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**ENVIRONMENTAL PROTECTION**

**LAND USE MANAGEMENT**

**WATER RESOURCE MANAGEMENT**

**Flood Hazard Area Control Act Rules; Coastal Zone Management Rules; and Stormwater Management Rules**

**Proposed Recodification: N.J.A.C. 7:13-17.2 as 20.2**

**Proposed Recodifications with Amendments: N.J.A.C. 7:13-9.8 as 15.1; 10.1 as 11.1; 10.3 through 10.6 as 11.3 through 11.6; 11.1 through 11.6 as 12.1 through 12.6; 11.9 as 12.8; 11.10 as 12.9; 11.12 as 12.12; 11.14 through 11.16 as 12.14 through 12.16; 11.17 as 12.18; 11.18 as 12.20; 11.19 as 12.21; 13.4 as 3.7; 13.5 as 3.8; 17 as 20; and 19.2 as 24.11**

**Proposed Amendments: N.J.A.C. 7:8-3.3, 4.2; and 5.5; and 7:13-1.1, 1.2, 1.4, 1.6, 2, 3, 4.1, and Appendices 1 and 2**

**Proposed Repeals and New Rules: N.J.A.C. 7:7E-3.26; and 7:13-1.3, 1.7, 5, 6, 7, 8, 14, 16, and 18**

**Proposed Repeals: N.J.A.C. 7:13-9.1 through 9.7, 10.2, 10.7, 11.7, 11.8, 11.11, 11.13, 12, 13.1 through 13.3, 15, and 19.1**

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**Proposed New Rules: N.J.A.C. 7:13-2.5, 4.2, 9, 10, 11.2, 12.7, 12.10, 12.11, 12.13, 12.17, 12.19, 13, 17, 19, 21, 22, 23, and 24.1 through 24.10**

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

Authority: N.J.S.A. 13:1D-1 et seq.; 13:1D-29 et seq., specifically 13:1D-33; 13:20-1 et seq.; 58:10A-1 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: 05-15-04

Proposal Number: PRN 2015-053

**Public hearings** concerning this proposal will be held as follows:

Monday, June 22, 2015, 10:00 A.M.

State of NJ Department of Environmental Protection

401 East State Street

1st Floor Public Hearing Room

Trenton, NJ 08625

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Thursday, June 25, 2015, 5:00 P.M.

Township of Long Branch Municipal Building

344 Broadway

Council Chambers Room

Long Branch, NJ 07740

Submit comments by July 31, 2015, 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 05-15-04

New Jersey Department of Environmental Protection

Office of Legal Affairs

Mail Code 401-04L

401 East State Street, 7th Floor

P.O. Box 402

Trenton, N.J. 08625-0402

This rule proposal may be viewed or downloaded from the Department's web site at

<http://www.nj.gov/dep/rules>.

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The agency proposal follows:

### **Summary**

As the Department is providing a 60-day comment period on this notice of proposal, this proposal 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 Flood Hazard Area Control Act (FHACA) Rules, N.J.A.C. 7:13, to reduce unnecessary regulatory burden, add appropriate flexibility, provide better consistency with Federal, local, and other State requirements, create additional permits-by-rule and general permits, and address implementation issues identified since the repeal and repromulgation of the rules in November 2007. The proposed amendments, repeals, and new rules consolidate similar provisions, simplify language, incorporate additional detail and description regarding the substantive standards that must be met to undertake regulated activities, and harmonize certain procedural provisions with the Department's other land use regulations.

The Department is proposing related amendments to the Coastal Zone Management (CZM) rules, N.J.A.C. 7:7E, and the Stormwater Management (SWM) rules, N.J.A.C. 7:8, for consistency with the FHACA Rules regarding development in flood hazard areas and the preservation of vegetation and habitat within and adjacent to surface waters. This Summary is organized according to seven broad 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:

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- Introduction;
- Framework and Applicability;
- Riparian Zones and Mitigation;
- Technical Requirements and Permit Standards;
- Permitting Process;
- Fees; and
- Enforcement.

## **INTRODUCTION**

### **Stakeholder outreach**

As part of this rulemaking, the Department conducted extensive stakeholder outreach. The Department sought input from local governments, the development community, the environmental community, and State and Federal agencies through 11 stakeholder meetings held on February 1, 4, and 7, 2011; April 13, 15, 18, and 20, 2011; and May 15, 16, 18, and 24, 2012. These stakeholder meetings addressed changes to the application process rules as well as standards governing development within flood hazard areas and riparian zones. Five subcommittees were formed to specifically address the following subject areas: riparian zones; building standards; acid producing soil deposits; stormwater management; and bridges, culverts, and transportation projects. The subcommittees addressed issues including the relationship between the riparian zone under the FHACA Rules and the special water resource protection area (SWRPA) under the SWM rules, the appropriate width of riparian zones along various surface waters, standards relevant to development within riparian zones, adaptability of development to

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future flood events, appropriate floor elevations for habitable buildings in flood hazard areas, mitigation of impacts related to exposure of acid producing soil deposits caused by development, standards relevant to the construction and replacement of bridges and culverts, and means by which the Department can continue to facilitate the repair, replacement and adaptability of public infrastructure. Many of the amendments proposed herein reflect the suggestions and recommendations of the subcommittees and stakeholders.

### **Changes to the rules governing the permit 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 Permit Program (CPP) rules, N.J.A.C. 7:7, and the CZM rules, N.J.A.C. 7:7E. The freshwater wetlands permitting program is implemented through the Freshwater Wetland Protection Act (FWPA) rules, N.J.A.C. 7:7A. The flood hazard area permitting program is implemented through the FHACA Rules. With this proposal and through the pending rulemaking to amend and combine in one chapter the CPP rules and the CZM rules (see 46 N.J.R. 1051(a), June 2, 2014) and an anticipated rulemaking to amend the FWPA rules, the Department intends to align the rules governing the permitting processes of all three programs to the extent the respective enabling statutes allow. The rules governing the process for obtaining a permit will be standardized across all three chapters and will be organized in a uniform order and format.

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In this proposal, 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.

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 increasing the use of electronic submittals. To facilitate these efforts, this proposal includes rules for an automated application and issuance process for general permits-by-certification (discussed further, below).

#### **Added flexibility for disturbance to riparian zone vegetation**

Under the existing rules, riparian zones of 50, 150, or 300 feet are established around regulated waters as set forth at existing N.J.A.C. 7:13-2.3 and 4.1. Given the many important ecological functions that riparian zone vegetation provides, adequately preserving such areas is essential to protecting New Jersey's natural resources and water supply. Accordingly, existing N.J.A.C. 7:13-10.2 limits the area of riparian zone vegetation that can be cleared, cut, and removed for various regulated activities under an individual permit. These limits may be exceeded provided certain demonstrations are met and adequate compensation is provided. However, in most cases, an applicant proposing to exceed these limits is required to request a hardship exception under N.J.A.C. 7:13-9.8 and demonstrate that strict compliance with the riparian zone limits would create an undue hardship. If the Department subsequently approves a

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hardship exception and issues a permit allowing the applicant to exceed the otherwise applicable limits, the permittee is required to provide compensation for the excess disturbance to riparian zone vegetation at a 2:1 ratio. Compensation can take the form of restoration, in which structures and/or impervious surfaces located in the riparian zone are removed and the area is replanted with vegetation; or enhancement, in which case trees are planted in the riparian zone in an area that is substantially devoid of trees. All such planting must be located in the riparian zone of the same regulated water as the disturbed vegetation for which compensation is required and be situated as close as possible to the disturbance.

The existing standards related to development within riparian zones have led to a number of unanticipated difficulties for applicants and the Department. First, many projects do not meet the limits of N.J.A.C. 7:13-10.2 for a given activity and applicants therefore seek a hardship exception from strict compliance with the riparian zone standards. Requesting a hardship exception generally requires the preparation of a detailed alternatives analysis through which the applicant seeks to demonstrate that strict compliance with the riparian zone limits creates an exceptional and undue hardship. This results in significantly increased time for preparing an application, greater uncertainty regarding whether the application will be approved, and overall higher application costs for the applicant because of the need to employ professionals to prepare the necessary documentation as well as the additional \$4,000 application fee for a hardship exception request. Because of the uncertainty regarding whether an application for a hardship exception will be approved, financing for prospective private development can be more difficult to obtain. Also, the Department commits significant staff resources to review hardship exception requests.

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In the majority of cases, the applicant, after a significant expenditure of time and resources, is able to demonstrate that strict compliance with the riparian zone limits does, in fact, create a hardship, and the Department approves the application with a requirement to provide mitigation to compensate for the excess riparian zone disturbance. However, it has also proven difficult or impossible for applicants to provide the riparian zone compensation required under the existing rules. As noted above, the existing rules establish only two means of riparian zone compensation: planting trees in an area largely devoid of trees and/or removing existing structures or other impervious surface and planting vegetation within the riparian zone of the same regulated water as the riparian zone disturbance and as close as feasible to that disturbance. These restrictions can prevent applicants from restoring or enhancing a severely degraded riparian zone because it is not located in the riparian zone of the same regulated water as the disturbed vegetation or is otherwise located farther from the site than a less desirable, but more closely situated, compensation area.

In order to address these issues, the Department is proposing various changes to the riparian zone requirements. First, the total amount of riparian zone vegetation allowed to be disturbed for roadways, utility lines, buildings, and other construction activities is proposed to be increased to better reflect the Department's experience in permitting these activities. Second, the Department is proposing to increase the area of riparian zone vegetation that can be disturbed for activities that do not adversely impact riparian zone functionality, such as disturbance to lawn, gardens, and other actively disturbed areas; work within roadway and utility line easements; and construction adjacent to a bulkhead or revetment along tidal waters and impounded fluvial waters. Third, allowances for riparian zone disturbance associated with a number of construction

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activities not addressed in the existing rules, which therefore require a hardship exception, such as site remediation projects, landfill closures, trails, boardwalks, footbridges, and subsurface sewage disposal systems, are being proposed, which will facilitate these projects and reduce the number of hardship exceptions requested. Fourth, the Department is proposing changes that will obviate the need for an applicant to obtain a hardship exception where an applicant demonstrates that a given project cannot feasibly meet the limits on riparian zone disturbance. The rules will require that the applicant provide riparian zone mitigation for all vegetation removed in excess of the limits. The proposed amendments additionally expand the locations where restoration and enhancement may be conducted to provide applicants with additional opportunities for riparian zone mitigation as well as to promote restoration and enhancement in degraded areas that may not be in close proximity to the disturbance requiring mitigation.

Reflective of the alignment of the land use regulatory programs, riparian zone creation and preservation are proposed to be added as compensation alternatives, as these are compensation options for disturbance to freshwater wetlands and transition areas under the FWPA rules. Also, standards for riparian zone mitigation banks are proposed, similar to freshwater wetlands mitigation banks under the FWPA rules.

### **Repeal of SWRPA in the Stormwater Management rules**

The SWM rules at N.J.A.C. 7:8-5.5(h) establish a 300-foot special water resource protection area (SWRPA) along Category One waters and certain tributaries. The FHACA Rules establish a 300-foot riparian zone along Category One waters and a slightly different set of

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tributaries. Where these buffers both apply to the same activity or project, implementation issues have arisen because of the differences in the regulatory requirements.

Pursuant to N.J.A.C. 7:8-5.5(h), a SWRPA applies to all waters designated Category One under the Department's Surface Water Quality Standards (N.J.A.C. 7:9B) and perennial or intermittent streams that drain into or upstream of the Category One waters as shown on the USGS Quadrangle Maps or in the County Soil Surveys, within the associated HUC 14 drainage. Under the FHACA Rules, a riparian zone applies to regulated waters as defined at N.J.A.C. 7:13-2.2, whether or not the water is depicted on a USGS Quadrangle Map or County Soil Survey. Since many surface waters regulated under the FHACA Rules do not appear on these maps, a riparian zone may apply where there is no SWRPA. Conversely, some features depicted on a USGS Quadrangle Map or County Soil Survey are manmade and possess drainage areas of less than 50 acres, and are therefore not regulated waters under the FHACA Rules. In such a case, a SWRPA exists where there is no riparian zone. The fact that SWRPAs and riparian zones apply to different sets of surface waters has led to inconsistent protections for surface waters and some confusion for both Department staff and the regulated community.

Additionally, the design and construction standards under the SWM rules for activities in a SWRPA in some cases differ significantly from the design and construction standards under the FHACA Rules for activities within a riparian zone. Construction within a SWRPA is permitted only in previously disturbed areas located more than 150 feet from the water and only where the applicant demonstrates that the functional value and overall condition of the SWRPA will be maintained to the maximum extent practicable. Under the FHACA Rules, development within a riparian zone is governed by standards that set specific limits on the amount of riparian

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zone vegetation that can be disturbed. For example, a greater area of riparian zone vegetation can be disturbed for roadways than for private residences, and different design and construction standards apply to each type of project in order to minimize adverse impacts to riparian zone functionality as well as to ensure the continued safety and stability of structures situated in riparian zones. Therefore, while the SWM rules prevent new development within a SWRPA, the FHACA Rules recognize that development within a riparian zone is sometimes unavoidable and therefore establish requirements to ensure that disturbance to riparian zone vegetation is minimized and, where disturbance to riparian zone vegetation would adversely impact the environment, that appropriate compensation is provided in order to ensure the continued preservation and/or improvement of riparian zone functionality.

The Department is therefore proposing to delete provisions related to the SWRPA from the SWM rules and to incorporate new standards in the FHACA Rules in order to create a 300-foot buffer with uniform standards that will apply to a uniform set of surface waters.

#### **Acid producing soil deposits**

The Department is proposing to delete all standards and requirements related to acid producing soil deposits in the FHACA Rules, as well as to delete reference to acid producing soil deposits from the riparian zone special area in the CZM rules, and to 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. This is appropriate because the Soil Conservation District staff are trained and equipped to guide prospective developers to design projects that will avoid exposing acid producing soil

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deposits and mitigate any impacts resulting from exposure of such deposits during construction.

Acid producing soil deposits are naturally occurring subsurface soil media containing iron sulfide minerals that, when exposed to air or water, react with oxygen to form sulfuric acid. The existing CZM and FHACA Rules establish a 150-foot riparian zone along the waters flowing through areas that contain such deposits, and the FHACA Rules place restrictions on how excavation can be performed in areas containing these soils. The intention of the existing rules is to minimize adverse environmental impacts resulting from exposure of acid producing soils. However, the 150-foot riparian zone along waters that flow through areas that contain these deposits has, in fact, resulted in unanticipated adverse environmental impacts and implementation difficulties. For example, requiring development and stormwater discharges to be located outside the 150-foot riparian zone along waters flowing through areas containing acid producing soil has caused significant erosion, leading to increases in the sediment load of the regulated water the riparian zone is intended to protect as well as lowered pH levels within these waters, which threaten aquatic biota. Further, determining the presence and location of acid producing soils can be costly and time-consuming to applicants.

With the deletion of the acid producing soil requirements, a regulated water flowing through an area that contains acid producing soils will possess a 50-foot riparian zone, unless a condition exists that would require a larger riparian zone, such as the presence of Category One waters, certain trout waters, or threatened or endangered species that are critically dependent on the regulated water for survival.

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### **Permits-by-rule**

The existing FHACA Rules contain permits-by-rule for 47 regulated activities. A person may undertake the specific regulated activity governed by the permit-by-rule without having to obtain prior written approval from the Department, provided all conditions of the permit-by-rule are satisfied. Activities permitted-by-rule meet the definition of a regulated activity under N.J.A.C. 7:13-2.4 and have been determined to have a *de minimis* impact on flooding and the environment. The Department is proposing to repeal the existing permits-by-rule and repromulgate them in separate sections to promote ease of use. The existing permits-by-rule are clarified, some are combined, and 19 new permits-by-rule are added. Each activity governed by the new permits-by-rule has been determined to result in a *de minimis* impact on flooding and the environment. The proposed new permits-by-rule cover a variety of common activities, such as minor stream cleaning projects, forestry activities, construction associated with existing buildings, roadways and utility lines, monitoring, investigation and ecologic enhancement activities, and the placement of solar panels in certain circumstances.

### **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 whether the

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particular proposed manner of conducting the activity meets the conditions of the general permit because the applicant has to certify that it does. 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.”

### **General permits**

The existing FHACA Rules contain 16 general permits authorizing certain regulated activities. With the exception of stream cleaning activities authorized under general permit 1, which has statutorily established review times that differ from the other general permits, the existing rules require that the Department complete review of applications for authorization under a general permit within 45 days. In order to harmonize the FHACA Rules with the Department’s FWPA and CZM rules, the Department is proposing that the review time for FHACA general permit applications be 90 calendar days and that the applicant provide public

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notice of an application for a general permit authorization. The proposed process by which the Department will review general permit applications is equivalent to the Department's current process to review applications for verifications and individual permits. The Department is also proposing six existing general permits as general permits-by-certification, and four existing general permits as permits-by-rule, and to establish nine new general permits.

### **Recodification table**

The following table summarizes the proposed relocation and recodification of the existing provisions of the FHACA 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.

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**TABLE OF CITATIONS AND RECODIFICATIONS, N.J.A.C. 7:13**

<b>Subject matter</b>	<b>Current citation</b>	<b>Proposed citation</b>	<b>Proposed change(s)</b>
Purpose and scope	1.1	1.1	Clarified and expanded; information relating to forms and Department address relocated to proposed new N.J.A.C. 7:13-1.3
Definitions	1.2	1.2	Clarified; amended; added and deleted new definitions
Types of permits and approvals	1.3	Repealed	Repealed
Delegation of authority	1.4	1.4	No change
Creation of a county water resources association	1.5	1.5	No change
Liberal construction	1.6	1.6	No change
Severability	1.7	1.7	Repealed and replaced
Permit requirement	2.1	2.1	Renamed; general permit-by-certification added; grandfathering provision amended
Regulated waters	2.2	2.2	Clarified; additions to the list of waters not regulated under this chapter
Regulated areas	2.3	2.3	Clarified; additions to the list of waters that do not receive a riparian zone
Regulated activities	2.4	2.4	Clarified
General provisions for determining the flood hazard area and floodway along a regulated water	3.1	3.1 and 5.5	Clarified; provisions regarding the need for a verification relocated to proposed new N.J.A.C. 7:13- 5.5
Selecting a method for determining the flood hazard area and floodway along a regulated water	3.2	3.2	Clarification regarding use of Method 4 when a Department delineation is available

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Flood hazard area and floodway based on a Department delineation (Method 1)	3.3	3.3	No change
Flood hazard area and floodway based on a FEMA flood insurance study (Methods 2 through 4)	3.4	3.4	Expanded description of acceptable hydrologic and hydraulic methodologies
Flood hazard area determined by approximation (Method 5)	3.5	3.5	No change
Flood hazard area and floodway determined by calculation (Method 6)	3.6	3.6	Expanded description of acceptable hydrologic and hydraulic methodologies
The riparian zone	4.1	4.1	Clarified, examples added; references to acid producing soil deposits deleted
General provisions for applicability determinations	5.1	2.5	Clarified; expanded scope
General provisions for verifications	6.1	5.1 and 18	Clarified; added new provision to allow verification of riparian zone only and/or portion of a site; substance of application contents addressed at N.J.A.C. 7:13-18
General provisions for permits-by-rule	7.1	6	Clarified and expanded; deletion of 14-day prior notice for permits-by-rule
Permits-by-rule	7.2	7	Existing permits-by-rule repealed and repromulgated with amendments and clarifications; 19 new permits-by-rule added
Standards applicable to all general permits	8.1	6.7, 18, and 21	Clarified and expanded at N.J.A.C. 7:13-6.7; substance of application contents addressed at N.J.A.C. 7:13-18; substance of application review addressed at N.J.A.C. 7:13-21

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General permit conditions	8.2	22.2	Clarification and amendment of existing standard conditions; addition of new standard conditions
General permit 1 for channel cleaning under the Stream Cleaning Act	8.3	9.1	Clarified
General permits 2A through 2G for agricultural activities designed by the NRCS	8.4	7.60, 7.61, 7.62, 7.63, 8.1, 8.2, and 8.3	General permits 2A, 2B, and 2C adopted as general permits-by-certification at N.J.A.C. 7:13-8, General permits 2D, 2E, 2F, and 2G adopted as permits-by-rule at N.J.A.C. 7:13-7
General permit 3 for bridge or culvert scour protection by a public entity	8.5	9.3	Clarified; expansion of activities eligible for authorization
General permit 4 for stormwater maintenance by a public entity	8.6	8.11	Adopted with amendments as general permit-by-certification 11 at N.J.A.C. 7:13-8.11
General permit 5 for the relocation of a building to reduce flood damage	8.7	Repealed	Combined with proposed general permit 5 at N.J.A.C. 7:13-9.5
General permit 6 for the reconstruction of a damaged or destroyed residence	8.8	8.5 and 9.5	Bifurcated into general permit-by-certification 5 at N.J.A.C. 7:13-8.5 and general permit 5 at N.J.A.C. 7:13-9.5; expansion of activities eligible for authorization
General permit 7 for residential construction in a tidal flood hazard area	8.9	8.6	Adopted with amendments as general permit-by-certification 6 at N.J.A.C. 7:13-8.6
General permit 8 for a utility line across or along a water with a drainage area of less than 50 acres	8.10	Repealed	Repealed

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General permit 9 for a roadway or footbridge across a water with a drainage area of less than 50 acres	8.11	9.9	Clarified; expansion of activities eligible
General permit 10 for stormwater outfall along a water with a drainage area of less than 50 acres	8.12	9.11	Adopted with amendments as general permit 11 at N.J.A.C. 7:13-9.11
General provisions for individual permits	9.1	10.1	Clarified
Application requirements for an individual permit	9.2	18	Clarified and amended
Application review procedures for a verification or individual permit	9.3	21	Clarified and amended
Duration of an individual permit	9.4	10.2	Clarified; additional projects eligible for 10-year permit; new reference to extensions
Individual permit conditions	9.5	10.3 and 22.2	Clarification of existing conditions; addition of new standard conditions
Cases where a verification is required prior to obtaining an individual permit	9.6	5.5	Clarified
Cases where an individual permit can be issued in an approximated flood hazard area	9.7	5.5	Clarified
Hardship exception for an individual permit	9.8	15.1	Clarified
Requirements for a regulated activity in a channel	10.1	11.1	Clarified; addition of new standards

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Requirements for a regulated activity in a riparian zone	10.2	11.2	Clarified; added flexibility in actively disturbed areas; replacement and augmentation of Table C; merger of SWRPA standards along category one waters and tributaries; removal of hardship exception requirement in cases where riparian zone limitations are exceeded; compensation relocated and expanded at proposed new N.J.A.C. 7:13-13
Requirements for a regulated activity in a floodway	10.3	11.3	Clarified; addition to list of exceptions for work in floodway
Requirements for a regulated activity in a flood fringe	10.4	11.4	Clarified; added limitations and explanations
Requirements for a regulated activity in or along a water with fishery resources	10.5	11.5	Clarified; added requirements
Requirements for a regulated activity in a documented habitat for threatened or endangered species	10.6	11.6	Clarified; added requirements
Requirements for a regulated activity in an area with acid producing soils	10.7	Repealed	All references to acid producing soil deposits deleted from chapter
Requirements that apply to all regulated activities	11.1	12.1	Clarified; added requirements; description of specific flood events that need to be analyzed under certain individual permits
Requirements for stormwater management	11.2	12.2	Clarified
Requirements for excavation; fill and grading activities	11.3	12.3	No change
Requirements for a structure	11.4	12.4	Clarified

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Requirements for a building	11.5	12.5	Clarified; added requirements; added flexibility
Requirements for a railroad; roadway or parking area	11.6	12.6	Clarified; added requirements
Requirements for a bridge or culvert	11.7	12.7	Clarified; added flexibility; new standards for terrestrial passage; clarification of when a stream must be spanned
Requirements for a footbridge	11.8	9.11	Recodified with amendments as general permit 11 at N.J.A.C. 7:13-9.11
Requirements for a utility line	11.9	12.8	Clarified; added standards
Requirements for a stormwater outfall structure	11.10	12.9	Added deference to local Soil Conservation District for stability issues
Requirements for a dam or a low dam	11.11	12.10 and 12.11	Clarified; low dams covered at proposed new N.J.A.C. 7:13-12.10; dams covered at proposed new N.J.A.C. 7:13-12.11
Requirements for a flood control project	11.12	12.12	Clarified and simplified
Requirements for a retaining wall or bulkhead	11.13	12.13	Repealed and repromulgated in simplified format; reduction in number of walls and bulkheads that need engineering certification
Requirements for bank stabilization	11.14	12.14	Clarified; added flexibility; new standards for restoring impaired streams to a natural condition
Requirements for sediment and debris removal from a water	11.15	9.2 and 12.15	Clarified; added flexibility; mosquito control activities deleted and proposed as general permit 2 at N.J.A.C. 7:13-9.2
Requirements for the storage of unsecured material	11.16	12.16	Clarified; riparian zone limitations deleted
Requirements for the placement, storage or processing of hazardous substances	11.17	12.18	Clarified; riparian zone limitations deleted

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Requirements for the placement, storage or processing of solid waste	11.18	12.20	Clarified; riparian zone limitations deleted
Requirements for the removal of existing fill or an existing structure	11.19	12.21	Clarified
Requirements for issuing an emergency permit	12.1	16.1	Restructured to align with CZM rules
Procedures after an emergency permit is issued	12.2	16.2	Restructured to align with CZM rules
Revision of a verification	13.1	22.5 and 22.6	Restructured to align with CZM rules; renamed modification; clarification of standards
Revision of a general permit	13.2		
Revision of an individual permit	13.3		
Revision of a Department delineation by application	13.4	3.7	Clarified
Revision or suspension of a Department delineation by the Department	13.5	3.8	Clarified
Transfer of an approval	14.1	22.4	Restructured to align with CZM rules
Suspension of an approval	14.2	22.7	Restructured to align with CZM rules; clarified
Termination of an approval	14.3	22.8	
General application provisions	15.1	18.1 through 18.4	

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Pre-application conference	15.2	17.1 and 17.2	
Application report	15.3	18.1 through 18.4	
Engineering report	15.4	18.5	Clarified
Environmental report	15.5	18.6	Clarified
General requirements for public notice of applications	16.1	19.1	Restructured to align with CZM rules; clarified
Public notice requirements for an application for a verification	16.2	19.1, 19.2 and 19.3	
Public notice requirements for an application for an individual permit	16.3		
Documenting public notice of an application	16.4	19.5	
Newspaper notice	16.5	19.4	
Contents of public notice of an application	16.6	19.2	
Application fees	17.1	20.1	
Requests for adjudicatory hearings	18.1	23.1	Restructured to align with CZM rules; clarification of requirements
Enforcement	19.1	24.1 through 24.10	Amended to include civil administrative penalties; aligned with enforcement provisions of other land use rules
Grace period applicability; procedures	19.2	24.11	Added references to new approvals and relocated standards

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Approximate method for determining flood hazard areas	Appendix 1	Appendix 1	Updated terminology
List of Department delineations	Appendix 2	Appendix 2	Deleted reference to Pahaquarry Township and Princeton Borough

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## **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 rules alignment effort includes establishing a consistent arrangement of the elements in each set of rules. The reader will find 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 requirements for issuing various types of permits and the substantive standards for those permits. After the substantive permitting standards, the reader will find mitigation requirements. After that, the reader will find permit application and review procedures, and fees. At the end of each chapter, the reader will find the rules governing 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 and 2, which are the general framework provisions (excluding definitions, which are discussed in the context of the rules where the respective defined terms are used) and the applicability and jurisdictional provisions. 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 at the end of the Introduction.

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## **General framework**

### **Scope and purpose (N.J.A.C. 7:13-1.1)**

The FHACA Rules are intended to help prevent and ameliorate the destructive impacts of flooding by establishing standards for disturbance to the land and vegetation in flood hazard areas. New Jersey periodically experiences severe flood events due to its climate, topography, and location along the Atlantic seaboard. Given the State's dense population and extensive level of existing development within flood hazard areas, this periodic flooding causes severe, repetitive, and deleterious social, economic, and environmental impacts. Flooding has and continues to be the most frequent, destructive, and costly natural hazard in New Jersey and is responsible for the large majority of disaster-related damage reported in the State. The most recent case in point is Superstorm Sandy, an historic storm that caused unprecedented flooding damage in New Jersey. In consideration of these concerns, the Department is proposing amendments to the description of the purpose of the rules at N.J.A.C. 7:13-1.1(c) to more specifically explain both the threat to the public health, safety, and welfare that flooding presents and the importance of protecting vegetation along surface waters in order to preserve bank stability and water quality.

### **Forms, information, technical manual; Department address and website (N.J.A.C. 7:13-1.3)**

Proposed new N.J.A.C. 7:13-1.3, Forms, checklists, information, technical manual; Department address and website, explains where forms, checklists, the Flood Hazard Area Technical Manual, and other information can be obtained; provides the addresses to which

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applications, fees, and other correspondence is to be submitted; lists the contact information for the Division of Land Use Regulation's Technical Support Center for questions concerning the FHACA Rules; and identifies the website at which applications for authorization under a general permit-by-certification are to be submitted. An explanation of the purpose and contents of the Flood Hazard Area Technical Manual is proposed at N.J.A.C. 7:13-1.3(b). This manual can be downloaded from the Division's website. The existing definition of "Flood Hazard Area Technical Manual" at N.J.A.C. 7:13-1.2 is not proposed to be continued. Additionally, since the guidance and information deemed helpful to applicants can change over time, specific references to the content of the technical manual throughout the chapter are proposed for deletion.

Liberal construction and severability (N.J.A.C. 7:13-1.6 and 1.7 and related definitions at N.J.A.C. 7:13-1.2)

The Department is proposing to amend the liberal construction provision at existing N.J.A.C. 7:13-1.6 to simply state the chapter shall be liberally construed to effectuate the purposes of the statutes under which it was adopted. The severability provision at existing N.J.A.C. 7:13-1.7, which establishes that should a court hold any provision(s) of the rules to be unconstitutional or invalid, the remainder of the rules will not be affected, is proposed to be repealed and replaced with new text that communicates the same concept but uses the language of the severability provision included in the pending CZM proposal at proposed new N.J.A.C. 7:7-1.8. Similarly, the existing definition of "Commissioner" at N.J.A.C. 7:13-1.2 is amended to match the definition in the CZM rules, which recognizes that the Commissioner of the Department can designate a representative to act on his or her behalf.

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### **Applicability and jurisdiction**

When a permit or authorization is required (N.J.A.C. 7:13-2.1 and related definitions at N.J.A.C. 7:13-1.2)

Existing N.J.A.C. 7:13-2.1, Permit requirement, is proposed to be re-headed, When a permit or authorization is required, and to be amended to include, among the permits and authorizations listed at N.J.A.C. 7:13-2.1(b), the new category of authorization under a general permit-by-certification.

In implementing the revised FHACA Rules that became effective November 5, 2007, the Department has determined that the “grandfathering” provisions at existing N.J.A.C. 7:13-2.1(c)4i have been, in some cases, unnecessarily limiting. Projects that had undergone several years of design, land preparation, and construction prior to that date and that had received municipal approvals but not, as required by N.J.A.C. 7:13-2.1(c)4i, a final approval that would enable commencement of construction on a specific lot and/or easement, were not grandfathered. As a consequence, as of November 5, 2007, those projects could not proceed without obtaining either a flood hazard area permit or a hardship waiver under the revised rules. Furthermore, the economic downturn that started prior to the November 5, 2007, effective date of the revised rules curtailed work on developments that had been previously initiated. If economic conditions had been normal, developments begun several years before the revised rules became effective would continue to be built and would likely have received all necessary construction approvals prior to November 5, 2007, and would thus have been grandfathered under N.J.A.C. 7:13-2.1(c)4i. However, many such projects were stalled by market changes and other economic forces beyond

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the control of the property owner or developer, with the result that the projects were not eligible for grandfathering despite the economic investments that had already been made.

In other cases, projects only partially qualified for grandfathering under the revised rules. For instance, a property owner or developer may have received final site plan approval for a residential subdivision prior to November 5, 2007, that enabled construction of site infrastructure including roadways, utilities, and stormwater management facilities. These activities would have been grandfathered. However, final building approval for the individual lots in a subdivision is received only as each house is constructed. If the development site were located along a regulated water that had a 25-foot riparian zone prior to November 5, 2007, but a 150- or 300-foot riparian zone after that date under the revised rules, a portion of the site that had not been subject to the FHACA Rules became regulated. Since there is no provision in the riparian zone standards allowing the construction of multiple houses within the riparian zone, a property owner or developer who made financial investments and commitments and who may have already constructed site infrastructure, could not construct individual houses as planned.

To address such inequities created by the grandfathering provisions, the Department is proposing to amend N.J.A.C. 7:13-2.1(c)4i to recognize a broader set of local approvals as qualifying for grandfathering under the FHACA Rules. The proposed amendments track the grandfathering provisions in the Department's SWM rules at N.J.A.C. 7:8-1.6(b)1. Rather than grandfathering only those regulated activities for which a valid municipal approval was issued prior to November 5, 2007, enabling commencement of construction of the regulated activity on a specific lot and/or easement, the provisions as proposed to be amended will grandfather regulated activities for which any one of five different types of approvals under the Municipal

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Land Use Law was obtained prior to November 5, 2007: (1) a preliminary or final site plan approval, (2) a final municipal building or construction permit, (3) a minor subdivision approval where no subsequent site plan approval is required, (4) a final subdivision approval where no subsequent site plan approval is required, or (5) a preliminary subdivision approval where no subsequent site plan approval is required.

Finally, since an applicant may initiate a design change without being required to do so by the government entity that issued the qualifying approval, a proposed amendment at N.J.A.C. 7:13-2.1(d) deletes reference to the issuing entity.

At N.J.A.C. 7:13-1.2, the Department is proposing a definition of “project” because the term is used in N.J.A.C. 7:13-2.1 and throughout the rules. A “project” includes all regulated activities occurring on a site and all regulated activities being proposed on a site, whether the regulated activities are undertaken concurrently or in phases. Impacts to flood storage and riparian zone functionality are incremental. Undertaking one regulated activity on a site may result in no adverse impact on the environment or flooding. However, undertaking many regulated activities on a single site could eventually result in significant adverse impacts. For this reason, many standards in this chapter refer to the impacts of the entire “project” in addition to the impacts of each individual regulated activity. Defining the term “project” in this way will help to ensure that potential impacts from ongoing and prospective development in flood hazard areas and riparian zones are appropriately evaluated by the Department.

In that same section, a new definition of “coastal permit” is proposed to describe Department approvals issued under the authority of the CPP and CZM rules and their enabling statutes. The existing chapter in some cases refers to such approvals as coastal permits and in

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other places describes CAFRA permits and Waterfront Development Permits. These references are replaced throughout the proposed rules with the term “coastal permit” to help simplify the chapter.

Regulated waters (N.J.A.C. 7:13-2.2 and related definitions at N.J.A.C. 7:13-1.2)

N.J.A.C. 7:13-2.2(a) provides that all waters of the State are regulated under the FHACA Rules with limited exceptions. The Department is proposing several amendments to N.J.A.C. 7:13-2.2(a)3, which exempts any segment of water that has a drainage area of less than 50 acres provided at least one of three listed criteria applies.

