative penalty assessment (N.J.A.C. 7:7A-22.6)

Existing N.J.A.C. 7:7A-16.7 is proposed to be recodified as N.J.A.C. 7:7A-22.6 and modified for clarity and consistency with the CZM and FHACA Rules. A violator who seeks to challenge an administrative order and/or notice of civil administrative penalty assessment through an adjudicatory hearing must submit a hearing request within 35 calendar days after receipt of the administrative order and/or the notice of civil administrative penalty. The Department will deny a hearing request submitted after this time. Also, if all of the required information is not included in the hearing request, the Department may deny the request. This provision is continued from N.J.A.C. 7:7A-16.7(d) as 22.6(d) with no substantive changes.

Proposed N.J.A.C. 7:7A-22.6(b), which lists the specific information that must be included in a request for a hearing, is recodified from N.J.A.C. 7:7A-16.7(a), with amendments. A request for a hearing must include the violator's contact information and any authorized representative's contact information, including a daytime telephone number, fax number, and e-

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mail address. The violator must also include a copy of the administrative order and/or notice of a civil administrative penalty assessment being challenged and the date the order or notice was received by the violator, which is a new requirement. A specific admission or denial of each of the facts in the order or notice or a statement that the violator is without knowledge of such facts is required. This requirement is continued from N.J.A.C. 7:7A-16.7(a)3 with clarifying language added to help ensure that the level of specificity that is necessary for a hearing request to be considered adequate is clear, thus avoiding unnecessary time and effort by both the person requesting the hearing and the Department to fill in any initially missing information.

Proposed new N.J.A.C. 7:7A-22.6(b)5 requires a violator requesting an adjudicatory hearing to submit a statement as to whether or not the violator agrees to allow the Department to delay the transfer of a granted hearing request to the Office of Administrative Law in order to engage in settlement negotiations.

The violator must submit information supporting the request, including copies of other written documents relied upon to support the request. Existing N.J.A.C. 7:7A-16.7(a)5 and 6 are proposed to be recodified at N.J.A.C. 7:7A-22.6(b)7 and 8 with no change in text.

Under recodified N.J.A.C. 7:7A-22.6(c), the request must be submitted to the Department's Office of Legal Affairs and Bureau of Coastal and Land Use Compliance and Enforcement. This requirement is continued from existing N.J.A.C. 7:7A-16.7(b) with minor amendments that do not affect meaning and updates to the applicable Department addresses. Existing N.J.A.C. 7:7A-16.7(d) and (e), which establish that the Department may deny a request that does not contain all of the required information and that adjudicatory hearings will be conducted in accordance with the Administrative Procedure Act and Uniform Administrative

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Procedure Rules, are proposed to be recodified at N.J.A.C. 7:7A-22.6(d) and (e) with changes that do not affect meaning.

Civil administrative penalties for failure to obtain a permit prior to conducting regulated activities (N.J.A.C. 7:7A-22.7)

The provisions for determining the amount of a civil administrative penalty for conducting regulated activities without first obtaining a permit, currently set forth at N.J.A.C. 7:7A-16.8, are recodified with amendments as N.J.A.C. 7:7A-22.7. Each violation of N.J.A.C. 7:7A-2.1 constitutes an additional, separate, and distinct violation, and that each day during which a violation continues or stays in place without the required permit constitutes an additional, separate, and distinct offense. As indicated above, these concepts are relocated from existing N.J.A.C. 7:7A-16.1(d) and (e) with amendments that do not affect meaning.

Proposed new N.J.A.C. 7:7A-22.7(e) sets forth the process for assessing a civil administrative penalty, specifying that the Department will identify the base penalty within Table 22.7A at proposed N.J.A.C. 7:7A-22.7(g) by first determining the number of points associated with a violation pursuant to proposed N.J.A.C. 7:7A-22.7(f). Points are assigned under proposed N.J.A.C. 7:7A-22.7(f) based upon the conduct and seriousness factors detailed in that subsection. The Department is also proposing to add further specificity in the lead-in language of proposed N.J.A.C. 7:7A-22.7(f)2 to more fully capture the considerations addressed in determining the seriousness factor under N.J.A.C. 7:7A-22.7(f)2i and ii. Particularly, the proposed new language indicates that the type, size, and location of the violation, in addition to the acreage of wetlands

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and/or transition areas impacted and the resource value classification of the wetlands impacted determine the seriousness factor of the violation.

Existing N.J.A.C. 7:7A-16.8(d) is proposed to be recodified as N.J.A.C. 7:7A-22.7(g) with Table D, which sets forth base penalty amounts for different point values, renamed as Table 22.7A to reflect its location within the chapter. The base penalty amounts for each point value are not proposed to be amended.

Existing N.J.A.C. 7:7A-16.8(e), which establishes mitigating factor multipliers that reduce the base penalty, is recodified as N.J.A.C. 7:7A-22.7(h) and new Table 22.7B with amendments. The Department may reduce the base civil administrative penalty using a penalty mitigating factor in two instances: where the steps taken by the violator to remove the unauthorized regulated activities and to mitigate the effects of the violation result in compliance within 30 calendar days, and where the violator submits a complete application for a permit for the unauthorized activities within 30 calendar days and a permit is subsequently obtained without the need to modify the regulated activities, provide mitigation, or restore disturbed regulated areas. The application of the mitigating factor recognizes and rewards a violator's responsiveness to the notice of civil administrative penalty assessment, since the goal is compliance with the rules and the avoidance of, or restoration of, any adverse impacts from the violation. The second mitigating factor as proposed is different from the existing rule in that the timeframe for a violator to submit a complete permit application is shortened from 60 days to 30 days and that multiplier is increased from 0.25 to 0.50. This change aligns the procedures to calculate a civil administrative penalty amount across the FWPA, CZM, and FHACA Rules to ensure consistent and predictable enforcement of the Department's land use regulations.

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Consistent with existing N.J.A.C. 7:7A-16.10(f), the Department may also adjust, upward or downward, the amount of a penalty based on the compliance history of the violator, the frequency with which a violation has occurred, the deterrent effect of the penalty, and/or any other mitigating, extenuating, or aggravating circumstances. The total penalty is equal to the daily civil administrative penalty as calculated under this section multiplied by the number of calendar days during which each violation continued or remained in place without a permit. The Department is proposing, at N.J.A.C. 7:7A-22.7(k), to add a reference to the fact that the Department may also add to a civil administrative penalty, the amount of economic benefit in dollars that the violator has realized due to noncompliance or delayed compliance with an applicable law and/or condition. Ensuring that such savings could not create a potential incentive for non-compliance is an important concept addressed in the existing rules at N.J.A.C. 7:7A-16.13 (recodified as N.J.A.C. 7:7A-22.12). These amendments are consistent with the civil administrative penalty provisions in the CZM and FHACA Rules.

Civil administrative penalties for violations other than failure to obtain a permit prior to conducting regulated activities (N.J.A.C. 7:7A-22.8)

Existing N.J.A.C. 7:7A-16.9, which establishes provisions for determining penalties for violations other than failing to obtain a permit prior to conducting regulated activities, submitting inaccurate or false information, failing to allow entry, or failing to pay a penalty, is recodified as N.J.A.C. 7:7A-22.8, with amendments. Each violation for which a penalty is assessed under this section constitutes an additional, separate, and distinct violation. As indicated above, this concept is recodified from existing N.J.A.C. 7:7A-16.1(d) and (e) with amendments that do not

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affect meaning. Also, if a requirement of N.J.S.A. 13:9B-1 et seq. or 58:10A-1 et seq., or any regulation, rule, permit, condition, or order adopted or issued by the Department pursuant thereto pertains to more than one act by a violator, more than one condition at a project site, or more than one occurrence of a regulated activity, then the failure to comply with the requirement as it pertains to each such act, condition, or occurrence constitutes an additional, separate, and distinct violation for purposes of assessing a penalty.

Like the procedure at N.J.A.C. 7:7A-22.7 for assessing penalties for failure to obtain a permit, the procedure for assessing a civil administrative penalty for violations other than the failure to obtain a permit before conducting regulated activities is similar to that in the coastal and flood hazard area program rules for these violations.

As under N.J.A.C. 7:7A-22.7, a penalty under this section is assessed in view of the conduct of the violator (major, moderate, or minor) and seriousness of the violation (major, moderate, or minor). However, rather than gauging seriousness of the violation by area of impact to the protected resource, it is instead determined by the degree of actual or potential harm the violation causes to human health, safety, or the environment, or the freshwater wetlands regulatory program, or by the degree of deviation from the applicable law or rule or permit condition. Once the conduct and the seriousness of the violation are determined, the base daily penalty amount is assessed using a matrix. In the matrix, the maximum penalty of \$25,000 applies for a violation determined to be major conduct and major seriousness. For a violation determined to be minor conduct and minor seriousness, the penalty is \$1,000. The other combinations of seriousness and conduct result in penalties at intervals between those two endpoints.

The total penalty is the base daily penalty from the matrix multiplied by the number of calendar days during which each violation continued or remained in place prior to removal or

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restoration. Notwithstanding the \$25,000 maximum penalty otherwise applicable, the Department may add to the assessed civil administrative penalty the amount of economic benefit that the violator realized as the result of its noncompliance or delayed compliance.

Violations of major seriousness are violations that have caused, or have the potential to cause, serious harm to human health or safety, property, the environment, or the freshwater wetlands regulatory program, or are violations that seriously deviate from any applicable law and/or condition. Serious deviations are defined as those violations that are in complete contravention of the law, requirement, and/or condition, and/or that severely impair or undermine the protection, operation, or intent of the law, requirement, or condition. Violations of major seriousness include activities that: negatively affect water quality; clearing, grading, or filling of transition areas when done in conjunction with such activities in freshwater wetlands; clearing, grading, or disturbance of freshwater wetlands and/or transition areas in excess of that authorized by a permit or plan; failure to timely record a conservation restriction or easement, and the property has been sold or transferred; failure to report the presence of a historic resource during construction and/or the deconstruction of a historic resource without prior Department approval; failure to comply with an historic resource or mitigation plan; and failure to provide information upon request to determine compliance with any applicable law and/or condition.

Violations of moderate seriousness are violations that have caused or have the potential to cause substantial harm to human health, safety, the environment, or the freshwater wetlands regulatory program, or are violations that are a substantial deviation from the applicable law and/or condition. Substantial deviations are defined as violations that are in substantial contravention of the law, requirement, and/or condition, and/or that substantially impair or undermine the protection, operation, or intent of the law, requirement, and/or condition. The Department is also proposing to

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add any violation that has caused, or has the potential to cause, serious harm to property to the list of violations of moderate seriousness. Harm to property may have a significant impact on the owner of the property and so the Department has determined that any violation causing or that has the potential to cause harm to property is a violation of moderate, rather than minor, seriousness. The change aligns the FWPA Rules with the CZM and FHACA Rules. Violations of moderate seriousness also include the failure to notify the Department of commencement of construction, failure to transfer a permit in accordance with this chapter, and failure to record a conservation restriction or easement and the property has not been sold or transferred.

Violations of minor seriousness are those not meeting the definitions of major and moderate seriousness.

Major conduct includes any intentional, deliberate, purposeful, knowing, or willful act or omission. The existing rule establishes a presumption that a violation of a Department permit, transition area waiver, letter of interpretation, agreement, order, settlement, exemption letter, or mitigation proposal is a knowing violation. The Department is proposing to clarify, at N.J.A.C. 7:7A-22.8(f)1, that this presumption is a rebuttable presumption.

Moderate conduct includes any unintentional but foreseeable act or omission. Minor conduct is any conduct not meeting the definitions of major and moderate conduct.

Civil penalties, civil actions, and criminal actions (N.J.A.C. 7:7A-22.13, 22.14, and 22.15)

Existing N.J.A.C. 7:7A-16.14, which establishes civil penalties that the Department may seek in Superior Court against any person who violates any regulation, rule, permit, order, or court order, is proposed to be recodified as N.J.A.C. 7:7A-22.13 with amendments. The

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maximum civil penalty amount and reasons for the imposition of a civil penalty have not changed.

Existing N.J.A.C. 7:7A-16.4, which addresses the Department's authority to bring civil actions in the Superior Court, is proposed to be recodified as N.J.A.C. 7:7A-22.14 with amendments that do not change meaning. In addition to seeking civil penalties in accordance with proposed N.J.A.C. 7:7A-22.13, the Department may seek injunctive and other relief in Superior Court for any violation of the FWPA, or any rule, permit, order, or settlement agreement by the Department pursuant to the FWPA.

Existing N.J.A.C. 7:7A-16.15, under which the Department may petition the Attorney General to bring a criminal action against a violator, is proposed to be recodified as N.J.A.C. 7:7A-22.15 with clarifying amendments that do not change meaning. For certain violations of the FWPA, the Department may petition the Attorney General to bring a criminal action against a violator for violations of the FWPA, any regulation, rule, permit, or order adopted or issued by the Department pursuant thereto. If convicted, the violator will be guilty of a crime of the third degree and subject to a fine ranging from not less than \$5,000 to not more than \$50,000 per day of violation, or imprisonment, or both.

Recording a notice concerning violation with deed for the property (N.J.A.C. 7:7A-22.17)

Existing N.J.A.C. 7:7A-16.17, which establishes the procedures applicable if the Commissioner orders a notice concerning the violation to be recorded with the deed of the property, is proposed to be recodified as N.J.A.C. 7:7A-22.17 with amendments. To accurately reflect the procedure for recording a lien with property, the Department is proposing to delete the

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requirement that the Clerk of the Superior Court record notice of violation of the FWPA, while continuing the requirement that the Clerk or registrar of deeds and mortgages of the county where the property on which the violation occurred is located record a notice concerning the violation with the deed for the property. Any fees or charges that are incurred by the Department for the recording must be paid by the owner of the affected property or the violator.

Grace period applicability; procedures (N.J.A.C. 7:7A-22.20)

Existing N.J.A.C. 7:7A-16.20 is proposed to be recodified with minor amendments as N.J.A.C. 7:7A-22.20. Throughout this section, the Department is proposing to specify that the provided timeframes are counted in calendar days to avoid ambiguity. Existing Table F, which identifies violations as minor or non-minor, is proposed to be renamed Table 22.20 to identify its location in the FWPA rules.

The citations in proposed Table 22.20 are updated to reflect the rule changes throughout the chapter. Additional citations are added in association with existing violation descriptions for clarity. Where post-planting monitoring reports are reference in violation descriptions, the term is replaced with post-construction monitoring reports to reflect changes to the mitigation subchapter as discussed above.

APPENDIX 1

Existing Appendix 1, Obligate and facultative fauna species found in vernal habitats, is proposed to be continued with several amendments to reflect current science. The Department is

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additionally proposing to add the scientific names of the currently listed species' common names to ensure accuracy and clarity.

Appendix 1 contains the list of species that are indicators of the presence of vernal habitat. A vernal habitat is a small (usually less than an acre), temporarily ponded or otherwise fish-free depression not connected to a flowing stream system. Vernal habitats have been documented to be ecologically important because they provide habitat for distinctive plants and animals. Because of the importance of these habitats, recodified N.J.A.C. 7:7A-5.7(b)15 precludes issuance of any general permit, except general permits 1, 6, 6A, and 16 in a vernal habitat. This means is that the landowner would be required to get an individual permit to complete a project that does not fall within the activities authorized under the listed general permits. For general permits 1, 6, 6A, and 16, the Threatened and Endangered Species Unit of the Division of Land Use Regulation review applications on a case-by-case basis and, when necessary, either require an individual permit or add conditions to a general permit to mitigate impacts to the vernal habitat.

Facultative species are those that use vernal habitats, but not exclusively, and, therefore, the Department requires the presence of two or more of these species for vernal habitat documentation. Obligate species are those species that are only found in vernal habitats; the presence of one obligate species is sufficient to document the presence of a vernal habitat.

The Upland Chorus Frog is proposed to be deleted from the list of facultative vernal habitat species because recent scientific evidence has shown this species does not occur in the State of New Jersey (see Lemmon EM, Lemmon AR, Collins JT, Lee-Yaw JA, and DC Cannatella. 2007. Phylogeny-based delimitation of species boundaries and contact zones in the

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trilling chorus frogs (*Pseudacris*). *Molecular Phylogenetics and Evolution* (44):1068-1082). The Jefferson x blue spotted salamander is proposed to be deleted from the list of facultative species as this hybrid is no longer recognized as a distinct species. See the entry for *Ambystoma laterale* on <http://explorer.natureserve.org/> for more information.

The Carpenter Frog and the Pickerel Frog are proposed to be added to the list of facultative species because they were mistakenly omitted from the rules when Appendix 1 was promulgated. The Eastern Box Turtle and Eastern Musk Turtle are proposed to be added to the list of facultative species because they occur in New Jersey and have been documented to use vernal habitats (see Donaldson BM and AC Echternacht. 2005. Aquatic habitat use relative to home range and seasonal movement of eastern box turtles (*Terrapene carolina carolina*: *Emydidae*) in eastern Tennessee. *Journal of Herpetology* 39:278-284 and Calhoun AJK and PG deMAynadier, eds. *Science and Conservation of Vernal Pools in Northeastern North America*. Boca Raton, FL: CRC Press. 2008. Print, respectively).

The Atlantic Coast Leopard Frog is a recently discovered species that occurs in New Jersey (see: Newman CE, Feinberg JA, Rissler LJ, Burger J, and HB Shaffer. 2012. A new species of leopard frog (Anura:Ranidae) from the urban northeastern US. *Molecular Phylogenetics and Evolution*. 63(2):445-455). It is proposed to be added to the list of facultative vernal habitat species. The Green Treefrog is also proposed to be added to this list. This species was recently discovered to occur in New Jersey and is a facultative vernal habitat species (see DiLeo K. 2012. Geographic distribution: *Hyla cinerea*. *Herpetol. Rev.* 43(1)).

Because the amendments proposed to this appendix only concern facultative species, and because it is rare to find only one facultative species within a vernal pool, the Department

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anticipates that any impact of these amendments on landowners will be minor. The Department will not determine a vernal habitat is present by only observing the presence of turtle species, so the addition of the Eastern Box Turtle and Eastern Musk Turtle will have very minor effects.

Removal of the upland chorus frog and addition of the Atlantic Coast Leopard Frog are only clarifications on phylogeny, which means that only these species' scientific descriptions have change, not their ranges. The frogs that are now considered the new Atlantic Coastal leopard frog were previously identified as southern leopard frogs – they were reclassified as a different species based on recent genetic discoveries. Any applicants that have vernal pools with Atlantic Coast frogs would have previously had vernal pools with southern leopard frogs, which are included in the existing appendix. The same concept applies to the deletion of upland chorus frogs; all of the frogs identified as upland chorus frogs in New Jersey were actually a different species, New Jersey chorus frogs, which are included in the existing appendix and not proposed to be deleted in the proposed appendix.

Green treefrogs are believed to be present in the State as a result of a range expansion from Delaware and currently are only documented along the Delaware Bay in Salem and Cumberland Counties. All habitat with green treefrogs would likely have already been documented with spring peepers and other facultative species. The Department does not anticipate any new vernal habitat to be documented as a result of the addition of this species.

AMENDMENTS TO FLOOD HAZARD AREA GENERAL PERMIT 1 (N.J.A.C. 7:13-9.1)

The Department is proposing to amend flood hazard area general permit 1 at N.J.A.C. 7:13-9.1 to reflect the January 11, 2016 amendments to the Stream Cleaning Act (Act), N.J.S.A.

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58:16A-67, effectuated by P.L. 2015, c. 210 and to ensure consistency with freshwater wetlands general permit 25 at proposed N.J.A.C. 7:7A-7.25, as described above. General permit 1 authorizes a county, municipality, or a designated agency thereof to desnag a channel and/or remove accumulated sediment, debris, and garbage under the Act.

The requirement at N.J.A.C. 7:13-9.1(a)7i that projects that involve the removal of sediment from a channel with a natural bed where the channel reach is less than 500 feet in length to qualify for this general permit is proposed to be replaced with new N.J.A.C. 7:13-9.1(a)7i and ii. Proposed N.J.A.C. 7:13-9.1(a)7i requires these projects, when undertaken by a municipality (or designated agency), to be located within that municipality. Proposed N.J.A.C. 7:13-9.1(a)7ii requires such projects undertaken by a county (or designated agency) to be located within one municipality or, if located in more than one municipality, the channel reach must be limited to 500 feet.

Under the statutory amendments, the limitation on the average width of the channel subject to the channel cleaning was increased from 15 to 30 feet. Existing N.J.A.C. 7:13-9.1(a)7ii is proposed to be recodified as N.J.A.C. 7:13-9.1(a)7iii and amended to reflect the increased width.

For consistency with the statutory changes, existing N.J.A.C. 7:13-9.1(a)7iii, which required that the channel has had a documented history of severe flooding that has resulted or can result in property damage, therefore, necessitating the proposed cleaning, clearing, or desnagging in order to be issued an authorization under general permit 1, is proposed for deletion. Stream cleaning activities authorized under this general permit rarely have an appreciable effect on recurrent flooding issues. Removing small volumes of sediment, garbage,

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or desnagging a stream do not address the myriad of issues that may be causing recurrent destructive flooding in a municipality. This general permit is intended to allow municipalities and counties to remove obstructions, garbage, and other accumulated debris and sediment from regulated waters to maintain the appearance and function of a regulated water within their municipal or county boundaries regardless of the history of flooding of the water. The purpose of this general permit is to allow for stream cleaning. It is not intended to be construed as a solution to a community's flooding problems.

Finally, the Department is proposing, at N.J.A.C. 7:13-9.1(a)7vi, to require projects that involve the removal of sediment from a channel with a natural bed to observe the timing restrictions at N.J.A.C. 7:13-11.5(d). The Act requires compliance with any timing restrictions imposed by the Department. Timing restrictions were imposed on stream cleaning activities subject to general permit 1 from 2007 through June 2016. However, this requirement was inadvertently omitted when the rules were amended on June 20, 2016 (See 48 N.J.R. 1067(a)). The proposed addition of N.J.A.C. 7:13-9.1(a)7vi corrects this omission and ensures protection of fisheries resources and continued consistency with the Act.

NOTICE REQUIREMENTS FOR MAINTENANCE DREDGING AND DEBRIS OR SEDIMENT REMOVAL PROJECTS

As briefly mentioned in the summary of proposed N.J.A.C. 7:7A-17, the Department is proposing changes to the public notice requirements in the CZM and FHACA Rules in addition to the FWPA Rules. The Department is proposing, at N.J.A.C. 7:7-24.3(c)5 and 24.4(c)5 to add maintenance dredging of a State navigation channel of one half-mile or longer to the types of

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activities where newspaper notice and notice to properties owners within 200 feet of any proposed above-ground structure is required instead of notice to all property owners within 200 feet of the site. Maintenance dredging does not involve above-ground structures, so public notice for these projects would consist of newspaper notice in accordance with N.J.A.C. 7:7-24.5.

Maintenance dredging projects are linear projects with similar effects to linear development and shore protection projects, and thus are proposed to have the same public notice requirements.

The Department is proposing similar amendments to the FHACA rules at N.J.A.C. 7:13-19.3(c)6 and to the FWPA Rules at N.J.A.C. 7:7A-17.3(c)5. These provisions add sediment or debris removal activities in a channel one-half mile or longer to the list of applications for which newspaper notice and notice to property owners within 200 feet of any above ground structure are required, rather than notice to property owners within 200 feet of the site. These projects do not involve the construction of above-ground structures, so notice will consist of a notice in a newspaper of general circulation in the applicable municipality(ies). These sediment removal projects are similar to maintenance dredging projects in their effects, and are, thus, proposed to have the same notice requirements to maintain consistency across the Department's land use permitting programs. These projects also have similar effects to linear development projects of one half mile or longer, which require newspaper notice in the existing FHACA Rules. For these reasons, the Department considers the addition of sediment or debris removal projects of one half mile or longer to the list of projects that require newspaper notice to be appropriate.

Social Impact

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Freshwater wetlands are an essential resource that provides functions and values, which benefit all who reside in the State. The proposed amendments, repeals, and new rules will allow the Department to more effectively and efficiently administer the freshwater wetlands program. The rulemaking reorganizes the chapter for clarity and substantially improves the freshwater wetlands permitting process by relocating sections, consolidating similar provisions, simplifying language, and harmonizing administrative requirements with other Department rules. This rulemaking represents the third part of the effort to align the rules governing the permitting process of the three land use permitting programs. The proposed amendments, repeals, and new rules also incorporate additional detail, where appropriate, regarding the substantive standards that must be met to undertake regulated activities. These changes will promote better consistency within the chapter and with the Department's other land use rules, as well as facilitate understanding and compliance among prospective applicants.

The proposed changes to agricultural exemptions will have a positive social impact through facilitating normal farming activities throughout the State. The amendments to include activities associated with the maintenance of cranberry bogs and blueberry fields and activities for the rehabilitation or renewal of cranberry bogs in the list of agricultural activities exempt from the requirements of N.J.A.C. 7:7A will reduce regulatory burden on cranberry and blueberry farmers. The facilitation of these normal farming activities in modified agricultural wetlands serves to promote industries that are an essential component of the economy and culture of New Jersey.

The rulemaking, furthermore, introduces two general permits-by-certification to facilitate projects that result in *de minimis* impacts to freshwater wetlands and the environment. The

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electronic submission and processing of applications for general permits-by-certification will have a positive social impact as it streamlines the permitting process for these applications and leverages technology, so as to eliminate paperwork for individuals who seek to conduct activities, such as constructing a house addition or repairing a malfunctioning subsurface sewage system, that have minimal impact on the environment.

The Department is further utilizing technology to allow for the submittal of LOI applications electronically. This E-LOI process reduces time and expense spent on the preparation of an application and provides a more convenient and efficient experience.

Added flexibility for mitigation alternatives provides additional opportunities for responsible creation of freshwater wetland and appropriate restoration and enhancement. The mitigation hierarchy and mitigation proposal application requirements are simplified and reorganized to promote compliance and streamline the application process, which will expedite the compensation for lost functions and values achieved through mitigation. The incorporation of provisions concerning the ILF Program standardizes procedures and clearly assigns responsibilities to create a predictable process. The various amendments to mitigation procedures will have a positive social impact by reducing potential confusion among the regulated community and mitigators and by promoting the timely compensation for lost functions and values caused by the disturbance of freshwater wetlands and/or State open waters.

The Department believes that the proposed amendments, repeals, and new rules will result in a social benefit and balance the protection of public health, safety, and welfare with the protection of important environmental resources associated with the State's freshwater wetlands.

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Economic Impact

The current Freshwater Wetlands Protection Act Rules provide standards for development in freshwater wetlands, State open waters, and transition areas. These standards, in addition to providing ecological benefit, provide economic protection of property and resources to the residents of the State of New Jersey by preserving and enhancing the natural value of wetlands. The amendments, repeals, and new rules proposed will continue to protect the valuable services of freshwater wetlands, including storm damage prevention, biodiversity, and water quality maintenance, while improving the permitting process, aligning the freshwater wetlands rules with other land use program rules, and increasing flexibility in mitigation efforts. The Department believes the proposed rules will have a positive economic impact while minimizing adverse impacts to the functions and values of freshwater wetlands and State open waters.

Several proposed changes in the permitting process streamline required actions for both the permit applicant and the Department. The alignment of land use rules will streamline the permitting process by creating consistency between land use programs and will be especially beneficial in cases where more than one type of permit is required for a regulated activity. By aligning the application procedures with flood hazard and coastal permit application procedures, the permitting process will be standardized across all three chapters as much as possible and will be organized in a uniform order and format. In keeping with these efforts, the implementation of a 90-day permit review time for general permit authorizations, individual permits, and transition area waivers will allow appropriate activities to commence in a more timely manner. The permitting process is further eased with the amendments to provisions concerning the duration

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and extension of general and individual permits, which allow reasonable flexibility and continued construction of specific regulated activities without undermining protections against adverse wetlands impacts.

The Department expects the implementation of the proposed rules will reduce time and expense spent on preparing, submitting, and reviewing a permit application for regulated activities in freshwater wetlands, State open waters, and transition areas. The increased use of electronic submittals reduces time, expense, and paperwork for permittees and permit reviewers alike. The proposed establishment of two general permits-by-certification leverages technology to dispense with unnecessary paperwork, obviates the need for case-by-case evaluation by the Department of a discrete category of activities that have been determined by the Department to cause very minimal individual and cumulative environmental impacts, and eliminates the requirement for public hearings, thereby reducing or eliminating processing time. The change to establish Electronic Letters of Interpretation (LOI) allows all supporting documents, with the exception of any required surveys, to be submitted electronically via the NJDEP online business portal, which significantly reduces paper use and facilitates a more efficient review process. The change to add the requirement to provide a detailed environmental report with individual permit applications will allow the Department to make more informed judgements on applications while ensuring appropriate protection of freshwater wetlands, State open waters, transition areas, and wildlife. Application checklists for permits and LOIs will aid in the submittal of complete applications and expedite permit approvals.

The existing rules charge a \$500.00 fee for the transfer of a permit when site ownership changes. The proposed rules delete this fee. The Department anticipates this change will have a

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minor positive economic impact for anyone who transfers a property on which permitted activities are occurring.

Changes to the mitigation rules will allow flexibility, which will increase compliance and reduce the cost of mitigation and enforcement. The proposed rules align the mitigation requirements in the FWPA Rules with those in the CZM and FHACA Rules, where practical, in order to achieve consistency among land use mitigation standards. The proposed changes incorporate the approved State of New Jersey In-Lieu Fee Mitigation Program Instrument to set forth standards for mitigation via monetary contributions that create consistency in the mitigation process and ensure compliance with Federal standards.

While the Department is currently authorized to adjust annually the set amounts of monetary contribution to mitigate for impacts associated with general permits, adjustments have not been made since October 2008, when the amounts were established by rule. Because mitigation costs have outpaced these set amounts, this rulemaking increases the amount of monetary contribution for a single-family property owner from \$38,000 to \$42,300 per acre of wetlands or waters impacted and for all other property owners from \$300,000 to \$334,000 per acre of wetlands or waters impacted and establishes a new procedure for the Department to adjust the monetary contribution amount. While this amendment will initially negatively impact those seeking to fulfill a mitigation obligation via a monetary contribution because the cost per acre is higher, it is necessary to ensure proper compensation for the functions and values lost through impacts to wetlands or waters.

While the increase in the monetary contribution amount may have a negative economic impact on those who are required to perform mitigation, several other proposed changes to the

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mitigation subchapter lead to additional economic benefits by increasing the flexibility in mitigation options. The changes proposed streamline processes and provide flexibility in the requirements for choosing a mitigation area to reduce time and expense of searching for a suitable site, which improves efficiency while maintaining environmental standards. Also, the modified definition of “temporary disturbance” acknowledges that disturbances associated with regulated activities, such as hazardous substance remediation or solid waste facility closure, are intended to be temporary, but may exceed six months in duration. This will likely improve compliance with mitigation rules, which reduces costs to the mitigator that would arise from noncompliance, as well as costs to the Department arising from enforcement action. In addition, several options of financial assurance instruments, including fully funded trust fund, line of credit, letter of credit, and surety bond, are proposed with templates, which will reduce Department review time.

Overall, the Department expects the implementation of the proposed rules to reduce time and expense spent on preparing, submitting, and reviewing a permit application for regulated activities in freshwater wetlands, State open waters, and transition areas. The alignment of land use rules will streamline the permitting process by creating consistency between land use programs and will be especially beneficial in cases where more than one type of permit is required for a regulated activity. Changes to the mitigation rules will allow flexibility, which will increase compliance and reduce the cost of mitigation and enforcement. In sum, the Department believes the proposed rules will have a positive economic impact, while continuing to minimize adverse impacts to the functions and values of freshwater wetlands and State open waters.

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Environmental Impact

The Department anticipates that the proposed amendments, repeals, and new rules will have an overall positive environmental impact. The streamlining of processes within the freshwater wetlands permitting program and between all three land use permitting programs will facilitate compliance and increase predictability in the permitting process for all land use programs. The clarifications proposed are anticipated to reduce the number of violations of the FWPA Rules by facilitating the public's understanding of the requirements.

The proposed new general permits-by-certification and proposed amendments to existing general permits and transition area waivers contain specific acceptability standards and requirements that will ensure the environmental impact of new developments and activities authorized under these permits is minimized.

The proposed new general permits-by-certification authorize a strict subset of activities authorized under existing general permits. They will have minimal impact when performed separately and only minimal cumulative adverse impacts on the environment because the activities authorized are limited in type and in area of disturbance. In some cases, such as the repair of a malfunctioning subsurface septic system under general permit-by-certification 24, these proposed new general permits-by-certification may have a positive environmental impact. Repair of a malfunctioning septic system is an activity that should be expedited to prevent the discharge of sewage into wetlands and State open waters. Providing an expeditious alternative to the traditional permitting processes in cases where a septic system poses a threat to freshwater wetlands or State open waters will increase protection of the environment from pollution.

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Amendments to existing general permits are anticipated to have a positive effect on the environment. The deletion of the requirement for activities associated with the creation, restoration, and enhancement of habitat and water quality functions and values authorized under general permit 16 to be sponsored or substantially funded by a Federal or State agency or other approved entity will allow more beneficial activities to take place. Requiring instead the approval of one of these entities will facilitate appropriate project designs without imposing a financial obligation on the approving entity. The reorganization, clarification, and amendment of this general permit will ensure the environment is not adversely impacted during these creation, restoration, and enhancement activities and encourage these environmentally valuable projects.

Proposed amendments to transition area requirements are anticipated to have minimal environmental impact. The expansion of the provision allowing certain transition area waivers to be combined with general permits to include transition area averaging plans and linear development waivers, while expanding the amount of disturbance associated with particular projects, will have a minimal impact on the environment. General permits and transition area waivers have established disturbance limits and other protective standards to ensure minimal environmental impact. In addition, transition area averaging plan waivers require a conservation restriction to be recorded to restrict any future activities in the averaging compensation area.

Changes to the mitigation rules are anticipated to have a positive environmental impact. The reorganization and amendment of the mitigation subchapter are intended to streamline the mitigation process and assist applicants who require mitigation to select a mitigation alternative in the most efficient and timely manner. The proposed changes ensure that the mitigation that is approved has the highest likelihood of success and that the mitigation gets constructed in

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accordance with this subchapter, so as to reduce the ecological loss and functionality from the time of impact to the time of mitigation.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65), requires State agencies that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law. This comparison is especially relevant in the case of the freshwater wetlands program rules.

The Department's authority for regulating development within freshwater wetlands and State open waters is derived from Federal and State law. The Freshwater Wetlands Protect Act, N.J.S.A. 13:9B-1 et seq., requires rules to be promulgated to govern the removal, excavation, disturbance, or dredging, drainage, or disturbance of water level or water table, dumping, discharging, or filling with any materials, driving of pilings, and placing obstructions in a freshwater wetland, and the destruction of vegetation, which would alter the character of a freshwater wetland. The FWPA Rules, N.J.A.C. 7:7A, fulfill this purpose and also regulate the discharge of dredge and fill material in State open waters, as well as govern activities in transition areas.

As discussed in the Summary above, New Jersey's freshwater wetlands program operates in place of the Federal 404 program (Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.). The Department, under Section 404(g), has assumed the Federal permitting authority. The United States Environmental Protection Agency (EPA) oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a

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Memorandum of Agreement between the Department and the EPA. The requirement imposed by the Federal Clean Water Act on a state assuming the Federal permitting authority is that the state implements regulatory standards at least equally stringent as those currently in place for the Federal 404 program for the protection of waters of the United States, including wetlands.

The proposed amendments, repeals, and new rules add flexibility where appropriate; address implementation issues; provide consistency with other Federal, local, and State requirements; align procedures with flood hazard and coastal permitting procedures where possible; and simplify language to improve the permitting process and reduce the cost of compliance. The proposed changes retain the appropriate level of stringency to ensure compliance with Federal law.

Jobs Impact

The FWPA Rules play a significant role in the planning and construction of residential, commercial, industrial, and public development in the State. The Department anticipates that the proposed amendments, repeals, and new rules will reduce the number of permit applications received by the Department and will furthermore reduce the complexity of the applications that are received. This will likely cause a slight reduction in the amount of time required by consultants, engineers, surveyors, and other professionals to demonstrate compliance with this chapter.

The alignment of the FWPA Rules with the CZM and FHACA Rules corrects contradictions between the standards of the three regulatory programs and harmonizes the permitting processes of the land use permitting programs to the maximum extent allowed by

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statute. This alignment reduces confusion for the regulated public and may lead to those seeking to conduct regulated activities in areas regulated under the FWPA Rules to rely on consultants to a lesser degree. Additionally, the proposed general permits-by-certification allow an applicant to submit an application electronically and receive an instant authorization if all conditions of the permit are certified to be met, which reduces the need for consultants to prepare applications. Therefore, the implementation of the proposed amendments, repeals, and new rules may lead to a slight reduction in such work for consultants, engineers, surveyors, and other professionals for projects seeking approval to construct under the more flexible standards of the rulemaking.

However, since the proposed amendments, repeals, and new rules add flexibility for project design, the proposed amendments, repeals, and new rules will not decrease the overall amount of appropriate development that will occur in these areas. As a result, the proposed amendments, repeals, and new rules may have a positive impact on jobs in construction. The Department, therefore, anticipates that the proposed amendments, repeals, and new rules may generate slightly more investment potential and job opportunities related to construction within areas regulated under the FWPA Rules.

Additionally, the proposed rules expand and increase flexibility for mitigation of impacts to freshwater wetlands and/or State open waters. The added flexibility and clarity in the mitigation hierarchy will facilitate efficient and environmentally beneficial mitigation and the establishment of mitigation banks. The Department anticipates that the proposed amendments, repeals, and new rules may generate more job opportunities and increase investment potential related to mitigation and mitigation banking.

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Given the above, the Department does not believe that the proposed amendments, repeals, and new rules will result in a significant impact on jobs.

Agriculture Industry Impact

Pursuant to N.J.S.A. 52:14B-4, the Department has evaluated this rulemaking to determine the nature and extent of the impact of the proposed amendments, repeals, and new rules on the agriculture industry. The Department anticipates that the proposed amendments, repeals, and new rules will have an overall positive impact on agriculture. The benefits of protecting water quality afforded by the FWPA Rules are realized by all landowners in and near freshwater wetlands and State open waters, including farmers. In order to facilitate agricultural activities that have a *de minimis* impact on the environment, added flexibility is proposed through the expansion of agricultural activities that are exempt from the requirements of the chapter.

In response to P.L. 2014, c. 89, which exempts certain temporary farm structures from the wetland permit and transition area requirements of the FWPA, the Department is proposing to amend the list of farming, ranching, and silviculture exemptions. The proposed changes will allow construction of temporary farm structures on farmed wetlands that were actively cultivated on or before July 1, 1988, and that are in active agricultural use at the time the structures are to be erected. The construction of these temporary farm structures, including hoopouses and polyhouses, will have a *de minimis* impact on the environment, as they are not permanent developments and will occur in wetlands that have been actively disturbed for farming for

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decades. This proposed exemption will positively impact agricultural operations in New Jersey by facilitating efficient operations and reducing regulatory burden.

In response to P.L. 2015, c. 272, the Department is proposing to add lists of activities that would be considered normal maintenance of cranberry bogs and blueberry fields and activities that would be considered renewal or rehabilitation of cranberry bogs to the list of farming exemptions. These additions clarify that the additional activities are part of established, ongoing cranberry and blueberry operations and, thus, will have a *de minimis* impact on the environment. Cranberries and blueberries are wetland dependent species and are important crops in the State's economy and culture. The proposed amendments will reduce the regulatory burden on farmers of these important crops while maintaining protection of the environment.

Additionally, the Department is proposing to clarify the meaning of "minor drainage" as it relates to established farming operations. This clarification will reduce confusion within the agricultural community and facilitate compliance with the requirements of this chapter. Overall, the proposed amendments, repeals, and new rules will provide more flexibility to, and less administrative and financial burden on, the agriculture industry.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that a number of contractors, builders, and property owners that will be affected by the proposed amendments, repeals, and new rules are "small businesses" as defined by the Regulatory Flexibility Act at N.J.S.A. 52:14B-17.

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The proposed amendments, repeals, and new rules apply to any person or entity owning property containing freshwater wetlands, transition areas, and/or State open waters, who intends to engage in a regulated activity. It is not possible for the Department to accurately estimate the number of small businesses affected by the proposed amendments, repeals, and new rules. The FWPA Rules regulate new development and other activities in freshwater wetlands, transition areas, and State open waters based on impacts to water quality, habitat, and other functions and values as a result of filling of, discharges to, and other impacts to these regulated features. As such, these rules will have the same impact on a small business in any industry as they will on any person or entity proposing such activities in freshwater wetlands, transition areas, and/or State open waters.

The existing rules require persons intending to build within freshwater wetlands, State open waters, and/or transition areas to first apply for construction permits where appropriate, which requires a certain amount of reporting and recordkeeping during the initial design and construction phase. The costs to small businesses in this regard are the same as to any person seeking to construct within these regulated areas, including surveying costs, engineering and environmental consultant fees, and permit application fees. The actual costs vary depending upon the size and type of the development and the particular site conditions. Permittees are also required to furnish, within a reasonable time, any information that the Department requests to determine compliance with a permit or to determine whether cause exists for suspension or termination of a permit. These are basic requirements intended to ensure that permitted activities are undertaken in accordance with the requirements of the rules, as well as any conditions that may be placed on a permit, and do not affect small businesses differently than any person

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undertaking activities in freshwater wetlands, State open waters, and/or transition areas. The proposed amendments, repeals, and new rules do not amend these requirements or add any additional costs, reporting, or recordkeeping requirements for small businesses or any other person, nor do they create additional need to retain professionals to comply with the rules.

In some cases, the proposed amendments, repeals, and new rules will reduce overall costs and reporting or recordkeeping requirements on small businesses, since some activities now qualify for a general permit-by-certification, which requires a simplified, online application resulting in an instant permit. The expanded list of agricultural exemptions will also reduce the overall costs and requirements on small farming businesses because more routine activities associated with ongoing farming operations will not require approval from the Department. Finally, the proposed amendments, repeals, and new rules, which serve to align the processes of the Department's land use permitting programs will reduce costs by streamlining the permitting process, especially if regulated activities fall under the jurisdiction of more than one permitting program (for example, if a proposed activity requires both a freshwater wetlands permit and a flood hazard area permit).

Since the amendments and new rules are the minimum necessary to protect public health and safety and the environment, adopting differing standards applicable to small businesses is neither appropriate nor sufficiently protective of the residents of New Jersey from the deleterious impacts of damage to freshwater wetlands, transition areas, and/or State open waters.

Housing Affordability Impact Analysis

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In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated this rulemaking to determine the impact if any on the affordability of housing. As indicated in the Economic Impact statement above, the proposed amendments, repeals, and new rules will make the FWPA Rules easier to understand and use, having a positive economic impact by reducing the overall cost of compliance. However, the Department believes it is unlikely that the economic impacts associated with the proposed amendments, repeals, and new rules would evoke a change in the average costs associated with housing or have an effect on the affordability of housing.

Smart Growth Development Impact Analysis

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments, repeals, and new rules to determine the impact, if any, on housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan (State Plan). As indicated in the Economic Impact statement above, the proposed amendments, repeals, and new rules will make the FWPA Rules easier to understand and use, having a positive economic impact by reducing the overall cost of compliance. However, the proposed amendments, repeals, and new rules are not anticipated to have an overall impact on housing. Therefore, while these changes will result in some cost savings, such savings will not be large enough to evoke a change in housing production in Planning Areas 1 or 2 or within designated centers.

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Full text of the rules proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 7:7A-1.2, 1.6, 2.12, 3.5, 4.5, 5.17, 5.22, 6.4, 6.6, 7:7A-6 Appendix, 7.3, 8, 9, 10, 12.4, 12.6, 12.7, 13.3, 13.5 through 13.9, 14.1, 15.8, 15.14, 15.17, 15.21, 15.22, and 15.24.

Full text of the proposed amendments, recodifications, and new rules follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER 7

COASTAL ZONE MANAGEMENT RULES

SUBCHAPTER 24. REQUIREMENTS FOR AN APPLICANT TO PROVIDE PUBLIC NOTICE OF AN APPLICATION

7:7-24.3 Contents and recipients of public notice of an application

(a) – (b) (No change.)

(c) If the permit application is for a development listed at (c)1 through [4] **5** below, the applicant shall provide the notice required at (b)6 above by publishing newspaper notice and, in addition, sending the notice at (d) below, in the manner set forth in the Municipal Land Use Law at N.J.S.A. 40:55D-12.b, to all owners of real property, including easements, within 200 feet of any proposed above ground structure that is part of the proposed development, such as a pumping station, treatment plant, groin, bulkhead, revetment or gabion, or dune walkover:

1. – 2. (No change.)

3. A public development on a site of 50 acres or more; [or]

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4. An industrial or commercial development on a site of 100 acres or more[.]; **or**

5. Maintenance dredging of a State navigation channel of one-half mile or longer.

(d) – (f) (No change.)

7:7-24.4 Additional requirements for public notice of an application for a CAFRA individual permit

(a) – (b) (No change.)

(c) An applicant for a CAFRA individual permit for a development listed at (c)1 through [4] **5** below shall provide the notice required at (b)4 above by publishing newspaper notice and, in addition, sending the notice described at (d) below, in the manner set forth in the Municipal Land Use Law at N.J.S.A. 40:55D-12.b, to all owners of real property, including easements, within 200 feet of any proposed above ground structure that is part of the proposed development, such as a pumping station, treatment plant, groin, bulkhead, revetment or gabion, or dune walkover:

1. – 2. (No change.)

3. A public development on a site of 50 acres or more; [or]

4. An industrial or commercial development on a site of 100 acres or more[.]; **or**

5. Maintenance dredging of a State navigation channel of one-half mile or longer.

(d) – (e) (No change.)

CHAPTER 7A

FRESHWATER WETLANDS PROTECTION ACT RULES

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SUBCHAPTER 1. GENERAL [INFORMATION] PROVISIONS

7:7A-1.1 [Scope and authority] **Purpose and scope**

(a) This chapter constitutes the rules governing the implementation of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. Certain violations of the New Jersey Water Pollution Control Act are also subject to enforcement provisions at N.J.A.C. 7:14.

(b) **The powers, duties, and functions vested in the Department under this chapter shall not limit, in any manner, the powers, duties, and functions vested under any other law, except as specifically set forth in this chapter.**

(c) **The Freshwater Wetlands Protection Act, on and subsequent to July 1, 1988, shall supersede any law or ordinance enacted by any municipality, county, or political subdivision thereof, regulating freshwater wetlands or freshwater wetlands transition areas, except that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction. No municipality, county, or political subdivision thereof shall enact any law, ordinance, rule, or regulation requiring a transition area adjacent to a freshwater wetland, except that the Pinelands Commission may provide for more stringent regulation of activities in and around freshwater wetland areas within its jurisdiction.**

(d) **This chapter shall not, however, preclude municipal advice to the Department concerning letters of interpretation or other matters.**

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(e) This chapter shall not preempt State regulatory programs that affect regulated activities in freshwater wetlands, including, but not limited to, Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and State-approved municipal water quality management plans. These programs will continue to regulate based on the concerns covered by their respective enabling statutes and rules, and may, through such regulation, have some impact on projects in freshwater wetlands. However, those programs will not use freshwater wetlands concerns as a basis for regulation, and any regulation by these programs of projects in freshwater wetlands will be limited to that based on other concerns (for example, flood danger).

(f) If a proposed project does not involve a freshwater wetland or State open water, does not constitute a regulated activity, or is exempt under this chapter, the final decision on the application shall be based solely on the requirements of other applicable permit programs.

7:7A-[13.4]1.2 Effect of a permit

(a) Compliance with a permit[, including a general permit authorization,] during its term constitutes compliance, for enforcement purposes, with sections 301, 307, and 403 of the Federal Act, with the Freshwater Wetlands Protection Act, and with this chapter. Because transition areas are not regulated under the Federal Act, compliance with a transition area waiver during its term constitutes compliance, for enforcement purposes, with the Freshwater Wetlands Protection Act and with this chapter. However, a permit may be modified, terminated and reissued, suspended,

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or terminated during its term for cause as set forth in this chapter.

(b) The issuance of a permit[, including a waiver or general permit authorization,] does not convey property rights of any sort, or any exclusive privilege.

(Agency Note: N.J.A.C. 7:7A-1.3 is proposed for recodification with amendments as N.J.A.C. 7:7A-1.4.)

7:7A-[1.4]1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. Additional definitions specifically applicable to N.J.A.C. 7:7A-[15]11, Mitigation, are set forth at N.J.A.C. 7:7A-[15.1]11.1.

“Abandoned” means, with respect to an agricultural field, including a blueberry field or a cranberry bog, that the field was used for agriculture, but has not been used to produce a crop or product, **or maintained or improved for agricultural purposes**, for five years or more. If an agricultural field has been abandoned for 40 or more years, it shall no longer be considered an abandoned agricultural field. **The lack of a commercial harvest or production of a crop on or from a cranberry bog or blueberry field shall not be a determining factor as to whether the agricultural use has been abandoned.**

[“ACOE” or “Corps” means the United States Army Corps of Engineers.

“Acid producing soils” means soils that contain geologic deposits of iron sulfide minerals (pyrite or marcasite) which, when exposed to oxygen from the air or from surface waters, oxidize to produce sulfuric acid. Acid producing soils, upon excavation, generally have a pH of 4.0 or

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lower. After exposure to oxygen, these soils generally have a pH of 3.0 or lower. Information regarding the location of acid producing soils in New Jersey can be obtained from local Soil Conservation District offices.]

“Administratively complete” means that every item required on the application checklist for a letter of interpretation or permit being sought is included in the application.

...

“Charitable conservancy” means a corporation or trust that meets the definition of a charitable conservancy at N.J.S.A. 13:8B-2. (Note: Effective as of May 1, 2017, the definition of charitable conservancy at N.J.S.A. 13:8B-2 is a corporation or trust whose purposes include the acquisition and preservation of land or water areas or of a particular land or water area, or either thereof, in a natural, scenic or open condition, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which has received tax exemption under section 501(c) of the 1954 Internal Revenue Code.)

“Commissioner” means the Commissioner of the Department [of Environmental Protection], or his or her designated representative.

...

“Complete for review” means that an application for a letter of interpretation or a permit is both administratively and technically complete and is ready to be evaluated by the Department for compliance with the applicable requirements of this chapter.

“Conservation restriction [or easement]” means a restriction, easement, covenant, or condition, in any deed, will, or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural

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state, scenic or open or wooded condition[s], or for conservation of soil or wildlife, or for outdoor recreation or park use, or as suitable habitat for fish or wildlife, to forbid or limit any or all of the following:

1. – 7. (No change.)

...

“Degraded wetland” means a wetland in which there is impaired surface water flow or groundwater hydrology, or excessive drainage; a wetland which has been partially filled or excavated, contaminated with hazardous substances, or which has an ecological [value] **function** substantially less than that of undisturbed wetlands in the region.

...

“**Electronic LOI**” or “**E-LOI**” means an application for a letter of interpretation submitted to the Department electronically.

...

“EPA priority wetlands” or “**USEPA priority wetlands**” means wetlands [which] **that** are designated as priority wetlands by **the USEPA**, and are listed on the “Priority Wetlands List for the State of New Jersey,” which is available from the Department[’s Office of Maps and Publications] at the address [listed] **set forth** at N.J.A.C. 7:7A-[1.3]**1.4**.

“Established, ongoing farming, ranching, or silviculture operation” means activities on areas subject to a farming, ranching, or silviculture use as of June 30, 1988, which use has been pursued continuously since June 30, 1988. Activities on areas lying fallow as part of a conventional rotational cycle that does not exceed five years are part of an established operation. Activities [which] **that** bring an area into farming, silviculture, or ranching use are not part of an

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established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle for so long that modifications to the hydrological regime are necessary to resume operations, or for more than five years, whichever is shorter.

A cranberry bog, blueberry field, or portion thereof that was used for such purposes as of June 30, 1988, and on which any of the activities listed at N.J.A.C. 7:7A-2.4(c)2 and 3 have occurred within the prior five years shall be considered an established, ongoing farming operation and shall not be deemed abandoned. The lack of a commercial harvest or production of a crop on or from the lands shall not be a determining factor as to whether the agricultural use has been abandoned.

“Excavation” means [to dig or remove] **the removal of soil, rocks, [etc.,] or other material** resulting in a change in site elevation.

...

“General permit-by-certification” means a permit to undertake a regulated activity for which the terms and conditions are established in rules promulgated under this chapter at N.J.A.C. 7:7A-5 and 6, and which may be conducted upon Department approval through the electronic permitting process set forth at N.J.A.C. 7:7A-16.6.

...

“Hoophouse” or “polyhouse” means a temporary pipe-frame structure covered with plastic sheeting, with a dirt or fabric floor, that provides for a controlled growing environment to create more favorable growing conditions for crops grown within the covered space. For the purposes of this chapter, a “hoophouse” or “polyhouse” shall not

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include permanent footings.

...

“Hydrophyte” means plant life adapted to growth and reproduction under periodically saturated root zone conditions during at least a portion of the growing season. A listing of these plants can be found in the "National List of Plant Species that Occur in Wetlands: 1988-New Jersey" and amendments thereto, compiled by the USFWS, [ACOE, EPA] **USACE, USEPA,** and the Natural Resources Conservation Service.

[“Impervious surface” means any structure or surface which prevents absorption of stormwater into land. Examples of impervious surfaces are pavement, rooftops, sidewalks, driveways, tennis courts and swimming pools]

“Impervious surface” means a surface that is covered with a layer of material, so that it is highly resistant to infiltration by water.

“Individual permit” means a freshwater wetlands permit or open water fill permit that is issued by the Department after an alternatives test and other site-specific and project-specific reviews required at N.J.A.C. 7:7A-[7]**10.**

...

“Letter of interpretation” or “LOI” means the document issued by the Department under N.J.A.C. 7:7A-[3]**4,** indicating the presence or absence of wetlands, State open waters, or transition areas; verifying or delineating the boundaries of freshwater wetlands, State open waters, and/or transition areas; or assigning a wetland a resource value classification.

“Linear development” means [land uses] **a development with the basic function of connecting two points,** such as **a road[s], drive[s], public walkway, railroad[s], sewerage pipe,**

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[and] stormwater management pipe[s], gas **pipeline**, [and] water pipeline[s], **or** electric, telephone, [and] **or** other transmission line[s and the rights-of-way therefor, the basic function of which is to connect two points]. Linear development shall not mean residential, commercial, office, or industrial buildings, improvements within a development, such as utility lines or pipes, or internal circulation roads.

...

“Major discharge” means a discharge or activity that the Department must transmit to [EPA] **USEPA** for review in accordance with the Department’s 1993 MOA with [EPA] **the USEPA** regarding assumption of the Federal 404 program. Provisions regarding [EPA] **USEPA** review of major discharges are found at N.J.A.C. 7:7A-[12.2]**19.5**. The following are major discharges:

1. (No change.)
2. A discharge with reasonable potential to affect Federally listed or proposed endangered or threatened species as determined by the [U.S. Fish and Wildlife Service] **USFWS**;

3. – 10. (No change.)

...

“Mitigation” means activities carried out pursuant to N.J.A.C. 7:7A-[15]**11** in order to compensate for freshwater wetlands or State open waters loss or disturbance caused by regulated activities.

“Mitigation bank” means an operation in which wetlands, uplands, and/or other aquatic resources are restored, created, enhanced, or preserved by a mitigation bank operator for the purpose of providing compensatory mitigation for disturbances to freshwater wetlands and/or State open waters.

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...

“1989 Federal Manual” means the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, published in 1989 by the [EPA, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service] **USEPA, USACE, USFWS**, and the U.S. Department of Agriculture's Natural Resources Conservation Service (formerly the Soil Conservation Service), as amended and/or supplemented, which Manual is incorporated herein by reference.

...

“Palustrine emergent” means a wetlands vegetation pattern in which persistent and [non persistent] **non-persistent** grasses, rushes, sedges, forbs, and other herbaceous or grass-like plants are the dominant vegetation.

...

“Permit” means an **authorization or** approval to engage in a regulated activity in a freshwater wetland, State open water, or transition area, issued by the Department under this chapter. The Department issues the following permits under this chapter:

1. - 3. (No change.)

...

“Project” means the following:

1. For the purpose of a transition area exemption under N.J.A.C. 7:7A-[2.8(f)]**2.4(f)** based on the application for or the grant of a preliminary site plan approval:

i. (No change.)

2. For the purpose of a transition area exemption under N.J.A.C. 7:7A-[2.8(f)]**2.4**, based on the application for or the grant of a preliminary subdivision approval:

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i.-ii. (No change.)

iii. The following are examples of how the Department will determine the “project” exempted on the basis of the application for or grant of preliminary subdivision approval:

(1) – (4) (No change.)

(5) Where land is subdivided but requires further subdivision, other than [de minimis] *de minimis* changes for road right of ways or other infrastructure, before the applicant can proceed to the next step of municipal approval (either building permits or site plan approvals), there is no evidence of intended economic development at the time of initial subdivision application or approval, because the proposed economic development only comes into being with the subsequent, untimely subdivision. Therefore, there is no basis for exemption.

...

“Regulated activity” means any of the activities described at N.J.A.C. 7:7A-2.2 or at N.J.A.C. 7:7A-[2.6]**2.3**.

...

[“Soil Conservation District” means a local subdivision of the New Jersey Department of Agriculture (NJDA), established pursuant to N.J.S.A. 4:24-1 et seq. Generally, each Soil Conservation District administers NJDA programs for a single county, although some administer programs for more than one county. The Soil Conservation Districts are overseen by the New Jersey State Soil Conservation Committee in the NJDA, which promulgates the Standards for Soil Erosion and Sediment Control in New Jersey, N.J.A.C. 2:90.]

“Site plan” or “plan” means a graphic depiction of land, vegetation, water, structures,

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and other physical features on paper, such as a blueprint, construction plan, cross-section, topographic map, architectural rendering, or other similar illustration, which is submitted to the Department to describe an existing or proposed activity or condition.

“Soil Conservation District” means a governmental subdivision of this State, and a public body corporate and politic, organized in accordance with N.J.S.A. 4:24-1 et seq. Each Soil Conservation District administers New Jersey Department of Agriculture programs for one or more counties. Soil Conservation Districts are overseen by the New Jersey State Soil Conservation Committee in the New Jersey Department of Agriculture, which promulgates the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90. For the purposes of this chapter only, the term “Soil Conservation District” shall include any exempt municipality authorized to enforce the Standards for Soil Erosion and Sediment Control by ordinance pursuant to N.J.S.A. 4:24-48.

...

[“Temporary disturbance” means a disturbance caused by permitted regulated activities that are permanently discontinued within six months after they are begun.]

“Technically complete” means that each item included in an application for a letter of interpretation or a permit provides sufficient information for the Department to declare the application complete for review.

“Temporary disturbance” means a regulated activity that occupies, persists, and/or occurs on a site for no more than six months. Where a disturbance associated with certain regulated activities, such as hazardous substance remediation or solid waste facility closure, is intended to be temporary, but will exceed six months in duration because of the

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nature of the activity, the Department will consider the disturbance to be temporary for purposes of this subchapter provided the disturbed areas are restored to their original topography, and all necessary measures are implemented to ensure that the original vegetative cover onsite is restored to its previous (or an improved) condition.

...

“Transition area waiver” or “waiver” means a waiver issued by the Department under this chapter, authorizing any of the regulated activities enumerated at N.J.A.C. 7:7A-[2.6]2.3 in a transition area.

...

“USACE” means the United States Army Corps of Engineers.

“USEPA” [or “EPA”] means the United States Environmental Protection Agency.

“USFWS” means the United States [Department of the Interior,] Fish and Wildlife Service.

...

“USGS quad map” means a topographic quadrangle map issued by the USGS, 7.5 minute series, drawn at a scale of 1:24,000[, available from the Department's Maps and Publications Office at the address listed in N.J.A.C. 7:7A-1.3].

“Utility line” means a pipe, cable, line, [conduit,] or wire for the transport or transmission of gases, liquids, electrical energy, or communications. This term includes a [tower or] pole **or tower** required to support a utility line, but does not include a tower [or pole] that only transmits **or receives electromagnetic** waves through the air, such as for radio, television, or telephone transmission. The term "utility line" does not include a stormwater pipe, or a pipe that drains a

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wetland or State open water, such as a drainage tile.

“Vernal habitat” means a wetland as identified at N.J.A.C. 7:7A-[2.3]3.1, or State open water, as defined above in this section that meets all of the criteria at 1 through 4 below.

Evidence of breeding by an obligate species under 2i below creates a rebuttable presumption that the criteria at 3 and 4 below are met:

1. – 4. (No change.)

“[Water-dependent] **Water dependent** activity” means an activity that cannot physically function without direct access to the body of water along which it is proposed. [An activity that can function on a site not adjacent to the water is not considered water dependent regardless of the economic advantages that may be gained from a waterfront location.] **Uses, or portions of uses, that can function on sites not adjacent to the water are not considered water dependent regardless of the economic advantages that may be gained from a waterfront location. Maritime activity, commercial fishing, public waterfront recreation, and marinas are examples of water dependent uses, but only the portion of the development requiring direct access to the water is water dependent. The test for water dependency shall assess both the need of the proposed use for access to the water and the capacity of the proposed water body to satisfy the requirements and absorb the impacts of the proposed use. A proposed use will not be considered water dependent if either the use can function away from the water or if the water body proposed is unsuitable for the use. For example, in a maritime operation, a dock or quay and associated unloading area would be water dependent, but an associated warehouse would not be water dependent.**

1. Examples of water dependent uses include: docks, piers, marina activities requiring

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access to the water, such as commissioning and decommissioning new and used boats, boat repairs and short-term parking for boaters, storage for boats that are too large to be feasibly transported by car trailer (generally greater than 24 feet), rack systems for boat storage, industries, such as fish processing plants and other commercial fishing operations, port activities requiring the loading and unloading of vessels, and water-oriented recreation.