The Department is proposing to include in this exemption any feature which is not a “State open water” as that term is defined in the FWPA rules at N.J.A.C. 7:7A-1.4. The following are not State open waters under that definition: non-tidal drainage and irrigation ditches excavated on dry land, water-filled depressions created in dry land incidental to construction or remediation activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of “waters of the United States,” and artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons. Because these features that are not State open waters do not significantly contribute to flooding, and as vegetation near these features does not provide significant water quality treatment and other benefits associated with a riparian zone, regulation of activities in and adjacent to these waters under the FHACA Rules is unnecessary.

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Water-filled depressions created incidental to construction, remediation or fill/sand/gravel mining are currently exempt under N.J.A.C. 7:13-2.2(a)3 because they are manmade, provided they drain less than 50 acres. The Department is proposing new N.J.A.C. 7:13-2.2(a)4 to provide that such waters are exempt regardless of drainage area. Surface waters created in this manner are generally devoid of vegetation and fishery resources, lack positive drainage that would connect them to waters outside the facilities that created them, and are constantly under modification due to ongoing excavation work. These features will cease to be exempt, however, if the construction or excavation operation is abandoned and the resulting body of water meets the definition of “waters of the United States” in the FWPA rules at N.J.A.C. 7:7A-1.4.

The Department is proposing to include a swale as defined in the FWPA rules at N.J.A.C. 7:7A-1.4 as an example of a water having no discernible channel that meets this exemption if it drains less than 50 acres, and so is not regulated under the FHACA Rules. As defined in the FWPA rules, a swale drains less than 50 acres and has no definite bed or banks.

The Department is also proposing amendments that distinguish between a water confined within a lawfully existing, manmade drainage feature such as a ditch, channel or basin, and a water confined within a lawfully existing conveyance structure such as a pipe, culvert, or bridge. For a water confined within a ditch, channel, or basin, the exemption also applies to a water that historically possessed a naturally occurring, discernible channel before it was modified. However, the fact that a water now confined within a pipe, culvert, or bridge formerly had a naturally occurring, discernible channel is not relevant to whether the water as confined in the conveyance structure should be exempt. Under N.J.A.C. 7:13-2.3(a), a regulated water with a

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drainage area of less than 50 acres does not have a flood hazard area and, under proposed N.J.A.C. 7:13-2.3(c), a piped water does not possess a riparian zone. The confinement of the water in the conveyance structure therefore means that neither a flood hazard area nor a riparian zone can be applied to it.

The Department is proposing clarifying amendments to the definitions of “channel” and “water” at N.J.A.C. 7:13-1.2. The definition of “channel” is proposed to be amended to explain that a channel that is of human origin through excavation or construction is referred to in the FHACA Rules as a “manmade channel.”

The definition of “water” is proposed to be amended to explain that a water can be either naturally occurring or resulting from human activity. The latter is referred to as a “manmade water” throughout the chapter. A naturally occurring water that is piped, relocated or otherwise modified remains a naturally occurring water notwithstanding modification. The reference to a storm sewer as a type of feature that does not meet the definition of a “water” is proposed to be deleted, since there have been misunderstandings about what constitutes a storm sewer. The Department’s New Jersey Pollutant Discharge Elimination System (NJPDES) rules at N.J.A.C. 7:14A-1.2 define “municipal separate storm sewer” and “separate storm sewer” to include aboveground features such as ditches and other manmade channels. However, ditches and other manmade channels are not exempt from regulation under the FHACA Rules unless they have a drainage area of less than 50 acres, as explained above. Accordingly, reference to storm sewer is replaced with reference to an underground pipe or culvert that conveys stormwater runoff. Such a feature is not a “water” under this chapter unless it was constructed to enclose, replace or divert a previously existing, naturally occurring water.

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Regulated areas (N.J.A.C. 7:13-2.3)

N.J.A.C. 7:13-2.3 describes the regulated areas that include and surround each regulated water. The rules address two distinct regulated areas: the flood hazard area and the riparian zone. For clarity, the Department is proposing to recodify the description of the flood hazard area from N.J.A.C. 7:13-2.3(a)1 to its own subsection at N.J.A.C. 7:13-2.3(b), with clarifying amendments that do not affect meaning. Similarly, the Department is proposing to delete the description of the riparian zone from N.J.A.C. 7:13-2.3(a)2 and codify it with changes at new N.J.A.C. 7:13-2.3(c); the changes are discussed in the Riparian Zones and Mitigation section of this Summary below.

Regulated activities (N.J.A.C. 7:13-2.4 and related definitions at N.J.A.C. 7:13-1.2)

N.J.A.C. 7:13-2.4 describes the activities that, if conducted within regulated areas as identified at N.J.A.C. 7:13-2.3, are subject to the requirements of the FHACA Rules.

The FHACA Rules include design and construction standards for the repair, alteration, elevation, or removal of structures. These activities are therefore proposed to be included in the list of regulated activities at N.J.A.C. 7:13-2.4(a)5.

The existing FHACA Rules establish specific design and construction standards for a private residence, a multi-residence building (such as a hotel), and a public building (such as an emergency response center) that are more strict than those for a non-residential building (such as a retail building or warehouse) because flooding presents a greater danger to buildings where people live or regularly congregate, where the occupants or workers provide essential public

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services, or from which people cannot easily be evacuated during a flood. Not infrequently, non-residential buildings are acquired in order to convert them into residential or public buildings. In order to ensure that the safeguards the FHACA Rules require be in place to protect residential and public buildings against flooding are also applicable to buildings converted to such uses, the Department is proposing to amend N.J.A.C. 7:13-2.4(a)6 to include conversion of a building to a “multi-residence building” or “critical building” as an action that, if taken within a regulated area, is considered a regulated activity under the rules and subject to any applicable requirements. As described with regard to the amendments related to buildings in the Technical Requirements and Permit Standards section of the Summary below, at N.J.A.C. 7:13-1.2, the definition of “public building” is proposed to be deleted and replaced with the definition of “critical building.” Also, as explained in the Technical Requirements and Permit Standards section of the Summary with regard to proposed amendments related to buildings, reference to “one private residence” is being replaced throughout the FHACA Rules by “single-family home or duplex.” Accordingly, the term is replaced in N.J.A.C. 7:13-2.4(a)6.

Proposed new N.J.A.C. 7:13-2.4(b) explains that an activity not listed at N.J.A.C. 7:13-2.4(a) does not require a flood hazard area approval, even if the activity is located within a flood hazard area or riparian zone. This is true under the existing rules but is not explicitly stated, which has led to some confusion within the regulated community. Proposed N.J.A.C. 7:13-2.4(b) additionally incorporates existing N.J.A.C. 7:13-1.1(e), which alerts prospective applicants that activities regulated under this chapter may also be subject to other Federal, State, or local requirements. The statement in existing N.J.A.C. 7:13-1.1(e) that the issuance of a flood hazard area approval is not an indication that such requirements are met is not continued because it

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contradicts N.J.A.C. 7:13-2.1(b)6, which provides that a CAFRA or waterfront development permit can in some cases satisfy the requirement to obtain a permit under the FHACA Rules.

To reflect other proposed amendments and clarify what is covered under the rules, two definitions are proposed for amendment at N.J.A.C. 7:13-1.2. The definition of “regulated activity” is proposed to be amended to include a reference to general permits-by-certification, which are new under this proposal, as well as to revise citations for permits-by-rule, general permits, and individual permits to reflect the proposed new structure of the chapter. The definition of “structure” is proposed to be amended to clarify that a guiderail and any kind of stormwater management facility, not simply stormwater management basins, are types of structures.

Applicability determination (N.J.A.C. 7:13-2.5, and related amendments at N.J.A.C. 7:13-1.2)

Under the existing rules at N.J.A.C. 7:13-5.1, a flood hazard area applicability determination can be requested to establish whether an activity is regulated such that a flood hazard permit or authorization must be obtained before the activity is undertaken. The applicability determination is not mandatory, but is intended to help persons seeking to undertake activities near the State’s waterways determine their obligations with respect to obtaining a flood hazard area authorization or permit. As such, the application for an applicability determination is not as detailed as the application for an authorization or permit, and the Department does not undertake the comprehensive review that an authorization or permit application involves. The applicability determination provides a snapshot of the site conditions and rules applicable to a proposed project at a particular moment in time.

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Existing N.J.A.C. 7:13-5.1 is proposed to be repealed and replaced with a new rule at N.J.A.C. 7:13-2.5. Most of the substance of existing N.J.A.C. 7:13-5.1 is continued at new N.J.A.C. 7:13-2.5 with amendments as described below, including that an applicant can request a determination as to whether a particular water is regulated in addition to, or instead of, whether a proposed activity is regulated. Other changes bring the rule more closely into alignment with the provisions regarding jurisdictional determinations in the existing CZM rules, which are recodified and renamed applicability determinations in the pending CZM proposal.

The Department will not undertake a site inspection or review calculations in the context of a request for an applicability determination. If making the determination would require the Department to undertake a site inspection or review calculations to determine the limits of the flood hazard area or riparian zone on the site, then the appropriate means to determine whether the proposed activity is within a regulated area is through an application for a verification (see N.J.A.C. 7:13-5). This is contemplated under the existing rule regarding applicability determinations at N.J.A.C. 7:13-5.1(d)2i, and is explicitly stated in the new rule at proposed N.J.A.C. 7:13-2.5(b) and (f)2iii.

The request for an applicability determination must include an application, a USGS quad map, and a copy of a Department delineation or FEMA flood insurance rate map, if available. These are the same materials currently required to be submitted as part of the required “application report” but without the currently required copy of the municipal tax map and any previous approvals received from the Department, since the Department can obtain these items itself electronically. If the applicant seeks a determination regarding whether a water is regulated, a copy of the best available topographic mapping for the drainage area of the water

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must also be submitted. If the applicant seeks a determination regarding whether any proposed activity is regulated, a written description, color photographs, and site plans must also be submitted.

As noted, several changes are proposed that align the FHACA rule governing applicability determinations with the corresponding CZM rule. The existing FHACA rule provides that an applicability determination will be issued within 30 days of receipt of the application materials, workload permitting. This provision is not part of the CZM rule and is not continued in the proposed FHACA rule. There are many factors that affect the length of time necessary to review a request for an applicability determination, such as the availability of staff and the number permit applications being processed by the Department. In some cases, the Department can respond to a request for an applicability determination within several days, but if additional mapping, topography, or site plans are necessary, the applicability determination may take more time.

Under the existing FHACA rule, an applicability determination has a term of five years but is void should the proposed activity become regulated as a result of a change in the FHACA Rules or because the Department modifies the flood hazard area or riparian zone limits on the site. The CZM rule, existing and as proposed, does not establish a term for an applicability determination. Under the proposed FHACA rule, an applicability determination does not have a term. The concept from the existing rule that the FHACA applicability determination is void should circumstances change such that the proposed activity becomes regulated is expressed through language in the proposed rule stating that the applicability determination is based on the rules in effect and the information provided in the application regarding the site conditions and

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the proposed activities as of the date of issuance. Consequently, the recipient of the applicability determination is on notice that subsequent amendments to the FHACA Rules, changes in site conditions, changes to the limits of the flood hazard area, floodway, or riparian zone, and/or changes to proposed activities may result in the water or the proposed activities for which the applicability determination was issued becoming regulated. As is true under the existing rule though not explicitly stated, the recipient of the applicability determination is responsible for determining whether any such changes occur subsequent to the issuance of the applicability determination, and is liable for any violation of the rules resulting from conducting activities where such changes have occurred.

The Department is proposing a revised definition of “applicability determination” at N.J.A.C. 7:13-1.2. The proposed definition explains that an applicability determination is the statement of applicability of the FHACA Rules to a water or a proposed activity or activities, reflecting the changes to the applicability determination rule at N.J.A.C. 7:13-2.5 described above. Other definitions are proposed both for consistency with the CZM rules and for clarification. The existing definition of the term “drawing” is proposed to be continued without amendment. However, instead of defining the term “drawing,” the definition will be of the term “site plan,” in order to be consistent with the CZM rules, which have historically used the term “site plan” to describe graphic depictions of features submitted to the Department as part of an application for an approval. The definition for “USGS quad map” is proposed to be amended to correct the name of the Federal agency that publishes these maps and to clarify that the Department no longer provides copies of these maps.

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## **RIPARIAN ZONES AND MITIGATION**

A riparian zone exists along every regulated water, with limited exceptions discussed below. The riparian zone includes the land and vegetation within each regulated water, as well as the land and vegetation within a certain distance, specified in the FHACA Rules, of each regulated water.

Research has shown that a vegetated area immediately adjacent to surface waters provides a variety of significant functions and values. Vegetated buffers along waters serve to reduce adverse effects to water quality by removing nutrients and pollutants from surface runoff, and reduce concentrations of nutrients and pollutants in subsurface water that flows into streams and other surface waters. Vegetated buffers moderate storm flows to surface waters (which reduces downstream flooding and degradation of aquatic habitat), stabilize soil through plant roots (which reduces erosion in the vicinity of surface waters), provide shade to surface waters (which moderates water temperature changes and provides a more stable aquatic habitat for fish and other aquatic organisms), and provide detritus (which is a food source for many aquatic organisms). Vegetated buffers provide large woody debris (which furnishes cover and habitat for aquatic organisms and may cause the formation of pools in the stream channel), provide habitat to a wide variety of aquatic and terrestrial species, trap sediments (thereby reducing degradation of the substrate that provides habitat for fish and other aquatic organisms), and provide corridors for movement and dispersal of many species of wildlife. In addition, vegetated buffers next to surface waters provide flood storage capacity and groundwater recharge functions (see Federal Register Volume 64 No. 139 Page 39274, July 21, 1999).

Given the many important ecological functions and benefits that a riparian zone provides,

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adequately protecting such areas is essential to protecting New Jersey's natural resources and water supply. The State has sought to safeguard these areas and the values they provide to assure that only appropriate activities occur in these areas through the FHACA Rules and the CZM rules, and through protection of the similar special water resource protection area (SWRPA) under the SWM rules, N.J.A.C. 7:8.

The Department is proposing various amendments and new rules reflecting the experience it has gained in regulating riparian zones to assure protection is sufficiently robust, while adding flexibility in how the necessary protection can be achieved and making it easier to conduct necessary activities in a manner that will have minimal impacts on these important near-water areas. The proposed amendments also seek to eliminate differences that currently exist between the protections afforded the riparian zone in the FHACA Rules and the CZM rules, and those protections provided to the SWRPA under the SWM rules, resulting in uniform standards that will apply to a uniform set of surface waters. The specific elements of the SWRPA standards incorporated into the riparian zone by the proposed amendments are discussed as each relate to each relevant project type below.

### **Waters that possess a riparian zone (N.J.A.C. 7:13-1.2, 2.2, and 2.3)**

The FHACA Rules specify which waters are regulated by the rules, what areas around the waters are regulated, how the riparian zone is determined for waters that are regulated, and what limitations are applicable to activities in the riparian zone. N.J.A.C. 7:13-2.2 establishes the waters that are regulated under the FHACA Rules, and N.J.A.C. 7:13-2.3 describes the regulated areas that include and surround each regulated water. The rules address two distinct

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regulated areas: the flood hazard area and the riparian zone. The Department is proposing to amend N.J.A.C. 7:13-2.2 and 2.3 in order to clarify the jurisdiction of the chapter and is additionally proposing substantive amendments to regulated waters that possess a riparian zone. Amendments to N.J.A.C. 7:13-2.2, Regulated waters, which determines what waters are subject to this chapter (and, thus, which waters will be subject to riparian zone requirements), are discussed in the Summary section below addressing Technical Requirements and Permit Standards. Amendments to N.J.A.C. 7:13-2.3, Regulated areas, as well as other provisions which specify limitations and requirements applicable to regulated activities in the riparian zone are discussed in this portion of the Summary.

Existing N.J.A.C. 7:13-2.3(a)2 provides that a riparian zone exists along every regulated water with limited exception. Particularly, there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit, or peninsula. Since the terms “oceanfront barrier island,” “spit,” and “peninsula” are not defined, some prospective applicants have been uncertain which coastal land areas are being referenced. To eliminate this potential confusion, the Department is reorganizing existing N.J.A.C. 7:13-2.3(a)2 at proposed N.J.A.C. 7:13-2.3(c) and replacing the terms “oceanfront barrier island,” “spit,” and “peninsula” with a single defined term “barrier island complex.” The proposed new definition at N.J.A.C. 7:13-1.2 includes a description of each of the types of land mass included in the new term and clarifies the specific coastal land areas that do not possess a riparian zone under this chapter without changing the lands that were intended to be exempt from riparian zones under the 2007 adoption of this provision. The proposed new definition additionally clarifies that while the Cape May peninsula is not part of the barrier island complex, Cape May

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does include barrier islands, spits, and peninsulas along its Atlantic coastline. Since a large portion of Cape May County is a peninsula, some applicants have erroneously concluded that the entirety of Cape May County does not possess any riparian zones along its regulated waters. Some applicants have furthermore argued that the entire southern portion of New Jersey itself is a peninsula and therefore does not possess riparian zones. As it is not the intent of the existing provision to exempt the entire Cape May peninsula or southern New Jersey from riparian zone requirements, the proposed new definition clarifies the specific coastal land areas that do not possess a riparian zone under this chapter. The proposed new definition also clarifies that the barrier island complex does not include bay islands that lie between the mainland and a barrier island, but which may be connected to the mainland or barrier island by roads.

In addition to reorganizing and clarifying the waters exempt from riparian zone requirements under the existing rules, the Department is additionally proposing to expand the list of waters that are excepted from the riparian zone requirement due to the limited benefits that would be provided by a riparian zone in certain circumstances. The existing exception from the riparian zone requirement for any lawfully existing stormwater management basin is expanded at proposed N.J.A.C. 7:13-2.3(c)1iv to include any lawfully existing wastewater treatment pond, since such ponds are similar to stormwater management basins and do not provide any significantly beneficial riparian zone functionality. For the same reasons as the proposed amendment to N.J.A.C. 7:13-2.2(a)3 summarized in the Technical Requirements and Permit Standards section of this Summary below, proposed N.J.A.C. 7:13-2.3(c)1v relieves regulated waters enclosed within a lawfully existing pipe, culvert, or bridge from riparian zone requirements since disturbance of vegetation in an area where the water is enclosed does not

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impact the functionality of the watercourse ecosystem. Similarly, a manmade open channel created to convey stormwater, which is fully lined with manmade impervious material, such as a concrete low-flow channel within a stormwater basin or a ditch completely lined with concrete or asphalt, does not provide the beneficial functions of a natural channel and therefore no riparian zone is associated with such feature. In many cases, these waters having been created in areas that were not previously regulated under this chapter and tend to flow through highly developed or previously disturbed areas, such as within stormwater management structures and through urban areas, where redevelopment is encouraged. The Department is therefore proposing to exempt these waters from riparian zone requirements at proposed N.J.A.C. 7:13-2.3(c)1vi.

**Location and width of riparian zones (N.J.A.C. 7:7E-3.26; N.J.A.C. 7:13-2.2, 2.3, and 4.1)**

The width of riparian zones applicable to regulated waters varies with the resource value of the water to be protected. Accordingly, a water classified as a Category One (C1) water by the Surface Water Quality Standards, N.J.A.C. 7:9B, receives the widest riparian zone (300 feet wide), with other regulated waters not exempt from riparian zone requirements receiving either a 150-foot or 50-foot riparian zone depending upon the resources associated with the water.

N.J.A.C. 7:13-4.1 sets forth the method for determining the location and width of riparian zones along regulated waters that possess a riparian zone. The Department is proposing amendments intended to clarify the existing rules by reorganizing existing provisions, adding descriptive language, moving existing language into defined terms, and adding cross-references to other sections of the rules that do not change the substance of the rule.

As part of this reorganization, existing N.J.A.C. 7:13-4.1 is proposed for amendment to

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begin the section with a complete description of what is included in the riparian zone. To accomplish this, the description of what is included within a riparian zone is moved to the beginning of the section from existing N.J.A.C. 7:13-4.1(b) and the description is amended to add the indication, currently codified in existing N.J.A.C. 7:13-4.1(c), that the riparian zone is located on both sides of the water. An existing reference to waters which do not have a riparian zone, which repeats the exclusion contained at N.J.A.C. 7:13-2.3(c)1, is replaced with a cross-reference to that paragraph. The direction provided at existing N.J.A.C. 7:13-4.1(b)1 through 4 for determining the location of the riparian zone when a top of bank is not discernible is proposed for deletion from this section as the description of how to determine the top of bank in this situation is included in the proposed new definition of the term “top of bank” as discussed below.

Clarifying and substantive amendments are proposed to existing N.J.A.C. 7:13-4.1(c), which sets forth the width of the regulated area along regulated waters. Because the FHACA Rules establish riparian zones only along regulated waters, the term “tributaries,” which could include waters that are not considered regulated waters in accordance with N.J.A.C. 7:13-2.2, is proposed to be replaced with the term “regulated waters.” Similar changes are made throughout the chapter to make clear that waters referenced are only those that are considered regulated waters under this chapter. Provisions related to the presence of acid producing soil deposits are additionally proposed for deletion, as discussed below. Amendments regarding documented habitat for threatened or endangered species are discussed in the Technical Requirements and Permit Standards section of the Summary below.

The Department is additionally proposing to add new diagrams with related regulatory

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text at proposed N.J.A.C. 7:13-4.1(d) through (h) that are intended to assist prospective applicants in determining where a riparian zone is located in five common scenarios. The situations depicted are where a regulated water begins or ends within a site; where a roadway or railroad crosses over a lawfully existing pipe, culvert, or bridge; where a regulated water enters or exits a lawfully existing pipe, culvert, or bridge, which does not support a roadway or railroad; where a lawfully existing excavated area or impoundment lies along a regulated water; and where a coastal wetland lies within a riparian zone. In all cases, the illustrations reflect how the rules are applied and are to enhance understanding as to how these situations are addressed under the rules. With reference to coastal wetlands, it is noted that the FHACA, at N.J.S.A. 58:16A-60, specifically exempts coastal wetlands from regulation under this chapter. Therefore, while a riparian zone can extend around and past coastal wetlands, no riparian zone exists within coastal wetlands themselves.

To complement the changes summarized above, the Department is proposing a new definition of “top of bank” to clarify the point from which both the riparian zone and certain setbacks required under the rules are measured. Existing N.J.A.C. 7:13-4.1(b) explains that the riparian zone is measured outward from the top of bank along regulated waters, and also provides guidance in cases where no discernible bank is present. However, the location of the top of bank along some regulated waters can be difficult to determine. Furthermore, since the chapter’s setback requirements are generally measured from “the top of bank or edge of water,” in addition to difficulties implicit in trying to determine where to begin measuring the setback for waters that do not possess a discernible top of bank, some applicants mistakenly believe they can choose to locate regulated activities 25 feet from either the top of bank or the edge of water. In

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In addition to being utilized in proposed N.J.A.C. 7:13-4.1, the newly defined term “top of bank” will replace the term “top of bank or edge of water” throughout the rules and will reference the point from which both riparian zones and setbacks are measured.

The proposed definition of “top of bank” incorporates the substance of existing N.J.A.C. 7:13-4.1(b)1 through 4, which specify how to locate the riparian zone in cases where a discernible bank is not present along a regulated water. The standards for locating the top of bank for lakes and ponds, non-linear tidal regulated waters such as bays or inlets, and on irregularly shaped waters, such as a wetland complex, remain essentially the same as at existing N.J.A.C. 7:13-4.1(b)2, 3, and 4.

In addition to clarifying these existing requirements, the Department is proposing to amend how the top of bank is determined along a linear regulated water that does not possess a discernible top of bank. Particularly, the Department is proposing to establish two different methods of determining the location of the top of bank depending upon the drainage area of the linear regulated water. Generally, the width of a linear water feature that has a drainage area of less than 150 acres is very small. Accordingly, where a top of bank is not discernible for such a water feature, there is little difference between measuring the riparian zone or setback from the feature’s centerline and measuring this same area from what would be considered the top of bank in cases where it is discernible for a similarly-sized water. Because of this, the proposed definition provides that, for linear regulated waters with a drainage area of less than 150 acres, the top of bank, if not discernible, is considered to be located at the water feature’s centerline.

Conversely, where a regulated water has a drainage area of 150 acres or greater, measuring the riparian zone or setback from the centerline of the feature is not appropriate since,

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depending upon the size of the surface water, the resulting riparian zone could be largely, or even entirely, located within the surface water. Such a situation does not meet the intent of the riparian zone, which is to preserve and protect vegetation within and outside a regulated water in order to provide enhanced water quality and other important benefits described above. Therefore, in the absence of a discernible top of bank along a linear regulated water that has a drainage area of greater than 150 acres, the top of bank is proposed to be measured landward of the limits of the two-year flood within the feature, since that flow approximates a bank-full flow that typically forms channels in New Jersey. Alternately, along linear fluvial regulated waters that contain water at all times and have a drainage area of at least 10 square miles, such as the Delaware River, the top of bank is considered to be located at the normal water surface limit. This is consistent with existing N.J.A.C. 7:13-4.1(b)2 for lakes and ponds, and provides an alternate, acceptable location for the top of bank since the limit of the two-year flood along such a feature could be difficult to calculate and possibly much larger than the width of the natural channel.

As indicated above, the Department seeks to protect the area adjacent to surface waters through several of its rules, including the Coastal Zone Management (CZM) rules, N.J.A.C. 7:7E, which contain the substantive standards regarding the use and development of coastal resources. These rules are utilized by the Department in reviewing permit applications under the Coastal Permit Program rules at N.J.A.C. 7:7. The CZM rules, at N.J.A.C. 7:7E-3.26, Riparian zones, contain provisions consistent with those in the existing FHACA Rules that ensure that the State's surface waters in both fluvial and tidal areas are afforded appropriate riparian zone protection. As part of this rulemaking, the Department is proposing amendments to the CZM rules at N.J.A.C. 7:7E-3.26 to ensure that standards for activities and development within

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riparian zones remain consistent between the flood hazard area permitting program and the coastal permitting program. These amendments, taking the form of a repeal and new rule at N.J.A.C. 7:7E-3.26, include the method for determining the location and width of riparian zones along regulated waters, expansion of the list of regulated waters that do not have a riparian zone, incorporation of the substance of the proposed definition of “top of bank,” changes related to treatment of areas containing acid producing soil deposits described in detail below, as well as other changes maintaining consistency between the two chapters for the reasons summarized above.

#### **Determining if a riparian zone is forested or unforested (N.J.A.C. 7:13-1.2 and 4.2)**

Forested riparian zones generally provide greater water quality treatment, temperature moderation, habitat, bank stability, and erosion control than actively disturbed riparian zones, such as periodically maintained lawns or gardens, or actively farmed areas. Therefore, the existing and proposed FHACA Rules set forth more stringent standards for disturbance to forested riparian zones than for disturbance to riparian zone vegetation in actively disturbed areas, which, by definition at proposed N.J.A.C. 7:13-1.2, do not include forested areas or non-ornamental woody vegetation.

The method that must be utilized to determine if a riparian zone is considered to be forested or unforested is proposed at new rule N.J.A.C. 7:13-4.2. A similar methodology has been used by the Department since 1996 in determining forested areas under the CZM rules and since 2006 in the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38. The methodology proposed herein is consistent with that proposed in the pending CZM rule proposal

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at N.J.A.C. 7:7-13.5 (see 46 N.J.R. 1051(a), June 2, 2014) and is supported by data from the U.S. Forest Inventory (USFI) Field Procedures Manual (U.S. Forest Service), Forest Statistics for New Jersey 1987 and 1999 (Griffith and Widmann, 2001), and Forests of the Garden State Resource Bulletin NE163 (Widmann, 2005). The USFI program provides an overall analysis of tree size Statewide and the percentage of such trees per acre in New Jersey's forests.

Consistent with the Highlands Water Protection and Planning Act Rules and pending CZM rule proposal, a forest is first identified using aerial photography. The Department believes that using aerial photography is the appropriate first step since it is easier and less costly than doing extensive sampling onsite. If an area includes areas of sporadic coverage that the applicant asserts do not constitute forest area, then the applicant is required to overlay a grid system on the photograph(s) to determine whether areas with sporadic coverage contain sufficient coverage to be identified as forest. The Department will provide this grid on its website at <http://www.nj.gov/dep/landuse/guidance.html> (see proposed N.J.A.C. 7:13-4.2(b)). The use of the grid to identify forest cover is a method consistent with the New Jersey No Net Loss Reforestation Act, N.J.S.A. 13:1L-14.1 et seq. The grid methodology is based on the crown cover scale method which uses tree canopy coverage in aerial images for determining the urban tree cover ("Measuring and Analyzing Urban Tree Cover." Nowak, David J., Rowan A. Rowntree, E. Gregory McPherson, Susan M. Sisinni, Esther R. Kerkmann, and Jack C. Stevens, 1996. Landscape and Urban Planning, issue 36, Elsevier Science B.V. PIIS0169-2046(96)000324-6. This document is available at [www.fs.fed.us/psw/programs/uesd/uep/products/cufr\\_97\\_DN96\\_31.PDF](http://www.fs.fed.us/psw/programs/uesd/uep/products/cufr_97_DN96_31.PDF)). The 33 percent tree canopy coverage of a half-acre grid cell used in determining an existing forested area was

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developed by the Department's State Forestry Services as an acceptable percentage to meet the goal of the No Net Loss under the New Jersey No Net Loss Reforestation Act and is currently utilized in the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38, and is proposed to be used in the CZM rules (see 46 N.J.R. 1051(a); June 2, 2014). The grid methodology used to classify areas of sporadic coverage utilizing the grid system at proposed N.J.A.C. 7:13-4.2(b) is not intended to identify the outer limits of the forest, but rather to identify areas within the forest that should be classified as forest.

Proposed N.J.A.C. 7:13-4.2(c) sets forth the methodology for determining a forest on a site by measuring trees and their density on the ground. The proposed methodology reflects the CZM rule proposal as well as the Highlands methodology specified at N.J.A.C. 7:38-3.9(c). This methodology is used where the Department identifies forest areas within a riparian zone that were not identified by the applicant or where the applicant disputes that an area identified as forested area based on overlaying the grid on the aerial photography, should be considered unforested. Specifically, an applicant must select two 25-foot by 25-foot plots in each acre of the riparian zone under dispute, with the highest density of trees of each acre based on a visual inspection (see proposed N.J.A.C. 7:13-4.2(c)). If the tree size and density are uniform throughout the area, one plot may be used. Where one plot is used, the point total of that plot must be doubled to determine the total point value for the sampled acre. In each plot, the diameter of each tree is measured at four and one-half feet above ground. Each tree is scored using a point value based on its diameter. The scores of all of the trees within each of the plots are added together. If the total score for both plots is equal to or greater than 16, the sampled acre of riparian zone is forested.

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To assist applicants in locating the outermost limits of the forest, where a sampled acre is determined to be forested, an area totaling one-half acre (21,780 square feet) surrounding the sampled acre is also considered forested with the limit of the forested area being determined under proposed N.J.A.C. 7:13-4.2(d) as described below. Forested areas generally do not form linear boundaries with unforested areas and, therefore, it is unlikely that the limit of forested areas would coincide with a grid line. Consequently, a sampled acre found to be forested is typically surrounded by additional forested areas. An exception is made for those surrounding areas that are sampled by the applicant and which score less than 16 using the methodology described above. In such a case, a sufficient number of plots must be sampled to delineate the forested portion of the surrounding area. Conversely, where a sampled acre is determined to be unforested, an area totaling one-half acre (21,780 square feet) surrounding the plot is also considered to be unforested. Proposed N.J.A.C. 7:13-4.2(d) provides that the limit of the forested area is the outermost edge of the canopy of the forest within areas identified using the aerial photography and sampling, including the portion of the canopy of the forest that extends outside of the areas analyzed through aerial photography or sampling (see proposed N.J.A.C. 7:13-4.2(b) and (c)).

In association with the above, the existing definition of “tree” is proposed for deletion. In many cases, the riparian zone standards in the rules protect trees and/or prevent the removal of trees due to the important stability and water quality functions they provide within riparian zones. However, the existing definition limits trees to woody plants that have a diameter of five inches or greater at a height of 4.5 feet above the ground. Since trees that have a diameter of less than five inches can provide similar stability and water quality benefits, the proposed deletion of

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the existing definition will broaden the type of vegetation protected in cases where limitations are placed on the clearing, cutting, and/or removal of trees. Accordingly, each existing limitation on the disturbance to trees has been evaluated and amended as necessary to ensure that the limitations are appropriate to the size, type, and location of each proposed regulated activity.

**Deletion of provisions regarding acid producing soil deposits (N.J.A.C. 7:13-1.2, 4.1, and 10.7)**

The Department is proposing to delete existing N.J.A.C. 7:13-4.1(c)2iv, which establishes a 150-foot riparian zone along regulated waters containing acid producing soil deposits (naturally-occurring soils that contain geologic deposits of iron sulfide minerals which, when exposed to oxygen from the air or from surface waters, oxidize to produce sulfuric acid), the related definition of “acid producing soils” at N.J.A.C. 7:13-1.2, and the individual permit standards for mitigating exposure of these soils at N.J.A.C. 7:13-10.7. While initially intended to provide positive protections to the riparian zone environment and the waters within the riparian zone, these provisions have been found to result in difficulties and unanticipated adverse environmental impacts discussed below.

Acid producing soil deposits, upon excavation, generally have a pH of 4.0 or lower. After exposure to oxygen, these soils generally have a pH of 3.0 or lower. The sulfuric acid produced by such exposure has a highly deleterious impact on vegetation and aquatic biota downstream of the exposed area. By establishing in the FHACA Rules a 150-foot riparian zone along regulated waters that flow through areas containing acid producing deposits, the Department sought to protect nearby vegetation and aquatic biota by pushing most development

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away from such areas, thereby avoiding disturbance that would expose such deposits with a corresponding reduction of the risk of adverse impacts to the environment. However, requiring stormwater discharges to be located outside the 150-foot riparian zone along waters flowing through areas containing acid producing soil deposits has resulted in formation of an erosional channel that can be of significant size and depth, and can lead to unsafe conditions, as well as increases in the sediment load of the regulated water the Department has sought to protect. This dynamic, which has been verified by the Department through numerous site inspections with staff from New Jersey's Soil Conservation Districts, paradoxically exposes the very soil deposits that the Department has sought to protect from exposure. In contrast, in many cases acid producing soil deposits could actually be better isolated from exposure by placing development on top of the deposits in such a way that the deposits cannot possibly contact air or water. For example, clean fill could be imported to the site and buildings or pavement placed above the acid producing soil deposits, without exposing these deposits, effectively capping these soils and preventing any potential future exposure.

Additionally, it is often difficult, costly, and time-consuming to determine the location of acid producing soil deposits, which can be located at various depths and are often scattered over large areas. When the 150-foot riparian zone along waters containing acid producing soil deposits was incorporated into the FHACA Rules, the Department acknowledged the variability of the location of acid producing soil deposits and allowed that an applicant could demonstrate that, despite such deposits being indicated on available soil mapping, there are, in fact, no acid producing soil deposits on the site in question. Upon such a demonstration, the 150-foot riparian zone would not be applicable to that site (see Response to Comment 406, 39 N.J.R. 4573(a),

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4628). However, while it had been anticipated that available mapping would generally provide a good indication of the presence of acid producing soil deposits on a site, based on soil data presented to the Department by prospective applicants since adoption of the 150-foot riparian zone, the Department has concluded that the available soil mapping cannot be used to predict the precise location or depth of acid producing soil deposits on a given site or along a given regulated water, which makes it very difficult to determine where the 150-foot riparian zone should apply. Further, since soil borings are typically performed at intervals of roughly 100 to 200 feet throughout a site, a small pocket of acid producing soil deposits can easily be missed, or, if isolated, small deposits are encountered, the resulting riparian zone can undulate between 50 feet and 150 feet along a given regulated water.