2. Water dependent uses exclude, for example: housing, hotels, motels, restaurants, warehouses, manufacturing facilities (except for those which receive and quickly process raw materials by ship), dry boat storage for boats that can be transported by car trailer, long-term parking, parking for persons not participating in a water dependent activity, boat sales, automobile junk yards, and non-water oriented recreation, such as roller rinks and racquetball courts.

...

[“Water quality certificate” means a Department determination issued for a proposed activity which requires a Federal license or permit, pursuant to 33 U.S.C. § 1341 of the Federal Act and N.J.S.A. 58:10A-1 et seq.]

“Water quality certificate” means a determination by the Department of the consistency with this chapter of an activity that proposes a discharge to waters of the United States that requires a Federal license or permit pursuant to Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341. Federal licenses and permits for which water quality certificates are issued include, but are not limited to:

1. NJPDES permits by USEPA under Section 402 of the Federal Clean Water Act, 33

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U.S.C. § 1342;

2. Permits for the discharge of dredged or fill material issued by the USACE under Section 404 of the Federal Clean Water Act, 33 U.S.C. § 1344;

3. Permits for activities that have a potential to discharge in navigable waters issued by the USACE under Sections 9 and 10 of the Rivers and Harbors Act, 33 U.S.C. §§ 403 and 404; and

4. Hydropower licenses issued by the Federal Energy Regulatory Commission under Sections 3(11), 4(e) and 15 of the Federal Power Act, 16 U.S.C. §§ 796(11), 797(e), and 808.

...

“Working day” means a day [upon] **on** which the offices of the New Jersey Department of Environmental Protection are open for business.

7:7A-[1.3]1.4 Forms, **checklists**, and information; [Internet web site] **Department address and website**

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

1. Through the Division of Land Use Regulation website at www.state.nj.us/dep/landuse; or
2. By contacting the Division of Land Use Regulation at:

Division of Land Use Regulation

New Jersey Department of Environmental Protection

P.O. Box 439

Trenton, New Jersey 08625-0439

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(609) 292-0060

Fax: (609) 292-8115] **at the address in (b) below, by telephone at (609) 984-0162, or through the Division's website at www.nj.gov/dep/landuse. Further information about the Department can be accessed at www.nj.gov/dep.**

(b) Applications, fees, and **other** correspondence shall be submitted to the **following** addresses [in (a) above, except that courier and hand deliveries shall be delivered to]:

1. For regular mail:

New Jersey Department of Environmental Protection

Division of Land Use Regulation

Mail Code 501-02A

PO Box 420

Trenton, NJ 08625;

2. For hand delivery, courier service, and overnight mail:

New Jersey Department of Environmental Protection

Division of Land Use Regulation

[New Jersey Department of Environmental Protection

5 Station Plaza]

501 East State Street

5 Station Plaza, Second Floor

Trenton, New Jersey 08609; and

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3. For submittal of an application for authorization under a general permit-by-certification, the Department's website at www.nj.gov/dep/online.

(c) Questions regarding the requirements of this chapter or about the status of a particular application can be directed to the Division of Land Use Regulation Technical Support Center at (609) 777-0454, via e-mail at LURTechSupport@dep.nj.gov, or by using an online contact form at www.nj.gov/dep/landuse/contact.html.

[(c)] **(d)** Applications or other materials sent or delivered to [a] **the Department at an** address other than those in [(a) and] (b) **above** shall not be deemed to have been received for the purposes of calculating application review deadlines or other time periods under this chapter.

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

7:7A-1.5 Liberal construction

This chapter shall be liberally construed to effectuate the purpose of the Acts under which it was adopted.

7:7A-[1.5]**1.6** (No change in text.)

SUBCHAPTER 2. APPLICABILITY AND ACTIVITIES FOR WHICH A PERMIT IS REQUIRED

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7:7A-2.1 [Jurisdiction; permit or waiver requirement] **When a permit is required**

[(a) A person proposing to engage in a regulated activity, as described at N.J.A.C. 7:7A-2.2, shall first obtain a general permit authorization or an Individual freshwater wetlands or open water fill permit. A person proposing to engage in a prohibited activity, as described at N.J.A.C. 7:7A-2.6, in a transition area shall first obtain approval from the Department through a transition area waiver or general permit authorization. The discharge of dredged or fill material in a State open water or wetland may also require a stream encroachment permit pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq.

(b) An agency of the State proposing to engage in a regulated activity shall first obtain a freshwater wetlands and/or open water fill permit, and/or a transition area waiver, but shall not be required to pay an application fee.]

(a) No person shall engage in a regulated activity subject to this chapter without a permit or authorization listed in (b) below. Initiation of a regulated activity without a permit or conducting a regulated activity beyond that specifically authorized by a permit is considered a violation of this chapter and shall subject the person or persons responsible for the regulated activity to enforcement action in accordance with N.J.A.C. 7:7A-22.

(b) A person undertaking any regulated activity under this chapter shall do so only in accordance with:

- 1. An authorization under a general permit-by-certification, pursuant to N.J.A.C. 7:7A-5 and 6;**
- 2. An authorization under a general permit, pursuant to N.J.A.C. 7:7A-5 and 7;**
- 3. A transition area waiver, pursuant to N.J.A.C. 7:7A-8;**

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4. An individual permit, pursuant to N.J.A.C. 7:7A-9 and 10; or

5. An emergency authorization, pursuant to N.J.A.C. 7:7A-14.

(c) On March 2, 1994, the Department assumed responsibility for administering the Federal wetlands program (also known as the 404 program) in delegable waters[, as defined at N.J.A.C. 7:7A-1.4]. In non-delegable waters, the [ACOE] **USACE** retains jurisdiction under Federal law, and both Federal and State requirements apply. [A project] **Accordingly, a person proposing to engage in a regulated activity** in non-delegable waters [requires] **shall obtain** two permits, one from the Department under this chapter and one from the [ACOE] **USACE** under the Federal 404 program.

(d) A permit issued under this chapter shall constitute the water quality certificate required under the Federal Act at 33 U.S.C. § 1341 for any activity covered by this chapter. If a discharge of dredged or fill material into waters of the United States[, as defined at N.J.A.C. 7:7A-1.4,] does not require a permit under this chapter but does require a water quality certificate, the Department shall use the standards and procedures in this chapter to determine whether to issue the water quality certificate, except in the New Jersey [Coastal] **coastal** zone, as described at N.J.A.C. [7:7E]**7:7-1.2(b)**. For a discharge of dredged or fill material in the [Coastal] **coastal** zone, the Department shall use the standards and procedures in the [Coastal Permit Program rules and the] Coastal Zone Management rules, N.J.A.C. 7:7 [and 7:7E, respectively], to determine whether to issue a water quality certificate.

[(e) A permittee shall be responsible for ensuring that the permitted project complies with all requirements in this chapter. However, any person who owns the property on which the project occurs, or who manages, oversees or works on the project, may share liability for work or

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activities that are not performed in accordance with this chapter.

(f) Only an activity specifically identified as authorized in a permit, including a transition area waiver or general permit authorization, shall be authorized under that permit.

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

7:7A-2.2 Regulated activities in freshwater wetlands and State open waters

(a) – (b) (No change.)

(c) Notwithstanding (a) above, the following activities are not regulated activities:

1. – 4. (No change.)

5. The driving of one or more pilings in a State open water, if the pilings are not regulated by the [ACOE] **USACE** under the Federal 404 program. The [ACOE] **USACE** regulates the placement of pilings if the placement would have the effect of a discharge of fill material. Examples of activities that are and are not regulated by the [ACOE] **USACE** are:

i. – ii. (No change.)

(Agency Note: N.J.A.C. 7:7A-2.3, 2.4, and 2.5, are proposed to be recodified with amendments as N.J.A.C. 7:7A-3.1, 3.2, and 3.3, respectively.)

7:7A-[2.6]**2.3** Regulated activities in transition areas

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(a) (No change.)

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

1. Normal property maintenance;

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

These activities include:

(1) – (7) (No change.)

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

(A) – (B) (No change.)

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

(9) (No change.)

ii. (No change.)

2.– 3. (No change.)

(c) Certain regulated activities are exempt from transition area requirements under N.J.A.C.

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7:7A-[2.8(f)]**2.4(f)**. In addition, an activity that is exempt from freshwater wetlands permit requirements under N.J.A.C. 7:7A-[2.8(c)]**2.4(c)** for farming activities, or N.J.A.C. 7:7A-[2.8(d)]**2.4(d)** for forestry activities, is also exempt from transition area requirements, subject to the limits on freshwater wetlands exemptions at N.J.A.C. 7:7A-[2.8]**2.4**. A person may request an exemption letter confirming the exemption status of an activity by using the procedures at N.J.A.C. 7:7A-[2.10]**2.6**.

(**Agency Note:** N.J.A.C. 7:7A-2.7 is proposed for recodification with amendments as N.J.A.C. 7:7A-3.4.)

7:7A-[2.8]**2.4** Activities exempted from permit and/or waiver requirement

(a) [This section sets forth certain activities that are exempt from certain permit requirements in this chapter. However, even if an activity is exempt under this chapter, it may still require a permit from the Army Corps of Engineers under the Federal wetlands program, and/or a water quality certificate issued by the Department.] **The following are exempt from the requirement of a freshwater wetlands permit and/or waiver unless the USEPA's regulations providing for the delegation to the State of the Federal wetlands program conducted pursuant to the Federal Act require a permit for any of these activities, in which case the Department shall require a permit for those activities so identified by that agency.** Any activity conducted under an exemption that does not meet all standards, conditions, or limitations of the exemption shall constitute a violation of this chapter, and shall be subject to enforcement action in accordance with N.J.A.C. 7:7A-[16]**22**.

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

1. – 3. (No change.)

4. [The normal harvesting of forest products, including the clear cutting of a non-cultivated, wooded wetland area,] **Normal silviculture activities** must be part of a forest management plan that [addresses wetlands,] **conforms to best management practices (BMPs)** and [that] is reviewed and approved by the State Forester before the activities are undertaken. A woodland management plan prepared for tax purposes but that does not address wetlands is insufficient to qualify for the exemption; and

5. If an area with hydric soils has been drained for farming **or other** purposes through the use of drainage structures such as tiles or ditches, the Department shall, **in the absence of compelling scientific information that wetland hydrology has been effectively removed by factors other than the drainage structures**, presume that the area [has] **maintains** wetlands hydrology for the purpose of identifying a freshwater wetland under N.J.A.C. 7:7A-[2.3]**3.1**. To rebut this presumption of wetlands hydrology, all drainage structures shall be removed or completely disabled and the area shall be left undisturbed for at least one normal rainfall year, after which the presence or absence of wetlands hydrology shall be determined through use of technical criteria, field indicators, and other information, in accordance with the 1989 Federal [manual] **Manual**.

(c) Subject to the limitations of this section, the following activities, when part of an established, ongoing farming, ranching, or silviculture operation, on properties [which] **that** have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment

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Act, N.J.S.A. 54:4-23.1 et seq., are exempt from the requirement of a freshwater wetlands or open water fill permit, or transition area waiver:

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

i. (No change.)

ii. The discharge of material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries, or other wetland crop species, where the farming activities and the discharge occur in wetlands and waters [which] **that** are in established use for such agricultural and silvicultural wetlands crop production[, and the ditching or water control facilities do not alter the bottom elevations of any watercourse;]. **Any discharge of material into wetlands or waters, excavation of wetlands, or draining of wetlands or waters, that are not in established use for such agricultural and silvicultural wetlands crop production requires a permit. For example, the construction of ditches within the confines of an established cranberry bog is an exempt activity. However, the construction of ditches in wetlands or waters located outside of the established cranberry bog requires a permit;**

iii. – iv. (No change.)

v. Minor drainage in wetlands is limited to drainage within areas that are part of an established farming or silvicultural operation. It includes maintenance of existing drainage tile[,] or other drainage structures. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (for example, wetlands species to upland

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species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). [In addition, minor drainage does not include the construction of any new canal, ditch, dike or other waterway or structure. Any discharge of dredged or fill material into the wetlands or State open waters incidental to the construction of any such structure or waterway requires a freshwater wetlands or State open water permit, and will not be considered minor drainage;]

2. Activities associated with the normal maintenance of cranberry bogs and blueberry fields where the maintenance activities and the discharge occur in wetlands and waters that are in established use for cranberry or blueberry production, such as:

i. Periodic flooding;

ii. Sanding;

iii. Control or suppression of weeds or brush in and around the bog or field;

iv. Pest control or suppression; and

v. Maintenance, repair, or cleaning of dams, ditches, underdrains, floodgates, irrigation systems, or other drainage or water control facilities;

3. Activities for the renewal or rehabilitation of a cranberry bog, including but not limited to:

i. Removal of undesirable soil or vegetation;

ii. Grading and leveling;

iii. Installation, reconfiguration, repair, or replacement of water control or supply systems or facilities;

iv. The removal, relocation, or construction of internal dams; and

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v. The planting of new vines in an appropriate soil layer;

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

i. (No change.)

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

(1) – (4) (No change.)

(5) Intended exclusively for agricultural purposes. The applicant shall submit a description of the purpose of the pond with any application for an exemption letter under N.J.A.C. 7:7A-[2.10]**2.6**; and

(6) Sized appropriately for the intended use under [(c)2ii(5)] **(c)3ii(5)** above.

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

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

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placement of fill shall be removed within 30 days;

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

(1) – (4) (No change.)

(5) The farm road shall be built at grade. If not built at grade, the applicant shall demonstrate to the Department why fill material is necessary for the farming operation with any application for an exemption letter under N.J.A.C. 7:7A-[2.10]2.6; and

(6) In accordance with [(c)3i(5)] (c)4i(5) above, if fill material is necessary, it shall be no more than six inches deep and shall be limited to 0.25 acres of wetland disturbance. In addition, pipes shall be installed to maintain wetland hydrology;

ii. “Maintenance of a farm road” means:

(1) – (2) (No change.)

(3) A culvert shall be used only to replace an existing culvert. If it is necessary to install a culvert for the first time, the Department will consider the project to be construction of a new road subject to the limitations in [(c)3i] (c)4i above[.]; and

6. Installation of temporary farm structures with only a dirt or fabric floor, such as hoophouses, polyhouses, run-in sheds, and pole barns and any grading or land contouring associated therewith, and fencing without foundations on lands that were actively cultivated on or before July 1, 1988, have been in active agricultural use since then, were in active agricultural use at the time that the temporary farm structures were or are to be erected, and are identified as “ModAg” farmed wetlands on the Wetlands Maps promulgated by the Department in 1988.

(d) Normal [harvesting of forest products] **silviculture activities**, in accordance with a forest

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

(e) (No change.)

(f) Subject to the limitations of this section including (g) below, the following projects, [as defined at N.J.A.C. 7:7A-1.4,] are exempt from transition area requirements, but are subject to freshwater wetlands and State open water requirements:

1. – 2. (No change.)

(g) – (h) (No change.)

(i) A project covered by an individual permit issued by the [U.S. Army Corps of Engineers] **USACE** prior to July 1, 1988, shall be governed only by the Federal Act, and shall not be subject to additional or inconsistent substantive requirements of this chapter. However, when the [ACOE] **USACE** permit expires, any application for an extension shall be made to the Department under N.J.A.C. 7:7A-[14.6]**20.4**. The Department shall not require a transition area as a condition of any extension of an [ACOE] **USACE** permit issued prior to July 1, 1988.

7:7A-[2.9]**2.5** Geographic areas exempted from permit and/or waiver requirement

(a) Regulated activities in areas under the jurisdiction of the [Hackensack Meadowlands

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Development Commission] **New Jersey Sports and Exposition Authority** under N.J.S.A.

13:17-1 et seq., do not require a permit under this chapter, but may require other State and/or Federal wetlands approvals, such as a Federal 404 permit from the [ACOE] **USACE**, [and/or] a [Water Quality Certificate issued by the Department, and/or] **water quality certificate**, or a Federal Consistency Determination issued under the Federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq.

(b) – (d) (No change.)

7:7A-[2.10]**2.6** Exemption letters

(a) (No change.)

(b) To apply for an exemption letter for a farming, silviculture, or ranching exemption under N.J.A.C. 7:7A-[2.8(c)]**2.4(c)**, an applicant shall submit the following:

1. – 3. (No change.)

4. The fee specified in N.J.A.C. 7:7A-[11]**18**.

(c) To apply for an exemption letter for a [forest products harvesting] **normal silviculture activities** exemption pursuant to N.J.A.C. 7:7A-[2.8(d)]**2.4(d)**, an applicant shall submit the following:

1. (No change.)

2. The fee specified in N.J.A.C. 7:7A-[11]**18**.

(d) To apply for an exemption letter for a transition area exemption pursuant to N.J.A.C. 7:7A-[2.8(f)]**2.4(f)**, an applicant shall submit the following:

1. – 2. (No change.)

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3. The fee specified in N.J.A.C. 7:7A-[11]18.

7:7A-[2.11]2.7 Stormwater management

If a project requires an individual permit under [these rules] **this chapter** and the project in its entirety (that means the whole project, not just the portions within wetlands or transition area) meets the definition of “major development” at N.J.A.C. 7:8-1.2, then the project shall comply in its entirety with the Stormwater Management rules at N.J.A.C. 7:8. If an activity requires a general permit under [these rules] **this chapter** and the regulated activity meets the definition of “major development” at N.J.A.C. 7:8-1.2, then the project of which the regulated activity is a part shall comply in its entirety with the Stormwater Management rules at N.J.A.C. 7:8. In accordance with N.J.A.C. 7:7A-[1.6(b)]1.1(c), the Pinelands Commission may require equal or more stringent stormwater management regulation of activities in and around freshwater wetland areas within its jurisdiction.

(**Agency Note:** N.J.A.C. 7:7A-3 is proposed for recodification with amendments as N.J.A.C. 7:7A-4.)

SUBCHAPTER 3. IDENTIFYING FRESHWATER WETLANDS AND TRANSITION AREAS; FRESHWATER WETLANDS RESOURCE VALUE CLASSIFICATION

7:7A-[2.3]3.1 Identifying freshwater wetlands

(a) Freshwater wetlands shall be identified and delineated using the three-parameter approach

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(that is, hydrology, soils, and vegetation) enumerated in the 1989 Federal Manual[, as defined at N.J.A.C. 7:7A-1.4].

(b) To aid in determining the presence or absence of freshwater wetlands, the Department may refer to any of the following sources of information:

1. – 3. (No change.)
4. [United States Geologic Survey] **USGS** topographic maps;
5. – 7. (No change.)

(c) Vegetative species classified as hydrophytes and indicative of freshwater wetlands shall include, but not be limited to, those plants listed in “National List of Plant Species that Occur in Wetlands: 1988 New Jersey,” compiled by the [United States Fish and Wildlife Service] **USFWS** in cooperation with the [ACOE] **USACE**, USEPA, and the United States Soil Conservation Service, and any subsequent amendments thereto.

(d) To obtain a determination from the Department of the presence, absence, or boundaries of freshwater wetlands on a particular site, a person may apply to the Department for a letter of interpretation under N.J.A.C. 7:7A-[3]4.

(e) (No change.)

(f) The Department has provided the New Jersey freshwater wetlands maps to the [following] offices **listed at (f)1 and 2 below** for public inspection[:]. **The maps are also available through NJ-GeoWeb at <http://www.nj.gov/dep/gis/newmapping.htm>.**

1. The county clerk or registrar of deeds and mortgages in each county; **and**
2. The municipal clerk of each municipality[:]; and
3. The Department’s Maps and Publications Sales Office, located at the address listed in

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N.J.A.C. 7:7A-1.3].

7:7A-[2.4]3.2 Classification of freshwater wetlands by resource value

(a) – (b) (No change.)

(c) [The] **For the purposes of (b) above, the** Department identifies present [or] **and** documented habitat for threatened or endangered species [for purposes of (b) above] using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened [or] **and** endangered wildlife species. [The details of this method are described in the Division of Land Use Regulation freshwater wetlands technical manual, available from the Department's Office of Maps and Publications at the address in N.J.A.C. 7:7A-1.3. An applicant may request that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value. Such a request shall include a demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity. Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.] **The report entitled New Jersey's Landscape Project, which is updated periodically, provides additional information on mapping methodology and is available at www.nj.gov/dep/fgw/ensphome.htm or through the Department's interactive website at www.nj.gov/dep/gis/geoweb splash.htm. Interested parties may also obtain information by writing to the Division of Fish and Wildlife, Endangered and Nongame Species Program at:**

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The Landscape Project

State of New Jersey Department of Environmental Protection

Division of Fish and Wildlife Endangered and Nongame Species Program

Mail Code 501-03

PO Box 420

Trenton, NJ 08625-0420.

(d) If the Department becomes aware of an occurrence of an threatened or endangered wildlife species on or proximate to a site that is not mapped as threatened or endangered wildlife species habitat by the Landscape Project, and the Department determines that the habitat may be suitable for that species, the Department shall notify the applicant of the proposed exceptional resource value classification based on new endangered or threatened species data and provide them with the opportunity to contest the classification decision prior to formally classifying the wetlands of exceptional resource value in accordance with (b) above.

(e) An applicant may request that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value. Such a request shall include a demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity. Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.

[(d)] (f) A freshwater wetland of ordinary resource value, or an ordinary resource value

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wetland, is a freshwater wetland, which does not exhibit any of the characteristics in (b) above, and which is:

1. An isolated wetland[, as defined at N.J.A.C. 7:7A-1.4, which] **that**:

i. – ii. (No change.)

2. – 4. (No change.)

Recodify existing (e) and (f) as **(g) and (h)** (No change in text.)

[(g)] **(i)** To obtain a Department determination of the resource value classification for a particular wetland, an applicant may obtain a letter of interpretation from the Department under N.J.A.C. 7:7A-[3]4.

7:7A-[2.5]3.3 [General] **Identifying a transition area** [provisions]

(a) – (b) (No change.)

(c) A transition area is required adjacent to a freshwater wetland of exceptional resource value and of intermediate resource value as classified in N.J.A.C. 7:7A-[2.4.]3.2. A transition area is not required adjacent to a freshwater wetland of ordinary resource value or adjacent to a State open water.

(d) The standard widths of a transition area [adjacent to a freshwater wetland of exceptional resource value shall be 150 feet. This] **are set forth at (d)1 and 2 below. These** standard widths shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-[6.1(a)]8.1(a).

1. The standard width of a transition area adjacent to a freshwater wetland of exceptional resource value shall be 150 feet.

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[(e)] **2.** The standard width of a transition area adjacent to a freshwater wetland of intermediate resource value shall be 50 feet. [This standard width shall only be modified through the issuance of a transition area waiver. The types of transition area waivers are listed at N.J.A.C. 7:7A-6.1(a).]

[(f)] **(e)** A person shall not engage in regulated activities, as described at N.J.A.C. 7:7A-2.6**2.3**, in a transition area except pursuant to a transition area waiver.

[(g)] **(f)** (No change in text.)

7:7A-[2.7]**3.4** Transition areas due to freshwater wetlands on adjacent property

(a) (No change.)

(b) To determine whether a site has transition areas on it caused by wetlands on another property:

1. (No change.)

2. If there are freshwater wetlands on another property within 150 feet of the site's property line, determine the resource value classification of the wetlands on the nearby property. For a Department-issued resource value classification of the wetlands, obtain an LOI under N.J.A.C.

7:7A-[3]**4**;

3. (No change.)

4. If any of the freshwater wetlands on nearby properties within 150 feet of the site's property line cannot be classified as ordinary resource value wetlands, determine the transition area on the site as follows:

i. If any wetlands on nearby properties are intermediate resource value wetlands, and are

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within 50 feet of the site's property line, there is at least some transition area on the site arising from these wetlands. In order to determine the size and shape of the transition area, obtain a delineation of the wetlands on the nearby properties and determine the transition area for each under N.J.A.C. 7:7A-[2.5(e)]**3.3(d)2**; and

ii. If any wetlands on nearby properties are exceptional resource value wetlands, and are within 150 feet of the site's property line, there is at least some transition area on the site arising from these wetlands. In order to determine the size and shape of the transition area, obtain a delineation of the wetlands on the nearby properties and determine the transition area for each under N.J.A.C. 7:7A-[2.5(d)]**3.3(d)1**; and

5. (No change.)

(c) (No change.)

SUBCHAPTER [3.] **4. LETTERS OF INTERPRETATION**

7:7A-4.1 Purpose and scope

This subchapter sets forth the general provisions relating to letters of interpretation; the types of letters of interpretation; the duration of a letter of interpretation; and the conditions that apply to a letter of interpretation.

7:7A-[3.1]**4.2 [Basic LOI information] General provisions**

(a) A letter of interpretation (LOI) provides the Department's official determination of one or more of the following:

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1. – 2. (No Change.)

3. What [is the] resource value classification[,] under N.J.A.C. 7:7A-[2.4, of] **3.2 applies to the** freshwater wetlands on a site.

(b) (No change.)

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

1. A presence/absence LOI, in which the Department determines whether any freshwater wetlands, transition areas, and/or State open waters exist on a site or on a portion of a site (also called a footprint of disturbance LOI). See N.J.A.C. 7:7A-[3.2] **4.3** for further details regarding presence/absence LOIs;

2. A line delineation LOI, in which the Department delineates the boundary lines of freshwater wetlands, transition areas, and/or State open waters for an applicant. See N.J.A.C. 7:7A-[3.3] **4.4** for further details regarding line delineation LOIs; and

3. A line verification LOI, in which the Department confirms or modifies a delineation proposed by the applicant. See N.J.A.C. 7:7A-[3.4] **4.5** for further details regarding line verification LOIs.

(d) If an area with hydric soils has been drained for farming **or other** purposes through the use of drainage structures or features, such as tiles or ditches, the Department shall, **in the absence of compelling scientific information that wetland hydrology has been effectively removed by factors other than the drainage structures**, presume that the area [has] **maintains** wetlands hydrology for the purpose of identifying a freshwater wetland under N.J.A.C. 7:7A-[2.3] **3.1**. To rebut this presumption of wetlands hydrology, all drainage structures shall be removed or completely disabled and the area shall be left undisturbed for at least one normal rainfall year,

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after which the presence or absence of wetlands hydrology shall be determined through use of technical criteria, field indicators, and other information, in accordance with the 1989 Federal [manual] **Manual**.

(e) Each LOI that indicates the presence of freshwater wetlands shall state the resource value classification of the wetlands under N.J.A.C. 7:7A-[2.4]3.2 and will specify the width of the transition area. However, in some cases, seasonal conditions make it difficult to determine the resource value classification of a wetland. For example, if there has been a past sighting of a bog turtle (an endangered species) in the area, and an LOI application is submitted in December when the early successional habitat needed by bog turtles may be impossible to identify under snow cover, Department staff cannot determine if the habitat remains suitable for bog turtles until the snow melts. In such a case, the Department shall notify the applicant that seasonal conditions do not permit an accurate assessment of resource value, shall provide an explanation of the seasonal conditions involved, and shall give the applicant the option to accept an exceptional resource value classification, or to wait for the LOI until the Department can determine the resource value **classification** of the wetland.

[(f) The Department shall issue an LOI within the applicable time period below. Average time periods from the Department's receipt of an application to a final decision on the application are set forth for all approvals at N.J.A.C. 7:7A-10.1(k):

1. If the Department does not request additional information regarding an LOI application under N.J.A.C. 7:7A-12.1(c)4, within 30 days after receiving the application;
2. If the Department requests additional information regarding an LOI application under N.J.A.C. 7:7A-12.1(c)4, within 45 days after receipt of information sufficient to declare the

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application complete;

3. If the applicant chooses to wait for a determination of resource value classification under (e) above, as soon as the Department determines that the resource classification of the wetlands can be definitively determined; and

4. If the Department conducts a site inspection, the time set forth in this subsection for issuance of the letter of interpretation shall be extended by 45 days.]

[(g)] **(f)** The Department shall issue an LOI for a portion of a site, also called a footprint of disturbance, under N.J.A.C. 7:7A-[3.2(c)2 or 3.4(b)2]**4.3(c)2 or 4.5(b)3**. Special application requirements shall apply to such an LOI, in order to ensure that the portion of the site is clearly marked on the plan and on the ground. These requirements are described at N.J.A.C. 7:7A-[10.3(b) and (d)4]**16.3(a)4i and (b)4** .

[(h)] **(g)** The Department shall not issue an LOI if the Department determines that the information submitted in the application for the LOI is inaccurate. In such a case, the applicant may provide corrected information upon the Department's request, or may apply directly for a permit without obtaining an LOI. If the applicant applies for the permit without first obtaining an LOI, the permit application must include all information that would be necessary for the Department to issue an LOI for the site, in accordance with N.J.A.C. 7:7A-[10.4(a)2, 10.5(a)1, or 10.6(a)3]**16.8(b)1, 16.9(b)1, or 16.10(b)1**, as applicable. The Department will then review the submitted wetland delineation as part of the permit review process.

[(i)] **(h)** [In order to ensure that a delineated wetlands boundary can be located in the future after the LOI is issued, an LOI applicant] **Except for a presence/absence LOI for an entire site under N.J.A.C. 7:7A-4.3(c)1, all LOI recipients** shall provide the Department with a survey of

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

(j) If an LOI covers only a portion of a site in accordance with N.J.A.C. 7:7A-3.2(c)2 or 3.4(b)2, the applicant shall provide, in addition to the survey required at (i) above, a survey of the boundaries of the portion of the site that are covered by the LOI.

(k) If a site is located in an area under the jurisdiction of the Pinelands Commission, the Department shall not issue a letter of interpretation. The lead agency in this area for determining the presence, absence, or extent of freshwater wetlands is the Pinelands Commission. However, in cases of disagreement, the Department and the Pinelands Commission retain authority to independently or jointly establish these boundaries.]

7:7A-[3.2]4.3 Presence/absence LOI

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(a) (No change.)

(b) A presence/absence LOI does not identify the boundaries or location of any freshwater wetlands, transition areas, and/or State open waters found within a site or portion thereof. To obtain an LOI indicating the location or the boundaries of freshwater wetlands, transition areas, and/or State open waters, an applicant shall apply for a line delineation LOI under N.J.A.C.

7:7A-[3.3]4.4, or a line verification LOI under N.J.A.C. 7:7A-[3.4]4.5.

(c) The Department shall issue a presence/absence LOI for either of the following:

1. An entire site, [as defined at N.J.A.C. 7:7A-1.4,] regardless of its size; or
2. (No change.)

(d) (No change.)

7:7A-[3.3]4.4 Line delineation LOI

(a) (No change.)

(b) The Department shall issue a line delineation LOI for a site, [as defined at N.J.A.C. 7:7A-1.4,] or for a municipal tax lot, that is one acre or smaller. The Department shall not issue a line delineation LOI for a site larger than one acre. The Department shall not issue a line delineation LOI for a portion of a site, unless the portion is a municipal tax lot.

7:7A-[3.4]4.5 Line verification LOI

(a) (No change.)

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

1. A site, [as defined at N.J.A.C. 7:7A-1.4,] regardless of its size;

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2. – 3. (No change.)

7:7A-[3.6]4.6 [Effect, duration, and extension] **Duration** of a letter of interpretation

(a) – (b) (No change.)

(c) Requests for extensions shall be made in writing to the Department before the letter of interpretation has expired, but no more than one year before the expiration date, and shall be subject to the application requirements at N.J.A.C. 7:7A-[10]16. Applicants will be required to submit a new application if an extension is not applied for prior to the expiration date of the letter of interpretation.

7:7A-4.7 Conditions that apply to an issued letter of interpretation delineation or verification

(a) Within 90 calendar days after the Department issues a delineation or verification letter of interpretation on a privately owned lot, or on a publicly owned lot other than a right-of-way, the recipient of the delineation or verification shall submit the following information to the Office of the County Clerk or the registrar of deeds and mortgages in which the site is located, and shall send proof to the Department in accordance with (b) below that this information is recorded on the deed of each lot referenced in the delineation or verification letter of interpretation:

- 1. The Department file number for the letter of interpretation;**
- 2. The approval and expiration date of the letter of interpretation;**

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3. A metes and bounds description of the wetland boundary approved under the letter of interpretation;

4. The width and location of any transition area approved under the letter of interpretation; and

5. The following statement: “The State of New Jersey has determined that all or a portion of this lot lies in a freshwater wetland and/or transition area. Certain activities in wetlands and transition areas are regulated by the New Jersey Department of Environmental Protection and some activities may be prohibited on this site or may first require a freshwater wetland permit. Contact the Division of Land Use Regulation at (609) 292-0060 or <http://www.nj.gov/landuse> for more information prior to any construction onsite.”

(b) Proof that the information at (a) above has been recorded on the deed of each lot referenced in the letter of interpretation shall be in the form of either a copy of the complete recorded document or a receipt from the clerk or other proof of recordation provided by the recording office. However, if the initial proof provided to the Department is not a copy of the complete recorded document, a copy of the complete recorded document shall be provided to the Department within 180 calendar days of the issuance or reissuance of the letter of interpretation.

SUBCHAPTER [4.] 5. GENERAL PROVISIONS FOR GENERAL PERMITS-BY-CERTIFICATION AND GENERAL PERMITS

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7:7A-5.1 Purpose and scope

This subchapter sets forth the standards for the Department to issue, by rulemaking, general permits-by-certification and general permits; the use of these permits to conduct authorized activities; the standards governing the use of more than one of these permits on a single site; the duration of authorizations under these permits; and the conditions that apply to these permits.

7:7A-[4.1]5.2 [Department issuance of] **Standards for issuance, by rulemaking, of general permits-by-certification and general permits**

(a) [This section details how the Department will adopt General permits except for general permits numbers 6 and 7. To adopt a general permit, the Department will publish a draft general permit as a rule proposal pursuant to the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.] **The Department will, in accordance with the rulemaking provisions of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., promulgate each general permit-by-certification or general permit, except for general permit numbers 6 and 7, after publication of a notice of rule proposal in the New Jersey Register and consideration of public comment.** In addition, the Department will send a copy of the draft **general permit-by-certification or general permit to the USEPA, and will follow the procedures for [EPA] USEPA comment found at N.J.A.C. 7:7A-[12.2]19.5.**

(b) The Department [may adopt a] **will promulgate a general permit-by-certification or general permit only if all of the following conditions are met:**

1. [After conducting an environmental analysis, the] **The Department determines that the**

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regulated activities will cause only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impacts on the environment, and will cause only minor impacts on freshwater wetlands and State open waters;

2. (No change.)

3. The Department [provides] **has provided** public notice and **an** opportunity for a public hearing **with respect to the proposed general permit-by-certification or general permit. After a general permit-by-certification or general permit has been promulgated pursuant to this subchapter, the Department will not hold public hearings on individual applications for authorization under a general permit-by-certification or general permit.**

(c) [In addition to the conditions required by this subchapter, each] **Each general permit-by-certification or** general permit shall contain limitations as necessary to comply with Federal regulations governing the Department's assumption of the Federal 404 program at 40 CFR [§] 233.21(c) as follows:

1. (No change.)

2. A precise description of the geographic area to which the **general permit-by-certification or** general permit applies, including, when appropriate, limits on the type(s) of water(s) or wetlands where activities may be conducted.

[(d) The Department may modify an adopted general permit as it applies to a particular project by adding special conditions which must be met in order to qualify for authorization under the general permit.]

(d) The Department will include in each general permit-by-certification or general permit promulgated pursuant to this subchapter appropriate conditions applicable to

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particular types of sites or development that must be met in order for a proposed activity to qualify for authorization under the general permit-by-certification or general permit.

(e) The Department may, **through rulemaking in accordance with the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.,** repeal [an adopted] **a general permit-by-certification or** general permit and thereafter require individual permits for activities previously covered by the **general permit-by-certification or** general permit, if it finds that the **general permit-by-certification or** general permit no longer meets the standards of the Freshwater Wetlands Protection Act and this chapter.

(f) – (g) (No change.)

7:7A-[4.2]5.3 [Using a] **Use of an authorization pursuant to a general permit-by-certification or a** general permit to [authorize specific] **conduct regulated** activities

(a) **An activity that meets the requirements of a general permit-by-certification may be conducted when the person proposing to conduct the activity receives the automatic authorization resulting from completion of the application submission through the Department’s electronic permitting system in accordance with N.J.A.C. 7:7A-16.6.**

[(a)] (b) [To use a general permit to authorize regulated activities, an applicant shall submit an application for a general permit authorization, using the application procedures for all permits and waivers set forth at N.J.A.C. 7:7A-10,] **An activity that meets the requirements of a general permit may be conducted when the person proposing to conduct the activity receives authorization from the Department in accordance with N.J.A.C. 7:7A-19,** except in an area under the jurisdiction of the Pinelands Commission. In such an area, the application shall

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be submitted to the Pinelands Commission rather than to the Department, in accordance with the Pinelands Comprehensive Management Plan (CMP). For information on freshwater wetlands and transition areas in the Pinelands, contact the Pinelands Commission at (609) 894-7300 or through its website at www.state.nj.us/pinelands.

[(b)] (c) Each **general permit-by-certification or** general permit specifies whether it covers activities in freshwater wetlands, transition areas, State open waters, or a combination thereof. An authorization issued under a **general permit-by-certification or** general permit that covers activities in freshwater wetlands satisfies the requirement for a freshwater wetlands permit. An authorization issued under a **general permit-by-certification or** general permit that covers activities in State open waters satisfies the requirement for an open water fill permit. An authorization issued under a **general permit-by-certification or** general permit that covers activities in a transition area satisfies the requirement for a transition area waiver.

[(c)] (d) Each **authorization under a** general permit [authorization] shall include [a limited transition area waiver to] **an access transition area waiver that** allows access to the authorized activity, in accordance with N.J.A.C. 7:7A-[6.1(a)6]**8.1(a)5**. No fee or application is required for this waiver and the disturbance authorized under this waiver is not counted in calculating the amount of disturbance under the general permit. [An access transition area waiver allows regulated activities only:

1. In that portion of the transition area bordering on that portion of the freshwater wetland in which the activity authorized by the general permit will take place; and
2. For an activity that the Department determines is necessary to accomplish construction,

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and for future use, of the activity authorized in the wetlands under the general permit. An activity not directly required in order to obtain access to the activity authorized in the wetlands under the general permit shall require a separate transition area waiver.

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

ii. If the activity authorized under the general permit partially eliminates the wetland, the access shall be limited to the transition area adjacent to the location of the approved wetland filling. Any additional impacts to the transition area shall require a separate transition area waiver.

iii. Upon conclusion of the activity authorized in the wetland under the general permit, the Department shall re-establish the wetland transition area adjacent to the new wetland boundary. Any part of the transition area that was temporarily disturbed for access only shall be allowed to revert to preconstruction condition or shall be restored if necessary to reestablish preconstruction conditions

(d) Usually, a general permit is the only wetlands approval required for activities in freshwater wetlands in New Jersey. However, if an activity is located in non-delegable waters, as defined at N.J.A.C. 7:7A-1.4, both a general permit authorization from the Department and a Federal 404 program approval from the ACOE may be required. In addition, if an activity is located in wetlands or transition areas in an area under the jurisdiction of the Pinelands

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Commission, approval may be required from the Pinelands Commission, in accordance with the Pinelands Comprehensive Management Plan (CMP). For information on freshwater wetlands and transition areas in the Pinelands, contact the Pinelands Commission at (609) 894-7300 or through its website at www.state.nj.us/pinelands.]

(e) The Department shall deny an application for **authorization under** a general permit [authorization] and require an application for an individual permit if the Department finds that:

1. Additional permit conditions added under N.J.A.C. 7:7A-[13.2]**20.3** would not be sufficient to ensure compliance with this chapter and other applicable laws; or
2. (No change.)

(f) The limits on disturbance in each **general permit-by-certification or** general permit apply to the entire site upon which activities authorized under the **general permit-by-certification or** general permit occur. An applicant shall not segment a project or its impacts by applying for a **general permit-by-certification or** general permit authorization for one portion of the project and applying for an individual permit for another portion of the project. Similarly, an applicant shall not segment a project or its impacts by separately applying for **authorizations under a general permit-by-certification or a** general permit [authorizations] for different portions of the same project.

(g) Unless otherwise specified, the limits on disturbance under a **general permit-by-certification or a** general permit apply to total disturbance, including both temporary and permanent disturbance.

(h) If a regulated activity is not covered by any **general permit-by-certification**, general permit, or combination [of general permits] **thereof**, an individual freshwater wetlands or open

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water fill permit must be obtained under N.J.A.C. 7:7A-[7]9 in order to authorize the activity under this chapter. If a regulated activity in a transition area is not covered by any **general permit-by-certification**, general permit, or combination [of general permits] **thereof**, a transition area waiver must be obtained under N.J.A.C. 7:7A-[6]8 in order to authorize the activity under this chapter.

(i) **An authorization under a general permit-by-certification or general permit does not relieve the person conducting the authorized regulated activities from the obligation to obtain any other applicable permits or approvals required by law.**

(**Agency Note:** N.J.A.C. 7:7A-4.3 is proposed for recodification with amendments as N.J.A.C. 7:7A-5.7)

7:7A-[4.4]5.4 Use of [multiple] **more than one** general permit[s] or **general permit-by-certification on a single site**

(a) [If an application contains] **A person may undertake** more than one **regulated** activity on a single site[, the Department may authorize the]. **The activities may be authorized** under one or more **general permits-by-certification and/or** general permits, provided [that]:

1. The individual limits of each **general permit-by-certification and/or** general permit are complied with. If activities under one **general permit-by-certification and/or** general permit are conducted in more than one place on a site, the total disturbance caused by all activities at all locations onsite under that **general permit-by-certification and/or** general permit shall be summed in order to determine if the limits in the **general permit-by-certification and/or**

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general permit are met. For example, if an applicant seeks authorization for more than one outfall structure under general permit 11 (N.J.A.C. 7:7A-[5.11]7.11) on a site, the impacts from all of the structures shall be summed and the total must be no greater than 0.25 acres, which is the acreage limit for that general permit (see N.J.A.C. 7:7A-[5.11(c)i]7.11(c)1). In a second example, if an applicant proposes a minor road crossing under general permit 10B (N.J.A.C. 7:7A-[5.10B]7.10B) and two outfall structures under general permit 11 on the same site, the minor road crossing cannot exceed 0.25 acres, which is the acreage limit for that general permit (see N.J.A.C. 7:7A-[5.10B(b)2]7.10B(b)2), and the combined impact of the two outfall structures cannot exceed the 0.25-acre limit for general permit 11. Other than the combination of general permits 6 and 6A, the Department shall not authorize the combination of two different **general permits-by-certification or general permits, [or a general permit and a transition area waiver] or combination thereof**, for a single activity. For example, if an applicant seeks authorization for a road crossing that will have an impact of 0.60 acres, an individual permit will be required because the Department will not authorize 0.25 acres under general permit 10B to be combined with 0.35 acres under general permit 6, which has a one-acre limit (see N.J.A.C. 7:7A-[5.6(b)1]7.6(a)1) for a minor road crossing of 0.60 acres[;]. **In addition, other than the combination of a transition area waiver averaging plan (see N.J.A.C. 7:7A-8.2), a special activity transition area waiver for linear development (see N.J.A.C. 7:7A-8.3(e)), or a special activity waiver for redevelopment (see N.J.A.C. 7:7A-8.3(f)), with a general permit, the Department shall not authorize the combination of a general permit or general permit-by-certification with a transition area waiver for a single activity;**

2. The total combined area of wetlands, State open waters, and transition areas disturbed or

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modified on the site under general permits 2, 6, 6A, 7, 8, 10A, 10B, 11, 12, 13, 14, 17, 17A, 18, 19, 21, [22, 24, 25, and 26] **23, 24, and 25, and general permits-by-certification 8 and 24** does not exceed one acre with the exception of the following:

i. Disturbance of State open waters as part of a lake dredging project under general permit 13 at N.J.A.C. 7:7A-[5.13]**7.13**. However, disturbance of wetlands or transition area in the lake or for access to the dredging project shall be counted toward the one acre limit in this subsection;

ii. Disturbance of State open waters as part of a channel or stream cleaning project under general permit [26] **25** at N.J.A.C. 7:7A-[5.26]**7.25**. However, disturbance of wetlands or transition area in the channel or stream or for access to the channel or stream cleaning project shall be counted toward the one acre limit in this subsection;

iii. Disturbance of a transition area solely for access to a general permit activity performed in a wetland in accordance with N.J.A.C. 7:7A-[4.2(c)]**8.1(a)5**; and

iv. Disturbance authorized under general permit 17 on a publicly owned site **or on land dedicated for conservation and/or recreation purposes**;

[3. Disturbance exceeding 0.5 acre under general permit 6 cannot be combined with any other general permit authorization on the same site, except with an authorization under general permit 6A, in which case the total impact to wetlands, State open waters, and transition area shall not exceed one acre. For example, 0.75 acres of disturbance of wetlands or State open waters under general permit 6 can be combined with 0.25 acres of disturbance of transition area under general permit 6A;]

Recodify existing 4. and 5. as **3. and 4.** (No change in text.)

(b) The Department may authorize activities under a **general permit-by-certification and/or**

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general permit more than once on the same site, and/or at different times on the same site.

However, the total disturbance authorized on a site under **general permits-by-certification and/or** general permits since July 1, 1988, shall meet the criteria for use of multiple general permits set forth at (a)1 and 2 above.

(c) If a **general permit-by-certification or** general permit is not listed at (a)2 above, any acreage disturbed under that **general permit-by-certification or** general permit is not counted towards the one acre limit in (a)2 above, regardless of whether the **general permit-by-certification or** general permit is used singly or in combination with other **general permits-by-certification or** general permits, and regardless of whether the **general permit-by-certification or** general permit is used once or repeatedly.

(d) (No change.)

7:7A-5.5 Duration of an authorization under a general permit-by-certification

(a) **An authorization under a general permit-by-certification is valid for five years from the date of issuance of the authorization.**

(b) **The five-year term of an authorization under a general permit-by-certification shall not be extended.**

(c) **All regulated activities being conducted pursuant to an authorization under a general permit-by-certification shall immediately cease if the authorization expires.**

(d) **If an authorization under a general permit-by-certification expires and the person intends to commence or continue the regulated activities, the person shall obtain a new authorization or permit under this chapter authorizing the regulated activities.**

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7:7A-5.6 Duration of an authorization under a general permit

(a) Except as provided in (b) below, an authorization under a general permit is valid for five years from the date of issuance of the authorization.

(b) The five-year term of an authorization under a general permit may be extended one time for five years pursuant to N.J.A.C. 7:7A-20.4.

(c) If an authorization under a general permit expires and the person intends to commence or continue the regulated activities, the person shall obtain a new authorization under this chapter authorizing the regulated activities.

1. If no regulated activities have occurred prior to the expiration of the authorization, the Department shall issue a new authorization under the general permit only if the project is revised where necessary to comply with the requirements of this chapter in effect when the application for the new authorization is declared complete for review;

2. If any regulated activities have occurred prior to the expiration of the authorization, the Department shall issue a new authorization under the general permit only if the project is revised where feasible to comply with the requirements of this chapter in effect when the application for the new authorization is declared complete for review. In determining the feasibility of compliance with the requirements in effect at the time the application is declared complete for review, the Department shall consider the amount of construction that has been completed prior to the expiration of the original authorization, the amount of reasonable financial investment that has been made in the original design consistent with the requirements applicable under the original authorization, and whether continuing

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construction as approved under the original authorization would have an adverse impact on the environment.

7:7A-[4.3]**5.7** Conditions [that apply to all] **applicable to an authorization pursuant to a general permit-by-certification or a general permit** [authorizations]

(a) A person [acting under the authority of] **conducting regulated activities pursuant to an authorization under a general permit-by-certification or a general permit** shall comply with:

1. The conditions [listed under] **set forth in the general permit-by-certification or general permit** itself;

2. The [standard] conditions [for] **that apply to all general permits-by-certification and general permits** set forth at (b) below;

3. The conditions [for] **that apply to all permits** at N.J.A.C. 7:7A-[13]**20.2**;

4. The limits on the use of multiple **general permits-by-certification or general permits** in N.J.A.C. 7:7A-[4.4]**5.4**; [and]

5. If required under a particular general permit, mitigation pursuant to N.J.A.C. 7:7A-[15]**11**[.]; **and**

6. Any additional conditions imposed under (f) below.

(b) The following conditions apply to all activities conducted under the authority of a **general permit-by-certification or general permit**:

1. Activities performed under a **general permit-by-certification or general permit** shall be associated with a proposed project. The Department shall not authorize activities under a **general permit-by-certification or general permit** for the purpose of eliminating a natural resource in

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order to avoid regulation. For the purposes of this subsection, project shall mean the use and configuration of all buildings, pavements, roadways, storage areas and structures, and all associated activities[. In accordance with N.J.A.C. 7:7A-1.6, the Pinelands Commission may require more stringent regulation of activities in and around freshwater wetland areas in its jurisdiction];

2. The regulated [activity] **activities** shall not occur in the proximity of a public water supply intake;

3. (No change.)

4. The [activity] **activities** will not occur in a component of either the Federal or State Wild and Scenic River System; nor in a river officially designated by Congress or the State Legislature as a “study river” for possible inclusion in either system while the river is in an official study status; except that the activity may occur in these waters if approved by the National Park Service in accordance with 40 CFR [§] 233;

5. The [activity] **activities** shall not adversely affect properties which are listed or are eligible for listing on the New Jersey or National Register of Historic Places unless the applicant demonstrates to the Department that the proposed activity avoids or minimizes impacts to the maximum extent practicable or the Department determines that any impact to the affected property would not impact the property's ability to continue to meet the criteria for listing at N.J.A.C. 7:4-2.3 or otherwise negatively impact the integrity of the property or the characteristics of the property that led to the determination of listing or eligibility. The Department shall not issue a conditional permit if it finds that the mitigation proposed is inadequate to compensate for the adverse [affect] **effect**. Any permit for an activity which may

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adversely [affect] **effect** a property listed or eligible for listing on the New Jersey or National Register of Historic Places shall contain conditions to ensure that any impact to the property is minimized to the maximum extent practicable and any unavoidable impact is mitigated.

i. If the permittee, before or during the work authorized, encounters a possible historic property, as described at N.J.A.C. 7:7A-[12.2(l)]**19.5(l)**, that is or may be eligible for listing in the New Jersey or National Register, the permittee shall preserve the resource, immediately notify the Department and proceed as directed.

ii. The Department shall not issue a **general permit-by-certification or** general permit authorization if the applicant, its consultants, engineers, surveyors and/or agents significantly adversely affect a historic property to which the **general permit-by-certification or** general permit authorization applies, unless the Department determines that circumstances justify issuing the **general permit-by-certification or** general permit authorization;

6. – 7. (No change.)

[8. During construction activities, all excavation must be monitored for the presence of acid-producing deposits. If any such deposits are encountered, the permittee shall implement the mitigation and disposal standards in the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13 and shall establish an annual post-planting monitoring program to ensure the reestablishment of vegetation in temporarily disturbed areas. The plantings shall have a minimum 85 percent plant survival and coverage rate after two complete growing seasons. If the plantings fail to achieve this survival rate, the Department will require the permittee to implement additional corrective measures;]

[9.] **8.** The [activity] **activities** will not result in a violation of the Flood Hazard Area Control

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Act, N.J.S.A. 58:16A-50, or implementing rules at N.J.A.C. 7:13;

[10.] **9.** (No change in text.)

[11.] **10.** If activities under the **general permit-by-certification or** general permit involve excavation or dredging, the applicant shall use an acceptable disposal site for the excavated or dredged material. No material shall be deposited or dewatered in freshwater wetlands, transition areas, State open waters or other environmentally sensitive areas. The Department may require testing of dredged material if there is reason to suspect that the material is contaminated. If any dredged material is contaminated with toxic substances, the dredged material shall be removed and disposed of in accordance with Department-approved procedures;

[12.] **11.** (No change in text.)

[13.] **12.** Best management practices[, as defined at N.J.A.C. 7:7A-1.4,] shall be followed whenever applicable;

Recodify existing 14. and 15. as **13. and 14.** (No change in text.)

[16.] **15.** [With the exception of activities associated with general permits 1, 6, 6A and 16, activities] **Activities** authorized under a **general permit-by-certification or** general permit shall not take place in a vernal habitat, [as defined at N.J.A.C. 7:7A-1.4,] or in a transition area adjacent to a vernal habitat, **with the exception of activities associated with general permits 1, 6, 6A, and 16, which shall be reviewed on a case-by-case basis in accordance with N.J.A.C. 7:7A-5.3(e).**

(c) In order to protect the fishery resources and/or the spawning of the fish population, any activity which may introduce sediment into a stream or cause a stream to become turbid shall not be performed during the time periods listed in Table [A] **5.7** below:

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[Table A¹

RESTRICTED TIME PERIODS FOR WATERS WITH FISHERY RESOURCES

Water body or water body classification	Time period (inclusive) during which activities shall not be performed
Brook trout production waters; Brown trout production waters; and All other trout production waters except Rainbow trout production waters	September 15 through March 15
Rainbow trout production waters	February 1 through April 30
Trout-stocked waters; Trout maintenance waters; and An area within one mile upstream of a trout-stocked or a trout maintenance water	March 15 through June 15
All unimpeded tidal waters open to the ocean, including: Coastal bays; Delaware Bay and River up to any impassable barrier; and Water bodies identified as anadromous migratory pathways.	April 1 to June 30
Water bodies that support general game fish	May 1 to June 30
Water bodies that support pickerel	Ice out to April 30
Water bodies that support walleye	March 1 to May 30
Water bodies used by American Shad for migrations in the Delaware River:	
—Mouth of Delaware Bay to Delaware Memorial Bridge; and —Tidal Maurice River.	March 1 through June 30; and October 1 through November 30
—Delaware Memorial Bridge to Trenton; and —Tidal portions of Rancocas, Raccoon, and Crosswicks Creeks.	March 1 through June 30; and September 1 through November 30
—Delaware River from Trenton to New York State line.	April 1 through June 30; and September 1 through November 30

¹ Note that the Delaware River Basin Commission (DRBC) imposes additional timing restrictions on certain activities in waters under DRBC jurisdiction. Contact the U.S. Fish and Wildlife Service's River Basin Coordinator through the DRBC at (609) 883-9500 for information on these additional timing restrictions.]

Table 5.7¹

RESTRICTED TIME PERIODS FOR WATERS WITH FISHERY RESOURCES

Water and classification	Time period (inclusive) during which activities are prohibited
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1. Trout Waters

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<ul style="list-style-type: none"> • All trout production waters except rainbow trout 	<p>September 15 through March 15</p>
<ul style="list-style-type: none"> • Rainbow trout production waters 	<p>February 1 through April 30</p>
<ul style="list-style-type: none"> • Trout stocked waters • Trout maintenance waters • All regulated waters located within 1 mile upstream of a trout stocked or a trout maintenance water 	<p>March 15 through June 15</p>
<p>2. Non-Trout Waters</p>	
<ul style="list-style-type: none"> • Regulated waters that support general game fish located north of Interstate 195 	<p>May 1 through July 31</p>
<ul style="list-style-type: none"> • Regulated waters that support general game fish located south of Interstate 195 	<p>May 1 through June 30</p>
<ul style="list-style-type: none"> • Regulated waters that support pickerel 	<p>Ice out through April 30</p>
<ul style="list-style-type: none"> • Regulated waters that support walleye 	<p>March 1 through May 30</p>
<p>3. Anadromous Waters</p>	
<ul style="list-style-type: none"> • All unimpeded tidal regulated waters open to the Atlantic Ocean or any coastal bay • All regulated waters identified as anadromous migratory pathways 	<p>April 1 through June 30</p>

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<ul style="list-style-type: none"> • Delaware River upstream of U.S. Route 1 	<p>April 1 through June 30 and September 1 through November 30</p>
<ul style="list-style-type: none"> • Delaware River between U.S. Route 1 and Interstate 295 (Delaware Memorial Bridge) • Tidal portions of Raccoon Creek, Rancocas Creek, Crosswicks Creek, and Cooper River 	<p>March 1 through June 30 and September 1 through November 30</p>
<ul style="list-style-type: none"> • All unimpeded tidal regulated waters open to the Delaware River downstream of Interstate 295 (Delaware Memorial Bridge) • Tidal portions of the Maurice River, Cohansey River, and Salem River 	<p>March 1 through June 30 and October 1 through November 30</p>

¹Note that the Delaware River Basin Commission (DRBC) imposes additional timing restrictions on certain activities in waters under DRBC jurisdiction. Contact the U.S. Fish and Wildlife Service's River Basin Coordinator through the DRBC at (609) 883-9500 for information on these additional timing restrictions.

(d) The Department [may] **shall** reduce, extend, or otherwise modify [the] a timing

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[requirements] **restriction** listed [at (c) above on a case-by-case basis provided] **in Table 5.7, if it determines that one or more of the following requirements is satisfied:**

1. [The applicant demonstrates that the] **Potential adverse** impacts to the fishery resource [shall be less] **are likely to be reduced** if [the] a regulated [activities] **activity** occurs during [the timing restriction] **a restricted time period** rather than during an unrestricted **time** period;

2. [The] **A regulated activity is subject to more than one restricted time period, the combined effect[s] of [the timing restrictions above] which would [restrict activities] limit the regulated activity** to [less] **fewer** than 183 calendar days per year. In such a case, the Department [may] **shall** allow regulated activities to occur for up to 183 calendar days, [if] **provided** the applicant demonstrates [to the Department] that [proper steps] **additional measures** will be taken [that will minimize the] **to reduce potential adverse** impacts to [the] fishery resources **to a level acceptable to the Department. Note that the 183-calendar day period during which the Department determines that activities may occur need not be consecutive. For example, the Department may determine that restricting activities for three months in the spring and three months in the fall best protects fishery resources in a particular case;**

[3. The Department determines that regulated activities must occur during periods when local schools are not in session in order to avoid increased risks or excessive delays to school buses or vans; or]

3. The observance of a timing restriction would adversely impact public health, safety, and/or welfare, and the applicant demonstrates that additional measures are taken where necessary to reduce adverse impacts to fishery resources to an acceptable level; or

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4. [The Department determines that, due] **Due** to the nature of the project or an unusual circumstance on site, the timing restriction must be modified [or extended] in order to prevent a substantial adverse impact to the fishery resource, to the aquatic environment, or to a threatened or endangered species or its habitat.

(e) If an activity will take place in a non-delegable water, [as defined at N.J.A.C. 7:7A-1.4,] and the activity requires approval from the [ACOE] **USACE** under the Federal 404 program, the activities authorized under the general permit **or general permit-by-certification** shall not begin until the permittee obtains the required Federal 404 program approval.

[(f) No activity is authorized under a general permit without a written approval from the Department, except for the following, which are subject to the notice and application requirements set forth in the applicable provisions cited below:

1. Maintenance of an off-stream stormwater management facility, as authorized under general permit 1 at N.J.A.C. 7:7A-5.1(d);

2. Repair of a malfunctioning septic system, as authorized under general permit 25 at N.J.A.C. 7:7A-5.25; and

3. Minor channel or stream cleaning activities, as authorized under general permit 26 at N.J.A.C. 7:7A-5.26.]

(f) In addition to the conditions that apply to every authorization pursuant to a general permit under (a) above, the Department shall establish additional conditions in a specific authorization pursuant to a general permit, on a case-by-case basis in accordance with N.J.A.C. 7:7A-20.3, as required to ensure the authorized regulated activity meets all applicable requirements of this chapter and its enabling statutes.

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SUBCHAPTER 6. GENERAL PERMITS-BY-CERTIFICATION

7:7A-6.1 General permit-by-certification 8—Construction of an addition to a lawfully existing residential dwelling

(a) General permit-by-certification 8 authorizes construction of an addition to a lawfully existing residential dwelling in freshwater wetlands and/or transition areas, provided the conditions at N.J.A.C. 7:7A-5.7 are met and:

- 1. The dwelling was lawfully constructed prior to July 1, 1988;**
- 2. The proposed addition is attached to or an extension of the residential dwelling;**
- 3. The proposed activities do not include disturbance of State open waters;**
- 4. The total area of disturbance, including freshwater wetlands, transition areas, and non-regulated areas, is no more than 750 square feet; and**
- 5. The footprint of the existing building has not increased by more than 750 square feet, cumulatively, since July 1, 1988, and the addition will not exceed a cumulative 750-square-foot increase in combination with previous additions.**

7:7A-6.2 General permit-by-certification 24—Repair or modification of a malfunctioning individual subsurface sewage disposal (septic) system

(a) General permit-by-certification 24 authorizes activities in freshwater wetlands and transition areas necessary for the repair or modification of a malfunctioning individual subsurface sewage disposal system, provided the conditions at N.J.A.C. 7:7A-5.7 are met and:

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1. The total area of disturbance including freshwater wetlands, transition areas, and non-regulated areas is no more than one-quarter acre and all disturbance is located on the same property where the malfunctioning system is located;

2. The proposed activities do not include disturbance of State open waters;

3. The repair or modification of the system is limited to serve only those volumes of sanitary sewage, estimated in accordance with N.J.A.C. 7:9A-7.4, that were approved prior to the malfunction; and

4. Prior to applying for this general permit-by-certification, the applicant obtains a letter from the local board of health with jurisdiction over the individual subsurface sewage disposal system, stating that:

i. The proposed activities are authorized under, and comply with, the Department's Standards for Individual Subsurface Sewage Disposal Systems at N.J.A.C. 7:9A;

ii. The proposed activities are not directly or indirectly caused by an expansion of the facility the individual subsurface sewage disposal system serves, or a change in its use, including a change from disuse or abandonment to any type of use; and

iii. There is no alternative location on the site that:

(1) Has a seasonal high water table deeper than 1.5 feet below the existing ground surface; and

(2) Can be used for a subsurface sewage disposal system.

SUBCHAPTER [5.] 7. [ADOPTED] GENERAL PERMITS

7:7A-[5.1]7.1 General permit 1—Maintenance and repair of existing features

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(a) General permit 1 authorizes activities in freshwater wetlands and State open waters[,]
required to carry out the repair, rehabilitation, replacement, maintenance, or reconstruction of a
previously authorized, currently serviceable structure, fill, roadway, utility line, active irrigation,
or drainage ditch, or stormwater management facility lawfully existing prior to July 1, 1988, or
permitted under this chapter[. General permit 1 does not cover transition areas because these
activities are not regulated in transition areas under N.J.A.C. 7:7A-2.6 and thus may be
performed in a transition area without Department approval under this chapter.], **provided all
applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

[(b)] **1.** [To be authorized under general permit 1, the] **The** previously authorized structure,
fill, roadway, utility, ditch, or facility [shall not have] **has not** been and will not be put to any use
other than as specified in any permit authorizing its original construction[.]; **and**

2. [Activities under general permit 1 shall] **The activities do** not expand, widen, or deepen
the previously authorized feature, and [shall] **do** not deviate from any plans of the original
activity, except that minor deviations due to changes in materials or construction techniques and
which are necessary to make repairs, rehabilitation, or replacements are allowed, provided such
changes do not result in disturbance of additional freshwater wetlands or State open waters upon
completion of the activity.

[(c)] **(b)** If the activity is the ongoing maintenance of an off-stream stormwater management
facility created in uplands, including a wetland constructed in uplands for stormwater
management purposes after September 4, 2001, the following shall apply:

1. The application for authorization shall be subject to the public notice requirements [at] **in**
N.J.A.C. 7:7A-[10.8]**17**, but shall not be subject to the [other] application requirements in

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N.J.A.C. 7:7A-[10]16;

2. The application for authorization shall **be submitted to the Department by mail at the address set forth at N.J.A.C. 7:7A-1.4, and shall** include the [information required by the application checklist, including information identifying and describing the site and the project, and a] **following:**

i. A completed application form as described at N.J.A.C. 7:7A-16.7(a)1 and available from the Department at the address set forth at N.J.A.C. 7:7A-1.4;

ii. A copy of the permit, if any, authorizing the original construction of the stormwater management facility;

[3. The Department shall process the application for authorization using the procedures at (d) below; and]

iii. A copy of a USGS quad map for the site;

iv. Documentation that public notice of the application has been provided in accordance with N.J.A.C. 7:7A-17; and

v. The appropriate application fee as set forth at N.J.A.C. 7:7A-18; and

[4.] **3.** For the purposes of this subsection, maintenance includes removal of sediment and debris and mowing of vegetation[,] as necessary to ensure that the stormwater management facility will function as it was originally designed and/or permitted. Maintenance does not include enlargement of a stormwater management structure, excavation below the original bottom of a structure, or any other change in its design.

[(d) Upon receipt of an application for authorization under (c) above, the Department shall process the application as follows:

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1. Within 20 days of the Department's receipt of the application, the Department shall notify the applicant if the application is not administratively complete (that is, if it does not include all of the information required under (c) above). If the Department so notifies the applicant, the time period in (d)2 below shall not begin to run. If the Department does not so notify the applicant, the application shall be deemed administratively complete 20 days after the Department receives it; and

2. If the application is administratively complete, the Department shall have 30 days after receipt of the complete application to notify the applicant that the activities are not authorized under general permit 1, or that the activities may be authorized but require a full application review under N.J.A.C. 7:7A-10. If the Department does not so notify the applicant, the application is automatically approved, to the extent that the activity does not violate other laws then in effect.

(e) Activities under general permit 1 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.2]7.2 General permit 2—Underground utility lines

(a) General permit 2 authorizes activities in freshwater wetlands, transition areas, and/or State open waters[,] necessary for the construction and/or maintenance of an underground utility line[.], **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

1. Permanent above-ground disturbance of wetlands, transition area, and/or State open waters is no greater than 0.5 acre. Anything that changes the character of the existing

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wetland, even if only to a different wetland type, is permanent disturbance. For example, maintained clearing over a utility line is permanent disturbance. For the purposes of this section, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance;

2. Permanently maintained clearing over the utility line is no wider than 20 feet unless a wider area is required by law;

3. The trench into which the utility line is placed is no wider than necessary to comply with the United States Occupational Safety and Health Administration safety standards for excavations, set forth at 29 CFR Part 1926, Subpart P;

4. Temporary disturbance, such as temporary construction clearing or temporary storage of dirt or equipment, is the minimum size necessary for compliance with applicable laws;

5. The activities shall not cause any change in preconstruction elevation of a freshwater wetland, transition area, or State open water; and

6. Manholes and siphons for sewer lines are placed outside of wetlands, unless the Department's Municipal Finance and Construction Element determines under N.J.A.C. 7:22 and/or 7:14A-23 that there is no feasible alternative to placement in wetlands.

(b) (No change.)

[(c) Activities under general permit 2 shall comply with the following limits:

1. Permanent above-ground disturbance of wetlands, transition area, and/or State open waters shall be is no greater than 0.5 acre. Anything that changes the character of the existing wetland, even if only to a different wetland type, is permanent disturbance. For example, maintained

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clearing over a utility line is permanent disturbance. For the purposes of this section, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance;

2. Permanently maintained clearing over the utility line shall be no wider than 20 feet unless a wider area is required by law;

3. The trench into which the utility line is placed shall be no wider than necessary to comply with the United States Occupational Safety and Health Administration safety standards for excavations, set forth at 29 CFR Part 1926, Subpart P;

4. Temporary disturbance, as defined at N.J.A.C. 7:7A-1.4, such as temporary construction clearing or temporary storage of dirt or equipment, shall be the minimum size necessary for compliance with applicable laws;

5. The activities shall not cause any change in preconstruction elevation of a freshwater wetland, transition area, or State open water; and

6. Manholes and siphons for sewer lines shall be placed outside of wetlands, unless the Department's Municipal Finance and Construction Element determines under N.J.A.C. 7:22 and/or N.J.A.C. 7:14A:23 that there is no feasible alternative to placement in wetlands.]

Recodify existing (d) and (e) as **(c) and (d)** (No change in text.)

[(f)] **(e)** Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for all permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means

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that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-[15.5]11 and shall be submitted to the Department for review and approval no later than [120] **90-calendar** days prior to the initiation of regulated activities authorized by this general permit. [Mitigation shall be performed prior to or concurrently with general permit activities.]

[(g) Activities under general permit 2 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.3]7.3 General permit 3—Discharge of return water

(a) General permit 3 authorizes the discharge of return water from an upland, contained, dredged material [disposal] **management** area into State open waters, and placement of a pipe above ground for the discharge through freshwater wetlands and/or transition areas, **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met.**

(b) The dredging itself may also require other State and Federal permits.

[(b) Activities under general permit 3 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.4]7.4 General permit 4—Hazardous site investigation and cleanup

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(a) General permit 4 authorizes activities in freshwater wetlands, transition areas, and State open waters[, which] **that** are undertaken by the Department or [expressly approved] **by a licensed site remediation professional** pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, for the investigation, cleanup, [or] removal, **or remediation** of[:

1. Hazardous] **hazardous** substances as defined [in] **by or pursuant to** the Department's rules governing hazardous substances at N.J.A.C. 7:1E, Appendix A[;] or

[2. Pollutants,] **pollutants** as defined [in] **by or pursuant to** the New Jersey [Water Pollution Control Act implementing] **Pollutant Discharge Elimination System (NJPDES)** rules at N.J.A.C. 7:14A[.], **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

[(b) There is no acreage limit on activities under general permit 4. However, disturbance shall be the minimum that is necessary for compliance with the Department's Technical Requirements for Site Remediation, N.J.A.C. 7:26E, and mitigation shall be performed for all disturbances of freshwater wetlands or State open waters caused by a cleanup authorized under this general permit except that mitigation is not required to compensate for disturbance of wetlands or State open waters that have formed as a direct result of the remediation activities. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.]

1. The applicant demonstrates, or provides a certification from a licensed site remediation professional pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, that the area of freshwater wetlands, State open waters, and/or transition areas disturbed is the minimum necessary for

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compliance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, and the Administrative Requirements for the Remediation of Contaminated Sites rules, N.J.A.C.

7:26C. This demonstration or certification shall include:

i. An exploration of all feasible alternative remediation methods acceptable under N.J.A.C. 7:26E and 7:26C; and

ii. The identification of any remediation methods that would result in less area of freshwater wetlands, State open waters, and transition areas disturbance with an explanation for why these remediation methods were not chosen; and

2. The applicant provides mitigation, in accordance with N.J.A.C. 7:7A-11, for the total area of freshwater wetlands and/or State open waters disturbed, except that mitigation is not required to compensate for disturbance of wetlands or State open waters that have formed as a direct result of the remediation activities.

[(c)] (b)The mitigation proposal required under [(b)] (a)**2** above may be incorporated into the document approved pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, and/or it may be submitted as part of the general permit application. The Department shall not issue an authorization under general permit 4 until the mitigation proposal, or an equivalent document that ensures that the requirements of N.J.A.C. 7:7A-[15]**11** are met, is approved. [Mitigation shall be performed prior to or concurrently with cleanup activities.

(d) Activities under general permit 4 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

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7:7A-[5.5]7.5 General permit 5—Landfill closures

(a) General permit 5 authorizes activities in freshwater wetlands, transition areas, and/or State open waters that are undertaken by the Department's Division of Solid and Hazardous Waste, or authorized through a solid waste facility closure and post-closure plan or disruption approval issued by the Department under N.J.A.C. 7:26-2A.9[.], **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

[(b) General permit 5 authorizes a disturbance authorized through a closure plan, post-closure plan, or disruption approval only if:]

1. The **Department determines that the** activities that will cause the disturbance are necessary to properly close the solid waste facility and to properly maintain and monitor it after closure. For example, an access road necessary for landfill closure may be authorized under general permit 5, but an access road that is not necessary for landfill closure, but that will facilitate development of the site, is not authorized under general permit 5; and

2. The **applicant demonstrates that the** amount of disturbance is the minimum necessary in order to adequately close and/or maintain the landfill. For example, a disturbance for an access road through wetlands may be necessary to properly close the landfill in accordance with [(b)2] **(a)1** above, but the road shall be the minimum size possible.

[(c)] **(b)** There is no acreage limit on activities under general permit 5. However, mitigation shall be performed to compensate for disturbance of freshwater wetlands and/or State open waters authorized under general permit 5, except that mitigation is not required for disturbance of wetlands located on top of the landfill, or on the intermediate or permanent cover of the

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landfill. The mitigation shall meet the procedural and substantive requirements at N.J.A.C. 7:7A-[15]11.

[(d)] (c) The mitigation proposal required under [(c)] (b) above may be incorporated into the closure and post-closure plan or disruption approval and/or it may be submitted as part of the general permit application.

[(e)] (d) The Department shall not issue an authorization under general permit 5 until the mitigation proposal is approved. Activities under general permit 5 shall not begin until the Department has approved the mitigation proposal. [Mitigation shall be performed prior to or concurrently with closure or disruption activities.

(f) Activities under general permit 5 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.6]7.6 General permit 6—Non-tributary wetlands

(a) General permit 6 authorizes regulated activities in freshwater wetlands and/or State open waters, if the freshwater wetlands and/or State open waters are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream[.], **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

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

1. The activities [shall] disturb no more than one acre of a freshwater wetland and/or State open water[, which] **that** is not a water of the United States[, as defined at N.J.A.C. 7:7A-1.4]; and

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2. The activities [shall] disturb no more than one-half acre of a freshwater wetland and/or State open water[, which] **that** is a water of the United States[, as defined at N.J.A.C. 7:7A-1.4]. Mitigation shall be performed for all permanent loss and/or disturbance to wetlands and/or State open water that are waters of the United States in accordance with [(d)] **(b)** below.

[(c)] **3.** [Activities under general permit 6 shall] **The activities do** not take place in any of the following:

[1.] **i.** An exceptional resource value wetland, as described at N.J.A.C. 7:7A-[2.4]**3.2;**

[2.] **ii.** A State open water that is a special aquatic site[, as defined at N.J.A.C. 7:7A-1.4];

Recodify existing 3. and 4. as **iii. and iv.** (No change in text.)

[(d)] **(b)** Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters that are also waters of the United States. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters that are also waters of the United States unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-[15.5]**11** and shall be submitted to the Department for review and approval no later than [120] **90-calendar** days prior to the initiation of regulated activities authorized by this general permit. [Mitigation shall be performed prior to or concurrently with general permit activities.

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(e) Activities under general permit 6 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.6A]**7.6A** General permit 6A—Transition areas adjacent to non-tributary wetlands

(a) General permit 6A authorizes regulated activities in transition areas adjacent to freshwater wetlands, if the freshwater wetlands are not part of a surface water tributary system discharging into an inland lake or pond, or a river or stream[.], **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

[(b)] **1.** [Activities under general permit 6A shall] **The activities** disturb no more than one-half acre of a transition area.

[1.] **i.** (No change in text.)

[(c)] **2.** Activities [under general permit 6A shall] **do** not take place in a transition area adjacent to the following:

[1.] **i.** An exceptional resource value wetland, as described at N.J.A.C. 7:7A-[2.4]**3.2**; or

[2.] **ii.** (No change in text.)

[(d)] Activities under general permit 6A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.7]**7.7** General permit 7—Human-made ditches or swales in headwaters

(a) General permit 7 authorizes activities in freshwater wetlands that are human-made ditches

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or in freshwater wetlands that are swales, provided [the] **all applicable requirements at**

N.J.A.C. 7:7A-5.7 and 20.3 are met and:

1. The ditch or swale is located in a headwater[. In accordance with the definition of a “swale” at N.J.A.C. 7:7A-1.4, a swale may be naturally occurring or of human construction.];

[(b)] **i.** (No change in text.)

[(c)] **2.** [Activities under general permit 7 shall] **The activities do** not take place in the following:

[1.] **i.** A ditch or swale that is, or is located within, an exceptional resource value wetland[s], as described at N.J.A.C. 7:7A-[2.4]**3.2**; or

[2.] **ii.** A ditch or swale that is, or is located within, a USEPA priority wetland[, as defined at N.J.A.C. 7:7A-1.4].

[(d)] **3.** [Activities under general permit 7 shall] **The activities do** not result in either of the following:

Recodify existing 1. and 2. as **i. and ii.** (No change in text.)

[(e)] Activities under general permit 7 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.8]**7.8** General permit 8—House additions

(a) General permit 8 authorizes activities in freshwater wetlands and/or transition areas[, necessary for the construction of additions or appurtenant improvements to residential dwellings lawfully existing prior to July 1, 1988, provided [that the improvements or additions require less

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than a cumulative surface area of 750 square feet of fill and/or disturbance and will not result in new alterations to a freshwater wetlands outside of the 750 square foot area. General permit 8 does not authorize activities in State open waters.] **all applicable requirements at N.J.A.C.**

7:7A-5.7 and 20.3 are met and:

1. The activities will not occur in State open waters;

2. The improvement or addition requires no more than a cumulative surface area of 750 square feet of fill and/or disturbance and will not result in new alterations to freshwater wetlands outside of the 750-square-foot area; and

3. The improvement or addition is located within 100 feet of the residential dwelling.

[1.] (b) If requested within five years of the destruction of a dwelling, this permit authorizes the replacement of a residential dwelling that was lawfully existing prior to July 1, 1988, within the same footprint of the previous dwelling with an increase of up to 750 square feet of fill and/or disturbance provided that:

Recodify existing i.– ii. and **1.-2.** (No change in text.)

[(b) To be authorized under general permit 8, an addition or improvement shall be located within 100 feet of the residential dwelling.

(c) Activities under general permit 8 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.9]**7.9** General permit 9—Airport sight line clearing

(a) General permit 9 authorizes the selective cutting of certain vegetation in freshwater

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wetlands and transition areas[,] at a public use aeronautical facility, as defined in the New Jersey Department of Transportation [(NJDOT)] rules at N.J.A.C. 16:54-1.3[.], **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

[(b)] **1.** [General permit 9 authorizes the] **The cutting of vegetation is** only as necessary to comply with the protected air space provisions for a public use aeronautical facility, mandated by the Federal Aviation Administration (FAA) and set forth in the New Jersey Department of Transportation rules at N.J.A.C. 16:54-4.2(a)1iii and 2ii[.];

[(c)] **2.** [General permit 9 covers only] **The activities are** necessary to enable an aeronautical facility to comply with New Jersey Department of Transportation rules. The cutting of vegetation in wetlands and/or transition areas as part of a project that increases the area of pavement or buildings at an airport is not authorized under general permit 9, and would require an individual permit under this chapter[.];

3. Adverse environmental impacts are minimized as follows:

i. Activities shall be timed to minimize disturbance of threatened and endangered species. The Department will specify the required timing in the general permit authorization when issued;

ii. The permittee shall leave all tree stumps, brush stumps, and root systems in place;

iii. The permittee shall minimize disturbance of freshwater wetlands and transition areas through use of matting, equipment running on oversized tires, or other similar practices; and

iv. Cut vegetation shall be disposed of in a manner that will minimize adverse environmental impacts on wetlands and transition areas, taking into consideration State

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Forest Fire Service requirements at N.J.S.A. 13:9-23 and/or other applicable laws.

[(d)] (b) In addition to meeting all applicable application requirements at N.J.A.C. 7:7A-[10]16, an applicant for authorization under general permit 9 shall provide a certification from the Director of the Division of Aeronautics in the New Jersey Department of Transportation, containing:

1. – 3. (No change.)

[(e)] The permittee shall minimize adverse environmental impacts as follows:

1. Activities shall be timed to minimize disturbance of threatened and endangered species.

The Department will specify the required timing in the general permit authorization when issued;

2. The permittee shall leave all tree stumps, brush stumps, and root systems in place;
3. The permittee shall minimize disturbance of freshwater wetlands and transition areas through use of matting, equipment running on oversized tires, or other similar practices; and
4. Cut vegetation shall be disposed of in a manner that will minimize adverse environmental impacts on wetlands and transition areas, taking into consideration State Forest Fire Service requirements at N.J.S.A. 13:9-23 and/or other applicable laws.

(f) Activities under general permit 9 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.10A]7.10A General permit 10A—Very minor road crossings

- (a) (No change.)

(b) The Department shall issue a general permit 10A authorization only if the activities

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comply **with all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 and** with the limits in one of the following scenarios:

1. – 2. (No change.)

(c) If a proposed road crossing skirts along the edge of a wetland or transition area or touches the wetland or transition area, without actually crossing through the wetland or transition area, the applicant shall, in addition to meeting the requirements at (b) above, demonstrate in accordance with N.J.A.C. 7:7A-[5.10B(d)]**7.10B(d)** that there is no alternative onsite location and/or configuration for the road crossing that would provide access to the developable upland with less adverse environmental impact.

(d) – (e) (No change.)

(f) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, "minimize" means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-[15.5]**11** and shall be submitted to the Department for review and approval no later than [120] **90-calendar** days prior to the initiation of regulated activities authorized by this general permit. [Mitigation shall be performed prior to or concurrently with general permit activities.

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(g) Activities under general permit 10A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

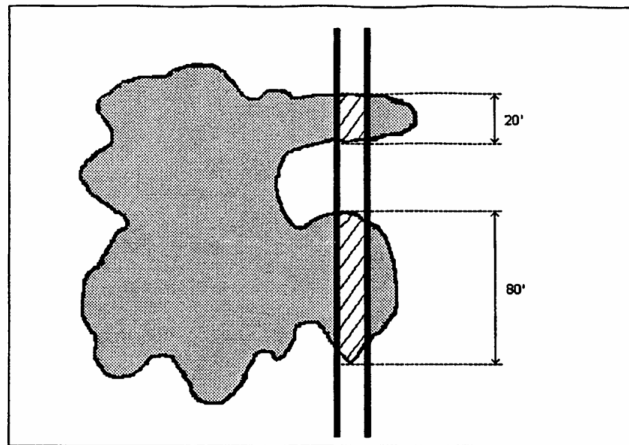


Figure 2
One Road Crossing That Crosses Two Fingers Of One Freshwater Wetland

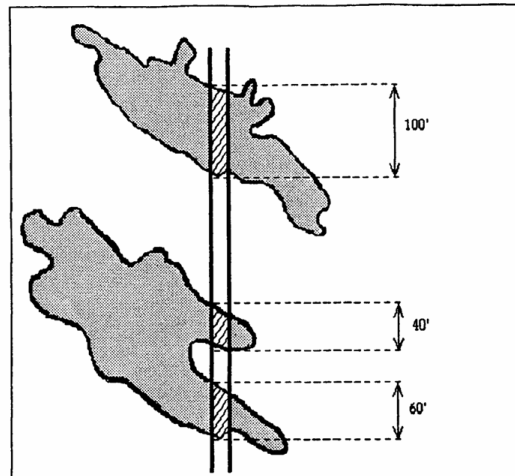


Figure 3
Two Road Crossings, Each Crossing A Different Freshwater Wetland

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7:7A-[5.10B]7.10B General permit 10B—Minor road crossings

(a) (No change.)

(b) The Department shall issue a general permit 10B authorization only if all [of the following criteria] **applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3** are met **and**:

1. – 2. (No change.)

(c) – (d) (No change.)

(e) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-[15.5]11 and shall be submitted to the Department for review and approval no later than [120] **90-calendar** days prior to the initiation of regulated activities authorized by this general permit. [Mitigation shall be performed prior to or concurrently with general permit activities.]

(f) Activities under general permit 10B shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.]

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7:7A-[5.11]7.11 General permit 11—Outfalls and intake structures

(a) – (b) (No change.)

[(c) Activities under general permit 11 shall comply with the following limits:]

(c) The Department shall issue a general permit 11 authorization only if all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:

1. The activities [shall] disturb no more than one quarter acre of freshwater wetlands, transition areas, and/or State open waters, including both temporary and permanent disturbance;

2. The area disturbed during construction of a conveyance structure [shall be] **is** no wider than is necessary to comply with the United States Occupational Safety and Health Administration safety standards for excavations, set forth at 29 CFR Part 1926, Subpart P; and

3. The amount [or] **of** rip-rap or other energy dissipating material placed [shall be] **is** the minimum necessary to prevent erosion, and shall not exceed 10 cubic yards of fill per outfall, unless a larger amount is required in order to comply with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.

(d) – (e) (No change.)

(f) For any excavated area in freshwater wetlands, transition areas, and/or State open waters, the following requirements apply:

1. – 2. (No change.)

3. The **wetland and/or transition** area above the excavation shall be replanted, in accordance with applicable BMPs, with **appropriate** indigenous [wetlands] species.

(g) – (h) (No change.)

(i) Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or

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greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, "minimize" means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-[15.5]**11** and shall be submitted to the Department for review and approval no later than [120] **90-calendar** days prior to the initiation of regulated activities authorized by this general permit. [Mitigation shall be performed prior to or concurrently with general permit activities.]

(j) Activities under general permit 11 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.12]**7.12** General permit 12—Surveying and investigating

(a) (No change.)

[(b) Disturbance under general permit 12 shall be the minimum necessary to obtain the desired information.]

(b) The Department shall issue a general permit 12 authorization only if all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:

1. Disturbance is the minimum necessary to obtain the desired information; and

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[(c)] **2.** If activities [under general permit 12] disturb soil, the soil [shall be] **is** restored to its pre-existing elevation, retaining its original soil layers, unless the soil disturbance is six inches in diameter or smaller. This [subsection] **paragraph** shall not apply if other permits [which] **that** allow permanent impacts in the same location have been obtained.

[(d) Activities under general permit 12 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.13] **7.13** General permit 13—Lake dredging

(a) General permit 13 authorizes up to one acre of dredging in palustrine emergent freshwater wetlands[, as defined at N.J.A.C. 7:7A-1.4,] necessary to restore or maintain a lake, pond, or reservoir[, as defined at N.J.A.C. 7:7A-1.4,] to its original bottom contours[. General permit 13 does not authorize dredging or other disturbances in wetlands that are not palustrine emergent wetlands. General permit 13 does not authorize disturbance of transition areas except as necessary to obtain access to a dredging project pursuant to (e) below.], **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

- 1. Dredging does not occur in wetlands that are not palustrine emergent wetlands;**
- 2. If the lake, pond, or reservoir is to be lowered during dredging:**
 - i. The permittee obtains a lake lowering permit from the Department’s Division of Fish and Wildlife;**
 - ii. Regulated activities do not begin until the lake, pond, or reservoir is lowered in accordance with the lake lowering permit; and**

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iii. All regulated activities are discontinued before the lake, pond, or reservoir is refilled;

3. In order to minimize adverse impacts on fish and on the downstream environment:

i. All necessary measures, including adjusting the timing of the dredging, are taken to prevent any detrimental effect to spawning of fish in the lake, pond, or reservoir or downstream; and

4. There is a continuous flow of sediment-free water to the area downstream of the lake, pond, or reservoir at all times during activities authorized under general permit 13.

(b) (No change.)

[(c) If the lake, pond or reservoir is to be lowered during dredging:

1. The permittee shall obtain a lake lowering permit from the Department's Division of Fish and Wildlife;

2. Regulated activities shall not begin until the lake, pond or reservoir is lowered in accordance with the lake lowering permit; and

3. All regulated activities shall be discontinued before the lake, pond or reservoir is refilled.

(d) In order to minimize adverse impacts on fish and on the downstream environment, the permittee shall:

1. Take all necessary measures, including adjusting the timing of the dredging, to prevent any detrimental effect to spawning of fish in the lake, pond or reservoir or downstream; and

2. Ensure that there is a continuous flow of sediment-free water to the area downstream of the lake, pond or reservoir at all times during activities under general permit 13.]

[(e)] (c) The permittee may temporarily disturb wetlands (palustrine emergent or otherwise),

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transition areas, or State open waters, beyond those disturbed directly by the dredging, in order to obtain vehicular access for the dredging[.], **provided:**

1. Disturbance to wetlands, transition areas, and/or State open waters for access [shall be limited to] **does not exceed** one eighth of an acre, unless the applicant demonstrates in accordance with the standards at N.J.A.C. 7:7A-[5.10B(d)]**7.10B(d)** that there is no alternative onsite location and/or configuration that would provide access to the dredging with less adverse environmental impact. If such a demonstration is made, the access disturbance may be increased as necessary, but shall not exceed one-quarter acre[. All]; **and**

2. Upon completion of dredging, all access disturbances [under this subsection shall be] **are** restored to their pre-existing elevation and condition [upon completion of dredging].

[(f)] (d) [The] **In addition to meeting all applicable application requirements at N.J.A.C. 7:7A-16, an** application for authorization under general permit 13 shall include:

1. (No change.)

2. For a lake larger than five acres, the following information:

i. (No change.)

ii. A list of the sources of sediment in the lake, including all stormwater pipes, outfalls, ditches, and similar features that discharge directly into the lake or that discharge into a tributary to the lake within 1,000 feet of the lake. The location of each listed source shall be indicated on the map required in [(f)2i] (d)**2i** above; and

iii. (No change.)

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

[(h)] (f) The permittee shall dispose of dredged material in accordance with the requirements

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[in the standard conditions for all general permits] at N.J.A.C. 7:7A-[4.3]**5.7, Conditions**

applicable to an authorization pursuant to a general permit-by-certification or a general permit. The Department may require testing of dredged material if there is reason to suspect that the material is contaminated.

[(i) Activities under general permit 13 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits and 13.2, Establishing permit conditions.]

7:7A-[5.14]**7.14** General permit 14—Water monitoring devices

(a) General permit 14 authorizes the placement and use of [the following] **water monitoring devices** in freshwater wetlands, transition areas, and State open waters, **provided the conditions at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

1. The devices consist of one or more of the following:

Recodify existing 1. – 5. as **i. – v.** (No change in text.)

[(b)] **2.** [General permit 14 does not authorize any activity that] **The devices will not** significantly disrupt[s] the movement of aquatic species native to the water body, or of species [which] **that** normally migrate through the area.

[(c)] **(b)** (No change in text.)

[(d)] **(c)** An item listed at (a) above is not regulated under this chapter and, therefore, does not require Department approval if it meets both of the following criteria;

1. (No change.)

2. The placement and/or use of the item does not involve the placement of fill[, as defined at

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

[(e) Activities under general permit 14 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.15]**7.15** General permit 15—Mosquito control activities

(a) General permit 15 authorizes activities in freshwater wetlands, transition areas, and State open waters necessary for mosquito control water management activities conducted by a county mosquito control agency, or by a Federal agency on Federal land **provided the conditions at N.J.A.C. 7:7A-5.7 and 20.3, as well as (b) through (g) below are met.**

(b) – (e) (No change.)

(f) A county agency applying for authorization under general permit 15 shall provide public notice of the application in accordance with this subsection, and shall not be subject to the public notice requirements found at N.J.A.C. 7:7A-[10.8]**10.17**. The county agency shall publish a display advertisement describing the proposed general permit activities. The advertisement shall be:

1. – 3. (No change.)

(g) (No change.)

[(h) Activities under general permit 15 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

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7:7A-[5.16]7.16 General permit 16—[Habitat creation]**Creation, restoration, and enhancement [activities] of habitat and water quality functions and values**

(a) General permit 16 authorizes **regulated activities in freshwater wetlands, transition areas, and State open waters necessary to implement a plan for the creation, restoration, or enhancement of habitat** [creation and enhancement activities in freshwater wetlands, transition areas, and State open waters, necessary to implement a plan for the restoration, creation or enhancement of the habitat] and water quality functions and values of wetlands[.]. [which is sponsored or substantially funded by a Federal or State agency or other entity described in (b) below. For the purposes of this general permit, a "sponsor" shall be an active participant in or substantial financial contributor to the activities, and shall approve the activities in writing.]

Activities authorized under this general permit include, but are not limited to:

- 1. Altering hydrology to restore, enhance, or create wetlands conditions, such as by blocking, removing, or disabling a human-made drainage ditch or other drainage structure such as a tile, culvert, or pipe;**
- 2. Breaching a structure, such as a dike or berm in order to allow water into an area;**
- 3. Placing habitat improvement structures such as:**
 - i. Nesting islands;**
 - ii. Fencing to contain, or to prevent intrusion by, livestock or other animals; and**
 - iii. Aquatic habitat enhancement devices or habitat improvement structures, such as placed boulders, stream deflectors, or brush piles;**
- 4. Regrading to provide proper elevation or topography for wetlands restoration, creation, or enhancement; and**

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5. Removing, planting, cutting, burning, or otherwise managing vegetation in order to increase habitat diversity or control invasive flora.

[(b) General permit 16 authorizes any of the following:

1. A fish and/or wildlife management plan created or approved by the Department's Division of Fish and Wildlife;
2. A project plan approved under the Partners for Fish and Wildlife program, administered by the U.S. Fish and Wildlife Service;
3. A project plan created by the U.S. Department of Agriculture's Natural Resources Conservation Service under the Wetlands Reserve program, the Conservation Reserve program, the Conservation Reserve Enhancement program, the wildlife habitat incentive program (WHIP), or a similar program, and approved by the local Soil Conservation District;
4. A plan approved by the Department's Office of Natural Resource Damages for the restoration, creation or enhancement of natural resources injured as the result of an oil spill or release of a hazardous substance;
5. A mitigation project required by and approved by a government agency, such as the U.S. Army Corps of Engineers;
6. A habitat creation or enhancement plan carried out by one of the Federal or State agencies at (b)1 through 5 above or by a government resource protection agency such as a parks commission; or
7. A habitat creation or enhancement plan carried out by a charitable conservancy, as defined at N.J.A.C. 7:7A-15.1, provided that the plan is part of a program listed at (b)2 through 5 above.

(c) To be eligible for authorization under general permit 16, an applicant shall demonstrate

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that the proposed project:

1. Is part of a comprehensive plan for the restoration, creation or enhancement of the habitat and water quality functions and values of wetlands, transition areas, and/or State open waters;
2. Is sponsored or partially funded by an appropriate entity in accordance with (b) above;]

(b) Creation, restoration, and enhancement activities are eligible for authorization under this general permit, provided the conditions at N.J.A.C. 7:7A-5.7 and 20.3 are met and:

1. The plan is:

i. Approved by one of the following agencies:

- (1) The Department's Division of Fish and Wildlife;**
- (2) The Department's Office of Natural Resource Restoration;**
- (3) The USFWS;**
- (4) The USDA Natural Resources Conservation Service;**
- (5) A government resource protection agency, such as a parks commission; or**
- (6) A charitable conservancy; or**

ii. Required by or approved by a government agency, such as the Department and/or USACE, under a mitigation plan.

(1) Pursuant to N.J.A.C. 7:7A-11, a mitigation plan submitted to the Department to satisfy the requirements and/or conditions of a permit does not require the submittal of a separate application for an authorization or permit;

[3.] **2. [Is] The project is consistent with the goals of the Freshwater Wetlands Protection Act;**

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[4.] **3.** [Will] **The project will** improve the values and functions of the ecosystem; [and]

[5.] **4.** [Will] **The project will** have a reasonable likelihood of success[.];

5. The activities disturb the minimum amount of freshwater wetlands, transition areas, and/or State open waters necessary to successfully implement the project plan; and

6. The activities do not decrease the total combined area of freshwater wetlands, State open waters, and/or transition areas on a site. However, the Department may approve such a decrease, if the Department determines that the activities causing the decrease are sufficiently environmentally beneficial to outweigh the negative environmental effects of the decrease. In addition, the Department may approve conversion of wetlands to State open waters or transition areas, conversion of State open waters to wetlands or transition areas, or the conversion of transition areas to freshwater wetlands or State open waters, if the Department determines that such conversion is environmentally beneficial.

[(d)] (c) [General] **This general** permit [16] does not authorize an activity unless the sole purpose of the activity is habitat creation, **restoration**, or enhancement. For example, general permit 16 does not authorize construction of a detention basin in wetlands for stormwater management, even if the detention basin or the project of which the basin is a part will also result in habitat creation, **restoration**, or enhancement. Similarly, general permit 16 does not authorize a flood control project that may also result in creation, **restoration**, or enhancement of some wildlife habitat.

[(e)] Examples of habitat creation and enhancement activities that may be authorized under general permit 16 are:

1. Altering hydrology to restore or create wetlands conditions, such as by blocking,

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removing, or disabling a human-made drainage ditch or other drainage structure such as a tile, culvert or pipe;

2. Breaching a structure such as a dike or berm in order to allow water into an area;

3. Placing habitat improvement structures such as:

i. Nesting islands;

ii. Fencing to contain, or to prevent intrusion by, livestock or other animals; and

iii. Fish habitat enhancement devices or fish habitat improvement structures such as placed

boulders, stream deflectors, or brush piles;

4. Regrading to provide proper elevation or topography for wetlands restoration, creation, or enhancement; and

5. Cutting, burning or otherwise managing vegetation in order to increase habitat diversity or control nuisance flora.

(f) Activities under general permit 16 shall meet the following requirements:

1. The activities shall disturb the minimum amount of freshwater wetlands, transition areas, and/or State open waters necessary to successfully implement the project plan;

2. The activities shall not decrease the total combined area of freshwater wetlands, State open waters and/or transition areas on a site. However, the Department may approve such a decrease if the Department determines that the activities causing the decrease are sufficiently environmentally beneficial to outweigh the negative environmental effects of the decrease. In addition, the Department may approve conversion of wetlands to State open waters or transition area, conversion of State open waters to wetlands or transition area, or the conversion of transition area to freshwater wetlands or State open waters, if the Department determines that

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such conversion is environmentally beneficial; and

3. The area of habitat enhancement or creation shall be protected from any future development by a recorded conservation restriction or easement in accordance with N.J.A.C. 7:7A-2.12.]

[(g)] (d) An application for authorization under general permit 16 does not require an application fee under N.J.A.C. 7:7A-[11]18.

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

[(i)] (f) If an activity is exempt under this chapter, it shall not require authorization under general permit 16 solely by virtue of being conducted as part of a program included in (b) above. For example, if a farmer proposes a habitat enhancement project that is eligible for authorization under general permit 16, and some of the activities involved in the project meet the requirements for the farming exemption under N.J.A.C. 7:7A-[2.8(c)]2.4(c), those activities do not lose their exempt status merely by virtue of being part of a project authorized under general permit 16.

[(j)] Activities under general permit 16 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.17]7.17 General permit 17--Trails and boardwalks

(a) General permit 17 authorizes activities in freshwater wetlands, transition areas, and/or State open waters necessary for construction of a trail and/or boardwalk for use by pedestrians, bicycles, and other non-motorized methods of transport, **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met.** General permit 17 does not authorize construction of a

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restroom, gazebo, rain shelter, or any covered or enclosed structure. General permit 17 does not authorize construction of a roadway for use by automobiles, golf carts, motorcycles, motorized trail bikes, all-terrain vehicles, or other motor vehicles.

(b) – (f) (No change.)

[(g) Activities under general permit 17 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.]

7:7A-[5.17A]7.17A General permit 17A—Non-Motorized, Multiple-use Paths

(a) General permit 17A authorizes activities in freshwater wetlands, transition areas, and/or State open waters necessary for construction of a non-motorized, multiple use path for use by bicycles, skate boards, rollerblades, and other non-motorized methods of transport, **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met.** General permit 17A does not authorize construction of a restroom, gazebo, rain shelter, or any covered or enclosed structure. General permit 17A does not authorize construction of a roadway for use by automobiles, golf carts, motorcycles, motorized trail bikes, all-terrain vehicles, or other motor vehicles.

(b) – (e) (No change.)

[(f) Activities under general permit 17A shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and N.J.A.C. 7:7A-13.2, Establishing permit conditions.]

7:7A-[5.18]7.18 General permit 18—Dam repair

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(a) – (c) (No change.)

(d) Activities under general permit 18 **shall meet all applicable requirements at N.J.A.C.**

7:7A-5.7 and 20.3 and are subject to the following limits:

1. – 6. (No change.)

(e) If a dam is removed under general permit 18, and the dam owner also owns or controls any of the property containing the lake bottom, the Department may require the owner to execute and record a conservation restriction [or easement] in accordance with the requirements at N.J.A.C. 7:7A-[2.12]**12** covering the lake bottom area. The conservation restriction [or easement] shall prohibit any development or regulated activity for five years from the date the dam is removed, in order to allow the stream corridor and associated wetlands in the lake bottom area to revert to their natural state. The conservation restriction [or easement] shall include the land covered by the lake bottom, and all associated wetlands, as they exist at the time the dam is removed. When the conservation restriction [or easement] expires, the Department's jurisdiction under this chapter shall be based on existing conditions on the site.

[(f) Activities under general permit 18 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.19]**7.19** General permit 19—Docks and piers

(a) General permit 19 authorizes:

1. (No change.)

2. Activities in freshwater wetlands, transition areas, and/or State open waters[,] necessary

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for the construction of a public boat ramp. Private boat ramps are not covered by this general permit.

(b) All activities under general permit 19, when combined, shall meet the **applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 and the** following criteria, as applicable:

1. – 3. (No change.)

(c) A dock or pier shall be elevated on pilings, so that it does not affect the hydrology of the surrounding wetland. In tidal wetlands that are subject to this chapter but not subject to the Department's coastal permitting program under N.J.A.C. 7:7 [or 7:7E], a dock or pier shall be elevated at least four feet above the ground surface.

(d) – (h) (No change.)

[(i) Activities under general permit 19 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.20]7.20 General permit 20—Bank stabilization

(a) General permit 20 authorizes activities in freshwater wetlands, transition areas, and/or State open waters[,] necessary to stabilize the bank of a water body in order to reduce or prevent erosion. [Examples of bank stabilization activities are the placement of gabions, rip-rap, or geotextiles along a stream bank.] General permit 20 does not authorize the channelization of a stream or the stabilization of the bottom of the stream. **Bank stabilization projects are eligible for authorization under this general permit provided the applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

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[(b)] **1.** [The applicant shall use vegetative] **Vegetative** or bioengineering stabilization methods **are used to stabilize the eroded bank**, unless the applicant demonstrates that, based on the velocity and configuration of the channel or other factors, the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90 require other methods[.];

[(c)] **2.** The total cumulative length of water body bank affected by **the** bank stabilization activities [under general permit 20 shall] meets the applicable length limit below in this [subsection] **paragraph**. These limits apply to the total linear footage of stream bank affected, regardless of which side of the stream it is on, or whether the activities are contiguous. For example, a bank stabilization using only rip-rap could disturb one bank of a stream for a distance of 150 feet, or both banks for 75 feet. The applicable length limits are as follows:

[1.] **i.** (No change in text.)

[2.] **ii.** For the following bank stabilization activities, no more than 300 feet of stream bank:

[i.] **(1)** (No change in text.)

[ii.] **(2)** Soil bioengineering systems not included in [(c)2i] **(a)2ii(1)** above but approved by the Department in writing, which are appropriate to the site and which provide environmental benefits similar to those provided by the measures in [(c)2i] **(a)2ii(1)** above. Examples of such measures are the placement of coconut fiber rolls or sand filled textile containers, parallel to the shoreline of a stream bank; and

[3.] **iii.** For bank stabilization activities that meet the following criteria, no more than 500 feet of stream bank:

[i. The activities are funded by the Department's Division of Watershed Management, or are included on an "action now" list, prepared for each region of the State by the Division of

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Watershed Management. These “action now” lists are available from the Division of Watershed Management at (609) 984-0058; and]

(1) The activities are funded by the Department's Bureau of Environmental Analysis, Restoration, and Standards; and

[ii.] **(2)** (No change in text.)

[4.] **iv.** (No change in text.)

[(d)] **3.** The bank stabilization activities described in [(c)] **(a)2** above may be used in combination. For example, a bank stabilization project might involve 100 feet of rip-rap authorized under [(c)1] **(a)2i** above, 300 feet of soil bioengineering authorized under [(c)2i] **(a)2ii** above, and 400 feet of vegetative planting measures authorized under [(c)3i] **(a)2iv** above[.]; **and**

[(e)] **4.** [A permittee shall minimize environmental] **Environmental** impacts **are minimized** as follows:

Recodify existing 1. – 6. as **i. – vi.** (No change in text.)

[(f) Activities under general permit 20 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.21]**7.21** General permit 21—Above ground utility lines

(a) General permit 21 authorizes the following activities in freshwater wetlands, transition areas, and/or State open waters[,] necessary for the construction of an above ground utility line[,] as defined at N.J.A.C. 7:7A-1.4]:

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1. – 4. (No change.)

5. Minor, temporary disturbances, [as defined at N.J.A.C. 7: 7A-1.4,] necessary for access during construction.

(b) Activities under general permit 21 shall comply with **the applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3** and the following limits:

1. (No change.)

2. Permanent disturbance of freshwater wetlands, transition areas, and/or State open waters, including the area of vegetative clearing to be maintained underneath the utility line **shall be no greater than 0.5 acre and no wider than 20 feet, unless the applicant demonstrates that a wider disturbance is necessary to comply with applicable laws or regulations.** For the purposes of this [subsection] **paragraph**, installation of a utility line in scrub shrub or emergent wetlands shall not be considered permanent disturbance. [Permanent disturbance shall be:

i. No greater than 0.5 acre; and

ii. No wider than 20 feet, unless the applicant demonstrates that a wider disturbance is necessary to comply with applicable laws.]

(c) – (d) (No change.)

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

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wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-[15.5]**11** and shall be submitted to the Department for review and approval no later than [120] **90-calendar** days prior to the initiation of regulated activities authorized by this general permit. [Mitigation shall be performed prior to or concurrently with general permit activities.

(f) Activities under general permit 21 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

[7:7A-5.22 (Reserved)]

7:7A-[5.23]**7.22** General permit [23]**22**—Expansion of cranberry growing operations in the Pinelands

(a) General permit [23] **22** authorizes the expansion of certain cranberry growing operations in the Pinelands. To be eligible for authorization under the general permit, the cranberry growing operation must be a single, discrete legal entity that, prior to the date general permit [23] **22** becomes operative under (u) below:

1. – 2. (No change.)

3. Was reported as a cranberry growing operation to the United States Department of Agriculture Cranberry Marketing Committee under the Federal Cranberry Marketing Order (7 [C.F.R.] **CFR** Part 929[, as amended]).

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(b) Activities authorized under general permit [23] **22** include, but are not limited to, the construction or expansion of a bog, reservoir, canal, ditch, dike, tail water recovery system, water quality improvement system, or other similar support type facility. General permit [23] **22** does not authorize:

1. – 3. (No change.)

(c) The Department shall authorize activities under general permit [23] **22** only if the activities will be conducted on the area with the lowest number ranking on the list at (d) below, which is available and has the following characteristics:

1. – 2. (No change.)

(d) For the purposes of general permit [23] **22**, State open waters and wetland types are ranked in the order that they shall be considered for use for the expansion of a cranberry growing operation, as follows:

1. – 8. (No change.)

(e) For the purposes of general permit [23] **22**, if a freshwater wetlands area was forested, but the trees have been harvested within the five years immediately preceding submittal of an application for authorization, the area is considered forested.

(f) The Department shall not issue more than one authorization under general permit [23] **22** per year to a single cranberry growing operation.

(g) The Department shall not issue an authorization under general permit [23] **22** for activities that will cause a net loss of freshwater wetlands at a single cranberry growing operation.

(h) The Department shall limit authorizations issued to any single cranberry growing

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operation under general permit [23] **22**, so as to ensure that the loss and/or disturbance of freshwater wetlands and/or State open waters at that single operation meets all of the following criteria:

1. (No change.)

2. No more than 10 acres of forested freshwater wetlands shall be lost and/or disturbed over the [five year] **five-year** term of general permit [23] **22**; and

3. (No change.)

(i) The Department shall limit authorizations issued Statewide, so as to ensure that the total Statewide loss and/or disturbance of freshwater wetlands and/or State open waters under general permit [23] **22** meets all of the following criteria:

1. No more than 60 acres of freshwater wetlands and/or State open waters shall be lost and/or disturbed in any one year that general permit [23] **22** is operative, except that if the Department authorizes fewer than 60 acres of loss and/or disturbance in any year, up to 30 acres of unused loss or disturbance may be carried forward to a subsequent year, but in no case shall more than 90 acres of freshwater wetlands and/or State open waters be lost or disturbed in one year;

2. No more than 300 acres of freshwater wetlands and/or State open waters shall be lost and/or disturbed during the [five year] **five-year** term of general permit [23] **22**;

3. – 4. (No change.)

(j) If an applicant proposes activities under general permit [23] **22** that will result in the loss and/or disturbance of Atlantic white-cedar wetlands, the applicant shall, in addition to meeting all other requirements, demonstrate that there is no suitable upland area available, which is owned by the applicant, which the applicant could use in order to eliminate or minimize impacts

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to Atlantic white-cedar wetlands. For purposes of this subsection, a suitable upland area is an upland area which meets all of the following criteria:

1. – 4. (No change.)

(k) If an applicant proposes activities under general permit [23] **22** in an Atlantic white-cedar wetlands that is larger than five acres, the applicant shall, in addition to meeting all other requirements of this section, submit a written statement from the Natural Resources Conservation Service that the activities will minimize, to the extent feasible, the impacts to the remaining Atlantic white-cedar wetlands.

(l) (No change.)

(m) The applicant shall transfer any PDCs required under (l) above to the Department, or to a nonprofit or governmental agency designated by the Department, prior to beginning activities authorized under general permit [23] **22**, and no later than 90 days after receiving the general permit authorization. The Department or its designee shall convey the PDCs to the Pinelands Development Credit Bank in accordance with the MOA established under (n) below, and shall use the resulting funds to establish and/or restore Atlantic white-cedar wetlands in the Pinelands.

(n) The Department shall enter into a memorandum of agreement (MOA) with the Pinelands Commission and the Pinelands Development Credit Bank. The MOA shall include a general plan for implementing the Atlantic white-cedar restoration program required by this section, and shall:

1. (No change.)

2. Include a requirement for at least one acre of Atlantic white-cedar restoration for each acre of Atlantic white-cedar wetlands lost and/or disturbed under general permit [23] **22**;

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3. – 4. (No change.)

(o) To minimize impacts to freshwater wetlands and/or State open waters, a permittee under general permit [23] **22** shall:

1. Follow, to the maximum extent practicable, the management practices recommended by the Rutgers [Cranberry and Blueberry Experiment Station] **Philip E. Marucci Center for Blueberry and Cranberry Research and Extension;**

2. Stabilize all disturbed areas in accordance with the New Jersey Field Office Technical Guide, 1998 edition, as amended and supplemented, issued by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS), available from the NRCS at [1370 Hamilton Street] **220 Davidson Avenue 4th Floor**, Somerset, New Jersey 08873;

3 – 5. (No change.)

(p) The requirements of (c), (j), (k), (l), and (m) above shall not apply to the proposed activities under general permit [23] **22** if the Department determines that the activities:

1. – 2. (No change.)

(q) Each year, the Commissioner shall make a finding as to whether the pace of impacts under the general permit is proportional to the pace of Atlantic white-cedar restoration efforts. The Commissioner shall consult with the Pinelands Commission, and shall consider, among other factors, whether restoration efforts are making reasonable progress towards the goals in the Department's overall plan for Atlantic white-cedar restoration. The Department shall publish the Commissioner's finding as a public notice in the New Jersey Register by October 31 of each year:

1. (No change.)

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2. If the Commissioner finds that the pace of impacts is out of proportion to the pace of Atlantic white-cedar restoration efforts, the Department shall publish a finding of temporary hold of general permit authorizations, and shall stop issuing authorizations under general permit [23]

22. A finding of temporary hold shall remain in effect until the Commissioner determines that the pace of impacts under the general permit has again become proportional to restoration efforts, and the Department publishes a finding of continuance.

(r) The Commissioner reserves the right (that is, discretion) to modify, suspend, or revoke general permit [23] **22** authorizations. Modification means the imposition of additional or revised terms or conditions on the authorization. Suspension means the temporary cancellation of the authorization while a decision is made to [either] modify, revoke, or reinstate the authorization. Revocation means the cancellation of the authorization. The Commissioner may assert discretionary authority by modifying, suspending, or revoking general permit [23] **22** authorizations for a specific geographic area or class of waters, whenever the Commissioner determines sufficient concerns for the environment under the Freshwater Wetlands Protection Act or the Federal Section 404(b)(1) Guidelines, or if the Commissioner otherwise determines that the general permit would result in more than minimal adverse environmental effects either individually or cumulatively. Whenever the Commissioner determines that a proposed specific activity covered by general permit [23] **22** would have more than minimal individual or cumulative adverse effects on the environment, the Commissioner shall either modify the general permit [23] **22** authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized by general permit [23] **22** and provide instructions on how to seek authorization under an individual permit. The Commissioner shall

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restore authorization under general permit [23] **22** at any time that the Commissioner determines that the reason for asserting discretionary authority has been satisfied by a condition, project modification, or new information.

(s) An application for authorization under general permit [23] **22** shall be submitted within 90 days after the general permit becomes operative under (u) below. Within 180 days after general permit [23] **22** becomes operative, the Department shall make a final decision on all applications submitted within the 90-day deadline. Thereafter, applications shall be submitted to the Department by January 1 of each year. The Department shall issue decisions on applications by March 1 of each year.

(t) If the Department receives applications for authorization under general permit [23] **22** which would, if approved, result in a total Statewide loss and/or disturbance of freshwater wetlands and/or State open waters that exceeds the limits at (i) above, the Department shall give priority to applications involving areas with the lowest number rankings on the list at (d) above, taking into consideration overall environmental impacts. If two or more applications involve similarly ranked land and similar environmental impacts, the Department shall give priority to the application submitted and determined complete under N.J.A.C. 7:7A-[9.5(d)]**19.2** first.

(u) General permit [23] **22** shall become operative as of the date that the Department publishes a notice in the New Jersey Register announcing that:

1. The Department has signed the [Memorandum of Agreement] **MOA** required under (n) above; and

2. Twenty-five thousand dollars has been deposited from public sources to the fund established by the Department under the [Memorandum of Agreement] **MOA** for the

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implementation of the Atlantic white-cedar restoration program.

(v) In order to ensure compliance with the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq., general permit [23] **22** will be added to the list of general permits subject to coordination procedures with the U.S. Fish and Wildlife Service under the Department's Memorandum of Agreement regarding the Endangered Species Act and New Jersey's assumption of the Federal 404 program.

7:7A-[5.24]**7.23** General permit [24]**23**—Spring developments

(a) General permit [24] **23** authorizes activities in farmed wetlands[,] or in State open waters[,] necessary for the construction of a spring development or other structure that diverts or collects water for the purpose of watering livestock. Activities authorized under general permit [24] **23** include the installation of a collecting trench, a cutoff wall, crushed rock, perforated tubing, and/or a spring box. General permit [24] **23** does not authorize diversion or use of water for irrigation, or for any purpose other than watering livestock. The activities authorized under general permit [24] **23** constitute soil and water conservation practices that are exempt in transition areas under N.J.A.C. 7:7A-[2.8(c)1]**2.4(c)1**.

(b) (No change.)

(c) An activity is authorized under general permit [24] **23** only if **all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

1. (No change.)
2. The activity will be conducted at an established, ongoing farming, ranching, or silviculture operation[, as defined at N.J.A.C. 7:7A-1.4]; [and]

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3. The activity is located in a farmed wetland[, as defined at N.J.A.C. 7:7A-1.4,] that is eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq.; **and**

[(d)] **4.** Any portion of a spring development from which livestock will drink, such as a watering trough or tub, [shall be] **is** located outside of wetlands and State open waters.

[(e) Activities under general permit 24 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.25]**7.24** General permit [25]**24**—Malfunctioning individual subsurface sewage disposal (septic) systems

(a) General permit [25] **24** authorizes activities in freshwater wetlands and transition areas necessary for the repair or modification of a malfunctioning individual subsurface sewage disposal system. General permit [25] **24** does not authorize activities in State open waters.

(b) For the purpose of general permit [25] **24**:

1. – 2. (No change.)

(c) [All activities] **Activities are authorized** under general permit [25 on the site shall disturb no more than one-quarter acre of freshwater wetlands and/or transition areas combined and shall be located on the same property where the malfunctioning system is located.] **24, provided the applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

1. The activities do not disturb more than one-quarter acre of freshwater wetlands and/or transition areas and shall be located on the same property where the malfunctioning

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system is located;

[(d)] **2.** [The Department shall not authorize activities under general permit 25 if the need for] **The** repair or modification is **not** directly or indirectly caused by an expansion of the facility the individual subsurface sewage disposal system serves, or by a change in its use, including a change from disuse or abandonment to any type of use[.]; **and**

3. [Any] **The** repair or modification of the system [shall be] **is** limited to serve only those volumes of sanitary sewage, estimated in accordance with N.J.A.C. 7:9A-7.4, that were approved prior to the malfunction.

[(e)] **(d)** Activities under general permit [25] **24** are not subject to the application contents requirements at N.J.A.C. 7:7A-[10]**16**, [except for] **but are subject to** the public notice requirements at N.J.A.C. 7:7A-[10.8, and there]**17. There** is no application fee for an authorization under general permit [25] **24**. Instead, an applicant for authorization under general permit [25] **24** shall submit the following in writing to the Department, at least 30 days prior to starting work:

1. -2. (No change.)

3. A letter from the local board of health with jurisdiction over the individual subsurface sewage disposal system, stating that:

i. (No change.)

ii. The proposed activities are not directly or indirectly caused by an expansion of the facility the individual subsurface sewage disposal system serves, or a change in its use, **including a change from disuse or abandonment to any type of use;** and

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iii. (No change.)

[(f) Upon receipt of an application under general permit 25, the Department shall process the application as follows:

1. Within 20 days of the Department's receipt of the application, the Department shall notify the applicant if the application is not administratively complete (that is, if it does not include all of the information required under (d) above). If the Department so notifies the applicant, the time period in (e)² below shall not begin to run. If the Department does not so notify the applicant, the application shall be deemed administratively complete 20 days after the Department receives it; and

2. If the application includes all of the information required under (d) above, the Department shall have 30 days after receipt of the complete application to notify the applicant that the activities are not authorized under general permit 25, or that the activities may be authorized but require a full application review under N.J.A.C. 7:7A-10. If the Department does not so notify the applicant, the application is automatically approved, to the extent that the activity does not violate other laws then in effect.]

[(g) Activities under general permit 25 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.26]7.25 General permit [26]25— Minor channel or stream cleaning for local government agencies

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(a) General permit [26] **25** authorizes a county, municipality, or a designated agency thereof to conduct activities in freshwater wetlands[,] **and** transition areas [and State open waters] within their jurisdiction, necessary to **desnag a channel or stream and/or** remove accumulated sediment, debris, and garbage [from a channel or stream in order to remove obstructions to], **which are obstructing** flow[, or to desnag the] **in a channel or stream[.], provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

[(b) To be authorized under general permit 26, a channel or stream cleaning, clearing, or desnagging project shall meet all of the following criteria:]

1. The **project's** sole purpose [of the activities] is to remove obstructions to flow, or to desnag a channel or stream;

2. The [activities are] **project is** necessary and in the public interest;

[3. The activities will disturb only the channel or stream bed, and shall not disturb the stream bank or its vegetation, except in areas necessary to gain access to the channel or stream. Where access is needed, disturbance to the stream bank and its vegetation shall be the minimum necessary for access;

4. The activities shall not alter the natural banks of the stream. Such modification may in some cases be authorized under general permit 20. General permit 26 does not authorize the straightening or realignment of a channel or stream. Straightening or realignment constitutes channel modification and requires an individual permit;]

[5.] **3.** The [activities shall] **project** consists [only] **solely** of **either:**

i. The removal of accumulated **silt**, sediment, debris, and/or garbage from a channel or stream with a natural bed[. General permit 26] **and** does not [authorize removal of material

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below] **alter** the natural [bottom] **bed or banks of the channel**; or

ii. The removal of any accumulated material from a channel or stream previously

[channelized] **lined** with concrete or similar artificial material;

[6. The permittee shall make every effort to perform work from only one stream bank;

7. The permittee shall ensure that the use of heavy equipment within the stream channel is avoided to the maximum extent practicable; and

8. The permittee shall ensure that vegetation and tree canopy on the more southerly or westerly stream banks is preserved in order to shade the channel or stream.

(c) If a channel or stream cleaning, clearing, or desnagging project involves removal of sediment, it shall meet all of the requirements at (b) above, and in addition, the affected portion of the channel or stream shall meet all of the following criteria:

1. It is less than 500 feet long;]

4. The project is conducted from only one bank, where possible, and the existing tree canopy on the more southerly or westerly bank is preserved in order to shade the channel or stream;

5. The use of heavy equipment in the channel is avoided; and

6. If the project involves sediment removal from a channel with a natural bed, the following requirements are satisfied:

i. If the project is undertaken by a municipality, or a designated agency thereof, it is located wholly within that municipality;

ii. If the project is undertaken by a county, or designated agency thereof, the project is located wholly within one municipality or, if located within more than one municipality, the

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channel reach is less than 500 feet in length;

[2.] **iii.** The **average width of the** channel or stream bed [is 15] **does not exceed 30** feet [or less in average width];

[3. The channel or stream has a documented history of flooding that is sufficiently severe so that the flooding results, or can result, in property damage necessitating the proposed cleaning, clearing, or desnagging;]

Recodify existing 4. and 5. as **iv. and v.** (No change in text)

(b) In accordance with N.J.A.C. 7:7A-2.2(b), if the project meets all the following criteria, Department approval under this chapter is not required:

1. The project disturbs State open waters only, and does not disturb wetlands located in the channel or stream;

2. The project does not disturb wetlands or transition areas adjacent to the channel or stream; and

3. The project does not involve the discharge of dredged or fill material in the State open water. For example, if the project involves placement of fill within a channel for an access road, or involves temporary placement of dredged material in the channel prior to removal of the dredged material, the project would be regulated and would require Department approval.

[(d)] **(c)** All materials, including dredged material, removed from a channel or stream during activities authorized under general permit [26] **25** shall be [disposed of] **placed** outside of freshwater wetlands, transition areas, State open waters, and areas regulated under the Department's Flood Hazard Area Control Act rules at N.J.A.C. 7:13, unless [the applicant

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demonstrates] **it is demonstrated** that this would cause more environmental harm than [disposing] **placement** of the material in these areas. For example, if removal of dredged material requires construction of a long temporary road through **wetlands with** a very [wet area] **high water table** to enable trucks to transport the dredged material offsite, this [might] **may** cause more environmental harm than [using a large blower to spread] **spreading** the dredged material thinly over a large area [of wetlands].

(d) This general permit does not authorize activities that alter the natural banks of the stream. Such modification may in some cases be authorized under general permit 20. This general permit does not authorize the straightening or realignment of a channel. Straightening or realignment constitutes channel modification and requires an individual permit pursuant to N.J.A.C. 7:7A-9.