Finally, engineering mechanisms exist to effectively mitigate against and prevent impacts from stormwater and floodwater exposure to acid producing soil deposits, as regularly managed by local Soil Conservation Districts. Potential adverse environmental impacts from acid producing soil deposits can therefore be prevented regardless of the existence of a 150-foot riparian zone.

Given all of the above, the Department is proposing to delete all standards and requirements related to acid producing soil deposits from this chapter, and rely on local Soil Conservation Districts to properly mitigate potential impacts, as they are required to do under the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90. The local Soil Conservation Districts, which are well staffed and effectively trained to help prospective developments avoid and mitigate impacts from exposure of acid producing soil deposits, are best suited to undertake the protections necessary for areas containing acid producing soil deposits.

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Accordingly, unless a wider riparian zone is required pursuant to proposed N.J.A.C. 7:13-4.1(d) as the result of some other condition applicable at the site, a regulated water flowing through an area that contains acid producing soil deposits will possess a 50-foot riparian zone.

**Deletion of SWRPA and related incorporation of certain standards into 300-foot riparian zone (N.J.A.C. 7:8-5.5; N.J.A.C. 7:13-4.1 and 11.2)**

The SWM Rules at N.J.A.C. 7:8-5.5(h) establish a 300-foot special water resource protection area (SWRPA) along surface waters designated as Category One (C1) waters under the Department's Surface Water Quality Standards at N.J.A.C. 7:9B and certain tributaries described below. The FHACA Rules at N.J.A.C. 7:13-4.1(c)1 establish a 300-foot riparian zone along C1 waters and a slightly different set of tributaries as described below. Often these buffers both apply, but their implementation has proved difficult for the reasons described below. Consequently, the Department is proposing to delete N.J.A.C. 7:8-5.5(h) and to incorporate new standards at N.J.A.C. 7:13 in order to create a 300-foot buffer with uniform standards that will apply to a uniform set of surface waters. The term SWRPA will no longer be used and the substantive standards for development within SWRPAs are proposed to be incorporated, where appropriate, into the requirements for a regulated activity in a 300-foot riparian zone at proposed N.J.A.C. 7:13-11.2. The Department anticipates that these amendments will simplify and clarify the Department's regulatory oversight of activities within 300 feet of the protected waters, as well as enable the Department to focus attention on those surface waters most susceptible to the effects of development.

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The SWM Rules limit where development can occur within the 300-foot SWRPA area and establish standards that must be met to protect stormwater runoff quality. These standards include a total suspended solid (TSS) removal rate and a temperature control standard where stormwater flowing through the SWRPA cannot comply with soil stabilization standards established under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39, et seq. The SWM rules additionally allow regional stormwater management planning committees and municipalities to develop regional and municipal stormwater management plans that may include, as an optional element, a stream corridor protection plan provided, if the plan includes waters that are subject to a SWRPA, that the regional or municipal plan's requirements for the protection of the SWRPA must be at least as stringent as the standards contained in N.J.A.C. 7:8-5.5 (see Regional stormwater management plan and elements, N.J.A.C. 7:8-3.3; and Municipal stormwater management plan and elements, N.J.A.C. 7:8-4.2).

While the SWRPA is similar in some respects to the 300-foot riparian zone along C1 waters and tributaries that are considered regulated waters under the FHACA Rules, three major differences between the riparian zone protections and the SWRPA protections to C1 waters and their tributaries have resulted in unintended and problematic consequences.

First, SWRPAs apply only in cases where a "major development" is proposed. A major development is defined at N.J.A.C. 7:8-1.2 to mean any development that "provides for ultimately disturbing one or more acres of land or increasing impervious surface by one-quarter acre or more." In contrast, riparian zones under the FHACA Rules apply irrespective of the size or intensity of a proposed development. Since many prospective construction projects do not

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meet the definition of a “major development” and SWRPAs are limited to C1 waters, riparian zones therefore impact a greater number of projects than do SWRPAs.

Second, the design and construction standards for activities subject to SWRPAs in some cases differ significantly from the design and construction standards for activities within riparian zones. With limited exceptions, construction meeting the SWM rule definition of “major development” within SWRPAs is permitted only in previously disturbed areas located more than 150 feet from waters possessing a SWRPA, and only in cases where the applicant demonstrates that the functional value and overall condition of the SWRPA will be maintained to the maximum extent practicable. Development within riparian zones, however, is governed by the standards at existing N.J.A.C. 7:13-10.2, proposed N.J.A.C. 7:13-11.2, which set forth specific limitations on the amount of riparian zone vegetation that can be disturbed for various activities under an individual permit. Similarly, each adopted permit-by-rule and general permit limit the amount of riparian zone vegetation that can be cleared, cut, and/or removed. For example, roadways are permitted to disturb a different amount of riparian zone vegetation than single-family home or duplexes, and different design and construction standards apply to each type of project in order to minimize adverse impacts to riparian zone functionality, as well as to ensure the continued safety and stability of structures situated in riparian zones. Therefore, while N.J.A.C. 7:8-5.5(h) prevents certain types of new development from occurring within SWRPAs, the FHACA Rules recognize that development within riparian zones is sometimes unavoidable, and therefore establishes requirements necessary to ensure that disturbance to riparian zone vegetation is avoided where feasible, minimized to the extent practicable, and, where disturbance to riparian zone vegetation would adversely impact the environment, appropriate compensation

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is provided in order to ensure the continued preservation and/or improvement of riparian zone functionality. In instances where development is indeed unavoidable, the Department is required to issue a hardship exception to allow the applicant to proceed. The Department has therefore determined that these amendments are appropriate to allow certain unavoidable development, subject to the standards set forth in the amended rules, rather than require the applicant to undertake the burden of applying for a hardship exception.

Finally, the stormwater rules at N.J.A.C. 7:8-5.5(h) establish SWRPAs along all surface waters designated as C1, as well as all surface waters that flow into the C1 waters, provided two criteria are met. First, the surface water must be depicted as a line on either a USGS quadrangle map or a county soil survey map. Second, the water must lie within the same HUC-14 drainage area as the C1 water to which it drains. The term "HUC-14" refers to the hydrologic unit code system developed by the United States Geological Service for delineating and identifying drainage areas. There are 921 HUC-14 sub watersheds in New Jersey, which range from 0.1 to 42 square miles in area. (More information on how the United States Geological Service designates hydrologic unit codes for various watersheds can be obtained at <http://water.usgs.gov/GIS/huc.html>.)

While the riparian zone applicable to a C1 water under the FHACA Rules covers a similar 300-foot area adjacent to the C1 water and its tributaries, and the tributaries potentially subject to the protected area are similarly only those within the same HUC-14 as the C1 water to which they drain, whether the tributaries are subject to a riparian zone depends upon whether the tributary is a regulated water under N.J.A.C. 7:13-2.2, irrespective of the water's depiction on a USGS Quadrangle Map or County Soil Survey. Since many surface waters regulated by the

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FHACA Rules do not appear on these maps, riparian zones therefore apply to waters that do not have a SWRPA because the water is not mapped. Conversely, some features depicted on a USGS Quadrangle Map or County Soil Survey are manmade and possess drainage areas of less than 50 acres, and are, therefore, not regulated under the FHACA Rules pursuant to N.J.A.C.

7:13-2.2. In such cases, SWRPAs are applicable to waters that are not subject to a riparian zone. The fact that SWRPAs and riparian zones apply to different sets of surface waters has led to inconsistent protection of surface waters and uncertainty.

Continued reliance on the USGS maps and county soil survey maps has a number of drawbacks. In some cases, a USGS map will indicate that a perennial stream exists at a given location, as evidenced by a solid blue line. However, the absence of a blue line on a USGS map does not necessarily indicate that a perennial stream does not exist at that location. Furthermore, whether a feature flows perennially or intermittently is not an indication of its relative environmental value and therefore should not determine whether a feature is appropriately subject to a protective buffer. With reference to the county soil survey maps, many of these were developed several decades ago and, as a result, do not necessarily accurately reflect current feature locations due either to natural migration or human intervention. Further, subsequent to adoption of the SWRPA requirements, the USDA Natural Resource Conservation Service has replaced these printed maps with online soil mapping that does not indicate the location of most surface waters, since hydrography from the printed maps is not uniformly provided in the current digital format. Accordingly, prospective applicants attempting to determine the location of SWRPAs must rely on printed county soil surveys, which are outdated, sometimes incorrect, and often difficult to obtain.

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In light of the problems inherent in the use of USGS maps and county soil survey maps for these purposes, the Department is proposing to continue to base riparian zones on the longstanding model presented in the existing FHACA Rules at N.J.A.C. 7:13-2.3 and 4.1. Accordingly, riparian zones along C1 waters and their tributaries will continue to apply along all features regulated under the FHACA Rules. As a result of the proposed amendments, while regional planning agencies and municipalities will continue to have the ability to incorporate a stream corridor protection plan into regional and municipal stormwater management plans, the waters to which those plans apply and the minimum standards that must be reflected in the stream corridor protection plan will be those applicable to riparian zones under the FHACA Rules (see proposed N.J.A.C. 7:13-11.2).

Given the differences between SWRPAs and riparian zones outlined above and the resultant difficulty in implementing these buffers, the Department is proposing to delete provisions related to the SWRPA from N.J.A.C. 7:8-5.5(h) as well as references to the SWRPA requirements in the FHACA Rules at current N.J.A.C. 7:13-4.1(d) and 10.2(j), proposed N.J.A.C. 7:13-4.1(i) and 11.2(j), respectively, and to incorporate new standards in the FHACA Rules, as described below, to create a 300-foot buffer to C1 waters and certain tributaries with uniform standards that will apply to a uniform set of surface waters. In addition to simplifying the regulatory scheme for those impacted by the rules, the proposed new standards in the FHACA Rules will enable the Department to focus attention on surface waters that are most susceptible to degradation.

### **Requirements and limitations applicable to regulated activities in a riparian zone**

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In some cases the disturbance to vegetation in riparian zones allowed under permits-by-rule, general permits, and individual permit standards under the existing FHACA Rules for various projects has been insufficient to appropriately accommodate responsible development, particularly for infrastructure projects. In some cases the existing rules place unnecessary burdens of proof upon applicants seeking to plan certain activities within riparian zones, do not sufficiently describe the types and amount of development that can appropriately be located within close proximity to regulated waters, and allow only limited options for mitigation when a project necessarily exceeds the allotted amount of vegetation that may be disturbed for a given activity.

In order to address these unintended consequences, the Department is proposing to restructure the requirements for activities within riparian zones to provide flexibility in appropriate circumstances, to remove requirements that have proven to be unmanageable, burdensome, and unhelpful in furthering the Department's goals of riparian zone protection, to modify the limitations on the area of riparian zone disturbance allowed for certain activities and to add classes of activities that were previously omitted under Table C at existing N.J.A.C. 7:13-10.2(d) (proposed Table 11.2 at proposed N.J.A.C. 7:13-11.2(e)), to allow removal of vegetation for a limited class of activities where such removal can occur without environmental degradation. The Department is further proposing to require appropriate proofs in situations where riparian zone disturbance necessarily exceeds the limitations of proposed Table 11.2, to clarify the situations under which development is permissible within 25 feet of the top of bank along a regulated water, and to introduce additional ways to provide compensation for riparian zone impacts at proposed N.J.A.C. 7:13-13. The Department believes that these proposed

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amendments, described below, will more reasonably balance the social, economic, and environmental benefits of riparian zone protection with the development and infrastructure needs of communities throughout the State.

Providing additional flexibility for disturbing riparian zone vegetation within actively disturbed areas (N.J.A.C. 7:13-1.2)

A new definition is proposed at N.J.A.C. 7:13-1.2 for “actively disturbed area” to clarify a particular type of land within a riparian zone that has been subject to regular and ongoing human usage or intervention, such that the typical functions and benefits associated with healthy riparian zone ecosystems have been significantly impaired. Since development in such areas will result in reduced impacts to riparian zone functionality, as compared with development that results in clearing, cutting, and/or removal of forested areas, trees, and other woody vegetation, the proposed FHACA Rules encourage riparian zone impacts to be located in actively disturbed areas, where feasible, as described in the summary of each permit-by-rule, general permit-by-certification, general permit, and individual permit standards addressing riparian zone disturbance.

The proposed definition provides that any expanse of land covered by impervious surface is considered an actively disturbed area. Redevelopment activities on land that is covered by impervious surface does not require clearing, cutting, and/or removal of riparian zone vegetation, and therefore would not impair riparian zone functionality. Any area that is actively farmed, which is defined at existing N.J.A.C. 7:13-1.2 to mean land that is “currently and continually in use for cultivation, grazing or other agricultural purposes, provided such activities are recognized

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as agricultural by the USDA ...,” is also considered an actively disturbed area, since actively farmed areas are subject to periodic alteration of vegetative coverage. Any portion of an easement, right-of-way, garden, lawn, or park, which is regularly maintained, such as through seasonal mowing or cultivation, is also provided as an example of an actively disturbed area, since the ability of vegetation in such areas to provide the functions of a riparian zone is severely diminished as a result of regular human intervention. Accordingly, where a necessary activity may occur in an actively disturbed portion of a site, conduct of the activity in that area rather than in an area containing riparian zone vegetation that has not been disturbed reduces impacts to both the riparian zone and the regulated water. The existing definition of “impervious surface” is further proposed to be amended to match the definition found in the SWM rules at N.J.A.C. 7:8-1.2. The examples of impervious surface are unnecessary, and the reference to densely packed gravel or stone roadways and parking areas as sometimes being considered impervious has led to confusion among the regulated community. The proposed amendment will promote consistency between the Department’s rules, without changing the meaning of the term.

The proposed new definition additionally clarifies that areas occupied by forests and other non-ornamental woody vegetation are not part of an actively disturbed area, since these areas provide greater riparian zone benefits than the examples described above. For example, in a typical residential yard, a periodically-maintained lawn may surround a handful of isolated, non-ornamental trees. The lawn itself is considered an actively disturbed area under the proposed definition, but the trees themselves are not. Thus, a permit-by-rule, general permit-by-certification or general permit that allows disturbance to actively disturbed areas would allow removal of grass around a tree, as well as from under a tree’s canopy, but the tree itself cannot be

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disturbed unless a permit specifically states that trees may be cleared, cut, or removed. An exception is made for ornamental woody vegetation, since such vegetation is generally planted in small quantities in landscaped areas and is often comprised of non-native and/or invasive species. Such vegetation does not provide significant riparian zone functionality.

In addition to the above, the existing and proposed FHACA Rules generally prevent clearing, cutting, and/or removal of riparian zone vegetation within 25 feet of any top of bank. Since vegetation in this area is essential for maintaining bank stability and discouraging channel migration, clearing, cutting, and/or removal of vegetation in this area can easily destabilize a channel, and lead to increased erosion and flooding, and adverse water quality impacts. However, where riparian zone disturbance is located adjacent to a bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water, and disturbance is limited to actively disturbed areas, then such impacts to erosion, flooding, and water quality will not occur. As discussed in this Summary below, the proposed new flexibility for activities within 25 feet of a top of bank is incorporated into the standards of a number of proposed permits-by-rule, general permits-by-certification, and general permits, as well as individual permit standards.

Permit-by-rule, general permit-by-certification, and general permit standards applicable to activities in the riparian zone

Through this rulemaking, the Department is proposing and/or modifying 63 permits-by-rule, 15 general permits-by-certification, and 13 general permits. Each existing permit-by-rule and general permit, and each proposed permit-by-rule, general permit-by-certification, and general permit, limits the amount and/or type of riparian zone vegetation that can be temporarily

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or permanently cleared, cut, and/or removed for authorized activities. These limits were determined by considering the area of land disturbance that is reasonably required to undertake each of the authorized activities as well as whether the activity is likely to disturb trees or can be situated primarily in actively disturbed areas, such as lawns, and thereby avoid disturbing trees, while additionally avoiding and/or minimizing potential adverse impacts to riparian zone functionality. For example, the construction of a small, non-habitable building such as a shed (see permit-by-rule 13), which is generally situated in lawn areas and can be erected with minimal land disturbance, is afforded less area of riparian zone vegetation that can be cleared, cut, and/or removed than the construction of an in-ground residential pool, which is much larger in area than a shed and also requires excavation and grading. For some activities, such as repairing a structure (see permit-by-rule 2) or reconstructing a bridge superstructure (see permit-by-rule 42), the proposed rules limit the area of riparian zone vegetation that can be cleared, cut, and/or removed around the perimeter of the structure, as disturbance in these cases is generally due to temporarily accessing the structure during repair or reconstruction. The proposed limits further acknowledge that some structures can be erected without disturbance to trees, while other structures cannot. For example, a fence can typically be erected around existing trees and with minimal riparian zone disturbance. However, construction of barrier-free access to a lawfully existing building as required by a public entity (see permit-by-rule 15) may not be possible to construct without the removal of some trees near the entrance to the building. The Department is additionally proposing to add flexibility for activities located in actively disturbed areas as well as activities located within 25 feet of the top of bank of an impounded fluvial water or bulkheaded tidal water, for the same reasons described below in the summary regarding

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proposed standards for obtaining an individual permit for a regulated activity that would result in clearing, cutting and/or removal of riparian zone vegetation. The specific limits on the amount and type of riparian zone vegetation that can be cleared, cut, and/or removed are set forth in each permit-by-rule, general permit-by-certification, and general permit.

Individual permit standards applicable to activities in the riparian zone

Proposed N.J.A.C. 7:13-11.2 replaces existing N.J.A.C. 7:13-10.2, which sets forth requirements that must be met for the issuance of an individual permit for a regulated activity that is located within a riparian zone.

General requirements for all projects within a riparian zone (N.J.A.C. 7:13-11.2(b))

Existing N.J.A.C. 7:13-10.2(d) includes four basic requirements that must be met by any regulated activity within a riparian zone for the Department to grant an individual permit under the FHACA Rules (this existing subsection additionally includes Table C, which sets forth the maximum area of vegetation that the Department will allow to be disturbed within the riparian zone for various activities; this table is proposed to be separated from the basic requirements applicable to all regulated activity in the riparian zone and relocated to N.J.A.C. 7:13-11.2(e), as described below). The Department is proposing to relocate these basic requirements to proposed N.J.A.C. 7:13-11.2(b) with amendments.

The existing rules require that the basic purpose of the project cannot be accomplished onsite without disturbing vegetation in the riparian zone, that disturbance is eliminated where possible and minimized where disturbance is unavoidable, that temporarily disturbed vegetation

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is replanted with appropriate replacement vegetation, and that any restrictions specified in the FHACA Rules as applicable to the specific proposed activity are satisfied.

Proposed N.J.A.C. 7:13-11.2(b) continues the basic requirements with amendments intended to eliminate repetition and better focus the intended benefits to be obtained from their application. Particularly, since proposed N.J.A.C. 7:13-11.2(b)1 provides that the Department will only issue an individual permit for a project for riparian zone disturbance if the disturbance is unavoidable, the requirement at existing N.J.A.C. 7:13-10.2(d)2 to eliminate impacts where possible is eliminated as duplicative, and two examples of methods to minimize riparian zone disturbances are added to proposed N.J.A.C. 7:13-11.2(b)2. The Department is not proposing to continue the general requirement that an applicant in all cases explore reducing the size or scope of the project as this requirement has proven generally unmanageable since the type of development that is permitted is a function of local zoning and the requirements that the applicant demonstrate that the purpose of the project cannot be accomplished without disturbing vegetation, that disturbance to riparian zone vegetation is minimized through methods such as those indicated in the examples, and that the other requirements of this section have been satisfied will ensure that riparian zone impacts are appropriately limited.

Proposed N.J.A.C. 7:13-11.2(b)3, 4, and 5 incorporate with clarifications the substance of existing N.J.A.C. 7:13-10.2(d)3 and 4.

*Activities allowed within 25 feet of top of bank (N.J.A.C. 7:13-11.2(c) and (d))*

Protection of the area located within 25 feet of a top of bank is particularly important as disturbance within this area can easily destabilize a channel and lead to increased erosion,

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flooding and adverse water quality impacts. However, the Department recognizes that in some cases disturbance within this area will not result in adverse impacts, or, in other cases, that disturbance within this area is unavoidable and can be properly mitigated. Proposed N.J.A.C. 7:13-11.2(c), which consolidates requirements found in the existing rule, sets forth the conditions under which development within 25 feet of a top of bank is appropriate.

New development within 25 feet of the top of bank is generally prohibited. However, certain disturbances in this area have little impact or may lead to overall environmental benefits, such as temporary disturbance to vegetation related to restoration and enhancement activities. Other disturbances are necessary to accommodate in-water activities such as sediment removal from a channel or the erection of structures that require proximity to a regulated water, such as linear infrastructure that must cross the channel, stormwater discharges and bank stabilization activities. These types of projects are allowed under proposed N.J.A.C. 7:13-11.2(c)1 through 4.

Where previous activity has occurred within 25 feet of the top of bank, resulting in the presence of existing impervious surface in this area, both the existing and proposed FHACA Rules generally require that this impervious surface be removed and the area revegetated. However, both the existing and proposed rules do allow redevelopment of disturbed portions of this near water area in limited circumstances, provided certain requirements are met (see existing N.J.A.C. 7:13-10.2(v) and proposed N.J.A.C. 7:13-11.2(d)). The Department is proposing to expand the exceptions from this requirement to include not only situations where removal of the impervious surface would threaten public safety, cause erosion or create undue hardship, but also where the proposed development borders a tidal water and disturbance is proposed adjacent to a lawfully existing bulkhead, retaining wall, or revetment. As indicated in the Summary above,

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impacts to erosion, flooding, and water quality do not occur in such a circumstance.

Proposed N.J.A.C. 7:13-11.2(d)2 and 3 reflect existing N.J.A.C. 7:13-10.2(v)1, divided to separate public safety and flooding impacts from impacts to the applicant. Proposed N.J.A.C. 7:13-11.2(d)3 broadens the exemption applicable to conditions specific to the property that justify relaxation of the general standard. Particularly, as expanded, undue impact would include cases where removing and/or not replacing the existing impervious surface would prevent reasonable use or access to the site and/or cause an unreasonable burden upon the applicant. Limiting the exemption in this paragraph to economic hardship inadequately addresses the types of issues that can arise onsite, such as where environmental constraints on the remainder of the site make continued utilization of the existing impervious surface necessary for the property to be utilized in any way, thus precluding the removal of existing impervious surface. The existing provision for the construction public walkways at N.J.A.C. 7:13-10.2(v)2 is not continued, as proposed N.J.A.C. 7:13-11.2(c)4 sufficiently addresses the construction of public trails and boardwalks within 25 feet of the top of bank.

*Limitations on the area of riparian zone vegetation that can be cleared, cut, and/or removed*

*(N.J.A.C. 7:13-11.2(e))*

Table C at existing N.J.A.C. 7:13-10.2(e) sets forth the maximum area of vegetation that can be cleared, cut, and/or removed for a variety of activities within a riparian zone. As noted in the Summary above, in some cases the riparian zone disturbance allowed for certain projects is of insufficient area to appropriately accommodate responsible development. Also, certain common activities are not provided a category within Table C, which forces applicants to apply

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for hardship exceptions on a more frequent basis than the Department had anticipated. Table 11.2, which replaces Table C, therefore incorporates a number of amendments to address these issues, as described below.

Proposed N.J.A.C. 7:13-11.2(e) specifies how Table 11.2 is utilized to determine the maximum amount of riparian zone vegetation disturbance that may occur in conducting a specific type of regulated activity without additional justification, mitigation, and/or a hardship exception request. Proposed N.J.A.C. 7:13-11.2(g) through (y) address a variety of regulated activities that can be proposed within a riparian zone and contain standards necessary to minimize impacts to riparian zone functionality appropriate to each type of regulated activity. In some cases, as described in the Summary below for N.J.A.C. 7:13-11.2(g) through (y), an applicant is required to provide additional justification in cases where riparian zone disturbance exceeds the limits set forth in proposed Table 11.2. However, in some cases, these limits can be exceeded only through the approval of a hardship exception request made in accordance with proposed N.J.A.C. 7:13-15.1. Further, mitigation is required in some cases for the amount of riparian zone disturbance in excess of the limits in Table 11.2, while in other cases mitigation is required for the total amount of riparian zone vegetation being cleared, cut, and/or removed.

Proposed N.J.A.C. 7:13-11.2(e)1 incorporates existing N.J.A.C. 7:13-10.2(c), which specifies how the total area of disturbance to vegetation for a given project is calculated, and additionally clarifies that areas containing vegetation some or all of the year, such as agricultural areas that are periodically plowed and cultivated, are considered vegetated for the purposes of this chapter. For example, agricultural fields that are in active production may not have vegetation present during certain periods of the year due to seasonal plowing and harvesting.

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The proposed language makes clear that constructing a building or other structure on the temporarily bare soil counts toward the total disturbance being proposed under Table 11.2. Existing N.J.A.C. 7:13-2.4(a)2, which establishes that clearing, cutting, and/or removal of vegetation in a riparian zone constitutes a regulated activity, is similarly amended, in order to provide clarity in similar cases for activities conducted under any authorization or permit.

Proposed N.J.A.C. 7:13-11.2(e)2 and 3 clarify that a person can obtain an individual permit for multiple regulated activities in a riparian zone, whether the activities are the same or different, provided the limits and conditions set forth in Table 11.2 are met for each regulated activity. People sometimes assume that disturbance for a given activity is cumulative, as is the case with disturbance to freshwater wetlands under the FWPA rules at N.J.A.C. 7:7A. However, under this section, with the exception discussed below of additions to a single-family home or duplex and accessory structures to a single-family home or duplex, a person can construct several of the same structures on a single site, provided each individual structure meets the limits at Table 11.2 and the remainder of the requirements of this section. For example, an applicant may be able to justify the need to construct more than one road crossing a regulated water or to install more than one utility crossing of a regulated water on a particular site in order to adequately provide for public safety, accommodate access into a site, meet the SWM rules, and/or to satisfy other State, Federal, or local requirements. Additionally, it may be necessary to undertake more than one site remediation effort or stabilize more than one segment of eroded stream corridor on a single site in order to improve water quality or ameliorate potential or ongoing adverse environmental impacts. An exception is made for riparian zone disturbance related to residential additions and accessory structures under proposed N.J.A.C. 7:13-11.2(n),

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which is calculated cumulatively. In some cases, the construction of a residential addition or accessory structure is authorized pursuant to a proposed permit-by-rule, general permit-by-certification, or general permit. In cases where a residential addition or accessory structure does not qualify for an adopted permit, proposed N.J.A.C. 7:13-11.2(n) authorizes additional riparian zone disturbance to accommodate construction typical to a single-family home or duplex under an individual permit. In order to ensure that riparian zone functionality is not impaired as a result of the construction of multiple additions and accessory structures on a given lot, riparian zone disturbance associated with activities under this subsection are considered cumulatively.

*Activities not subject to Table 11.2 (N.J.A.C. 7:13-11.2(f))*

As indicated in the summary of various proposed amendments above, there are certain types of activities that have little impact on the riparian zone functionality the Department is seeking to protect with the FHACA Rules riparian zone provisions. For instance, as discussed in the summary of proposed amendments to provide additional flexibility for disturbing riparian zone vegetation within actively disturbed areas, development in such areas will result in reduced impacts to riparian zone functionality, as compared with development that results in clearing, cutting, and/or removal of forested areas, trees, and other woody vegetation. Recognizing that conduct of these types of activities will have such limited impact, proposed new N.J.A.C. 7:13-11.2(f) provides for eight classes of regulated activities that are not subject to the riparian zone vegetation impact limits of proposed Table 11.2, provided they are conducted as described in this subsection. It should be noted that, while allowance is made for these limited impact activities with reference to the limit specified in proposed Table 11.2, these activities continue to be

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subject to all other limitations specified in proposed N.J.A.C. 7:13-11.2.

Proposed N.J.A.C. 7:13-11.2(f)1 provides that the net loss of up to one-quarter acre of riparian zone vegetation within an actively disturbed area, measured cumulatively since the adoption date of the existing chapter, is not subject to proposed Table 11.2. This exception would not allow the removal of forested areas or areas of non-ornamental woody vegetation as these areas are not considered to be part of an actively disturbed area, as indicated in the proposed definition of that term at N.J.A.C. 7:13-1.2. As noted above, since vegetation within an actively disturbed area is disturbed on a regular basis, its ability to provide the important functions typically afforded by a riparian zone is diminished. The Department has therefore determined that projects resulting in a net loss of no more than one-quarter acre of actively disturbed areas will not adversely impact riparian zone functionality, provided all other individual permit requirements are satisfied. The proposed paragraph additionally addresses an unintended consequence of the existing FHACA Rules whereby some individual permit requirements related to riparian zone disturbance are more stringent than certain permits-by-rule. In a number of cases, activities undertaken pursuant to a permit-by-rule are authorized to be situated “where previous development or disturbance has occurred (such as an area maintained as a lawn or garden or an abandoned parking area that has partially revegetated).” (see existing N.J.A.C. 7:13-7.2(a)2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, and 19, (e)1, 2, and 3, and (f)2, 3, and 4). Activities authorized under the existing permits-by-rule are also generally limited to activities that do not constitute a “major development,” which is defined under the SWM rules at N.J.A.C. 7:8-1.2 to be a project that disturbs an acre of land and/or results in the creation of one-quarter an acre of impervious surface. Therefore, under many permits-by-rule, a person can

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undertake an activity that results in the loss of up to one-quarter an acre of riparian zone vegetation where “previous development or disturbance has occurred.” However, a person intending to undertake a project for which all requirements of a given permit-by-rule are not met must instead apply for and receive an authorization under a general permit or an individual permit under this chapter. In the majority of cases, an individual permit must be obtained, which subjects the activity to the requirements of existing Table C. Since the limits of Table C are in many cases much more stringent than that which could be allowed under a permit-by-rule for similar activities, this has led to an inconsistent approach toward riparian zone protection and has caused confusion among the regulated community. In order to harmonize the types of activities allowed under the different permits within this chapter, proposed N.J.A.C. 7:13-11.2(f)1 provides that the net loss of up to one-quarter acre of riparian zone vegetation within an actively disturbed area is not subject to proposed Table 11.2.

Proposed N.J.A.C. 7:13-11.2(f)2 clarifies that activities which do not result in clearing, cutting, and/or removal of riparian zone vegetation, are not subject to the requirements of Table 11.2. Activities that do not impact riparian zone vegetation do not impair riparian zone functionality, and therefore do not require limitations under this chapter.

Proposed N.J.A.C. 7:13-11.2(f)3 clarifies that converting vegetation within an actively disturbed area from one type to another is not subject to the requirements of Table 11.2, since this activity does not impair riparian zone functionality. Since forested areas and areas of non-ornamental woody vegetation are not part of an actively disturbed area in accordance with the proposed definition of that term, this paragraph does not allow conversion of these forms of vegetation to another type of vegetation.

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Proposed N.J.A.C. 7:13-11.2(f)4 provides that temporary disturbance to vegetation within an actively disturbed area is not subject to the requirements of Table C (proposed Table 11.2), since this activity does not impair riparian zone functionality, provided all disturbed areas are adequately stabilized and replanted with vegetation. For example, a person may propose to replace or modify an existing subsurface septic system or underground utility line located within an actively disturbed area, which involves temporarily disturbing an area of mowed grass and replacing the grass in-kind after the work is completed. In such a case, there is no net loss of riparian zone vegetation and therefore no adverse impact to riparian zone functionality.

Proposed N.J.A.C. 7:13-11.2(f)5 provides that relocating a lawfully existing structure situated within a riparian zone to an actively disturbed area on the same site is not subject to the requirements of Table 11.2, provided all disturbed areas are adequately stabilized and replanted with vegetation in accordance with proposed N.J.A.C. 7:13-11.2(z). For example, a person may propose to relocate a small building or sidewalk from one location within the riparian zone to another. If the proposed new location for the structure is in an actively disturbed area, and the former location of the structure is suitably revegetated, there is no net loss of riparian zone vegetation and therefore no adverse impact to riparian zone functionality.

Proposed N.J.A.C. 7:13-11.2(f)6 provides that clearing, cutting, and/or removal of vegetation that is completely submerged, such as grasses growing at the bottom of a lake, are not subject to the requirements of Table 11.2, since this activity does not impair riparian zone functionality. This provision only reflects that such activity is not considered to be covered under Table 11.2; impacts to aquatic vegetation would continue to be subject to any protections and limitations imposed by other rules, such as those provided to submerged vegetation under

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the CZM rules. This provision does not apply to vegetation growing within or adjacent to a regulated water, which is partially submerged by water, such as a tree whose roots are covered by water. The removal of such vegetation could impair riparian zone functionality and is therefore subject to the limitations of Table 11.2.

Proposed N.J.A.C. 7:13-11.2(f)7 provides that disturbance to vegetation located within an existing right-of-way or easement of an existing public roadway is not subject to the limitations of Table 11.2 in certain cases. Actively disturbed areas along public roadways, which are situated on an existing roadway embankment, or within an area adjacent to an existing roadway, and which were disturbed for the initial construction of the roadway, do not provide significant riparian zone benefits. Therefore, in cases where the disturbance of such vegetation is necessary for the continued, safe use of a public roadway, the limitations of Table 11.2 do not apply.

Proposed N.J.A.C. 7:13-11.2(f)8 provides that disturbance to riparian zone vegetation located within certain areas that are separated from the regulated water that creates the riparian zone is not subject to the limitations of Table 11.2 in certain cases. Portions of a riparian zone that are separated from a regulated water by a roadway or railroad, and which do not slope toward the regulated water, do not provide significant riparian zone benefits, in cases where stormwater runoff from the separated area does not drain into the regulated water. Therefore the limitations of Table 11.2 do not apply in such cases.

Table 11.2, Maximum allowable area of riparian zone vegetation that can be cleared, cut, and/or removed under an individual permit without mitigation (N.J.A.C. 7:13-11.2(f))

Table 11.2 at proposed N.J.A.C. 7:13-11.2(f) replaces Table C at existing N.J.A.C. 7:13-

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10.2(d). Table C sets forth the maximum area of vegetation that the Department will allow to be disturbed within the riparian zone for various regulated activities under an individual permit. Except as provided in certain cases at existing N.J.A.C. 7:13-10.2(f), (i), (k), and (o), exceeding the riparian zone disturbance set forth in Table C requires the Department's approval of a hardship exception under existing N.J.A.C. 7:13-9.8. Furthermore, in every case where the Department agrees that a limit within Table C is justifiably exceeded, the permittee must provide mitigation in accordance with existing N.J.A.C. 7:13-10.2(t) and (u). The Department adopted the values in Table C because these values represented the upper-limit of riparian zone disturbance reasonably required to accomplish the various activities listed in the table. However, in implementing the rules since 2007, the Department has determined that, in a number of cases, the values of Table C do not uniformly provide sufficient area to accomplish regulated activities within riparian zones. The Department believes that a number of factors generally contribute to the need for higher levels of riparian zone disturbance than is provided in Table C, such as temporary impacts related to access, mobilization, staging, and grading associated with a variety of construction activities, Federal and other State requirements related to the construction and maintenance of linear infrastructure projects, and variations in geology and topography throughout the State, which warrant the need for differing areas of grading, construction techniques, and soil stabilization methods. In cases where a project justifiably exceeded the limits in Table C, the Department has issued individual permits under the hardship exception provisions of existing N.J.A.C. 7:13-9.8.