(e) [Activities] **An application for authorization** under general permit [26 are] **25** is not subject to the application requirements in N.J.A.C. 7:7A-[10, except for] **16, but is subject to** the public notice requirements at N.J.A.C. 7:7A-[10.8]**17**. An application for authorization under general permit [26] **25** shall **be submitted to the Department by mail at the address set forth at N.J.A.C. 7:7A-1.4, and shall** include the following:

[1. The location of the affected portion of the channel or stream, including the county and municipality, and the block(s) and lot(s)

2. A USGS quad map showing the affected portion of the stream;]

1. A completed application form as described at N.J.A.C. 7:7A-16.7(a)1 and available from the Department at the address set forth at N.J.A.C. 7:7A-1.4;

2. Two sets of plans prepared by an engineer, which clearly depict the segments of

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channel or stream to be cleaned and the limit of wetlands and/or transition areas to be impacted;

3. The location of the affected portion of the channel, including the county, municipality, and the block(s) and lot(s);

4. One copy of a USGS quad map showing the affected portion of the channel or stream;

[3.] **5. Color photographs and a brief narrative description of the affected portion of the channel or stream, including the access points where workers and equipment will be brought to the channel or stream, and the wetlands and/or transition areas to be impacted by the activities;**

Recodify existing 4. and 5. as **6. and 7.** (No change in text.)

[6.] **8. A description of the [disposal] proposed methods that will be used to remove material from the channel or stream and the location [and methods for all] where the dredged material [that will be removed from the channel or stream] will be placed;**

9. The appropriate application fee as set forth at N.J.A.C. 7:7A-18;

[7.] **10. Documentation that the public notice requirements of N.J.A.C. 7:7A-[10.8]17 have been met; and**

[8. A certification that meets both of the following criteria:

i. The certification is signed by a licensed professional engineer who is the county or municipal engineer, or who is employed by the appropriate Soil Conservation District; and

ii. The certification lists each condition in (b), (c) and/or (d) above that applies to the project, and states whether the condition has been satisfied or will be satisfied.]

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11. A certification signed by the county or municipal engineer, or an engineer employed by the local Soil Conservation District, which lists each requirement in (a) and (c) above that applies to the project, and states how the requirement has been or will be satisfied.

[(f) Within 15 days of the Department's receipt of an application submitted under (e) above for a project that does not involve sediment removal, the Department shall do one of the following:

1. Notify the applicant either that the application is not administratively complete (that is, that it does not include all of the information required under (e) above), or that the application is administratively complete but that the application requires a full application review under N.J.A.C. 7:7A-10. If the application is not administratively complete, the Department shall request more information. If the reapplication requires a full application review, the Department shall provide the applicant with the reasons for this. For example, an application may require a full review because of a sighting of a threatened or endangered species which must be investigated;

2. Notify the applicant that the project does not qualify for authorization under general permit 26; or

3. Take no action. If the Department takes no action, the channel or stream cleaning project is authorized under general permit 26 to the extent that the project does not violate other laws then in effect.

(g) Within 60 days of the Department's receipt of an application submitted under (e) above for a project that does involve sediment removal, the Department shall do one of the following:

1. Notify the applicant that the application is not administratively complete (that is, that it

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does not include all of the information required under (e) above) and request more information;

2. Notify the applicant that the project does not qualify for authorization under general permit 26; or

3. Take no action. If the Department takes no action, the channel or stream cleaning project is authorized under general permit 26 to the extent that the project does not violate other laws then in effect.

(h) If the Department notifies the applicant under (f)2 or (g)2 above that a channel or stream cleaning, clearing, or desnagging project is not authorized under general permit 26, the Department shall provide the applicant with the technical reasons for the decision. If the Department's technical reasons are based upon the inability to determine the natural bed of the channel or stream, the Department shall, at the request of the applicant, assist in identifying the natural bed of the channel or stream.]

[(i)] (f) [Upon] **Within 15 calendar days after** completion of a project under general permit [26] **25** that involves the removal of sediment, the permittee shall submit to the Department [a written notice that the project has been completed. The notice shall contain a certification that meets both of the following criteria]:

1. A written notice that the project has been completed; and

[1.] **2.** [The] A certification, [is] signed by [a licensed professional engineer who is] the county or municipal engineer, or [who is] **an engineer** employed by the [appropriate] **local** Soil Conservation District[; and

2. The certification states] **that lists** each [condition] **requirement** in [(b),] **(a) and** (c) [and/or (d)] above that applies to the project, and states [whether] **how** the [condition]

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requirement has been satisfied.

[(j) Activities under general permit 26 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

7:7A-[5.27]**7.26** General permit [27]**26**—Redevelopment of previously disturbed areas

(a) General permit [27] **26** authorizes the disturbance of certain degraded freshwater wetlands, transition areas, and/or State open waters necessary for redevelopment[, as defined at N.J.A.C. 7:7A-1.4,] of an area previously significantly disturbed by industrial or commercial activities[.], **provided all applicable requirements at N.J.A.C. 7:7A-5.7 and 20.3 are met and:**

[(b) General permit 27 authorizes activities only if:]

1. – 2. (No change.)

3. The area meets at least one of the following criteria:

i. (No change.)

ii. It is the subject of a redevelopment agreement entered into pursuant to N.J.S.A. 58:10B-27; [or]

iii. It has been identified as an environmental opportunity zone pursuant to N.J.S.A. 54:4-3.150 et seq.; [and] **or**

iv. It has been identified as an area of redevelopment by the municipality and formally designated as such by the New Jersey Department of Community Affairs in accordance with N.J.S.A. 40A:12A-6;

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4. The freshwater wetlands, transition areas, and/or State open waters to be disturbed are significantly degraded by human disturbance or alteration and are of little ecological value.

Examples of significantly degraded wetlands are those that have formed as a result of a landfill cap, ponding of contaminated ground or surface water, or as a result of demolition of structures on a previously developed site[.];

[(c) Activities under general permit 27 shall be limited as follows:]

[1.] **5.** The activities [shall] disturb no more than one acre of a freshwater wetlands and/or State open water, which is a not a water of the United States[, as defined at N.J.A.C. 7:7A-1.4];

[2.] **6.** The activities [shall] disturb no more than one acre of a transition area; and

[3.] **7.** The activities [shall] disturb no more than one-half acre of a freshwater wetland and/or State open water, which is a water of the United States[, as defined at N.J.A.C. 7:7A-1.4].

[(d)] **(b)** Mitigation shall be performed for all permanent loss and/or disturbance of 0.1 acres or greater of freshwater wetlands or State open waters. Mitigation shall be performed for permanent loss and/or disturbance of less than 0.1 acres of freshwater wetlands or State open waters unless the applicant demonstrates to the Department that all activities have been designed to avoid and minimize impacts to wetlands. For purposes of this subsection, “minimize” means that the project is configured so that most or all of it is contained in the uplands on the site, and that the wetlands are avoided to the greatest extent possible. An applicant is not required to reduce the scope of the project or to consider offsite alternatives to comply with this requirement.

1. The mitigation shall meet the substantive and procedural requirements at N.J.A.C. 7:7A-15.5] **11** and shall be submitted to the Department for review and approval no later than [120] **90-calendar** days prior to the initiation of regulated activities authorized by this general permit.

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[Mitigation shall be performed prior to or concurrently with general permit activities.]

[(e)] (c) A disturbance authorized under general permit [27] **26** does not count toward the one acre of disturbance allowed under multiple general permits under N.J.A.C. 7:7A-4.4(a)2] **5.4(a)2**.

[(f) Activities under general permit 27 shall comply with all applicable requirements at N.J.A.C. 7:7A-4.3, Conditions that apply to all general permits, and 13.2, Establishing permit conditions.]

SUBCHAPTER [6.] **8. TRANSITION AREA WAIVERS**

7:7A-[6.1] **8.1** General **provisions for** transition area waivers [provisions]

(a) This section sets forth the requirements for transition area waivers. The Department issues the following types of transition area waivers:

1. An averaging plan transition area waiver, addressed at N.J.A.C. 7:7A-[6.2] **8.2**;
2. A special activity transition area waiver for stormwater management, linear development, redevelopment, or activities eligible for an individual permit, addressed at N.J.A.C. 7:7A-[6.3] **8.3**;

[3. A matrix type width reduction transition area waiver, addressed at N.J.A.C. 7:7A-6.4;]

[4.] **3.** A hardship transition area waiver, addressed at N.J.A.C. 7:7A-[6.5] **8.4**;

[5.] **4.** A general permit transition area waiver. If a general permit authorizes disturbance of a transition area, an authorization issued under the general permit constitutes a transition area waiver for the activities covered by the general permit. This waiver is not addressed in this

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section, but in each general permit in N.J.A.C. 7:7A-[5]7 that covers transition area disturbances.

All general permits except for general permits 1, 6, 7, [22] and [24] **23** authorize activities in transition areas; and

[6.] **5.** An access transition area waiver. Each general permit authorization, individual freshwater wetlands permit, and mitigation proposal shall include a limited transition area waiver to allow access to the authorized activity. No fee or application is required for this waiver **and the disturbance authorized under this waiver is not counted in calculating the amount of disturbance under the permit or mitigation proposal.** However, an access transition area waiver will allow regulated activities only:

i. (No change.)

ii. For an activity that the Department determines is necessary to accomplish [the permitted activity] **construction, and for future use, of the activity authorized in the wetlands under the general permit.** An activity not directly required in order to obtain access to the permitted activity shall require a separate transition area waiver. If the activity authorized under the permit eliminates the wetland in its entirety, the transition area associated with that wetland may also be eliminated in its entirety without a separate transition area waiver. If the activity authorized under the permit partially eliminates the wetland, the access shall be limited to the transition area adjacent to the location of the approved wetland filling. Any additional impacts to the transition area shall require a separate transition area waiver.

(b) [The] **If necessary, the** Department shall include in a transition area waiver additional conditions [as necessary] to ensure that an activity does not result in a substantial impact on the

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adjacent wetlands, and does not impair the purposes and functions of transition areas as set forth in N.J.A.C. 7:7A-[2.5]3.3. Such conditions [shall] **may** include, but are not limited to, the following:

1. Construction activities shall be conducted in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit[, as defined at N.J.A.C. 7:7A-1.4];

2. The structure is designed and shall be used in such a way that there will be no regulated activities in the transition area or the wetland except any that are authorized by a permit[, as defined at N.J.A.C. 7:7A-1.4];

3. The **modified** transition area [and/or wetland is fenced, using a type of fencing that protects and maintains all functions and values of the resources, prior to construction of the structure (including site preparation), and the fence is permanently maintained,] **shall be permanently marked, in a manner determined appropriate by the Department**, so as to clearly delineate its boundary and to prevent people from [entering and/or] disturbing the transition area and/or wetland[;]. **Examples of appropriate markers include permanent fencing, concrete monuments, and boulders.**

i. In determining the appropriate type of marker, the Department will consider such factors as the type of project proposed, wildlife that may be present, and the likelihood for people to disturb the transition area and/or wetland. For example, it may be necessary to mark the boundary of a modified transition area associated with a single-family home or duplex with permanent fencing because in many of these situations the modified transition area is directly adjacent to back yards and, therefore, the likelihood of homeowners

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disturbing the transition area is great. However, it may be appropriate to identify a modified transition area associated with a commercial or industrial development with concrete monuments because the likelihood of people disturbing the modified transition is usually less around these types of developments;

ii. If the Department determines that it is appropriate to delineate the boundary of the modified transition area with monuments, boulders, or similar markers, the number of markers and spacing between markers shall be determined by the Department and shall be that necessary to clearly identify the modified transition area, taking into consideration the size of the modified transition area to be delineated;

4. The permittee shall execute and record a conservation restriction [or easement], in accordance with the procedures at N.J.A.C. 7:7A-[2.12]12, which prohibits any regulated activities in the **remaining** transition area [and wetlands] as appropriate[; and].

[5. During construction activities, all excavation must be monitored for the presence of acid-producing deposits. If any such deposits are encountered, the permittee shall implement the mitigation and disposal standards in the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13 and shall establish an annual post-planting monitoring program to ensure the reestablishment of vegetation in temporarily disturbed areas. The plantings shall have a minimum 85 percent plant survival and coverage rate after two complete growing seasons. If the plantings fail to achieve this survival rate, the Department will require the permittee to implement additional corrective measures.]

(c) (No change.)

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(d) An applicant whose application does not meet the requirements for any of the transition area waivers listed in (a) above may obtain a transition area waiver through scientifically documenting that a proposed activity will have no substantial impact on the adjacent wetlands. This documentation may include, but is not limited to, nutrient or sediment transport models, buffer models, or wildlife habitat suitability studies. **An applicant is not eligible for a waiver under this subsection if the applicant took action that rendered its application ineligible for any of the transition area waivers listed in (a) above.** An application submitted under this subsection shall address the following, as they relate to the adjacent wetlands:

1. -3. (No change.)

(e) [With the exception of a waiver for redevelopment for which it is not practicable, in accordance with N.J.A.C. 7:7A-6.3(f)4, or access, all transition] **Transition** area waivers [shall] **may** be conditioned on the recording of a Department-approved conservation restriction [or easement, as defined at N.J.A.C. 7:7A-1.4, and] in accordance with the requirements at N.J.A.C. 7:7A-[2.12]12, restricting future activities in the [entire] **remaining** transition area [and adjacent wetlands on the site].

1. If the permittee does not conduct regulated activities before the transition area waiver expires, the following apply with regard to the transition area:

i. If no activities have been conducted, regardless of whether or not [the] **a** conservation restriction [or easement] was recorded, the permittee shall obtain a new transition area waiver to conduct regulated activities in the transition area; or

ii. If no activities have been conducted and [the] **a** conservation restriction [or easement] was properly recorded, but the permittee wants to reconfigure the project to use portions of the

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property contained within the restriction or easement, the permittee shall apply for a new transition area waiver, together with a request for a modification of the conservation restriction or easement in accordance with the procedures at N.J.A.C. 7:7A-[2.12(i)]12;

2. In the case of a subdivision for which a transition area waiver was approved, if one or more lots remain undeveloped when the transition area waiver expires, the following shall apply with regard to the transition area:

i. If no activities have been conducted on a lot which was part of a larger subdivision, regardless of whether or not [the] a conservation restriction [or easement was recorded], the permittee shall apply for a new transition area waiver for the lot, using the same plan that was used to obtain the transition area waiver for the subdivision as a whole. That is, if a transition area waiver averaging plan was obtained for the subdivision as a whole and that transition area waiver averaging plan expires, the individual lot owner shall apply for a transition area averaging plan for the individual lot using the original averaging plan for the subdivision as a whole. The Department shall consider proposed changes to the originally approved plan only if the conservation easement or restriction was recorded and the changes meet the standards for a [de minimis] *de minimis* modification at N.J.A.C. 7:7A-[2.12(i)]12;

3. If the permittee does not properly record [the] a required conservation restriction [or easement], he or she shall be in violation of the Freshwater Wetlands Protection Act and this chapter.

(f) The process at N.J.A.C. 7:7A-[17]13 is also available to applicants for a transition area waiver.

(g) (No change.)

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(h) With the exception of a transition area waiver for access in accordance with N.J.A.C.

7:7A-[6.1(a)6]**8.1(a)5**, a transition area averaging plan waiver in accordance with N.J.A.C.

7:7A-8.2, a special activity waiver for linear development in accordance with N.J.A.C.

7:7A-8.3(e), and a special activity waiver for redevelopment in accordance with N.J.A.C. 7:7A-

[6.3(f)]**8.3(f)**, the Department shall not issue a transition area waiver under this section and a general permit authorization for the same site and for the same activity, if the combined effect of the transition area waiver and general permit authorization would be to expand the general permit activity beyond the limits set forth in the general permit. [For example, if an applicant proposes one road crossing on a site, the Department will not permit the combination of a general permit 10 authorization with an averaging plan for the same road crossing because to do so would cause the crossing to exceed the 0.25 acre limit of general permit 10.]

(i) With the exception of an transition area waiver for access approved in accordance with [(a)6] **(a)5** above or a transition area waiver meeting the requirements for an individual permit at N.J.A.C. 7:7A-[6.3(g)]**8.3(g)**, a transition area waiver shall not be approved to allow encroachment within 75 feet of an exceptional resource value wetland.

7:7A-[6.2]**8.2** Transition area averaging plan waiver

(a) A transition area averaging plan waiver modifies the overall shape of a transition area without reducing its total square footage. The Department may approve a transition area averaging plan waiver for activities adjacent to an intermediate or exceptional resource value freshwater wetlands. [A diagram of an example transition area averaging plan is shown in N.J.A.C. 7:7A-6, Appendix A.]

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(b) The Department shall issue a transition area averaging plan waiver only if the transition area, as modified, will continue to serve the purposes of a transition area set forth in N.J.A.C.

7:7A-[2.5]3.3. The Department shall presume that the following will result in a transition area that will not serve the purposes set forth in N.J.A.C. 7:7A-[2.5]3.3, and shall not issue a transition area averaging plan waiver, unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-[6.1(d)]8.1(d):

1. The portion of the existing, pre-activity transition area that will be reduced has a slope greater than 25 percent[, as calculated under N.J.A.C. 7:7A-6.4(g)];

i. The percent slope shall be established by measuring the distance perpendicular to the contour of the slope on the plan. The percent slope shall be calculated for each two-foot contour interval at 10-foot intervals. For example, any location in the transition area where there is a one-foot rise over a 10-foot horizontal run constitutes a 10 percent slope; a two-foot rise over a 10-foot horizontal run constitutes a 20 percent slope.

2. – 4. (No change.)

(c) In addition to the presumptions at (b) above, the Department shall also presume that, for a transition area adjacent to an intermediate resource value wetland, the following will result in a substantial impact on the adjacent freshwater wetlands, and the Department shall not issue a transition area averaging plan waiver unless the applicant demonstrates otherwise under N.J.A.C. 7:7A-[6.1(d)]8.1(d):

1. A structure, impervious surface, or stormwater management facility[, as defined at N.J.A.C. 7:7A-1.4,] will be placed within 20 feet of freshwater wetlands; or

2. The transition area averaging plan proposes to:

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i. (No change.)

ii. Reduce a transition area to less than 25 feet wide in an area containing critical habitat for fauna or flora[, as defined at N.J.A.C. 7:7A-1.4];

iii. – vi. (No change.)

(d) In addition to the presumptions at (b) and (c) above, the Department shall also presume that, for a transition area adjacent to an exceptional resource value wetland, the following will result in a substantial impact on the adjacent freshwater wetlands, and the Department shall not issue a transition area averaging plan waiver unless the applicant demonstrates that the activity would qualify for an individual permit under this chapter:

1. The freshwater wetland adjacent to the transition area is a breeding or nesting habitat for a threatened or endangered species[as defined a N.J.A.C. 7:7A-1.4];

2. – 3. (No change.)

(e) Each transition area averaging plan shall be specific to a particular freshwater wetland and its associated transition area. To determine whether a freshwater wetland area is all one wetland or made up of multiple separate wetlands, the Department shall consider the factors listed at N.J.A.C. 7:7A-[6.1(f)]**8.1(c)**. If an applicant proposes to expand a transition area to compensate for a reduction elsewhere, the expanded portion of the transition area shall:

1. (No change.)

2. Be located on the same site[, as defined at N.J.A.C. 7:7A-1.4,] as the reduction;

3. (No change.)

4. Have the same ecological characteristics as the reduced portion of the transition area, including the vegetation types, or have characteristics that are equivalent or better [as] **than the**

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characteristics of the reduced portion of the transition area in regards to the transition area's ability to serve the functions listed at N.J.A.C. 7:7A-[2.5]**3.3**. For example, if a forested portion of the transition area is reduced, the expanded portion of the transition area must also be forested.

(f) All transition area averaging plan waivers shall be conditioned on the recording of a Department-approved conservation restriction in accordance with the requirements at N.J.A.C. 7:7A-12 restricting future activities in the averaging compensation area.

7:7A-[6.3]**8.3** Special activity transition area waiver

(a) – (d) (No change.)

(e) The Department shall issue a special activity transition area waiver for linear development[, as defined at N.J.A.C. 7:7A-1.4,] if there is no feasible alternative location for the linear development. In considering alternative locations, the Department shall consider the factors at (c) above and the following:

1. – 2. (No change.)

(f) The Department shall issue a special activity transition area waiver for redevelopment of a significantly disturbed area if all of the following conditions are met:

1. The area of proposed activity is significantly disturbed, so that it is not functioning as a transition area at the time of application, for example, the area is covered by an impervious surface such as pavement, by gravel or paver blocks, or by a deck that is less than five feet off the ground[. For example, a lawn is not considered to be so significantly disturbed that it is not functioning as a transition area];

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2. – 3. (No change.)

4. Where practicable, any remaining disturbed portion of the transition area shall be planted with indigenous plants that are beneficial to the wetland and protected from future development by a conservation restriction[or easement] that meets the requirements at N.J.A.C. 7:7A-[2.12]**12**.

(g) The Department shall issue a special activity transition area waiver for an activity if the applicant demonstrates that, if the activity were instead proposed in a freshwater wetland, it would meet the standards for a freshwater wetlands individual permit at N.J.A.C. 7:7A-[7.2]**10.2** and [7.4]**10.3**, and mitigation in accordance with N.J.A.C. 7:7A-[15.26]**11**.

7:7A-[6.5]**8.4** Hardship transition area waiver

(a) (No change.)

(b) The Department shall presume that a hardship under (a) above exists and shall issue a hardship transition area waiver that reduces the transition area in an amount determined under (c) below, provided [that] the applicant demonstrates that all of the following criteria are met:

1. – 6. (No change.)

7. The applicant has offered the site for sale at fair market value as determined by a fair market value appraisal, performed by a State-licensed appraiser and using a form letter provided by the Department, to adjacent property owners and the offer was refused or is not reasonable, assuming a minimum beneficial economically viable use, in accordance with N.J.A.C. 7:7A-[17]**13**, to alleviate the hardship;

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8. The applicant has offered the site for sale at fair market value as determined by a fair market value appraisal, performed by a State-licensed appraiser, and using a form letter provided by the Department, to interested public and/or private conservation organizations on a list provided by the Department, and the offer was refused or is not reasonable, assuming a minimum beneficial economically viable use, in accordance with N.J.A.C. 7:7A-[17]13, to alleviate the hardship; and

9. (No change.)

(c) (No change.)

7:7A-8.5 Duration of a transition area waiver

A transition area waiver is valid for five years from the date of issuance, and may be extended one time for five years pursuant to N.J.A.C. 7:7A-20.4.

SUBCHAPTER 9. INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

7:7A-9.1 Requirement to obtain an individual permit

A person shall obtain an individual permit under this subchapter in order to undertake any activity that does not meet the requirements of an authorization under a general permit-by-certification pursuant to N.J.A.C. 7:7A-6, an authorization under a general permit pursuant to N.J.A.C. 7:7A-7, or a transition area waiver pursuant to N.J.A.C. 7:7A-8.

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7:7A-9.2 Duration of an individual permit

(a) An individual permit for any regulated activity other than those identified at (b) below is valid for five years from the date of issuance, and may be extended one time for five years pursuant to N.J.A.C. 7:7A-20.4.

(b) An individual permit for a linear activity or project that is greater than 10 miles in length, a flood control project, or a quarry or mining operation is valid for 10 years from the date of issuance, and shall not be extended.

(c) All regulated activities authorized by an individual permit shall immediately cease if the permit, including any extension thereof pursuant to N.J.A.C. 7:7A-20.4, expires. If a person intends to commence or continue regulated activities that had been authorized under an individual permit that has expired, the person shall obtain a new individual permit under this chapter authorizing the regulated activities.

1. If no regulated activities have occurred prior to the expiration of the individual permit, the Department shall issue a new individual permit only if the project is revised, where necessary, to comply with the requirements of this chapter in effect when the application for the new individual permit is declared complete for review.

2. If any regulated activities have occurred prior to the expiration of the individual permit, the Department shall issue a new individual permit only if the project is revised, where feasible, to comply with the requirements of this chapter in effect when the application for the new individual permit is declared complete for review. In determining the feasibility of compliance with the requirements in effect at the time the application is

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declared complete for review, the Department shall consider the amount of construction that has been completed prior to the expiration of the original individual permit, the amount of reasonable financial investment that has been made in the original design consistent with the requirements applicable under the original individual permit, and whether continuing construction as approved under the original individual permit would have an adverse impact on the environment.

7:7A-9.3 Conditions applicable to an individual permit

(a) A person conducting regulated activities pursuant to an individual permit shall comply with:

- 1. The conditions set forth in the individual permit itself; and**
- 2. The conditions that apply to all permits at N.J.A.C. 7:7A-20.2.**

(b) In addition to the conditions that apply to every individual permit under (a) above, the Department shall establish conditions in accordance with N.J.A.C. 7:7A-20.3 in a specific individual permit, as required on a case-by-case basis, to ensure the authorized regulated activity meets all applicable requirements of this chapter and its enabling statutes.

SUBCHAPTER [7.] 10. REQUIREMENTS FOR ALL INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

7:7A-[7.1]10.1 General provisions for individual permits

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(a) [To be authorized under] **A regulated activity or project subject to** an individual permit[, an activity] shall meet the [following] **applicable** requirements **below**:

1. [All activities that require an individual permit shall meet all of the r requirements]

Requirements for all individual permits at N.J.A.C. 7:7A-[7.2]**10.2**;

2. [In addition to the requirements at N.J.A.C. 7:7A-7.2,] **For** a [non water-dependent] **non-water dependent** activity, [as defined at N.J.A.C. 7:7A-1.4, shall meet] the requirements at N.J.A.C. 7:7A-[7.4]**10.3**, except if the activity disturbs only State open waters that are not special aquatic sites [as defined at N.J.A.C. 7:7A-1.4]; and

3. [In addition to the requirements at N.J.A.C. 7:7A-7.2,] **For** a [non water-dependent] **non-water dependent** activity in an exceptional resource value wetland or trout production water, [shall meet] the requirements at N.J.A.C. 7:7A-[7.5]**10.4**.

(b) (No change.)

(c) Each individual permit applies to the entire site upon which permitted activities occur. An applicant shall not segment a project or its impacts by applying for general permit authorization for one portion of the project and applying for an individual permit for another portion of the project. Similarly, an applicant shall not segment a project or its impacts by separately applying for individual permits for different portions of the same project **on the same site**.

(d) (No change.)

7:7A-[7.2]**10.2** Standard requirements for all individual permits

(a) This section sets forth requirements that apply to all activities to be covered by an individual permit, including both [water-dependent] **water dependent** activities[, as defined at

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N.J.A.C. 7:7A-1.4,] and [non water-dependent] **non-water dependent** activities. Additional individual permit requirements that apply only to [non water-dependent] **non-water dependent** activities are found in N.J.A.C. 7:7A-[7.4]**10.3**.

(b) The Department shall issue an individual freshwater wetlands or open water fill permit only if the regulated activity:

1. – 8. (No change.)

9. Will not adversely affect a property [which] **that** is listed or is eligible for listing on the New Jersey or National Register of Historic Places unless the applicant demonstrates to the Department that the proposed activity avoids or minimizes impacts to the maximum extent practicable or the Department determines that any impact to the affected property would not impact the property's ability to continue to meet the criteria for listing at N.J.A.C. 7:4-2.3 or otherwise negatively impact the integrity of the property or the characteristics of the property that led to the determination of listing or eligibility. The Department shall not issue a conditional permit if it finds that the mitigation proposed is inadequate to compensate for the adverse [affect] **effect**. Any permit for an activity which may adversely affect a property listed or eligible for listing on the New Jersey or National Register of Historic Places shall contain conditions to ensure that any impact to the property is minimized to the maximum extent practicable and any unavoidable impact is mitigated;

i. If the permittee, before or during the authorized work, encounters a possible historic property, as described at N.J.A.C. 7:7A-[12.2(l)]**19.5(l)**, that is or may be eligible for listing on the New Jersey or National Register, the permittee shall preserve the resource, immediately notify the Department and proceed as directed by the Department;

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10. -11. (No change.)

12. Is in the public interest, as determined by the Department in consideration of the following:

i. - iv. (No change.)

v. The quality and resource value classification pursuant to N.J.A.C. 7:7A-[2.5]**3.3** of the wetland, which may be affected and the amount of freshwater wetlands to be disturbed;

vi. – vii (No change.)

13.-14. (No change.)

15. In accordance with N.J.A.C. 7:7A-[2.11]**2.7**, is part of a project that in its entirety complies with the Stormwater Management rules at N.J.A.C. 7:8.

(c) (No change.)

7:7A-[7.4]**10.3** Additional requirements for a [non water-dependent] **non-water dependent** activity in a wetland or special aquatic site

(a) In addition to meeting the requirements of N.J.A.C. 7:7A-[7.2]**10.2**, a [non water-dependent] **non-water dependent** activity in a freshwater wetland or special aquatic site[, as defined in N.J.A.C. 7:7A-1.4,] shall meet the requirements of this section. If an activity is water-dependent, [as defined at N.J.A.C. 7:7A-1.4,] or if it disturbs only a State open water that is not a special aquatic site, this section does not apply to the activity.

(b) There shall be a rebuttable presumption that there is a practicable alternative to a [non water-dependent] **non-water dependent** activity in a freshwater wetland or in a special aquatic

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site, which alternative does not involve a freshwater wetland or special aquatic site, and that such an alternative would have less of an impact on the aquatic ecosystem.

(c) In order to rebut the presumption established in (b) above, an applicant must demonstrate all of the following:

1. – 4. (No change.)

5. If any portion of the proposed activity will take place in an exceptional resource value wetland or in trout production waters, that the requirements of N.J.A.C. 7:7A-[7.5]**10.4** are met.

7:7A-[7.5]**10.4** (No change in text.)

SUBCHAPTER [15.] **11. MITIGATION**

7:7A-[15.1]**11.1** [Mitigation definitions] **Definitions**

In addition to the terms defined at N.J.A.C. 7:7A-[1.4]**1.3**, the following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

[“Charitable conservancy” means a corporation or trust that meets the definition of a charitable conservancy at N.J.S.A. 13:8B-2, and amendments thereto. As of September 4, 2001, N.J.S.A. 13:8B-2 defines a charitable conservancy as a corporation or trust whose purposes include the acquisition and preservation of land or water areas or of a particular land or water area, or either thereof, in a natural, scenic or open condition, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which has received tax

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exemption under section 501(c) of the 1954 Internal Revenue Code.]

...

“Credit purchase” means the purchase of credits [in] **from** a mitigation bank, as **that term is** defined [below] **at N.J.A.C. 7:7A-1.3**, as a substitute for performance of restoration, creation, enhancement, or upland preservation by [the purchaser] **a permittee**. Each credit counts for a certain acreage amount of [restoration, creation, or enhancement] **mitigation type**. Once a credit is applied to satisfy a mitigation obligation under this subchapter, it is exhausted and may not be sold or used again.

[“Degraded wetland” means a wetland in which there is impaired surface water flow or groundwater hydrology, or excessive drainage; a wetland which has been partially filled or excavated, contaminated with hazardous substances, or which has an ecological value substantially less than that of undisturbed wetlands in the region.]

...

“**Fee simple**” means **absolute ownership in land, unencumbered by any other interest or estate.**

“In-kind mitigation” means mitigation that provides similar **or higher** values and functions as the area disturbed, including similar wildlife habitat, similar vegetative species coverage, and density, equivalent flood water storage capacity, and equivalency of other relevant values or functions. In the case of a mitigation bank, this is accomplished through the purchase of credits in a bank at which similar values and functions have been established.

“**In-lieu fee program**” or “**ILF Program**” means **a program approved by the Department and the USEPA that involves the restoration, creation, enhancement, and/or**

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preservation of wetland and State open water habitats through funds paid to a government or non-profit entity to satisfy compensatory mitigation requirements. An in-lieu fee mitigation program sells compensatory mitigation credits to permittees whose obligation to provide mitigation is transferred to the in-lieu fee mitigation program.

“In-lieu fee program instrument” or “ILF Instrument” means the legal document for the establishment, operation, and use of an in-lieu fee mitigation program.

...

[“Mitigation” means activities carried out in accordance with this subchapter in order to compensate for the loss or disturbance of freshwater wetlands or State open waters.]

“Mitigation area” means the portion of a site[, right-of-way,] or piece of property upon which mitigation is proposed or performed. If a mitigation area includes a wetland, a transition area is included as part of the mitigation area in accordance with N.J.A.C. 7:7A-[15.8(b)]**11.12(c)**.

[“Mitigation bank” means an operation in which wetlands, uplands and/or other aquatic resources are restored, created, enhanced, or preserved by a mitigation bank operator, for the purpose of providing compensatory mitigation for disturbances to freshwater wetlands and/or State open waters.]

“Mitigation banking instrument” means documentation of Department approval of the objectives and administration of the bank including, as appropriate:

1. – 10. (No change.)
11. Contingency and [remedial] **corrective** actions and responsibilities;
12. – 14. (No change.)

[“Mitigation bank service area” means a geographic area within which a mitigation bank's

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credits may be used to compensate for a disturbance.]

“Mitigation bank site” means the portion of a site, [right-of-way,] or piece of property, upon which a mitigation bank is proposed or [created] **developed**.

“Monetary contribution” or **“monetary contribution to the in-lieu fee program”** means giving money to the Wetlands Mitigation [Fund] **Council**.

...

“Restoration” means:

1. The reestablishment of wetland and/or State open water characteristics and functions in an area that was once a [freshwater] wetlands and/or State open water but is no longer[. For example, an area that has been drained and farmed could be restored to its original condition by blocking or removing drainage devices and replanting with appropriate wetlands plants]; or
2. The reversal of a temporary disturbance and the reestablishment of the functions and values of the [freshwater] wetlands and/or State open water that was temporarily disturbed.

“Service area” means the geographic area within which impacts can be mitigated at a specific mitigation bank.

“Upland preservation” means the permanent protection of transition areas or other uplands from disturbance or development, through transfer of the property to a charitable conservancy [as defined in this section,] and the execution of legal instruments to prevent development, such as a conservation restriction [or easement].

“Watershed Management Area” means an aggregation of HUC 11s[, as defined at N.J.A.C. 7:7A-1.4,] designated by the Department as a watershed management area and shown on the map entitled “New Jersey's Watersheds, Watershed Management Areas, and Water Regions,” dated

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April 2000, as amended and supplemented. The map of watershed management areas may be [obtained from the Department's Division of Watershed Management at (609) 984-0058, or may be] viewed on the internet at [<http://www.state.nj.us/dep/gis>] <http://www.nj.gov/dep/gis>.

...

7:7A-[15.2]11.2 General mitigation requirements

[(a) The Department shall not consider a mitigation proposal in determining whether to approve a permit for a project.]

(a) Mitigation shall be in-kind and shall fully compensate for any ecological loss. The Department will consider proposals for out-of-kind mitigation, provided the mitigator demonstrates to the Department that the mitigation meets the goals and objectives of this subchapter and would result in equal ecological functions and values as compared to the ecological functions and values of the resource(s) prior to loss or impact. In order to demonstrate equal ecological functions and values, the mitigator shall provide current scientific literature concerning wetlands, aquatic resources, and mitigation; as well as survey the conditions on the site of disturbance and on the proposed mitigation area and provide written documentation regarding the existing and proposed soil conditions, type and density of vegetation, any existing contamination or other degradation, sediment and pollution removal ability and flood storage capacity of the wetland resources, all proposed soil erosion protection measures, and existing, as well as any anticipated, wildlife habitat conditions. The documentation shall also detail how the mitigation proposal will replace the ecological values of the wetland resource lost or disturbed.

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(b) Mitigation proposals may be submitted as part of a permit application for concurrent review. The determination as to whether a permit application should be approved shall be independent of the analysis of proposed mitigation for compliance with this subchapter. Where a mitigation proposal is not submitted as part of a permit application for an otherwise approvable project and this chapter requires mitigation for wetland, State open water, and/or transition area impacts proposed, the Department shall place a condition upon any permit issued requiring submission and Department approval of a mitigation proposal prior to the commencement of any regulated activities under the permit.

(c) A mitigator shall carry out the full acreage amount of mitigation required under this subchapter, unless the mitigator demonstrates, through use of productivity models or other similar studies, that a smaller mitigation area will result in replacement wetland resources of equal ecological value to those lost or disturbed. However, in no case shall the Department approve a mitigation ratio of less than 1:1. The mitigator shall demonstrate equal ecological value in accordance with (a) above.

(d) Mitigation for an individual permit is not required in cases where the Department determines that environmental impacts to the freshwater resources are *de minimis* and where the applicant demonstrates avoidance and minimization of impacts.

[(b)] (e) [The Department may require mitigation in accordance with this chapter] When mitigation is required in order to compensate for impacts to a freshwater wetland, State open water, and/or transition areas resulting from [the following] regulated activities, the Department shall authorize any regulated activities required to undertake and complete

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the mitigation through:

[1. Regulated activities authorized under an individual or general freshwater wetlands or open water fill permit;

2. Certain violations of the Freshwater Wetlands Protection Act and/or this chapter; and

3. Regulated activities approved in accordance with a special activity transition area waiver at N.J.A.C. 7:7A-6.3(g).

(c) Mitigation shall, at a minimum, fully compensate for the loss of ecological value caused by a disturbance, by replacing any freshwater wetlands and/or State open waters values and functions lost or disturbed with equal values and functions. To do this, mitigation shall meet all of the following criteria:

1. The mitigation alternative and the location of the mitigation shall comply with N.J.A.C. 7:7A-15.5 or 15.6, whichever applies;

2. If the mitigation is restoration, creation, or enhancement:

i. The acreage amount of mitigation shall be that required under N.J.A.C. 7:7A-15.8; and

ii. The mitigation shall be in-kind mitigation, as defined at N.J.A.C. 7:7A-15.1, unless the Department determines that, because of special circumstances, out-of-kind mitigation would be more likely to provide equal functions and values;

3. If the mitigation is credit purchase, the credits purchased shall be appropriate to the type of disturbance and the purchase shall comply with this chapter and the Council's authorization of the mitigation bank. For example, if credits were awarded by the Council for use as mitigation for disturbances of wetlands within a certain service area, the credits shall not be considered appropriate as mitigation for a disturbance outside of the service area. The amount of credits

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shall be determined under N.J.A.C. 7:7A-15.8(f);

4. If the mitigation is uplands preservation, the mitigation shall meet the requirements of N.J.A.C. 7:7A-15.9;

5. If the mitigation is a monetary contribution, the amount of the monetary contribution shall be approved by the Council in accordance with N.J.A.C. 7:7A-15.21; and

6. If the mitigation is land donation, the land to be donated shall be approved by the Council in accordance with N.J.A.C. 7:7A-15.22.]

1. **An authorization under a general permit;**
2. **A freshwater wetlands individual permit;**
3. **An open water fill individual permit;**
4. **A special activity transition area waiver at N.J.A.C. 7:7A-8.3(g);**
5. **Approval of a mitigation proposal submitted to comply with a condition of a permit;**
6. **An enforcement document specifying mitigation requirements; or**
7. **Approval of a mitigation proposal submitted to comply with the requirements of an enforcement document.**

[(d)] (f) To be approved under this subchapter, mitigation must have a high probability of [long term] **long-term** success[. At] **which, at** a minimum, [this] requires the following:

1. Adequate financial and other resources [must be] dedicated to the project;
2. [The] **A** project [must be designed to] **design that** takes advantage of and works within the existing conditions in the proposed mitigation area to the extent possible;
3. [The hydrology] **Hydrology** in and around the mitigation area [must be] adequate to support wetland conditions year round and indefinitely into the future. The hydrology for a

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proposed wetland mitigation site shall not include discharged stormwater;

4. [The soils (and hydrology)] **Soils** in the mitigation area must be adequate to support wetland conditions; and

5. [The] **Assignment of** responsibility for [long term] **long-term** maintenance of the mitigation area [must be clearly assigned] to an entity that has [the] **adequate** resources to ensure [long term] maintenance [of the mitigation area. For upland preservation or land donation, a maintenance fund shall be created in accordance with N.J.A.C. 7:7A-15.17(c) or 15.19(c), respectively] **as required by this subchapter.**

[(e) Mitigation under this subchapter requires prior Department approval. In addition, if the mitigation shall be through a monetary contribution or a land donation, the amount of money or the particular parcel of land must also be approved by the Wetlands Mitigation Council.

(f) All correspondence with the Department and/or the Mitigation Council, including requests for application forms and checklists, and applications for Council approval or funding, shall be addressed to:

Mitigation Staff

NJDEP Division of Land Use Regulation

P.O. Box 439

Trenton, New Jersey, 08625

(609) 984-0194

lurweb@dep.state.nj.us

(g) When the Department requires mitigation, the permit, approval or enforcement document under which the mitigation is required shall authorize any regulated or prohibited activities, as

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defined at N.J.A.C. 7:7A-1.4, necessary to accomplish the mitigation. When mitigation is required for a disturbance that is not subject to a Department-issued permit, for example, when mitigation is required by the ACOE, the mitigation itself must be authorized through a permit or enforcement document issued by the Department under this chapter. In some cases, mitigation also involves activities that require approval through one or more other Division of Land Use Regulation permits, such as a flood hazard area, CAFRA, or Waterfront Development permit; or through other State or Federal permits. In such a case, mitigation shall not begin without these approvals.]

(g) Mitigation shall not commence until the Department has approved a mitigation proposal through one of the approvals listed at (e) above. In addition, for mitigation through a monetary contribution to the in-lieu fee mitigation program or a land donation, the amount of money or the particular parcel of land must also be approved by the Wetlands Mitigation Council.

(h) Mitigation approved under this subchapter may also require additional State or Federal permits or approvals, such as a flood hazard area permit or a coastal permit from the Department or an approval from the USACE. Mitigation shall not commence until all necessary permits or approvals are obtained.

[(h)] **(i) If [a mitigation requirement arises from a] the Department requires mitigation as part of a remedy for a violation [rather than a permit] under this chapter, the Department shall determine the amount of mitigation [alternative required on a case-by case basis, taking into] necessary and the particular alternative required in consideration of the [size] extent (area) and severity of the violation and the functions and values provided by the proposed mitigation. A**

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mitigation proposal submitted as part of a [settlement of an enforcement action] **remedy for a violation** shall provide for mitigation that is at least as ecologically valuable as mitigation that would **otherwise** be required under this chapter [as a result of a] **under a permit**. [This may include an increase in mitigation to compensate for the time lapse between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).] **The Department may require a greater amount of mitigation than that required under a permit where necessary to provide at least equal ecological value due to the duration of time that the freshwater resource(s) was impaired as a result of the particular regulated activities undertaken in violation of this chapter.**

[(i)] **(j)** A mitigation area shall be permanently protected from future development **by a conservation restriction** in accordance with [N.J.A.C. 7:7A-15.14 and in accordance with] N.J.A.C. 7:7A-[2.12]**12**.

[(j)] If mitigation is performed through uplands preservation or land donation, the mitigator shall transfer all rights in the mitigation area to a government agency or charitable conservancy in accordance with N.J.A.C. 7:7A-15.17(c) or 15.19(c), respectively. A mitigation banker shall also transfer a mitigation bank to a government agency or charitable conservancy after the bank is successfully completed, in accordance with N.J.A.C. 7:7A-15.23(i).

(k) Upon approval by the Department, a permittee may aggregate the mitigation for multiple disturbances, so as to perform mitigation for more than one disturbance with a single mitigation project. Such an aggregated mitigation project shall be used only as mitigation for disturbances performed by the permittee, unless the permittee obtains Council approval of the project as a mitigation bank under this subchapter.]

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(k) Mitigation may consist of one or more mitigation alternatives set forth under this subchapter.

(l) Mitigation for multiple disturbances by a single permittee may, upon Department approval, be aggregated into a single mitigation project. Such an aggregated mitigation project shall not be used as mitigation for disturbances by any person other than the permittee, unless the permittee obtains approval of the project as a mitigation bank under this subchapter.

[1] **(m) [An activity that is required in order] Mitigation provided to satisfy a mitigation requirement of a Federal[, or local law or another State[, or local government requirements, other than those imposed] law shall not substitute for, or otherwise satisfy, any mitigation requirement under this chapter[, shall not qualify as mitigation under this subchapter. For example, if land is required by a county to be preserved as open space, the Department shall only approve the parcel for a land donation if the applicant also performs wetlands restoration or enhancement in accordance with this subchapter.**

(m) A permittee may use one mitigation alternative or a combination of mitigation alternatives to compensate for a permitted disturbance.

(n) Upon approval of the Department, a permittee may aggregate onto one site the mitigation for multiple small (less than 0.5 acre in size), wetland disturbances resulting from the same project but that span several Watershed Management Areas.] unless the mitigation project also meets the requirements of this subchapter. For example, a mitigation project proposed to meet a mitigation requirement of the Coastal Zone Management Rules at N.J.A.C. 7:7 shall satisfy a mitigation requirement imposed under this chapter only if the proposed mitigation

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project meets the requirements of this subchapter.

(n) If the mitigator encounters a possible historic property that is or may be eligible for listing in the New Jersey or National Register, the mitigator shall preserve the resource, immediately notify the Department, and proceed as directed by the Department.

(o) Specific requirements for each type of mitigation project are located as follows:

- 1. Mitigation for temporary disturbance at N.J.A.C. 7:7A-11.8;**
- 2. Requirements for wetland restoration, creation, or enhancement at N.J.A.C. 7:7A-11.12;**
- 3. Requirements for upland preservation at N.J.A.C. 7:7A-11.13;**
- 4. Requirements for credit purchase from an approved mitigation bank at N.J.A.C. 7:7A-11.14;**
- 5. Requirements for land donation at N.J.A.C. 7:7A-11.15;**
- 6. Requirements for a monetary contribution to the ILF Program at N.J.A.C. 7:7A-11.16; and**
- 7. Requirements for mitigation for transition area impacts (N.J.A.C. 7:7A-8.3(g)) at N.J.A.C. 7:7A-11.11.**

7:7A-[15.3]**11.3** Timing of mitigation

(a) Mitigation shall be performed within the applicable time period below:

1. [Mitigation for a disturbance authorized by a permit, other than] Except for restoration of a temporary disturbance[, as defined at N.J.A.C. 7:7A-1.4,] under (a)2 below, mitigation required under a general permit authorization, individual permit, or special activity

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transition area waiver shall be performed prior to or concurrently with the [permitted] **regulated** activity [except that no regulated activities shall occur before the Department has approved a mitigation proposal, and shall be continued to completion according to the schedule in the approved mitigation proposal] **that causes the disturbance;**

2. Mitigation for [a] **any** temporary disturbance [authorized by a permit] shall [be started] **commence** immediately [following] **upon** completion of the **regulated** activity that caused the disturbance[,] and shall [be continued to] **continue until** completion, [within] **which shall not exceed** six months after the [end] **cessation** of the [activity] **regulated activities** that caused the disturbance; and

3. Mitigation required as part of an enforcement action shall be performed in accordance with [a] **the schedule set forth** in the enforcement document.

(b) All mitigation shall be continued until completion according to the schedule in the approved mitigation proposal.

Recodify existing (b) – (c) as **(c) – (d)** (No change in text.)

7:7A-[15.4]**11.4** Property suitable for mitigation [and the criteria for addressing contaminated sites]

(a) The Department shall approve mitigation only on property that is owned in fee simple and under legal control of the person responsible for performing the mitigation, unless the person responsible for performing the mitigation demonstrates that they have legal rights to the property sufficient to enable compliance with all requirements of this chapter.

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[(a)] **(b)** Any offsite [restoration, creation, enhancement, land donation, or upland preservation] **mitigation** shall be carried out on private property, except that a government agency[, as defined at N.J.A.C. 7:7A-1.4,] may create, restore, or enhance on public land in accordance with this subchapter, as mitigation for a project funded solely with public monies, if the land was not acquired with Green Acres funding, as defined at N.J.A.C. 7:36-2.1, and any one of the following criteria is met:

1. -3. (No change.)

(c) The following shall not constitute mitigation under this subchapter:

[(b)] **1.** [An] **The installation of, or** improvement to, [a] **an existing** public facility [which is] intended for human use, such as a ball field, nature trail, or boardwalk[, does not constitute mitigation.]; **or**

2. A stormwater management facility, such as a basin.

[(c)] **(d)** (No change in text.)

[(d)] **(e)** The Department shall not approve [mitigation through] creation, restoration, or enhancement in an area **that the Department has determined** is [already] **currently of** [highly ecologically valuable] **high ecological value**, for example if the area contains a mature, well developed, ecologically desirable natural community; [a State open water that supports fish;] **or** a forested habitat[; or].

(f) The Department shall not approve creation, restoration, or enhancement in an area that the Department has determined is a significant cultural or historic resource[s], as identified in accordance with N.J.A.C. 7:7A-[12.2]19.5.

[(e)] The Department shall approve mitigation through creation, restoration, or enhancement

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only on property that is owned in fee simple and under the full legal control of the person responsible for performing the mitigation, or the person responsible for performing the mitigation shall demonstrate that the person has legal rights to the property sufficient to enable compliance with all requirements of his chapter. If a property is affected by an easement or other encumbrance, the person responsible for performing the mitigation shall ensure that the encumbrance is extinguished.]

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

[(g)] (h) The Department shall not approve mitigation that would [destroy]:

1. Destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species; [and shall not] **or**

2. In any way jeopardize the continued existence of any local population of a threatened or endangered species.

[(h) The Department shall not approve mitigation in an area that contains contamination until all potential contaminated areas have been identified, and all remediation of the area(s) is completed so that there is no potential for the mitigation activities to result in the reintroduction of contamination to ecological communities or exposure of humans to contamination, and there is no potential for the mitigation site to be contaminated by the belated discovery of new areas of contamination requiring remediation. The Department will determine on a case by case basis whether it is feasible on a site containing contamination to conduct onsite mitigation.

1. If the Department determines that there is reason to suspect contamination on the proposed mitigation area, the site must be properly characterized and assessed to ensure there is no ecological risk associated with the proposal. To obtain this characterization, the mitigator shall

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remediate the site pursuant to the Administrative Requirements for the Remediation of Contaminated Sites rules at N.J.A.C. 7:26C-2.4.

2. The applicant shall not submit a proposed mitigation bank containing known or suspected contamination to the Department for conceptual approval in accordance with N.J.A.C. 7:7A-15.25(a) until the site has been fully characterized in accordance with (h)1 above.

(i) Stormwater management facilities designed to treat stormwater shall not constitute mitigation.]

(i) The Department shall not approve mitigation in an area where the proposed mitigation poses an ecological risk. For purposes of this section, ecological risk means that the mitigation may result in the reintroduction of contamination to ecological communities, the exposure of humans to contamination, or the contamination of the mitigation site by subsequent exposure to new areas of contamination requiring remediation. The mitigator shall properly characterize and assess the mitigation area in accordance with the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-1.16 and 4.9 to determine ecological risk.

1. If the Department determines based on the characterization and assessment that the mitigation activities at the proposed site do not pose an ecological risk, the Department shall complete its review of the proposed mitigation site to determine whether the proposed mitigation satisfies the requirements of this subchapter.

2. If the Department determines based on the characterization and assessment that the proposed mitigation activities at the proposed site do pose an ecological risk, the mitigator shall not be permitted to use the site for mitigation unless the mitigator remediates the site

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pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-4.8, 5.1, and 5.2. The Department shall allow the mitigator to proceed with the mitigation project only after it demonstrates that the remediation and/or mitigation activities will fully address the ecological risk and that the proposed mitigation satisfies the requirements of this subchapter.

(j) Properties where a substantial amount of soil must be removed in order to achieve suitable wetland hydrology are not acceptable mitigation sites.

(Agency Note: N.J.A.C. 7:7A-15.5, 15.6, 15.7, and 15.9 are proposed for recodification with amendments as 11.9, 11.10, 11.8, and 11.13, respectively.)

7:7A-[15.10]11.5 Conceptual review of a mitigation area

(a) This section sets forth the requirements for the conceptual review of potential mitigation areas except for mitigation bank sites. The requirements for conceptual review of a mitigation bank site are set forth at N.J.A.C. 7:7A-11.26(a) and (b).

[(a)] **(b)** The Department [strongly recommends that an] **encourages** applicants **to** obtain the [Department's] conceptual review of any land being considered as a potential mitigation area, prior to **purchase of land for mitigation purposes and/or** submittal of a mitigation proposal [involving restoration, creation, enhancement, uplands preservation, or land donation].

[(b)] An applicant may request a conceptual review at any time prior to submittal of a mitigation proposal. However, the Department strongly recommends that an applicant obtain a Department conceptual review before buying the land for a mitigation area.]

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(c) To obtain [the Department's] conceptual review of a mitigation area, the applicant shall submit a written request **to the address set forth at N.J.A.C. 7:7A-1.4**, including:

1. (No change.)
2. A map showing [Department staff how to find the mitigation area] **the location and extent of the prospective mitigation area, including topography if available;**
3. – 4. (No change.)
5. [Unconditional written consent] **Consent** from the owner of the [proposed] **prospective** mitigation area allowing Department representatives to enter the property [and] **in a reasonable manner and at reasonable times to** inspect the mitigation area.

(d) [Upon receipt of a complete request for a conceptual review, the Department may schedule a site inspection. At a site inspection, Department staff shall candidly discuss the apparent strengths and weaknesses of the proposed mitigation area, but all guidance provided shall be non-binding on the Department. A Department decision on a proposed mitigation area or mitigation proposal is binding only if it is incorporated into an approval obtained in accordance with this subchapter.] **The Department's guidance on a proposed mitigation area is not binding and shall not be relied upon by the applicant in purchasing a proposed mitigation area.** A conceptual review does not grant any property or other rights[, and does not authorize mitigation activities] **or in any way imply that the Department has authorized, or will authorize, any mitigation activities at the proposed mitigation area, or issue any other approval.**

7:7A-[15.11]11.6 Basic requirements for [all] mitigation proposals

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(a) A mitigation proposal **required under this chapter** shall be submitted [within the applicable time period below:

1. For mitigation required by an individual permit, the mitigation proposal shall be submitted] at least 90 **calendar** days prior to the [start] **commencement** of **regulated** activities authorized by [the] **a** permit. [Activities authorized by the permit shall not begin until the mitigation proposal is approved and the mitigation has begun;

2. For mitigation required by a general permit authorization , the mitigation proposal shall be submitted no later than 120 days prior to the initiation of regulated activities authorized by the general permit; and]

[3.] **(b)** [For mitigation requirements arising from] **A mitigation proposal to remedy** a violation[, the mitigation proposal] **under this chapter** shall be submitted by the deadline set forth in the Department's enforcement document.

[(b)] **(c)** [The] **A** mitigation proposal shall [provide] **include** all information necessary for the Department to determine if the requirements of this subchapter are met. [The information required for each mitigation alternative is set forth in a mitigation proposal checklist, provided by the Department. To obtain the mitigation proposal checklist for a particular mitigation alternative, contact the Department at the address in N.J.A.C. 7:7A-15.2(f).]

[1.] **(d)** The applicant shall [also] provide notification in accordance with N.J.A.C. 7:7A-[10.8(j)]**17** for all mitigation proposals **to be carried out at a location that is not the location of the permit activity** that include creation, enhancement, or restoration (except restoration for a temporary disturbance).

[(c) In order to demonstrate that an offsite mitigation alternative is not feasible under this

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subchapter, an applicant shall provide to the Department a list of at least six potential areas upon which the mitigation alternative might be performed. Each of these potential areas shall:

1. Be located at a practical elevation suitable for a wetland or State open water;
2. Have an adequate water supply;
3. Be large enough for the mitigation proposed;
4. Be available for purchase; and
5. Meet the requirements of N.J.A.C. 7:7A-15.4(h) regarding contamination

(d) A mitigation proposal submitted as part of a settlement of an enforcement action shall provide for mitigation that is at least as ecologically valuable as mitigation that would be required under this chapter as a result of a permit. This may include an increase in the amount of mitigation to compensate for the time that has elapsed between the disturbance and the completion of mitigation, such as that required at N.J.A.C. 7:7A-15.3(b).

(e) A mitigation proposal shall include as many copies of each item as required by the checklist.

7:7A-15.12 Contents of a mitigation proposal

(a) The application checklist for every mitigation proposal shall require the information listed at (b)1 through 8 below. In addition, each mitigation proposal shall also require information specific to the mitigation alternative proposed, listed at (c) through (g) below.]

(e) The information required to be submitted in a mitigation proposal for restoration, creation, and/or enhancement, uplands preservation, and land donation is set forth in the appropriate mitigation proposal checklist, available from the Department's website at the address set forth at N.J.A.C. 7:7A-1.4 and described at (h) and (i) below.

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(f) The information required to be submitted in a mitigation proposal for a monetary contribution to the Department's ILF Program in accordance with N.J.A.C. 7:7A-11.16 is set forth in the appropriate monetary contribution checklist, available from the Department's website at the address set forth at N.J.A.C. 7:7A-1.4. The checklists require the following information:

- 1. A copy of the permit (if issued) authorizing the impact(s) being mitigated; and**
- 2. A demonstration that the contribution amount addresses the factors specified at N.J.A.C. 7:7A-11.16.**

(g) A mitigation proposal for the purchase of bank credits shall consist of a description of the type and quantity of wetland resource disturbance for which mitigation is being proposed, a copy of the permit (if issued) authorizing the disturbance being mitigated, and identification of the mitigation bank from which appropriate credits will be purchased.

[(b)] **(h) The [application] mitigation proposal checklists [for every mitigation proposal shall] identified at (e) above** require the following **information:**

1. Basic information regarding the applicant, the [disturbance] specific **impacts** for which the mitigation is [required] **intended to compensate**, and **a copy of the permit (if issued)** or [other item which] **enforcement document** that is the source of the mitigation requirement;
2. (No change.)
3. Information demonstrating that the proposed mitigation alternative complies with N.J.A.C. 7:7A-[15.5 or 15.6]**11.9 or 11.10**, as applicable, including information on the feasibility or practicability of other mitigation alternatives;
4. – 6. (No change.)

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7. A certification of truth and accuracy **in accordance with N.J.A.C. 7:7A-16.2(j)**; [and]

8. [Unconditional written consent] **Consent** from the owner of the proposed mitigation area allowing the Department to enter the property [and] **in a reasonable manner and at reasonable times to** inspect the proposed mitigation area[.];

[(c) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to purchase credits shall require information demonstrating that credit purchase is acceptable under N.J.A.C. 7:7A-15.5 or 15.6, and any information necessary for the Department to determine the mitigation bank from which appropriate credits must be purchased under N.J.A.C. 7:7A-15.5 or 15.6.

(d) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to restore, create, or enhance wetlands, to preserve uplands, or to donate land shall also require the following information:

1. Basic information regarding the proposed mitigation area, including, but not limited to, its location and size, ownership, and any legal or other restrictions on the property such as easements;

2. Unconditional written consent from the owner of the proposed mitigation area, as defined at N.J.A.C. 7:7A-15.1, for Department representatives to enter the proposed mitigation area to conduct inspections;]

9. The following material necessary to explain and illustrate the existing and proposed conditions at the mitigation site:

[3.] **i.** Visual materials, [including, but not limited to,] **such as maps, site plans, planting plans, surveys, topography, diagrams, delineations, and/or photographs** [showing the proposed

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mitigation area, existing conditions and features on the proposed mitigation area];

[4.] **ii.** [Written] A narrative [information and/or reports] describing the **existing conditions and** proposed mitigation, [area, existing conditions and features on the proposed mitigation area, and the mitigation alternative proposed;] **as well as supporting soil or vegetation samples; and**

iii. A preventive maintenance plan detailing how invasive or noxious vegetation will be controlled, and how predation of the mitigation plantings will be prevented;

10. A specific breakdown of each resource for which mitigation is being proposed (for example, 0.01 acres of forested wetlands or 0.4 acres of scrub shrub wetlands) and the type and quantity of proposed mitigation for each resource;

[5.] **11.** Information and/or certifications regarding the presence or absence of endangered [or] **and/or** threatened **wildlife and plant** species habitat, or [archaeological resources, as described at N.J.A.C. 7:7A-12.2, or] other features on the proposed mitigation area that are relevant to determining compliance with this chapter. [Failure to provide all such information of which the applicant, its consultants, or agents is aware may result in denial or termination of the permit under N.J.A.C. 7:7A-14.5, and may subject the applicant to penalties for submittal of false information under N.J.A.C. 7:7A-16.9;]

12. A certification that the proposed mitigation will not adversely affect historic resources that are listed or are eligible for listing on the New Jersey or National Register of Historic Places;

[6.] **13.** (No change in text.)

[7.] **14.** Information regarding relevant features of other properties in the vicinity of the mitigation area, such as whether [they] **nearby properties** are publicly owned, **or** contain

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preserved open space[, contain] **or** significant natural resources[, etc.];

[8. Scientific information, including scientific literature, models or other studies concerning wetlands, soils, vegetation, hydrology, wildlife habitat, and any other factors relevant to the functions and values of the proposed mitigation area and mitigation activities;

9. Information to enable the Department to determine the functions and values of the proposed mitigation area, and its potential to be a successful mitigation area, including narrative information, maps, photographs, soil or vegetation samples, delineations and/or other visual materials, describing and/or showing the mitigation area;

10. All past correspondence between the Department and the applicant or permittee, and/or the owner(s) of the proposed mitigation area, regarding the mitigation activities and the mitigation area;]

[11.] **15.** (No change in text.)

[12.]**16.** [Estimates of costs involved in performing] **Cost estimates to perform the** mitigation[,] and [in maintaining] **maintain** the mitigation area after construction and/or transfer is completed;

[13. Draft documents for protection and transfer of the mitigation area after successful completion of mitigation, in accordance with N.J.A.C. 7:7A-15.14, 15.17(c) and 15.19(c); and

14. If the Department determines that there is reason to suspect contamination on the proposed mitigation area, a copy of the characterization and other information obtained from the Department's Division of Remediation Management and Response, as required at N.J.A.C. 7:7A-15.4(h). In addition, in order for the Department to protect the health and safety of the employees who will inspect the potential mitigation site, the applicant shall provide the following:

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- i. The applicable human health and ecological effect thresholds for each contaminant identified in the characterization as provided by the Site Remediation Program or the EPA;
- ii. The method of exposure for each contaminant listed in the characterization, for example inhalation, ingestion, dermal contact, or explosive potential;
- iii. The method of transmission of the contaminant identified in the characterization, for example through soil particles, dust particles, vapor or liquid;
- iv. The potential to transmit health risks and or known contaminants off site, for example by way of soil or liquids on footwear, clothing or skin; and
- v. The current status of the cleanup of the site with the Site Remediation Program or the EPA, the name(s) and contact number(s) of the project manager, and all applicable case or file numbers.