Furthermore, in cases where a regulated activity is not listed in existing Table C, an applicant must either comply with existing N.J.A.C. 7:13-10.2(r), which allows a small amount

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of riparian zone disturbance for uncategorized disturbances, or else must seek a hardship exception in order to obtain an individual permit for the activity. This use of hardship exception requests has unnecessarily increased application costs, led to uncertainty for prospective developers, and increased the Department's administrative and technical review of applications, thereby diverting the Department's attention from other important goals. This also contradicts the purpose of existing N.J.A.C. 7:13-9.8, which is to provide a means of relief from strict compliance with one or more requirements of this chapter in unique and unusual situations. Given the number of hardship exception requests received related to compliance with Table C, and the Department's experience in reviewing these requests and determining that in many cases exceptions were needed not because of unique or unusual circumstances, but because the area allowed in Table C for the particular activity was inadequate for a standard project, the Department has determined that adjustments to some values in Table C are warranted in order to better represent the typical area of riparian zone disturbance associated with a variety of activities. Several new subcategories of regulated activities are also being added to cover common regulated activities that are omitted from the existing table, as discussed below.

In light of the above, the Department is proposing to delete Table C and to propose Table 11.2, so named for the section within which it is located, in its place. Table 11.2 incorporates the substance of existing Table C, with the following proposed amendments.

Through implementation of the existing rules, it has become apparent that the existing limits for roadways and railroads are not uniformly sufficient to permit the construction of these vital infrastructure projects. Based on applications for roadway and railroad projects received and approved since the existing chapter was adopted, the Department has determined that the

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amount of disturbance permitted for these activities should be increased. Proposed Table 11.2 therefore increases the maximum amount of riparian zone disturbance allowed for a railroad and public roadway that crosses a regulated water by one-fifth (20 percent) and for a railroad and public roadway that does not cross a regulated water by one-half (50 percent). Proposed Table 11.2 additionally increases the maximum amount of riparian zone disturbance allowed for all other roadways, including a private driveway serving one single-family home or duplex, which cross a regulated water by one-third (33 percent) and for all other roadways, including a private driveway serving one single-family home or duplex, which does not cross a regulated water by two-thirds (67 percent). Additional allowances for work within existing roadway rights-of-way are provided at proposed N.J.A.C. 7:13-11.2(f), with activities falling under that subsection not subject to the limits provided in proposed Table 11.2, as discussed in the Summary above.

For bank stabilization projects or channel restoration projects, the title of this category is proposed to be amended in Table 11.2 to refer to “bank stabilization and channel restoration,” since this more accurately describes the types of activities covered by this category. The titles of the three subcategories falling under this category are also proposed to be amended to clarify the Department’s intention for activities in this category. “Activities accomplished with vegetation alone” in the existing table is intended to refer to areas stabilized with vegetation under existing N.J.A.C. 7:13-10.2(i)1 and proposed N.J.A.C. 7:13-11.2(i)1. Soil bioengineering which combines the use of living and nonliving plant materials in combination with natural and synthetic support materials is added to this subcategory since it is an effective tool for stabilizing stream banks. Examples of materials utilized in soil bioengineering include live branch cuttings, live facings, live stakes, vegetative earth buttresses, and coir fiber products. The Department is

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proposing to combine these two types of activities under the subcategory “Areas stabilized with vegetation and/or bioengineering” since both of these activities are a type of vegetative solution and under proposed N.J.A.C. 7:13-11.2(i) there is no limit on disturbance of riparian zone vegetation provided the disturbance is justified. “Other permanent disturbance” in the existing table is intended to refer to areas where a stream bank is stabilized with hard armoring under existing N.J.A.C. 7:13-10.2(i)2 and proposed N.J.A.C. 7:13-11.2(i)2. “Other temporary disturbance” in the existing table is intended to refer to riparian zone disturbance necessary for access to perform the stabilization or restoration of the stream bank, which disturbance is to be restored to pre-construction vegetative coverage upon completion of the project.

The amount of disturbance permitted for each subcategory falling under the bank stabilization and channel restoration category is only proposed to be amended for banks stabilized with hard armoring falling under the “areas stabilized using other methods” subcategory. The amount of riparian zone disturbance associated with such projects is generally proportional to the length of the armoring. Therefore, rather than limiting riparian zone disturbance to a total of 2,000 square feet regardless of the project length as is the case in existing Table C, proposed Table 11.2 limits riparian zone impacts to 10 square feet of disturbance per linear foot of armoring. A bank stabilization project using hard armoring along 300 feet of both sides of a channel would be allowed 6,000 square feet of disturbance to riparian zone vegetation ((2 banks) x (300 linear feet of project) x (10 square feet per linear foot) = 6,000 square feet).

For stormwater discharges, the titles of the two subcategories under this portion of the table are proposed to be amended to clarify the Department’s intention for activities in this

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category. “Permanent disturbance” in the existing table is intended to refer to areas of vegetation that are permanently cleared due to the placement of the headwall and conduit outlet protection. “Temporary disturbance” in the existing table is intended to refer to areas of vegetation that are temporarily disturbed due to the placement of the underground stormwater pipe leading to the proposed headwall, which is to be restored to pre-construction vegetative coverage upon completion of the project. Accordingly, proposed Table 11.2 renames these two subcategories as “headwall and outlet protection” and “stormwater pipe,” respectively. As discussed earlier in the Summary, the Department has determined that the total area of disturbance allotted for the headwall and conduit outlet protection were inadequate to accommodate their construction, since the size of the conduit outlet protection can vary greatly depending on the diameter of the pipe, the soil type and the expected velocity of discharge. Therefore, the Department is proposing to increase the amount of disturbance under this subcategory from 1,000 square feet to 2,000 square feet to address the types of headwall and conduit outlet protection commonly used within the riparian zone .

For utility lines, the two subcategories of “crossing a water” and “not crossing a water” are proposed to be replaced. The existing subcategory of “crossing a water” is afforded 2,000, 6,000, and 12,000 square feet for a 50-, 150-, or 300-foot riparian zone, respectively. This translates to an equivalent of 20 square feet of disturbance per linear foot of utility line, assuming the utility line crosses through the riparian zone perpendicularly. The existing subcategory of “not crossing a water” is afforded 40 percent of the disturbance of lines crossing a water. As discussed earlier in the Summary, the Department has determined that the amount of riparian zone disturbance necessary for the placement of a typical utility line generally exceeds the values

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allotted in Table C, partly because utility lines typically cannot cross through a riparian zone perpendicularly, and partly because the allotted width of disturbance is not sufficient to accommodate most utility line construction. Further, the amount of riparian zone disturbance associated with such projects is generally proportional to the length of the utility line being constructed. Accordingly, two new subcategories are proposed. “New” utility lines are allotted 30 square feet of disturbance per linear foot of utility line, which represents a proposed increase of no less than 50 percent depending on the angle at which a utility line crosses through a riparian zone. The “reconstruction, upgrade, expansion, or maintenance” of an existing utility line, the second proposed subcategory, is allowed unlimited disturbance, provided the justifications required for issuance of an individual permit impacting riparian zone vegetation at proposed N.J.A.C. 7:13-11.2(l) are met. For the reasons discussed earlier in the Summary, reviewing proposed projects and hardship exception requests that the limits of existing Table C do not provide sufficient area to accomplish the activity contributing to the need for higher levels of riparian zone disturbance, such as access to perform the regulated activity. Accordingly, the Department has added a new subcategory to address access to the project.

A total of four subcategories under the category “single-family home or duplex” are proposed, and associated riparian zone disturbance limits are amended, in order to reflect the typical level of disturbance necessary for these activities. New riparian zone disturbance limits are proposed for erecting “new” structures and the “reconstruction” of existing structures. The existing category of “addition, garage, barn or shed” is proposed to be bifurcated into “addition” and “accessory structure” and placed under the category of single-family home or duplex, since these subcategories are intended to apply only to additions and structures associated with a

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single-family home or duplex. In addition to the four new subcategories, a new subcategory added under the “other projects” category will also apply to a single-family home or duplex. This subcategory, “individual subsurface sewage disposal systems,” applies to the construction of a new individual subsurface sewage disposal system at a single-family home or duplex and the repair or alteration of a lawfully existing malfunctioning individual subsurface sewage disposal system not only at single-family home but also any other building.

Under existing Table C, a total of 2,500 square feet of disturbance is allowed within a 50-foot riparian zone and a total of 5,000 square feet of disturbance is allowed within a 150-foot or 300-foot riparian zone for the construction of a private residence (redesignated as the single-family home or duplex category under the proposed rules). The 2,500-square-foot limit for a 50-foot riparian zone assumes that not all of all the single-family home or duplex is located within the riparian zone, considering that no construction is permitted within 25 feet of the top of bank under existing N.J.A.C. 7:13-10.2(m)4 and proposed N.J.A.C. 7:13-11.2(c). However, the Department’s review of applications for development of single-family homes or duplexes impacting riparian zone vegetation has demonstrated in many circumstances the limits currently allowed under Table C are not sufficient for construction of a single-family home or duplex in a riparian zone under typical circumstances. For example, the slope of the ground and the type of vegetation onsite can influence the area of land that needs to be cleared to accommodate a new single-family home or duplex. The Department is therefore proposing to increase the limits to 3,500 square feet of disturbance within a 50-foot riparian zone and 7,000 square feet of disturbance within a 150-foot or 300-foot riparian zone.

The Department is also proposing to establish a separate subcategory for the

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reconstruction of an existing house. Since the existing category did not specify whether the limits of disturbance applied to new buildings or reconstructed buildings, some people have been confused about the correct way to apply this provision. Therefore, the new subcategory for the reconstruction of a single-family home or duplex permits a limit of disturbance of 2,000 square feet. Reconstructing a building entirely within its existing footprint does not result in clearing, cutting, and/or removal of riparian zone vegetation, and would not therefore count toward the limits set forth in Table 11.2, pursuant to proposed N.J.A.C. 7:13-11.2(f)2. The proposed limit of disturbance of 2,000 square feet accommodates minor expansion of the single-family home or duplex being reconstructed as well as to provide access to the structure during and after construction.

As noted above, the existing category of “addition, garage, barn or shed” is proposed to be bifurcated into “addition” and “accessory structure” and placed under the category of single-family home or duplex. Also, whereas an addition refers only to the expansion of an existing building, “accessory structure” includes any structure associated with a single-family home or duplex, such as a pool, fence, or sidewalk. Existing Table C permits 1,000 square feet of disturbance in a 50-foot riparian zone and 2,000 square feet of disturbance in a 150-foot or 300-foot riparian zone for an addition to a private residence or construction of a garage, barn, or shed. However, as explained earlier in the Summary, the Department has determined the limits in existing Table C do not provide sufficient area for the construction of these structures. Therefore, the Department is proposing to increase the limit of disturbance as follows. An addition to a lawfully existing single-family home or duplex will be permitted 2,000 square feet of disturbance. This limit of disturbance is cumulative; all additions to the single-family home or

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duplex, which are constructed on or after the adoption date of the existing chapter in 2007, are considered when calculating the total amount of riparian zone vegetation that can be disturbed under Table 11.2 for multiple additions to the same single-family home or duplex. Additionally, the limit of riparian zone vegetation disturbance provided for accessory structures is 4,000 square feet. Similar to the limit of disturbance for an addition, this limit of disturbance under Table 11.2 is cumulative; all structures accessory to the single-family home or duplex which are constructed on or after the adoption date of the existing chapter in 2007, are considered when calculating the total amount of riparian zone vegetation that can be disturbed under Table 11.2 for multiple structures accessory to the same single-family home or duplex.

A new subcategory is being proposed in Table 11.2 under the “other projects” category for an individual subsurface sewage disposal system. As noted above, this subcategory applies to the construction of a new system associated with a single-family home or duplex or the repair or alteration of a lawfully existing malfunctioning system at a single family-home or any other building. Since existing Table C does not have a category for individual subsurface sewage disposal systems, individuals proposing such systems are required to count the associated riparian zone disturbance associated with the construction of a new individual subsurface sewage disposal system as part of the disturbance a new single-family home or duplex. Where the system was failing and repair or alteration of the system was required to address the problem with the system, the disturbance would be subject to the limits applicable under the category entitled “all other regulated activities.” However, neither of these limits provide sufficient area to construct a subsurface sewage disposal system associated with a single-family home or duplex in the majority of cases. The Department is therefore proposing to allow a maximum of 5,000

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square feet of disturbance since this limit of disturbance is adequate to allow construction of a standard individual subsurface disposal system to serve an average sized single family home or duplex and/or to repair or alter a malfunctioning system.

The existing category of “public accessway or public access area” is proposed to be placed under the category “tidal development” and renamed “public access area” to better reflect the provisions of existing N.J.A.C. 7:13-10.2(p) and proposed N.J.A.C. 7:13-11.2(o). This category is also proposed to be reorganized in Table 11.2 to be a subcategory of “tidal development” with “water dependent development” in order to clarify that these provisions are only available in tidal areas.

In addition to the subcategory individual subsurface sewage disposal systems, the Department is proposing to add the following new subcategories: “hazardous substance remediation,” “solid waste facility closure,” “trail or boardwalk,” “footbridge,” “removing sediment and/or debris from a regulated water,” and “removing existing fill and/or an existing structure.

In many cases, in order to obtain an individual permit for hazardous substance remediation or closure of a solid waste facility, the Department must approve a hardship exception request due to the amount of riparian zone disturbance being proposed. Given the inherently beneficial nature of these projects, no limit to riparian zone disturbance is proposed, provided the requirements of proposed N.J.A.C. 7:13-11.2(r) are met for hazardous substance remediation or the requirements of proposed N.J.A.C. 7:13-11.2(s) are met for closure of a solid waste landfill, which require minimization of the impacts to riparian zone vegetation and mitigation for the total area of vegetation that is cleared, cut, and/or removed.

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Under the existing rules, trails, boardwalks, and footbridges fall under the category “all other regulated activities,” which allows a small amount of riparian zone disturbance and requires mitigation at a 2:1 ratio for all loss of riparian zone vegetation. However, the amount of disturbance provided for this category does not allow for the construction of trails and boardwalks of any significant length. Streamside trails, boardwalks, and footbridges promote interaction with riparian systems and educate people on the importance of protecting these important resources. As such, the Department is proposing to allow 10 square feet of riparian zone disturbance per linear foot of trail or boardwalk under an individual permit. This is greater than the amount of riparian zone allowed under general permit 17 at proposed N.J.A.C. 7:13-9.17, which is appropriate because trails and boardwalks must sometimes involve grading, the placement of fill, or a wider cartway to accommodate a variety of uses, which can require more riparian zone disturbance per linear foot of trail. An upper limit of one acre of riparian zone vegetation disturbance per site is also proposed, since the construction of a trail system rarely justifies a greater area of disturbance. For example, one acre of disturbance allows a 10-foot wide path of disturbance that is 4,356 feet long (0.825 miles) within a riparian zone. A footbridge is allotted 1,000 square feet of disturbance, since this is generally sufficient to construct a footbridge that does not qualify for the design set forth under permit-by-rule 23 or general permit 12 at proposed N.J.A.C. 7:13-7.23 and 9.12, respectively.

The area of riparian zone disturbance allotted for flood control projects is not proposed to be amended.

The individual permit standards at existing N.J.A.C. 7:13-11.15 for sediment and debris removal from a regulated water require minimization of the area of riparian zone vegetation that

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can be disturbed to conduct sediment and debris removal activities, but do not set specific limits on the area of disturbance permitted to access the regulated water. Since accessing a regulated water for sediment and debris removal activities will in many cases necessitate some disturbance to riparian zone vegetation, proposed Table 11.2 permits up to 1,000 square feet of riparian zone vegetation to be cleared, cut, and/or removed per access point. Additional requirements designed to minimize the amount of riparian zone vegetation that can be disturbed and to preserve the integrity of the banks of the regulated water are incorporated at proposed N.J.A.C. 7:13-11.2(w).

Existing N.J.A.C. 7:13-11.19, proposed N.J.A.C. 7:13-12.21, sets forth standards that apply to the removal of an existing fill or structure. While the existing individual permit standards require that riparian zone disturbance can occur only where necessary to access the fill or structure being removed, and that the area of riparian zone disturbance must be minimized, there are no specific limits on the area of riparian zone disturbance. In order to limit potential adverse impacts to riparian zone functionality, proposed Table 11.2 provides that only riparian zone vegetation within 20 feet of the fill or structure can be disturbed, which is the same requirement for the removal of a structure under the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)2, proposed N.J.A.C. 7:13-7.4. Additionally, while the removal of fill or structures from a regulated area provides environmental benefits and can help to mitigate flooding, in order to ensure that riparian zone functionality is not significantly impaired, no more than one acre of riparian zone vegetation can be cleared, cut, and/or removed to undertake the activity.

The final category in proposed Table 11.2, entitled “any regulated activity not listed in this table above,” clarifies the existing title of this category in Table C and deletes the existing limits of disturbance. A small amount of disturbance, proportionate to the width of the riparian

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zone, is allowed under Table C. However, proposed N.J.A.C. 7:13-11.2(y)2 requires applicants to demonstrate that there is no other feasible use of the site, which would reduce disturbance to riparian zone vegetation, such as constructing a different type of development onsite, reducing the size or scope of the project, or relocating the project to a different portion of the site. This incorporates requirements at existing N.J.A.C. 7:13-10.2(d)2, under which the Department will evaluate whether to permit riparian zone disturbance under this category. In cases where the Department agrees that the requirements of proposed N.J.A.C. 7:13-11.2(y)2 are met, proposed N.J.A.C. 7:13-11.2(y)3 requires an applicant to provide mitigation for the total area of riparian zone vegetation that is all cleared, cut, and removed accordance with proposed N.J.A.C. 7:13-13. An exception is made for activities disturbing no greater than 2,000 square feet of riparian zone vegetation, in which case no mitigation is required. Activities under proposed N.J.A.C. 7:13-11.2(y) are additionally limited to the disturbance of no more than one-quarter acre of riparian zone vegetation.

*Additional requirements for specific regulated activities under an individual permit (N.J.A.C. 7:13-11.2(g) through (y))*

The substantive requirements applicable to individual permits for the categories of regulated activities addressed in proposed Table 11.2 are specified in proposed N.J.A.C. 7:13-11.2(g) through (y). The Department is eliminating the current requirement applicable to several of these activities that mitigation for exceedances of the riparian zone vegetation limits contained in current Table C be provided in a compensation to loss ratio of 2:1. While the requirement contained in the existing rules of mitigation at a ratio of 2:1 is not continued, with mitigation

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instead required to be provided in accordance with the proposed mitigation subchapter, as discussed in the summary of proposed N.J.A.C. 7:13-13, the level of mitigation required will depend upon the type of mitigation provided. Only where the applicant proposes to restore a water would the mitigation required be provided at less than the current mitigation area to area of disturbance ratio of 2:1. This reflects the Department's determination that restoration projects provide a superior level of benefit in recreating lost riparian zones in the limited circumstances such a project would be an option as explained in the summary of proposed Subchapter 13. The Department is proposing other amendments to the existing requirements as follows.

*Railroads and public roadways (N.J.A.C. 7:13-11.2(g))*

The existing rules specify requirements applicable to construction of new railroads or public roadways that impact riparian zone vegetation in N.J.A.C. 7:13-10.2(e), with requirements applicable to expansion or improvement of existing facilities separately addressed in existing N.J.A.C. 7:13-10.2(f). Both construction of new railroads and public roadways, as well as expansion/improvement of existing railroads and public roadways require minimization of the width of the railroad/roadway and allow impacts to 150-foot or 300-foot riparian zones only upon a showing of compelling public need that cannot be satisfied without impacting the riparian zone vegetation. Where a new crossing of a regulated water is proposed, it must be as near perpendicular to the water as possible. Finally, both new and expansion/improvement projects must not result in clearing, cutting, and/or removal of riparian zone vegetation in excess of the limits specified in Table C, though there is an exception for expansion/improvement of existing facilities where public safety requires with mitigation to be provided at a mitigation to loss ratio

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of 2:1.

Proposed N.J.A.C. 7:13-11.2(g) consolidates existing N.J.A.C. 7:13-10.2(e) and (f) with expansion of the allowance for potential exceedance of the limits specified in proposed Table 11.2 to include both new projects and expansion/improvement of existing railroads and public roadways. The proposed subsection allows such an exceedance if the applicant demonstrates that compliance with all Federal, State, and local standards cannot be achieved, and public safety cannot be adequately ensured, without exceeding these limits. The construction of a new railroad or public roadway that meets all Federal, State, and local standards is sometimes not possible without exceeding the limits of Table C. In such a case, under the existing rules applicants are required to apply for a hardship exception. If the hardship is demonstrated, the Department will require mitigation in accordance with existing N.J.A.C. 7:13-10.2(s). The Department is proposing to remove the need for a hardship exception, as described above, and to allow proposed Table 11.2 to be exceeded in limited cases as warranted by public safety needs and when necessary to comply with Federal, State, and local roadway standards governing railroads and public roadways. In such a case, the applicant must provide compensation for all cleared, cut, and removed vegetation in excess of these limits using one or more methods described in proposed N.J.A.C. 7:13-13. The Department is also clarifying that reconstruction of an existing railroad or public roadway is considered to be an improvement falling under this subsection. The remainder of existing N.J.A.C. 7:13-10.2(e) is incorporated at proposed N.J.A.C. 7:13-11.2(g) with clarifying and substantive amendments as follows.

Proposed N.J.A.C. 7:13-11.2(g)2 and 3 are new, and address compensation for riparian zone impacts of railroads and public roadways. In the case of construction of a new railroad or

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public roadway within a 50- or 150-foot riparian zone, or for any expansion, reconstruction, or improvement of a lawfully existing railroad or public roadway irrespective of the riparian zone width, the applicant must provide compensation for all cleared, cut and removed vegetation in excess of the limits specified in proposed Table 11.2. If riparian zone disturbance associated with the railroad or public roadway does not exceed the limits of Table 11.2, then no compensation is required, which is consistent with existing N.J.A.C. 7:13-10.2(e) and (f). In the case of construction of a new railroad or public roadway within a 300-foot riparian zone, the applicant must provide compensation for all cleared, cut, and removed vegetation. This is a new requirement resulting from the proposed merging of the 300-foot riparian zone and the 300-foot SWRPA under N.J.A.C. 7:8-5.5(h) noted earlier in this Summary. The Department's SWM rules at N.J.A.C. 7:8-5.2(e) provide a waiver from strict compliance from the groundwater recharge, stormwater runoff quantity, and stormwater runoff quality requirements at N.J.A.C. 7:8-5.4 and 5.5 for the enlargement of an existing public roadway or railroad. Proposed N.J.A.C. 7:13-11.2(g)2 therefore requires riparian zone mitigation for such projects only where the area of riparian zone vegetation cleared, cut, and/or removed exceeds the limitations of Table 11.2. However, the construction of a new railroad or public roadway within a SWRPA must meet the requirements of N.J.A.C. 7:8-5.5(h), which provides that encroachment is allowed only in outer 150 feet of the SWRPA, in cases where previous development or disturbance has occurred, and where the applicant demonstrates that the functional value and overall condition of the SWRPA will be maintained to the maximum extent practicable. In order to assist applicants to make this demonstration, the Department has developed a functional value analysis, available as part of the Stormwater Management Best Practices Manual, which proposes various mitigation

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requirements in relation to the level of proposed development within a SWRPA. In cases where a flood hazard area permit is subject to the requirements of the SWM rules, and disturbance within the inner 150 feet of a SWRPA is proposed, or disturbance is proposed in areas where previous development or disturbance has not occurred, the applicant must currently apply for and receive a hardship exception. The functional value analysis provided by the Department requires appropriate mitigation for such cases as well. This process is both time consuming and does not provide applicants with predictability. Rather than require an applicant to perform a functional value analysis and in some cases to apply for a hardship exception, the Department is proposing to simplify the existing process by establishing standards for the placement of a private roadway in any riparian zone designed to protect the riparian zone, and requiring compensation for all disturbance related to impacts within a 300-ft riparian zone, which mirrors the required mitigation under the Department's functional value analysis.

*Private roadways (N.J.A.C. 7:13-11.2(h))*

Similar to individual permit requirements applicable to railroads and public roadways that impact riparian zone vegetation, the existing rules, at N.J.A.C. 7:13-10.2(g) and (h), provide separate standards for new private roadways and expansion/improvement of existing private roadways. In both new and expansion/improvement of existing roadways, riparian impacts may not exceed the limits specified in Table C and the width of the roadway must be limited. Where proposed activities impact a 150-foot or 300-foot riparian zone, additional demonstrations are required before a permit may be issued, with the intent being to assure that impacts approved are necessary and that the approved impacts are the minimum necessary to provide safe access.

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Further, a new private roadway will only be approved if the lot to be accessed was not created by preliminary or final subdivision approved after October 2, 2006, the date that the riparian zone provisions were proposed.

The Department is proposing to consolidate, with amendments described below, the requirements applicable to new private roadways and expansion/improvement of existing private roadways in proposed N.J.A.C. 7:13-11.2(h), with the proposed subsection clarifying that reconstruction of an existing private roadway, which is currently considered to be an improvement to such a roadway, is subject to the requirements of the new subsection. While the existing provisions do not allow the riparian zone impact limits specified in Table C (proposed Table 11.2) to be exceeded, the proposed rules provide an exception where a greater impact is necessary to provide safe, adequate access into the site, which meets all Federal, State, and local requirements for roadways, for the same reason a similar exception is proposed for construction of railroads and public roadways that impact riparian zone vegetation (see proposed N.J.A.C. 7:13-11.2(h)1 and summary of proposed N.J.A.C. 7:13-11.2(g) above). As is proposed for railroads and public roadways, the applicant must provide compensation for all cleared, cut, and removed vegetation in excess of the limits specified in Table 11.2.

Proposed N.J.A.C. 7:13-11.2(h)2 and 3 are new, and address compensation for riparian zone impacts of private roadways. In the case of construction within a 50- or 150-foot riparian zone, the applicant must provide compensation for all cleared, cut and removed vegetation in excess of the limits specified in proposed Table 11.2. If riparian zone disturbance associated with the private roadway does not exceed the limits of Table 11.2, then no compensation is required, which is consistent with existing N.J.A.C. 7:13-10.2(g) and (h). In the case of construction

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within a 300-foot riparian zone, the applicant must provide compensation for all cleared, cut and removed vegetation. This is a new requirement resulting from the proposed merging of the 300-ft riparian zone and the 300-foot SWRPA under N.J.A.C. 7:8-5.5(h) noted earlier in this Summary. Existing N.J.A.C. 7:8-5.5(h)1ii provides that encroachment is allowed only in the outer 150 feet of the SWRPA, in cases where previous development or disturbance has occurred, and where the applicant demonstrates that the functional value and overall condition of the SWRPA will be maintained to the maximum extent practicable. In cases where a flood hazard area permit is subject to the requirements of the SWM rules, and disturbance within the inner 150 feet of a SWRPA is proposed, or disturbance is proposed in areas where previous development or disturbance has not occurred, the applicant must currently apply for and receive a hardship exception. As noted above, the functional value analysis provided by the Department requires appropriate mitigation for such cases as well. For the same reasons as described for railroads and public roadways above, rather than require an applicant to perform a functional value analysis and in some cases to apply for a hardship exception, the Department is proposing to simplify the existing process by establishing stringent standards for the placement of a private roadway in any riparian zone, and requiring compensation for all disturbance related to impacts within a 300-foot riparian zone, which mirror the required mitigation under the Department's functional value analysis.

In addition to providing the ability to approve impacts in excess of that allowed in Table 11.2 where the impact is necessary and is minimized without the need to resort to the hardship process, the proposed rules incorporate other concepts from the existing provisions with amendments reflecting the Department's experience in implementing the existing rules. As

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required by the existing rules, in all cases the width of the private roadway must be minimized, which is clarified at proposed N.J.A.C. 7:13-11.2(h)4 to refer to the width of disturbance associated with the construction, expansion, reconstruction, or improvement of the roadway.

The existing requirement at N.J.A.C. 7:13-10.2(h)3 that the applicant demonstrates the project is necessary for the continued safe access to the site where the project impacts a 150-foot or 300-foot riparian zone is applied at proposed N.J.A.C. 7:13-11.2(h)5 to any expanded, reconstructed, or improved roadway, since impacts to riparian zone vegetation should be justified irrespective of the width of the riparian zone.

Existing N.J.A.C. 7:13-10.2(g)4 specifies that a new private roadway will only be approved to provide access to a lot that did not receive preliminary or final subdivision approval after the proposal date of the existing chapter. This was adopted to prevent people from subdividing large properties and selling off lots to individual owners, each of which could build a separate roadway and thus cause a large amount of riparian zone disturbance over time. However, some properties subdivided after October 2, 2006, were not subdivided in such a way that additional riparian zone disturbance would occur on the original site. For example, in certain situations it is possible for a lot that includes a riparian zone to be subdivided into two lots either in a way that creates two lots containing a riparian zone that necessarily must be crossed to create access to each lot or in a way that results in only one of the created lots containing the riparian zone with only one access path continuing to be needed to access a non-riparian portion of the site where a regulated activity is planned. While subdivision in the first case would create the additional riparian zone disturbance the rules seek to avoid, subdivision in the second case would not increase riparian zone disturbance from roadway access to that site.

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To better reflect the intent of this limitation to ensure that riparian zone impacts are not increased as a result of subdivision of properties while allowing development that does not increase impacts to proceed, proposed N.J.A.C. 7:13-11.2(h)6 provides that, in cases where the construction of a new roadway serves or accesses a lot that received preliminary or final subdivision approval after November 5, 2007, the effective date of the amendments proposed on October 2, 2006, the applicant must demonstrate that none of the lots created in the subdivision are currently served or accessed by a roadway, and that none of the lots created in the subdivision possess a valid authorization from the Department to construct a new roadway in the riparian zone. This is necessary to ensure that no more than one roadway is constructed within a riparian zone on the original parcel. Additionally, the applicant must demonstrate that the area of riparian zone disturbance to construct the roadway does not exceed the area of riparian zone disturbance that would have been allowed by this chapter to construct a roadway to serve or access the original parcel. A parcel could be subdivided in such a way that constructing a roadway to access one of the subdivided lots may result in much greater riparian zone disturbance than would have been required to construct a roadway to access the original parcel prior to its subdivision. This proposed requirement ensures that the subdivision process does not result in greater impacts to riparian zone functionality.

The proposed rule continues in effect required demonstrations that must be made by an applicant for an individual permit for a new private roadway impacting riparian zone vegetation currently codified at N.J.A.C. 7:13-10.2(g)5 and 6, with the required demonstrations, currently only required when a 150-foot or 300-foot riparian zone is impacted, expanded to include applications proposing impact to a 50-foot riparian zone (see proposed N.J.A.C. 7:13-11.2(h)7

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and 8). Because of the important benefits provided by riparian zones, as discussed above, the Department believes that requiring these further demonstrations that the proposed impact is necessary and cannot be avoided through other means of access to a site is equally important for impact to any riparian zone.

*Bank stabilization and channel restoration (N.J.A.C. 7:13-11.2(i))*

Bank and channel stabilization projects are inherently beneficial in that they generally help preserve riparian zone vegetation, reduce erosion and flooding, and reduce total suspended solids in regulated waters. Similarly, channel restoration projects can improve ecologically degraded resources and, where a water is removed from an enclosing structure, result in the restoration of previously eliminated benefits provided by a healthy riparian zone.

Proposed N.J.A.C. 7:13-11.2(i) incorporates individual permit requirements applicable to bank and channel restoration/stabilization that result in clearing, cutting, and/or removing vegetation in a riparian zone, currently specified at N.J.A.C. 7:13-10.2(i), with amendments.

The existing rules provide that restoration consisting of cutting back the bank to a stable slope and planting with vegetation suitable for stabilization may be performed upon a showing that the project is necessary and the area of vegetation disturbance is minimized. Stabilization by any other method is limited to disturbance as specified in existing Table C, absent a demonstration that exceedance of those limits is necessary. If such an exceedance is necessary, permanent impacts to riparian zone vegetation must be compensated at a ratio of mitigation to area of impact in excess of the limit specified in Table C of 2:1. The rules further specify that temporary disturbances may not exceed the limits in Table C and all such disturbances must be

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replanted (see existing N.J.A.C. 7:13-10.2(i)1 through 3).

Proposed N.J.A.C. 7:13-11.2(i)1 incorporates with amendments existing N.J.A.C. 7:13-10.2(i)1. The requirement that the applicant demonstrate the project is necessary under the individual permit requirements at existing N.J.A.C. 7:13-11.14(b) is duplicative, since existing N.J.A.C. 7:13-11.14, proposed N.J.A.C. 7:13-12.14, apply to all individual permit applications for bank stabilization and channel restoration projects, and is therefore not proposed to be continued. The applicant must also demonstrate that the area of vegetation cleared, cut, and/or removed within the riparian zone is the minimum necessary to successfully implement the project, which is a more accurate description of the Department's intent under the existing paragraph. This requirement is additionally proposed to apply to a project using soil bioengineering in accordance with N.J.A.C. 7:13-12.14(c)2, in order to ensure that impacts to riparian zone functionality are minimized.

Proposed N.J.A.C. 7:13-11.2(i)2 incorporates with amendments existing N.J.A.C. 7:13-10.2(i)2, and addresses the stabilization of a bank or channel by any means other than vegetation and soil bioengineering. Whereas proposed N.J.A.C. 7:13-11.2(i)1 recognizes that vegetation and soil bioengineering can be used to both stabilize and restore a bank or channel, the structural methods listed at proposed N.J.A.C. 7:13-11.2(i)2 can stabilize, but not restore, a bank or channel. The proposed rule refers specifically to the construction of revetments, retaining walls, or other armoring, and lining or piping a channel, since these are the only structural methods available to stabilize a bank or channel set forth in proposed N.J.A.C. 7:13-12.14. Where stabilization cannot feasibly meet the limitations in Table 11.2, mitigation must be provided for the area of excess disturbed vegetation.

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Finally, because a regulated water enclosed by a structure is not considered to have a functioning riparian zone, only riparian zone disturbance limits in proposed Table 11.2 applicable to access the project are applicable to such a project (see proposed N.J.A.C. 7:13-11.2(i)3). While it may be necessary to remove vegetation in the area of the enclosed water in order to expose the water and remove the enclosing structure, this vegetation did not provide benefits associated with the riparian zone while the water was enclosed; in contrast, restoration of the channel and riparian zone to a natural condition as a result of removal of the vegetation will provide significant benefits. Accordingly, only impacts to riparian zone vegetation associated with another regulated water that is not enclosed are addressed.

Existing N.J.A.C. 7:13-10.2(i)3, which addresses temporary impacts related to access the proposed stabilization, is proposed for deletion as no longer necessary since Table 11.2 includes a new subcategory limiting temporary disturbance and proposed N.J.A.C. 7:13-11.2(z) requires all temporary impacts to be restored.

*Stormwater discharges (N.J.A.C. 7:13-11.2(j))*

Requirements applicable to construction of a stormwater discharge that impacts riparian zone vegetation, currently specified in existing N.J.A.C. 7:13-10.2(j), are proposed to be relocated to proposed N.J.A.C. 7:13-11.2(j) with amendments designed to address issues that have become apparent in implementation of the rules.

The existing rules prohibit riparian zone disturbance in excess of the limits specified in existing Table C and prohibit any portion of the stormwater discharge, including conduit outlet protection and/or conveyance swale, from being located within a 150-foot or 300-foot riparian

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zone unless specific conditions are met (see existing N.J.A.C. 7:13-11.2(j)1 and 2).

Similar to the case with railroads and public and private roadways, it has become apparent that an absolute prohibition on exceedance of the limits specified in existing Table C has resulted in situations where it is not possible to meet the limitations of Table C due to a number of variables, such as soil type, topography, and drainage area of the discharge. While the proposed rules continue to require that the disturbance limits specified in proposed Table 11.2 not be exceeded, the Department has determined that it is appropriate to allow an exceedance where the Soil Conservation District having jurisdiction over the site determines that exceeding these limits is necessary to meet the requirements of the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90. These standards set forth design criteria for the size, characteristics, and location of rip-rap and other types of conduit outlet protection necessary to ensure that a proposed stormwater discharge is stable. Constructing conduit outlet protection in accordance with N.J.A.C. 2:90 in some cases requires a larger area of riparian zone disturbance than is permitted under Table 11.2. Because of the expertise local Soil Conservation Districts have developed in the application of the Standards for Soil Erosion and Sediment Control in New Jersey to conditions in the area of the State that they cover, the proposed rules rely upon the Soil Conservation Districts or their designees to determine what is necessary to satisfy those standards and result in a project that will not have unanticipated negative impacts (see proposed N.J.A.C. 7:13-11.2(j)1).

The proposed rules establish requirements applicable to riparian zone impacts, with the requirements dependent upon the type of riparian zone impacted. Where a stormwater discharge is proposed that impacts a 50-foot riparian zone and it is demonstrated that disturbance to

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riparian zone vegetation in excess of the limits specified in proposed Table 11.2 is necessary, the applicant is required to provide riparian zone compensation for all vegetation in excess of that which is allowed in Table 11.2 (see proposed N.J.A.C. 7:13-11.2(j)2).

As indicated above, existing N.J.A.C. 7:13-10.2(j)2 prohibits any portion of a stormwater discharge from being located within a 150-foot or 300-foot riparian zone, except in four specific cases. This is consistent with the prohibition under the existing SWM rules of discharges within the SWRPA, with limited exception, in order to protect water quality. However, this requirement has led to a number of unexpected adverse environmental impacts. In a significant number of cases where a stormwater discharge from a proposed development is situated outside a riparian zone, as required by existing N.J.A.C. 7:13-10.2(j)2, an erosional feature has formed over time downstream of the stormwater discharge, as runoff seeks a stable path from the discharge point to the receiving surface water. These erosional features are sometimes significant in size and depth, and have led to unsafe conditions as well as increases in the sediment load of the regulated water the Department has sought to protect. This dynamic has been verified by a number of New Jersey's Soil Conservation Districts, which have worked with the Department to develop a more effective standard for stormwater discharges. In response to the above, the Department is proposing to amend the requirements for riparian zone disturbance for stormwater discharges within 150-foot and 300-foot riparian zones to allow appropriate discharges provided certain requirements are met.

For a stormwater discharge that impacts a 150-foot or 300-foot riparian zone, the proposed rules require the applicant to demonstrate that situating the stormwater discharge outside the riparian zone is likely to result in greater erosion or other deleterious environmental

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impacts than situating the stormwater discharge and associated disturbance within the riparian zone. The applicant is further required to provide riparian zone compensation for all vegetation disturbed in excess of that which is allowed in proposed Table 11.2 (see proposed N.J.A.C. 7:13-11.2(j)3) for a 150-foot riparian zone and to provide riparian zone compensation for all disturbed vegetation in a 300-foot riparian zone. This is consistent with the mitigation recommended by the Department's functional value analysis discussed above (see proposed N.J.A.C. 7:13-11.2(j)4).

Additional requirements are proposed to be applicable to any stormwater discharge impacting a 300-foot riparian zone when the discharge, conduit outlet protection and/or conveyance swale is associated with a major development, as that term is defined in the SWM rules at N.J.A.C. 7:8-1.2. As noted above, the purpose of existing N.J.A.C. 7:13-10.2(j)2 is to protect water quality, which is accomplished by ensuring that stormwater runoff discharged from pipes is able to flow through an expanse of existing vegetation within the riparian zone, allowing additional suspended solids and other pollutants that are present in the runoff to be trapped by the vegetation and removed before reaching the receiving water. In order to achieve this level of water quality treatment, the proposed rules set forth two options for prospective applicants. First, stormwater discharges or structures associated with major development may be located within a 300-foot riparian zone if the applicant demonstrates that all runoff from the water quality design storm is infiltrated or discharged outside the riparian zone to the maximum extent practicable (see proposed N.J.A.C. 7:13-11.2(j)4iii). The water quality design storm is defined in the SWM rules at N.J.A.C. 7:8-5.5(a) to be a rainfall of 1.25 inches over a two-hour period. Erosion related to stormwater discharges is generally the result of runoff from larger storm

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events and that runoff from the water quality design storm can be discharged outside a riparian zone, and therefore farther from surface waters, without the likelihood of developing erosion downstream of the discharge. Given the relatively small volume of runoff resulting from the water quality design storm, the Department believes that, in a majority of cases, runoff from the water quality design storm can be captured and infiltrated outside the riparian zone. In cases where onsite soils are not amenable to infiltration, runoff from the water quality design storm can alternately be discharged outside the riparian zone and allowed to flow overland through the riparian zone. In such cases, applicants may be directed by local Soil Conservation Districts to discharge stormwater from larger storms into a stable portion of the riparian zone or, where necessary, into the regulated water itself, since the Standards for Soil Erosion and Sediment Control at N.J.A.C. 2:90 require the applicant to analyze certain storm events, such as the 25-year storm, and demonstrate that stormwater discharge during such storms is stable. The Department also recognizes that there will be cases where the water quality design storm cannot safely or feasibly be infiltrated or discharged outside the riparian zone, such as sites with steep slopes, proximity of offsite properties that could be affected by a stormwater discharge, and existing structures that could be situated between the regulated water and the proposed discharge location. The proposed rules establish water quality treatment criteria for impacts to 300-foot riparian zones in such a case (see proposed N.J.A.C. 7:13-11.2(j)4iii). Particularly, the rules require that runoff from the water quality design storm must be infiltrated or discharged outside the riparian zone to the maximum extent practicable. This will assure that any impacts to the riparian zone and to water quality are minimized. Any runoff from the water quality design storm that is discharged within the riparian zone is required to be treated in accordance with N.J.A.C.

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7:8-5.5 to reduce the post-construction load of total suspended solids by 95 percent of the anticipated load from the developed site, expressed as an annual average. The requirement to remove 95 percent of total suspended solids is consistent with the requirements of the SWM rules at N.J.A.C. 7:8-5.5(h)3ii and will further assure that water quality is protected.

*Utility lines (N.J.A.C. 7:13-11.2(k) and (l))*

Requirements applicable to construction of utility lines that impact riparian zone vegetation, currently specified in existing N.J.A.C. 7:13-10.2(k) and (l) for utility lines that cross a regulated water and those that impact the riparian zone, but do not cross the regulated water, respectively, are proposed to be consolidated and relocated to proposed N.J.A.C. 7:13-11.2(k) and (l) with amendment.

The rules allow limited activities related to utility lines to be conducted under existing and proposed permits-by-rule. In all cases, those activities are limited so that they cannot exceed the riparian zone vegetation disturbance limits specified in existing Table C, proposed Table 11.2. In cases where activities associated with a new utility line do not meet the requirements of these permits-by-rule, and the proposed regulated activity disturbs riparian zone vegetation, proposed N.J.A.C. 7:13-11.2(k) applies. In cases where activities associated with the reconstruction, replacement, repair, or maintenance of an existing utility line do not meet the requirements of these permits-by-rule, and the proposed regulated activity disturbs riparian zone vegetation, proposed N.J.A.C. 7:13-11.2(l) applies.

The Department is proposing to expand the types of activity that may qualify for exceedance of the limits specified in proposed Table 11.2 under this subsection of the rules to

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include activities that would currently qualify under the existing rule hardship provision (see proposed N.J.A.C. 7:13-11.2(k)1). Whereas existing N.J.A.C. 7:13-10.2(k)1 permits the limitations of Table C to be exceeded only where a wide trench is needed to safely install an underground utility line, proposed N.J.A.C. 7:13-11.2(k)1 allows the limits of Table 11.2 to be exceeded for both aboveground and underground utilities lines in cases where the applicant demonstrates that there is a compelling public need to construct the utility line which cannot feasibly be accomplished without exceeding these limits. This is the same test that would be applied through a hardship exception at existing N.J.A.C. 7:13-9.8 for a utility line that exceeds the limits of existing Table C. Both in the proposed rule and under the existing hardship provision, the applicant must provide compensation for all cleared, cut, and removed vegetation in excess of these limits specified in the Table.

Proposed N.J.A.C. 7:13-11.2(k)2 incorporates existing N.J.A.C. 7:13-10.2(k)2 and (1)2, which both require that it be demonstrated that riparian zone disturbance is unavoidable, with amended citations that do not change meaning. Proposed N.J.A.C. 7:13-11.2(k)3 is new, and requires that disturbance to riparian zone vegetation is the minimum necessary to comply with the New Jersey Board of Public Utilities and all other State and Federal requirements governing the construction of the utility line. This provision acknowledges that, where it has been determined that utility line impacts on the riparian zone are necessary, the construction will be required to meet these other standards. While that is the case, the impact proposed must be the minimum necessary to achieve compliance with those requirements to limit riparian zone impacts and required mitigation.

The proposed rules also add provisions not contained in the existing rules to address

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activities during construction to assure that temporary impacts are limited to the maximum extent practicable and to protect forested areas anywhere in the riparian zone and trees within 25 feet of any top of bank due to the positive impacts preservation of these trees have on water quality and channel stability (see proposed N.J.A.C. 7:13-11.2(k)4, 5, and 6).

The Department is proposing a new subsection, proposed N.J.A.C. 7:13-11.2(l), to specify standards applicable to reconstruction, replacement, repair, or maintenance of an existing aboveground or underground utility line within a riparian zone to eliminate uncertainty that has existed under the existing rules as to whether these activities are subject to existing N.J.A.C. 7:13-10.2(k) and (l).

The standards applicable to reconstruction, replacement, repair, or maintenance of existing utility lines are similar to the requirements applicable to construction of new utility lines, with proposed N.J.A.C. 7:13-11.2(l)3 through 6 mirroring the requirements applicable to construction of a new utility line at proposed N.J.A.C. 7:13-11.2(k)3 through 6 and similarly requiring that any disturbance, both during construction and post-construction, be the minimum necessary with particular emphasis on protecting trees and forested areas for the reasons discussed above. The additional requirements applicable to individual permits for reconstruction, replacement, repair, and maintenance activities recognize that these existing lines will have an associated easement or right-of-way area as well as actively disturbed areas. Consistent with the rules' intent to protect riparian zone vegetation, the proposed subsection seeks to limit any vegetation disturbance to the existing easement/right-of-way and requires that activities be limited to already actively disturbed areas absent a compelling public need for impacts outside of those areas (see proposed N.J.A.C. 7:13-11.2(l)1 and 2).

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*Single-family homes and duplexes (N.J.A.C. 7:13-11.2(m) and (n))*

Requirements applicable to individual permits for the construction or expansion of a private residence and construction of appurtenant structures to a private residence that impact riparian zone vegetation are currently specified in existing N.J.A.C. 7:13-10.2(m) and (n) respectively. The Department is amending these provisions to replace the term “private residence,” which is defined in existing N.J.A.C. 7:13-1.2 to mean a one or two-family dwelling, with the term “single-family home or duplex” for consistency of terminology with the Department’s CZM rules and is relocating the existing provisions to proposed N.J.A.C. 7:13-11.2(m) and (n) with amendments.

With reference to construction of a new single-family home or duplex, the proposed rules clarify that reconstruction of a lawfully existing single-family home or duplex is considered to be equivalent to construction of a new single-family home or duplex, and thus subject to the requirements of this subsection when the construction will impact riparian zone vegetation. The proposed rules also clarify that, in reviewing an individual permit application proposing construction of such a structure impacting riparian zone vegetation, the Department will consider permitting a proposed lawn or other landscaped area around the building, with those areas to be subject to the requirements contained in the rules, including prohibitions on the extent of riparian zone impacts to riparian zone vegetation.

The existing rules prohibit any exceedance of disturbance limits specified in existing Table C. This limitation is continued for new construction at proposed N.J.A.C. 7:13-11.2(m)1. Similar to existing N.J.A.C. 7:13-10.2(g)4, applicable to individual permits for private roadways

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impacting riparian zone vegetation, discussed above, the existing rules specify that construction of a new private residence will only be approved if the lot on which the residence is proposed to be located did not receive preliminary or final subdivision approval after the proposal date of the existing chapter (see existing N.J.A.C. 7:13-11.2(m)2). As with the limitation applicable to private roadways, this restriction was adopted to prevent people from subdividing large properties and selling off lots to individual owners, each of which could build a separate private residence creating a significant cumulative increase in the amount of disturbance to riparian zone vegetation. For the same reasons discussed above with reference to private roadways impacting riparian zone vegetation, proposed N.J.A.C. 7:13-11.2(m)2 provides that, in cases where the construction of a new single-family home or duplex is proposed on a lot that received preliminary or final subdivision approval after the November 5, 2007 effective date of the amendments proposed on October 2, 2006, the applicant must demonstrate that none of the lots created in the subdivision contain a habitable building or possess a valid authorization from the Department to construct a habitable building in the riparian zone. This is necessary to ensure that no more than one single-family home or duplex is constructed within a riparian zone on the original parcel prior to its subdivision, and thereby minimize adverse impacts to riparian zone functionality.

The rule continues to only be applicable to a single family home or duplex not constructed as part of a subdivision of multi-unit development (see proposed N.J.A.C. 7:13-11.2(m)3, which incorporates, with clarifying amendments, existing N.J.A.C. 7:13-10.2(m)3). Existing N.J.A.C. 7:13-10.2(m)4i, which requires the applicant to demonstrate there is no other reasonable use for the site under the applicable zoning for the property that would reduce or

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eliminate the impact to the riparian zone, is proposed for deletion. Municipal zoning generally dictates the use of a site. A person proposing the construction of a private residence or duplex on a site that is zoned for residential development often does so because there is no other type of development that would be permitted under municipal zoning. Requiring the applicant to demonstrate there is no other reasonable use for such a site is therefore burdensome and is proposed for deletion. Existing N.J.A.C. 7:13-10.2(m)4ii and iii are also proposed for deletion, as they are duplicative of proposed N.J.A.C. 7:13-11.2(b) and (c), respectively.

As indicated above, standards applicable to construction of an addition to an existing building and for construction of an appurtenant structure (redesignated as an accessory structure under the proposed rules) associated with an existing building which impact riparian zone vegetation are currently specified at existing N.J.A.C. 7:13-10.2(n). As with construction of a new private residence, the existing rules require that the construction of the addition or appurtenant structure not result in impact to riparian zone vegetation exceeding the limits in Table C. Further, the individual permit will only be issued if there is no other location onsite that would reduce or eliminate riparian zone impacts and disturbance must be at least 25 feet from the regulated water, with limited exception.

In some cases, additions and accessory structures are authorized under proposed permits-by-rule or general permits. In cases where an addition or accessory structure does not meet the requirements of a permit-by-rule or general permit, and riparian zone vegetation is disturbed, proposed N.J.A.C. 7:13-11.2(n) applies. Proposed N.J.A.C. 7:13-11.2(n) incorporates with amendments existing N.J.A.C. 7:13-10.2(n)1, which addresses compliance with Table C. Proposed N.J.A.C. 7:13-11.2(n) clarifies that only additions to a lawfully existing single-family

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home or duplex will be permitted. Further, proposed N.J.A.C. 7:13-11.2(n) adds a new requirement that impacts to riparian zone vegetation are cumulative since the adoption date of the existing rules. This is necessary in order to limit the overall disturbance to riparian zone vegetation on a given site so that an addition to a single-family home or duplex will not impair riparian zone functionality. Existing N.J.A.C. 7:13-10.2(n)2i and ii are proposed for deletion, as they are duplicative of proposed N.J.A.C. 7:13-11.2(b) and (c), respectively.

*Development adjacent to a tidal water (N.J.A.C. 7:13-11.2(o) and (p))*

Requirements applicable to individual permits for the construction of a public accessway or public access area and requirements applicable to construction of water dependent developments along a tidal water that impact riparian zone vegetation are currently specified in existing N.J.A.C. 7:13-10.2(p) and (q), respectively. These provisions are proposed for relocation to proposed N.J.A.C. 7:13-11.2(o) and (p) with limited amendment.

Proposed N.J.A.C. 7:13-11.2(o) incorporates with amendments existing N.J.A.C. 7:13-10.2(p), which sets forth standards for the construction of a public accessway or public access area along a tidal water. Proposed N.J.A.C. 7:13-11.2(o) refers only to a public access area, since this term is consistent with the CZM rules. A reference to existing N.J.A.C. 7:13-10.2(d)1 and 2, which address avoidance and minimization unless the requirements of the public access rule at N.J.A.C. 7:7E-8.11 are met, is proposed to be deleted. Because of the importance of preserving riparian zone functionality, the Department believes that avoidance and minimization of disturbance, as set forth in proposed N.J.A.C. 7:13-11.2(b), is appropriate for all development in riparian zones. The requirement that no building be construction within 25 feet of any top of

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bank is also proposed to be deleted, since this limitation is addressed in proposed N.J.A.C. 7:13-11.2(c), which allows only limited activities within 25 feet of top of bank, with new buildings not allowed in this area unless they are constructed in an actively disturbed area adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water, and thus do not impact riparian zone vegetation, and existing buildings only being allowed to be reconstructed if the building cannot feasibly be relocated further from the top of bank.

Proposed N.J.A.C. 7:13-11.2(p) incorporates with amendments existing N.J.A.C. 7:13-10.2(q), which sets forth standards for the construction of water dependent development along a tidal water. The requirement that no building be constructed within 25 feet of any top of bank is also proposed to be deleted for the same reasons discussed above in the summary of proposed N.J.A.C. 7:13-11.2(o).

*Individual subsurface sewage disposal systems affecting riparian zone vegetation (N.J.A.C. 7:13-11.2(q))*

The existing rules do not have specific category limits for riparian zone vegetation impacts applicable to construction of an individual subsurface sewage disposal system that serves a new private residence (redesignated as a single-family home or duplex in this proposal), or the reconstruction or repair a lawfully existing malfunctioning individual subsurface sewage disposal system regardless of the type of building the existing system serves. Accordingly, these activities are subject to the riparian zone vegetation impact limits applicable to “all other regulated activities” under existing Table C and conditions applicable to issuance of an individual permit under existing N.J.A.C. 7:13-10.2(r) (discussed below in the discussion of

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activities not listed in proposed Table 11.2).

The installation of an individual subsurface sewage disposal system at a single-family home or duplex is subject to the standards contained in the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A. The proposed rules recognize that this approval is applicable and that, in certain circumstances, exceedance of the limit proposed in Table 11.2 may be necessary to comply with State and local requirements. However, in order to restrict potential impact to riparian zone vegetation, disturbance to riparian zone vegetation is required to be the minimum necessary to achieve compliance with that approval process. Additionally, both for construction of a new system serving a single-family home or duplex, or reconstruction or repair of an existing malfunctioning individual subsurface sewage disposal system serving any building, mitigation must be provided for any area of vegetation disturbed in excess of the limits specified in proposed Table 11.2 (see proposed N.J.A.C. 7:13-11.2(q)1 and 2).

The proposed new subsection subjects both new and reconstructed/repared systems to other requirements designed to assure that riparian zone vegetation and the benefits it provides are protected. In both cases, the new subsection seeks to protect the area within 50 feet of the top of bank. Individual subsurface sewage disposal systems are designed to infiltrate effluent into the ground. Systems located in close proximity to surface waters can leech effluent into these waters and adversely impact aquatic biota. Furthermore, as surface waters are dynamic systems that periodically flood and often meander over time, locating individual subsurface sewage disposal systems in close proximity to surface waters can result in other adverse environmental impacts as well as increasing the likelihood of expensive and possibly environmentally damaging repair and reconstruction activities. Therefore, where a new system is proposed, the system must

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not result in disturbance of riparian zone vegetation within 50 feet of the top of bank. In the case of an existing system being reconstructed or repaired, disturbance of this area may only occur if the existing system is already located there and, even then, only if the repaired or modified system cannot be relocated outside the 50-foot area and as far from the regulated water as possible (see proposed N.J.A.C. 7:13-11.2(q)3ii and 4iii).

As required for construction of roadways impacting riparian zone vegetation under proposed N.J.A.C. 7:13-11.2(h) and construction of a single-family home or duplex under proposed N.J.A.C. 7:13-11.2(m), proposed N.J.A.C. 7:13-11.2(q)3iii addresses the situation where the lot on which construction is proposed was created or subdivided after November 5, 2007. In such a case, the applicant must demonstrate that none of the lots created in the subdivision contain a habitable building or possess a valid authorization from the Department to construct a habitable building in the riparian zone. This is necessary to ensure that no more than one new individual subsurface sewage disposal system is constructed within a riparian zone on the original parcel prior to its subdivision, and thereby minimize adverse impacts to riparian zone functionality.

Finally, the rules require additional proofs for reconstruction or repair of an existing system in the riparian zone to assure that the reconstruction or repair is not actually inappropriately increasing the impact of the previously permitted existing system. Particularly, it must be demonstrated that the need for reconstruction or repair is not the result of a change in either the size of the building served by the system or the type of use to be made of that building (for example, a residence being converted into a commercial building, such as a restaurant) and the volume of sewage which the system is designed to address is not increased over that

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previously approved, so that it could be utilized to serve future expansion of the building served (see proposed N.J.A.C. 7:13-11.2(q)4i and ii).

The proposed new subsection is only applicable to construction of a new individual subsurface sewage disposal system if the proposed system is to serve a single-family home or duplex satisfying the conditions specified in the proposed section. Because the impacts associated with construction of a new system serving anything other than one single-family home or duplex can vary widely due to the size of the building and the volume of sewage generated by that building, making any exceedance of the limits in proposed Table 11.2 more appropriately addressed through the hardship exception process on a case by case basis, construction of a new system to serve any other building continues to fall under the category of regulated activities not individually listed in Table 11.2 and will be subject to individual permit requirements under proposed N.J.A.C. 7:13-11.2(y), discussed below.

*Hazardous substance investigation, cleanup, and removal (N.J.A.C. 7:13-11.2(r))*

The existing rules additionally do not have specific category limits for riparian zone vegetation impacts occurring as the result of investigation, cleanup, or removal of hazardous substances or pollutants. Accordingly, as is the case currently for construction or repair of individual subsurface disposal systems associated with a single-family home or duplex, except for cases in which the investigation, cleanup, or removal of hazardous substances can be addressed under a permit-by-rule, these activities are subject to the riparian zone vegetation impact limits applicable to “all other regulated activities” under existing Table C and conditions applicable to issuance of an individual permit under existing N.J.A.C. 7:13-10.2(r) (discussed

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below in the discussion of activities not listed in proposed Table 11.2).

Similar to construction of an individual subsurface disposal system, Department rules specify the standards to be met in the investigation, cleanup, and removal of hazardous substance pollution. These include the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. The proposed new requirements applicable to issuance of an individual permit for the conduct an investigation, cleanup, or removal of hazardous substances and petroleum and petroleum products recognize that these standards must be met to assure that the cleanup activity achieves the required level of remediation. However, again reflecting the importance of riparian zone vegetation, the proposed rules require that any impact to such vegetation as a result of the investigation, cleanup, or removal be demonstrated to be the minimum necessary to comply with these other rules, with the applicant required to justify why other allowed remediation methods that would reduce the area impacted are not feasible. This requirement is intended to ensure that an appropriate balance is struck between the benefits achieved by remediation of hazardous substances and protection of riparian zone vegetation (and the corresponding functions provided by the riparian zone). Finally, the proposed rules require that mitigation be provided in accordance with proposed Subchapter 13 for the total area of vegetation impacted to further ensure impacts from the remediation project are minimized to the greatest extent possible.

*Solid waste landfill closure or post-closure plans and disruption activities (N.J.A.C. 7:13-11.2(s))*

As is the case with the construction of an individual subsurface disposal system and the

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investigation, cleanup, and removal of hazardous substance pollution, solid waste landfills are subject to Department regulation to ensure that they are designed, managed, and closed, including post-closure maintenance, in a manner that controls environmental impacts from such a facility (see the Solid Waste rules, N.J.A.C. 7:26).

The proposed new requirements applicable to issuance of an individual permit for the conduct of activities at a solid waste landfill related to the closure or post-closure maintenance of the solid waste landfill recognize that permitted sanitary landfills are required to conduct certain activities to ensure appropriate closure pursuant to 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.

While recognizing that the requirements contained in the closure/post-closure plan must be met, as is the case with hazardous waste investigation, cleanup, and removal, in light of the importance of riparian zone vegetation, the proposed rules require that any impacts be demonstrated to be necessary and that the impact to riparian zone vegetation is the minimum necessary to comply with the applicable plan. This demonstration must include the same exploration of alternative methods and identification of any such methods that would result in less impact to riparian zone vegetation required for a hazardous substance investigation, cleanup, and removal. This will enable the Department to confirm whether the chosen method minimizes adverse impacts to riparian zone functionality.

*Trails and boardwalks in the riparian zone (N.J.A.C. 7:13-11.2(t))*

Specific requirements applicable to individual permits for the construction of a trail or boardwalk are proposed to be added to the rules at proposed N.J.A.C. 7:13-11.2(t). Similar to

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new requirements proposed for roadways, the requirements proposed are equivalent to those currently applied to an application seeking a hardship exception for such a project under existing N.J.A.C. 7:13-9.8. A proposed trail or boardwalk cannot exceed the limits on disturbance to riparian zone vegetation unless the applicant demonstrates that there is a compelling public need to construct the trail or boardwalk, which cannot feasibly be accomplished without exceeding these limits, in which case mitigation must be provided for the excess disturbed vegetation.

*Footbridges in a riparian zone (N.J.A.C. 7:13-11.2(u))*

The Department is additionally proposing specific vegetation limits in proposed Table 11.2 and individual permit requirements applicable to the construction of a footbridge which impacts riparian zone vegetation. Impacts to riparian zone vegetation in excess of the proposed limits discussed in the summary of Table 11.2 above are generally prohibited, with an exceedance only allowed upon demonstration of a compelling public need that cannot be met without the proposed impact. This is the same test that would be applied to an application for a hardship exception under existing N.J.A.C. 7:13-9.8. In such a case, the applicant must provide compensation for all cleared, cut, and removed vegetation in excess of the limits specified in the rules using one or more methods described in the proposed mitigation subchapter, N.J.A.C. 7:13-13, which is equivalent to the mitigation requirement applicable to a project qualifying for a hardship exception, which is required to provide compensation under existing N.J.A.C. 7:13-10.2(s). All footbridge projects impacting riparian zone vegetation, regardless of whether the project exceeds the limits specified in proposed Table 11.2, are required to disturb the minimum width of riparian zone vegetation possible and, similar to railroads and roadways, must be as perpendicular to the channel as possible to ensure that the minimum area necessary is impacted.

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*Flood control projects (N.J.A.C. 7:13-11.2(v))*

Requirements applicable to individual permits for the construction of a flood control project are currently specified in existing N.J.A.C. 7:13-10.2(o). These provisions are proposed for relocation to proposed N.J.A.C. 7:13-11.2(v) with limited amendment.

By their nature, flood control projects are often required to impact riparian zone vegetation. The limits in existing Table C and those specified in proposed Table 11.2 balance the benefits to the public from such a project against impacts to riparian zone vegetation in arriving at the limit contained in the Table. However, the rules, as with most other potential activities impacting riparian zone vegetation, recognize that there may be situations where public safety or other compelling public need justify that a greater level of impact be allowed than that anticipated by the Table. Accordingly, exceedances are allowed upon showing that such a compelling need is present, with mitigation required for vegetation impacted in excess of the limits specified in the Table.

*Removing sediment and/or debris from a regulated water (N.J.A.C. 7:13-11.2(w))*

The standards for the removal of sediment and debris from a regulated water under an individual permit at existing N.J.A.C. 7:13-11.15(c)5 through 10 ensure that the amount of riparian zone vegetation that can be disturbed and preserve the integrity of the banks of the regulated water is minimized, thus maintaining riparian zone functionality and avoiding erosion and instability along the regulated water to the extent possible. These standards are incorporated at proposed N.J.A.C. 7:13-11.2(w) with limited amendments. As noted above, proposed Table

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11.2 sets forth the maximum area of riparian zone vegetation permitted to be disturbed for each access point. Whereas the existing standards require that the project does not disturb the channel bank or the riparian zone, unless such disturbance is unavoidable, necessary to gain access to the channel and minimized, proposed N.J.A.C. 7:13-11.2(w) instead requires that the number of access points to the regulated water is the minimum necessary to conduct the project, since temporarily disturbing the channel and/or riparian zone is generally necessary to conduct any sediment and debris removal project. Additionally, existing N.J.A.C. 7:13-10.1, proposed N.J.A.C. 7:13-11.1, incorporate standards which appropriately minimize disturbance to channels. An additional standard is proposed requiring that, where possible, the project is conducted within actively disturbed areas, since restoration of pre-activity vegetation, as required under proposed N.J.A.C. 7:13-11.2(z), is much simpler and quicker to accomplish in actively disturbed areas than restoring forested areas or other areas with dense vegetation. Additionally, the existing requirement related to avoiding the use of heavy equipment in a regulated water is expanded to include a means whereby an applicant can demonstrate that there is no feasible alternative that would result in less environmental damage.

*Removing existing fill or structures (N.J.A.C. 7:13-11.2(x))*

Existing N.J.A.C. 7:13-11.19, proposed N.J.A.C. 7:13-12.21, sets forth standards that apply to the removal of existing fill or structures. As noted above in the summary of proposed Table 11.2, the removal of fill or structures from a regulated area can provide environmental benefits as well as mitigate flooding. In order to ensure that the removal of existing fill or structures does not significantly impair riparian zone functionality, proposed Table 11.2

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establishes limits on the location and area of riparian zone vegetation that can be cleared, cut, and/or removed. In cases where a fill or structure removal project requires clearing, cutting, and/or removal of riparian zone vegetation in excess of these limits, an applicant must request a hardship exception and, in accordance with proposed N.J.A.C. 7:13-13.11.2(e), provide mitigation, in accordance with N.J.A.C. 7:13-13, for the area of riparian zone vegetation being cleared, cut, and/or removed exceeds the limits in Table 11.2.

*Activities not listed in Table 11.2 that impact riparian zone vegetation (N.J.A.C. 7:13-11.2(y))*

As indicated above, the substantive requirements applicable to individual permits for the specific categories of regulated activities addressed in proposed Table 11.2 are specified in proposed N.J.A.C. 7:13-11.2(g) through (x). For regulated activities not addressed in proposed N.J.A.C. 7:13-11.2(g) through (x), the existing rules at N.J.A.C. 7:13-10.2(r) and the proposed rules at proposed N.J.A.C. 7:13-11.2(y) provide standards that must be met for an individual permit to be issued.

Existing N.J.A.C. 7:13-10.2(r) prohibits impacts exceeding the limits set forth in Table C (with allowed impacts varying between 1,000 square feet and 6,000 square feet depending upon the width of the riparian zone impacted), prohibits any building to be located within 25 feet of the bank of the water, requires a demonstration that the project could not be accomplished or located in a manner that would reduce or eliminate riparian zone impacts and requires mitigation on a 2:1 mitigation to disturbed area ratio for all cleared, cut, and/or removed riparian zone vegetation.

The Department is proposing to simplify the existing provision, change the maximum

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limit of disturbance to riparian zone vegetation, and provide a limited exception from the mitigation requirement contained in the existing rule. The proposal continues to limit the maximum area of disturbance to the limits set forth in proposed Table 11.2 and to require that the applicant demonstrate that the project could not be accomplished or located in a manner that would reduce or eliminate riparian zone impacts. As indicated in the summary of Table 11.2, a single one-quarter-acre limit is proposed to be applicable to riparian zones of all widths for the reasons explained there. The Department is proposing to require mitigation only for projects disturbing greater than 2,000 square feet of riparian zone vegetation with mitigation to be performed in accordance with the options provided in proposed N.J.A.C. 7:13-13. The Department believes exempting these smaller impacts from required mitigation is appropriate due to their *de minimis* impact on riparian zone functionality. As discussed in the summary of proposed N.J.A.C. 7:13-13, the level of mitigation required for projects that disturb more than 2,000 square feet of riparian zone vegetation will depend upon the type of mitigation provided. Only where the applicant proposes to restore a water would the mitigation required be provided at less than the current mitigation area to area of disturbance ratio of 2:1. This reflects the Department's determination that restoration projects provide a superior level of benefit in recreating lost riparian zones in the limited circumstances such a project would be an option. Finally, as indicated above in the summary of changes to tidal development, the existing requirement that no building be constructed within 25 feet from the regulated water is deleted since this requirement is already stated in proposed N.J.A.C. 7:13-11.2(c), which allows certain exceptions where construction within 25 feet of a top of bank will not exacerbate erosion or subject the building to increased risk. Accordingly, that part of the existing provision is not

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included in this proposed subsection.

*Replanting of temporarily disturbed riparian zone vegetation (N.J.A.C. 7:13-11.2(z))*

Proposed N.J.A.C. 7:13-11.2(z) is new, and requires that all temporary disturbance to riparian zone vegetation is properly replanted upon completion of the regulated activity. This is necessary to ensure that riparian zone functionality is not unnecessarily impaired by proposed development, and to reduce the likelihood of long term adverse impacts to water quality. The requirements applicable to revegetation of temporary riparian zone vegetation impacts associated with an activity conducted under an individual permit under proposed N.J.A.C. 7:13-11.2(z) are the same as those applicable to temporary impacts to riparian zone vegetation authorized under permits-by-rule and authorizations under a general permit-by-certification or general permit under proposed N.J.A.C. 7:13-6.7(b)5.

Proposed new N.J.A.C. 7:13-11.2(z) requires that temporarily disturbed areas within the riparian zone must be replanted in accordance with proposed new N.J.A.C. 7:13-11.2(z)1, except as provided at proposed N.J.A.C. 7:13-11.2(z)2, as described below.

To assure that the replacement vegetation fulfills the same functions and values as the vegetation temporarily disturbed by conduct of the regulated activity, the proposed rules generally require that all such disturbed areas shall be replanted with vegetation of equal or better ecological characteristics as the vegetation that was disturbed, that all plantings consist of native, non-invasive vegetation (with an exception allowed for existing actively disturbed areas, which may be replanted with the same type of vegetation that was disturbed) and that all vegetation be planted immediately after completion of regulated activities, unless otherwise

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prevented by seasonal weather (see proposed N.J.A.C. 7:13-11.2(z)1i through iii). The proposed rule includes examples to illustrate how the requirements are applied.