(e) In addition to the basic information required for all mitigation proposals under (b) above, and the information required at (c) above, an application checklist for a proposal to restore, create, or enhance wetlands shall require the following information:

1. Visual materials, including, but not limited, to maps, plans, surveys, diagrams, or photographs showing all mitigation activities proposed;
2. Written narrative information and/or reports describing in detail all mitigation activities proposed;
3. A description of post-construction activities, including but not limited to schedules for monitoring, maintenance, and reporting;
4. Contingency measures that will be followed if the mitigation project fails or shows indications of failing;

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5. A letter of credit or other financial assurance meeting the requirements of N.J.A.C. 7:7A-15.13; and

6. A certification that the proposed mitigation will not adversely affect properties which are listed or are eligible for listing on the National Register of Historic Places in accordance with N.J.A.C. 7:7A-12.2. If the mitigator, before or during approved mitigation, encounters an historic property on the mitigation site that may be eligible for listing in the National Register, the mitigator shall immediately notify the Department and proceed as directed by the Department.

(f) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to make a monetary contribution shall require the following:

1. Information demonstrating to the Department that a monetary contribution is acceptable under N.J.A.C. 7:7A-15.5 or 15.6 and the requirements at either (f)1i or ii below:

i. For a monetary contribution to satisfy mitigation requirements for approved individual permits, cost estimates, appraisals, and other information necessary to demonstrate compliance with the requirements for monetary contribution at N.J.A.C. 7:7A-15.21; or

ii. For a monetary contribution to satisfy mitigation requirements for approved general permits, the calculation demonstrating compliance with N.J.A.C. 7:7A-15.21(d).

(g) In addition to the basic information required for all mitigation proposals under (b) above, an application checklist for a proposal to make a land donation shall require the following:

1. Information demonstrating to the Department that a land donation is acceptable under N.J.A.C. 7:7A-15.5 or 15.6; and

2. All information necessary to demonstrate to the Wetlands Mitigation Council that the

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parcel of land proposed for donation meets the requirements for land donation at N.J.A.C. 7:7A-15.22.]

17. A preliminary characterization and assessment of the site in accordance with N.J.A.C. 7:7A-11.4(h) to enable the Department to determine if contamination is present and if the proposed mitigation activities pose an ecological risk;

18. A description of post-construction activities, including schedules for monitoring, maintenance, and reporting; and

19. Contingency measures that will be followed if the mitigation project fails or shows indications of failing.

(i) In addition to the information required by the mitigation proposal checklist as set forth at (h) above, a proposal to create, restore, or enhance wetlands shall also include a projected water budget for the proposed mitigation site. The water budget shall:

- 1. Detail the sources of water for the mitigation project, as well as the water losses;**
- 2. Document that an ample supply of water is available to create, enhance, or restore wetland conditions, as applicable;**
- 3. Contain sufficient data to show that the mitigation project will, indefinitely into the future, have sustained wetland hydrology; and**
- 4. Include the following regional information for the proposed and existing site conditions:**
 - i. The tidal range (low, high, and spring high tide) over the course of a month (where applicable);**
 - ii. The elevation of the existing reference wetland system in the vicinity of the project**

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site;

iii. The salinity range of adjacent waters (where applicable); and

iv. A detailed discussion relating to the created substrate of the proposed mitigation site.

(Agency Note: N.J.A.C. 7:7A-15.12 and 15.13 are proposed for recodification as N.J.A.C. 7:7A-11.6 and 11.17, respectively.)

7:7A-[15.15]**11.7** Department review and **approval of** a mitigation proposal

(a) The Department shall, within 30 **calendar** days [after receiving] **of receipt of** a mitigation proposal **submitted to comply with a condition of a permit**, review the proposal for completeness **in accordance with N.J.A.C. 7:7A-11.6**, and:

1. (No change.)
2. Declare the mitigation proposal complete **for further review**.

(b) If a mitigation proposal is intended to compensate for a major discharge[, as defined at N.J.A.C. 7:7A-1.4,] the Department shall consult with **the** USEPA prior to determining whether to approve the proposal.

(c) (No change.)

7:7A-[15.7]**11.8** Mitigation for a temporary disturbance

(a) Mitigation for a temporary disturbance[, as defined at N.J.A.C. 7:7A-1.4,] shall be performed as follows:

- 1.– 2. (No change.)

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(b) The transition area for a temporary disturbance shall be as follows:

1. (No change.)

2. If additional mitigation is performed under (a)2ii above, the width of the transition area on the mitigation area shall be the width required at N.J.A.C. 7:7A-[15.8(b)1 or 3]**11.12(c)**, as applicable.

7:7A-[15.5]**11.9** Mitigation **hierarchy** for a smaller disturbance

(a) This section governs, for a smaller disturbance, the mitigation alternative required and the location of mitigation in relation to the disturbance. [(See Figure 4 below for an illustration of the information in this section.)] However, if a smaller disturbance is a temporary disturbance, [as defined at N.J.A.C. 7:7A-1.4,] it is governed by N.J.A.C. 7:7A-[15.7]**11.8**. [The acreage amount of mitigation required for both smaller and larger disturbances is determined under N.J.A.C. 7:7A-15.8.]

(b) (No change.)

(c) The Department presumes that onsite mitigation for a smaller disturbance is not feasible. Therefore, mitigation for a smaller disturbance shall be performed through [credit purchase in accordance with (d) below, unless the applicant demonstrates under (e) below that one of the following will be more environmentally beneficial:

1. Onsite restoration, creation or enhancement; or

2. Offsite restoration, creation, or enhancement, which is performed in the same HUC 11, as defined at N.J.A.C. 7:7A-1.4, as the disturbance, or performed in an adjacent HUC 11 within the same watershed management area as the disturbance.

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(d) Mitigation through credit purchase shall be performed as follows:

1. Through the purchase of credits from either of the following:

i. A mitigation bank located in the same HUC 11 as the disturbance; or

ii. A mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999,

which includes the disturbance site in its bank service area. The service area for each mitigation bank is set forth in the Wetlands Mitigation Council approval for the bank;

2. If no credits are available from a bank listed in (d)1 above, through the purchase of credits from a mitigation bank located in a HUC 11 that is both adjacent to the HUC 11 in which the disturbance is located and within the same watershed management area, as defined at N.J.A.C. 7:7A-15.1, as the disturbance;

3. If no credits are available from a bank listed in (d)1 or 2 above, through the purchase of credits from a mitigation bank located anywhere in the same watershed management area as the disturbance; or

4. If no credits are available from a mitigation bank located in (d)1, 2, or 3 above, through the purchase of credits from a mitigation bank which includes the disturbance site in its bank service area. (e) **the purchase of in-kind credits from a mitigation bank with a service area that includes the site of the disturbance in accordance with N.J.A.C. 7:7A-11.14, or, if that is not feasible, then either through onsite restoration, creation, or enhancement or offsite restoration, creation, or enhancement within the same watershed management area as the disturbance.** In determining [if] **the feasibility of** onsite or offsite mitigation for a smaller disturbance [would be environmentally beneficial for the purposes of (c) above,] the Department shall consider the following factors [and any other relevant factors specific to the site or project]

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regarding the proposed mitigation area:

1. Size. Generally, the larger a mitigation area, the greater its potential environmental benefit.

A mitigation area that is associated with a large existing wetland complex is more likely to be environmentally beneficial [for the purpose of (c) above];

2. (No change.)

3. Habitat value. A mitigation area that will provide valuable habitat for critical wildlife species or threatened or endangered species is more likely to be environmentally beneficial;

[and]

4. Interaction with nearby resources. A mitigation project is more likely to be environmentally beneficial if it complements existing nearby resources. For example, a mitigation project that adds riparian wetlands habitat adjacent to an existing stream enhances the environmental value of both the riparian area and the stream[.]; **and**

5. Availability of parcels for offsite mitigation that meet the requirements of (f) below.

[(f)] **(d)** If [credit purchase under (d) above, and onsite or offsite mitigation under (c)above, are] **mitigation as described at (c) above** is not feasible, mitigation shall be [performed through a monetary contribution in accordance with N.J.A.C. 7:7A-15.21 or, if the Department determines that no other mitigation alternative is practicable or feasible, mitigation shall be performed through upland preservation, in accordance with N.J.A.C. 7:7A-15.9, or a land donation approved by the Wetlands Mitigation Council, in accordance with N.J.A.C. 7:7A-15.22.] **in the form of one or more of the following, as determined in consultation with the Department:**

1. **Monetary contribution to the ILF Program in accordance with N.J.A.C. 7:7A-11.16;**

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and/or

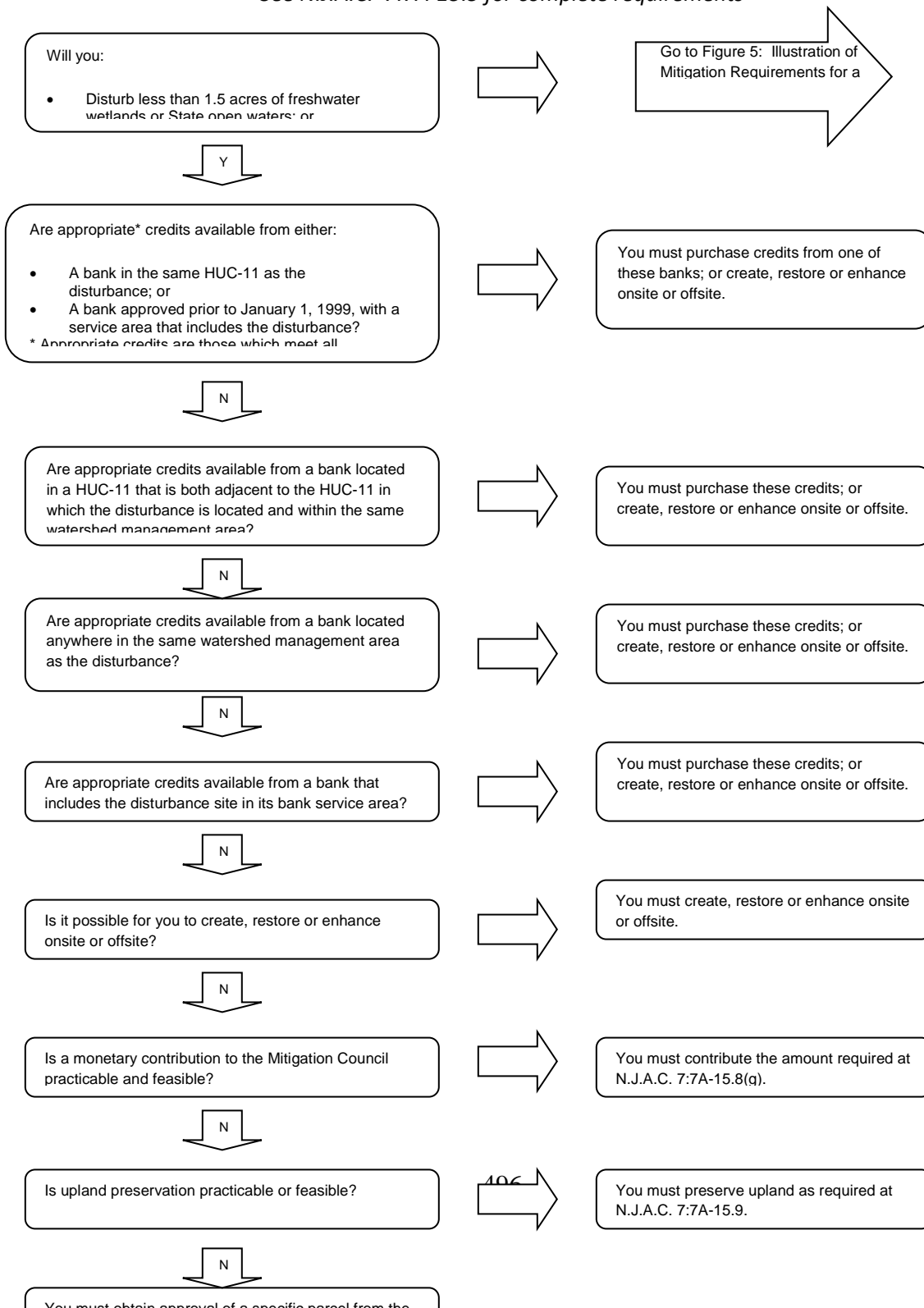
2. Upland preservation in accordance with N.J.A.C. 7:7A-11.13.

(e) If mitigation as described at (d) above is not feasible, mitigation shall be in the form of a land donation in accordance with N.J.A.C. 7:7A-11.15.

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[Figure 4: Flow chart Illustrating Mitigation Alternatives for a Smaller Disturbance

See N.J.A.C. 7:7A-15.5 for complete requirements



]

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(f) In order to demonstrate that offsite mitigation under (c) above is not feasible, an applicant shall provide to the Department a list of at least six sites within the same watershed management area to accommodate the required mitigation. With respect to each site on the list, the applicant shall explain why:

- 1. The site is not located at a practical elevation suitable for wetlands;**
- 2. The site lacks an adequate water supply;**
- 3. The site is not available for purchase; and**
- 4. The site does not meet the requirements of N.J.A.C. 7:7A-11.4(i) regarding ecological risk.**

7:7A-[15.6]**11.10** Mitigation **hierarchy** for a larger disturbance

(a) This section governs, for a larger disturbance, the mitigation alternative required and the location of mitigation in relation to the disturbance. [(See Figure 5 below for an illustration of the information in this section.)] However, if a larger disturbance is a temporary disturbance[, as defined at N.J.A.C. 7:7A-1.4,] it is governed by [N.J.A.C. 7:7A-15.7. The acreage amount of mitigation, regardless of the size of the disturbance, is determined under] N.J.A.C. 7:7A-[15.8]**11.8**.

(b) A larger disturbance is a disturbance not listed at N.J.A.C. 7:7A-[15.5(b)]**11.9(b)**.

[(c) Mitigation for a larger disturbance shall be performed through restoration, creation, or enhancement, carried out on the site of the disturbance to the maximum extent feasible. Onsite mitigation shall not be performed through upland preservation.

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(d) If onsite restoration, creation, or enhancement is not feasible, mitigation shall be performed through any of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank located in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area;
2. The purchase of credits from a mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999, which includes the disturbance site in its bank service area; or
3. Offsite restoration, creation, or enhancement, in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area as the disturbance.

(e) If mitigation under (d) above is not feasible, mitigation shall be performed through either of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank in the same watershed management area as the disturbance; or
2. Restoration, creation, or enhancement, in the same watershed management area as the disturbance.

(f) If mitigation is not feasible under (c), (d) or (e) above, mitigation shall be performed through:

1. The purchase of credits from a mitigation bank which includes the disturbance site in its bank service area; or
2. Restoration, creation or enhancement in the same drainage basin.]

(c) Mitigation for a larger disturbance shall be performed through restoration, creation, or enhancement onsite or, if that is not feasible, then offsite in the same watershed

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management area as the disturbance or through the purchase of credits from a mitigation bank with a service area that includes the area of disturbance. In determining the feasibility of onsite or offsite mitigation for a larger disturbance, the Department shall consider the following factors regarding the proposed mitigation area:

1. Size. Generally, the larger a mitigation area is, the greater its potential environmental benefit. A mitigation area that is associated with a large existing wetland complex is more likely to be environmentally beneficial;

2. Location in relation to other preserved open space. A mitigation area adjacent to public land or other preserved areas is more likely to be environmentally beneficial;

3. Habitat value. A mitigation area that will provide valuable habitat for critical wildlife species or threatened or endangered species is more likely to be environmentally beneficial;

4. Interaction with nearby resources. A mitigation project is more likely to be environmentally beneficial if it complements existing nearby resources. For example a mitigation project that adds riparian wetlands habitat adjacent to an existing stream enhances the environmental value of both the riparian area and the stream; and

5. Availability of parcels for offsite mitigation that meet the requirements of (f) below.

[(g)] (d) If mitigation as described at (c) above is not feasible [under (c), (d), (e) or (f) above], mitigation shall be [performed through] required in the form of one or more of the following, as determined in consultation with the Department:

1. A monetary contribution to the Department's ILF Program in accordance with N.J.A.C. 7:7A-[15.21]11.16; or

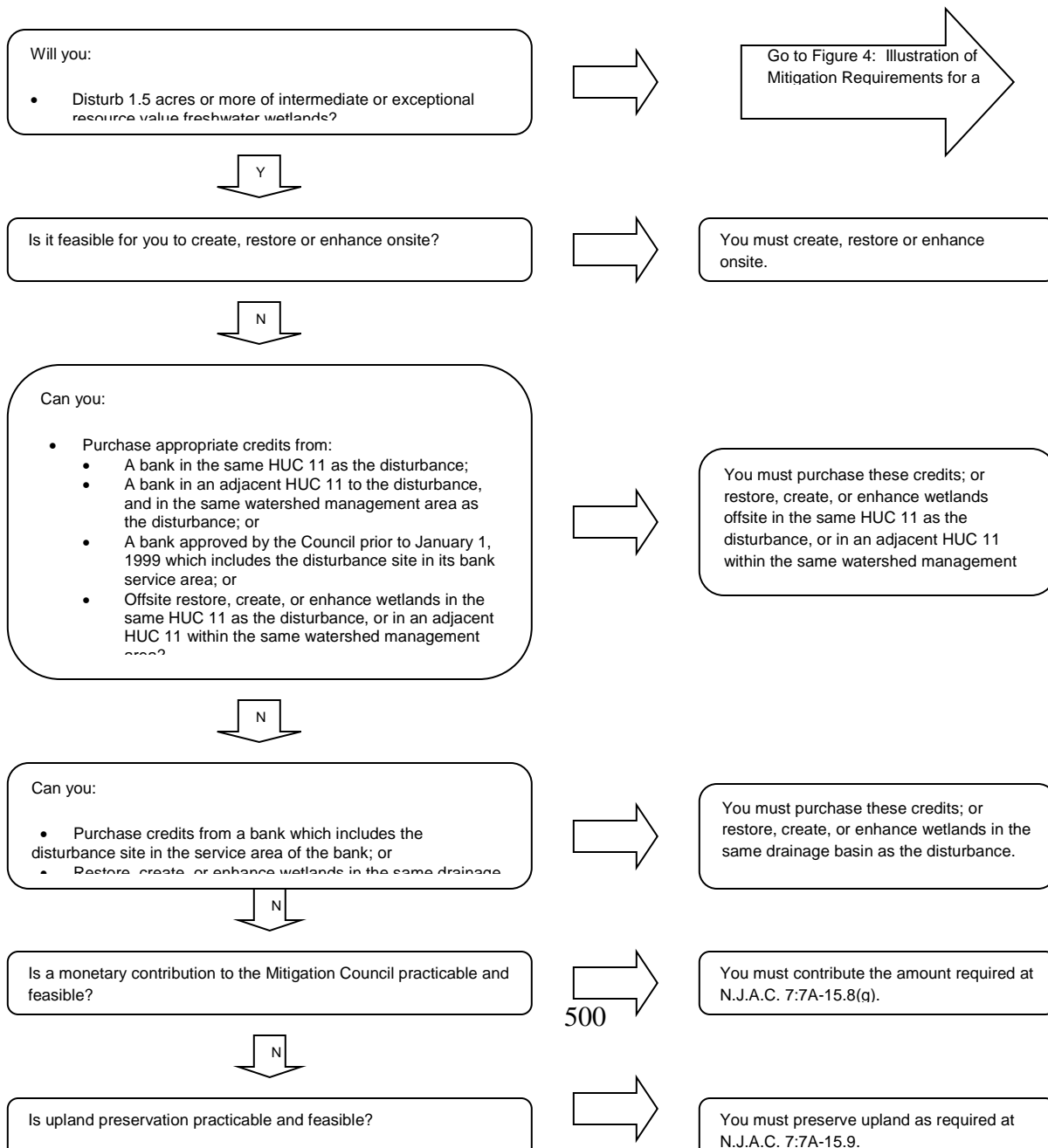
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2. Upland preservation, in accordance with N.J.A.C. 7:7A-[15.9; or]11.13.

[3.] (e) [A] **If mitigation as described at (d) above is not feasible, mitigation shall be in the form of a land donation approved by the Wetland Mitigation Council in accordance with N.J.A.C. 7:7A-[15.22]11.15.**

Figure 5: Flow chart Illustrating Mitigation Alternatives for a Larger Disturbance

See N.J.A.C. 7:7A-15.6 for complete requirements



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(f) In order to demonstrate that offsite mitigation under (c) above is not feasible, an applicant shall provide to the Department a list of at least six sites within the same watershed management area to accommodate the required mitigation. With respect to each site on the list, the applicant shall explain why:

- 1. The site is not located at a practical elevation suitable for wetlands;**
- 2. The site lacks an adequate water supply;**
- 3. The site is not available for purchase; and**
- 4. The site does not meet the requirements of N.J.A.C. 7:7A-11.4(i) regarding ecological risk.**

(Agency Note: N.J.A.C. 7:7A-15.16, 15.18, 15.19, 15.20, 15.23, and 15.25 are proposed for recodification with amendments as N.J.A.C. 7:7A-11.12, 11.13, 11.22, 11.16, 11.15, 11.25, and 11.26, respectively.)

7:7A-[15.26]**11.11** Mitigation for transition area impacts in accordance with N.J.A.C. 7:7A-[6.3(g)]**8.3(g)** (special activity transition area waivers based upon individual permit criteria)

(a) This section governs the mitigation alternative required and the location of mitigation in relation to the disturbance for a transition area impact in accordance with N.J.A.C. 7:7A-[6.3(g)]**8.3(g)** (special activity transition area waivers based upon individual permit criteria). Mitigation for a transition area disturbance shall be performed through restoration or enhancement of transition areas carried out on the site of the disturbance to the maximum extent feasible.

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(b) If onsite transition area restoration or enhancement is not feasible, mitigation shall be performed through [any of the following, at the applicant's option]:

1. The purchase of credits from a mitigation bank [located in the same HUC 11 as the disturbance or in an adjacent HUC 11 within the same watershed management area;

2. The purchase of credits from a mitigation bank approved by the Wetlands Mitigation Council prior to January 1, 1999, which includes the disturbance site in its bank service area] **with a service area that includes the area of disturbance;** or

[3.] 2. Offsite restoration or enhancement in the same [HUC 11 or in an adjacent HUC 11 within the same] watershed management area as the disturbance.

[(c) If transition area mitigation under (b) above is not feasible, transition area mitigation shall be performed through either of the following, at the applicant's option:

1. The purchase of credits from a mitigation bank in the same watershed management area as the disturbance; or

2. Restoration, enhancement, or upland preservation in the same watershed management area as the disturbance.

(d) If transition area mitigation is not feasible under (b) or (c) above, mitigation shall be performed through:

1. The purchase of credits from a mitigation bank which includes the disturbance site in its bank service area; or

2. Restoration or enhancement in the same drainage basin.]

[(e)] (e) If transition area mitigation is not feasible under (b)[, (c) or (d)] above, mitigation shall be performed through:

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1. A monetary contribution **to the Department's ILF Program** in accordance with N.J.A.C.

7:7A-[15.21]**11.16**;

2. Upland preservation, in accordance with N.J.A.C. 7:7A-[15.9]**11.13**; or

3. A land donation approved by the Wetland Mitigation Council in accordance with N.J.A.C.

7:7A-[15.22]**11.15**.

7:7A-[15.16]**11.12** Requirements [that apply after the Department approves] **for** restoration, creation, or enhancement

[(a) After the Department approves mitigation through restoration, creation, or enhancement, the mitigator shall execute and record a conservation restriction or easement covering the mitigation area. The conservation restriction or easement shall meet the requirements of N.J.A.C. 7:7A-2.12, and shall be executed and filed for recording prior to the start of mitigation activities.]

(a) This section sets forth the requirements that apply to a creation, restoration, or enhancement mitigation project.

(b) If creation or restoration is the mitigation alternative, wetlands shall be created or restored at a creation or restoration to lost or disturbed ratio of 2:1, unless the applicant demonstrates in accordance with (b)1 below that creation or restoration at a ratio of less than 2:1 will provide equal ecological functions and values. The mitigation project shall be designed to include a wetlands transition area pursuant to (c) below. The wetlands transition area shall not be counted in the acreage of mitigation provided by the wetlands creation or restoration.

1. **A mitigator may create or restore wetlands at a ratio of less than 2:1 if the mitigator**

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demonstrates through the use of productivity models or other similar studies that restoring or creating a lesser area of wetlands will result in replacement wetlands of equal ecological value to those lost or disturbed. However, in no case shall the Department approve a ratio of less than 1:1. In order to demonstrate equal ecological value, the mitigator shall survey and provide written documentation regarding, at a minimum, existing soil, vegetation, water quality functions; flood storage capacity; soil erosion and sediment control functions; and wildlife habitat conditions and detail how the mitigation proposal will replace the ecological values of the wetlands lost or disturbed.

(c) A mitigation area involving restoration or creation shall include a transition area. The transition area shall not be counted in calculating the acreage of mitigation required. For example, if a person must create one acre of wetlands, the mitigation area shall include one acre of created wetlands and, in addition, a transition area around the created wetlands. The width of the transition area around a wetland resulting from mitigation shall be determined as follows:

1. If the mitigation area includes or will include exceptional resource value wetlands, the transition area shall be 150 feet wide;

2. If mitigation is restoration under N.J.A.C. 7:7A-11.8(b)1 of an area temporarily disturbed, the transition area shall be that which was required for the wetland prior to the temporary disturbance; and

3. For all mitigation not listed at (c)1 or 2 above, the transition area shall be 50 feet wide.

(d) If enhancement is the mitigation alternative, the Department shall determine, on a

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case-by-case basis, the amount of enhancement required to ensure that the mitigation results in wetlands of equal or better functions and values to those lost.

[(b)] (e) Within [30] **60 calendar days** after construction [and planting] of a **creation**, restoration, [creation,] or enhancement **wetlands mitigation** project is completed, the mitigator shall submit a construction completion report to the Department. The Department may [require] **establish** a different [schedule] **timeframe** for **the** submittal of the construction completion report if it determines that [a different schedule] **doing so** would [be more effective for] **better facilitate** assessing the progress and success of the mitigation. The construction completion report shall include:

1. An as-built plan of the completed mitigation area, showing grading, plantings (**including** species, **size, and** densities[, etc.]), and any structures included in the approved mitigation proposal;

2. Photographs of the completed mitigation; **and**

3. An explanation for any deviation from the approved mitigation proposal[; and].

[4. Any other information necessary for the Department to determine if the mitigation is successful under (d) below.]

[(c)] (f) In addition to the construction completion report required under [(b)] (d) above, the mitigator shall submit [to the Department an annual post-planting] **a post-construction** monitoring report **to the Department** each year for five years after [the] completion of [planting and] construction, [or for] **unless** a different [time period if] **timeframe for submittal is** specified in the approved mitigation proposal. The Department may [at any time] modify the frequency and/or duration of **required** reporting [required.] **if it determines that such**

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modification is necessary to ensure the success of the mitigation. Post-construction monitoring shall begin the first full growing season after the mitigation project is completed.

(g) The [post-planting] **post-construction** monitoring reports **required under (e) above** shall be submitted **to the Department** by December 31 of each **reporting** year, and shall include:

1. (No change.)
2. [A complete listing of the] **The** requirements and goals of the approved mitigation proposal; [and]
3. A detailed explanation of the ways in which the mitigation has or has not achieved progress toward[s those] **the goals of the approved mitigation proposal**. If [the] mitigation has not achieved **anticipated** progress, the report shall also include a list of [remedial] **corrective** actions [necessary to do so.] **to be implemented and a timeframe for completion;**
4. **Information required by the wetlands mitigation monitoring project checklist available from the Department at the address set forth at N.J.A.C. 7:7A-1.4. For a wetlands mitigation project, the checklist requires the following information:**
 - i. **A USGS quad map and an aerial photograph on which the limits of the mitigation site and all proposed access points are clearly indicated;**
 - ii. **Photographs of the mitigation site with a location map indicating the location and direction of each photograph;**
 - iii. **An assessment of the success of the planted vegetation; a separate assessment of the species that are naturally colonizing the mitigation site; and an overall assessment of plant**

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coverage including documentation concerning invasive or noxious plant species and the percent coverage of these species on the site;

iv. An assessment of the hydrology of the mitigation site including, where appropriate, monitoring well data, stream gauge data, relevant tidal data, photographs, and field observation notes collected throughout the monitoring period;

v. A field delineation of the wetlands at the wetlands mitigation project site, based on techniques specified in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, published in 1989 by the USEPA, USACE, USFWS, and U.S. Department of Agriculture's Conservation Services, incorporated herein by reference, available at www.digitalmedia.fws.gov/cdm/ref/collection/document/id/1341; and

vi. A plan showing the flagged wetlands delineation and global positioning system data points.

[(d) At the end of the post-planting monitoring period for a restoration, creation, or enhancement project, the mitigator shall demonstrate to the Department that the mitigation project is successful. To do so, the mitigator shall demonstrate that the mitigation satisfies all requirements of this subchapter, all requirements of the approved mitigation proposal, and any applicable permit conditions. At a minimum, the mitigator shall demonstrate that:]

(h) The standards by which the wetlands mitigation project shall be determined to be successful are set forth at (h)1 through 5 below. The mitigator shall submit a post-construction monitoring report as required at (g) above demonstrating that these standards have been met. The standards are:

1. The [post-planting monitoring period required by the] **goals of the** approved mitigation

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proposal [has] **(including the required transition area) have** been [successfully completed and the monitoring data show that:]

[i. The vegetation in the mitigation area meets the requirements for the types of species, area of coverage, and survival rate, as set forth in the approved mitigation proposal;

ii. The soils in the mitigation area meet the requirements in the approved mitigation proposal; and

iii. The hydrologic regime in the mitigation area meets the requirements in the approved mitigation proposal, and will continue to do so; and

2. The areas designated for freshwater wetlands, transition areas, and/or State open waters in the approved mitigation proposal are in fact freshwater wetlands, transition areas, or State open waters as defined at N.J.A.C. 7:7A-1.4; and

3. The mitigation meets all applicable requirements of this subchapter, including:

i. Any requirements at N.J.A.C. 7:7A-15.2 that apply;

ii. The requirements for the amount of mitigation under N.J.A.C. 7:7A-15.8; and

iii. All restrictions, agreements, and other legal documents required by this subchapter have been executed.

(e) If the mitigator makes the demonstrations required for a restoration, creation, or enhancement project at (d) above, the Department shall issue a declaration that the mitigation is successful.

(f) If the mitigator does not make the demonstrations required at (d) above, the mitigator shall perform additional mitigation or other remedial action as directed by the Department, and shall monitor and report on the mitigation or action as directed by the Department.] **achieved;**

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2. The mitigation site is a wetland, as documented through monitoring well data, stream gauge data, relevant tidal data (when appropriate), photographs, and field observation notes collected throughout the monitoring period;

3. The wetland community comprised of the planted vegetation or targeted hydrophytes as detailed in the approved mitigation proposal and permit conditions has been achieved, or, if not yet achieved, all site indicators suggest that the site is on a positive trajectory to meeting the desired wetland plant community;

4. The mitigation provided meets all applicable requirements of this subchapter; and

5. The mitigator has executed and recorded a conservation restriction for the mitigation area that meets the requirements of N.J.A.C. 7:7A-12.

(i) If a mitigation project does not meet the success criteria in (h) above, the Department, in consultation with the permittee, shall determine the appropriate corrective action(s) that the mitigator shall implement. Corrective action may include regrading or replanting the mitigation site, relocation of the mitigation project to another, more suitable site, and/or extending the monitoring period as necessary to ensure success of the mitigation.

(j) If the mitigator makes the demonstrations required for a restoration, creation, or enhancement project at (h) above, the Department shall issue a declaration that the mitigation is successful.

7:7A-[15.9]11.13 Requirements for upland preservation

(a) (No change.)

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(b) Preserved uplands shall be valuable for the protection of a freshwater wetlands ecosystem. Factors the Department shall consider in evaluating an area for upland preservation include, but are not limited to:

1. – 2. (No change.)

3. Whether the uplands to be preserved are located in the same [HUC 11] **watershed management area** as the disturbance;

4. Whether the uplands to be preserved are adjacent to a freshwater wetland that:

i. (No change.)

ii. Contains critical habitat for flora or fauna[, as defined at N.J.A.C. 7:7A-1.4];

iii.- v. (No change.)

5.- 7. (No change.)

(c) The amount of uplands preserved shall be sufficient to ensure that the functions and values resulting from the preservation of the uplands will fully compensate for the loss of functions and values caused by the disturbance[, in accordance with N.J.A.C. 7:7A-15.2(c)]. In determining if an upland preservation proposal will fully compensate for a disturbance, the Department shall consult the sources, and consider the conditions, referenced in N.J.A.C. 7:7A-[15.8(j)]**11.2(a)**. At a minimum, the uplands preserved shall be:

1. (No change.)

2. If adjacent to a wetland, the uplands preserved shall include the standard transition area required for the wetlands under N.J.A.C. 7:7A-[2.5]**3.3**, plus an additional area at least 150 feet wide, measured from the outer edge of the transition area.

(d) [If mitigation is performed] **The Department shall declare mitigation** through upland

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preservation[, the mitigator shall transfer the mitigation area] **successful upon:**

1. Demonstration that any required conservation restriction has been recorded in accordance with N.J.A.C. 7:7A-12;

2. Documentation that the property has been transferred in fee simple to a government agency or Department approved charitable conservancy[, as defined at N.J.A.C. 7:7A-1.4, in accordance with N.J.A.C. 7:7A-15.17(c).]; and

3. Documentation that a maintenance fund for maintenance and supervision of the mitigation area has been transferred to the governmental agency or charitable conservancy. The amount of the maintenance fund shall be determined by agreement between the mitigator and the agency or conservancy.

7:7A-11.14 Requirements for credit purchase from an approved mitigation bank

(a) If the Department determines that credit purchase is the appropriate mitigation alternative, the Department shall evaluate the values and functions lost as a result of the impacts and determine the number of credits required to ensure that the mitigation results in wetlands, State open waters, or transition areas of equal functions and values to those lost.

(b) The mitigator shall prepare and execute all documents necessary to ensure that the credits have been purchased from a Department-approved mitigation bank with available credits.

(c) The Department shall determine mitigation through credit purchase successful upon receipt of documentation from the permittee that the credit purchase was made as

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required. Documentation shall include a written certification from the mitigation bank operator, indicating the number of credits purchased and the Department permit number.

7:7A-[15.19]**11.15** Requirements [that apply after the Department approves mitigation through] **for a land donation**

(a) [After] **If** the Department determines [under N.J.A.C. 7:7A-15.5 or 15.6] that a land donation is the appropriate mitigation alternative, the mitigator shall apply to the Wetlands Mitigation Council for approval of the particular parcel of land to be donated [under the standards at N.J.A.C. 7:7A-15.22].

(b) The Council shall approve the proposed parcel of land to be donated only if the amount of land to be donated is sufficient to ensure that the functions and values provided by the donated land will fully compensate for the loss of functions and values caused by the disturbance.

(c) If a proposed parcel to be donated is also being donated or otherwise restricted in order to satisfy requirements of another government agency, the Council shall not approve the donation unless the applicant also enhances or restores wetlands on the parcel. For example, if land is required by a municipality to be preserved as open space, the Council shall only approve the parcel for a land donation if the applicant also performs wetlands restoration or enhancement in accordance with this subchapter. If restoration or enhancement cannot be performed on the parcel, the Council shall not accept the parcel as a land donation.

(d) The Council shall approve the proposed parcel of land to be donated only if the

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applicant demonstrates that the land has the potential to be a valuable component of a wetland ecosystem. The Council shall evaluate each parcel to determine its potential on a case-by-case basis, taking into consideration the following:

1. The parcel shall be at least five acres in size, or shall be immediately adjacent to a protected natural area, such as a State wildlife management area;

2. The parcel shall not be adversely affected by solid waste, hazardous waste, or air, water, or soil pollution;

3. A functional comparison between the impacted wetland system and the wetland system proposed for donation; and

4. The parcel shall meet at least one, and preferably several, of the following criteria:

i. Contains exceptional resource value wetlands;

ii. Contains critical habitat for flora or fauna;

iii. Contains wetlands or waters draining to FW1 or category one waters, as defined at N.J.A.C. 7:9B, or into public drinking water sources;

iv. Contains wetlands or waters that connect one public open space or significant natural resource to another public open space or significant natural resource. For example, a parcel containing a stream that runs through two wildlife preserves that are not adjacent;

v. Is adjacent to public lands containing wetland preserves, such as a Federal wildlife refuge, a State wildlife management area, a State park or forest, or a State, county, or local wetland preservation area, or wetland preservation areas held by a charitable conservancy;
or

vi. Has unique aspects or characteristics that contribute to its ecological value, such as

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an unusual or regionally rare type of wetland.

[(b)] (e) The Department shall declare mitigation through a land donation successful upon a demonstration that:

1. (No change.)

[2. The land donation has been completed in accordance with the Council resolution approving the contribution, all applicable permit conditions, requirements of this subchapter, and requirements of the approved mitigation proposal.

(c) Within 60 days after the Department declares mitigation through land donation successful under (b) above, a mitigator shall:]

[1.] **2.** [Transfer the mitigation area] **The land donation has been transferred** in fee simple to a government agency or a **Department approved** charitable conservancy[, as defined at N.J.A.C. 7:7A-1.4. The agency or conservancy shall first be determined suitable for the responsibility by the Department, and shall agree to preserve the mitigation area as a natural area in perpetuity.] **and that the transfer has been recorded with each county in which the preserved land is located;**

[2.] **3.** [Provide] **The mitigator has provided** the government agency or charitable conservancy with an adequate maintenance fund for maintenance and supervision of the mitigation area. The amount of the maintenance fund shall be determined by agreement between the mitigator and the agency or conservancy; and

[3. Ensure that the transfer and a conservation restriction or easement, in accordance with N.J.A.C. 7:7A-2.12 and 15.14, are recorded with the county or other appropriate agency and that a copy is sent to the Department.]

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4. The required conservation restriction has been recorded in accordance with N.J.A.C.

7:7A-12.

7:7A-[15.18]**11.16** Requirements [that apply after the Department approves mitigation through] **for a monetary contribution to the Department's in-lieu fee program**

(a) After the Department determines under N.J.A.C. 7:7A-15.5 or 15.6 that monetary contribution is the appropriate mitigation alternative, the mitigator shall either:

1. If mitigating for an individual permit, apply to the Wetlands Mitigation Council for approval of the amount of the monetary contribution under the standards at N.J.A.C. 7:7A-15.21(a) through (c); or

2. If mitigating for a general permit, calculate the amount of the monetary contribution under the standards at N.J.A.C. 7:7A-15.21(d).]

(a) This subchapter includes the requirements for a monetary contribution to the Department's ILF Program, described at N.J.A.C. 7:7A-11.23, to compensate for wetland impacts in accordance with the State of New Jersey In-Lieu Fee Mitigation Program Instrument (ILF Instrument) made and entered into by and among the Department, the USEPA, and the Wetlands Mitigation Council.

(b) For mitigation through a monetary contribution to the ILF Program, the mitigator shall first obtain the Department's authorization to use monetary contribution as the mitigation alternative. After the Department determines that monetary contribution is the appropriate mitigation alternative, the mitigator shall either:

1. For an individual permit, obtain approval from the Wetlands Mitigation Council for

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the amount of the monetary contribution; or

2. For a general permit, calculate the amount of the monetary contribution in accordance with (e) below.

(c) The Wetlands Mitigation Council shall approve the amount of a monetary contribution for an individual permit only if the contribution is equal to the lesser of the following:

1. The cost of buying and enhancing and/or restoring existing degraded freshwater wetlands and/or State open waters, resulting in an area that will provide equal functions and values to that disturbed; or

2. The cost of buying uplands and creating freshwater wetlands, and/or State open waters, resulting in an area that will provide equal functions and values to that disturbed.

(d) In determining the costs at (c)1 and 2 above, the Council may consider cost estimates submitted by the applicant and the Department, information obtained from experts in the field of mitigation (including Council members), and any other information available to the Council.

(e) The following analysis shall be used to determine the amount of a monetary contribution when mitigating for general permit impacts at N.J.A.C. 7:7A-7:

1. For single-family property owners, the acreage of wetlands/State open water impacts multiplied by \$42,300, adjusted in accordance with (f) below, using the Consumer Price Index for Urban Consumers as published by the United States Department of Labor; or

2. For all other property owners, the acreage of wetlands/State open water impacts multiplied by \$334,000, adjusted in accordance with (f) below using the Consumer Price

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Index for Urban Consumers as published by the United States Department of Labor.

(f) When the Department determines, based on an annual review of the Consumer Price Index for Urban Consumers as published by the United States Department of Labor under (e)1 or 2 above, that the singular or cumulative Consumer Price Index adjustment(s) results in a change of \$500.00 or more above the currently codified figure, the Department shall publish a notice of administrative change announcing the adjustment and the amount of the adjusted monetary contribution in the New Jersey Register.

[(b)] (g) The Department shall declare mitigation through a monetary contribution to the ILF Program successful upon a demonstration that:

1. For a monetary contribution for an individual permit:

i. The Wetlands Mitigation Council has approved the amount of the monetary contribution;

[and]

ii. The monetary contribution has been completed in accordance with the **ILF Instrument and the Council** resolution approving the contribution, all applicable permit conditions, requirements of this subchapter, and requirements of the approved mitigation proposal [or]; **and**

iii. The ILF Program Administrator has received the payment in full; or

2. For a monetary contribution for a general permit:

i. The amount has been properly calculated in accordance with [N.J.A.C. 7:7A-15.21(d)] **(e) above; and**

[ii. The monetary contribution has been approved by the Department and completed in accordance with the general permit checklist for monetary contributions]

ii. The ILF Program Administrator has received the payment in full.

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7:7A-[15.13]11.17 Financial assurance for [a proposal to restore, create, or enhance wetlands]

mitigation projects; general provisions

(a) The Department shall approve a proposal for restoration, creation, or enhancement only if the mitigator or mitigation bank operator provides a letter of credit or other financial assurance that meets the requirements of this section, except that this section does not apply to a mitigation proposal submitted by a government agency, as defined at N.J.A.C. 7:7A-1.4, or an entity that is exempt from this requirement under Federal law.

(b) A letter of credit or other financial assurance under this section shall be obtained from a firm licensed to provide such services in New Jersey.]

(a) Financial assurance in accordance with this section is required for mitigation projects involving restoration, creation, or enhancement activities as mitigation for impacts to wetlands, State open waters, and transition areas. Financial assurance is not required for a mitigation proposal or mitigation bank proposal submitted by a government agency or an entity that is exempt from the requirement to provide financial assurance under Federal law.

(b) The person responsible for conducting mitigation identified at (b)1 or 2 below shall establish and maintain financial assurance in accordance with this section:

1. Where mitigation is required pursuant to a permit, the permittee or mitigation bank sponsor of a mitigation project or mitigation bank; or

2. Where mitigation is required as part of the remedy for a violation, the person designated to provide mitigation in the enforcement document.

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(c) The person identified at (b) above shall establish and maintain financial assurance in the amount specified at (f) below, until the Department determines that the mitigation site or mitigation bank has satisfied the applicable performance standards, permit conditions, enforcement document, or settlement agreement.

(d) Financial assurance shall comprise of one or more of the instruments identified at (d)1 through 5 below. A template for each of the types of financial assurance identified at (d)1 through 4 is available from the Department at the address set forth at N.J.A.C. 7:7A-1.4.

- 1. A fully funded trust fund, in accordance with N.J.A.C. 7:7A-11.18;**
- 2. A line of credit, in accordance with N.J.A.C. 7:7A-11.19;**
- 3. A letter of credit, in accordance with N.J.A.C. 7:7A-11.20;**
- 4. A surety bond, in accordance with N.J.A.C. 7:7A-11.21; and/or**
- 5. Other forms of financial assurance, other than self-insurance or self-guarantee, as determined by the Department to meet the requirements of this section.**

(e) Financial assurance that meets the requirements of this section shall be provided at least 30 calendar days prior to undertaking mitigation activities approved under a permit or mitigation banking instrument, or as required under an enforcement document or settlement.

[(c)] (f) The [letter of credit or other] amount of financial assurance shall be [in an amount sufficient for the Department to hire an] based on an itemized estimate provided by an independent contractor [to complete and maintain the mitigation project or mitigation bank should the mitigator default. At a minimum, the financial assurance shall be based upon itemized

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estimates provided by third-party contractors and in] **and shall include the** following [amounts]:

1. [A construction assurance] **Construction costs**, equal to 115 percent of the estimated cost of completing the creation, restoration, or enhancement; and

2. [A maintenance assurance to assure the success of the mitigation through the completion of the monitoring period,] **Maintenance costs**, equal to 115 percent of the estimated cost of monitoring and maintaining the site, including the cost to replant the mitigation area.

[(d)] **(g)** The Department shall review the financial assurance annually and [the mitigator shall] adjust the [financial assurance] **amount as necessary** to reflect current economic factors[, as direct by the Department].

[(e)] **(h)** The Department shall require additional financial assurance if additional construction and/or monitoring is required **to ensure success of the mitigation project**.

[(f)] **(i)** The portion of the financial assurance required under [(c)1] **(f)1** above shall be released upon the Department's determination that the construction **(including grading, hydrologic modifications, and planting)** [phase] of the mitigation project or [mitigation] bank has been successfully completed in accordance with the approved mitigation proposal.

[(g)] **(j)** The portion of the financial assurance required under [(c)2] **(f)2** above shall be released [upon] **when** the Department['s declaration] **determines** that [a] **the mitigation project or bank** is successful [under] **pursuant to** N.J.A.C. 7:7A-[15.16(e), or upon the successful completion of a] **11.12(h) or 11.25(j) (for a mitigation bank)** [in accordance with N.J.A.C. 7:7A-15.23(h),] as applicable.

(k) If the Department determines that the person responsible for conducting mitigation and providing financial assurance as specified at (b) above has failed to perform a

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mitigation project or bank as required by a permit, mitigation banking instrument, enforcement document, or settlement agreement, the Department shall:

1. Provide written notice of this determination to the person; and

2. Require that the mitigation project or bank be brought into conformance with the permit, mitigation banking instrument, enforcement document or settlement agreement within 30 calendar days after receipt of the notice, unless the timeframe for compliance is extended in writing by the Department.

(l) No sooner than 30 days from the date the person required to establish the financial assurance receives the notice under (k) above, the Department may, at its discretion, perform the mitigation project or bank by drawing on the funds available in the financial assurance.

7:7A-11.18 Financial assurance; fully funded trust fund requirements

(a) A person who chooses to establish a fully funded trust fund as financial assurance pursuant to this subchapter shall submit to the Department the original fully funded trust fund agreement. The trust fund agreement shall:

1. Be executed by an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a New Jersey or Federal agency;

2. Include any applicable Department file number and the name, street address, lot and block numbers, municipality, and county of the mitigation site;

3. Specify that the fully funded trust fund cannot be revoked or terminated without the prior written approval of the Department;

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4. Specify that the trustee may only disburse funds with the Department's written approval;

5. Specify that funds shall be utilized solely for the purposes of conducting the mitigation project or mitigation bank as approved by the Department;

6. Specify that the Department may access the fully funded trust fund to pay for the cost of the mitigation project or bank, pursuant to N.J.A.C. 7:7A-11.17(l); and

7. Identify the Department as the sole beneficiary of the fully funded trust fund.

(b) Any person responsible for conducting a mitigation project or bank that uses a fully funded trust fund to satisfy the requirements of this subchapter shall annually, at least 30 calendar days prior to the anniversary date of when that person was obligated to establish a financial assurance, submit to the Department a written statement from the trustee confirming the value of the trust in the amount that the Department has approved, and confirming that the trust shall continue for the next consecutive 12-month period.

7:7A-11.19 Financial assurance; line of credit requirements

(a) A person who chooses to establish a line of credit agreement as financial assurance pursuant to this subchapter shall submit to the Department the original line of credit. The line of credit shall:

1. Be issued by an entity that is licensed by the New Jersey Department of Banking and Insurance to transact business in the State of New Jersey or by a Federally regulated bank;

2. Include any applicable Department file number, and the name, street address, lot and block numbers, municipality, and county of the mitigation site;

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3. Specify that the line of credit shall be issued for a period of one year and shall be automatically extended thereafter for a period of at least one year;

4. Specify that, if the issuer of the line of credit decides not to extend the line of credit beyond the then-current expiration date, the issuer shall notify the person using the line of credit and the Department by certified mail of that decision at least 120 calendar days before the current expiration date, beginning from the date of receipt by the Department as shown on the signed return receipt;

5. Specify that the lender shall disburse only those funds that the Department approves in writing;

6. Specify that the funds in the line of credit shall be utilized solely for the purposes of conducting the mitigation project or bank; and

7. Specify that the Department may access the line of credit to pay for the cost of the mitigation project or bank, pursuant to N.J.A.C. 7:7A-11.17(l).

(b) A person responsible for conducting a mitigation project or bank who uses a line of credit to satisfy the requirements of this subchapter shall annually, at least 30 calendar days prior to the anniversary date of when that person was obligated to establish a financial assurance, submit to the Department a written statement from the lender confirming the value of the line of credit in an amount that the Department has approved and confirming that the lender has renewed the line of credit for the next consecutive 12-month period.

7:7A-11.20 Financial assurance; letter of credit requirements

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(a) A person who chooses to provide a letter of credit as financial assurance to guarantee the availability of funds pursuant to this subchapter shall submit to the Department the original letter of credit. The letter of credit shall:

- 1. Be issued by an entity that is licensed by the New Jersey Department of Banking and Insurance to transact business in the State of New Jersey or by a Federally regulated bank;**
- 2. Include any applicable Department file number, and the name, street address, lot and block numbers, municipality, and county of the mitigation site;**
- 3. Specify that the letter of credit is irrevocable and issued for a period of at least one year and that it will be automatically extended thereafter for a period of at least one year;**
- 4. Specify that, if the issuer of the letter of credit decides not to extend the letter of credit beyond the then-current expiration date, the issuer shall notify the person providing the letter of credit and the Department by certified mail of that decision at least 120 calendar days before the current expiration date, beginning from the date of receipt by the Department as shown on the signed return receipt; and**
- 5. Specify that the Department may access the letter of credit to pay for the cost of the mitigation project or mitigation bank, pursuant to N.J.A.C. 7:7A-11.17(l).**

7:7A-11.21 Financial assurance; surety bond requirements

(a) A person who chooses to provide a surety bond as a financial assurance to guarantee the availability of funds pursuant to this subchapter shall complete and submit to the Department the original surety bond. The surety bond shall:

- 1. Be issued by an entity that is licensed by the New Jersey Department of Banking and**

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Insurance to transact business in the State of New Jersey or is listed as acceptable surety on Federal bonds in Circular 570 of the U.S. Department of the Treasury;

2. Include any applicable Department file number, and the name, street address, lot and block numbers, municipality, and county of the mitigation site;

3. Specify that, if the issuer of the surety bond decides not to extend the surety bond beyond the then-current expiration date, the issuer shall notify the person using the surety bond and the Department by certified mail of that decision at least 120 calendar days before the current expiration date, beginning from the date of receipt by the Department as shown on the signed return receipt; and

4. Specify that the Department may access the surety bond to pay for the cost of the mitigation project or mitigation bank, pursuant to N.J.A.C. 7:7A-11.17(l).

7:7A-[15.20]11.22 Wetlands Mitigation Council

(a) The Wetlands Mitigation Council's duties and functions include:

1. (No change.)

2. Advising the Department on mitigation issues; **and**

[3. Buying land in order to conduct mitigation, or to preserve wetlands, transition areas, uplands, and/or State open waters;

4. Contracting with a charitable conservancy or appropriate agency to carry out its responsibilities;

5. Conducting research to monitor the success of mitigation as part of a Council-funded and approved creation, restoration or enhancement project;

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6. Enhancing or restoring wetlands on public lands; and

7. Disbursing funds from the Wetlands Mitigation Fund to finance the activities listed at (a)3, 4, 5 and 6 above. To request funding for a mitigation project, contact the Council through the mitigation staff at the address in N.J.A.C. 7:7A-15.2(f).]

3. Managing the Department's ILF Program in accordance with the ILF Instrument and N.J.A.C. 7:7A-11.23 and 11.24. As the ILF Program Administrator, the Council is responsible for:

i. Accepting approved monetary contributions to the Wetlands Mitigation Fund;

ii. Disbursing funds from the Wetlands Mitigation Fund to finance the following activities:

(1) Buying land in order to conduct mitigation, or to preserve wetlands, transition areas, uplands, and/or State open waters;

(2) Enhancing or restoring wetlands on public lands; and

(3) Conducting research to monitor the success of mitigation as part of a Council-funded and approved creation, restoration, or enhancement project.

iii. Requesting proposals for ILF grant applications;

iv. Reviewing grant applications and managing grant contracts; and

v. Establishing and maintaining Accounting Reports for the ILF Program that meet the requirements set forth in the ILF Instrument and 40 CFR 230.98(i)(3).

(b) If the Council transfers funds or land, the Council shall first execute and record a conservation restriction [or easement or other legally binding document] that meets all applicable requirements at N.J.A.C. 7:7A-[15.14]12, and that ensures that the funds or land will be used

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only for mitigation and freshwater wetlands conservation.

(c) The Council may contract with a government agency, nonprofit organization, or other appropriate agency to carry out its responsibilities under this chapter. Any such contract shall be subject to review and approval by the USEPA.

(d) ILF grant funding procedures, including how to apply for a grant, are found at N.J.A.C. 7:7A-11.24.

[(c)] **(e) Council meetings are open to the public. A schedule of Council meetings and other information relating to specific Council meetings can be obtained by contacting Council staff at the address [in] set forth at N.J.A.C. 7:7A-[15.2(f)]1.4.**

[(d)] **The Wetlands Mitigation Fund shall not be used to aid a permittee or violator in locating a mitigation area required as a condition of a permit, or required in order to resolve a violation.**

(e) The Council may contract with a government agency, nonprofit organization, or other appropriate agency to carry out its responsibilities under this chapter. Any such contract shall be subject to review and approval by the USEPA.]

7:7A-11.23 New Jersey In-Lieu Fee Mitigation Program

(a) The Department's ILF Program provides a third-party compensatory mitigation option for unavoidable impacts to wetland resources and enforcement actions approved by the Department.

(b) The ILF Program will be used for all activities and program management related to the selection, design, acquisition, implementation, monitoring, management, and long-term protection of ILF Program projects.

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(c) The ILF Program Instrument sets forth guidelines and responsibilities for the establishment, use, operation, protection, monitoring, and maintenance of the ILF Program to ensure that work associated with the ILF Program produces the necessary compensatory mitigation credits to compensate for unavoidable impacts to wetland resources. The ILF Program Instrument is intended to ensure New Jersey's Wetland Mitigation Fund complies with EPA's 2008 regulations governing in-lieu fee programs (40 CFR 230.98). The Council will sell credits to satisfy compensatory mitigation requirements only if all of the terms of the ILF Program Instrument are satisfied.

(d) The Council shall receive 10 percent of each monetary contribution when contributions are deposited into the ILF Program account. This administrative fee will be used for reasonable overhead and related costs of administering the ILF Program.

(e) The Council shall disperse mitigation fund dollars in accordance with the ILF Program Instrument for ILF projects within primary and secondary service areas of the State.

(f) The Council is authorized to sell credits to provide compensatory mitigation for impacts authorized by the Department within each service area, provided:

1. The Council collects the monetary contributions in accordance with the ILF Instrument; and

2. In the event that a project funded by the Council fails to result in mitigation, and the Council fails to timely fund an alternative mitigation project, the Council deducts the outstanding mitigation obligations from its pool of available credits.

(g) The Department will only consider the Council to be a feasible alternative for

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mitigation if the Council maintains a minimum balance of 10 credits and the Department is satisfied the Council is accurately accounting for its mitigation obligations.

(h) If the Council does not perform in accordance with the ILF Instrument, or this subchapter, the Department will reevaluate whether using the Council is a feasible means of ensuring mitigation.

(i) If the Department determines that Council is no longer a feasible alternative for mitigation, the Department shall ensure that all outstanding wetland mitigation obligations are met in accordance with this subchapter.

7:7A-11.24 New Jersey In-Lieu Fee Mitigation Program grant funding procedures

(a) The Program Administrator shall publish, on the Department's website, a request for grant proposals for the water regions in which funding is available in the Wetland Mitigation Fund in accordance with the ILF Instrument.

(b) To be eligible for funding, interested applicants must submit a conceptual ILF grant proposal in response to the request for proposals. A conceptual proposal shall be prepared in accordance with the ILF Program Instrument and shall:

- 1. Identify the location of the project (including service area, county, and municipality);**
- 2. Identify the amount of wetlands to be preserved, enhanced, created, or restored;**
- 3. Identify the amount of money requested for the project;**
- 4. Include a detailed explanation of the proposed budget;**
- 5. Identify the amount of proposed credits to be generated; and**
- 6. Include a summary of the proposal.**

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(c) If the Council determines that a conceptual proposal is eligible to be submitted as a full proposal, the full proposal shall be submitted within 90 days after conceptual approval and shall include:

1. The information required in the appropriate restoration, creation, and/or enhancement mitigation proposal checklist, available from the Department's website at the address set forth at N.J.A.C. 7:7A-1.4, and described at N.J.A.C. 7:7A-11.6(i); and

2. The following information prepared in accordance with the ILF Program instrument:

i. A cover page that identifies the title of the project, location of the project including lot and block numbers, municipality, county, and watershed management area, applicant's name, address, phone number, and e-mail, funding amount requested, and project cost;

ii. A scope of work that includes background information, goals, objective, and approach, and project partners;

iii. A project implementation schedule;

iv. Detailed budget narratives justifying all proposed expenses; and

v. An appendix that includes any prior permits or Letters of Interpretations issued for the property; maps, aerial photographs, photographs, plans, or drawings of the proposed project, a map of known contaminated sites, and a landscape map for the project area.

(d) Prior to the Council and the grantee entering into a contract, the Council shall send all approved proposals to the USEPA for review and consultation as follows:

1. The grantee must address any comments or concerns raised by the USEPA; and

2. The USEPA shall have 15 business days to review the proposed project. The USEPA

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may or may not issue comments on the project. If no response is received by the Council from the USEPA, the Council will assume that the USEPA has no objections to the project and will proceed with the contracting process.

(e) Each approved project shall have a project contract agreement. The grantee and the Council shall be held to the terms and the conditions of the contract.

(f) At any point during the contract, if the grantee fails to perform in accordance with the proposal, the contract, or the permit, the Council can take the steps necessary to terminate the contract and return any unused money back to the Wetland Mitigation Fund to be reallocated to another wetland mitigation project.

7:7A-[15.23]11.25 Mitigation banks

(a) A mitigation bank requires approval by the Department prior to the sale of any mitigation credits. "Approval" for the purposes of this section means [final] approval in accordance with N.J.A.C. 7:7A-[15.25]11.26.

(b) If [creation] **the establishment** of a mitigation bank involves regulated activities as described at N.J.A.C. 7:7A-2.2 or [N.J.A.C. 7:7A-2.6] **2.3**, the bank operator shall [also] obtain **all necessary approvals** from the Department [a freshwater wetlands permit, open water fill permit, and/or transition area waiver, authorizing] **prior to undertaking** the regulated activities.

(c) Once the Department has approved a mitigation bank, the bank operator shall carry out all requirements of the banking instrument approving the bank, regardless of whether or when credits are sold. **Construction of the wetland creation, enhancement, and restoration components of an approved mitigation bank shall be initiated no later than one year after**

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the date of the first credit transaction.

(d) The Department shall determine how many mitigation credits each mitigation bank operator may **receive or** sell, based on the increase in [wetland] values and functions created as a result of the proposed mitigation bank, as well as how the increase in functions and values will interact with the regional wetland and aquatic resources. The Department shall evaluate each mitigation bank to determine its functions and values [on a case by case basis,] considering the following [factors]:

1. The functions and values provided by the bank site at the time the mitigation bank proposal is submitted, [including, but not limited to,] **such as** existing soil, vegetation, water quality functions, flood storage capacity, soil erosion and sediment control functions, and wildlife habitat functions;

2. – 3. (No change.)

4. The amount of wetlands, transition area, [and] **and/or** State open waters on the proposed bank site;

5. The potential for the completed mitigation site to be a valuable component of the [aquatic] ecosystem;

6. – 10. (No change.)

(e) The Department shall include in the banking instrument approving [the] **a mitigation** bank a schedule, [under which a bank operator may sell credits. The schedule shall be] as set forth at (e)1 through [6] **8** below, **under which a bank operator may sell credits**. The Department shall adjust the amount of credits [within the ranges at] **that can be released under** (e)2 through [6] **8** below to reflect the degree of progress the bank has shown toward meeting the

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goals and performance standards in the approved mitigation proposal:

1. Ten percent of the credits shall be released upon completion of both of the following:
 - i. (No change.)
 - ii. Compliance with all pre-release credit sale conditions in the banking instrument approving the bank, [such as] **including** securing all construction permits, posting adequate and effective financial assurance in accordance with N.J.A.C. 7:7A-[15.13]**11.17**, and [completing] **filing of** the conservation restriction [or easement and the agreement providing for transfer of the bank site at completion];
2. Up to [20] **10** percent of the credits shall be released upon successful establishment of the approved hydrologic regime, [so] **such** that this regime will [remain] **persist** over time under normal hydrologic conditions;
3. (No change.)
4. Up to [20] **10** percent of the credits shall be released when monitoring indicates that the performance standards in the banking instrument approving the bank have been met for an entire one-year period;
5. **Up to 10 percent of the credits shall be released when monitoring indicates that the performance standards in the banking instrument approving the bank have been met for a two-year period;**
- [5.] **6.** (No change in text.)
7. **Up to 15 percent of the credits shall be released when monitoring indicates that the performance standards in the banking instrument approving the bank have been met for four consecutive years; and**

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[6.] **8.** [Up to 25 percent of the] **The remaining** credits shall be released when monitoring in accordance with the banking instrument approving the bank indicates that the performance standards in the banking instrument have been met for five consecutive years.