The general revegetation requirements in proposed N.J.A.C. 7:13-11.2(z)1 differ from the existing rules with reference to the requirement regarding use of native, non-invasive species.

The existing chapter requires that all temporarily disturbed riparian zone vegetation be replanted with native, non-invasive vegetation. However, this requirement sometimes resulted in an undue burden on permittees. A house or business, for example, is typically surrounded by grass or landscaping, which often consists of non-native and/or invasive species. By requiring the exclusive use of native, non-invasive vegetation to replace disturbed vegetation, a person would be required to replace their lawn or landscaping with another type of vegetation that is not consistent with the site. This is particularly difficult in agricultural fields, where some crops could not be replanted based on this requirement. As such, the Department is proposing to allow in-kind replacement of temporarily disturbed vegetation in such areas, since this would result in no net impact on the functionality of the riparian zone. The proposed rules further allow one type of vegetation in an actively disturbed area to be replaced with another kind, such as replacing a lawn with a garden or farm field, since such replacement will not adversely impact the functionality of the riparian zone.

While the requirements generally applicable to revegetation of temporary disturbance of riparian zone vegetation are those summarized above, the proposed rules do recognize that the nature of some regulated activities do not always allow all requirements contained in proposed N.J.A.C. 7:13-11.2(z)1 to be satisfied. Accordingly, the rules provide a limited exception to the general requirements in proposed N.J.A.C. 7:13-11.2(z)2. Particularly, in cases where replanting

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in accordance with these proposed provisions would interfere with access to a structure, or would interfere with the necessary, continued maintenance of a structure, plantings shall consist of native, non-invasive vegetation of equal or greater ecological function and value as the vegetation that was disturbed only to the extent feasible. For example, a person may need to remove vegetation within a certain perimeter around a proposed structure, or under or above a proposed utility line, in order to provide access to the structure or utility during its construction. Upon completion of the regulated activity, requiring the in-kind replacement of vegetation, or requiring the placement of native, non-invasive vegetation, may sometimes interfere with access to the structure or prevent its maintenance. In such cases, the Department recognizes that meeting the proposed new provisions of N.J.A.C. 7:13-11.2(z)1i and ii could be unsafe, or in violation of other Federal, State or local requirements. The Department is therefore proposing to allow flexibility under this proposed new provision in such cases.

### **Riparian zone mitigation**

As indicated above, because of the importance of the riparian zone and the vegetation contained in that area, the existing rules set limits on the area of riparian zone vegetation that can be cleared, cut, or removed with the level of disturbance allowed dependent upon the type of regulated activity proposed. In cases where the prescribed limits on riparian zone disturbance are justifiably exceeded, riparian zone compensation is required at a ratio of 2:1, meaning the area of compensation must be twice the area of the disturbance to riparian zone vegetation for disturbances in excess of that allowed by the rules. The existing rules provide two methods of riparian zone compensation: removal of lawfully existing structures or impervious surfaces in the

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riparian zone with the area cleared replanted with vegetation (referred to as “restoration” in these amendments), and/or the planting of new trees in the riparian zone in an area that is substantially devoid of trees due to a previous, lawful development (referred to as “enhancement” in these amendments).

Due to the importance of mitigation in assuring that the functions and values of the riparian zone are appropriately protected when impact to one part of the riparian area in excess of that allowed by the rules is necessary, the Department is proposing that mitigation requirements be relocated to a separate subchapter, proposed Subchapter 13, with amendments. The proposed amendments are designed to increase mitigation options by expanding both the locations where mitigation may occur, as well as the means that may be utilized to perform mitigation, with two new mitigation methods proposed; riparian zone creation and riparian zone preservation. The proposed riparian zone creation and preservation standards are similar to the standards for these compensation options for disturbance to freshwater wetlands and transition areas in the FWPA rules. Standards for riparian zone mitigation banks are also proposed to be adopted, which will encourage the development of banks similar to the freshwater wetlands mitigation banks. A definition for “mitigation bank” is proposed at N.J.A.C. 7:13-1.2, which mirrors the existing definition in the FWPA rules and proposed definition in the CZM rules, and which establishes the type of operation that may be undertaken to provide compensatory mitigation for disturbances to riparian zone vegetation under the FHACA Rules.

#### Definitions specific to mitigation (N.J.A.C. 7:13-13.1)

As part of the proposed new mitigation subchapter, to assist the user of the rules in

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understanding the intent of the rules, the Department is proposing to define 11 terms used in the proposed subchapter at proposed N.J.A.C. 7:13-13.1. Many of these proposed new terms are defined in the Department's FWPA rules at N.J.A.C. 7:7A-15.1. The proposed definitions are similar to the ones defined in the FWPA rules with adjustments made to reflect the unique nature of the mitigation of riparian zone vegetation. Other terms used in this proposed subchapter are defined at N.J.A.C. 7:13-1.2 because they are also used elsewhere in this chapter.

A definition is proposed for the term "mitigation" that identifies the specific forms of riparian zone compensation allowed under the proposed subchapter, as described above. Definitions for "creation," "enhancement," "restoration" and "preservation" are similarly proposed to describe the acceptable means by which riparian zone mitigation can be accomplished. Specific requirements applicable to these forms of mitigation are contained in proposed N.J.A.C. 7:13-13.9, 13.10, and 13.12, with more general requirements applicable to each specified throughout this subchapter, as described above. A definition is also proposed for "mitigation area" that identifies the portion of a site or piece of property upon which mitigation is proposed or performed.

The proposed definitions of "credit purchase," "mitigation bank site," and "mitigation banking instrument" parallel the definitions of these terms in the Department's FWPA rules. As described in the rules, the operator of a Department approved mitigation bank is allowed to conduct activities that result in increased values and functions of the resource protected by the rules allowing for the mitigation bank on property owned by the mitigation bank operator and subsequently sell mitigation credits in an amount and according to a schedule approved by the Department to developers of projects within a specified area to satisfy mitigation requirements

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applicable to that project. The Department currently allows individuals to engage in wetland mitigation banking to provide a mitigation alternative for impacts to freshwater wetlands and coastal wetlands and is proposing to similarly allow the creation of riparian zone mitigation banking, as well as the use of riparian zone mitigation bank credits. The term “service area” is a new definition that is similar to the term defined at 33 CFR Part 332, entitled “Compensatory Mitigation for Losses of Aquatic Resources.” This term is proposed in order to clearly identify the area in which an approved bank may sell credits.

The proposed definition of “fee simple” is the same as that in the Department’s Green Acres Program rules at N.J.A.C. 7:36-2.1. The term “fee simple” is used in describing ownership of the property on which mitigation may be performed. Fee simple ownership is necessary to ensure that the permittee has full legal rights and authority to conduct the proposed mitigation plan.

#### General mitigation requirements (N.J.A.C. 7:13-13.2)

While mitigation required to compensate for riparian zone impacts will vary from project to project, there are certain standards and requirements that are applicable to all mitigation projects. These requirements are contained in proposed N.J.A.C. 7:13-13.2.

To ensure that the proposed mitigation adequately compensates for the areas disturbed by the proposed project, all mitigation must fully compensate for any ecological loss. For example, if the proposed impact to riparian zone vegetation would result in a loss of sediment and pollution control, the mitigation must provide sediment and pollution control to replace the ecological loss. Mitigation plans are authorized by the Department in one of four contexts: as

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part of an individual permit; through approval of a mitigation proposal submitted to comply with a condition of an individual permit; through specific terms incorporated in an enforcement document; or through approval of a mitigation proposal submitted to comply with the requirements of an enforcement document (see N.J.A.C. 7:13-13.2(c)). While the mitigation proposal can be submitted as part of an application for an individual permit and may be reviewed by the Department concurrent with the permit application, as indicated at proposed N.J.A.C. 7:13-13.2(b), the Department does not consider a mitigation proposal as a factor in determining whether to approve any application under this chapter; the Department's decision on whether an application qualifies for permit approval under the rules is made independent of the determination of whether the mitigation proposal satisfies the requirements of proposed Subchapter 13 – an application for a permit that does not satisfy the requirements of the chapter will not be approved no matter how significant a mitigation proposed may be.

To ensure the long-term success of the mitigation project, it may only be commenced when all necessary approvals, both from the Department and any other agency that has jurisdiction, are obtained to ensure that changes that may affect the anticipated benefits to be achieved are not imposed after the mitigation project has already commenced (proposed N.J.A.C. 7:13-13.2(d) and (e)) and the mitigation area must be permanently protected by a conservation restriction satisfying the standards specified in proposed Subchapter 14 (proposed N.J.A.C. 7:13-13.2(g)). Additionally, while a mitigation project may satisfy requirements applicable under other rules, such as the Department's Freshwater Wetland Protection Act Rules, it will only be accepted to satisfy the requirements of the FHACA Rules if it fully satisfies all of the requirements of this subchapter, again to ensure that the necessary compensatory ecological

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benefit under this rule is fully achieved (proposed N.J.A.C. 7:13-13.2(j)). To ensure that the proposed mitigation in the enforcement context fully compensates for the impact to the affected riparian zone, the rules provide that the Department will determine the amount of mitigation and the type of mitigation alternative required taking into account the size and severity of the violation and the functions and values provided by the proposed mitigation. Mitigation required as a consequence of a violation must be at least as ecologically beneficial as mitigation required to compensate for a permitted disturbance (proposed N.J.A.C. 7:13-13.2(f)).

In addition to adding to the two existing forms of mitigation allowed by the rules currently, as will be discussed below, the proposed mitigation rules provide flexibility by allowing the applicant in a non-enforcement situation to choose which form of mitigation best addresses the total amount of mitigation required to be provided for the proposed regulated activity under the rules and the site-specific conditions on the property on which mitigation is to occur. Additionally, the rules allow the applicant to utilize more than one form of mitigation to achieve the required level of ecological benefit (proposed N.J.A.C. 7:13-13.2(h)). The proposed rules also allow aggregation of mitigation for multiple disturbances to allow the required mitigation to be performed in the most efficient manner possible while assuring that the necessary ecological benefit is achieved (proposed N.J.A.C. 7:13-13.2(i)). Allowing the permittee to aggregate the mitigation for several small disturbances into one mitigation site may additionally result in a more environmentally beneficial mitigation project than requiring a separate mitigation project for each small disturbance.

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Location of mitigation and property suitable for mitigation (N.J.A.C. 7:13-13.4 and 13.8)

To ensure that mitigation adequately compensates for unavoidable impacts to the riparian zone, it is necessary that several factors be satisfied. The mitigation must occur in an area that will provide compensation sufficiently connected with the riparian zone proposed to be impacted. The mitigation must occur on an appropriate property having the necessary characteristics to ensure the mitigation will be successful and will remain in place in perpetuity. The mitigation area must be of the appropriate size to ensure that the ecological benefits created are adequate to fully compensate for the impacts of the regulated activity. Further, the mitigation must be conducted at the appropriate time to ensure that compensation does not occur long after the riparian zone is impacted by the regulated activity.

In order to provide appropriate compensation for the impacts to a riparian zone, the mitigation proposed must be located in close proximity to the area impacted; mitigation provided in the southern part of the State will do little to compensate for impacts to the riparian zone in a location in the northwestern part of the State. Accordingly, the proposed rules provide that creation, restoration, enhancement, or preservation mitigation must occur either on the site where the disturbance is proposed to occur or offsite, but within the same watershed management area. Similarly, where mitigation is to be provided through purchase of credits from a mitigation bank, it is required that mitigation credits be purchased from a mitigation bank that has an approved service area that includes the location where the disturbance to the riparian zone is to occur (proposed N.J.A.C. 7:13-13.8(a) and (b)). The Department may allow mitigation in a different watershed management area, provided it is as close as possible to the watershed management

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area where the disturbance is to occur, if the mitigator demonstrates that it is not feasible to mitigate in the same watershed management area as the disturbance and provided the mitigation fully compensates for the disturbance. For example, the Department may allow mitigation in a different watershed management area than the one where the disturbance will occur when the applicant has explored and exhausted all of the mitigation options in the same watershed management area without finding a suitable mitigation option (proposed N.J.A.C. 7:13-13.8(c)).

In addition to specifying the general geographic area where the mitigation project must occur, the proposed rules identify suitable properties on which mitigation may be conducted (see proposed N.J.A.C. 7:13-13.4). Mitigation may be carried out on either private or public property, provided that mitigation is conducted on property that is owned in fee simple by the mitigator or it is demonstrated that the person performing the mitigation has legal rights to the property sufficient to enable them to perform the mitigation on the property and comply with all requirements of the FHACA Rules (N.J.A.C. 7:13-13.4(b)). In addition, the property must have no ownership rights assigned to others that would affect the ability of the mitigation area to comply with the rules' requirements (for example, an access easement running through the proposed mitigation area to provide vehicular access to an adjacent property that prevents the mitigator from performing any required maintenance). This proposed section additionally specifies how the presence of an encumbrance, such as an easement, impacts the calculation of the mitigation provided by a proposed mitigation project with the area impacted generally not being considered to provide riparian zone benefits unless it is demonstrated that the encumbrance will not in any way affect the ability of the area to comply with the requirements of the rules (see N.J.A.C. 7:13-13.4(d)).

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If the mitigation is proposed to be conducted on public property the mitigator must obtain a commitment by the public entity that they will place a conservation restriction on the mitigation area, if an existing conservation restriction does not protect the area in perpetuity. Since there are limitations on the types of uses that are allowed on land that was acquired using Green Acres funding or is otherwise subject to Green Acres restrictions to ensure that the land continues to perform purposes consistent with Green Acres focus on recreation and conservation, for such lands the applicant is additionally required to provide proof that the Green Acres Program approves the use of the area for mitigation (proposed N.J.A.C. 7:13-13.4(e)).

Even if the applicant demonstrates that they either own the property proposed for mitigation or have obtained rights sufficient to ensure that the mitigation can be performed and maintained in perpetuity in accordance with all requirements of the rules, consistent with the over-arching general requirement that mitigation must fully compensate for any ecological loss resulting from the proposed impacts to the riparian zone, the rules preclude certain areas from being considered as a potential site for a mitigation area. Accordingly, the Department will not consider mitigation activities in an area that is already of high ecological value, for example a mature, natural forested community, as activities in these areas will not provide additional benefits sufficient to offset impacts to a functioning riparian zone (proposed N.J.A.C. 7:13-13.4(g)). Further, the proposed rules do not allow properties which have been dedicated to other uses not conducive to riparian zone functions to serve as mitigation sites as mitigation performed on these properties would be unlikely to provide the types of riparian zone benefits necessary to offset ecological loss resulting from proposed impacts to the riparian zone. Accordingly, areas

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intended for human use and stormwater management facilities cannot be considered as mitigation sites (proposed N.J.A.C. 7:13-13.4(f)).

Conversely, the Department will not consider sites where activities would create negative ecological impacts by jeopardizing threatened or endangered species or their habitat, or mitigation activities where the proposed mitigation would pose an ecological risk that would potentially expose humans or the ecological community to contamination, or result in the spread of contamination to new areas (proposed N.J.A.C. 7:13-13.4(h)). Ecological risk will be assessed in accordance with the Department's Technical Requirements for Site Remediation at N.J.A.C. 7:26E-1.16 and 4.9. Only if analysis demonstrates that there is no ecological risk at the site or the contamination at the site is fully remediated in compliance with the requirements of the Technical Requirements for Site Remediation may mitigation proceed. 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. This provision is necessary both to assess the likelihood of success of a potential mitigation site, and to protect the health and safety of Department staff that will be inspecting the site. The Department cannot properly review a mitigation proposal without knowing the potential for success as it relates to contamination on a site. This provision is similar to N.J.A.C. 7:7A-15.4(h) in the FWPA rules.

Forms of mitigation and amount of mitigation required (N.J.A.C. 7:13-13.1, 13.9, 13.10, 13.11, 13.12, and 13.13)

As indicated above, the proposed amendments expand the mitigation options available to compensate for riparian zone impacts to include four methods of mitigation that may be

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performed by the applicant: riparian zone creation, riparian zone restoration, riparian zone enhancement and riparian zone preservation. As an alternative to these methods, the rules also provide the potential for mitigation obligations to be satisfied by purchase of credits from a mitigation bank, if one is present in the area of the proposed regulated activity impacting a riparian zone (proposed N.J.A.C. 7:13-13.13(a)).

Because the ecological benefit provided from an equivalent area under each of the mitigation methods allowed will vary (with, for example, one acre of area that is the subject of a riparian zone creation plan which restores a piped regulated water to a natural condition and stabilizes the restored channel with native vegetation providing greater ecological benefit than one acre of existing riparian zone preserved in accordance with the rules' requirements), the proposed rules require different levels of compensation to be provided to fully compensate for the riparian zone area impacted by the regulated activity with the amount/ratio of mitigation area to area disturbed dependent upon the form of mitigation proposed. Where appropriate, the Department has set mitigation ratios that it will presume to result in mitigation of equal ecological value. In these instances, however, the proposed rules provide an opportunity for the mitigator to demonstrate that a lesser ratio will satisfy the rule. Except as otherwise noted, the Department has determined a minimum ratio of 1:1 to be appropriate to ensure no net loss of riparian zone area. Reference to where specific requirements applicable to each of the mitigation options are codified within the proposed subchapter is included in the proposed rules at N.J.A.C. 7:13-13.2(k).

Riparian zone creation, a proposed new riparian zone mitigation alternative, involves restoration of a regulated water that has been enclosed by a pipe, culvert, or other structure to its

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natural condition by removing the enclosing structure, restoring the water to its pre-disturbance condition and configuration to the maximum extent practical, stabilizing the channel, and planting non-invasive native vegetation (see proposed N.J.A.C. 7:13-13.9). Because such a project creates ecological benefits both in the channel of the water and in the area adjacent to the water that has been removed from the enclosed structure where there were previously no ecological benefits provided because of the presence of the structure, the rules propose that, if this mitigation alternative is chosen, mitigation is required at a lower ratio of mitigation area to area of impact to the riparian zone than that required of mitigation utilizing riparian zone restoration, enhancement or preservation, with mitigation generally required at a ratio of 1:1.

As discussed above, mitigation through creation of riparian zones must generally be at a creation to lost or disturbed ratio of 1:1, ensuring, without further analysis, that there is no net loss of riparian zone area. However, N.J.A.C. 7:13-13.9(b)1 provides that the 1:1 ratio may be relaxed to no less than a creation to loss ratio of 0.5:1 if the mitigator demonstrates that creation of a lesser area will provide a riparian zone of equal ecological value. In addition, the proposed paragraph identifies the information that must be analyzed to demonstrate that the proposed area does fully compensate for the ecological impacts to the riparian zone area affected. This provision is similar to the provision in the Freshwater Wetland Protection Act rules at N.J.A.C. 7:7A-15.8(j). This allowance recognizes that a creation project, in which a regulated water and a riparian zone are created where they did not exist before, can provide a much greater ecological benefit compared to the area affected than other types of mitigation that enhance, restore or preserve an existing riparian zone. For example, the removal of a pipe and creation of a meandering natural stream channel that is stabilized with native vegetation, in addition to the

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planting of trees within 50 feet of the new channel, to mitigate for disturbance to a degraded grassed riparian zone would provide such an increase in ecological functions and values that a 0.5:1 ratio would be appropriate.

As indicated above, the next two mitigation options provided in proposed Subchapter 13, riparian zone restoration and enhancement, are the two options that are currently provided for in the rules at existing N.J.A.C. 7:13-10.2(t). As indicated in proposed N.J.A.C. 7:13-13.1, restoration mitigation is accomplished by the reestablishment of the functions and values of a riparian zone or certain lands adjacent to the riparian zone through activities such as the removal of impervious surfaces and planting the area with native, non-invasive vegetation species or restoring to a natural condition a regulated water that has been previously straightened, channelized or lined with revetments, retaining walls or other armoring. Enhancement mitigation results in the improvement of the functions and values of a degraded riparian zone or certain adjacent areas by activities such as the removal of invasive plant species or the planting of native, non-invasive vegetation. The proposed rules at N.J.A.C. 7:13-13.10 provide further detail as to what is required for a proposed project to qualify as one of these forms of mitigation under the rules including the type and location of land on which the mitigation may be performed, the level of restoration or enhancement that must be provided, and the ratio of mitigation area to riparian zone impacted that is required depending upon which type of mitigation project is proposed.

Both restoration and enhancement mitigation projects must result in land restored to a natural condition, free from any gravel, impervious surface, or manmade structures, except for structures necessary to support the proposed mitigation plan. The mitigation area must

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additionally be planted with native, non-invasive vegetation of equivalent or superior density and ecological functions and values as the disturbed area (proposed N.J.A.C. 7:13-13.10(d)1 and 2).

These requirements are designed to maximize the ecological values and functions that will result from the mitigation.

Restoration and enhancement mitigation activities may occur outside the riparian zone as long as the mitigation project protects the adjacent riparian zone in a manner sufficient to ensure that the over-arching requirement applicable to all mitigation projects that the proposed mitigation will fully compensate for any ecological loss resulting from the proposed impacts to the riparian zone is satisfied. This will not occur unless the mitigation is directly adjacent to the riparian zone without any intervening separation and the entire mitigation project must be located within a specified distance from the top of bank of the regulated water. The distance within which the mitigation project must be located depends upon the riparian zone applicable to the regulated water on which the riparian zone is located. To adequately compensate for riparian zone impacts, for waters with either a 50-foot or 150-foot riparian zone, the mitigation project is required to be within an area adjacent to the required riparian zone that is equivalent to the width of the riparian zone (for example, the project for a water with a 50-foot riparian zone must be located within the 50 feet adjacent to the edge of the riparian zone (that is, within 100 feet of the top of bank)). However, because a 300-foot riparian zone is only assigned to waters of exceptional value, it is required that a restoration or enhancement mitigation project occur within the riparian zone of that water (proposed N.J.A.C. 7:13-13.10(d)3 through 6).

For the same reasons applicable to a creation mitigation project which restores a regulated water that has been enclosed by a pipe, culvert, or other structure to its natural condition (see

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summary of proposed N.J.A.C. 7:13-13.9 above), a restoration mitigation project which is designed to achieve the same goal for a regulated water that has been previously straightened, channelized or lined with revetments, retaining walls or other armoring, will only be approved if all structures are removed, the water is restored to a natural condition and configuration to the maximum extent practical, and the area is planted with non-invasive native vegetation to stabilize the restored channel (see proposed N.J.A.C. 7:13-13.10(d)1 and 2).

Under the existing regulations, an applicant can provide riparian zone compensation by planting new trees in the riparian zone in an area that is substantially devoid of trees at a ratio of at least 2:1. This type of mitigation alternative is similar to “enhancement” as set forth in this subchapter. However, the 2:1 compensation ratio required under the existing regulations for the planting of trees in an area that is substantially void of trees is not always appropriate. For example, if the riparian zone to be disturbed by the regulated activity is grassland bird habitat, in order to replace that habitat it would be necessary to plant grasses and shrubs instead of trees. Therefore, the Department is proposing that enhancement ratios generally be provided at an enhancement to loss ratio of 3:1 and to allow vegetation other than trees to be planted as long as the vegetation is native, non-invasive, of equivalent or superior density, and provides equivalent ecological functions as the disturbed vegetation. Restoration ratios will generally be provided at a restoration to loss ratio of 2:1 as in the existing rule. The 2:1 ratio for restoration is still appropriate because while enhancement includes planting vegetation in an area void of vegetation, in addition to the planting of vegetation, restoration also includes the removal of existing structures such as parking lots. Recognizing that the ecological benefit resulting from enhancement and restoration activities can vary greatly depending upon factors such as the

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existing conditions on the proposed mitigation site and the type of vegetation proposed to be utilized, proposed N.J.A.C. 7:13-13.10(b)1 and (c)1 allow that the specified general ratios may be relaxed if the mitigator demonstrates that a lesser area that would normally be required will provide equal or greater functions and values than the disturbed riparian zone. For example, the ecological benefit provided by a proposal to plant trees in a riparian zone devoid of trees to mitigate for an impact to a grassed riparian zone, would be much greater than the ecological benefit provided by a proposal to plant trees as mitigation for the disturbance of trees.

Accordingly, the compensation ratio required in the situation where planting of trees is the proposed compensation for an impact to a grassed riparian zone would be less than that required when the mitigation project is to compensate for impacts to trees. However, in order to ensure that adequate compensation is provided, in no case may the required compensation to loss ratio for enhancement or restoration mitigation be less than 1:1. Limiting the restoration and enhancement ratio to no less than 1:1 ensures that there will be no net loss of riparian zone area. Because riparian zone creation, restoration and enhancement all involve re-establishing or improving the function of a riparian zone or certain lands outside of the riparian zone, it is necessary that post-construction monitoring and reporting occur to ensure that the mitigation project, as built, is fully compensating for the ecological loss from the regulated activity that required the mitigation project (see proposed N.J.A.C. 7:13-13.11). This requirement is not applicable to riparian zone preservation, discussed below, as such mitigation does not involve modification of existing conditions.

Monitoring and reporting required begins with submission of a construction completion report generally within 60 calendar days of construction completion. This report serves as the

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baseline against which the subsequent post-construction monitoring will be compared. The construction completion report documents the project as built including an explanation of any deviation from the approved project plan. Thereafter, annual monitoring reports must be submitted generally for a five-year period with the duration and frequency subject to modification by the Department as necessary to ensure the success of the particular mitigation project. The proposed rules detail the required contents of the report with the information required designed to monitor the success of the project, identify any areas where the goals of the project are not being achieved and outline corrective actions to be implemented to correct any deficiencies (see proposed N.J.A.C. 7:13-13.11(c) and (d)). Any corrective action will only be implemented after consultation and Department approval of the chosen corrective action. Examples are provided of the types of actions that might be necessary, depending upon the deficiency identified (see proposed N.J.A.C. 7:13-13.11(f)).

To be considered successful, the final post-construction monitoring report must demonstrate that the goals of the mitigation project are met, the percent coverage of the planted vegetation in the approved mitigation proposal has been achieved, the mitigation meets all applicable requirements of this subchapter, and a conservation restriction has been executed in accordance with proposed N.J.A.C. 7:13-14 (see proposed N.J.A.C. 7:13-13.11(e)).

Riparian zone preservation is a proposed new mitigation option to compensate for riparian zone impacts (proposed N.J.A.C. 7:13-13.12). Under a riparian zone preservation plan, undeveloped lands valuable for the protection of a riparian system are permanently protected from future disturbance or development, through the execution of a conservation easement. In determining whether an area is sufficiently valuable for protection of a riparian system, the

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property must meet certain requirements specified at proposed N.J.A.C. 7:13-13.12(c). At a minimum, the preservation area shall be valuable for the protection of a riparian system, free of contaminants and hazardous waste, and larger than an area that would be required for other types of mitigation. The Department will also consider various other factors, specified at N.J.A.C. 7:13-13.12(d), in determining whether the area is valuable to preserve. These include factors focusing on any unique ecological aspects on the proposed land that would be protected if the land is preserved, any unique aspects of the riverine system that would benefit from the preservation and the relationship of the area proposed to be preserved to existing and planned development. These standards ensure that the land preserved will provide benefits to the riparian zone in the area in which it is located sufficient to fully compensate for the impacts to the riparian zone by the regulated activity.

A mitigator choosing this mitigation option must both record a conservation restriction covering the preserved area and transfer the property in fee simple to a government agency or Department approved charitable conservancy and provide proof to the Department that these documents have been appropriately recorded in order for the mitigation to be considered complete (proposed N.J.A.C. 7:13-13.12(e)). Similar to the requirements for upland preservation in the Freshwater Wetland Protection Act rules at N.J.A.C. 7:7A-15.9, the Department is not proposing a standard ratio for riparian zone preservation. This is because the ecological benefits provided by lands to be preserved can vary greatly. For example, a property proposed for preservation that includes a mature native forest adjacent to a headwater stream and that is part of a larger open space initiative, would provide significant ecological benefits

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compared to a property that may be much larger but that does not include the same unique characteristics.

#### Credit purchase from an approved mitigation bank (N.J.A.C. 7:13-13.13)

As described above, in addition to mitigation being achieved through a mitigation plan involving creation, restoration, enhancement, or preservation mitigation, where the regulated activity is located within the service area of a Department approved mitigation bank, mitigation may be achieved by the purchase of mitigation credits. Proposed N.J.A.C. 7:13-13.13 sets forth the requirements applicable to such a purchase. Under this form of mitigation, credits are purchased in an amount determined by the Department to ensure that the mitigation results in a riparian zone of equal functions and values to those lost. The proposed rules require the mitigator to prepare and execute all documents necessary to ensure that the credits have been purchased from a Department-approved mitigation bank with available credits.

#### Timing of mitigation (N.J.A.C. 7:13-13.3)

In order for the mitigation performed to fully compensate for the riparian zone impacts of the regulated activity, in addition to how and where the mitigation project is performed, when the mitigation is performed must be considered. The timing of mitigation will depend upon whether the mitigation is for a non-temporary permitted disturbance, a permitted temporary disturbance, or a disturbance that resulted in a violation. Generally, mitigation must be performed prior to or concurrent with the regulated activity requiring the mitigation. Where the disturbance to a riparian zone is temporary, mitigation is required to commence immediately upon completion of

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the regulated activity and must be completed within six months. Mitigation required as a result of an unpermitted disturbance must be completed in accordance with the schedule identified in the enforcement document (see proposed N.J.A.C. 7:13-13.3(a)). For the mitigation to be considered to fully compensate for the disturbance by the regulated activity on the riparian zone, all projects must continue until completion according to the schedule in the approved mitigation proposal. Any delay in starting or completing the mitigation that is required as compensation for the riparian zone disturbance may result in further mitigation to compensate for impacts occurring as a result of the delay.

Financial assurance for mitigation projects (N.J.A.C. 7:13-13.14, 13.15, 13.16, 13.17 and 13.18)

A mitigation project will only provide the benefits it was designed to provide to compensate for riparian zone impacts from a regulated activity if it is completed and post-project monitoring and maintenance is performed in accordance with the rules and the terms of the approval for the specific mitigation project. An unacceptable loss in riparian zone benefits will occur if the person or entity responsible for performing the mitigation either refuses to or becomes financially unable to perform all aspects of the mitigation project, including any required follow-up. To ensure that projects are completed and achieve the designed results, the Department is proposing to incorporate financial assurance requirements for all creation and restoration proposals. Because creation and restoration mitigation projects involve the most intensive amount of activity, including removal of structures, returning waters to their natural condition and function, and potentially extensive planting of native vegetation in the newly created/restored riparian area, they also entail the greatest potential for environmental damage

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should activities cease before construction of the project is completed with structures only partially removed or a stream channel exposed and returned to a prior location, but banks not stabilized as required, as well as a greater level of potential post-construction activity, such as adjustments to correct unanticipated conditions or replanting plants that initially do not survive. Accordingly, it is most important to ensure that adequate resources are available both in the construction of these types of mitigation and during the post-construction monitoring period.

To ensure that resources are available to complete a creation or restoration mitigation project should the person or entity responsible for the mitigation be unwilling or unable to perform, the proposed rules identify the types of financial assurance that will be accepted and requirements applicable to any form of financial assurance chosen by the applicant for approval of a mitigation project, as well as specific requirements applicable to the particular type of financial assurance chosen.

The proposed rules specify the types of financial assurance that are acceptable to the Department and other general requirements at proposed N.J.A.C. 7:13-13.14. Specifically, this section identifies the mitigation projects for which a financial assurance is required; identifies the persons responsible for the financial assurance; identifies the types of financial assurances acceptable to the Department; establishes the amount of financial assurance; and explains the Department's actions in response to a failure to perform mitigation.

Financial assurance for mitigation involving creation or restoration must be provided by the permittee or mitigation bank sponsor or, where mitigation is required in the enforcement context, the person designated in the enforcement document. The financial assurance requirements specified for creation and restoration mitigation projects do not apply to a proposed

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mitigation project or proposed mitigation bank submitted by a government agency or entity that is exempt from the requirement of a financial assurance by Federal law (proposed N.J.A.C. 7:13-13.14(a) and (b)). To provide the necessary assurance that a mitigation project will perform as designed and provide the necessary compensation for riparian zone impacts, the financial assurance must remain in place until it is determined that the project has satisfied all requirements applicable to that particular project (proposed N.J.A.C. 7:13-13.14(c)). Acceptable forms of financial assurance include a fully funded trust fund; a line of credit; a letter of credit; and a surety bond. The Department will also consider other forms of financial assurances, other than self-insurance or self-guarantee, but will only accept an alternate form if it provides the level of assurance and safety contemplated by the requirements of the proposed section (proposed N.J.A.C. 7:13-13.14(d)).

Templates that reflect the requirements for each type of financial assurance specified in the rules are being developed and will be available from the Division of Land Use Regulation's web site at [www.dep.nj.us/landuse](http://www.dep.nj.us/landuse). Other requirements applicable to all forms of financial assurance ensure that the financial assurance is in place at all times necessary to avoid potential problems with completion of the project (proposed N.J.A.C. 7:13-13.14(e)), and that the amount of financial assurance is adequate to cover the estimated cost of the mitigation project (including both the construction of the project and post-construction activities), with a 15 percent margin of safety and annual adjustments to reflect any changing economic conditions or changes in the scope of the mitigation that impact the anticipated cost of completing the project (proposed N.J.A.C. 7:13-13.14(f), (g), and (h)). The proposed rules additionally specify the findings

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necessary before incremental release of the financial assurance provided may occur (proposed N.J.A.C. 7:13-13.14(i) and (j)).

Should it become apparent to the Department that the mitigation for which the financial assurance is provided is not being performed in accordance with the conditions applicable to that project, written notice will be provided to the person responsible for the mitigation project of the Department's determination and a 30-day period from receipt of the notice provided to bring the project into compliance with all requirements. Should compliance not be achieved within this period, the Department may either provide an extension of time for good cause shown or the Department may perform the mitigation project by drawing on funds provided by the financial assurance (proposed N.J.A.C. 7:13-13.14(k) and (l)). The ability of the Department to take over the mitigation project after providing a limited period for the person responsible for the mitigation to cure deficiencies is particularly important where environmental damages are occurring as the result of a partially completed mitigation project, such as erosion and potential flooding impacts created by an unstabilized bank or the incomplete restoration of a water to its original location.

As indicated in proposed N.J.A.C. 7:13-13.14(d)1 through 4, the four forms of financial assurance accepted and the specific requirements applicable to each are contained in proposed N.J.A.C. 7:13-13.15 through 13.18. The requirements of proposed N.J.A.C. 7:13-13.15 through 13.18 are modeled after the financial assurance requirements contained in the Department's Administrative Requirements for the Remediation of Contaminated sites, N.J.A.C. 7:26C-5. The proposed financial assurance requirements in these sections are tailored to each form of financial assurance and are intended to put in place an efficient system for establishing, reviewing and

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approving financial assurance documents while assuring that the entities providing each form of financial assurance will remain viable throughout the period that the mitigation project is progressing, including post-construction monitoring and reporting, ensuring that the mitigation project will be completed in accordance with all requirements contained in the Department's approval.