(f) Preservation credits may be released in their entirety when the conditions set forth at (e)1 above have been met.

[(f)] **(g)** The mitigation bank operator shall execute and record a **conservation** restriction on the mitigation bank site prior to the sale of any credits. The conservation restriction [or easement] shall meet the requirements [for protecting mitigation sites from future disturbance, set forth at N.J.A.C. 7:7A-2.12 and 15.14] **of N.J.A.C. 7:7A-12.**

[(g)] **(h)** The mitigation bank operator shall monitor the bank during and after construction until such time that the last credit is sold, the final inspection is conducted, or the bank is transferred to a charitable conservancy, whichever occurs last, in order to ensure its success. The bank operator shall submit progress reports to the Department at least annually during and after construction, and more [often] **frequently** if required by the banking instrument approving the bank.

[(h)] **(i)** If the **mitigation** bank falls more than one year behind the schedule for completion specified in the banking instrument approving the bank, the Department may amend the banking instrument approving the bank, and may require [remedial] **corrective** action to ensure the successful completion of the bank. The Department may reduce the number of credits that may be sold based on the approved [remedial] **corrective** action, in order to reflect the change in [wetlands] values and functions that will result from the changes to the bank.

[(i)] **(j)** Upon completion of the monitoring period and all other requirements in the banking

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instrument approving the bank, **the Department shall determine the mitigation bank is successful, provided** the mitigation bank operator [shall]:

1. Demonstrates that the bank is successful, [using the criteria for successful restoration, creation, or enhancement at N.J.A.C. 7:7A-15.16, or for successful upland preservation at N.J.A.C. 7:7A-15.17, as applicable] **as set forth within the banking instrument and the permit;**

2. Transfers the mitigation bank site in fee simple to a government agency or **Department-approved** charitable conservancy;

3. Provides the government agency or charitable conservancy to which the mitigation bank site is transferred with a maintenance fund. The maintenance fund shall support maintenance activities such as trash removal, maintenance of natural features, monitoring the site to ensure [its] **proper** upkeep, maintenance of water control structures, fences[,] or safety features, and any other activities necessary to ensure the site complies with this chapter and all applicable laws. The amount of the maintenance fund shall be determined between the bank operator and the agency or conservancy to which the mitigation bank site is transferred; and

4. Ensures that the transfer, and the conservation restriction [or easement] required under [(h)] **(g)** above, are recorded with the county or other appropriate agency.

[(j)] A mitigation bank approval shall be valid for five years, or until any Department permit required to conduct the bank activities expires. The Department shall approve a single five-year extension if the permit is extended for five years and only if the mitigation bank operator demonstrates that:

1. If extended, the bank shall produce the increase in functions and values upon which the

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original mitigation bank approval was based;

2. Bank construction was begun prior to expiration of the mitigation bank approval;

3. Bank construction has continued uninterrupted in accordance with the banking instrument approving the bank;

4. All permits required for the construction of the bank are valid; and

5. No significant changes in the conditions on the mitigation bank site, as defined at N.J.A.C. 7:7A-15.1, have occurred.]

(k) If [a bank approval expires and is not extended under (j) above,] the Department [shall] determines **that the mitigation bank operator is in default of any provision of the mitigation banking instrument, the Department shall determine** whether the amount of mitigation completed at the bank site is commensurate with the number of credits already sold. If the Department determines that the amount of mitigation completed is [not commensurate with] **less than** the number of credits already sold, the [banker shall be considered in default and the] Department [shall] **may** assert its rights to the financial assurance provided under [this subchapter] **N.J.A.C. 7:7A-11.17(k) and (l)**.

7:7A-[15.25]**11.26** Application for [approval of] a mitigation bank

(a) A prospective mitigation bank operator [shall] **may** obtain conceptual review of a proposed mitigation bank before [investing in] buying land or preparing a detailed mitigation bank proposal. [Through] **In** a conceptual review, Department staff [shall candidly] **will** discuss the apparent strengths and weaknesses of the proposed mitigation bank[, but all guidance provided shall be non-binding]. **Guidance provided through a conceptual review is not**

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binding on the Department **and shall not be relied upon by the applicant in purchasing a proposed mitigation area.** [A Department decision on a proposed mitigation bank is binding only if it is incorporated into an approval obtained in accordance with this subchapter.] A conceptual review does not grant any property or other rights[, and does not authorize mitigation activities or sale of credits. The findings provided by the Department as part of the conceptual review shall be valid for a period of three years or until the requirements governing conceptual review are amended in a way that would render the conceptual review inconsistent with the new requirements, whichever occurs sooner. Once expired, a new conceptual review shall be required.] **or in any way imply that the Department has or will authorize any mitigation activities at the proposed mitigation area or issue any other approval.**

(b) To obtain conceptual review of a proposed mitigation bank, an applicant shall submit the following to the Department:

1. (No change.)

2. Information on previous uses of the site, including [possible contamination and/or] **the presence of** historic or archaeological resources[, identified in accordance with N.J.A.C. 7:7A-12.2;] **in accordance with N.J.A.C. 7:7A-19.5 or the potential of mitigation activities to pose an ecological risk as defined in N.J.A.C. 7:7A-11.4(h).**

i. [If contaminated] **If available**, the applicant shall provide a copy of the characterization and other information [obtained from the Department's Division of Remediation Management and Response, as] required at N.J.A.C. 7:7A-[15.4(h)1]**11.4(h) to determine ecological risk;**

[ii. To address historic or archaeological resources, if applicable, the applicant shall comply with the provisions at N.J.A.C. 7:7A-12.2;]

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3. The proposed mitigation alternative(s) **being considered**, [for example,] **such as** creation, restoration, and/or enhancement;

4. – 5. (No change.)

6. The names and addresses of all **current** owner(s) of the mitigation bank site, and any [proposed] **prospective** owner(s), as of the date the request for conceptual review is submitted; and

7. [Unconditional written consent] **Consent** from the owner of the proposed mitigation bank site, allowing Department representatives to enter the property **in a reasonable manner and at reasonable times to** [and] inspect the site.

[(b)] (c) To obtain [final] Department approval of a proposed mitigation bank, an applicant shall submit the information required by the [application] **wetlands mitigation bank proposal** checklist, available from **the** Department [staff] at the address [in] **set forth at** N.J.A.C. 7:7A-[15.2(f)]**1.4**. The checklist shall require **a draft mitigation banking instrument that includes** the following [types of information]:

1. A letter of interpretation covering the entire proposed mitigation bank site, issued by the Department under N.J.A.C. 7:7A-[3]**4**;

[2.All past correspondence between the mitigation bank operator and the Department regarding the proposed mitigation bank site, including any correspondence regarding conceptual review under (a) above;]

[3.] **2**. A functional assessment of the bank site prior to construction[,] and proposed site conditions after construction[. The assessment shall include a discussion of how the proposed bank will interact with regional wetland and aquatic resources];

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[4. Information on the following items, sufficient for the Department to determine if the mitigation bank is consistent with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, published jointly by EPA and other Federal agencies in the November 28, 1995 Federal Register at 60 Fed. Reg. 58605:

- i. Mitigation bank goals and objectives;
- ii. Ownership of mitigation bank lands including disclosure of all leases, easements, and other encumbrances;
- iii. Mitigation bank size, and classes of wetlands, transition areas, uplands, and/or other aquatic resources included in the mitigation bank;
- iv. Description of baseline conditions on the mitigation bank site, including natural features and parameters, as well as pollutants, contamination, historic or cultural resources, and other relevant features;
- v. The service area within which the mitigation bank credits may be used to compensate for a disturbance. The service area shall be designated to give priority to mitigation for impacts occurring:
 - (1) In the same HUC 11 as the proposed bank;
 - (2) Adjacent to the same HUC-11 and within the same watershed management area as the proposed bank; and
 - (3) In the same watershed management area as the proposed bank;
- vi. Types of wetlands, transition areas, and/or State open waters for which credits from the bank could serve as suitable compensation]

3. The goals and objectives of the bank;

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4. Ownership of the bank site including disclosure of any leases, easements, or other encumbrances;

5. The size of the bank site, as well as type and amount of the resources for which credits from the bank could serve as suitable compensation;

6. A description of baseline conditions on the bank site, including all relevant natural features and parameters, as well as pollutants, contamination, and other factors that could affect the bank's ability to provide mitigation credits;

7. For a bank proposal that includes creation, restoration, and/or enhancement of wetlands or waters, a projected water budget prepared in accordance with N.J.A.C. 7:7A-11.6(j);

8. The proposed service area within which the mitigation bank credits can be used to compensate for a disturbance. The service area shall be designated to give priority to mitigation for impacts in the same watershed management area(s) as the proposed bank;

Recodify existing vii. and viii. as **9. and 10.** (No change in text.)

[ix.] **11.** Performance standards to enable the Department to determine when credits may be released under N.J.A.C. 7:7A-[15.23(e)]**11.25(e)**;

[x.] **12.** Performance standards to enable the [Council] **Department** to determine if and when the mitigation bank is successful;

[xi.] **13.** (No change in text.)

[xii.] **14.** Contingency and [remedial] **corrective** actions that will be taken **by the mitigation bank operator** in case the bank fails[, and who is responsible for each. For example, alternative sites, grading plans, or hydrologic manipulations];

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[xiii.] **15.** Financial assurances meeting the requirements of N.J.A.C. 7:7A-[15.13]**11.17**;

[xiv. Proposed compensation ratios, that is, the number of credits the bank operator proposes to generate and sell, based on the type and amount of mitigation performed at the bank; and]

[xv.] **16.** (No change in text.)

[5.] **17.** (No change in text.)

[6.] **18.** Draft legal instruments necessary to meet the requirements of this chapter, including a conservation restriction [or easement], financial assurance, property transfer, [or] **and/or** agreement with a charitable conservancy to maintain the site; [and]

[7.] **19.** Identification of the persons who will construct, operate, [(debit and credit)] and maintain the mitigation bank and mitigation bank site[.]; **and**

20. Documentation that public notice of the proposed mitigation bank was provided in accordance with N.J.A.C. 7:7A-17.

[(c) An application for approval of a mitigation bank shall be submitted to Department staff at the address in N.J.A.C. 7:7A-15.2(f). Department staff shall notify the applicant of any additional information required to make the application complete. The applicant shall then submit five copies of the complete application to the Department staff.]

(d) [Each Department] **The Department's approval of a mitigation bank** shall incorporate conditions [as] necessary to ensure that the requirements of this [chapter] **subchapter** are met.

SUBCHAPTER 12. CONSERVATION RESTRICTIONS

7:7A-12.1 Conservation restriction form and recording requirements

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(a) Any conservation restriction required under this chapter shall conform with the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq., and shall:

1. Run with the land and be binding, in perpetuity, upon:

i. For mitigation areas, the land owner and successors in interest to any interest in the land or any part of the land covered by the mitigation area; and

ii. For conservation restrictions required under this chapter that do not include a mitigation area, the land owner and successors in interest to any interest in the land or in any part thereof;

2. Be recorded in accordance with the New Jersey Recording Act, N.J.S.A. 46:15-1.1 et seq., in the chain of title for all properties affected by the restriction; and

3. Be in the form and include such terms as specified and approved by the Department. The applicant shall not alter the form, except in consultation with the Department and only when the Department agrees that an alteration is necessary to address site-specific conditions. Form conservation restrictions are available from the Department's website at the address set forth at N.J.A.C. 7:7A-1.4; and

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

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(b) The conservation restriction shall be recorded in the Office of the County Clerk or the registrar of deeds and mortgages of the county in which the regulated activity, project, project site, or mitigation area is located, and proof that the conservation restriction has been recorded shall be provided to the Department as follows:

1. For a permit that authorizes the establishment of a mitigation bank, prior to the release of any credits;

2. For any other permit for which a conservation restriction is required, prior to the sooner of either:

i. The start of any site disturbance (including pre-construction earth movement, removal of vegetation or structures, or construction of the project); or

ii. The date that is 90 calendar days after the issuance of the permit or approval of the mitigation plan, if a mitigation plan is submitted pursuant to a condition of the permit in accordance with N.J.A.C. 7:7A-11.2(e).

(c) Proof that the conservation restriction has been recorded under (b) above shall be in the form of either a copy of the complete recorded document or a receipt from the clerk or other proof of recordation provided by the recording office. However, if the initial proof provided to the Department is not a copy of the complete recorded document, a copy of the complete recorded document shall be provided to the Department within 180 days of the issuance of the permit or approval of the mitigation plan, if a mitigation plan is submitted pursuant to a condition of the permit.

(d) The conservation restriction shall include a requirement that each owner of any interest in the land subject to the conservation restriction shall:

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1. Notify the county and/or municipality of the conservation restriction whenever any application for a local approval involving the land subject to the conservation restriction is submitted; and

2. Insert notice of the conservation restriction into any subsequent deed or other legal instrument by which the owner divests either the fee simple title or any possessory interest in the land subject to the conservation restriction.

(e) Any conservation restriction shall be enforceable by the Department. The Department may also direct that the conservation restriction be made enforceable by a government agency or by a charitable conservancy whose trustees have no other ownership interest in the land.

(f) If the mitigation area is donated land or a mitigation bank that requires approval by the Wetland Mitigation Council, the conservation restriction shall be approved by both the Department and the Wetland Mitigation Council.

7:7A-12.2 Property owners' reservation of rights

(a) Except for a conservation restriction associated with a mitigation site, the property owner or grantor may request approval from the Department to undertake a *de minimis* modification of the area subject to a conservation restriction recorded in accordance with this subchapter. The Department shall approve the modification in writing, if it determines that the modification will result in an equivalent level of protection of the regulated resource or the modification will result in an equivalent area of resource protection and will not compromise the original protected resource.

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(b) The property owner or grantor may reserve the right to abandon the project. At any time prior to the start of any site disturbance, including pre-construction earth movement, removal of vegetation or structures, or construction of the project, the property owner or grantor may inform the Department in writing that it is abandoning the project and request that the Department void the permit. Upon confirmation that no site disturbance, including pre-construction earth movement, removal of vegetation or structures, or construction of the project, has occurred, the Department shall provide to the permittee or grantor an executed release of the conservation restriction, which the permittee or grantor may then record.

(Agency Note: N.J.A.C. 7:7A-16 is proposed for recodification with amendments as N.J.A.C. 7:7A-22.)

SUBCHAPTER [17.] **13. RECONSIDERATION BY DEPARTMENT OF ITS ACTION OR INACTION CONCERNING A PERMIT**

7:7A-[17.1]**13.1** Reconsideration by Department of its action or inaction concerning a permit

(a) (No change.)

(b) The Department may reconsider and modify its action or inaction concerning a permit so as to minimize the detrimental effect to the value of the property, provided:

1. – 2. (No change.)

3. [Either] **Any** of the following requirements [is] **are** met:

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i. A court has determined that the issuance, modification, or denial of an individual freshwater wetlands permit would constitute a taking of property, and the property owner thereupon submits a request for a reconsideration and modification of the permit action or inaction; [or]

ii. A takings complaint has been filed with the court or the court has determined that the issuance, modification or denial of [a] **an** individual freshwater wetlands permit would constitute a taking of property, and the Department initiates the reconsideration[.]; **or**

iii. The issuance, modification, or denial of an individual freshwater wetlands permit is for a single-family home or duplex and the Department initiates the reconsideration prior to the filing of a takings complaint.

(c) (No change.)

(d) In determining whether the property owner's investments in the property as a whole were reasonable, and reflected reasonable expectations, the Department shall evaluate the following information:

1. Conditions at the time of the investment. That is, the investment shall have been made in pursuit of development that would likely have been legally and practically possible on the property, considering all constraints existing and reasonably ascertainable at the time of the investment. For example, if a property owner bought property containing freshwater wetlands regulated under this chapter, it would not be reasonable to expect that the property could be developed without constraints. In determining conditions at the time of the investment, the Department shall consider, at a minimum, the following:

i. (No change.)

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ii. Historic landmarks or other historic or cultural resources, as described at N.J.A.C. 7:7A-[12.2]**19.5**;

iii. – vi. (No change.)

2. – 5. (No change.)

(e) (No change.)

(f) In determining the environmental impacts of any minimum beneficial economically viable uses of the property and the consistency of those impacts with the goals of the Freshwater Wetlands Protection Act, in accordance with (c) above, the Department shall evaluate whether the minimum beneficial economically viable use would:

1. Adversely affect the quality and resource value classification of the wetland, pursuant to N.J.A.C. 7:7A-[2.5]**3.2**, and the quantity of freshwater wetlands, transition areas, and/or State open waters to be disturbed;

2. Adversely affect other protected resources, for example, historic or cultural resources, as described at N.J.A.C. 7:7A-[12.2]**19.5**, ecologically unique areas or critical wildlife habitat;

3. – 4. (No change.)

(g) The Department shall not modify its action or inaction concerning a permit and approve a minimum beneficial economically viable use as [the] **a** result of [a] **the** reconsideration **of the application of a rule(s) in this chapter** under this section if that use would cause any one of the following:

1. – 3. (No change.)

(h) (No change.)

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(i) A complete request for the Department to reconsider and modify its action or inaction concerning a permit under [(a) above] **this section** shall include the following items:

1. A completed [LURP] application form, **as described at N.J.A.C. 7:7A-16.7(a)1 and available from the Department at the address set forth at N.J.A.C. 7:7A-1.4**, indicating a request for reconsideration and the type of permit being requested;

2. Unconditional written consent from the owner of the site[, as defined at N.J.A.C. 7:7A-1.4,] for Department representatives to enter the site to conduct site inspections;

3. Documentation **in accordance with N.J.A.C. 7:7A-17.5** that public notice [has been given pursuant to] **of the request was provided in accordance with** the requirements at N.J.A.C. 7:7A-[10.8(c), (d), (e) and (g)]**17. The public notice shall follow the form provided by the Department, and shall state that a request for reconsideration has been submitted to the Department, that the request can be reviewed at the municipal clerk's office or at the Department, and that comments may be submitted to the Department within 15 calendar days of receipt of the notice.** This notice may be combined with the offer to sell the property required under (i)7 below;

4. Document(s) showing when the property as a whole[, as defined at N.J.A.C. 7:7A-1.4,] was acquired, the purchase price of the property as a whole, and the instrument which documents the applicant's real property interest;

5. Document(s) showing the amount[, **and** nature, [and] **as well as the** date of any investments made to maintain and/or develop the property as a whole, other than the purchase price;

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6. The language of a proposed conservation restriction [or easement] that meets the requirements of (m)2 below;

7. Documentation that the property has been offered for sale in a letter[,] following the form provided by the Department, to all owners of property, **including easements as shown on the tax duplicate**, within 200 feet of the property as a whole, and to the land conservancies, environmental organizations, and government agencies on a list supplied by the Department; and that no reasonable offer to purchase, that assumes a minimum beneficial economically viable use, has been received. This documentation shall include the following:

i. (No change.)

ii. All responses the property owner receives to the letters sent under this subsection. Each response shall be submitted to the Department within 15 **calendar** days after the property owner's receipt of the response; and

iii. A list, certified by the municipality, of all owners of real property within 200 feet of the property as a whole, including owners of easements as shown on the tax duplicate. **The list of property owners certified by the municipality shall be no more than one year old;**

8. The written offer of sale required under (i)7 above shall be sent by certified mail and shall:

i. (No change.)

ii. Include a copy of a fair market value appraisal, performed by a State-licensed appraiser, that assumes that a minimum beneficial economically viable use of the property [will] **would** be allowed;

iii. – iv. (No change.)

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9. [A development] **Site plans** showing the project that is proposed in order to provide a minimum beneficial economically viable use;

10. Information and/or certifications regarding the presence or absence of endangered or threatened species habitat, historic or archaeological resources, as described at N.J.A.C. 7:7A-[12.2]**19.5**, or other features on the site relevant to determining compliance with the requirements of this chapter;

11. A mitigation proposal that complies with N.J.A.C. 7:7A-[15]**11**, to offset the impacts of the project on freshwater wetlands, transition areas, and/or State open waters;

12. – 13. (No change.)

14. Documents showing that the property owner has concluded all administrative and judicial appeals of the Department's decision on the application for an individual freshwater wetlands permit. Such documentation shall include the last of the following (submitted after the appeal period for the applicable decision has expired):

i. (No change.)

ii. A final decision issued by the Commissioner regarding the Department's decision on the application for an individual permit **if the property owner contested the permit decision**; and

iii. (No change.)

15. (No change.)

(j) In the case where the Department initiates the reconsideration of whether to modify its action or inaction concerning a permit under (a) above, the Department shall, upon initiation of the reconsideration process, follow all steps described in (j)1 through 3 below. In the case where the property owner is requesting that the Department reconsider and modify its action or inaction

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concerning a permit, the Department shall, upon initiation of the reconsideration process, follow the steps described in (j)1i[, 1iii] **and iii**, 2, and 3 below:

1. Provide the following notifications:

i. (No change.)

ii. In accordance with the requirements at N.J.A.C. 7:7A-[10.8 (c), (d), and (e)1 through 4 and 6]17; and

iii. (No change.)

2. – 3. (No change.)

(k) If the Department determines to approve a development upon reconsideration under this section, the Department shall provide notice of the development that the Department proposes to allow under the reconsideration following the same procedure described at (j) above, except that the Department shall provide a 30-day comment period, commencing from the date of **publication of the** notice in the DEP Bulletin.

(l) The Department shall complete the written analysis required under (c) above, which shall incorporate its decision on the request for reconsideration and modification of its action or inaction concerning a permit, as follows:

1. For a request for reconsideration under (b) and (h) above, no later than 180 **calendar** days from the Department's receipt of a complete request under (h) above; or

2. For a reconsideration initiated by the Department under (b) above, no later than 180 **calendar** days from the publication of notice in the DEP Bulletin under (j) above.

(m) (No change.)

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(n) The property owner or any other person with a particularized property interest who is aggrieved by the Department's determination on a reconsideration of the Department's action or inaction concerning a permit may request an adjudicatory hearing on the reconsideration determination pursuant to the procedures set forth at N.J.A.C. 7:7A-21.1.

SUBCHAPTER 14. EMERGENCY AUTHORIZATIONS

7:7A-14.1 Standards for issuance of an emergency authorization

(a) The Department shall issue an emergency authorization only if the person seeking such authorization demonstrates that a threat to life, severe loss of property, or environmental degradation exists or is imminent, and the threat, severe loss, or degradation:

- 1. Can only be prevented or ameliorated through undertaking a regulated activity; and**
- 2. Is likely to occur, persist, or be exacerbated before the Department can issue an authorization under a permit for the preventive or ameliorative activity.**

7:7A-14.2 Procedure to request an emergency authorization

(a) A person requesting an emergency authorization shall provide the Department with the following information by telephone and, in addition, by fax, electronic mail, or letter, unless the nature of the emergency is so immediate that only telephone notice is feasible:

- 1. The name, address, and contact information for the owner(s) of the property upon which the regulated activity will be conducted and for the owner(s) of any other properties affected by the proposed regulated activity;**

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2. A demonstration that the property owner(s) has given permission for the proposed regulated activity or, in the case of a public entity proposing activities on private property through power of eminent domain, a written statement of the public entity's intention to conduct the regulated activity;

3. The street address, lot and block numbers, municipality, and county of the property upon which the regulated activity is proposed;

4. The nature and cause of the threat to life, severe loss of property, or environmental degradation, including the condition of existing structures, the vulnerability of people and/or property, and the threat to the environment;

5. The date and time at which the person requesting the emergency authorization learned of the threat to life, severe loss of property, or environmental degradation;

6. The nature and extent of the proposed regulated activity;

7. The proposed start and completion dates for the proposed regulated activity;

8. Photographs of the area where the regulated activity will be conducted;

9. If possible, a site plan showing the proposed regulated activity and anticipated impacts of the proposed activity to freshwater wetlands, State open waters, and/or transition areas; and

10. Any other information necessary for the Department to ensure compliance with the requirements of this chapter.

(b) A person requesting an emergency authorization need not comply with the public notice requirements at N.J.A.C. 7:7A-17 or submit an application fee. However, public notice and an application fee are required, as applicable, for the application for the permit,

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that, as required at N.J.A.C. 7:7A-14.3(f), must be submitted for the activities conducted under the emergency authorization.

(c) Emergency activities in an area under the jurisdiction of the Pinelands Commission may require approval by the Pinelands Commission, in accordance with the Pinelands Comprehensive Management Plan. For information on freshwater wetlands and transition areas in the Pinelands, contact the Pinelands Commission at (609) 894-7300 or through its website at www.nj.gov/pinelands.

7:7A-14.3 Issuance of emergency authorization; conditions

(a) The Department shall issue or deny an emergency authorization within 15 calendar days after receiving a request that meets the requirements of N.J.A.C. 7:7A-14.2. The Director of the Division of Land Use Regulation, or the Director's designee, shall provide this decision to the person who requested the emergency authorization verbally and, if the decision is to issue the emergency authorization, shall provide written confirmation within five working days thereafter.

(b) Notice of the issuance of the emergency permit shall be published and public comments received, in accordance with the provisions of 40 CFR 124.10 and 124.11, and of the Federal Act and applicable State law, provided that this notification shall be mailed no later than 10 days after issuance of the emergency permit.

(c) The Department's written confirmation of its decision to issue the emergency authorization shall include:

1. A full description of the activities authorized under the emergency authorization;

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2. The timeframes within which the regulated activities authorized under the emergency authorization must be commenced and conducted as set forth in (e) below;

3. A requirement that the person conducting the regulated activities authorized under the emergency authorization provide regular updates of progress at the site;

4. Any limits or other criteria necessary to ensure compliance to the maximum extent practicable with all requirements of this chapter; and

5. A requirement to provide mitigation for impacts to wetlands, State open waters, and transition areas in accordance with N.J.A.C. 7:7A-11, as appropriate.

(d) If the Department receives a request for an emergency authorization for a major discharge, the Department will notify the Regional Administrator of Region II of the USEPA before issuing an emergency permit, and will send a copy of the written permit to the USEPA upon issuance.

(e) The regulated activities authorized under the emergency authorization shall be commenced and conducted within the following timeframes:

1. Activities authorized under the emergency authorization shall be commenced within 30 calendar days after the Department's verbal decision is provided pursuant to (a) above, unless the Department establishes a different timeframe in accordance with (g) below. If the emergency activities are not commenced within 30 calendar days or by the date established under (g) below, as applicable, the emergency authorization is automatically void as of the 30th calendar day after the verbal approval or as of the date established in accordance with (g) below, as applicable; and

2. Activities authorized under the emergency authorization, including any required

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restoration, shall be completed within 60 calendar days after the Department's verbal decision is provided in accordance with (a) above, unless the Department establishes a different timeframe in accordance with (g) below. If the regulated activities authorized under the emergency authorization are not completed within 60 calendar days or by the date established in accordance with (g) below, as applicable, the regulated activities shall cease until either a permit is obtained, or another emergency authorization is obtained.

(f) The person to whom the emergency authorization is provided shall submit a complete application in accordance with N.J.A.C. 7:7A-16 for a permit for the activities conducted under the emergency authorization within 90 calendar days after the Department's verbal decision is provided in accordance with (a) above, or by a different date established in accordance with (g) below, as applicable.

(g) The Department shall establish a timeframe different from those set forth at (e) or (f) above where the applicant demonstrates that the timeframe set forth at (e) or (f) cannot feasibly be met for all or a portion of the authorized activities or where the Department determines that a different timeframe is necessary to facilitate the regulated activities. Except where further time is required to complete restoration of the freshwater wetland subsequent to completion of the emergency activity, in no case will an emergency authorization extend for more than 90 days.

(h) The person to whom the emergency authorization is provided shall conduct all activities authorized under the emergency authorization in accordance with all requirements that apply to that activity under this chapter to the maximum extent practicable.

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(i) The permit application submitted under (f) above shall, in addition to meeting the application requirements for the specific permit, include:

1. A demonstration that the regulated activities conducted under the emergency authorization meet the requirements of this chapter, or an explanation as to why full compliance could not be achieved; and

2. “As-built” site plans, signed and sealed by an engineer, land surveyor, or architect, as appropriate, showing the regulated activities that were or are being conducted under the emergency authorization.

(j) Upon review of the application submitted under (f) above, the Department shall require design changes, restoration, and/or stabilization measures as necessary to ensure the requirements of this chapter are met to the maximum extent practicable.

(k) The Department may modify or terminate an emergency authorization at any time without prior notice if the Department determines that modification or termination is necessary to protect public health, safety, and welfare, and/or the environment.

(l) If the person to whom the emergency authorization was provided conducts any regulated activity not authorized under the emergency authorization and/or the permit obtained thereafter for the activities governed by the emergency authorization, such shall constitute a violation of this chapter subject to enforcement action under N.J.A.C. 7:7A-22.

SUBCHAPTER 15. PRE-APPLICATION CONFERENCES

7:7A-15.1 Purpose and scope

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(a) A pre-application conference is a meeting between the Department and a prospective applicant to discuss the applicant's project and the application procedures and standards that will apply to the project. A prospective applicant may request a pre-application conference for any project. In the appropriate case, the Department may determine that the questions raised by a prospective applicant can be adequately addressed by telephone or in writing.

(b) A pre-application conference is not mandatory, but is recommended for large and/or complicated projects.

(c) Discussion or guidance offered by the Department at a pre-application conference shall not constitute a commitment by the Department to approve or deny an application.

(d) There is no fee for a pre-application conference.

(e) Where the prospective applicant's project will require approvals from several Department programs, the applicant is encouraged to contact the Department's Office of Permit Coordination and Environmental Review at (609) 292-3600 for assistance in coordinating the various applications.

7:7A-15.2 Request for a pre-application conference; scheduling; information required

(a) A request for a pre-application conference shall be directed by electronic mail to LURTechSupport@dep.nj.gov, or by writing to the address set forth at N.J.A.C. 7:7A-1.4 to the attention of "Supervisor, (county in which the proposed project is located)."

(b) A request for a pre-application conference for any project shall include the following:

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- 1. A written description of the site and the proposed project including the dimensions, number, and uses of proposed structures;**
- 2. Site plans or conceptual designs depicting the proposed project, if available;**
- 3. The street address, lot and block numbers, municipality, and county of the property upon which the regulated activity is proposed; and**
- 4. A copy of any Letter of Interpretation that the Department has issued for the site. If a Letter of Interpretation has not been issued, the prospective applicant shall provide the general location of freshwater wetlands, transition areas, and State open waters.**

(c) Within 10 calendar days of receipt of the material submitted in accordance with (b) above, the Department shall:

- 1. Determine that a pre-application conference is necessary and contact the prospective applicant to schedule a pre-application conference; or**
- 2. Determine that a pre-application conference is not necessary and that the prospective applicant's questions can be addressed in writing or by telephone. Where the Department makes such a determination, the Department shall address the questions within 20 calendar days of receipt of the material submitted in accordance with (b) above.**

SUBCHAPTER 16. APPLICATION REQUIREMENTS

7:7A-16.1 Purpose and scope

(a) This subchapter sets forth the application requirements for:

- 1. A letter of interpretation, including an E-LOI, and an extension or modification of a letter of interpretation;**

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2. An authorization under a general permit-by-certification;

3. An authorization under a general permit, with the following exceptions:

i. The ongoing maintenance of an off-stream stormwater management facility created in uplands under general permit 1;

ii. The repair or modification of an individual subsurface disposal system (septic system) under general permit 24; and

iii. Minor channel cleaning performed by a local government agency under general permit 25;

4. A transition area waiver; and

5. An individual permit.

(b) The application requirements for the following are set forth elsewhere in this chapter:

1. For an exemption letter, see N.J.A.C. 7:7A-2.6;

2. For the ongoing maintenance of an off-stream stormwater management facility created in uplands under general permit 1, see N.J.A.C. 7:7A-7.1;

3. For general permit 24, see N.J.A.C. 7:7A-7.24;

4. For a general permit 25, see N.J.A.C. 7:7A-7.25;

5. For a mitigation proposal, see N.J.A.C. 7:7A-11;

6. For an emergency authorization, see N.J.A.C. 7:7A-14; and

7. For an extension, transfer, or modification of an approval, see N.J.A.C. 7:7A-20.4, 20.5, or 20.6, respectively.

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7:7A-16.2 General application requirements

(a) The Department provides a checklist for each type of application submitted under this subchapter. The checklist identifies the submissions required under the rules to be part of an application, and also the appropriate level of detail and the format of the information to be submitted for each type of application. For example, where the rules require, as part of an application, the submittal of a site plan or photographs showing certain types of information, the corresponding checklist will indicate, based on the type of development the particular permit covers; the number of copies of the plan to be submitted; the scale and details of the information to be illustrated on the plan; and the number and orientation of photographs of the location of the proposed development. The checklist will also indicate that the plan should be folded or prepared in a certain manner to facilitate processing. Checklists can be downloaded from the Department's website at www.nj.gov/dep/landuse or obtained by contacting the Department at the address set forth at N.J.A.C. 7:7A-1.4.

(b) The level of detail and documentation required for an application shall be commensurate with the size and impact of the proposed regulated activity or project, its proximity to critical areas, and its potential for impacts to freshwater wetlands, transition areas, and/or State open waters. The Department shall, upon request, provide the applicant with guidance regarding the appropriate level of detail for an application based on the activity the applicant proposes to undertake.

(c) The following persons may submit an application under this subchapter:

1. The owner(s) of a site on which a regulated activity is proposed or conducted, or which is the subject of a letter of interpretation;

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2. An agent designated by the owner(s) of a site to obtain or operate under a letter of interpretation or permit on behalf of the owner(s);

3. A public entity proposing an activity within a right-of-way or easement that is held or controlled by that entity or that will be appropriated by that entity under the power of eminent domain; or

4. A person that has the legal authority to perform the activities proposed in the application on the site, and to carry out all requirements of this chapter.

(d) An application shall be certified as set forth in (j) below by the following individual(s), or by a duly authorized representative, as described at (e) below:

1. If the applicant is a corporation, a principal executive officer of at least the level of vice president;

2. If the applicant is a partnership or sole proprietorship, a general partner or the proprietor, respectively;

3. If the applicant is a municipality, or a State, Federal, or other public entity, either a principal executive officer or ranking elected official; or

4. If the applicant is an entity not covered at (d)1, 2, or 3 above, all individual owners of record of the property upon which the activities will occur.

(e) An individual is a duly authorized representative of the applicant under (d) above only if the authorization is:

1. Made in writing by an individual required to certify under (d) above and is provided to the Department as part of the application; and

2. Specifies that the authorized representative is either:

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i. The individual who has overall responsibility to obtain the letter of interpretation and/or operate, construct, or complete the activity, such as a contractor, construction site supervisor, or other individual of equivalent responsibility; or

ii. In a position of responsibility equivalent to that of the individual described in (e)2i above. In this case, the individual holding the specified position is the duly authorized representative for purposes of (d) above.

(f) If the written authorization provided to the Department under (e) above is no longer accurate because a different individual or position has overall responsibility to obtain the letter of interpretation or permit and/or operate, construct, or complete the activity, a new authorization satisfying the requirements of (e) above shall be submitted to the Department prior to or concurrent with any reports, information, or applications requiring the applicant's certification.

(g) If an application includes activities within a right-of-way or easement, the application shall include written consent for the activity from the holder(s) of the right-of-way or easement.

(h) Any survey or site plan submitted as part of an application shall be signed and sealed by an engineer, land surveyor, or architect, as appropriate, unless the proposed regulated activity or project is one for which no survey, topography, or calculations are necessary to demonstrate the requirements of this chapter are met, in which case the applicant may elect to prepare his or her own site plan;

(i) Any professional report, survey, calculation, or other document prepared by a consultant, engineer, land surveyor, architect, attorney, scientist, or other professional and

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submitted as part of an application shall be certified in accordance with (j) below. This certification is separate from the certification of the application by the applicant.

(j) The certification required by (d) and (i) above is as follows:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining and preparing the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment.”

(k) Failure to provide complete and accurate information of which the applicant or its agents are aware, or reasonably should have been aware, may result in denial of an application or termination of the authorization under the general permit-by-certification or general permit, the transition area waiver, or the individual permit under N.J.A.C. 7:7A-20.9, and may subject the applicant or its agents to enforcement action under N.J.A.C. 7:7A-22.

(l) When a proposed regulated activity or project requires more than one approval under this chapter, or requires, in addition, an approval under the Coastal Zone Management Rules at N.J.A.C. 7:7, and/or the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13, an applicant may submit a single application for all of the approvals, except for an authorization under a general permit-by-certification, provided that the application meets all application requirements of each such approval included.

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7:7A-16.3 Additional application requirements for an LOI

(a) In addition to meeting the requirements at N.J.A.C. 7:7A-16.2, an application for an LOI shall include the following material, in the number and format specified in the appropriate application checklist:

1. A completed application form, available from the Department at the address set forth at N.J.A.C. 7:7A-1.4. This form requires basic information regarding the requested LOI, including LOI type, name and address of the applicant and any designated agent(s), the specific site or portion of site that is the subject of the application, and certifications as to the truth and accuracy of the information provided and as to the ownership of the property;

2. Documentation that public notice of the application has been provided in accordance with N.J.A.C. 7:7A-17;

3. The appropriate application fee as set forth at N.J.A.C. 7:7A-18;

4. A survey, certified in accordance with N.J.A.C. 7:7A-16.2(j), shall be submitted for every LOI, except a presence/absence LOI for an entire site. All surveys shall be conducted and documentation provided in accordance with the requirements at N.J.A.C. 7:36 Appendix 2, or a subset of these requirements as may be defined by the appropriate LOI checklist.

i. The survey for a presence/absence LOI for a portion of a site under N.J.A.C. 7:7A-4.3(c)2 shall identify the portion(s) of the site that is the subject of the application; and

5. Consent from the owner of the site allowing the Department to enter the site in a reasonable manner and at reasonable times to inspect the site. This consent shall continue

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in effect for the duration of the application review and decision process, including for the duration of any appeal made from the decision on the application.

(b) In addition to meeting the requirements at (a) above, an application for a line verification LOI issued under N.J.A.C. 7:7A-4.5 shall include the following material, in the number and format specified in the appropriate application checklist:

1. A proposed delineation of all freshwater wetlands, transition areas, and State open waters on the site, or portion thereof, which is the subject of the application. The delineation shall be clearly marked in the field as required by the application checklist. When delineating a State open water one to five feet in width measured from top of bank, with no wetland boundary, the delineation shall indicate the centerline of the State open water with several data points numbered and shown on the plans. When delineating a State open water that is greater than five feet in width, the delineation shall include two survey lines, with numbered points, depicting the top of bank on both sides of the State open water;

2. Data sheets or other materials that explain and support the delineation including, but not limited to:

i. Soil logs describing the soil characteristics at the location of each soil boring, including a description of the field indicators, or lack thereof, for hydrology as outlined in the 1989 Federal Manual and as specified in the appropriate application checklist; and

ii. A description of the vegetative species on the site recorded at each soil boring location as specified in the appropriate application checklist;

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3. If the applicant would like the Department to verify that a wetland is an isolated wetland, a request for that determination, and supporting documentation demonstrating that the wetland is isolated. For example, if inlets or pipes are present in the vicinity of the subject wetland, a map of the storm sewer system depicting the endpoint and invert elevations of the inlet or pipe; and

4. If the LOI is for a portion of a site, documentation that the site and portion meet the requirements at N.J.A.C. 7:7A-4.5(b)3i through iii, and information identifying the subject portion of the site in accordance with N.J.A.C. 7:7A-4.5(b)3iv.

(c) If a site is located in an area under the jurisdiction of the Pinelands Commission, the Department shall not issue a letter of interpretation. The lead agency in this area for determining the presence, absence, or extent of freshwater wetlands is the Pinelands Commission. However, in cases of disagreement, the Department and the Pinelands Commission retain authority to independently or jointly establish these boundaries.

7:7A-16.4 Application requirements for an E-LOI

(a) An application for an LOI may be submitted electronically via the “NJDEP online business portal” (portal). The web address for the portal is: www.nj.gov/dep/online. All application information and supporting documentation can be submitted electronically with the exception of any required surveys, which must be mailed or delivered to the Department for review.

(b) The portal requires an applicant submitting an application for an LOI

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electronically to provide the following, as specified in the appropriate application checklist:

- 1. The type of LOI being requested;**
- 2. The name of or other identifier for the application;**
- 3. The location of the specific site or portion of site that is the subject of the application, including address, city, state, zip code, municipality, State plane coordinates, and, as applicable, lot and block numbers;**
- 4. Contact information for the applicant, property owner, and any designated agent(s), including: name, address, telephone number, e-mail address, municipality, county, organization, and organization type;**
- 5. The following certifications:**
 - i. A certification that the site identified in the application is the actual location subject to the application;**
 - ii. A certification that the applicant has obtained written consent from the property owner that the application can be made on the property owner's behalf. This certification is required regardless of whether the applicant and property owner are the same person;**
 - iii. A certification of truth and accuracy of the information provided;**
 - iv. A certification that any required survey has been conducted and documentation provided as required by this chapter; and**
 - v. A certification that the applicant has obtained written consent from the property owner allowing the Department to enter the site in a reasonable manner and at reasonable times to inspect the site;**
- 6. To accomplish the certifications under (b)5 above, the PIN that was issued to the**

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applicant upon registering with the Department's online permitting system; and

7. The appropriate application fee set forth at N.J.A.C. 7:7A-18.

(c) In addition to meeting the requirements of (b) above, an applicant submitting an LOI electronically is required to upload the following digital documents to the portal, in the format and number specified in the appropriate application checklist:

1. Documentation that public notice of the application has been provided in accordance with N.J.A.C. 7:7A-17;

2. Color photographs of the site as described in the application checklist;

3. Consent from the owner of the site allowing the Department to enter the site in a reasonable manner and at reasonable times to inspect the site. The electronic submission of a signed Property Owner's Certification Form shall serve as the property owner's consent. This consent shall continue in effect for the duration of the application review and decision process, including for the duration of any appeal made from the decision on the application;

4. A document, which includes the names and qualifications of the person(s) who prepared the material and, if applicable, the person(s) who performed the delineation;

5. A copy of the tax map(s) for the subject site;

6. A digital copy of all required surveys; and

7. A written narrative and/or reports necessary to accurately describe the site, its location, and existing site conditions.

(d) In addition to meeting the requirements of (a), (b), and (c) above, an applicant submitting an LOI electronically is required to upload to the portal the following

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shapefile(s) in the format specified in the appropriate application checklist and guidance documents:

1. For all E-LOIs, a shapefile that defines the boundaries of the site;

2. For an application for a presence/absence E-LOI for a portion(s) of a site under N.J.A.C. 7:7A-4.3(c)2, a shapefile that defines the footprint of disturbance;

3. For an application for a line delineation E-LOI under N.J.A.C. 7:7A-4.4, the Department will delineate the wetlands and/or wetland transition areas on the site. Once the Department has flagged the site, the applicant must submit a shapefile(s) that defines the limit of wetlands, State open waters, and/or transition areas as indicated by the Department delineation.

4. For an application for a line verification E-LOI under N.J.A.C. 7:7A-4.5:

i. A shapefile(s) that defines the limit of wetlands, State open waters, and/or transition areas, as appropriate; and

ii. Data sheets for sample locations that include soil borings and a description of vegetation.

(e) In addition to meeting the requirements of (c) and (d) above, an applicant submitting an E-LOI, with the exception of an applicant submitting an E-LOI application for a presence/absence LOI for an entire site, is required to submit a paper survey to the Division for review that meets the requirements of N.J.A.C. 7:7A-16.3(a)4, in the format and number specified in the appropriate application checklist.

7:7A-16.5 Application requirements for an LOI extension

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(a) In addition to meeting the requirements of N.J.A.C. 7:7A-16.3(a)1, 2, and 3, an application to extend an LOI shall include the following material, in the number and format specified in the appropriate application checklist:

- 1. A copy of the original LOI that the applicant wishes to extend;**
- 2. A copy of the survey or site plan submitted as part of the application for the original LOI that the applicant wishes to extend; and**
- 3. Any other information reasonably necessary to determine if the information in the original LOI remains accurate.**

7:7A-16.6 Additional application requirements for an authorization under a general permit-by-certification

(a) An application for authorization under a general permit-by-certification shall be submitted electronically through the Department's online permitting system at www.nj.gov/dep/online.

(b) The online application for a general permit-by-certification requires an applicant to provide the following:

- 1. The number (and subject matter) of the general permit-by-certification under which the application for authorization is being submitted;**
- 2. The name of or other identifier for the proposed development or project;**
- 3. The location of the proposed development or project, including address, city, state, zip code, municipality, State plane coordinates, and lot and block numbers;**

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4. Information specific to the proposed project related to the requirements of the general permit-by-certification under which the application is being submitted, such as, for example, the area of proposed disturbance to wetlands under general permit-by-certification 8 (see N.J.A.C. 7:7A-6.1);

5. Contact information for both the applicant and the property owner, including: name, address, telephone number, e-mail address, municipality, county, organization, and organization type;

6. A certification as to each of the following:

i. That the site identified in the application is the actual location of the project site;

ii. That public notice of the application has been provided in accordance with N.J.A.C. 7:7A-17;

iii. That the applicant has obtained written consent from the property owner that the application can be made on the property owner's behalf. This certification is required regardless of whether the applicant and property owner are the same person; and

iv. That conditions specific to the general permit-by-certification under which the application for authorization is being submitted are or will be met. For example, an applicant for authorization under general permit-by-certification 24 must certify that the total area of disturbance is no more than one-quarter acre;

7. To accomplish the certification under (b)6 above, the PIN that was issued to the applicant upon registering with the Department's online permitting system; and

8. The application fee for a general permit-by-certification set forth at N.J.A.C. 7:7A-18.

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(c) Once the online application process is successfully completed, the authorization will be accessible to the applicant through the Department's online permitting system at www.nj.gov.dep/online.

7:7A-16.7 Additional application requirements for an authorization under a general permit, for an individual permit, or for a transition area waiver

(a) In addition to meeting the requirements at N.J.A.C. 7:7A-16.2, an application for an authorization under a general permit, for an individual permit, or for a transition area waiver shall include the following material, in the number and format specified in the appropriate application checklist:

1. A completed application form, available from the Department at the address set forth at N.J.A.C. 7:7A-1.4. This form requires basic information regarding the regulated activity or project, including the name and address of the applicant and any designated agent(s), the specific location of the regulated activity or project, the types of approvals being sought, a brief description of the proposed activities, and certifications as to the truth and accuracy of the information provided and as to the ownership of the property;

2. Documentation that public notice of the application has been provided in accordance with N.J.A.C. 7:7A-17;

3. The appropriate application fee as set forth at N.J.A.C. 7:7A-18;

4. Site plans, certified in accordance with N.J.A.C. 7:7A-16.2(j), which include the following, both on and adjacent to the site, as applicable:

i. Existing features, such as lot lines, structures, land coverage, and vegetation, which

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are necessary to demonstrate that the proposed regulated activity or project meets the requirements of this chapter;

ii. All proposed regulated activities; the size, location, and details of any proposed structures, roads, or utilities; details of any clearing, grading, filling, excavation, and dredging; the location and area of wetlands, transition areas, and/or State open waters that will be disturbed and the limits of disturbance;

iii. Existing and proposed topography where necessary to demonstrate that the proposed regulated activity or project meets the requirements of this chapter. All topography shall reference NGVD or include the appropriate conversion factor to NGVD;

iv. Details of any proposed soil erosion and sediment control measures; and

v. State plane coordinates for a point at the approximate center of the site, except for a linear activity or project as provided at (a)5i below. The accuracy of the State plane coordinates shall be within 50 feet of the actual center point for the site;

5. State plane coordinates for a point at the approximate center of the site, except for a linear activity or project as provided at (a)5i below. The accuracy of the State plane coordinates shall be within 50 feet of the actual center point for the site;

i. State plane coordinates shall be provided for a linear activity or project, such as a roadway, utility, stream bank stabilization project, or sediment and debris removal project, as follows:

(1) For a linear activity or project of one-half mile or more in length, the State plane coordinates shall include the coordinates for the end points of the delineation or linear activity or project and the coordinates for points located at 1,000-foot intervals along the

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entire length of the linear activity or project; and

(2) For a linear activity or project of less than one-half mile in length, the State plane coordinates shall include the coordinates for the end points of the linear activity or project;

6. In addition to the site plan specified at (a)4 above, other visual representations, such as photographs, graphs, maps, and tables, that illustrate existing site conditions and the proposed activity or project;

7. Calculations, analyses, reports, data, and supporting materials necessary to demonstrate that the proposed activity or project meets the requirements of this chapter, and the requirements of the Department's Stormwater Management rules at N.J.A.C. 7:8, if applicable;

8. Information about the anticipated impacts of the proposed activity or project, including any monitoring or reporting methods that will be used;

9. Information and certifications regarding the presence or absence of endangered or threatened species habitat, critical habitat for fauna or flora, historic or archaeological resources, or other features on the site that are relevant to determining compliance with the requirements of this chapter;

10. If a site is known or suspected to be contaminated with toxic substances, and if the Department requests it, a laboratory analysis of representative samples of the soil or sediment on the site;

11. Any information necessary to ensure compliance with State and/or Federal law, and/or to determine whether an application for an authorization under a general permit, an individual permit, or a transition area waiver meets State and/or Federal standards;

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12. Any other information not listed in this subsection, if necessary to ensure compliance with the Federal rules governing the Department's assumption of the Federal 404 program at 40 CFR 233.30; and

13. Consent from the owner of the site allowing the Department to enter the site in a reasonable manner and at reasonable times to inspect the site. This consent shall continue in effect for the duration of the application review and decision process, including for the duration of any appeal made from the decision on the application.

(b) If a proposed activity or project for which an authorization under a general permit, an individual permit, or a transition area waiver is sought requires mitigation in accordance with this chapter, the applicant may submit a mitigation proposal as part of the application for the authorization. If the applicant does not submit a mitigation proposal with the application, the applicant shall submit the mitigation proposal at least 90 calendar days before the start of activities authorized by the permit, in accordance with N.J.A.C. 7:7A-11.

7:7A-16.8 Additional requirements specific to an application for authorization under a general permit

(a) In addition to the requirements at N.J.A.C. 7:7A-16.2 and 16.7, an application for authorization under a general permit shall meet the requirements of this section.

(b) An application for authorization under a general permit shall include the following:

1. A line delineation LOI issued under N.J.A.C. 7:7A-4.4 or a line verification LOI issued under N.J.A.C. 7:7A-4.5, if an LOI of either type has been issued. A

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presence/absence LOI issued under N.J.A.C. 7:7A-4.3 is not sufficient. If no LOI has been issued, or if only a presence/absence LOI has been issued, the application shall include all information required for an application for a line delineation LOI or line verification LOI, covering the portion of the site that will be affected by the general permit activity;

2. The total area, in acres, of wetlands and State open waters on the site before the regulated activity is performed, and the total area, in acres, of wetlands and State open waters on the site that will remain after the regulated activity is performed. The total area of wetlands and State open waters on the site can be approximated using a planimeter or other mapping technique;

3. Documentation regarding when the lot that is the subject of the general permit was created by subdivision;

4. A history of the ownership of the property beginning June 30, 1988, to present; and

5. A listing of contiguous lots that were in common ownership with the lot on which the activities are proposed and the ownership history of each lot beginning June 30, 1988, to present.

(c) An application for a general permit authorization for regulated activities in an area under the jurisdiction of the Pinelands Commission shall be submitted to the Pinelands Commission rather than to the Department.

7:7A-16.9 Additional requirements specific to an application for an individual permit

(a) In addition to meeting the requirements at N.J.A.C. 7:7A-16.2 and 16.7, an application for an individual permit shall meet the requirements of this section.

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(b) An application for an individual permit shall include the following:

1. A line delineation LOI issued under N.J.A.C. 7:7A-4.4 or a line verification LOI issued under N.J.A.C. 7:7A-4.5, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-4.3 is not sufficient. If no LOI has been issued for the site, or if only a presence/absence LOI has been issued, the application shall include all information required for an application for a line delineation LOI or line verification LOI;

2. The total area of wetlands and State open waters, in acres, on the site before the regulated activity is performed, and the total area, in acres, of wetlands and State open waters on the site that will remain after the regulated activity is performed. The total area of wetlands and State open waters on the site can be approximated using a planimeter or other mapping technique;

3. A copy of the deed and/or other legal documents pertaining to the site;

4. An environmental report that includes:

i. A narrative that describes the basic project purpose of the proposed activity, including whether it is water dependent;

ii. Maps (such as freshwater wetlands maps and USDA soil surveys) that provide an environmental inventory of the site;

iii. Information regarding special aquatic sites, public lands, critical habitat, and other relevant environmental features of the site;

iv. An analysis of any potential temporary and/or permanent adverse environmental impact(s), whether onsite or offsite, of the proposed regulated activity or project on

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freshwater wetlands, State open waters, transition areas, fishery resources, and threatened or endangered species and their habitat.

v. An alternatives analysis that allows the Department to evaluate whether the requirements of N.J.A.C. 7:7A-10.2 are met, including the following:

(1) A description of all alternatives considered, including offsite alternatives, as well as onsite alternatives that could minimize environmental impacts on the site, and the reasons for rejecting each alternative;

(2) Information regarding the history of the property as a whole, as necessary to evaluate the cost to the property owner of various alternatives. Such information may include:

(A) Document(s) showing when the property as a whole was acquired and its purchase price;

(B) Documentation of any investments made to maintain and/or develop the property as a whole;

(C) Documentation of attempts by the property owner to sell the property or to obtain other property; and

vi. A description of all measures taken to reduce any potential adverse environmental impact(s) to the resources listed at (b)4iv above.

7:7A-16.10 Additional requirements specific to an application for a transition area waiver

(a) In addition to meeting the requirements at N.J.A.C. 7:7A-16.2 and 16.7, an application for a transition area waiver shall meet the requirements of this section.

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(b) An application for a transition area waiver shall include the following:

1. A line delineation LOI issued under N.J.A.C. 7:7A-4.4, or a line verification LOI issued under N.J.A.C. 7:7A-4.5, if an LOI of either type has been issued. A presence/absence LOI issued under N.J.A.C. 7:7A-4.3 is not sufficient. If no LOI has been issued for the site, or if only a presence/absence LOI has been issued, the application shall include all information required for an application for a line delineation LOI or line verification LOI.

(c) In addition to the information required at (b) above, an application for a special activity transition area waiver based upon an individual permit criteria under N.J.A.C. 7:7A-8.3(g) shall include the information required for an individual permit application at N.J.A.C. 7:7A-16.9(b).

(d) In addition to the information required at (b) above, an application for a hardship transition area waiver under N.J.A.C. 7:7A-8.4 shall include the information contained in N.J.A.C. 7:7A- 13.1(i)4, 5, 7, and 8i, ii, and iii, and a statement indicating that the property owner has requested a hardship transition area waiver.

7:7A-16.11 Confidentiality

(a) Any information submitted to the Department under this chapter may be claimed as confidential by the submitter at the time of submittal.

(b) Claims of confidentiality for the following information will be denied:

- 1. The name and address of any permit applicant or permittee;**
- 2. Effluent data;**

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3. Permit application; and

4. Permit decision.

(c) Claims of confidentiality for all information not listed in (b) above will be denied unless the claimant can show that the information should be kept confidential under the requirements and procedures of 40 CFR Part 2.

SUBCHAPTER 17. REQUIREMENTS FOR AN APPLICANT TO PROVIDE PUBLIC NOTICE OF AN APPLICATION

7:7A-17.1 Purpose and scope

(a) An applicant shall provide public notice in accordance with this subchapter for the following:

1. An application for a letter of interpretation, including the extension of a letter of interpretation, pursuant to N.J.A.C. 7:7A-4;

2. An application for an authorization under a general permit-by-certification pursuant to N.J.A.C. 7:7A-5 and 6;

3. An application for an authorization under a general permit pursuant to N.J.A.C. 7:7A-5 and 7, except for general permit 15 for mosquito control activities at N.J.A.C. 7:7A-7.15, which is subject only to the notice requirements found at N.J.A.C. 7:7A-7.15(f);

4. An application for an individual freshwater wetland permit or open water fill permit pursuant to N.J.A.C. 7:7A-9 and 10;

5. An application for a transition area waiver pursuant to N.J.A.C. 7:7A-8;

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6. A mitigation proposal pursuant to N.J.A.C. 7:7A-11, which is not submitted as part of a permit application; and

7. An application for a major technical modification pursuant to N.J.A.C. 7:7A-20.6.

(b) A person who requests a reconsideration of the Department's action or inaction concerning a permit under N.J.A.C. 7:7A-13 shall provide public notice in accordance with N.J.A.C. 7:7A-13.1(i)3.

(c) An applicant is not required to provide public notice for the following:

1. A request for an exemption letter pursuant to N.J.A.C. 7:7A-2.6;

2. An application for an emergency authorization pursuant to N.J.A.C. 7:7A-14;

3. An application for an administrative modification or a minor technical modification pursuant to N.J.A.C. 7:7A-20.6; or

4. The transfer of a permit pursuant to N.J.A.C. 7:7A-20.5.

(d) When a proposed regulated activity or project requires more than one approval under this chapter, or requires, in addition, an approval under the Coastal Zone Management rules at N.J.A.C. 7:7, and/or the Flood Hazard Area Control Act rules at N.J.A.C. 7:13, an applicant may provide combined public notice for all applications submitted, provided the combined notice meets all of the notice requirements applicable to each application.

(e) Failure to provide public notice as required under this subchapter shall be cause for the Department to cancel an application under N.J.A.C. 7:7A-19.8.

7:7A-17.2 Timing of public notice of an application

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For any of the applications listed in N.J.A.C. 7:7A-17.1(a), the applicant shall provide public notice in accordance with this subchapter no more than 30 calendar days prior to submitting the application, and no later than the date the application is submitted to the Department.

7:7A-17.3 Contents and recipients of public notice of an application

(a) For any of the applications listed in N.J.A.C. 7:7A-17.1(a), the applicant shall provide a copy of the entire application, as submitted to the Department, to the municipal clerk in each municipality in which the site is located.

(b) For any of the applications listed in N.J.A.C. 7:7A-17.1(a), the applicant shall provide notice of the application to all of the persons or entities at (b)1 through 6 below, in accordance with the timeframe specified at N.J.A.C. 7:7A-17.2. The notice shall include the information specified at (e) below.

- 1. The construction official of each municipality in which the site is located;**
- 2. The environmental commission, or other government agency with similar responsibilities, of each municipality in which the site is located;**
- 3. The planning board of each municipality in which the site is located;**
- 4. The planning board of each county in which the site is located;**
- 5. The local Soil Conservation District if the regulated activity or project will disturb 5,000 square feet or more of land; and**
- 6. All owners of real property, including easements, located within 200 feet of the site of the proposed regulated activity, in the manner set forth in the Municipal Land Use Law at**

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N.J.S.A. 40:55D-12.b, unless the regulated activity or project is one of those listed at (c)1 through 4 below, in which case the notice shall be provided as set forth in (c) below. The owners of real property, including easements, shall be those on a list that was certified by the municipality. The date of certification of the list shall be no earlier than one year prior to the date the application is submitted to the Department.

(c) For an application for an LOI, regulated activity, or project listed at (c)1 through 5 below, unless the application is for an individual permit or for a mitigation proposal to create, enhance, or restore wetlands, State open waters. and/or transition areas, which is not submitted as part of a permit application, the applicant shall provide the notice required at (b)6 above by publishing newspaper notice and, in addition, sending the notice at (e) below, in the manner set forth in the Municipal Land Use Law at N.J.S.A. 40:55D-12.b, to all owners of real property, including easements, within 200 feet of any proposed above ground structure that is part of the proposed development or project, excluding any conveyance lines suspended above the ground or small utility support structures, such as telephone poles.

- 1. A linear project of one-half mile or longer;**
- 2. A trail or boardwalk of one-half mile or longer;**
- 3. A public project on a site of 50 acres or more;**
- 4. An industrial or commercial project on a site of 100 acres or more; or**
- 5. A project to remove sediment or debris from a channel of one-half mile or longer.**

(d) If the application is for an individual permit, in addition to providing notice required at (b) above, the applicant shall:

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1. Provide notice by publishing newspaper notice in accordance with N.J.A.C. 7:7A-17.4; and

2. If the proposed project involves more than 10 acres of fill, publish a newspaper notice that meets the requirements of N.J.A.C. 7:7A-17.4(b) in a newspaper with regional circulation in the region in which the site is located.

(e) The public notice required at (b) and (c) above, other than newspaper notice, shall:

1. Include all of the following:

i. A brief description of the area the applicant wishes the LOI to cover, and/or the site and regulated activity or project;

ii. A site plan, showing the location and boundaries of the site and depicting the area the applicant wishes the LOI to cover, and/or the proposed regulated activity, or project in relationship to existing site conditions. This need not be a full set of plans and may be shown on one 8½ inch by 11 inch sheet of paper provided the scale is legible and the location of the regulated activity or project in relation to the property boundary is clearly shown; and

iii. A copy of the form notice letter, available from the Department's website at the address set forth at N.J.A.C. 7:7A-1.4. The form notice letter explains that: an application will be submitted to the Department for an LOI and/or the specific regulated activity or project depicted on the enclosed site plan; a complete copy of the application is available to be reviewed at either the municipal clerk's office or by appointment at the Department's Trenton office; and comments or information on the requested LOI or proposed regulated

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activity or project and site may be submitted to the Department at the address set forth at N.J.A.C. 7:7A-1.4 within 15 calendar days of receipt of the letter; and

2. Be sent by certified mail or by delivery whereby the signature of the person to whom the notice is delivered is obtained, except that an applicant may obtain written permission from the specific municipal or county entity to submit notice to it electronically.