Conceptual review of a mitigation area (N.J.A.C. 7:13-13.5 and 13.20)

Before a commitment is made to purchase land or resources are utilized in preparing a mitigation proposal, the proposed rules encourage prospective applicants to request a conceptual review of the mitigation area by the Department. Proposed N.J.A.C. 7:13-13.5 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. 7:7-13.20(a) and (b). The conceptual review allows the applicant to obtain non-binding input from the Department on the land under review as a potential mitigation site. The proposed rules allow such a review to occur with the applicant only needing to supply basic information, provided consent is obtained from the property owner for Department access to inspect the site. Due to the limited nature of the information supplied, the guidance provided by the Department is not binding. However, through this mechanism, an applicant can avoid committing resources unnecessarily to purchase of, or development of a proposed mitigation plan on, a property that could not support an approvable mitigation project in accordance with this subchapter.

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Basic requirements for mitigation proposals (N.J.A.C. 7:13-13.6 and 13.7)

In order to provide the Department with the information necessary to assess the mitigation proposal, proposed N.J.A.C. 7:13-13.6 specifies the types of information which must be provided by the applicant as well as when the information must be supplied to allow the Department adequate time for review.

The rules identify the information requirements applicable to the mitigation proposal, with requirements dependent upon the form of mitigation proposed (see proposed N.J.A.C. 7:13-13.6(d) through (e)). All mitigation proposals involving creation, restoration, enhancement, and/or preservation of riparian zones must provide the information identified at proposed N.J.A.C. 7:13-13.6(f). This information is not required for mitigation proposed to be provided by the purchase of mitigation bank credits as the information was already submitted by the operator of the mitigation bank when the mitigation bank was approved by the Department (see proposed N.J.A.C. 7:13-13.6(e) for information required to be submitted by the proposed purchaser of credits, which includes a description of the type and quantity of riparian zone disturbance for which mitigation is being proposed, a copy of the permit (if issued) requiring mitigation, and identification of the mitigation bank from which the credits will be purchased. Application requirements applicable to an applicant seeking to create a mitigation bank are described in the summary of proposed N.J.A.C. 7:13-13.19). Each of the items identified in proposed N.J.A.C. 7:13-13.6(f) is necessary to ensure compliance with the FHACA Rules and is intended to eliminate or reduce the probability of failure after construction of the mitigation area. The Department has found that if a site is well planned and is constructed properly, the likelihood of success significantly increases and the amount of money that an applicant spends

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on corrective actions during the monitoring period is significantly reduced. The items required provide the Department with information on the impact which requires the mitigation, information allowing the Department to understand existing and proposed conditions at the site (including whether the site contains threatened or endangered species, or their habitat, and, for creation or restoration projects, an indication whether the site contains contamination constituting an ecological risk in accordance with proposed N.J.A.C. 7:13-13.4(i)), information on the sequencing proposed to be utilized in completing the mitigation project, and an understanding of what measures will be taken if any portion of the proposed mitigation does not perform as planned during the post-construction monitoring period. All information must be certified as to truth and accuracy, and consent of the owner of the proposed mitigation area for Department access to the property must be obtained and presented as part of the application.

In addition to the information identified in proposed N.J.A.C. 7:13-13.6(f), applicants proposing creation or restoration mitigation must provide calculations and information on surrounding properties that will help the Department determine that the proposed project will satisfy the requirements of the rules, as well as cost information necessary for the Department to ensure that adequate financial assurance is provided if the project is approved (see proposed N.J.A.C. 7:13-13.6(g)).

The Department has developed mitigation proposal checklists for each form of mitigation. These forms reflect the requirements contained in the rules and will make it easier for the applicant to assure that all required information is provided (see proposed N.J.A.C. 7:13-13.6(d)).

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A mitigation proposal authorized by a permit under this chapter must be submitted at least 90 calendar days prior to the commencement of authorized activities. In the enforcement context, the Department's enforcement document will specify the applicable deadline (see proposed N.J.A.C. 7:13-13.6(a) and (b)).

Within 30 calendar days after receiving a mitigation proposal, the Department will review the proposal for completeness and either request additional information or declare the proposal complete (see proposed N.J.A.C. 7:13-13.7).

#### Mitigation banks (N.J.A.C. 7:13-1.2, 13.19, and 13.20)

As indicated above, the Department is proposing to allow the creation of mitigation banks as a potential option to satisfy mitigation obligations. As reflected in proposed N.J.A.C. 7:13-1.2, a mitigation bank is an operation in which riparian zone vegetation is created, restored, enhanced, or preserved by a mitigation bank operator, for the purpose of providing compensatory mitigation for disturbances to riparian zone vegetation. Credits generated by an approved mitigation bank may be used solely by the mitigation bank operator to satisfy mitigation requirements to be incurred by the mitigation bank operator (see proposed N.J.A.C. 7:13-13.20(b)4). While this option is new to the FHACA Rules, mitigation banks are used successfully in other contexts, including under the Department's FWPA rules.

The standards applicable to mitigation banks under the FHACA Rules are specified at proposed N.J.A.C. 7:13-13.19 (the application process to obtain approval is specified at proposed N.J.A.C. 7:13-13.20, described below). For the purposes of consistency with the FWPA rules and to ensure that mitigation banks are reviewed and established using the same standards, this

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section incorporates many of the standards of the FWPA rules at N.J.A.C. 7:7A-15.23. These standards have been modified in order to apply to all types of mitigation rather than just wetland mitigation. Incorporating mitigation banking into this chapter will allow the Department and mitigation bank operators to develop a more comprehensive and robust mitigation banking program in the State and provide those who need to provide mitigation in areas where a mitigation bank has been established another option to compensate for unavoidable impacts to riparian zones.

Consistent with the requirements applicable to any mitigation project, a mitigation bank must be approved by the Department, must obtain any other approvals necessary to conduct any necessary regulated activities (that is, approval of the mitigation bank proposal does not relieve the bank operator from obtaining any other permits or approvals that may be applicable to the activities to be conducted), and certain steps must be taken to initiate the underlying mitigation project before credits may be sold or utilized by the mitigation bank operator (see proposed N.J.A.C. 7:13-13.19(a), (b), (e), and (f)).

The number of credits that may be sold or utilized by the mitigation bank operator depends upon the Department's determination of the increase in 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 aquatic and non-aquatic resources. The Department's analysis resulting in a determination of the appropriate number of credits that should be assigned to the proposed mitigation project includes not only a comparison of existing functions and values provided by the bank site prior to initiation of any proposed mitigation to the functions and values anticipated if the proposed mitigation is approved to determine the extent of increase that would be achieved

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by conduct of the mitigation, but also consideration of the likelihood of long-term success of the proposed mitigation, the amount of mitigation proposed to be performed, how the mitigation to be provided by the proposed mitigation would fit with the needs of the area, and whether the mitigation would address resource losses in a manner not already available from other resources in the area. Utilizing available scientific literature regarding credit ratios, and the Department's and other government agencies' experience with mitigation and mitigation banks, this information provides the Department with the information needed to determine the overall value of the proposed mitigation bank project to allow it to assign an appropriate amount of credits to compensate for future impacts to riparian zones.

As indicated above, consistent with the requirement applicable to other mitigation projects that the mitigation project must be initiated either before or concurrent with the activity that requires the mitigation, mitigation credits associated with a mitigation bank project can only be utilized or sold when specific performance standards are met (see proposed N.J.A.C. 7:13-13.19(e)). The release schedule assures that credits released reflect the degree of progress towards completing the project and ensuring that the goals and performance standards have been met, including through the post-construction monitoring phase. The release schedule further provides flexibility for adjustment of release of credits within a particular part of the schedule based upon progress on the specific project. For example, if a mitigation bank project is in the one-year post-planting monitoring period and it is determined that, while most of the project is successful, there are areas of the mitigation project that are not meeting the performance standards and replanting or other corrective action is needed, the percentage of mitigation credits released will be reduced below the 10 percent maximum allowed at that stage of the project (see

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proposed N.J.A.C. 7:13-13.19(e)3). The credit release schedule is the same as the FWPA rules at N.J.A.C 7:7-15.23(d) with two exceptions. Hydrology is not a factor when restoring or enhancing a riparian zone; therefore, this standard is not incorporated into proposed N.J.A.C. 7:13-13.19(e). The credits associated with this performance standard under the FWPA schedule are proposed to be reassigned to other performance standards in the FHACA Rules. In addition, the Department is proposing to allow for a credit release in years two and four, instead of in years three and five as in the FWPA rules, provided performance standards have been met, because riparian zone mitigation is more predictable, and has a reduced risk of failure, as opposed to freshwater wetlands. Because a mitigation bank project providing preservation mitigation does not involve active modification of riparian zone functions or require any monitoring to ensure the success of the activities conducted as part of the mitigation, all mitigation credits are released for such a project upon signature of the mitigation bank instrument and filing of the required conservation restriction (see proposed N.J.A.C. 7:13-13.19(f)). Because it is important that the mitigation project be protected in perpetuity, the proposed rules require that, no matter what type of mitigation is provided, the mitigation bank operator must execute and record a conservation restriction on the mitigation bank site prior to the sale of any credits (proposed N.J.A.C. 7:13-13.19(g)).

Because mitigation bank credits may continue to be unused for a significant period of time after the mitigation project is completed, monitoring of the continued success of the mitigation project is required until the last credit is sold, the final inspection is conducted, or the bank is transferred to a charitable conservancy, whichever occurs last. Progress reports are required to track the continued success of the mitigation project (see proposed N.J.A.C. 7:13-

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13.19(h)). These standards are consistent with those monitoring standards placed on wetland mitigation projects under the FWPA Rules.

As with any mitigation project, it is critical that the mitigation project performed by a mitigation bank operator proceed to successful completion to fully compensate for the riparian zone impacts for which mitigation bank credits are offered as mitigation. This is true even if mitigation credits are not sold or utilized as a partially completed creation or restoration project where exposed stream banks are not stabilized or other activities not completed could actually lead to environmental damages, rather than the environmental benefits the project was designed to provide. Accordingly, the proposed rules require that any approved project be fully completed (see proposed N.J.A.C. 7:13-13.19(c)). Further, if the project is not proceeding according to the required schedule, the rules recognize that the mitigation banking instrument may have to be amended to include corrective action, and the number of mitigation credits may have to be reduced to reflect the decrease in values and functions anticipated from the project as a result of the delay (see proposed N.J.A.C. 7:13-13.19(i)). This provision is intended to ensure that a bank follows the approved schedule and provides the Department a mechanism to put the bank back on schedule.

To be considered to be successful, a mitigation bank must have completed monitoring demonstrating satisfaction of all agreement requirements, the mitigation bank site must be transferred to a governmental entity or approved charitable conservancy, the conservation restriction protecting the property in perpetuity must be filed and a maintenance fund must be provided to allow the governmental agency or approved charitable conservancy to maintain the mitigation area (see proposed N.J.A.C. 7:13-13.19(j)).

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If the Department determines that the mitigation bank operator is in default of any provision of the mitigation banking instrument and the default results in a termination of the banking instrument, the Department will review the status of the project. If credits sold or utilized exceed the benefit created by the amount of mitigation completed, the Department shall assert its right to call on the financial assurance provided pursuant to this proposed subchapter (see proposed N.J.A.C. 7:13-13.19(k)).

*Application for a mitigation bank (N.J.A.C. 7:13-13.20)*

The application process for a mitigation bank proposal is specified at proposed N.J.A.C. 7:13-13.20. This section incorporates many of the substantive standards of the FWPA rules at N.J.A.C. 7:7A-15.25.

For the same reasons applicable to an application for approval of a mitigation project to compensate for riparian zone impacts from a single regulated activity, a potential applicant for mitigation bank approval may seek a non-binding conceptual review of the proposed mitigation bank before significant resources are committed to complete development of the proposal and/or purchase of the proposed mitigation site. Because mitigation bank projects are generally of larger size than mitigation projects to compensate for impacts from a specific regulated activity and the impacts for which the mitigation bank will eventually provide compensation are speculative at the time of approval, more information must be supplied to allow a conceptual review of a mitigation bank proposal, including diagrams, delineations or other material that are necessary for the Department to understand the scope and potential benefits to be provided by the proposed project (see proposed N.J.A.C. 7:13-13.20(a) and (b)). While conceptual review of

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mitigation banks is required under the equivalent provision of the FWPA Rules, because riparian zone mitigation has a lesser chance of failure than wetland mitigation, it is an option available at the potential applicants' discretion under the proposed rules. Proposed N.J.A.C. 7:13-13.20(c) establishes the contents of a mitigation bank proposal. The application requirements applicable to a mitigation bank proposal include many of the same items as applications for mitigation projects proposed for impacts from a specific regulated activity requiring mitigation at proposed N.J.A.C. 7:13-13.6, including information on existing conditions at the proposed mitigation site as well as information on the benefits anticipated to be achieved by the proposed project. The requirements additionally include items unique to a mitigation performed as part of establishment of a mitigation bank, such as the proposed service area within which credits would be allowed to be used as compensation, the method used to determine credits and debits and other information necessary for the Department to determine that the proposed bank will serve its intended functions and provide the required compensation for riparian zone impacts over the potentially longer life of the mitigation bank (see proposed N.J.A.C. 7:13-13.20(c)).

### **Conservation restrictions**

The Department is proposing rules governing conservation restrictions for purposes of the FHACA Rules in a new subchapter, N.J.A.C. 7:13-14, Conservation Restrictions. A conservation restriction must be recorded by a permittee under the existing rules and the rules as proposed to be amended where mitigation is required for impacts to riparian zone vegetation. Specifically, existing N.J.A.C. 7:13-10.2(t)3 requires that the lands on which mitigation is performed through enhancement (planting of vegetation) or restoration (removal of impervious

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surfaces), be protected from future development through the recording of a conservation restriction. Under proposed N.J.A.C. 7:13-13, impacts to a riparian zone may also be mitigated through the preservation of land. In this case, the permittee is required to record a conservation restriction on the land to be preserved.

The proposed conservation restriction rules are modeled on those governing conservation restrictions in the existing FWPA rules at N.J.A.C. 7:7A-15 as well as those in the pending proposed CZM rules at proposed N.J.A.C. 7:7-18 (see 46 N.J.R. 1051(a); June 2, 2014). At N.J.A.C. 7:13-1.2, the Department is proposing a definition for “conservation restriction,” which is the same as the definition for the term in the existing CZM rules at N.J.A.C. 7:7E-1.8.

#### Form and recording requirements (N.J.A.C. 7:13-14.1)

The form and recording requirements for conservation restrictions, as well as the required forms of proof that must be provided, are proposed at new N.J.A.C. 7:13-14.1, Conservation restriction form and recording requirements. Proposed N.J.A.C. 7:13-14.1(a) sets forth the form and basic recording requirements for a conservation restriction. The conservation restriction runs with the land and is binding upon the landowner, and successors in interest to any interest in the land or any part of the land on which the mitigation area is located. The conservation restriction must 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. This recording requirement is consistent with the New Jersey Supreme Court case, *Island Venture Associates v. NJDEP*, 179 N.J. 485 (2004), and is necessary to ensure that restrictions appear in the chain of title and, therefore, provide notice to perspective purchasers and are enforceable against successors in title. The conservation restriction must also

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be in the form and include such terms as specified by the Department. The form of the conservation restriction may only be altered by the applicant when the Department agrees that an alteration is necessary to address site-specific conditions. Because the available forms of conservation restriction are drafted to include specific limitations and requirements designed to protect the public health, safety, and welfare, or to protect wildlife and/or fisheries, or to otherwise preserve, protect, and enhance the natural environment, the form conservation restrictions may only be altered with the explicit consent of the Department to assure the amended document continues to provide the appropriate level of protection. Form conservation restrictions are available from the Department's website.

Proposed N.J.A.C. 7:13-14.1(b) requires that the conservation restriction be recorded in the Office of the County Clerk or registrar of deeds and mortgages of the county in which the regulated activity, project, project site, or mitigation area is located and that proof of recordation be provided to the Department. This will ensure that there will be proper notice to future owners and other interested parties of restrictions applicable to the area subject to the conservation restriction and also ensures that the conservation restriction is enforceable. For permits which authorize the establishment of a mitigation bank, the conservation restriction must be recorded prior to the release of credits. In all other cases, the conservation restriction must be recorded prior to the sooner of either the start of any site disturbance, including pre-construction earth movement, removal of vegetation of structures, or construction of the project, or the date that is 90 calendar days after the issuance of the permit or, if a mitigation plan is submitted pursuant to a condition of the permit, within 90 days from approval of the mitigation plan. The 90-calendar-day timeframe will allow sufficient time for an applicant to complete the restriction and complete

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the filing process. Should a permit be obtained to construct a development on a property that is subject to an agreement of sale, the parties may include provisions in the contract of sale warranting that the contract seller will cooperate to assure that the conservation restriction is filed within the 90-day timeframe.

Proposed N.J.A.C. 7:13-14.1(c) requires proof that the conservation restriction has been recorded in accordance with proposed N.J.A.C. 7:13-14.1(b). Proof of recordation must be in the form of either a copy of the complete recorded document or a receipt or other proof that the conservation restriction has been recorded issued by the recording office. Where the permittee submits proof other than a copy of the complete recorded document, a copy of the complete recorded document must be submitted to the Department within 180 calendar days of issuance of the permit.

Proposed N.J.A.C. 7:13-14.1(d) identifies two provisions that must be included in the conservation restriction and are necessary to ensure that a municipality or county considering future development on the site are aware of the conservation restriction and that future property owners are also aware of the conservation restriction. Specifically, the conservation restriction must include a requirement that each owner of any interest in the land subject to the conservation restriction (that is, the mitigation area): 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 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.

Proposed N.J.A.C. 7:13-14.1(e) provides that any conservation restriction under this

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chapter is enforceable by the Department and may also be directed by the Department to be made enforceable by a government agency or by a charitable conservancy whose trustees have no other interest in the land.

Reservation of rights (N.J.A.C. 7:13-14.2)

Proposed new N.J.A.C. 7:13-14.2, Reservation of rights, reserves certain rights of the property owner to allow modification or remove of a conservation restriction in certain limited circumstances.

Proposed N.J.A.C. 7:13-14.2(a) provides that a property owner may request approval from the Department to make a de minimis modification to the conservation restriction if the modification will result in an equivalent level of protection for the regulated resource. For example, a property owner may request that a utility line be moved from one part of a restricted area to another and propose to restrict the same amount of land as was originally restricted and thereby demonstrate that the resource has an equivalent level of protection. The Department may also approve the de minimis modification if the applicant demonstrates that an equivalent area of land is restricted and that the modification will not compromise the riparian zone. For example, the construction of a trail through a regulated area may be acceptable where the trail is constructed of wood chips since such construction would not result in adverse impacts to the riparian zone and an equivalent area that provides equal or greater riparian zone functions is provided.

N.J.A.C. 7:13-14.2(b) provides that 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

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prior to the start of any site disturbance, including pre-construction earth movement, removal of vegetation or structures, or construction of the project, 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.

## **TECHNICAL REQUIREMENTS AND PERMIT STANDARDS**

### **Determining the flood hazard area and floodway**

Existing N.J.A.C. 7:13-3 sets forth the methods for determining the flood hazard area and floodway on a given site. A number of amendments are proposed in order to add clarity, ensure that the best available data is used to determine flood hazard areas and floodways, and to provide additional flexibility and guidance to design professionals who are calculating the extent of these areas.

#### Use of best available data (N.J.A.C. 7:13-3.2 and related definitions at N.J.A.C. 7:13-1.2)

Existing N.J.A.C. 7:13-3.2 sets forth the options available to a prospective applicant seeking to determine the flood hazard area and floodway limits on a given site. Subchapter 3 provides six different methods that may be available to an applicant, depending on the existence

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of a Department delineation or FEMA flood insurance study, whether the applicant prefers to self-calculate the flood hazard area and/or floodway limits, and what type of project is being proposed.

Amendments to these methods were adopted through emergency rulemaking on January 24, 2013, and readopted on March 24, 2013 (see 45 N.J.R. 360(a) and 1104(a)). The adopted amendments recognized the availability of advisory base flood elevation maps for New Jersey's eastern waterfront, which were released by FEMA in December 2012 in response to Superstorm Sandy, and made changes to how the flood hazard area and floodway limits can be determined to ensure that the best available data would be utilized to determine the extent of flooding.

Under the existing rules as amended in 2013, in cases where a Department delineation of a regulated water has been promulgated prior to the date of the January 24, 2013, emergency rulemaking, applicants seeking to determine the extent of the flood hazard area and floodway have two options (see existing N.J.A.C. 7:13-3.2(c)):

1. Determine the flood hazard area and/or floodway using a Department delineation under Method 1 or a FEMA flood map under Method 2 or 3 (depending upon whether it is a tidal or fluvial flood hazard area), with the applicant to use the method that results in a higher flood hazard area design flood elevation and wider floodway limit; or
2. Determine the flood hazard area and/or floodway by calculation in accordance with Method 4, which is based on FEMA flow rate data, or Method 6, which is based on calculations prepared by a design professional.

Option 1 above ensures that the more protective design flood elevation and floodway

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limits are selected among the available options. However, option 2 above does not similarly ensure that the more protective flow rate will be selected among the available options.

Accordingly, a person could calculate the design flood elevation and floodway limits using Method 4, which is based on potentially outdated FEMA data, resulting in a design flood elevation and floodway limits that are not as protective as provided by option 1. This potential problem does not arise if a person uses Method 6 under option 2 because the requirements of Method 6 ensure that the computed design flood elevation and floodway limits represent the best available data. Accordingly, in that case, if the design flood elevation and floodway limits computed are lower and smaller, respectively, than those on the Department delineation promulgated prior to January 24, 2013, they would be more accurate because they are based on the best available data and thus appropriately protective.

Since using Method 4 to develop design flood elevations or floodway limits may underestimate the size, depth, and velocity of flooding, N.J.A.C. 7:13-3.2(c)2 is proposed to be amended to provide that Method 4 can be used only if the flow rate used to determine the flood hazard area design flood elevation and floodway limit is no less than the flow rate used to develop the Department delineation along the same regulated water. This amendment will ensure that flood hazard area and floodway limits determined using Method 4 will be no less protective than a Department delineation for the same regulated water.

Related amendments and deletions are proposed to the existing definitions of “FEMA flood insurance study,” “FEMA flood profile,” “FEMA floodway map,” and “FEMA 100-year flood elevation.” The Department’s January 24, 2013, emergency rulemaking amended the definition of “FEMA 100-year flood elevation” to ensure that the best available flood elevation is

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used when determining the flood hazard area design flood elevation and floodway limits using FEMA data under Methods 2 (FEMA tidal method) at N.J.A.C. 7:13-3.4(d) and Method 3 (FEMA fluvial method) at N.J.A.C. 7:13-3.4(e). As noted above, this amendment recognized the availability of advisory base flood elevation maps for New Jersey's eastern waterfront, which were released by FEMA in December 2012 in response to Superstorm Sandy. FEMA has more recently pursued improving its flood mapping in other parts of the State, including a number of fluvial waters, and has released preliminary mapping that indicates the extent of the floodway is larger than depicted on its effective mapping, and/or that the peak flow rate of water during a flood, which had been used to calculate the effective floodway limits and 100-year flood elevation, are higher than previously reported.

Since construction in floodways can subject structures and occupants to increased flood damage and potential loss of life and property, it is imperative that the Department use the best available floodway data when determining whether a proposed structure is located within a floodway and subsequently whether it complies with the design and construction standards of the FHACA Rules. Additionally, the Flood Hazard Area Control Act at N.J.S.A. 58:16A-52.b requires that, "The department shall, wherever practicable, make floodway delineations identical to the floodway delineations approved by the Federal Government for the National Flood Insurance Program." Further, hydraulic calculations used for the design of bridges, culverts, and other water control structures must be based on the best available flow rate data in order to ensure that such structures are appropriately sized and suitably flood resistant. Therefore, to ensure that the best available flood data is used by the Department and the regulated community, the definitions of "FEMA flood insurance study," "FEMA floodway map," and "FEMA flood

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profile” are proposed for consolidation in a proposed new definition of “FEMA flood mapping.”

The proposed definition incorporates the requirement to rely on the best available data set forth in the existing definition of “FEMA 100-year flood elevation” and at N.J.A.C. 7:13-3.4(b) regarding the eligibility of FEMA flood mapping for use under Methods 2, 3, and 4. The proposed definition specifies that the information to be utilized where the rules allow reliance on FEMA flood information includes data adopted as part of the most recent effective Flood Insurance Study, dated on or after January 31, 1980, or any more recent advisory or proposed (preliminary) flood mapping, if the more recent advisory or proposed (preliminary) mapping results in higher flood elevations, wider floodway limits, or greater flow rates than depicted in the most recent effective Flood Insurance Study. The single term captures the rule intent to use the best available information while ensuring that public safety, property, and the environment are adequately protected. The new definition additionally incorporates reference to where the information can be found currently part of the definition of “FEMA flood insurance study.” References throughout the FHACA Rules to FEMA flood insurance studies are replaced with the proposed term, and redundant references to FEMA information at N.J.A.C. 7:13-3.4(a) are deleted.

#### Methods 4 and 6 (N.J.A.C. 7:13-3.4 and 3.6)

Several amendments are proposed to Methods 4 and 6 in order to provide more flexibility and guidance to applicants seeking to determine the flood hazard area design flood elevation and floodway limits, as well as to address situations where an applicant intends to calculate tidal flood elevations, flood elevations in areas subject to both tidal and fluvial flooding, and flood

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elevations for more frequent flood events, such as the two-year or 10-year flood.

Under existing Methods 4 and 6, all hydraulic calculations must be performed using a standard step backwater analysis, which is a computational method that is used to determine the water surface elevation at a given flow rate within an open channel. The analysis takes into account friction, channel slope, and geometry, and combines energy, momentum, and continuity equations to determine water depth. The HEC-RAS computer program developed by the U.S. Army Corps of Engineers, a widely-used method of determining water surface elevations, relies on this methodology. However, because calculating flood elevations depends on many factors, including site conditions, such an analysis does not in all cases result in the most accurate determination of flood elevations. Given the wide variety of conditions that can exist within a watershed or at a point of analysis, Methods 4 and 6 are proposed to be amended to list a standard step backwater analysis as one type of hydraulic analysis that is acceptable to the Department, rather than the only option, since using another method can in appropriate instances result in a more accurate flood elevations. Additionally, under Method 6, the use of alternate computational methodologies is proposed to be allowed to determine the flood hazard area, provided the Department determines that the alternate calculations will more accurately model hydrologic and hydraulic conditions, and provided the flood hazard area design flood elevation is determined using a flood that is no less than 125 percent of the peak flow and volume of a 100-year flood, which is flow rate and volume that would be used in the standard methodology. These amendments will provide design professionals with greater flexibility in determining flood elevations as warranted by site conditions, while ensuring that the flood hazard area design flood elevation determined using alternative methodologies will be at least as protective of public

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safety as the methodologies set forth in existing Method 6.

With regard to hydrologic calculations under Method 6 to determine the peak flow rate in the regulated water, the existing provision requires that this analysis shall assume existing “development conditions” in the drainage area. This requirement is clarified, without a change in meaning, to refer instead to the existing “land use coverage” as of the date of the verification application under which the Department will verify the flood hazard area and floodway limits, since that term is more customarily used by design professionals undertaking hydrologic calculations.

With regard to the calculation of floodway limits under Methods 4 and 6, a new requirement is being proposed to address situations where a hydraulic analysis results in a decrease in water surface elevations, rather than an increase in water surface elevations as would generally be expected with such an analysis. To compute floodway limits along a regulated water, computations are undertaken assuming that land at the edge of the floodplain cannot convey floodwaters, such as would occur if the floodplain were filled in with structures or earth. Generally, a reduction in the space through which floodwaters can flow causes a corresponding rise in water surface elevations. However, a decrease in water surface elevation can occur when floodway calculations are performed on a regulated water that is flowing under “supercritical” flow conditions. Supercritical flow generally occurs in channels having a steep slope and high velocity, such that the velocity of flow is greater than the velocity of waves propagating through the water. In such a case, flow is dominated by inertial forces and the depth of flow is less than the channel’s “critical depth.” Critical depth is the depth of flow where energy in the system is at a minimum for a particular flow rate. Typically, when floodway calculations are performed on a

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flood hazard area that possesses supercritical flow, the velocity simply increases. Assuming a constant volume of flow, as the velocity of flow increases, the cross-sectional area of flow decreases proportionately. Therefore, performing a floodway analysis in such a case results in a drop in water surface elevations. Because of this dynamic, during the development of Department delineations, any flood hazard area flowing supercritical is considered to be completely floodway and possesses no flood fringe. Therefore, Methods 4 and 6 are proposed to be amended to require that the entire flood hazard area be considered to be a floodway in such a case. This is appropriately protective of public safety and is in accordance with longstanding Department practice, as reflected in the development of Department delineations. In addition, Methods 4 and 6 are amended to alert applicants that non-linear waters in tidal areas do not possess a floodway, in order to avoid unnecessary computations.

With regard to developing the flood hazard area design flood elevation in tidal areas, Method 6 is proposed to be amended to require development of an analysis that is based on FEMA's most recent flood mapping analysis and which incorporates new data for the area being analyzed. FEMA currently uses complex tidal surge and wave attenuation modeling that predicts three-dimensional flow, which is the most accurate modeling available. Therefore, requiring the use of FEMA methodology in tidal areas will ensure that the best available data is utilized.

Methods 4 and 6 are additionally proposed to be amended to address areas that are subject to both fluvial and tidal flooding. This is common along sections of fluvial waterways that discharge into a bay or the ocean. During a 100-year flood event, a large area of land could be inundated by tidal backwater from the bay or ocean. However, during smaller flood events, the regulated water may remain fluvial and not experience tidal backwater effects. In such a case,

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demonstrating compliance with the requirements of proposed N.J.A.C. 7:13-12.7, which sets forth limitations on offsite flooding impacts of bridges and culverts, as well as proposed N.J.A.C. 7:13-12.1(f) and (g), which address offsite flooding impacts from development in general, may necessitate undertaking both a fluvial analysis and a new tidal analysis, in accordance with the requirements of the method being used. Similarly, compliance with these requirements, as well as compliance with the flood storage displacement limitations of proposed N.J.A.C. 7:13-11.4, may require the computation of additional flow rates and flood events that are more frequent (and therefore smaller) than the flood hazard area design flood elevation. For example, demonstrating compliance with the chapter's flood storage displacement limitations generally requires knowledge or approximation of the 10-year flood elevation, and compliance with the requirements for bridges and culverts in some cases requires knowledge of the two-, 10-, 25-, 50- and 100-year flood elevations. In such a case, applicants are advised to calculate these flow rates and flood elevations using the same methodologies detailed in Methods 4 and 6 for determining the flood hazard area design flood elevation, to the extent that such methodologies are appropriate for site conditions.

#### Method 5 (N.J.A.C. 7:13-3.5)

Existing N.J.A.C. 7:13-9.7 sets forth the conditions under which the Department will issue an individual permit in a flood hazard area that is approximated under Method 5. Method 5 does not provide a floodway limit, which in certain cases is necessary to ensure that a proposed project is not situated in a floodway, as well as to calculate the volume of the flood fringe and therefore determine compliance with the flood storage displacement requirements of proposed

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N.J.A.C. 7:13-11.4. Therefore, only those activities that the Department can, without a review of calculations, determine are both located outside a floodway and meet the chapter's flood storage displacement requirements can be authorized or permitted in a flood hazard area that has been approximated under Method 5.

The substance of existing N.J.A.C. 7:13-9.7 is proposed to be incorporated at N.J.A.C. 7:13-3.5(f), with amendments for clarity and to incorporate references to a general permit authorization, since the proposed subsection applies to both general permit authorizations and individual permits. Proposed N.J.A.C. 7:13-3.5(f) additionally clarifies that the Department's determination of these conditions must be based on a visual inspection of submitted site plans and without a review of calculations. This is stated in existing N.J.A.C. 7:13-9.7(a)2, and is appropriate for both cases described at proposed N.J.A.C. 7:13-3.5(f). Additionally, the existing reference to activities that "will not obstruct flow in a floodway" is not continued, since activities that obstruct floodway flows are prohibited under this chapter except in specific situations listed at proposed N.J.A.C. 7:13-11.3(c), which would require the use of another method of determining the flood hazard area that additionally provides floodway limits, such as Methods 4 or 6.

#### Revision of a Department delineation (N.J.A.C. 7:13-3.7 and 3.8)

Existing N.J.A.C. 7:13-13.4, which contains provisions addressing the revision of the flood hazard area design flood elevation or floodway limit of a regulated water that has been adopted by the Department as an official delineation, is proposed to be recodified at proposed N.J.A.C. 7:13-3.7. Similarly, existing N.J.A.C. 7:13-13.5, which sets forth the process by which

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the Department may revise and/or suspend a Department delineation under its own initiative, is proposed to be recodified at proposed N.J.A.C. 7:13-3.8. This recodification is being proposed in order to locate all provisions related to flood mapping into Subchapter 3. Department delineations are described in N.J.A.C. 7:13-3.3 and the regulated waters for which delineations exist are listed in detail in Appendix 2.

Proposed N.J.A.C. 7:13-3.7(a) is amended to clarify that the section applies to the revision of a Department delineation in response to an application made to the Department by any person. This is in contrast to a revision or suspension of a Department delineation initiated by the Department under proposed N.J.A.C. 7:13-3.8. Proposed N.J.A.C. 7:13-3.7(d)2 is amended to require a “completed application form” rather than a “LURP application form” since this term is no longer used under this chapter.

#### N.J.A.C. 7:13 Appendix 2 List of Department Delineated Waters

Appendix 2 lists the promulgated Department delineations by county and municipality. In 1997, Pahaquarry Township, Warren County, was dissolved and incorporated into Hardwick Township, Warren County. Further, in 2013, Princeton Borough, Mercer County, and Princeton Township, Mercer County, were consolidated into one municipality. The list of Department delineations is proposed to be amended to reflect the dissolution of Pahaquarry Township and the consolidation of Princeton Borough and Princeton Township.

#### **Verifications**

A verification is a document containing the Department’s approval of the flood hazard

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area design flood elevation, and the flood hazard area, floodway, and/or riparian zone limit on a site. As detailed below, a number of clarifications and amendments are proposed in order to address issues that have arisen since the Department began issuing verifications under the existing chapter, and to harmonize the FHACA Rules with the Department's other land use rules.

Purpose and scope, and general provisions (N.J.A.C. 7:13-5.1 and 5.2 and related definition at N.J.A.C. 7:13-1.2)

Existing N.J.A.C. 7:13-6.1 establishes the scope, application contents, conditions, duration, and reissuance of a verification. Proposed N.J.A.C. 7:13-5.1, 5.2, 5.3, and 5.4 set forth the scope, general provisions, duration, and reissuance of a verification, respectively, and proposed N.J.A.C. 7:13-5.5 sets forth when a verification is required for issuance of an authorization under a general permit or an individual permit. Proposed N.J.A.C. 7:13-5.6 sets forth the conditions that apply to a verification and N.J.A.C. 7:13-18 sets forth the application contents for a verification.