7:7A-17.4 Content and format of newspaper notice

(a) The newspaper notice pursuant to N.J.A.C. 7:7A-17.3(c) shall be either a legal notice or a display advertisement in the official newspaper of the municipality in which the site is located, or if there is no official newspaper, a newspaper of general circulation in the municipality.

(b) The newspaper notice pursuant to N.J.A.C. 7:7A-17.3(c) shall include all of the following:

1. The mailing address and telephone number of the Department as set forth at N.J.A.C. 7:7A-1.4;

2. The name and mailing address of the applicant;

3. The type of approval being sought;

4. A description of the proposed regulated activity, or project;

5. The street address of the site;

6. A list of each lot, block, municipality, and county within which the LOI is requested and/or the proposed, regulated activity or project will occur; and

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7. The standard language of the form notice letter available from the Department website at the address set forth at N.J.A.C. 7:7A-1.4.

i. The form notice letter explains that: an application will be submitted to the Department for the specific regulated activity or project as identified pursuant to (b)4, 5, and 6 above; a complete copy of the application is available to be reviewed at either the municipal clerk's office or by appointment at the Department's Trenton office; and comments or information on the requested LOI or proposed regulated activity or project and site may be submitted to the Department at the address set forth at N.J.A.C. 7:7A-1.4 within 15 calendar days of the date of the notice.

7:7A-17.5 Documenting public notice of an application

(a) An applicant shall include as part of the application documentation that the required public notice of the application has been provided, as follows:

1. For public notice other than newspaper notice, the documentation shall consist of:

i. A copy of the certified United States Postal Service white mailing receipt for each public notice that was mailed, or other written receipt;

ii. A certified list of all owners of real property, including easements, located within 200 feet of the property boundary of the site (including name, mailing address, and lot and block numbers) prepared by the municipality for each municipality in which the project is located. The date of certification of the list shall be no earlier than one year prior to the date the application is submitted to the Department; and

iii. A copy of each public notice letter that was mailed; and

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2. For newspaper notice, the documentation shall consist of:

i. A copy of the published newspaper notice; and

ii. The date and name of the newspaper in which notice was published.

SUBCHAPTER [11.] **18. APPLICATION FEES**

7:7A-[11.1]**18.1** Application fees

(a) This subchapter establishes the application fees for:

1. An exemption letter pursuant to N.J.A.C. 7:7A-[2.10]**2.6**;

2. A letter of interpretation pursuant to N.J.A.C. 7:7A-[3]**4**;

3. An authorization under a general permit pursuant to N.J.A.C. 7:7A-[5]**7**, except for:

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

[5.16]**7.16**;

ii. General permit 17—Trails and boardwalks, N.J.A.C. 7:7A-[5.17]**7.17**, for a project located on publicly-owned land; and

iii. General permit [25]**24**—Malfunctioning individual subsurface sewage disposal (septic) systems, N.J.A.C. 7:7A-[5.25]**7.24**;

4. An authorization under a general permit-by-certification pursuant to N.J.A.C. 7:7A-6, except for general permit-by-certification 24—Repair or modification of a malfunctioning individual subsurface sewage disposal (septic) system, N.J.A.C. 7:7A-6.2.

[4.] **5.** A transition area waiver pursuant to N.J.A.C. 7:7A-[6]**8**;

[5.] **6.** A freshwater wetlands individual permit and an open water fill individual permit pursuant to N.J.A.C. 7:7A-[7]**9**;

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[6.] **7.** (No change in text.)

[7.] **8.** A modification of an authorization under a general permit, a transition area waiver, or a freshwater wetlands or open water fill individual permit pursuant to N.J.A.C. 7:7A-[14.3]**20.6**; and

[8.] **9.** An extension of a letter of interpretation pursuant to N.J.A.C. 7:7A-[3.6]**4.6**, or of an authorization under a general permit, a transition waiver, or a freshwater wetlands or open water fill individual permit, pursuant to N.J.A.C. 7:7A-[14.6]**20.4**.

(b) There is no application fee for:

1. An application submitted by an agency of the State [pursuant to N.J.A.C. 7:7A-2.1(b)];

2. An authorization under the following general permits:

- i. General permit 16—Habitat creation and enhancement activities, N.J.A.C. 7:7A-[5.16]**7.16**;
- ii. General permit 17—Trails and boardwalks, N.J.A.C. 7:7A-[5.17]**7.17**, for a project located on publicly-owned land; and
- iii. General permit [25]**24**—Malfunctioning individual subsurface sewage disposal (septic) systems, N.J.A.C. 7:7A-[5.25]**7.24**; [or]

3. An authorization under general permit-by-certification 24—Repair or modification of a malfunctioning individual subsurface sewage disposal (septic) system, N.J.A.C. 7:7A-6.2;

[3.] **4.** An emergency [permit] **authorization** pursuant to N.J.A.C. 7:7A-[8.]**14**; or

5. The transfer of an emergency authorization, authorization under a general permit, a transition area waiver, or an individual permit pursuant to N.J.A.C. 7:7A-20.5.

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(c) – (d) (No change.)

[(e) An application fee is refundable if the Department returns the application as administratively incomplete under N.J.A.C. 7:7A-12.1(b). An application fee is not refundable once the application has been declared administratively complete under N.J.A.C. 7:7A-12.1. However, if the Department denies an application, or if the applicant withdraws the application under N.J.A.C. 7:7A-12.6, the Department shall credit the fee toward a new application for a revised project on the same site, if the new application is submitted within one year of the denial or withdrawal.]

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

[(g)](f) The fees for applications under this chapter are set forth in Table [A] **18.1** below:

Table [A] **18.1**

APPLICATION FEES

Exemption letter

	Fee
Exemption letter pursuant to N.J.A.C. 7:7A-[2.10] 2.6	\$500.00

Letter of Interpretation (LOI)

	Fee
Presence/absence LOI pursuant to N.J.A.C. 7:7A-[3.2] 4.3	\$1,000
Footprint of disturbance LOI pursuant to N.J.A.C. 7:7A-[3.2] 4.3	\$1,000

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Delineation LOI pursuant to N.J.A.C. 7:7A-[3.3] 4.4	\$1,000
Line verification LOI pursuant to N.J.A.C. 7:7A-[3.4] 4.5	\$1,000 plus \$100.00 per acre of the site (or fraction thereof)

Authorization under a general permit-by-certification pursuant to N.J.A.C. 7:7A-6

	Fee
General permit-by-certification 24—Repair or modification of a malfunctioning individual subsurface sewage disposal (septic) system, N.J.A.C. 7:7A-6.2	No fee
Any other general permit-by-certification	\$1,000

Authorization under a general permit pursuant to N.J.A.C. 7:7A-[5]7

	Fee
General permit 16—Habitat creation and enhancement activities, N.J.A.C. 7:7A-[5.16] 7.16	No fee
General permit 17—Trails and boardwalks, N.J.A.C. 7:7A-[5.17] 7.17 , for a project located on publicly-owned land	No fee
General permit [25] 24 —Malfunctioning individual subsurface sewage disposal (septic) systems, N.J.A.C. 7:7A-[5.25] 7.24	No fee
Any other general permit	\$1,000

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Transition area waiver pursuant to N.J.A.C. 7:7A-[6]8

	Fee
Transition area waiver with a valid letter of interpretation	\$1,000 plus \$100.00 per acres of disturbed regulated area (or fraction thereof)
Transition area waiver without a valid letter of interpretation	\$1,000 plus \$100.00 per acre of disturbed regulated area (or fraction thereof) and the application fee for the appropriate LOI

Freshwater wetlands or open water fill individual permit pursuant to N.J.A.C. 7:7A-[7]10

	Fee
Freshwater wetlands or open water fill individual permit for the construction of one single-family home or duplex and/or appurtenant improvements, which is not being constructed as part of a residential subdivision or multi-unit development	\$2,000
Freshwater wetlands or open water fill individual permit for any other activity	\$5,000 plus \$2,500 per acre of disturbed regulated area (or fraction thereof)

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Water quality certificate pursuant to N.J.A.C. 7:7A-2.1(d)

	Fee
Water quality certificate where a permit is not also issued	\$5,000 plus \$2,500 per acre of disturbed regulated area (or fraction thereof)

Modification of an authorization under a general permit, a transition area waiver or a freshwater wetlands or open water fill individual permit pursuant to N.J.A.C. 7:7A-[14.3]20.6

	Fee
[Minor] Administrative modification [of an authorization under a general permit]	\$500.00
Minor technical modification [of a transition area waiver]	\$500.00
[Minor modification of a freshwater wetlands or open water fill individual permit	\$500.00]
Major modification of a transition area waiver, freshwater wetlands or open water fill individual permit	30 percent of the original application fee or \$500.00, whichever is greater

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Extension of a letter of interpretation (LOI) pursuant to N.J.A.C. 7:7A-[3.6]**4.6** or of an authorization under a general permit, a transition area waiver, or an individual permit pursuant to N.J.A.C. 7:7A-[14.6]**20.4**

	Fee
Extension of a presence/absence LOI	\$500.00
Extension of a footprint of disturbance LOI	\$500.00
Extension of a delineation LOI	\$500.00
Extension of a verification LOI	50 percent of the original application fee or \$500.00, whichever is greater
Extension of an authorization under a general permit	\$500.00
Extension of a transition area waiver	\$500.00
Extension of a freshwater wetlands or open water fill individual permit	50 percent of original application fee or \$500.00, whichever is greater

Additional application fee for stormwater review if a project is a “major development” pursuant to the Stormwater Management Rules (see N.J.A.C. 7:8-1.2)

	Fee
Base fee for any major development	\$3,000

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Additional fee for review of groundwater recharge calculations (see N.J.A.C. 7:8-5.4)	\$250.00 per acre of land disturbed by the project (or fraction thereof)
Additional fee for review of runoff quantity calculations (see N.J.A.C. 7:8-5.4)	\$250.00 per acre of land disturbed by the project (or fraction thereof)
Additional fee for review of water quality calculations (see N.J.A.C. 7:8-5.5)	\$250.00 per acre of impervious surface subject to water quality review (or fraction thereof)

7:7A-[11.2]18.2 (No change in text.)

SUBCHAPTER [12.] 19. [DEPARTMENT REVIEW OF] APPLICATION[S] **REVIEW**

7:7A-19.1 General application review provisions

(a) This subchapter sets forth the review procedures for applications for a letter of interpretation, applications for authorization under a general permit, applications for an individual permit, and applications for a transition area waiver. These procedures also apply to applications for a water quality certificate.

(b) The review procedures for the following are set forth elsewhere in this chapter:

1. For a request for a written determination of exemption from the permit requirements of this chapter, see N.J.A.C. 7:7A-2.6;
2. For a mitigation proposal, see N.J.A.C. 7:7A-11;
3. For a request for an emergency authorization, see N.J.A.C. 7:7A-14; and

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4. For a request to extend, transfer, or modify a letter of interpretation or an approval, see N.J.A.C. 7:7A-20.4, 20.5, or 20.6, respectively.

(c) An applicant may submit a revised application at any time during the application review process. Except for applications for authorization under general permit 25 for minor channel cleaning for local government agencies at N.J.A.C. 7:7A-7.25, the applicant shall send a copy of the revised portions of the application to the municipal clerk of each municipality in which the site is located and shall provide notice explaining the revisions to any person listed at N.J.A.C. 7:7A-17.3(b) whom the Department determines would likely be affected by the revised application. The applicant shall provide documentation in accordance with N.J.A.C. 7:7A-17.5 that the notice was provided.

1. If an applicant submits a revised application less than 30 calendar days prior to the deadline for Department decision established pursuant to N.J.A.C. 7:7A-19.7(b), the revised application shall state that the applicant consents to a 30-calendar day extension of the decision deadline in accordance with N.J.A.C. 7:13-19.7(c).

(d) In reviewing an application, the Department shall apply the requirements of this chapter in effect at the time the application is declared complete for review.

(e) The Department shall publish notice in the DEP Bulletin of the receipt of each administratively complete application, the status of the application during review, and the Department's decision to approve or deny the application. Publication in the DEP Bulletin constitutes constructive notice to interested persons of Department actions on applications for a letter of interpretation, applications for authorization under a general permit, applications for an individual permit, applications for a transition area waiver, or

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applications for a water quality certificate. Actual notice of the Department's decision to approve or deny an application will be provided, in accordance with N.J.A.C. 7:7A-19.7, to the applicant and to persons who specifically request such notice.

(f) If a person submits an application and does not receive a response from the Department within the deadlines imposed in this subchapter, the person shall not be entitled to assume that the application is approved, except if the application is for authorization of the following activities and complies with the applicable general permit:

1. Ongoing maintenance of an off-stream stormwater management facility created in uplands, including a wetland constructed in uplands for stormwater management purposes, under general permit 1;

2. Repair of a malfunctioning individual subsurface sewage disposal system under general permit 24, or general permit-by-certification 24; or

3. Minor channel or stream cleaning activities under general permit 25.

(g) Within 30 days after a notice of an application for an individual permit or transition area waiver is published in the DEP Bulletin, interested persons may request in writing that the Department hold a fact-finding meeting on the application. Requests shall state the nature of the issues proposed to be raised at the meeting.

1. The Department may issue or deny an individual permit or transition area waiver without a fact-finding meeting. However, the Department shall hold a fact-finding meeting if the Department determines that:

i. There is a significant degree of public interest in the application, as manifested by written requests for a meeting within the 30-day meeting request period set forth in (g)

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above. In considering the degree of public interest, the Department will consider whether the issues raised in the meeting requests are relevant to the application;

ii. A fact-finding meeting is requested by the USEPA; or

iii. The Department determines that based on public comment received and/or a review of the scope and/or environmental impact of the proposed project, additional information is necessary to assist the Department in its evaluation of the potential impacts, and that this information can only be obtained through a fact-finding meeting.

7:7A-[12.1]19.2 Completeness review

(a) Except for the applications identified at (a)1, 2, and 3 below, the completeness review process for all applications for a letter of interpretation, applications for authorization under a general permit, applications for a transition area waiver, applications for an individual permit, and applications for a water quality certificate, is set forth at (b) through (g) below.

1. For an application for authorization under general permit 1 for ongoing maintenance of an off-stream stormwater management facility created in uplands, including a wetland constructed in uplands for stormwater management purposes under N.J.A.C. 7:7A-7.1, the completeness review process is set forth at N.J.A.C. 7:7A-19.3;

2. For an application for authorization under general permit 24 for repair of a malfunctioning individual subsurface sewage disposal system under N.J.A.C. 7:7A-7.24, the completeness review process is set forth at N.J.A.C. 7:7A-19.3; and

3. For an application for an authorization under general permit 25 for minor channel

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or stream cleaning for local government agencies at N.J.A.C. 7:7A-7.25, the completeness review process is set forth at N.J.A.C. 7:7A-19.4.

[(a)] **(b)** Within 20 working days[, as defined at N.J.A.C. 7:7A-1.4,] after receiving an application, **where day one of the 20-working day period is the date the application is received**, the Department shall [review the application as follows] **take one of the following actions:**

[1. If all items required by the application checklist are included, the Department shall declare the application administratively complete. However, if an included item is clearly deficient, the item shall not be considered to be included and the Department shall declare the application administratively incomplete; and

2. If each application item is adequate to allow the Department to determine if the proposed project complies with this chapter, the Department shall declare the application technically complete.

(b) If the application is not administratively complete under (a)1 above, the Department shall return the application to the applicant with a list of the missing items. The applicant may resubmit the application at any time. If the application is resubmitted within one year, the original application fee shall be credited to the fee for the resubmitted application. If the application is not resubmitted, the applicant may obtain a fee refund upon request.

(c) If the application is administratively complete under (a)1 above, the Department shall:

1. Notify the applicant that the application is administratively complete;
2. Transmit a copy of the application to other agencies if required under this chapter. For example, an application for an individual permit for a major discharge must be transmitted to

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EPA for comment under N.J.A.C. 7:7A-12.2;

3. Publish notice of the application in the DEP Bulletin; and

4. If the application is not technically complete under (a)2 above, request any additional information necessary for technical completeness.

(d) If the Department requests additional information under (c)4 above, the applicant shall provide copies of the additional information to the persons who received a copy of the initial application under N.J.A.C. 7:7A-10.8, and to the reviewing agencies who received a copy under (c)2 above.

(e) If an application is returned for incompleteness under (b) above, the applicant may submit a new application without repeating the public notice requirements of N.J.A.C. 7:7A-10.8 if the new application:

1. Is submitted within 60 days after the date the Department returned the original submittal; and

2. Is sufficiently similar to the original submittal that the original public notice would provide reasonable notice of the characteristics of the new submittal to potential interested parties.

(f) If a person submits an application and does not receive a response from the Department within the deadlines imposed in this subchapter, the person shall not be entitled to assume that the application is approved, except if the application is for authorization of the following activities and complies with the applicable general permit:

1. Maintenance of a stormwater management facility under general permit 1;

2. Repair of a malfunctioning individual subsurface sewage disposal system under general permit 25; or

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3. Minor channel or stream cleaning activities under general permit 26.]

1. Determine the application is both administratively and technically complete, issue notification to the applicant in writing that the application is complete for review, effective as of the date the Department received the application, and transmit a copy of the application to other agencies if required under this chapter. For example, an application for an individual permit for a major discharge must be transmitted to the USEPA for comment under N.J.A.C. 7:7A-19.5;

2. Determine the application is administratively complete but technically incomplete and issue notification to the applicant in writing that the application is technically incomplete. This notification shall specify the additional information required and the deadline by which the information must be submitted; or

3. Determine the application is administratively incomplete and return the application.

(c) Within 15 calendar days after receiving the additional information submitted pursuant to (b)2 above for a technically incomplete application, the Department shall take one of the following actions:

1. Determine the application is technically complete and issue notification to the applicant in writing that the application is complete for review, effective as of the date the Department received the additional information, and transmit a copy of the application to other agencies if required under this chapter; or

2. Determine the additional information is not sufficient and issue notification to the applicant in writing that the application remains technically incomplete. The notification shall specify the additional information required and the deadline by which the additional

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information must be submitted. If the applicant submits all of the information requested pursuant to this notification, the Department shall declare the application complete for review, effective as of the date the Department received the additional information.

(d) The applicant shall send the additional information submitted to the Department pursuant to (b)2 and (c)2 above to the municipal clerk of each municipality in which the project is located and shall provide notice explaining that additional information has been submitted to the Department to any person listed at N.J.A.C. 7:7A-17.3 whom the Department determines would likely be affected by the additional information. The applicant shall provide documentation in accordance with N.J.A.C. 7:7A-17.5 that the additional information and notice were provided.

(e) An applicant shall submit all additional information pursuant to (b)2 or (c)2 above within 90 calendar days after the date of the Department request, unless the Department specifies a different deadline in the request. If the applicant does not submit the additional information by the deadline, the Department shall, in accordance with N.J.A.C. 7:7A-19.8, cancel the application or, if the applicant demonstrates good cause for the delay in providing the requested information, extend the time to submit the information.

(f) If the Department does not take one of the actions in (b) above within 20 working days after receiving an application, the application shall be declared complete for review, effective as of the date the application was received by the Department.

(g) If the Department does not take one of the actions in (c) above within 15 calendar days after receiving additional information submitted for a technically incomplete

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application, the application shall be declared complete for review, effective as of the date the additional information was received by the Department.

7:7A-19.3 Department review and decision on an application for authorization for maintenance of a stormwater management facility, including a wetland constructed in uplands for stormwater management purposes, under general permit 1 and repair of a malfunctioning individual subsurface sewage disposal system under general permit 24

(a) Within 20 working days after receiving an application for authorization under general permit 1 for maintenance of a stormwater management facility, including a wetland constructed in uplands for stormwater management purposes, or an application for authorization under a general permit 24 for repair of a malfunctioning individual subsurface sewage disposal system, where day one of the 20-working day period is the date the application is received, the Department shall take one of the following actions:

1. Determine the application is administratively and technically complete and declare the application complete for review effective as of the date the Department received the application; or

2. Determine the application is not administratively and technically complete and notify the applicant that the application is incomplete. If the Department so notifies the applicant, the time period in (b) below shall not begin to run. If the Department does not so notify the applicant, the application shall be deemed administratively complete.

(b) If the application is administratively complete, the Department shall have 30 days after receipt of the complete application to notify the applicant that the activities are not

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authorized under general permit 1 or general permit 24, or that the activities may be authorized but require a full application review under N.J.A.C. 7:7A-19.2. If the Department does not so notify the applicant, the application for authorization under general permit 1 or general permit 24 shall be deemed approved, subject to conditions applicable to all general permits in accordance with N.J.A.C. 7:7A-5.7 and the conditions applicable to all permits at N.J.A.C. 7:7A-20.3.

(c) The Department shall provide notice of the decision on an application for authorization under a general permit 1 and general permit 24 in the DEP Bulletin and to any person who specifically requested notice of the decision on a particular application.

7:7A-19.4 Department review and decision on an application for authorization under general permit 25 for minor channel or stream cleaning for local government agencies

(a) Within 15 calendar days after receiving an application for authorization under a general permit 25 for activities that do not include the removal of sediment, or within 60 calendar days after receiving an application for activities that include the removal of sediment, where day one of the 15- or 60-calendar-day period is the date the application is received, the Department shall take one of the following actions:

1. Determine the application is both administratively and technically complete, and declare the application complete for review effective as of the date the Department received the application, and approve or deny the application in accordance with the following:

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i. Determine that the application meets the requirements of this chapter and issue an authorization approving the application in writing. The authorization shall include any conditions necessary to ensure compliance with this chapter; or

ii. Determine that the application does not meet the requirements of this chapter and deny the application in writing. The decision denying the application shall include the reasons for the denial;

2. Determine the application is administratively complete but technically incomplete and notify the applicant that the application is technically incomplete. This notification shall specify the additional information required and the deadline by which the information must be submitted; or

3. Determine the application is administratively incomplete and return the application.

(b) If the Department does not make a decision to approve or deny an application for an authorization under a general permit 25 by the applicable deadline set forth in (a) above, the applicant is authorized to commence stream cleaning activities to the extent that the project does not violate other laws then in effect.

1. An authorization issued under this subsection shall include the standard conditions set forth in N.J.A.C. 7:7A-20.2.

2. An authorization issued under this subsection shall not prevent the Department from taking enforcement action pursuant to N.J.A.C. 7:7A-22 for any activity undertaken in violation of this chapter.

(c) The Department shall provide notice of the decision on an application for authorization under general permit 25 in the DEP Bulletin and to any person who

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specifically requested notice of the decision on a particular application.

7:7A-[12.2]**19.5** USEPA review

(a) (No change.)

(b) The Department shall transmit the following items to **the** USEPA for review:

1. (No change.)

2. Each application involving a major discharge[, as defined at N.J.A.C. 7:7A-1.4];

3. – 6. (No change.)

(c) (No change.)

(d) If **the** USEPA intends to comment upon, object to, or make recommendations with respect to an item, or with respect to the Department's failure to accept the recommendations of an affected state pursuant to N.J.A.C. 7:7A-[12.3(d)] **19.6(e)**, **the** USEPA may notify the Department of this intent within 30 days of receipt of the permit application or other item. If the Department has been so notified, the permit or other item shall not be issued until after the receipt of such comments or within 90 days of the USEPA's receipt of the application or other item, or the Department response, whichever comes first. The USEPA may notify the Department within 30 days of receipt that there is no comment but that **the** USEPA reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a [hearing] **fact-finding meeting**.

(e) – (k) (No change.)

(l) The Department shall identify all wetland permit applications for proposed projects that may affect properties which are listed, or are eligible for listing, on the New Jersey or National

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Register of Historic Places. In accordance with N.J.A.C. 7:4-8.1(a), an “effect” on “property which is listed or is eligible for listing on the New Jersey or National Register of Historic Places” can be direct or indirect and occurs whenever any aspect of the project causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archaeological, or cultural characteristics that qualified a historic property to meet the criteria of evaluation for inclusion in the New Jersey or National Register. Applications reflecting any of the following characteristics shall be deemed to present a high probability of the presence of historic and archaeological resources, requiring assessment and shall require, with the wetlands permit application, the submittal of a Phase IA historical and archaeological survey, and an architectural survey[, defined at N.J.A.C. 7:7A-1.4]:

1. – 5. (No change.)

(m) – (p) (No change.)

7:7A-[12.3]19.6 Public comment on an application

(a) The Department shall publish notice in the DEP Bulletin of each administratively complete application in accordance with N.J.A.C. 7:7A-[12.1]19.1, except for an application for **an administrative modification or** a minor **technical** modification. The DEP Bulletin is available at [www.state.nj.us/dep/bulletin/] www.nj.gov/dep/bulletin/. This notice shall constitute notice of the application to all interested persons except those who must be notified by the applicant under N.J.A.C. 7:7A-[10.8]17.3.

(b) The Department shall make copies of all applications available for public inspection by appointment in the offices of the Department in Trenton (see N.J.A.C. 7:7A-[1.3]1.4 for address)

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during normal business hours.

(c) The applicant shall transmit a copy of each application to the clerk of the municipality in which the project is located in accordance with N.J.A.C. 7:7A-[10.8]**17.3**, to be made available for public inspection.

(d) (No change.)

(e) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any state(s) other than New Jersey, the Department shall provide an opportunity for such state(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted, the Department shall notify the affected state and the USEPA in writing, prior to permit issuance, of the Department's intent not to accept these recommendations, together with the reasons for so doing. The [EPA] **USEPA** shall then have the same amount of time provided for applications and draft general permits in N.J.A.C. 7:7A-[12.2] **19.5** to comment upon, object to, or make recommendations regarding the Department's action.

7:7A-[12.5] **19.7** [Final decisions] **Department decision on an application that is complete for review**

[(a) The Department shall issue or deny a permit or waiver within 180 days of submittal of a complete application, provided the Department has satisfied all of the requirements in N.J.A.C. 7:7A-12.2.]

(a) The Department shall issue an LOI within the applicable time period below:

1. If the Department does not request additional information regarding an LOI

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application under N.J.A.C. 7:7A-19.2(b)1, within 30 days after receiving the application;

2. If the Department requests additional information regarding an LOI application under N.J.A.C. 7:7A-19.2(b)2, within 45 days after receipt of information sufficient to declare the application complete;

3. If the applicant chooses to wait for a determination of resource value classification under N.J.A.C. 7:7A-3.2, as soon as the Department determines that the resource classification of the wetlands can be definitively determined; and

4. If the Department conducts a site inspection, the time set forth in this subsection for issuance of the letter of interpretation shall be extended by 45 days.

(b) Within 90 calendar days after an application for an authorization under a general permit, application for transition area waiver, or application for an individual permit is declared complete for review in accordance with N.J.A.C. 7:7A-19.2, the Department shall:

1. Determine that the application meets the requirements of this chapter and issue an authorization, waiver, or individual permit approving the application in writing. The authorization, waiver, or individual permit shall include any conditions necessary to ensure compliance with this chapter; or

2. Determine that the application does not meet the requirements of this chapter and deny the application in writing. The decision denying the application shall include the reasons for the denial.

(c) The 90-calendar day deadline set forth in (b) above may be extended for 30 calendar days by mutual agreement between the applicant and the Department. An applicant consenting to an extension shall do so in writing. The deadline shall not be

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extended by less than or greater than 30 calendar days.

(d) If the Department does not make a decision to approve or deny an application for an authorization of a general permit, an individual permit, a transition area waiver, or a water quality certificate by the applicable time period set forth in (b) above, the person shall not be entitled to assume that the application is approved.

(e) The review time set forth in (b) above does not apply to applications that require USEPA review in accordance with N.J.A.C. 7:7A-19.5.

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

[(c) The Department may issue a permit imposing conditions necessary for compliance with the Freshwater Wetlands Protection Act, this chapter, the Federal Act and the New Jersey Water Pollution Control Act. Any regulated activities undertaken under the authority of any issued permit, waiver, or general permit authorization shall constitute an acceptance by the applicant of the entire permit including all conditions therein.]

[(d)] (g) Decisions by the Department shall be published in the DEP Bulletin and a copy of every issued individual permit which requires USEPA review under N.J.A.C. 7:7A-[12.2]**19.5** shall be transmitted to USEPA.

[(e) The permit application review process may be extended by mutual agreement between the applicant and the Department.]

7:7A-19.8 Cancellation of an application

(a) The Department shall cancel an application for any of the following reasons:

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1. An applicant does not submit additional information within the time frame prescribed by the Department under this subchapter for an application that has been determined to be technically incomplete;

2. The applicant does not submit a fee required under N.J.A.C. 7:7A-18, or the Department cannot collect the fee for any reason (for example, if a check is returned for insufficient funds); or

3. The applicant does not comply with the applicable public notice requirements at N.J.A.C. 7:7A-17.

(b) To cancel an application, the Department shall:

1. Send the applicant a written notice of its intent to cancel the application and notifying the applicant that the fee and/or additional information identified pursuant to (a) above must be provided to the Department within 15 calendar days.

2. If, by the 15-calendar-day deadline, the applicant submits a written statement providing good cause for the delay in providing the fee and/or additional information, the Department shall extend the time required for submittal.

3. If the applicant does not submit the fee and/or additional information, or a statement of good cause for delay under (b)2 above, the Department shall cancel the application and send the applicant a written notice of the cancellation.

7:7A-19.9 Withdrawal of an application

An applicant may withdraw an application in writing at any time during the Department's review of the application. The Department shall promptly acknowledge the

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withdrawal in writing.

7:7A-19.10 Re-submittal of an application after denial, cancellation, or withdrawal

If an application for a letter of interpretation, an application for an authorization under a general permit, an application for a transition area waiver, an application for an individual permit, or an application for a water quality certificate is denied or cancelled by the Department, or is withdrawn by the applicant, the applicant may re-submit the application in accordance with N.J.A.C. 7:7A-16. The Department shall treat a re-submitted application as a new application and shall review it in accordance with this subchapter.

7:7A-19.11 Fee refund or credit when an application is returned, withdrawn, or cancelled

(a) Except as provided in (b) below, the Department shall, upon written request of an applicant, fully refund the submitted application fee in the following circumstances:

- 1. The application is returned because it is not administratively complete;**
- 2. The application is withdrawn within 60 calendar days of its submittal to the Department and is not technically complete; or**
- 3. The application is withdrawn within 20 working days of its submittal to the Department, whether or not the application is administratively or technically complete.**

(b) The Department shall not refund a fee for an application that has been approved or denied or a fee that has been previously credited under (c) below.

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(c) If an application is withdrawn by the applicant under circumstances other than those identified at (a)2 and 3 above, or is cancelled under N.J.A.C. 7:7A-19.8, any application fee that was paid to the Department shall be credited toward the application fee for one new application, provided the new application is submitted:

- 1. Within one year of cancellation or withdrawal;**
- 2. By the same applicant;**
- 3. For the same site; and**
- 4. For the same project.**

SUBCHAPTER 20. PERMIT AND WAIVER CONDITIONS; MODIFICATION, TRANSFER, SUSPENSION, AND TERMINATION OF AUTHORIZATIONS AND PERMITS

7:7A-20.1 Purpose and scope

(a) This subchapter sets forth the conditions that apply to all permits.

(b) This subchapter sets forth the procedures for:

1. Extending the term of: a transition area waiver, the duration of which is governed by N.J.A.C. 7:7A-8.5; an authorization under a general permit, the duration of which is governed by N.J.A.C. 7:7A-5.6; or an individual permit, the duration of which is governed by N.J.A.C. 7:7A-9.2;

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2. Transferring an emergency authorization, a transition area waiver, an authorization under a general permit, or an individual permit to a new owner of the site where the regulated activity or project authorized under the authorization or permit is taking place;

3. Modifying a transition area waiver, an authorization under a general permit, or an individual permit;

4. Suspending a transition area waiver, an authorization under a general permit, an individual permit, or an emergency authorization; and

5. Terminating a transition area waiver, an authorization under a general permit, an individual permit, or an emergency authorization.

7:7A-[13.1]20.2 [Standard conditions] **Conditions** that apply to all permits

(a) The Department places conditions on a permit to ensure that the approved project complies with this chapter. The conditions that apply to all permits are set forth in (c) below.

(b) If a permittee undertakes any regulated activity authorized under a permit, such action shall constitute the permittee's acceptance of the permit in its entirety, as well as the permittee's agreement to abide by the permit and all conditions therein.

[(a)] (c) The following conditions apply to all permits [issued under this chapter], including all waivers and general permit authorizations:

[1. Duty to comply: The permittee shall comply with all conditions of the permit. Any noncompliance with a permit, including a waiver or general permit authorization, constitutes a violation of the Freshwater Wetlands Protection Act and this chapter, and is grounds for

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enforcement action, for termination, termination and reissuance, or modification, or for denial of an extension. In some cases, noncompliance with a permit or general permit authorization, may also constitute a violation of the Water Pollution Control Act and/or the Federal Act;

2. Duty to reapply: If the permittee wishes to continue an activity covered by the permit after the expiration date of the permit, the permittee must apply for and obtain a permit extension or a new permit, prior to the permit's expiration;

3. Duty to halt or reduce activity: It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit;

4. Duty to minimize environmental impacts: The permittee shall take all reasonable steps to prevent, minimize or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit. Mitigation consistent with N.J.A.C. 7:7A-15 will also be required for freshwater wetlands permits, open water fill permits and some general permits;

5. Proper operation and maintenance: The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used to achieve compliance with the permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the permit. This provision requires the proper execution of any approved mitigation proposal designed to mitigate losses caused by the

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permitted activity. The permittee shall maintain the authorized work areas in good condition and in accordance with the permit;

6. Permit actions: The permit may be modified, suspended, or terminated for cause. The filing of a request by the permittee for a modification, or a notification of planned changes or anticipated noncompliance does not stay any condition of a permit, including a waiver or general permit authorization;

7. Property rights: The permit does not convey any property rights of any sort, or any exclusive privilege;

8. Duty to provide information: The permittee shall furnish to the Department within a reasonable time, any information which the Department requests to determine whether cause exists for modifying, terminating and reissuing, or terminating the permit, or to determine compliance with the permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by the permit or waiver;

9. Inspection and entry: The permittee shall allow the Department, or an authorized representative, upon the presentation of credentials, to:

i. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the permit;

ii. Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

iii. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit; and

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iv. Sample or monitor at reasonable times, for the purposes of assuring compliance or as otherwise authorized by the Federal Act, by the Freshwater Wetlands Protection Act, or by any rule or order issued pursuant thereto, any substances or parameters at any location;

10. Monitoring and records requirements are as follows:

i. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity;

ii. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by the Department at any time;

iii. Records of monitoring information shall include:

(1) The date, exact place, and time of sampling or measurements;

(2) The individual(s) who performed the sampling or measurements;

(3) The date(s) analyses were performed;

(4) The individual(s) who performed the analyses;

(5) The analytical techniques or methods used; and

(6) The results of such analyses;

11. Signatory requirement: All applications, reports, or information submitted to the Department shall be signed and certified as required in N.J.A.C. 7:7A-10.9;

12. Reporting requirements are as follows:

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i. Planned changes: The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted project or activity;

ii. Anticipated noncompliance: The permittee shall give advance notice to the Department of any planned changes in the permitted project or activity which may result in noncompliance with permit requirements;

iii. Transfers: The permit is not transferable to any person except after notice to the Department. The Department may require modification or termination and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary to comply with N.J.A.C. 7:7A-14.3. In some cases, modification or termination and reissuance is mandatory;

iv. Monitoring reports: Monitoring results shall be reported at the intervals specified elsewhere in the permit;

v. Twelve hour reporting: The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 12 hours from the time the permittee becomes aware of the potentially dangerous circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and, if the noncompliance has not been corrected, the anticipated length of time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance;

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vi. Other noncompliance: The permittee shall report all instances of noncompliance not reported pursuant to (a)12i, iv and v above, at the time monitoring reports are submitted. The reports shall contain the information listed in (a)12v above; and

vii. Other information: Where the permittee becomes aware that it failed to submit any relevant facts in an application, or submitted incorrect information in an application or in any report to the Department, it shall promptly submit such facts or information;

13. Duty to mitigate: The permittee shall perform any mitigation required under the permit prior to or concurrently with regulated activities in accordance with N.J.A.C. 7:7A-15.3(a). If a permittee performs permitted activities without performing required mitigation, the acreage of mitigation required shall be increased by 20 percent each year in accordance with N.J.A.C. 7:7A-15.3(b); and

14. Construction notification: The permittee shall submit written notification to the Bureau of Coastal and Land Use Compliance and Enforcement, NJDEP, P.O. Box 422, 401 East State Street, Trenton, NJ 08625-0422, seven days prior to the commencement of site preparation or of regulated activities, whichever comes first. The notification shall contain proof of recording of a conservation restriction or easement, if one was required as part of the permit.

(b) The permittee need not comply with the conditions of a permit, including a waiver or general permit authorization, to the extent and for the duration that such noncompliance is authorized in an emergency permit approved by the Department under N.J.A.C. 7:7A-8.

(c) If a permit, including a transition area waiver or general permit authorization, is issued, regulated activities are not authorized under the permit, and construction shall not be started, until the Department receives a written acceptance of the all terms and conditions of the permit

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from the permittee. A permit acceptance form is available from the Department as part of each application checklist. If a permittee begins regulated activities prior to submittal of the written permit acceptance, the permittee shall be deemed to have accepted all terms and conditions of the permit as of the date the activities were begun.

(d) A copy of the permit, including an authorization or transition area waiver, shall be kept on the site and shall be available for public inspection. All projects authorized by an individual or general permit or transition area waiver shall be posted with a sign, prominently displayed at the main entrance to the property or work site, at all times from commencement to completion of the permitted activity. The sign shall contain at least the following information:

1. The work which is authorized by the Department;
2. The type of permit that authorized the work, and the Department's file number;
3. A Department phone number for verification; and
4. The location on the site at which the permit and plans may be inspected.

(e) A permit, including a waiver or general permit authorization, runs with the land and is binding upon the permittee and the permittee's successors in interest in the land or in any part thereof.

(f) A permit, including a waiver and/or a general permit authorization, issued under this chapter does not relieve a permittee from the obligation to obtain any other permits or approvals required by law.]

1. The issuance of a permit shall in no way expose the State of New Jersey or the Department to liability for the sufficiency or correctness of the design of any construction or structure(s). Neither the State nor the Department shall, in any way, be liable for any

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loss of life or property that may occur by virtue of the activity or project conducted as authorized under a permit;

2. The issuance of a permit does not convey any property rights or any exclusive privilege;

3. The permittee shall obtain all applicable Federal, State, and local approvals prior to commencement of regulated activities authorized under a permit;

4. A permittee conducting an activity involving soil disturbance, the creation of drainage structures, or changes in natural contours shall obtain any required approvals from the Soil Conservation District having jurisdiction over the site;

5. The permittee shall take all reasonable steps to prevent, minimize, or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit;

6. The permittee shall immediately inform the Department of any unanticipated adverse effects on the environment not described in the application or in the conditions of the permit. The Department may, upon discovery of such unanticipated adverse effects, and upon the failure of the permittee to submit a report thereon, notify the permittee of its intent to suspend the permit, pursuant to N.J.A.C. 7:7A-20.8;

7. The permittee shall immediately inform the Department by telephone at (877) 927-6337 (WARN DEP hotline) of any noncompliance that may endanger public health, safety, and welfare, or the environment. The permittee shall inform the Division of Land Use Regulation by telephone at (609) 292-0060 of any other noncompliance within two working days of the time the permittee becomes aware of the noncompliance, and in writing within

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five working days of the time the permittee becomes aware of the noncompliance. Such notice shall not, however, serve as a defense to enforcement action if the project is found to be in violation of this chapter. The written notice shall include:

- i. A description of the noncompliance and its cause;**
 - ii. The period of noncompliance, including exact dates and times;**
 - iii. If the noncompliance has not been corrected, the anticipated length of time it is expected to continue; and**
 - iv. The steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance;**
- 8. Any noncompliance with a permit constitutes a violation of this chapter and is grounds for enforcement action under N.J.A.C. 7:7A-22, as well as, in the appropriate case, suspension and/or termination of the permit;**
- 9. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the authorized activity in order to maintain compliance with the conditions of the permit;**
- 10. The permittee shall employ appropriate measures to minimize noise where necessary during construction, as specified in N.J.S.A. 13:1G-1 et seq., and N.J.A.C. 7:29;**
- 11. The issuance of a permit does not relinquish the State's tidelands ownership or claim to any portion of the subject property or adjacent properties;**
- 12. The issuance of a permit does not relinquish public rights to access and use tidal waterways and their shores;**

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13. The permittee shall allow an authorized representative of the Department, upon the presentation of credentials, to:

i. Enter upon the permittee's premises where a regulated activity is located or conducted, or where records must be kept under the conditions of the permit;

ii. Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

iii. Inspect, at reasonable times, any facilities, equipment, practices, or operations regulated or required under the permit. Failure to allow reasonable access under this paragraph shall be considered a violation of this chapter and subject the permittee to enforcement action under N.J.A.C. 7:7A-22; and

iv. Sample or monitor at reasonable times, for the purposes of assuring compliance or as otherwise authorized by the Federal Act, by the Freshwater Wetlands Protection Act, or by any rule or order issued pursuant thereto, any substances or parameters at any location;

14. The permittee shall not cause or allow any unreasonable interference with the free flow of a regulated water by placing or dumping any materials, equipment, debris or structures within or adjacent to the channel while the regulated activity(ies) is being undertaken. Upon completion of the regulated activity(ies), the permittee shall remove and dispose of in a lawful manner all excess materials, debris, equipment, and silt fences and other temporary soil erosion and sediment control devices from all regulated areas;

15. The permittee and its contractors and subcontractors shall comply with all conditions, site plans, and supporting documents approved by the permit;

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16. All conditions, site plans, and supporting documents approved by a permit shall remain in full force and effect, so long as the regulated activity or project, or any portion thereof, is in existence, unless the permit is modified pursuant to N.J.A.C. 7:7A-20.6;

17. The permittee shall record the permit, including all conditions listed therein, with the Office of the County Clerk (the Registrar of Deeds and Mortgages, if applicable) of each county in which the site is located. The permit shall be recorded within 30 calendar days of receipt by the permittee, unless the permit authorizes activities within two or more counties, in which case the permit shall be recorded within 90 calendar days of receipt. Upon completion of all recording, a copy of the recorded permit shall be forwarded to the Division of Land Use Regulation at the address set forth at N.J.A.C. 7:7A-1.4;

18. The permittee shall perform any mitigation required under the permit in accordance with N.J.A.C. 7:7A-11;

19. If any condition or permit is determined to be legally unenforceable, modifications and additional conditions may be imposed by the Department as necessary to protect public health, safety, and welfare, or the environment;

20. Any permit condition that does not establish a specific timeframe within which the condition must be satisfied (for example, prior to commencement of construction) shall be satisfied within six months of the effective date of the permit;

21. A copy of the permit and all approved site plans and supporting documents shall be maintained at the site at all times and made available to Department representatives or their designated agents immediately upon request;

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22. The permittee shall provide monitoring results to the Department at the intervals specified in the permit;

23. A permit shall be transferred to another person only in accordance with N.J.A.C. 7:7A-20.5;

24. A permit can be modified, suspended, or terminated by the Department for cause;

25. The submittal of a request to modify a permit by the permittee, or a notification of planned changes or anticipated noncompliance, does not stay any condition of a permit;

26. Where the permittee becomes aware that it failed to submit any relevant facts in an application, or submitted incorrect information in an application or in any report to the Department, it shall promptly submit such facts or information; and

27. The permittee shall submit written notification to the Bureau of Coastal and Land Use Compliance and Enforcement, 401 East State Street, 4th Floor, PO Box 420, Mail Code 401-04C, Trenton, NJ 08625, at least three working days prior to the commencement of regulated activities.

7:7A-[13.2]**20.3** Establishing permit conditions

(a) In addition to the standard conditions required in all permits under N.J.A.C. 7:7A-[13.1]**20.2**, the Department shall establish conditions in a permit, including a waiver or general permit authorization, as required on a case-by-case basis, to assure compliance with all applicable requirements of the Federal Act, the Freshwater Wetlands Protection Act, the Water Pollution Control Act, this chapter and other applicable rules or regulations. For the purposes of

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this subsection, an applicable requirement is a statutory or regulatory requirement which takes effect before the Department's final administrative decision on a permit, or before the modification or termination and reissuance of a permit.

(b) In addition to the standard requirements in N.J.A.C. 7:7A-[13.1]**20.2**, each permit shall include information meeting the following requirements, when applicable:

1. A specific identification and description of the authorized activity, including:

i.– iv. (No change.)

v. The location and boundaries of the activity site(s), including a detailed sketch and the name and description of affected freshwater wetlands, State open waters, and transition areas, identification of the HUC 11[, as defined at N.J.A.C. 7:7A-1.4] **and watershed management area**; and

vi. (No change.)

2. Provisions ensuring that the regulated activity will be conducted in compliance with the **findings and/or** environmental guidelines issued under section 404(b)(1) of the Federal Act [(] **at 40 [C.F.R.] CFR Part 230[)]**, the Freshwater Wetlands Protection Act, and this chapter, including conditions to ensure that the regulated activity shall be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States **and/or waters of the State**, such as requirements for restoration or mitigation;

3. Any requirements necessary to comply with water quality standards established under applicable Federal or State law. If an applicable water quality standard is promulgated or modified after the permit or waiver is issued, the permit or waiver shall be modified as provided in N.J.A.C. 7:7A-[14]**20.6**.

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4. Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of the Federal Act or applicable State or local law. If an applicable toxic effluent standard or prohibition is promulgated or modified after the permit or waiver is issued, the permit or waiver shall be modified as provided in N.J.A.C. 7:7A-[14]20.6;

5. Applicable best management practices (BMPs) [as defined at N.J.A.C. 7:7A-1.4];

6. Any conditions necessary for general permits as required under N.J.A.C. 7:7A-[4 or] 5 or 7;

7. – 8. (No change.)

(c) – (d) (No change.)

7:7A-[14.6]20.4 [Permit extensions] **Extension of an authorization under a general permit, a transition area waiver, and an individual permit**

[(a) This section governs the extension of a permit, including a waiver or a general permit authorization. This section does not apply to LOIs or exemption letters. Provisions governing the duration and extension of LOIs are found at N.J.A.C. 7:7A-3.6. Provisions governing the duration of exemption letters are found at N.J.A.C. 7:7A-2.10.]

(a) A person may request one five-year extension of an authorization under a general permit, the duration of which is governed by N.J.A.C. 7:7A-5.6, an individual permit, the duration of which is governed by N.J.A.C. 7:7A-9.2, and a transition area waiver, the duration of which is governed by N.J.A.C. 7:7A-8.5.

(b) The Department shall issue [one five-year] **an** extension [of a permit] only if:

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1. [The permittee applies] **A person submits a request** for [the] extension [at least 90 days] **that meets the requirements of (c) below and that is received by the Department** prior to the expiration of an **authorization**, individual permit, or [individual] transition area waiver[, and at least 30 days prior to the expiration of a general permit authorization]. **The Department shall not accept a request for extension received more than one year prior to the expiration of an authorization, transition area waiver, or individual permit;** [and]

2. The [permittee] **person requesting the extension** demonstrates that there has been no significant change in [any of the following between the date the permit was issued and the date the application for extension is submitted:] **the overall condition of the site;**

[i. The project and activities that were approved in the original permit;]

3. The person requesting the extension demonstrates that regulated activities approved under any authorization, waiver, or individual permit for which an extension is sought have not been revised or amended, unless the permittee has obtained a modification of the authorization, waiver, or individual permit under N.J.A.C. 7:7A-20.6; and

[ii.] **4. [The] For an individual permit, the person requesting the extension demonstrates that the rules in this chapter governing the [site] regulated activities authorized under the permit for which an extension is sought have not been amended such that the activities do not meet the rules as amended. In this instance, the individual permit shall expire on the date set forth therein, and the permittee shall comply with the requirements of N.J.A.C. 7:7A-9.2[; and].**

[iii. The conditions on the site, including the wetlands boundary and resource classification.

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(c) The Department shall deny a permit extension if the permittee has violated the terms of the original permit, or if any of the other causes for termination at N.J.A.C. 7:7A-14.5 exist.

(d) If the requirements in this section for an extension are not met, the permit shall expire and regulated activities shall stop until a new permit is obtained.]

[(e)] (c) [An application] **A request for an extension of a transition area waiver, an authorization under a general permit, or an individual permit** shall [meet the application requirements at N.J.A.C. 7:7A-10, including the public notice requirements at N.J.A.C. 7:7A-10.8.] **include:**

- 1. A completed application form as described at N.J.A.C. 7:7A-16.7(a)1 and available from the Department at the address set forth at N.J.A.C. 7:7A-1.4;**
- 2. The appropriate application fee as set forth at N.J.A.C. 7:7A-18; and**
- 3. A narrative demonstrating that the requirements of (b) above are met.**

(d) **Within 15 calendar days after receiving a request for an extension of an authorization under a general permit or within 30 calendar days after a request for an extension of a waiver or individual permit, the Department shall take one of the actions identified in (d)1 or 2 below. During the Department's review of the extension request, regulated activities subject to the authorization or individual permit may continue.**

- 1. The Department shall determine that the request meets the requirements of this section and issue an extension in accordance with (g) below; or**
- 2. The Department shall determine that the request meets the criteria for denial at (e) below and deny the extension request.**

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(e) The Department shall deny a request for an extension for any of the following reasons:

1. The waiver, authorization, or individual permit for which the extension is sought is not one specified in (a) above;

2. The Department receives the request more than one year prior to the expiration date of the waiver, authorization, or individual permit for which the extension is sought;

3. The Department receives the request after the expiration date of the waiver, authorization, or individual permit for which the extension is sought;

4. The term of the waiver, authorization, or individual permit for which the extension is sought has been extended before;

5. The applicant does not demonstrate that all of the requirements at (b) above are met;

6. The request does not include all of the information required to be submitted under (c) above; or

7. The waiver, authorization, or individual permit for which the extension is sought has been terminated in accordance with N.J.A.C. 7:7A-20.9.

(f) If the Department denies a request for an extension under (e) above:

1. The waiver, authorization, or individual permit shall expire on its original expiration date or on the date of receipt of the denial by the permittee, whichever is later, unless already terminated in accordance with N.J.A.C. 7:7A-20.9; and

2. All regulated activities authorized under any authorization under a general permit, transition area waiver, or individual permit shall cease on the expiration date of the authorization, waiver, or individual permit specified in (f)1 above, and shall not commence

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again unless and until a new authorization, waiver, or individual permit is obtained in accordance with N.J.A.C. 7:7A-16.

(g) If the Department determines that the requirements of this section have been met, the Department shall issue an extension of the waiver, authorization under a general permit, or individual permit for one five-year period, beginning on the original expiration date of the waiver, authorization under a general permit, or individual permit. The extension shall be in writing, and shall include any conditions the Department determines are necessary to ensure the requirements of this chapter are met.

7:7A-20.5 Transfer of an emergency authorization, authorization under a general permit, a transition area waiver, or an individual permit

(a) If the site for which the Department has issued an emergency authorization, an authorization under a general permit, a transition area waiver, or an individual permit, is transferred to a new owner, the authorization, waiver, or individual permit, including all conditions, shall be automatically transferred to the new owner, provided the authorization, waiver, or individual permit is valid on the date that the site is transferred to the new owner.

(b) The authorization, waiver, or individual permit transferred under (a) above shall continue in effect provided that, within 30 calendar days after the transfer of ownership of the site, the new owner submits the following information to the Department:

- 1. The name, address, and contact information of the new owner; and**

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2. Documentation that the transfer will not alter any condition on which the original authorization, waiver, or individual permit was based and will not otherwise circumvent any requirement of this chapter.

7:7A-[14.3]20.6 Modification of an **authorization under a general permit, a transition area waiver, or an individual permit**

(a) [With the exception of a modification due to a change in ownership or operational control of a project, as described in (c)3 below, which is mandatory, a] **A transition area waiver that is valid in accordance with N.J.A.C. 7:7A-8.5, an authorization under a general permit that is valid in accordance with N.J.A.C. 7:7A-5.6, or an individual permit that is valid in accordance with N.J.A.C. 7:7A-9.2, may be modified in accordance with this section through an administrative modification, a minor technical modification, or a major technical modification. An authorization under a general permit-by-certification shall not be modified.** A modification of [a] **an authorization under a general permit**, [including] a transition area waiver, or [general permit authorization,] **an individual permit** may be requested by a permittee or, in the cases set forth at [(f)] **(h)** below, the Department may modify a permit on its own initiative.

[(b) A permittee shall apply for a change to an existing permit through one of the following:

1. A minor modification under (c) below. A minor modification may be made to any permit, including a transition area waiver or general permit authorization;

2. A major modification under (d) below. A major modification may only be made to an individual freshwater wetlands permit, open water fill permit, or transition area waiver; and

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3. A general permit authorization modification under (e) below.

(c) The following changes are minor modifications that may be made to any permit or in the case of a change in ownership or operational control shall be made to any permit, including a general permit authorization or transition area waiver:

1. Correction of a typographical error that does not materially affect the terms of the permit or waiver;

2. An increase in the frequency of monitoring or reporting by the permittee;

3. A change in ownership or operational control of a project, where no other change in the original permit or waiver is necessary. If any other change in the permit is necessary, the change shall be made through a major modification.

i. A permit may be transferred to another person, provided:

(1) The permit is valid;

(2) The permit is not an emergency permit;

(3) The permit is transferred to a person who currently owns the site, or who is under contract to purchase the site, on which activities authorized under the permit are to be conducted. A transfer of a permit to a contract purchaser shall become valid only upon the actual transfer of the site to the new owner;

(4) The Department determines that the transfer will not alter a basic condition upon which the original permit was granted or otherwise circumvent a requirement of this chapter as described in (c)3i(4) below;

(A) The Department shall not approve the transfer of a permit if doing so would alter a basic condition or premise upon which the original permit was granted or would otherwise circumvent

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a requirement of this chapter. For example, a permit issued to a public entity may be granted in consideration of the fact that the public entity has powers of eminent domain or is acting in the public interest. Since such factors would not exist if the applicant were a private party, the basic premise upon which the permit was approved may be invalid and therefore the Department would not approve the transfer. In another example, if an applicant receives a permit based upon the Department's finding of no alternative to the proposed activity, but the person to whom the permittee proposes to transfer the site has an alternative, the basic premise upon which the permit was approved no longer exists. In such cases, the Department would not approve the transfer of the permit to the new owner;

(5) The permittee to whom the permit was transferred notifies the Department before conducting site preparation or regulated activities, in accordance with N.J.A.C. 7:7A-13.1(a)14; and

(6) The original permittee, who wants to transfer the permit, provides to the Department proof of recording of any conservation restriction or easement that was a requirement of the permit being transferred; and

4. A change in materials, construction techniques, or the minor relocation of an activity on a site, if the change is required by another permitting agency. However, this change is not a minor modification if the change would result in additional wetland, State open water or transition area impacts over those of the original permit or waiver.

(d) Any change not listed at (c) above as a minor modification, if affecting a project covered by an individual freshwater wetlands permit, open water fill permit, or transition area waiver, shall constitute a major modification. To obtain approval for a major modification, an applicant

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shall meet the same substantive and procedural standards that would apply to an application for a new individual permit, except that the application need only address the portions of the permit affected by the proposed modification. Portions of the permit that are not affected by the proposed modification are not subject to public notice, public hearing, Department review, or other procedures that would apply to an application for a new individual permit.

(e) Any change not listed at (c) above as a minor modification, if affecting a project covered by a general permit authorization, shall meet the following requirements:

1. The changed project would continue to be authorized under the same general permit; and
2. The proposed change would not result in a significant change in the scale, use or environmental impact of the project as approved. A change that will result in a reduction in environmental impact shall not constitute a significant change. Examples of significant changes include, but are not limited to, increased clearing, grading, filling or impervious surfaces, a change in stormwater management technique, and movement of the project to a different wetland or location.]

(b) The term of a waiver, an authorization under a general permit, or an individual permit shall not be extended by a modification.

(c) An administrative modification of a waiver, an authorization under a general permit, or an individual permit applies to a change to a site plan or other document on which the original waiver, authorization under a general permit, or individual permit was based, but which does not alter the design or layout of the project or affect the wetland limits. An administrative modification may include:

- 1. Correcting a drafting or typographical error on a site plan or report;**

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2. Improving topographical or other data in order to make the waiver, authorization under a general permit, or individual permit more accurately reflect the site, the extent of regulated areas, and/or the permitted activities; or

3. Adding notes, labels, or other clarifying information to the approved site plan, if required to do so by the Department or another government entity.

(d) A minor technical modification of a waiver, an authorization under a general permit, or an individual permit applies to a change in the design or layout of a project, including any associated change to an approved site plan or other document, that the applicant demonstrates does not result in new or additional impacts to the wetland or transition area. A minor technical modification may include:

1. A change in materials or construction techniques;

2. A reduction in the amount of development on the site, such as deletion of a permitted structure or activity, or a reduction in the footprint of a regulated activity or project;

3. A change in the size, shape, or location of the regulated activities or project, provided the total area of disturbance does not increase.

(e) A major technical modification of a waiver, an authorization under a general permit, or an individual permit applies to any change in regulated activities or project authorized pursuant to the waiver, authorization, or individual permit, including any associated change to an approved site plan or other document, which is not addressed under (c) or (d) above and that does not require a new permit in accordance with (f) below.

(f) Notwithstanding any other provision in this section, the Department shall not issue a modification of a waiver, an authorization under a general permit, or an individual permit

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if the Department determines that the person requesting the modification proposes changes that will constitute a substantial redesign of the regulated activities or project or that will significantly increase the environmental impact of the regulated activities. In such a case, the applicant shall submit a new application for a waiver, an authorization, or an individual permit in accordance with N.J.A.C. 7:7A-16 and the Department shall review the application in accordance with N.J.A.C. 7:7A-19. Changes for which a new application shall be submitted include:

- 1. A change to the basic purpose or use of a regulated activity or project, such as a change from the construction of a hospital to the construction of an apartment complex;**
- 2. An expansion of a regulated activity or project beyond that which was described in the public notice of the application provided in accordance with N.J.A.C. 7:7A-17;**
- 3. A substantial redesign of the regulated activity or project such that the Department determines a new engineering analysis of the site and/or regulated activity or project is necessary;**
- 4. A significant change in the size or scale of the regulated activity or project, including the addition of structures;**
- 5. A significant change in the impact of the regulated activity or project on any wetland or transition area; or**
- 6. A change that would result in impacts to a site not owned or controlled by the permittee.**

(g) The modified transition area waiver, modified authorization under a general permit, or modified individual permit, including all conditions listed therein, shall be

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recorded within 30 calendar days of receipt by the person requesting such modification, with the Office of the County Clerk (the Registrar of Deeds and Mortgages, if applicable) of each county in which the site is located. Where the site subject to the modified waiver, modified authorization under a general permit, or modified individual permit is located within two or more counties, the modified waiver, authorization, or permit shall be recorded within 90 calendar days of receipt. Upon completion of all recording, a copy of the recorded modified verification, authorization, or permit shall be forwarded to the Division of Land Use Regulation at the address set forth at N.J.A.C. 7:7A-1.4.

[(f)] **(h)** The following are causes for which the Department may modify [a] **an authorization under a general** permit, [including] a transition area waiver, or [general permit authorization] **an individual permit**, on its own initiative:

1. – 3. (No change.)

4. Cause exists for the Department to terminate the permit under N.J.A.C. 7:7A-[14.5]**20.9**, but the Department determines that a modification will ensure that the project complies with this chapter;

5. (No change.)

6. The ownership or operational control of the site has been transferred to a person other than the permittee, the permitted activities are not completed, and the permittee has not applied for a [minor modification reflecting the] transfer as required under [(c) above] **N.J.A.C. 7:7A-20.5**.

[(g)] **(i)** If the Department intends to modify a permit, the Department shall notify the permittee in writing. The notice shall:

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1. – 2. (No change.)

3. Notify the permittee of the right to request a meeting with the Department[, or a public hearing,] within [ten] **10** days of the permittee's receipt of the notice.

(h) An applicant for a modification shall follow the procedures at N.J.A.C. 7:7A-10.7. An application for a modification to a general permit authorization does not require public notice in accordance with N.J.A.C. 7:7A-10.8. An application for a minor modification does not require a fee under N.J.A.C. 7:7A-11, or public notice under N.J.A.C. 7:7A-10.8.

(i) An application for a modification shall be reviewed in accordance with the applicable provisions of N.J.A.C. 7:7A-12, Department review of applications.]

7:7A-20.7 Application for a modification

(a) This section sets forth requirements for an application to modify a transition area waiver, an authorization under a general permit, or an individual permit. The general application requirements at N.J.A.C. 7:7A-16.2 apply to applications for modifications in addition to the application requirements in this section.

(b) To apply for an administrative modification to a waiver, an authorization under a general permit, or an individual permit under N.J.A.C. 7:7A-20.6(c), the person requesting the modification shall submit:

1. A description of the proposed change to the site plan or other document on which the original waiver, authorization, or individual permit was based;

2. The site plans approved as part of the waiver, authorization, or individual permit with revisions illustrating the proposed change;

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3. A copy of the waiver, authorization, or individual permit for which the modification is requested; and

4. Any information necessary to ensure compliance with State and/or Federal law.

(c) To apply for a minor technical modification of a waiver, an authorization under a general permit, or an individual permit under N.J.A.C. 7:7A-20.6(d), the person requesting the modification shall submit:

1. A completed application form as described at N.J.A.C. 7:7A-16.7(a)1 and available from the Department at the address set forth at N.J.A.C. 7:7A-1.4;

2. The appropriate application fee set forth at N.J.A.C. 7:7A-18;

3. A description of the scope and purpose of the proposed change to the regulated activity or project authorized under the authorization or individual permit;

4. The site plans approved as part of the waiver, authorization, or individual permit with revisions illustrating the proposed change in the regulated activity or project;

5. A copy of the waiver, authorization, or individual permit for which the modification is requested;

6. Other visual representations, such as photographs, graphs, and tables, that illustrate the proposed change to the regulated activity or project, as applicable;

7. A revised environmental report if the proposed modification is of an individual permit. The revised environmental report shall address the aspects of the regulated activity or project that are proposed to be changed and demonstrate that the regulated activity or project for which the modification is requested continues to comply with all requirements of this chapter; and

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8. Any information necessary to ensure compliance with State and/or Federal law.

(d) To apply for a major technical modification of a waiver, an authorization under a general permit, or an individual permit under N.J.A.C. 7:7A-20.6(e), the person requesting the modification shall submit:

1. A completed application form as described at N.J.A.C. 7:7A-16.7(a)1 and available from the Department at the address set forth at N.J.A.C. 7:7A-1.4;

2. Documentation that public notice of the application for the major technical modification was provided in accordance with N.J.A.C. 7:7A-17;

3. The appropriate application fee set forth at N.J.A.C. 7:7A-18;

4. A description of the scope and purpose of the proposed change to the regulated activity or project authorized under the waiver, authorization, or individual permit;

5. The site plans approved as part of the waiver, authorization, or individual permit with revisions illustrating the proposed change;

6. A copy of the waiver, authorization, or individual permit for which the modification is requested;

7. Other visual representations, such as photographs, graphs, and tables, that illustrate the proposed change to the regulated activity or project, as applicable;

8. Calculations, analyses, data, and supporting materials necessary to demonstrate that the regulated activity or project as proposed to be changed meets the requirements of this chapter, if applicable;

9. For a modification of an individual permit, a revised environmental report addressing the aspects of the regulated activity or project that are proposed to be changed

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and a demonstration that the regulated activity or project for which the modification is requested continues to comply with all requirements of this chapter; and

10. Any information necessary to ensure compliance with State and/or Federal law.

7:7A-[14.4]**20.8** Suspension of a [permit, waiver or general permit authorization] **waiver, an authorization under a general permit, an individual permit, or an emergency authorization**

(a) [When the] **The Department shall** suspend[s] **an individual** permit, [including] a waiver, [or] general permit authorization, [any work that is being conducted under the authority of the permit shall stop immediately upon receipt of the notice required under (c) below.

(b) The Department shall suspend a permit if:

1. The Department makes a written determination that immediate suspension would be in the public interest; or

2. Cause exists for the Department to terminate the permit under N.J.A.C. 7:7A-14.5, but the Department determines that suspension is more appropriate.] **or an emergency authorization for good cause, including, but not limited to, the following:**

1. The waiver, authorization under a general permit, individual permit, or emergency authorization was based on false or inaccurate information;

2. The permittee or person to whom an emergency authorization was issued has not complied with a condition of the waiver, authorization under a general permit, individual permit, or emergency authorization;

3. The permittee or person to whom an emergency authorization was issued has undertaken activities onsite that violate this chapter;

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4. The permittee or person to whom an emergency authorization was issued has misrepresented or failed to fully disclose all relevant facts pertaining to the waiver, authorization under a general permit, individual permit, or emergency authorization;

5. The permittee or person to whom an emergency authorization was issued has failed to fully and correctly identify impacts of the regulated activity or project in the application for the waiver, authorization under a general permit, individual permit, or emergency authorization;

6. The regulated activities conducted pursuant to the waiver, authorization under a general permit, individual permit, or emergency authorization have caused unanticipated environmental impacts;

7. The permittee or person to whom an emergency authorization was issued has made a change in the project that, under N.J.A.C. 7:7A-20.6, would require a modification to the waiver, authorization under a general permit, or individual permit, but the permittee did not first obtain the required modification; or

8. The Department determines that suspension of the waiver, authorization under a general permit, individual permit, or emergency authorization is necessary for emergency reasons or to protect public health, safety, and welfare, or the environment.

[(c)] (b) The Department shall [notify the permittee] provide written notice of a suspension[, in writing. The] by certified mail to the permittee or person to whom the waiver, permit, or authorization was issued in accordance with (c) below, except if the waiver, authorization under a general permit, individual permit, or emergency authorization is suspended for emergency reasons, in which case the Department shall

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contact the permittee or person to whom the waiver was issued by telephone or by any practical method, and will follow up with written notice.

(c) A notice of suspension shall:

[1. State the reasons for the suspension, including the written determination of public interest, if one was prepared under (b)1 above;

2. Order the permittee to immediately stop the activities that had been authorized under the suspended permit; and

3. Notify the permittee of the right to request a meeting with the Department, or a public hearing, within ten days of the permittee's receipt of the notice.

(d) If the permittee requests a public hearing regarding the suspension, the Department and permittee shall follow the procedures at N.J.A.C. 7:7A-12.4.

(e) The Department shall reinstate, modify or terminate the permit after the hearing or meeting or, if no hearing or meeting is held, within a reasonable amount of time after the notice required under (c) above.]

1. State that the waiver, authorization under a general permit, individual permit, or emergency authorization is suspended upon the receipt of the notice by the permittee;

2. Include the reasons for the suspension;

3. State that all regulated activities authorized under the suspended transition area waiver, authorization under a general permit, individual permit, or emergency authorization shall cease immediately upon receipt of the notice by the permittee; and

4. Notify the permittee of the right to, within 10 calendar days after the permittee receives the notice, request:

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i. A meeting with the Department to discuss the suspension; and/or

ii. An adjudicatory hearing in accordance with N.J.A.C. 7:7A-21.

(d) Within 30 calendar days after receiving a notice of suspension under (b) above, the permittee shall provide the Department with a written strategy to remedy the cause(s) of the suspension. The written strategy shall include:

1. A description of how the strategy will remedy the cause(s) of the suspension;

2. A demonstration that the strategy will bring the regulated activity or project into compliance with this chapter; and

3. A proposed timeframe within which the permittee will execute the strategy.

(e) Within 30 calendar days after the Department receives the written strategy required under (d) above, the Department shall take one of the following actions:

1. Accept the strategy, reinstate the transition area waiver, authorization under a general permit, individual permit, or emergency authorization, and require the permittee to implement the strategy within a prescribed timeframe. The Department may add conditions or revisions as necessary to ensure that the strategy achieves compliance with this chapter;

2. Determine that the strategy is insufficient and request additional detail, information, and/or changes to the strategy, in order to remedy the non-compliance. Within 15 calendar days after the Department receives the requested information, the Department shall take either the action described at (e)1 above or the action described at (e)3 below; or

3. Determine that the strategy is unacceptable to achieve compliance with this chapter, and notify the permittee of its intent to terminate the transition area waiver, authorization

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under a general permit, individual permit, or emergency authorization pursuant to

N.J.A.C. 7:7A-20.9

(f) Noncompliance with any of the requirements of this section shall constitute cause for the Department to terminate the transition area waiver, authorization under a general permit, individual permit, or emergency authorization under N.J.A.C. 7:7A-20.9.

7:7A-[14.5]20.9 Termination of an authorization under a general permit, an individual permit, a transition area waiver, or an emergency authorization

[(a) The following are causes for the Department to terminate a permit, including a waiver or general permit authorization, during its term, or to deny a permit extension:

1. Noncompliance by the permittee with any portion or condition of the permit, including pursuing land uses other than those authorized by an individual permit. For example, if an individual permit authorizes construction of a 10,000 square foot preschool, construction of a 10,000 square foot retail store on the same footprint would constitute noncompliance with the permit;
2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;
3. A Department determination that the issuance of the permit was based on false or inaccurate information; or
4. The permit has unanticipated negative environmental impacts such as, but not limited to, excessive erosion and subsequent siltation, destruction of vegetation not covered by the permit,

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or die-off of aquatic biota, which become apparent during the performance of the permitted activities.]

(a) The Department shall terminate, for good cause, an authorization under a general permit, an individual permit, a transition area waiver, or an emergency authorization that has been suspended pursuant to N.J.A.C. 7:7A-20.8. Good cause for termination includes, but is not limited to, the following:

1. The permittee has not ceased all regulated activities as required in the notice of suspension pursuant to N.J.A.C. 7:7A-20.8(c)3;

2. The permittee has not complied with the requirement at N.J.A.C. 7:7A-20.8(d) to submit a strategy to remedy the causes of the suspension; or

3. The Department has determined that the strategy submitted is unacceptable to achieve compliance with this chapter.

(b) [Prior to a termination, the] The Department shall [furnish] provide written notice of its intent to terminate an authorization under a general permit, individual permit, transition area waiver, or emergency authorization by certified mail to the permittee. [by certified mail. The permittee shall stop all regulated activities immediately upon receiving the notice. Within 10 days after receiving the notice, the permittee shall:

1. Remedy the violation or unanticipated negative environmental impacts;

2. Submit a plan for bringing the activities back into compliance or correcting the unanticipated impacts; or

3. Request a hearing under N.J.A.C. 7:7A-1.7.

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(c) If the permittee has not taken one of the actions required at (b) above within 10 days after receiving the Department's notice, the permit, waiver, or general permit authorization shall automatically terminate and the permittee shall remedy the unanticipated negative environmental impacts or violations. Once the impacts or violations are remedied, the Department may reinstate the permit or require the applicant to apply for a new permit.

(d) If a permittee submits a plan under (b)2 above, the permittee shall begin implementation of the plan immediately upon the Department's approval of the plan, and shall remedy the violations or unanticipated impact within 60 days.

(e) If a permit, including a waiver or general permit authorization, is terminated, the permittee shall restore the site to its pre-activity condition to the maximum extent practicable and feasible, or otherwise compensate for any loss in resource value through mitigation under N.J.A.C. 7:7A-15. This restoration or compensation shall be completed within 90 days after the permit is terminated, unless the Department authorizes in writing a longer period of time.]

(c) The permittee may request an adjudicatory hearing on the notice of intent to terminate in accordance with N.J.A.C. 7:7A-21. The hearing request shall be submitted within 10 calendar days after receipt of the notice of intent to terminate.

(d) If the permittee does not request an adjudicatory hearing under (c) above, or if the adjudicatory hearing request is denied, the transition area waiver, authorization under a general permit, individual permit, or emergency authorization shall automatically terminate, effective 10 calendar days after the permittee received the notice of intent to terminate under (b) above.

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(e) If the Department terminates an authorization under a general permit, individual permit, transition area waiver, or emergency authorization, the permittee shall take all of the actions at (e)1, 2, and 3 below. Failure to do so shall constitute a violation of this chapter and shall subject the permittee to enforcement action pursuant to N.J.A.C. 7:7A-22:

- 1. Remedy any changes to the site made in violation of this chapter;**
- 2. Remedy any adverse impacts to wetlands, transition areas, State open waters, and the environment caused by the regulated activities on the site; and**
- 3. Restore, to the maximum extent practicable, the site to its condition prior to the start of the activities authorized under the transition area waiver, authorization under a general permit, individual permit, or emergency authorization.**

SUBCHAPTER 21. REQUESTS FOR ADJUDICATORY HEARINGS

7:7A-[1.7]21.1 [Hearings and appeals] Procedure to request an adjudicatory hearing; decision on the request

[(a) Subject to the limits on third party hearings at (k) below, a person may request an administrative hearing to contest a decision under this chapter on any of the following actions:

1. An exemption letter request;
2. An application for a letter of interpretation;
3. An application for authorization to act under a general permit;
4. An application for a transition area waiver;
5. An application for an individual freshwater wetlands permit;
6. An application for an individual open water fill permit; or

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7. An application for a modification or extension of any Department issued document.

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

(a) This subchapter sets forth the process by which a person may request an adjudicatory hearing to contest a Department decision to approve or deny an application under this chapter. A person seeking to contest an administrative order and/or a civil administrative penalty assessment shall do so in accordance with the adjudicatory hearing request provisions applicable to Department enforcement actions under this chapter at N.J.A.C. 7:7A-22.

(b) To contest a Department decision on an application under this chapter, a person shall submit an adjudicatory hearing request within 30 calendar days after public notice of the decision is published in the DEP Bulletin. If a person submits the adjudicatory hearing request after this time, the Department shall deny the request.

(c) A [request for] **person requesting** an [administrative] **adjudicatory** hearing shall[:

1. Be in writing;

2. Contain all] **provide the following** information on [required by the administrative] **an adjudicatory** hearing request [checklist] **form**, available from the Department at the address [in] **set forth at N.J.A.C. 7:7A-[1.3;]1.4:**

[3. Explain in what way the person submitting the request believes the Department has acted improperly;

4. Explain what issues the person submitting the request will raise if a hearing is held; and

5. Be submitted to the Department at the following address, with a copy to the Division of

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Land Use Regulation at the address at N.J.A.C. 7:7A-1.3(b):

Office of Legal Affairs

Attention: Administrative Hearing Requests

Department of Environmental Protection

401 East State Street, 4th Floor

P.O. Box 402

Trenton, New Jersey 08625-0402

(d) To contest a decision listed at (a) above, a person shall submit a hearing request within 30 days after notice of the decision is published in the DEP Bulletin. If a person submits the hearing request after this time, the Department shall deny the request. The DEP bulletin is available through the Department's website at www.state.nj.us/dep.

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

(f) A request by a permittee for a hearing shall automatically stay operation of a permit, including a transition area waiver or general permit authorization, unless the permittee shows good cause why the permit should continue in effect while being contested. If a hearing is requested by a permittee, all permitted activities shall stop upon the date the hearing request is submitted, and shall not be started again until the matter is resolved, unless the Department

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grants an exception in writing. If a person other than the permittee requests a hearing, the requester may also request a stay of the permit. The Department shall grant the request for a stay of the permit if the requester shows good cause why the permit should be stayed.

(g) When the Department receives an administrative hearing request, the Commissioner may refer the matter to the Office of Administrative Law for an administrative hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, or may deny the request for a hearing. If the Commissioner refers the matter to the Office of Administrative Law, the Department shall so notify the person who submitted the request and the applicant.

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

1. The person who requested the hearing shall send by certified mail a notice of intent to settle the matter. A form for the notice may be obtained from the Department at the address in N.J.A.C. 7:7A-1.3. The notice shall be sent to:

i. Each person provided notice of the application for the permit or approval which is the subject of the appeal; and

ii. Each person who commented on the application;

2. The Department shall publish a notice of intent to settle in the DEP Bulletin, and shall accept comments on the notice for at least 30 days;

3. After the 30 day comment period provided for in (h)2 above, the person who requested the hearing shall send by certified mail a notice of settlement. A form for the notice may be obtained

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from the Department at the address in N.J.A.C. 7:7A-1.3. The notice shall be sent to:

- i. Each person provided notice of intent to settle under (h)1 above; and
- ii. Each person who commented on the notice of intent to settle provided under (h)2 above;

and

4. The Department shall publish a notice of the final settlement in the DEP Bulletin.]

1. The name, address, daytime telephone number, fax number, and e-mail address of the person requesting the hearing, and of the person's authorized representative.

2. A copy of the Department decision on which a hearing is being requested;

3. The date that the Department decision on which a hearing is being requested was received by the person requesting the hearing;

4. A specific admission, denial, or explanation of each fact appearing in the Department decision, or a statement that the person is without knowledge thereof;

5. A concise statement of the facts or principles of law asserted to constitute any factual or legal defense;

6. Where the person submitting the hearing request is not the person to whom the decision that is being contested was issued, evidence that a copy of the hearing request has been mailed or delivered to the person to whom the decision was issued.

(d) A person requesting an adjudicatory hearing shall:

1. Submit the original hearing request to:

New Jersey Department of Environmental Protection

Office of Legal Affairs

Attention: Adjudicatory Hearing Requests

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Mail Code 401-04L, PO Box 402

401 East State Street, 7th Floor

Trenton, NJ 08625-0402; and

2. Submit a copy of the hearing request to the Director of the Division of Land Use Regulation at the address set forth at N.J.A.C. 7:7A-1.4.

(e) Nothing in this subchapter shall be construed to provide a right to an adjudicatory hearing in contravention of the Administrative Procedure Act, N.J.S.A. 52:14B-3.1, 3.2, and 3.3.

(f) The Department shall notify the requester that the hearing request is granted or denied. If the hearing request is denied, the denial shall provide the reason(s) for the denial. If the hearing request is granted, the Department shall refer the matter to the Office of Administrative Law for a contested case hearing in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

[(i)] **(g)** (No change in text.)

[(j)] **(h)** The Commissioner's action under [(i)] **(g)** above shall be considered final agency action for the purposes of the Administrative Procedure Act, and shall be subject [only] to judicial review in the Appellate Division of the Superior Court, as provided in the Rules of Court.

[(k) Nothing in this section shall be construed to provide a right to an administrative hearing in contravention of, N.J.S.A. 52:14B-3.1 through 3.3 of the Administrative Procedure Act.]

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7:7A-21.2 Procedure to request dispute resolution

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

7:7A-21.3 Effect of request for hearing on operation of permit or authorization

(a) When a permittee requests an adjudicatory hearing to appeal any portion of a permit or an authorization, the operation of the permit or authorization shall be automatically stayed in its entirety, unless the permittee shows good cause in writing why the permit or authorization should continue in effect while being contested. All permitted activities shall stop as of the date the hearing request is submitted, and shall not be started again until the matter is resolved, unless the Department grants an exception in writing.

(b) When a person other than the permittee requests an adjudicatory hearing on a permit or authorization, the operation of the permit or authorization is not automatically stayed. The Department shall stay operation of the permit or authorization only if it determines that good cause to do so exists. If a stay is imposed, all permitted activities shall stop as of the date the stay is imposed, and shall not be started again until the matter is resolved, unless the Department grants an exception in writing.

7:7A-21.4 Notice of settlement agreement

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(a) If the Department and the person requesting an adjudicatory hearing agree to a settlement that may result in the issuance of a freshwater wetland permit or waiver for a regulated activity, notice of the opportunity to comment on the settlement shall be provided as follows:

1. The person who requested the adjudicatory hearing shall send by certified mail a “notice of intent to settle” the matter, using the notice form available from the Department at the address set forth at N.J.A.C. 7:7A-1.4, to the following:

i. Each person who was provided specific notice of the application that resulted in the decision that is the subject of the adjudicatory hearing request; and

ii. Each person who commented on the application;

2. The Department shall publish in the DEP Bulletin the notice of intent to settle, and shall accept comments on the notice for at least 30 calendar days; and

3. If, after the 30-calendar-day comment period under (a)2 above, the settlement is finalized, the Department shall publish a notice of the final settlement in the DEP Bulletin.

SUBCHAPTER [16.] **22. ENFORCEMENT**

7:7A-[16.1]**22.1** General provisions

(a) [For the purposes of this subchapter (N.J.A.C. 7:7A-16), the term "applicable law and/or condition" means one or more applicable provisions or conditions of the Freshwater Wetlands Protection Act,] **Whenever the Department finds that a person has violated any provision of N.J.S.A. 13:9B-1 et seq.[]; the New Jersey Water Pollution Control Act, N.J.S.A.[] or 58:10A-1 et seq.[]; and/or], or any regulation, rule, letter of interpretation, permit, agreement, transition area**

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waiver, order, settlement, exemption letter, **or** mitigation proposal[, or rule promulgated or approved pursuant thereto.

(b) The burden of proof and degrees of knowledge or intent required to establish a violation of the Freshwater Wetlands Protection Act or of any permit, order, rule or regulation promulgated pursuant thereto shall be no greater than the burden of proof or degree of knowledge or intent which USEPA must meet in establishing a violation of the Federal Act or implementing regulations.

(c) If the Department finds that a person is or has been violating any applicable law and/or condition, the Department may take one or more of the following actions:] **adopted or issued by the Department pursuant thereto, the Department may, singly or in combination, and in accordance with the grace period requirements set forth at N.J.A.C. 7:7A-22.20, pursue the remedies specified in (a)1 through 5 below. Pursuit of any of the remedies specified under this section shall not preclude the Department from seeking any other remedy specified.**

1. Issue an [administrative] order [under] **requiring the person found to be in violation to comply in accordance with N.J.A.C. 7:7A-[16.3]22.3;**

2. Bring a civil action [under N.J.A.C. 7:7A-16.4] **for injunctive and other relief in accordance with N.J.A.C. 7:7A-22.14;**

3. [Assess] **Levy** a civil administrative penalty [under] **in accordance with N.J.A.C. 7:7A-[16.5]22.7** through [16.13, and in accordance with the grace period requirements set forth at N.J.A.C. 7:7A-16.20] **22.12;**

4. Bring an action for a civil penalty [under] **in accordance with N.J.A.C. 7:7A-[16.14]22.13;** and/or

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5. [Bring] **Petition the Attorney General to bring** a criminal action [under] **in accordance with** N.J.A.C. 7:7A-[16.15]**22.15**.

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

(e) Each violation of any applicable law and/or condition shall constitute an additional, separate, and distinct violation for which a separate penalty may be assessed.

(f) The Department's pursuit of any of the remedies available under this subchapter shall not preclude the Department's pursuit of any of the other remedies for the same or another violation. Compliance with any Department enforcement order, including payment of a penalty, shall not preclude the Department from pursuing any of the other remedies available under this subchapter in connection with the violation for which the order was issued.

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

(b) The Department has the power, as enumerated in N.J.S.A. 13:1D-9, and consistent with constitutional requirements, to enter and inspect any property, facility, building, premises, site, or place for the purpose of investigating an actual or suspected source of pollution of the environment and conducting inspections, collecting samples, copying or photocopying documents or records, and for otherwise ascertaining compliance or noncompliance with any laws, permits, orders, codes, rules, and regulations of the Department.

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(c) Each applicant or permittee shall provide, upon request of the Department, any information required to determine compliance with the provisions of N.J.S.A. 13:9B-1 et seq., or 58:10A-1 et seq., or any rule or regulation adopted, or permit or order issued pursuant thereto.

(d) For the purposes of this subchapter, a permit shall mean an authorization under a general permit-by-certification, an authorization under a general permit, an individual permit, a transition area waiver, an exemption letter, an emergency authorization, a letter of authorization, a memorandum of agreement, or other written authorization, or other approval issued pursuant to N.J.S.A. 13:9B-1 et seq. and/or 58:10A-1 et seq.

(e) The burden of proof and degrees of knowledge or intent required to establish a violation of N.J.S.A. 13:9B-1 et seq., or of any permit, order, rule, or regulation promulgated pursuant thereto shall be no greater than the burden of proof or degree of knowledge or intent that the USEPA must meet in establishing a violation of the Federal Act or implementing regulations.

7:7A-[16.2]22.2 USEPA review

The Department shall make available without restriction any information obtained or used in the enforcement of [the Freshwater Wetlands Protection Act, the Water Pollution Control Act,] **N.J.S.A. 13:9B-1 et seq., and/or 58:10A-1 et seq.,** and/or this chapter, to **the** USEPA upon request.

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7:7A-[16.3]22.3 [Administrative] **Issuance of an administrative order**

[(a)] Whenever[, on the basis of available information,] the Department finds **that** a person [in violation of] **has violated any provision of N.J.S.A. 13:9B-1 et seq., or 58:10A-1 et seq., or any regulation, rule, permit, or order adopted or issued by the Department pursuant thereto** [any applicable law and/or condition], the Department may issue an order[:

1. Specifying each provision of the applicable law and/or condition which has been, or is being violated;

2. Citing the action which constituted the violation;

3. Requiring immediate compliance with the provision or provisions violated;

4. Requiring the restoration or rehabilitation of the freshwater wetlands, State open waters or transition area which is the site of the violation; and

5. Providing notice of the right to a hearing on the matters contained in the order.]

specifying the provision or provisions of the act, regulation, rule, permit, or order of which the person is in violation, citing the action that constituted the violation, ordering abatement of the violation, and giving notice to the person of his or her right to a hearing on the matters contained in the order. The ordered party shall have 35 calendar days from receipt of the order within which to deliver to the Department a written request for a hearing in accordance with N.J.A.C. 7:7A-22.6. After the hearing and upon a finding that a violation has occurred, the Department may issue a final order. If a hearing is not requested within 35 calendar days of receipt of the order, then the order shall become final on the 36th calendar day following receipt. A request for hearing shall not automatically stay the effect of the order.

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(Agency Note: N.J.A.C. 7:7A-16.4 is proposed for recodification with amendments as N.J.A.C. 7:7A-22.14.)

7:7A-[16.5]**22.4** Civil administrative penalty

(a) Whenever, on the basis of available information, the Department finds a person in violation of any provision of the Freshwater Wetlands Protection Act, or of any permit, transition area waiver, letter of interpretation, agreement, order, settlement, exemption letter, mitigation proposal, or rule promulgated or approved pursuant thereto, the Department may assess a civil administrative penalty of no more than \$25,000 for each violation, not including any amount assessed for economic benefit as determined under N.J.A.C. 7:7A-[16.13]**22.12**. The amount of the civil administrative penalty for each such violation shall be determined under N.J.A.C. 7:7A-[16.8]**22.7** through [16.13]**22.12**.

(b) (No change.)

(c) The Department may, in its discretion, settle a civil administrative penalty assessed under this subchapter, in accordance with N.J.A.C. 7:7A-[16.6(d)]**22.5(d)**. However, if the Department settles a penalty for a violation of the Water Pollution Control Act, the settlement is subject to N.J.A.C. 7:14-8.

7:7A-[16.6]**22.5** Assessment, settlement, and payment of a civil administrative penalty

(a) To assess a civil administrative penalty **under N.J.S.A. 13:9B-1 et seq. or 58:10A-1 et seq.**, the Department shall notify the violator by certified mail (return receipt requested) or by

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personal service. This [notice of civil administrative penalty assessment] **Notice of Civil**

Administrative Penalty Assessment (NOCAPA) shall:

1. Identify [each] **the** section of the [applicable law and/or condition] **statute, rule, administrative order, or permit** violated;
2. Concisely state the [facts] alleged [to] **facts that** constitute the violation;
3. Specify the amount of the civil administrative penalty [and state the basis thereof] **to be imposed and the fact that interest may be due in accordance with (c) below**; and
4. Advise the violator of the right to request an adjudicatory hearing [under] **pursuant to the procedures in N.J.A.C. 7:7A-[16.7]22.6.**

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

1. If no hearing is requested [under] **pursuant to N.J.A.C. 7:7A-[16.7]22.6**, a notice of civil administrative penalty assessment becomes a final order on the 36th **calendar** day [after the violator receives] **following receipt of** the notice of civil administrative penalty assessment **by the violator**;

2. If the Department denies [a] **an untimely submitted** hearing request [under] **pursuant to N.J.A.C. 7:7A-[16.7(c) or (d)]22.6(d)**, a notice of civil administrative penalty assessment becomes a final order [upon the violator's receipt of the denial] **on the 36th calendar day following receipt of the notice of civil administrative penalty assessment by the violator**;

[or]

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3. If the Department denies a hearing request pursuant to N.J.A.C. 7:7A-22.6(e) because it does not include all the required information, a notice of civil administrative penalty assessment becomes a final order upon receipt of notice of such denial by the violator; or

[3.] **4.** If the Department grants a hearing **request**, a notice of civil administrative penalty assessment becomes a final order upon **receipt by** the [violator's receipt] **violator** of a final order in the contested case.

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

(c) In addition to the amount of the civil administrative penalty that is due and owing pursuant to (b) above, the violator shall also pay to the Department interest on the amount of the penalty, at the rate established by the New Jersey Supreme Court for interest rates on judgments as set forth in the Rules Governing the Courts of the State of New Jersey, R. 4:42-11(a). Interest shall accrue on the amount of the civil administrative penalty due and owing from the date the payment is due and continuing until the civil administrative penalty is paid in full with interest if:

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1. A violator does not pay a civil administrative penalty imposed pursuant to a final order within 90 calendar days of the date that payment is due; or

2. A violator fails to make a civil administrative penalty payment pursuant to a payment schedule entered into with the Department within 90 calendar days of the date that payment is due.

(d) The Department may, in its discretion, settle any civil administrative penalty assessed [under this subchapter, based on an evaluation of] **pursuant to N.J.A.C. 7:7A-22.7 through 22.12 according to** the factors at (d)1 through 4 below. As provided at N.J.A.C. 7:7A-16.5] **22.4(c)**, this subsection does not apply to penalties assessed for violations of [the Water Pollution Control Act] **N.J.S.A. 58:10A-1 et seq.:**

1. (No change.)

2. The [violator's] timely implementation of measures leading to compliance[, which measures were] not previously considered in the assessment of penalties, including measures to clean up, reverse, or repair environmental damage caused by the violation, or to remove the violation;

3. The [violator's] full payment **by the violator** of a specified part of a civil administrative penalty[, if payment is] **assessed if** made within a time period established by the Department in an administrative order[, if] **and provided that** the violator waives the right to request an adjudicatory hearing on the civil administrative penalty; or

4. (No change.)

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7:7A-[16.7]22.6 [Appeal of an] **Procedures to request and conduct an adjudicatory hearing to contest** an administrative order and/or notice of civil administrative penalty assessment

(a) [A violator may] **To** request an adjudicatory hearing to contest an administrative order[,] and/or a notice of civil administrative penalty assessment issued [under this chapter . To request an adjudicatory hearing] **pursuant to N.J.S.A. 13:9B-1 et seq., and/or 58:10A-1 et seq.,** the violator shall submit [the following information in writing to] **a hearing request in writing within 35 calendar days after receipt by the violator of the administrative order and/or notice of a civil administrative penalty assessment being contested. If a violator submits the hearing request after this time, the Department shall deny the request.**

(b) **A violator requesting an adjudicatory hearing shall provide the following information on an adjudicatory hearing request form, available from** the Department at the address[es in (b) below] **set forth at N.J.A.C. 7:7A-1.4:**

1. The name, address, [and] **daytime** telephone number, **fax number, and e-mail address** of the violator **requesting the hearing** and [its] **the violator's** authorized representative;

[2. The violator's defenses to each of the findings of fact in the administrative order and/or notice of civil administrative penalty assessment, stated in short and plain terms;]

2. A copy of the Department's administrative order and/or notice of a civil administrative penalty assessment for which a hearing is being requested;

3. The date that the administrative order and/or notice of a civil administrative penalty assessment was received by the violator;

[3.] **4. [An] A specific admission or denial of each of the [findings of] facts appearing in the Department's administrative order and/or notice of civil administrative penalty**

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assessment or a statement that the person is without knowledge thereof. If the violator is without knowledge or information sufficient to form a belief as to the truth of a finding, the violator shall **so** state [this] and this shall have the effect of a denial. A denial shall fairly meet the substance of the findings denied. When the violator intends in good faith to deny only a part or a qualification of a finding, the violator shall specify so much of it as is true and material and deny only the remainder. The violator may not generally deny all the findings but shall make all denials as specific denials of designated findings. For each finding the violator denies, the violator shall allege the fact or facts as the violator believes it or them to be;

5. A statement as to whether the violator agrees to allow the Department to delay the transfer of a granted hearing request to the Office of Administrative Law for the purposes of engaging in settlement negotiations as provided by the Uniform Administrative Procedure Rules at N.J.A.C. 1:1-8.1(b);

Recodify existing 4.- 6. as **6.- 8.** (No change in text.)

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

1. Submit the original **hearing** request to:

New Jersey Department of Environmental Protection

Office of Legal Affairs

ATTENTION: Adjudicatory Hearing Requests

[Department of Environmental Protection]

Mail Code 401-04L, PO Box 402

401 East State Street, [4th]7th Floor

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[P.O. Box 402]

Trenton, New Jersey 08625-0402; **and**

2. Submit a copy of the **hearing** request to:

New Jersey Department of Environmental Protection

Bureau of Coastal and Land Use Compliance and Enforcement

[Department of Environmental Protection]

PO Box 420

Mail Code 401-04C

401 East State Street, 4th Floor

[P.O. Box 422]

Trenton, New Jersey 08625-[0422]**0420**

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

(d) If the violator fails to include all the information required by [(a)] **(b)** above, the Department may deny the hearing request.

(e) [Any] **All** adjudicatory hearings **held pursuant to this section** shall be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., **52:14F-1 et seq.**, and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

7:7A-[16.8]**22.7** Civil administrative [penalty amount] **penalties** for failure to obtain a permit prior to conducting regulated activities

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(a) [When] **For the failure to obtain a permit prior to conducting regulated activities,** the Department **may** assesses a civil administrative penalty for the failure to obtain a permit prior to conducting regulated activities, the Department shall use the procedures in this section to determine the amount of the penalty if the violation pertains to freshwater wetlands and/or freshwater wetland transition areas, except if the violation type is listed at N.J.A.C. 7:7A-[16.9, 16.10, 16.11, or 16.12]**22.8, 22.9, 22.10, or 22.11,** in which case the penalty amount shall be determined under whichever of those sections applies. For the purposes of this section, permit shall [have the meaning set forth at N.J.A.C. 7:7A-1.4.] **mean an authorization under a general permit-by-certification, an authorization under a general permit, an individual permit, a transition area waiver, an exemption letter, an emergency authorization, a letter of authorization, a memorandum of agreement, or other written authorization, or other approval issued pursuant to N.J.S.A. 13:9B-1 et seq., and/or 58:10A-1 et seq.**

(b) **Each violation of N.J.A.C. 7:7A-2.1 shall constitute an additional, separate, and distinct violation.**

(c) **Each day during which the violation continues or remains in place without the required permit shall constitute an additional, separate, and distinct offense.**

[(b)] (d) (No change in text.)

(e) **To assess a civil administrative penalty pursuant to this section, the Department shall identify the civil administrative base penalty within Table 22.7A in (g) below by determining the number of points pursuant to (f) below. The civil administrative penalty shall be the amount within Table 22.7A in (g) below, unless adjusted pursuant to (h) and/or (i) below.**

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

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

i.- ii. (No change.)

iii. Minor conduct shall include any conduct not identified in [(c)1i] (f)1i or ii above and is assigned one point.

2. The seriousness factor of the violation is assigned points as provided in [(c)2i] (f)2i and ii below **and shall be based on the type, size, and location of the violation as provided at (f)2i and ii below and the** acreage of wetlands and/or transition areas impacted and the resource value of the freshwater wetlands.

i. The acreage of wetlands and/or transition areas impacted shall be assigned points in accordance with [(c)2i(1)] (f)2i(1) through (7) below:

(1) – (7) (No change.)

ii. The resource value classification shall be assigned points in accordance with [(c)2ii(1)] (f)2ii(1) through (5) below. If the site of a violation contains regulated areas of more than one resource value classification, the points assigned to a violation for the highest resource classification on the site shall apply for the entire site:

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(1) – (5) (No change.)

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

Table [D] **22.7A**

(No change in table.)

[(e)] (h) The Department shall [subtract from the daily] **adjust the amount of the** base penalty [determined] **assessed** pursuant to [(d)] (g) above [a] **based upon the mitigating** penalty [mitigation amount] **component as** calculated [by multiplying the daily base penalty times the penalty mitigating factor multiplier pursuant to (e)1 or 2] **in Table 22.7B** below, if applicable.

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

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

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

1. The Department shall multiply the base penalty dollar amount by the multiplier for either of the applicable mitigating factors in Table 22.7B below to obtain the mitigating penalty component. Where neither mitigating factor in Table 22.7B applies, the civil administrative penalty shall be the civil administrative base penalty determined pursuant to (g) above, unless adjusted pursuant to (i) below.

Table 22.7B

Mitigating Penalty Component

Mitigating Factor	Multiplier
Where the nature, timing, and effectiveness of any measures taken by the violator to remove the unauthorized regulated activities and to mitigate the effects of the violation for which the penalty is being assessed results in compliance within 30 calendar days of receipt of the notice of violation from the Department	0.50
Where a complete application is submitted within 30 calendar days after receipt of the notice of the violation from the Department and a permit is subsequently obtained for the unauthorized regulated activities without	0.50

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the need to modify the regulated activities, provide mitigation, or restore disturbed regulated areas	
--	--

2. To obtain the civil administrative penalty, the Department shall subtract the mitigating penalty component calculated pursuant to (h)1 above, where applicable, from the base penalty.

(i) The Department may, in its discretion, adjust the amount of a penalty assessed pursuant to (g) and, where applicable, (h) above based upon any or all of the factors listed in (i)1 through 4 below. No such factor constitutes a defense to any violation. The factors are:

- 1. The compliance history of the violator;**
- 2. The frequency with which a violation has occurred;**
- 3. The deterrent effect of the penalty; and/or**
- 4. Any other mitigating, extenuating, or aggravating circumstances.**

(j) The total civil administrative penalty shall be the daily civil administrative penalty determined under (g) and (h) above, multiplied by the number of calendar days during which each violation continued or remained in place without the required permit.

(k) Notwithstanding the maximum civil administrative penalty of \$25,000 pursuant to this subsection, the Department may add to a civil administrative penalty assessed under this subchapter, the amount of economic benefit in dollars that the violator has realized as the result of not complying with, or by delaying compliance with, any applicable law and/or condition.

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7:7A-[16.9]**22.8** Civil administrative [penalty amount] **penalties** for [any] violations other than failure to obtain a permit prior to conducting regulated activities[, submittal of inaccurate or false information, failure to allow entry, or failure to pay a civil administrative penalty]

(a) [When the Department assesses a civil administrative penalty for a] **For** violations other than [the] failure to obtain a permit prior to conducting regulated activities, the Department shall use the procedures in this section to determine the amount of the penalty, except if the violation type is listed at N.J.A.C. 7:7A-[16.10, 16.11, or 16.12]**22.9, 22.10, or 22.11**, in which case the penalty amount shall be determined under whichever of those sections applies.

(b) Each violation of N.J.S.A. 13:9B-1 et seq. or 58:10A-1 et seq., or any regulation, rule, letter of interpretation, permit, agreement, transition area waiver, order, settlement, exemption letter, or mitigation proposal adopted or issued by the Department pursuant thereto, shall constitute an additional, separate, and distinct violation.

(c) Where any requirement of N.J.S.A. 13:9B-1 et seq. or 58:10A-1 et seq., or any regulation, rule, permit, condition, or order adopted or issued by the Department pursuant thereto, may pertain to more than one act, condition, or occurrence, the failure to comply with such requirement as it pertains to each such act, condition, or occurrence shall constitute an additional, separate, and distinct violation.

[(b)] **(d) [The] To assess a civil administrative penalty pursuant to this section, the** Department shall use the two factors described at [(c)] **(e)** and [(d)] **(f)** below, seriousness and conduct, to determine the amount of the base daily civil administrative penalty [under this section]. The applicable daily penalty amount is determined using the base daily penalty matrix

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in [Table E] **the table** below, based on the seriousness of the violation determined pursuant to [(c)] **(e)** below and the conduct of the violator determined pursuant to [(d)] **(f)** below.

Table [E] **22.8**

Base [daily penalty matrix] **Daily Penalty Matrix**

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

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

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

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i. – viii. (No change.)

2. [“]Moderate[”] seriousness shall apply to any violation [which] **that** has caused or has the potential to cause substantial harm to human health, safety, **property**, the Freshwater Wetlands Protection Act regulatory program, or the environment, or [substantially deviates] **is a substantial deviation** from the applicable law and/or condition. “Substantial deviations” [shall] include, but are not [be] limited to, violations [which] **that** are in substantial contravention of the [applicable] law and/or condition, and/or [which] **that** substantially impair or undermine the protection, operation, or intent of [the applicable law and/or condition] **N.J.S.A. 13:9B-1 et seq., or 58:10A-1 et seq., or any regulation, rule, or permit condition issued by the Department pursuant thereto.** The Department shall consider a violation that is limited solely to the transition area but is not associated with a permit to be of moderate seriousness. Violations of [“]moderate[”] seriousness [also] include, but are not limited to:

i. –iii. (No change.)

3. [“]Minor[”] seriousness shall apply to any violation not included in [(c)1] **(e)1** or 2 above. [(d)] **(f)** The conduct of the violator shall be determined as major, moderate, or minor as follows:

1. [“]Major[”] conduct shall include any intentional, deliberate, purposeful, knowing, or willful act or omission by the violator. [The Department presumes a violation of any provision of a] **There is a rebuttable presumption that any violation of a Department** permit, transition area waiver, letter of interpretation, agreement, order, settlement, exemption letter, or mitigation proposal[, as well as any violation by a person who has previously applied for or received any

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such instrument pursuant to the Freshwater Wetlands Protection Act and/or this chapter, to be]

or the conditions thereof is a knowing violation;

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

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

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

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

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

[(f)] **(g)** The total civil administrative penalty shall be the daily civil administrative penalty determined [as provided] under [(b)] **(d)**, [through] (e), **and (f)** above, multiplied by the number of **calendar** days during which each violation continued **or remained in place prior to removal or restoration**.

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Recodify existing N.J.A.C. 7:7A-16.10 and 16.11 as **22.9 and 22.10** (No change in text.)

7:7A-[16.12]**22.11** Civil administrative penalty for failure to pay a civil administrative penalty

(a) (No change.)

(b) The daily civil administrative penalty amount assessed under this section shall be equal to the unpaid civil administrative penalty, but shall not exceed the maximum allowed at N.J.A.C.

7:7A-[16.5(a)]**22.4(a)** and (b).

(c)-(d) (No change.)

7:7A-[16.13]**22.12** Economic benefit factor

(a) Notwithstanding the maximum civil administrative penalty of \$25,000 pursuant to N.J.A.C. 7:7A-[16.5(a)]**22.4(a)**, the Department may add to a civil administrative penalty assessed under this subchapter the amount of economic benefit in dollars that the violator has realized as the result of not complying, or by delaying compliance with, an applicable law and/or condition.

(b) (No change.)

7:7A-[16.14]**22.13** Civil [penalty] **penalties**

[(a) Each person who does any of the following shall be subject, upon the order of a court, to a civil penalty not to exceed \$25,000 per day of the violation, not including any amount assessed for economic benefit as determined under N.J.A.C. 7:7A-16.13:

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1. Violates the Freshwater Wetlands Protection Act, the Water Pollution Control Act, or this chapter;

2. Violates an administrative order or a court order issued pursuant to the Freshwater Wetlands Protection Act, the Water Pollution Control Act, or this chapter;]

(a) Any person who violates N.J.S.A. 13:9B-1 et. seq., or 58:10A-1 et. seq., or any regulation, rule, permit, order, or court order pursuant thereto, [3. Fails] or who fails to pay [in full] a civil administrative penalty [assessed under this chapter, or fails to make a payment] in full pursuant to [a penalty payment schedule entered into with the Department; or] N.J.A.C. 7:7A-22.4, [4. Knowingly] or who knowingly makes any false or misleading statement on any application, record, report, or other document required to be submitted to the Department[.] shall be subject, upon order of a court, to a civil penalty of not more than \$25,000 for each violation, and each calendar day during which a violation continues shall constitute an additional, separate, and distinct offense. In addition to any penalties, the court may assess against the violator the amount of economic benefit accruing to the violator from the violation.

(b) [A civil] Any penalty established pursuant to this section may be imposed [under this section may be] and collected[,] with costs[,] in a summary proceeding pursuant to the Penalty Enforcement Law of 1999, N.J.S.A. 2A:58-[1]10 et seq. The Superior Court shall have jurisdiction to enforce the [penalty enforcement law] provisions of the Penalty Enforcement Law of 1999 in [conjunction] connection with the Freshwater Wetlands Protection Act[,] and the Water Pollution Control Act[, and this chapter].

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7:7A-[16.4]**22.14** Civil actions

(a) [Whenever, on the basis of available information, the Department finds a person in violation of any applicable law and/or condition, the] **The** Department may institute [a civil] **an** action **or proceeding** in **the** Superior Court for [appropriate] **injunctive and other** relief, **including the appointment of a receiver, for any violation of N.J.S.A. 13:9B-1 et seq., or any regulation, rule, permit, or order adopted or issued by the Department pursuant to this act, and the court may proceed in the action in a summary manner.** Such relief may include, singly or in combination:

1. (No change.)

2. [Assessment of the violator for the] **Recovery of reasonable** costs of any investigation, inspection, or monitoring survey [which] **that** led to the [establishment] **discovery** of the violation, and for the reasonable costs of preparing and bringing [legal] **a civil** action **commenced** under this [section] **subsection;**

3. [Assessment of the violator for any] **Recovery of reasonable** costs incurred by the State in removing, correcting, or terminating the adverse effects [upon the freshwater wetlands, State open waters or transition areas] resulting from any [unauthorized regulated activity] **violation** for which [legal] **a civil** action **has been commenced and brought** under this [section may have been brought] **subsection;**

4. [Assessment against the violator for] **Recovery of** compensatory damages for any loss or destruction of natural resources, including but not limited to wildlife, fish, aquatic life, habitat, plants, or historic or archaeological resources and for any other actual damages caused by [an unauthorized regulated activity. Assessments under this section shall be paid to the State

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Treasurer except that compensatory damages shall be paid by specific order of the court to any persons who have been aggrieved by the unauthorized regulated activity] **any violation for which a civil action has been commenced and brought under this subsection;** and /or

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

(b) Recovery of damages and costs under (a) above shall be paid to the State Treasurer.

7:7A-[16.15]**22.15** Criminal actions

(a) The Department, upon petition to the Attorney General, may bring a criminal action in court for certain violations of [the Freshwater Wetlands Protection Act, or of a permit, waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved] **N.J.S.A. 13:9B-1 et seq. or any regulation, rule, permit, or order adopted or issued by the Department** pursuant thereto.

(b) (No change.)

(c) A person who knowingly, purposely, or recklessly violates [the Freshwater Wetlands Protection Act,] **N.J.S.A. 13:9B-1 et seq.** or any [permit, approval, transition area waiver, order, exemption letter, or rule promulgated or approved pursuant thereto,] **regulation, rule, permit,**

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or order adopted or issued by the Department pursuant thereto, shall be guilty, upon conviction, of a crime of the third degree and shall be subject to a fine of no less than \$5,000 [nor] **and not** more than \$50,000 per day of violation, or imprisonment, or both.

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

1. Knowingly, purposely, or recklessly makes a false statement, representation, or certification in any application, record or other document filed or required to be maintained under [the Freshwater Wetlands Protection Act] **N.J.S.A. 13:9B-1 et seq.**, or [under a permit, transition area waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved] **any regulation, rule, permit, or order adopted or issued by the Department pursuant thereto**; or

2. Falsifies, tampers with, or purposely, recklessly or knowingly renders inaccurate, any monitoring device or method required to be maintained under [the Freshwater Wetlands Protection Act, or a permit, transition area waiver, order, exemption letter, mitigation proposal, or rule promulgated or approved] **N.J.S.A. 13:9B-1 et seq. or any regulation, rule, permit, or order adopted or issued by the Department** pursuant thereto.

7:7A-[16.16]**22.16** (No change in text.)

7:7A-[16.17]**22.17** [Notice of violation recorded on deed to property] **Recording a notice concerning violation with the deed for the property**

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(a) On order of the Commissioner,[:

1. The] **the** clerk or [register] **registrar** of deeds and mortgages of the county [containing] **where** the property [upon] **on** which the violation occurred **is located** shall record a notice [of] **concerning the** violation of [the Freshwater Wetlands Protection Act on] **N.J.S.A. 13:9B-1 et seq., with** the deed [of] **for** the property[; and/or].

[2. The clerk of the Superior Court shall record a notice of violation of the Freshwater Wetlands Protection Act.] **Any fees or other charges that are incurred by the Department for the recording of the notice concerning the violation shall be paid by the owner of the affected property or the violator.**

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

7:7A-[16.18]**22.18** "After the fact" permit

(a) The Department may issue an "after the fact" permit for a regulated or prohibited activity that has already occurred and that does not meet the standards for approval in this chapter only if all of the following are true:

1. (No change.)

2. The Department has assessed and collected the costs or damages enumerated in N.J.A.C.

7:7A-[16.4]**22.14** from the violator;

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3. – 5. (No change.)

(b) – (c) (No change.)

7:7A-[16.19]**22.19** Public participation

(a) To provide for public participation in the Department's enforcement process, the Department shall:

1. – 2. (No change.)

3. Publish notice of any proposed settlement of a Department enforcement action in the DEP Bulletin and provide at least 30 **calendar** days for public comment on the settlement.

7:7A-[16.20]**22.20** Grace period applicability; procedures

(a) Each violation identified in Table [F] **22.20** at (f) below by an "M" in the Type of Violation column[,] for which the conditions of (d)1 through 6 below are satisfied, and each violation determined under (c) below as minor for which the conditions of (d)1 through 9 below are satisfied, is a minor violation and is subject to a [30-day] **30-calendar**-day grace period as described at (e) below.

(b) Each violation identified in Table [F] **22.20** at (f) below by an "NM" in the Type of Violation column is a non-minor violation and is not subject to a grace period.

(c) If a violation is not listed in Table [F] **22.20** at (f) below, the designation of the violation as minor or non-minor is determined as follows:

1. If the violation is not listed in Table [F] **22.20** at (f) below but is comparable to a violation designated as "M" in Table [F] **22.20** and the violation meets all of the criteria of (d)1 through 6

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

2. If the violation is not listed in Table [F] **22.20** at (f) below and is not comparable to a violation listed in Table [F] **22.20** but the violation meets all of the criteria of (d)1 through 9 below, then the violation is minor. The minor violation shall be subject to a grace period of 30 **calendar** days as described at (e) below.

3. If the violation is not listed in Table [F] **22.20** at (f) below but is comparable to a violation designated as "NM" in Table [F] **22.20**, then the violation is a non-minor violation and is not subject to a grace period.

4. If the violation is not listed in Table [F] **22.20** at (f) below and is not comparable to a violation listed in Table [F] **22.20**, and the violation does not meet all of the criteria at (d)1 through 9 below, the violation is non-minor and is not subject to the grace period.

5. Comparability of a violation to a violation in Table [F] **22.20** at (f) below is based on the nature of the violation (for example, recordkeeping, accuracy of information provided to the Department, amount and type of impacts to the protected resources). A violation shall not be considered comparable to any violation designated as "M" in Table [F] **22.20** unless the violation also meets the criteria at (d)7 through 9 below.

(d) The Department shall provide a grace period of 30 **calendar** days for any violation identified as minor provided the following conditions are met:

1. – 4. (No change.)

5. In the case of a violation of [the Freshwater Wetlands Protection Act,] N.J.S.A. 13:9B-1 et seq., or any rule or regulation promulgated thereunder, or permit [or waiver] issued pursuant

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thereto, the person responsible for the violation has not been identified in a previous enforcement action by the Department or a local government agency as responsible for the same or a substantially similar violation at the same site or any other site within the preceding 12-month period;

6. – 9. (No change.)

(e) For a violation determined to be minor under (a) or (c) above, the following provisions apply:

1. The Department shall issue a notice of violation to the person responsible for the minor violation that:

i. (No change.)

ii. Specifies that a penalty may be imposed unless the minor violation is corrected and compliance is achieved within the specified grace period of 30 **calendar** days.

2. – 3. (No change.)

4. If the person responsible for the minor violation seeks additional time beyond the specified grace period to achieve compliance, the person shall request an extension of the specified grace period in writing no later than one week before the expiration of the specified grace period. The request shall include the anticipated time needed to achieve compliance, the specific cause or causes of the delay, and any measures taken or to be taken to minimize the time needed to achieve compliance. The request shall be signed and certified to be true by the responsible party or their designee. The Department may, in its discretion, approve in writing an extension which shall not exceed 90 **calendar** days, to accommodate the anticipated delay in

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achieving compliance. In exercising its discretion to approve a request for an extension, the Department may consider the following:

i. – iv. (No change.)

5. – 6. (No change.)

(f) The designations of violations of the Freshwater Wetlands Protection Act Rules as minor (M) or non-minor (NM) are set forth in Table [F] **22.20** below. The violation descriptions are provided for informational purposes only. In the event that there is a conflict between a violation description in Table [F] **22.20** and the rule to which the violation description corresponds, the rule shall govern.

Table [F] **22.20**

<u>Rule Citation</u>	<u>Violation Description</u>	<u>Type of Violation</u>
N.J.A.C. 7:7A-2.1(a), 2.2(a) and (b), [2.5(f)] 3.3(e) , [2.6(a)] 2.3(a)	Conducting regulated or prohibited activities in a freshwater wetland, transition area and/or State open water without prior Department approval.	NM
N.J.A.C. 7:7A-[4.3] 5.7 and 9.2	Failure to comply with conditions of a Department permit or authorization not related to submission of documentation to the Department.	NM

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Table [F] **22.20**

<u>Rule Citation</u>	<u>Violation Description</u>	<u>Type of Violation</u>
N.J.A.C. 7:7A-[4.3] 5.7 and 9.2	Failure to submit to the Department documentation as required by a permit condition.	M
N.J.A.C. 7:7A-[6.1(h)] 8.2(f) and 12	Failure to execute and record the required conservation restriction prior to the beginning of activities authorized under a transition area waiver, or transfer of the site.	NM
N.J.A.C. 7:7A-[10.1(f)] 16	Failure to provide in the application all information required in this chapter of which the applicant, its consultants, engineers, surveyors, or agents is or should be aware	NM
N.J.A.C. 7:7A-[10.9] 17	Failure to provide appropriate public notice during the permit application	NM

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Table [F] **22.20**

<u>Rule Citation</u>	<u>Violation Description</u>	<u>Type of Violation</u>
	process	
N.J.A.C. 7:7A-[13.1] 20.2 and 20.3	Failure to comply with conditions of a Department permit or authorization not related to submission of documentation to the Department.	NM
[N.J.A.C. 7:7A-13.1] 20.2 and 20.3	Failure to submit to the Department documentation as required by a permit condition.	M
N.J.A.C. 7:7A-[14.4(a)] 20.8	Failure to comply with a permit suspension order	NM
N.J.A.C. 7:7A-[14.5(b)] 20.9	Failure to comply with a permit termination order.	NM
N.J.A.C. 7:7A-[15.2(b)] 11.2(e)	Failure to conduct mitigation as required by a Department approval or administrative order	NM

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Table [F] **22.20**

<u>Rule Citation</u>	<u>Violation Description</u>	<u>Type of Violation</u>
N.J.A.C. 7:7A- [15.3(a)] 11.3(a)	Failure to conduct mitigation as required by a Department approval or administrative order	NM
N.J.A.C. 7:7A- [15.11(a)] 11.6(a)	Failure to submit a mitigation proposal to the Department as required by a Department approval or order	NM
N.J.A.C. 7:7A- [15.16(a)] 11.12(g)5	Failure to execute and record the conservation restriction that meets the requirements of N.J.A.C. 7:7A-[15.14] 12 prior to the start of mitigation activities	NM
N.J.A.C. 7:7A- [15.16(b)] 11.12(d)	Failure to submit a construction completion report within the required timeframe of completion of construction and planting of a restoration, creation or enhancement project	M

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Table [F] **22.20**

<u>Rule Citation</u>	<u>Violation Description</u>	<u>Type of Violation</u>
N.J.A.C. 7:7A- [15.16(c)] 11.12(e) and (f)	Failure to submit an annual [post-planting] post-construction monitoring report at the required intervals following the completion of the construction and planting associated with mitigation	M
N.J.A.C. 7:7A- [15.16(d)] 11.12(g)	Failure to demonstrate to the Department at the end of the [post-planting] post-construction monitoring period that the mitigation project is successful	M
N.J.A.C. 7:7A- [15.17(c)1] 11.13(d)2	Failure to transfer the mitigation area in fee simple to a government agency or charitable conservancy within 60 days after the Department declares mitigation through upland preservation successful	NM
N.J.A.C. 7:7A-	Failure to provide the government agency or	NM

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Table [F] **22.20**

<u>Rule Citation</u>	<u>Violation Description</u>	<u>Type of Violation</u>
[15.17(c)2] 11.13(e)	charitable conservancy with a maintenance fund for the mitigation area transferred to the government agency or charitable conservancy	
N.J.A.C. 7:7A- [15.18(a)] 11.16(b)1	Failure to apply to the Wetlands Mitigation Council for approval of the amount of monetary contribution following the Department's determination that monetary contribution is an appropriate mitigation alternative	NM
N.J.A.C. 7:7A- [15.19(a)] 11.15(a)	Failure to apply to the Wetlands Mitigation Council for approval of the particular parcel of land to be donated following the Department's determination that land donation is an appropriate mitigation alternative	NM

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APPENDIX 1

OBLIGATE AND FACULTATIVE FAUNA SPECIES FOUND IN VERNAL HABITATS

<u>Obligate Species</u>	<u>Facultative Species</u>
Marbled Salamander (<i>Ambystoma opacum</i>)	Common Snapping Turtle (<i>Chelydra serpentina serpentine</i>)
Blue-spotted Salamander* (<i>Ambystoma laterale</i>)	Eastern Mud Turtle (<i>Kinosternon subrubrum subrubrum</i>)
Jefferson Salamander (<i>Ambystoma jeffersonianum</i>)	Spotted Turtle(<i>Clemmys guttata</i>)
Eastern Tiger Salamander* (<i>Ambystoma tigrinum tigrinum</i>)	Eastern Painted Turtle (<i>Chrysemys picta picta</i>)
Wood Frog (<i>Lithobates sylvaticus</i>)	Red-spotted Newt (<i>Notophthalmus viridescens viridescens</i>)
Spotted Salamander (<i>Ambystoma maculatum</i>)	American Toad (<i>Anaxyrus americanus</i>)
Eastern Spadefoot Toad (<i>Scaphiopus holbrookii</i>)	Fowler's Toad (<i>Anaxyrus fowleri</i>)
[Jefferson x Blue-spotted Salamander*]	Pine Barrens Treefrog* (<i>Hyla andersonii</i>)
	Northern Gray Treefrog (<i>Hyla versicolor</i>)

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Fairy shrimp (order Anostraca)

Cope's (Southern Gray) Treefrog* (*Hyla chrysoceles*)

[Upland Chorus Frog]

Northern Cricket Frog (*Acris crepitans*)

New Jersey Chorus Frog (*Pseudacris kalmi*)

American Bull Frog (*Lithobates catesbeianus*)

Northern Green Frog (*Lithobates clamitans*)

Southern Leopard Frog (*Lithobates*

sphenocephalus)

Four-toed Salamander (*Hemidactylum scutatum*)

Northern Spring Peeper (*Pseudacris crucifer*)

Long-tailed Salamander** (*Eurycea longicauda longicauda*)

Wood Turtle** (*Glyptemys insculpta*)

Carpenter Frog (*Lithobates virgatipes*)

Pickerel Frog (*Lithobates palustris*)

Atlantic Coast Leopard Frog (*Rana kauffeldi*)

Green Treefrog (*Hyla cinerea*)

Eastern Box Turtle (*Terrapene carolina*)

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carolina)

Eastern Musk Turtle (*Sternotherus odoratus*)

*Listed as a New Jersey State endangered species

** Listed as a New Jersey State threatened species

CHAPTER 13

FLOOD HAZARD AREA CONTROL ACT RULES

SUBCHAPTER 9. GENERAL PERMITS

7:13-9.1 General permit 1 - channel cleaning under the Stream Cleaning Act

(a) General permit 1 authorizes a county, municipality, or a designated agency thereof to desnag a channel and/or remove accumulated sediment, debris, and garbage under the “Stream Cleaning Act” at N.J.S.A. 58:16A-67, provided the conditions at N.J.A.C. 7:13-6.7 are met and:

1. -6. (No change.)

7. If the project involves sediment removal from a channel with a natural bed, the following requirements are satisfied:

i. If the project is undertaken by a municipality, or a designated agency thereof, it is located wholly within that municipality;

[i.] **ii. [The] If the project is undertaken by a county, or designated agency thereof, the project is located wholly within one municipality or, if located within more than one municipality, the channel reach is less than 500 feet in length;**

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[ii.] **iii.** The average width of the channel bed does not exceed [15] **30** feet;

[iii. The channel has a documented history of severe flooding that has resulted or can result in property damage, therefore necessitating the proposed cleaning, clearing, or desnagging;]

iv. The channel is not classified as a Pinelands water or Category One water; [and]

v. The channel is not a present or documented habitat for threatened or endangered species[.]; **and**

vi. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed.

(b) – (f) (No change.)

SUBCHAPTER 19. REQUIREMENTS FOR AN APPLICANT TO PROVIDE PUBLIC NOTICE OF AN APPLICATION

7:13-19.3 Contents and recipients of public notice of an application

(a) – (b) (No change.)

(c) If the application is for a delineation, regulated activity, or project listed at (c)1 through [5] **6** below, the applicant shall provide the notice required at (b)6 above by publishing newspaper notice in accordance with N.J.A.C. 7:13-19.4 and, in addition, sending the notice at (d) below, in the manner set forth in the Municipal Land Use Law at N.J.S.A. 40:55D-12.b, to all owners of real property, including easements, within 200 feet of any proposed above ground structure that is part of the proposed regulated activity or project, excluding any conveyance lines suspended above the ground or small utility support structures such as telephone poles.

1. – 3. (No change.)

4. A public project on a site of 50 acres or more; [or]

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5. An industrial or commercial project on a site of 100 acres or more[.]; **or**

6. A project to remove sediment or debris from a channel of one-half mile or longer.

(d) – (f) (No change.)