Existing N.J.A.C. 7:13-6.1(a) implies that the Department can only issue a verification of an entire site. However, people often only require a verification of the portion of a site that is intended for construction. To more clearly reflect the ability to obtain a verification for less than an entire site, the definition for "verification" at N.J.A.C. 7:13-1.2 is proposed to be amended to reflect that a verification can be obtained for any portion of a site. Similarly, proposed N.J.A.C. 7:13-5.2(a) provides that the Department can verify some or all of the flood hazard area design flood elevation, flood hazard area limit, floodway limits and/or the riparian zone limits for either an entire site or a prescribed portion of a site.

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Proposed N.J.A.C. 7:13-5.1(b) explains that obtaining a verification is necessary to obtain a general permit authorization or individual permit in the cases set forth at N.J.A.C. 7:13-5.5.

This subsection is proposed for clarity and does not alter existing Department practice of requiring a verification prior to or concurrent with the issuance of an authorization under a general permit or an individual permit. N.J.A.C. 7:13-5.1(c) incorporates existing N.J.A.C. 7:13-3.1(c), which explains how the Department determines flood hazard area, floodway, and riparian zone limits.

#### Duration and reissuance (N.J.A.C. 7:13-5.3 and 5.4)

Under both the existing and proposed rules, a verification is valid for a period of five years from issuance unless it is issued with an individual permit that is valid for 10 years. Further, the proposed rules continue to provide that a verification will automatically reissue if a permit for a regulated activity relying on the verification, so that the permit and the verification have the same expiration date (proposed N.J.A.C. 7:13-5.3(a) through (c)). While not allowed under the existing rules, the Department is proposing to allow a verification to be extended one time for five years pursuant to proposed N.J.A.C. 7:13-22.3(c) as long as the verification was not previously reissued or was not issued concurrent with a permit having a 10-year duration (see proposed N.J.A.C. 7:13-5.2(d)). Because flooding and environmental conditions on a site can change over time, it would not be appropriate to extend the life of a verification beyond 10 years. Limited extension of a jurisdictional determination is consistent with the Department's other land use rules.

Allowing unrestricted land disturbance and construction relying upon a verification based

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on inaccurate or incomplete information would contradict the purpose of the FHACA Rules to protect persons and property from the effects of flooding and to preserve the quality of surface waters. Therefore, the Department proposes to explicitly indicate in the rules that, in such a case, the Department may void the original verification and issue a new verification reflecting the actual conditions on the site (see proposed N.J.A.C. 7:13-5.3(e)). Examples of the types of information that would trigger such a correction or update of a verification are included in the proposed subsection. This mirrors similar provisions in the FWPA rules.

Proposed N.J.A.C. 7:13-5.4 incorporates with clarifications existing N.J.A.C. 7:13-6.1(f), which provides for the automatic reissuance of a verification originally valid for five years in cases where the Department approves an authorization under a general permit or an individual permit that references or relies on the verification. As noted above, the Department's jurisdictional limits under this chapter can change over time. As such, proposed N.J.A.C. 7:13-5.4(b) provides that a verification that is automatically reissued shall not be extended.

When a verification is required for issuance of an authorization under a general permit or an individual permit (N.J.A.C. 7:13-5.5)

Existing N.J.A.C. 7:13-9.6, which addresses the situations in which the Department requires a verification before it will issue an individual permit, is relocated with amendments at proposed N.J.A.C. 7:13-5.5. Many activities that require an individual permit under the existing FHACA Rules are covered by proposed new general permits. In a number of cases, authorization under a general permit can be issued only if the applicant first receives a verification. As such, the section heading is clarified and amended to include general permit authorizations.

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Proposed N.J.A.C. 7:13-5.5(a) incorporates with clarifying amendments existing N.J.A.C. 7:13-9.6(a). In most cases, the Department cannot evaluate whether a proposed activity meets the design and construction standards for an individual permit without a determination of the limits of the flood hazard area and floodway on a site. This is also true for several existing general permits as well as many of the new general permits proposed at N.J.A.C. 7:13-9. This is the case because certain design and construction standards require knowledge of the depth of flooding within the flood hazard area as well as the limits of the floodway in order for the Department to be able determine compliance with a requirement of the chapter. For example, existing N.J.A.C. 7:13-10.3(b)1 (proposed N.J.A.C. 7:13-11.3(b)1) generally prohibits the construction of a new building in a floodway. If an applicant proposes to construct a building near a regulated water, and the Department does not have knowledge regarding the location of the floodway, the Department cannot evaluate whether the building is proposed inside or outside a floodway. Since knowing the floodway limits requires a verification, the Department cannot issue an individual permit in this case without the applicant first obtaining verification. Exceptions to this requirement are provided in existing N.J.A.C. 7:13-9.6(b) and (c), relocated at proposed N.J.A.C. 7:13-5.5(b) and (c), which detail the situations in which the Department is able to determine compliance with the rules without verification of both the flood hazard area and the floodway.

Proposed N.J.A.C. 7:13-5.5(b) incorporates with clarifying amendments existing N.J.A.C. 7:13-9.6(b), which sets forth the cases in which the Department does not require a verification of either the flood hazard area elevation or the floodway in order to determine that a project meets the requirements of this chapter. In these cases, the activity being proposed either

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would obviously not affect flooding or else the project and site conditions are such that compliance with the chapter can be evaluated without a detailed delineation of the regulated areas on a site. A third case where no verification is required is also provided at proposed N.J.A.C. 7:13-5.5(b)2 as described below. Proposed N.J.A.C. 7:13-5.5(b) furthermore clarifies that the Department's determination of these conditions must be based on a visual inspection of submitted site plans and without a review of calculations. This is stated in existing N.J.A.C. 7:13-9.6(b)2, and is appropriate for all three proposed cases.

Proposed N.J.A.C. 7:13-5.5(b)1 incorporates existing N.J.A.C. 7:13-9.6(b)1 with clarifying amendments. The term "onsite" is replaced with "within a flood hazard area" because a verification is not needed when fill or an aboveground structure are clearly being proposed outside any flood hazard area. For example, a person could propose an activity very far away from a small stream on a large site. Based on a review of topography and the drainage area of the stream, Department staff can in some cases conclude that the activity is so far away from the stream that it could not possibly be located within the flood hazard area of that stream, and therefore no verification of the flood hazard area is necessary.

Proposed N.J.A.C. 7:13-5.5(b)2 is new. In cases where a project consists solely of the construction, replacement, enlargement, repair, or removal of a railroad or roadway, including regulated activities associated with any existing or proposed bridge or culvert, there is no need for a separate verification application. In order to determine whether such projects comply with this chapter, the Department will generally require the applicant to perform hydrologic and/or hydraulic analyses of the project pursuant to proposed N.J.A.C. 7:13-12.7 (existing N.J.A.C. 7:13-11.7), which likely include determining the flood hazard area design flood elevation, the

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floodway limits, and/or providing details of potential flooding impacts. However, requiring an applicant to receive a verification does not provide the Department with additional information necessary to evaluate the permit application in such cases. Therefore, in order to reduce the burden of paperwork and associated costs to the applicant, the Department is proposing to no longer require an applicant to obtain a verification when obtaining a general permit authorization or individual permit for such projects.

Proposed N.J.A.C. 7:13-5.5(b)3 incorporates with clarifying amendments existing N.J.A.C. 7:13-9.6(b)2, which describes a situation in which fill and/or an aboveground structure is proposed (and thus the project cannot meet the requirements at N.J.A.C. 7:13-5.5(c)1 or 2), but where it is not necessary for the flood hazard area elevation or floodway limits to be verified if three conditions apply. Existing N.J.A.C. 7:13-9.6(b)2ii is amended to indicate that only aboveground structures are a concern, since belowground structures cannot displace flood storage or otherwise affect flooding. Additionally, the existing reference to activities that “will not obstruct flow in a floodway” is not continued, since activities that obstruct floodway flows are prohibited under this chapter except in specific situations listed at proposed N.J.A.C. 7:13-11.3(c), which would either require a verification under this section (such as the construction of a habitable building) or are proposed to not require a verification (such as the construction in certain cases of a bridge or culvert). Proposed N.J.A.C. 7:13-5.5(c) incorporates with amendments existing N.J.A.C. 7:13-9.6(c), which provides for situations in which it is necessary for the Department to know the flood hazard area elevation, but unnecessary for the floodway limits to be verified. This exception to the floodway verification requirement is applicable where an applicant wishes to construct a habitable building, or a railroad, roadway, or parking area, but

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it is clear from a visual inspection of submitted drawings that the proposed building is located outside a floodway and also that the chapter's flood storage displacement requirements are satisfied. In the case of a habitable building, the flood hazard area design flood elevation typically needs to be known and verified in order to establish the proper floor elevation for the building and also to determine if access to the building is possible during a flood. Similarly, the flood hazard area design flood elevation must typically be known when constructing a railroad, roadway or parking area to determine whether the requirements of proposed N.J.A.C. 7:13-12.6 (existing N.J.A.C. 7:13-11.6) are met. However, if, due to the size and location of the project, the Department can determine, without reviewing calculations, that the project is clearly located outside the floodway and also that the project meets the chapter's flood storage displacement limits, it is unnecessary to also require verification of the floodway limits. Proposed N.J.A.C. 7:13-5.5(c) broadens the existing provision by not limiting it to the construction a habitable building, railroad, roadway or parking area. Any construction activity that meets the requirements of existing N.J.A.C. 7:13-9.6(c)1 and 2, based on a visual inspection of submitted site plans and without a review of calculations, does not require knowledge of the location of the floodway, and therefore does not require a verification of the floodway limit. Proposed N.J.A.C. 7:13-5.5(c) is also amended for clarity and to incorporate references to a general permit authorization, since this proposed section applies to both general permit authorizations and individual permits.

Conditions that apply to an issued verification (N.J.A.C. 7:13-5.6)

Proposed N.J.A.C. 7:13-5.6 is a relocation with amendments of existing N.J.A.C. 7:13-

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6.1(g), which sets forth requirements that the applicant for a verification must satisfy within 90 calendar days after receiving a verification. The existing reference to enforcement action where a verification is not properly recorded is not continued, since failure to observe the requirements of any approval is subject to enforcement under existing N.J.A.C. 7:13-19, proposed N.J.A.C. 7:13-24. Proposed N.J.A.C. 7:13-5.6 additionally requires that the width and location of any riparian zone approved under the verification also be recorded and referenced in the recorded statement, to ensure that prospective purchasers and those seeking to conduct future activities on the site are put on notice of the limitations applicable to the site, which will reduce the possibility of the flood hazard area and riparian zone being unintentionally impacted in an inappropriate manner in the future.

### **Impacts from flooding**

Engineering certification (definition at N.J.A.C. 7:13-1.2, proposed general permits-by-certification at N.J.A.C. 7:13-8.2, 8.3, 8.4, 8.5, 8.6, 8.8, 8.10, 8.11, 8.13, 8.14, and 8.15, proposed general permits at N.J.A.C. 7:13-9.3, 9.4, 9.5, 9.6, 9.10, and 9.13, and proposed individual permit standards at N.J.A.C. 7:13-12.5 and 12.13)

A new definition is proposed for “engineering certification” to describe the type of document that is provided to the Department by a New Jersey licensed professional engineer in order to confirm that one or more requirements of the FHACA Rules are met. The existing rules require an engineer to certify that activities authorized under a general permit comply with the chapter. A flood-proofing certification must also be submitted for wet and dry flood-proofed buildings under an individual permit at existing N.J.A.C. 7:13-9.2(e). The proposed FHACA

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Rules expand the opportunities for engineers to certify that activities under a general permit-by-certification, general permit, or individual permit meet the design and construction standards of the chapter. Except as discussed below, where an engineering certification in accordance with this chapter is submitted to demonstrate compliance with a requirement of this chapter, the Department will rely on the engineering certification in lieu of performing a site-specific engineering analysis to determine that the certified requirement is met.

The proposed definition explains that an engineering certification must be signed and sealed and be accompanied by the material and information that the certifying engineer used to base the certification, which enables the Department to review the certification and confirm that it accurately reflects the conditions of the site and the requirements of this chapter. Where a New Jersey licensed professional engineer employed by the Department reviews the certification and determines that clear and compelling evidence of a threat to public health, safety, welfare, and the environment exists, the Department engineer can reject a submitted certification. This is necessary in order to enable the Department to prevent an applicant from undertaking activities that could exacerbate flooding or adversely impact the environment should the submitted certification prove to be inaccurate. For example, under proposed general permit 6, which authorizes the construction of one single-family home or duplex, and one associated driveway that does not cross a regulated water in a fluvial flood hazard area, the applicant must provide an engineering certification confirming that the flood storage displacement (net-fill) requirements of the chapter are met. Based on the best available data, an engineer employed by the applicant may determine that these requirements are met and provide an engineering certification to this effect. However, the Department may be aware of site conditions pre-dating the general permit

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application or other factors that instead demonstrate that these requirements are in fact not met.

Since general permit 6 simply requires the submission of an engineering certification, the requirements under this general permit would be met even if the certification proved to be in error. Therefore, the Department reserves the right to reject an engineering certification in unusual situations where a Department engineer determines that clear and compelling evidence of a threat to public health, safety, welfare and the environment is present.

#### Exemptions from flood storage displacement limitations (N.J.A.C. 7:13-11.4)

Existing N.J.A.C. 7:13-10.4, which sets forth requirements applicable to the conduct of a regulated activity under an individual permit in the flood fringe area, with requirements primarily focused on flood storage displacement limitations, is proposed to be recodified at N.J.A.C. 7:13-11.4, with amendments to provide clarity, flexibility, and additional guidance.

The space that water occupies on a site within a flood fringe during a flood is referred to as the "flood storage volume" of that site. Flood fringes temporarily store large volumes of water during a flood. Structures, earth, and other materials placed within a flood fringe occupy some of this space and thereby displace a certain volume of space that would otherwise be available as flood storage. Reducing flood storage volumes can increase the depth and velocity of flooding and lead to expanded flood hazard areas, increased public safety hazards, and greater loss of property. Deeper and faster flows in channels can furthermore increase the potential for erosion, stream bank failure and sediment deposition, all of which adversely impact fishery resources and other aquatic biota. For these reasons, the FHACA Rules establish limitations on the volume of flood storage that a project can displace.

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Proposed N.J.A.C. 7:13-11.4(d) lists regulated activities which, due to their *de minimis* impact on flooding, unavoidable nature, and/or inherently beneficial effect, are not subject to the flood storage volume displacement limits under an individual permit. Existing N.J.A.C. 7:13-10.4(d)3 exempts the reconstruction, improvement, or enlargement of a railroad or public roadway, existing N.J.A.C. 7:13-10.4(d)4 exempts the construction or improvement of a driveway for a private residence, and existing N.J.A.C. 7:13-10.4(d)5 exempts the construction of one private residence. These exemptions are proposed to be reorganized for clarity and also to accommodate new requirements for the construction of a new private residence and associated driveway.

Provisions related to the reconstruction or improvement, including enlargement, of a private driveway, currently codified at existing N.J.A.C. 7:13-10.4(d)4, are proposed to be recodified to proposed N.J.A.C. 7:13-11.4(d)3. The Department is additionally proposing to amend the exemptions provided under existing N.J.A.C. 7:13-10.4(d)4 and 5 (proposed N.J.A.C. 7:13-11.4(d)4 and 5) to apply only to lots which were not created or subdivided after the original adoption date of this chapter on November 5, 2007. People sometimes subdivide a property located within a flood hazard area and then attempt to construct multiple private residences, one at a time, on each of the newly created lots, thereby circumventing the chapter's more stringent access and flood storage requirements that apply to multi-unit developments. Proposed N.J.A.C. 7:13-11.4(d)4ii and 5ii will ensure that the appropriate requirements are applied to these developments. People also sometimes misunderstand existing N.J.A.C. 7:13-10.4(d)5i to exempt a private residence that is being constructed as part of a "smaller" residential subdivision, consisting of perhaps two or three houses, while the construction of a private residence that is

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part of a “larger” residential subdivision, consisting of perhaps a few dozen houses, is not exempted. In order to clarify the intent of the provision, without changing its meaning, proposed N.J.A.C. 7:13-11.4(d)4 and 5 provide that construction is exempt from the flood storage displacement requirements of this section only if it is not part of a residential subdivision or multi-unit development. Existing N.J.A.C. 7:13-10.4(d)6 exempts the construction of a flood control project. This provision is proposed to be amended to also exempt from the flood storage displacement requirements of this section activities necessary for the maintenance of an existing flood control project, such as incidental fill or grading of constructed embankments and levies, repair or replacement of flood walls, and other regulated activities necessary to ensure that a flood control project continues to function as intended. Cross-reference is additionally added to proposed N.J.A.C. 7:13-12.12, which provides the design and construction standards applicable to any flood control project in a regulated area.

The Department is also proposing to exempt four additional types of projects from the flood storage displacement limitations at proposed N.J.A.C. 7:13-11.4(d)7, 9, 10, and 11: the restoration of a regulated water to a natural condition; the repair, modification, or reconstruction of a malfunctioning individual subsurface sewage disposal system; investigation, cleanup, and removal of hazardous substances; and landfill closure activities. These environmentally beneficial activities cannot in many cases be undertaken without flood storage displacement. Removing structures that enclose a regulated water can cause a decrease in upstream flood elevations, therefore causing a loss in flood storage volume, which can exacerbate flooding downstream of the project. Subsurface sewage disposal systems often malfunction due to poorly draining soils, high groundwater tables, and other factors, which require the construction of a

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mounded (aboveground) system in order to properly remediate the malfunction. Similarly, hazardous site investigation and cleanup activities and landfill closure activities often require grading and/or the placement of fill material, such as to construct a cap to prevent or reduce further groundwater contamination. In cases where these activities take place within flood hazard areas, the Department recognizes that it may not be possible or feasible to fully compensate for the volume of flood storage displacement necessitated by the activity. Since these activities are being undertaken to ameliorate impacts on the environment and/or to provide an environmental benefit to degraded areas, individuals who cannot provide sufficient compensatory flood storage have historically requested and received hardship exceptions for these activities. In order to reduce the existing regulatory burden for these environmentally beneficial projects, the Department is proposing to exempt these projects from the flood storage displacement limitations of this section, provided several conditions are met to ameliorate any potential offsite impacts to flooding and the environment.

For each of these projects, the applicant must demonstrate that the proposed volume of flood storage displacement is the minimum necessary to accomplish the project in accordance with State and local requirements. For the repair, modification, or reconstruction of a malfunctioning individual subsurface sewage disposal system, hazardous site investigation and cleanup activities, and landfill closure activities, the applicant must additionally demonstrate that, to the maximum extent practicable, all flood storage displaced by the project is provided compensation using one or more of the methods set forth in this section. However, in no case can a project under this section displace more than 20 percent of the flood storage volume existing at the time of individual permit application. These limitations are necessary to ensure that the

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project does not potentially exacerbate offsite flood conditions. For the repair, modification, or reconstruction of a malfunctioning individual subsurface sewage disposal system, two added limitations are proposed, which mirror the requirements for general permit 25, at N.J.A.C. 7:7A-5.25, for the same activity within freshwater wetlands. The applicant must demonstrate that the project is not being undertaken to accommodate any expansion or change in use, and that the system shall continue to serve existing volumes of sewage. These limitations are necessary to ensure that any loss of flood storage results only from activities necessary to restore a malfunctioning system to working order and not to accommodate proposed new development. Any flood storage displacement that does not meet the requirements of these proposed new exemptions can be authorized only through a hardship exception.

Requirement that proposed flood storage must be effective (N.J.A.C. 7:13-11.4)

Proposed N.J.A.C. 7:13-11.4(j) describes various factors that the Department will consider in determining the volume of flood storage on a site. Applicants sometimes do not properly calculate flood storage volume in order to demonstrate compliance with the limitations of existing Table D (proposed Table 11.4). The Department is therefore proposing to further describe the functions to be provided by compensatory flood storage in order to assist applicants who are preparing flood storage volume calculations.

During the course of a flood, floodwaters continually enter and exit the flood fringe. Therefore, a site that lies in a flood fringe does not simply fill up with floodwaters at the beginning of a flood and then release that same water at the end of the event. A helpful illustration of this dynamic is a sink with a faucet running and its drain open. The faucet

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represents floodwaters entering an area, the sink represents the flood fringe, and the drain represents floodwaters leaving the area. In this illustration, water is continually entering and exiting the sink. When flow entering the sink from the faucet is greater than the flow leaving the sink through the drain, the sink will begin to fill up with water. When the faucet is shut off, water slowly recedes down the drain. Accordingly, while the volume of the sink itself is based on fixed geometric dimensions, the total volume of water passing through the sink would be many times the volume of the sink, depending on how long the faucet is left running. Reducing the volume of the sink, or otherwise rendering some portion of the sink unavailable to incoming water, would cause the sink to fill up much faster (perhaps causing it to overflow) and would also increase the rate at which water leaves the sink through its drain. In the same way, floodwaters entering a flood fringe occupy a certain volume of space. If the volume of the flood fringe is reduced, either by placing fill material or otherwise rendering some portion of the flood fringe unavailable to incoming water, the flood fringe will flood more quickly and deeply, and the volume of floodwaters leaving the area will increase, which could exacerbate downstream flooding.

Because of this complex dynamic, it is important not only that development does not reduce the volume of the flood fringe, but also that any compensatory flood storage volume being created by the applicant is “effective,” meaning that floodwaters can freely enter and exit the storage area being created. Credit should not be given for created areas that will simply fill up with floodwaters and remain full during the course of the flood. To extend the illustration of the sink above, this would be equivalent to placing an open container within the sink. Once the container is filled with water from the faucet, it will no longer be able to accept new water, and

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the effective volume of the sink has been decreased accordingly. Similarly, applicants sometimes propose to create belowground chambers connected to the flood fringe by pipes, which fill up with floodwaters at the onset of flooding and remain full until floodwaters recede. Such an area does not provide effective flood storage, since there is no free exchange of floodwaters during the course of the flood. Applicants also sometimes propose to create isolated depressions or similar aboveground areas on the edge of a flood fringe, which are connected to the flood hazard area via pipes. While it is true that floodwaters can enter into and fill up these areas at the beginning of a flood event, there is often no free exchange of floodwaters during a flood, and so these areas may not provide effective flood storage. N.J.A.C. 7:13-11.4(j)1 is therefore being proposed to further describe the functions that must be provided by compensatory flood storage for it to be considered to be effective. Examples are provided at proposed N.J.A.C. 7:13-11.4(j)1i and ii of ineffective flood storage areas, which reflect the concerns discussed above.

#### Added flexibility for sites that lie below the 10-year flood elevation (N.J.A.C. 7:13-11.4)

Proposed N.J.A.C. 7:13-11.4(j)2 and 3 incorporate, with amendments, existing N.J.A.C. 7:13-10.4(j)1 and 2, which explain that the flood storage displacement limits of the section apply to both the flood hazard area design flood and the 10-year flood. Applicants must therefore demonstrate that each project meets these limits for both of these floods. Meeting this requirement is not necessary if the entire project lies above the 10-year flood elevation since, in such a case, either no flood storage exists below the 10-year flood elevation or else no impact to such flood storage will occur. The existing rules further require that any flood storage displacement proposed both above and below the 10-year flood elevation must be compensated

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for by the creation of an equal volume of flood storage above or below the 10-year flood elevation, as applicable. However, generally it is not possible for applicants to meet this requirement on a property that lies entirely below the 10-year flood elevation unless offsite compensation is available.

For example, where a building is constructed on a site that lies entirely below the 10-year flood elevation, a portion of the proposed building will be located below the 10-year flood elevation and a portion of the proposed building will extend upward and above the 10-year flood elevation (and presumably above the flood hazard area design flood elevation). The building will therefore result in flood storage displacement below the 10-year flood elevation and flood storage displacement above the 10-year flood elevation. Fill below the 10-year flood elevation can likely be compensated for onsite, such as by removing material from the flood fringe by demolishing existing structures or excavating the ground. However, there is no possible way to compensate for fill proposed above the 10-year flood elevation unless an extant structure, which reaches above the 10-year flood elevation and has equal or greater flood storage volume than the proposed fill, can be demolished and removed from the flood fringe. The existing requirement has therefore unintentionally created a hardship for certain individuals, since the existing standard can in some instances be impossible to satisfy.

In order to address this issue, proposed N.J.A.C. 7:13-11.4(j)4 provides alternate means to provide compensation for flood storage displacement where displacement above the 10-year flood elevation cannot be provided onsite through a hierarchy of compensation methods, including both onsite and offsite methods. Onsite flood storage volume above the 10-year flood elevation must be created to the maximum extent practicable. If all flood storage displacement

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cannot be compensated for onsite, the creation of offsite flood storage volume above the 10-year flood elevation must be pursued to the maximum extent practicable. Finally, only if the applicant cannot fully compensate for flood storage displacement with either onsite or offsite creation of flood storage volume above the 10-year flood elevation, flood storage volume can be created below the 10-year flood elevation, either onsite or offsite, in order to fully compensate for the proposed fill. This hierarchy ensures that compensation occurs for displacement above the 10-year flood elevation in the best way possible, with the minimum adjustments possible to address the particular site.

Clarification regarding flood storage inside a building (N.J.A.C. 7:13-11.4)

Proposed N.J.A.C. 7:13-11.4(j)8 incorporates existing N.J.A.C. 7:13-10.4(j)6 and clarifies that volume inside a building is considered displaced flood storage volume unless the building remains permanently open to the passage of floodwaters in accordance with the requirements at proposed N.J.A.C. 7:13-12.5(p). This subsection sets forth the requirements for enclosures beneath the lowest floor of a habitable building, such as a crawl space, as well as enclosures at habitable buildings used for parking or storage, and requires that the enclosure be constructed with flood vents, which will allow floodwaters to freely enter and exit the enclosure.

Clarification regarding flood credits in the Central Passaic Basin (N.J.A.C. 7:13-11.4)

Existing N.J.A.C. 7:13-10.4(s), proposed to be recodified at proposed N.J.A.C. 7:13-11.4(s), provides for the purchase of Central Passaic Basin fill credits to compensate for proposed flood storage displacement in that basin. Fill credits are units of flood storage volume

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that have already been created in the Central Passaic Basin by excavation and/or removal of fill.

The person who created the excess flood storage volume can sell "credits" for this volume to a permittee who needs to compensate for proposed fill elsewhere in the Central Passaic Basin. The permittee thus uses these credits to compensate for the diminished flood storage volume on the site of the proposed development. N.J.A.C. 7:13-10.4(s) places limits on the use of fill credits to ensure that the intended compensation occurs. However, flood storage created in this way can be miles away from the fill for which it is intended to compensate and could be located along another stream entirely. The Department therefore concluded that allowing offsite compensation in such a manner does not constitute effective flood mitigation. Consequently, as of October 2, 2006, the Department stopped accepting applications to create additional fill credits in this manner and provided that any approved fill credits must be created by the applicant prior to October 2, 2011. Since these dates have passed, proposed N.J.A.C. 7:13-11.4(s) is proposed to be amended to simply state that no person or facility shall create new or additional fill credits in this manner, and that fill credits can be bought or sold only if lawfully created under a previously-approved permit under this chapter. Once all previously approved fill credits have been purchased, offsite compensation in the Central Passaic Basin will no longer be possible through fill credits.

#### Adverse impacts to offsite properties (N.J.A.C. 7:13-12.1)

Existing N.J.A.C. 7:13-11.1(f) sets forth the regulated activities which the Department considers to constitute adverse impacts on a property not owned by the applicant and specifies what must be done to qualify for an individual permit if such impacts would occur as a result of

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the proposed regulated activity. Five types of adverse impacts are listed. If any of these adverse impacts are anticipated to occur, the applicant must demonstrate that they have obtained authorization to undertake the activity by one of the methods at existing N.J.A.C. 7:13-9.2(f). However, the five types of impacts listed at existing N.J.A.C. 7:13-11.1(f) do not fully capture all adverse offsite impacts that can occur as a result of regulated activities under this chapter. To address this and to streamline the rules by moving the requirements currently codified at N.J.A.C. 7:13-9.2(f) into this section to eliminate the current need to go to that cross-referenced section to determine the required demonstrations, a number of amendments are being proposed.

Existing N.J.A.C. 7:13-11.1(f) is proposed to be bifurcated into proposed N.J.A.C. 7:13-12.1(f) and (g). Proposed N.J.A.C. 7:13-12.1(f) incorporates existing N.J.A.C. 7:13-9.2(f) and the first sentence of existing N.J.A.C. 7:13-11.1(f), and sets forth the conditions under which the Department will approve an individual permit that adversely impacts a property not owned by the applicant. Proposed N.J.A.C. 7:13-12.1(g) incorporates the second sentence of existing N.J.A.C. 7:13-11.1(f), as well as the substance of existing N.J.A.C. 7:13-11.1(f)1 through 4, and sets forth situations that the Department will consider to adversely affect a property not owned by an applicant.

Proposed N.J.A.C. 7:13-12.1(g)2 is amended to provide for cases where the Department determines that a stormwater discharge will cause erosion or increased flooding offsite, as well as cases where the Department determines that flow will be significantly concentrated. This amendment is necessary to protect offsite properties from nearby development activities, since it is possible that a proposed stormwater discharge can cause erosion or increased flooding without a correspondingly significant increase in overland flow. Furthermore, concentrating overland

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flow onto a site, in a location where no such concentration of flow exists, can adversely impact the use of a site, since a concentrated flow path can result in increased localized flooding.

Proposed N.J.A.C. 7:13-12.1(g)3 addresses adverse offsite impacts related to the relocation of a regulated water. Both existing and proposed N.J.A.C. 7:13-4.1 provide that the riparian zone is measured outward from the top of bank along a regulated water. In cases where an individual intends to relocate a regulated water or otherwise alter the location of its top of bank, the location of the outer limit of the riparian zone would therefore change accordingly. While it is uncommon for the Department to issue an individual permit to relocate a regulated water or alter the location of its top of bank, the Department has in some cases determined that such relocation or alteration is in the best interest of public health, safety and welfare and the environment. For example, a regulated water may flow through an area of contaminated soil, which may be most suitably remediated by redirecting the normal stream flow into a relocated channel that bypasses the contamination. In such a case, the riparian zone of the relocated water could extend into offsite properties that did not possess a riparian zone prior to the relocation of the regulated water, or else could extend further into a property that already possesses a riparian zone, which would subject that property to additional restrictions under this chapter. The Department considers such occurrences to constitute an adverse impact to an offsite property.

Proposed N.J.A.C. 7:13-12.1(g)4 lists three additional types of activities that can result in adverse offsite impacts. Proposed N.J.A.C. 7:13-12.7(e) and (f) limit offsite flood impacts resulting from construction and reconstruction of a bridge or culvert, respectively. A bridge or culvert that does not meet these standards adversely impacts offsite properties. Similarly, since proposed N.J.A.C. 7:13-12.14(d) limits offsite flood impacts resulting from the restoration of a

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regulated water to a natural condition, any restoration of a regulated water that does not meet proposed N.J.A.C. 7:13-12.14(d) adversely impacts offsite properties.

Proposed N.J.A.C. 7:13-12.1(g)5 incorporates with amendments the substance of existing N.J.A.C. 7:13-11.1(f)3, 4, and 5. Whereas existing N.J.A.C. 7:13-11.1(f)3 focuses on impacts to buildings not owned by the applicant, proposed N.J.A.C. 7:13-12.1(g)5i provides for adverse impacts to any offsite habitable building, railroad, roadway or parking area. A proposed activity can cause adverse impacts to these critical structures as well as buildings. The existing requirement to demonstrate that an offsite building is not subject to increased frequency or depth of flooding during any flood event up to and including the flood hazard area design flood is proposed to be replaced with the flood events described in proposed N.J.A.C. 7:13-12.1(i). The existing requirement technically requires an analysis of an infinite number of flood events up to the flood hazard area design flood, which is impractical. As discussed below, proposed N.J.A.C. 7:13-12.1(i) sets forth six different flood events that the Department believes adequately capture this requirement.

Proposed N.J.A.C. 7:13-12.1(g)5ii and iii are amended to address flood impacts during events of lesser intensity than the flood hazard area design flood. Since existing N.J.A.C. 7:13-11.1(f)4 and 5 address only potential offsite impacts during the flood hazard area design flood elevation, a project could cause a significant increase in flood elevation during a lesser flood event and not be addressed. For example, a construction activity could be proposed that would raise the elevation of the 10-year flood by several feet, but not raise the flood hazard area design flood elevation. In order to ensure that proposed N.J.A.C. 7:13-12.1(g)5ii and iii are fully protective of properties not owned by a prospective applicant, reference is proposed to be made

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to the flood events described in proposed N.J.A.C. 7:13-12.1(i).

Proposed N.J.A.C. 7:13-12.1(h) incorporates with amendments existing N.J.A.C. 7:13-11.1(g), which creates a presumption that a project which causes a significant change in the cross-sectional area and/or hydraulic capacity of a channel or floodway has the potential to cause adverse offsite impacts. Based on this presumption, the subsection requires the submittal of calculations to either demonstrate that there are no offsite impacts, or to identify any affected offsite properties impacted.

Proposed N.J.A.C. 7:13-12.1(i) is new. In many cases, the existing FHACA Rules do not specify the flood events that a person is required to analyze in order to demonstrate compliance with a number of provisions. The Department has historically required modeling of the flood hazard area design flood, as well as some smaller flood events, in order to evaluate the potential flooding impacts of a bridge or culvert. As noted above, existing N.J.A.C. 7:13-11.1(f) requires that a project does not exacerbate flooding “during any flood event up to and including the flood hazard area design flood elevation.” Existing N.J.A.C. 7:13-11.7(c)1 and (d)1 set forth a similar standard for bridges and culverts. This implies that a wide range of flood events must be analyzed in order to demonstrate compliance with these requirements. Since specific flood events are not listed, applicants interpret this requirement with great variety, and provide hydrologic and hydraulic modeling of any combination of flood events. Since the events selected by the applicant may not succeed in demonstrating compliance with the requirements of this chapter, or else are more numerous than would be required to demonstrate compliance, achieving compliance with this requirement has become unpredictable, overly costly and time-consuming for applicants. In order to provide more predictable application preparation costs, as well as more

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predicable review times and outcomes for submitted applications, the Department is proposing to require an analyses of the six specific flood events listed at proposed N.J.A.C. 7:13-12.1(i).

Analysis of this set of flood events adequately models and compares existing and proposed flood conditions for bridges and culverts and will similarly be predictive for other activities requiring analysis of flood events.

#### Added flexibility for flood control projects (N.J.A.C. 7:13-12.12)

Proposed N.J.A.C. 7:13-12.12 incorporates with amendments existing N.J.A.C. 7:13-11.12, which sets forth requirements that must be met for a flood control project. An amendment is proposed to simplify the proofs necessary for the Department to issue an individual permit for a flood control project that results in disturbance to a channel and/or riparian zone. The existing rule requires a demonstration that certain steps have been taken to ensure that the flooding problem will not reoccur after the flood control project has been constructed. However, since many factors contribute to flooding, including climate change and offsite development, which are not under the applicant's control, it is not possible to fully ensure that flooding will not reoccur. Accordingly, proposed N.J.A.C. 7:13-12.12(c)3 instead requires a demonstration that local stormwater ordinances have been analyzed and modified, to the extent necessary and appropriate, to help ameliorate future flooding within the watershed. Additionally, the requirement that the applicant develop a regional plan to preserve existing flood storage within the drainage area of the project is proposed for deletion, since the existing and proposed FHACA Rules require that all regulated activities within a flood hazard area cannot displace flood storage volume, except for the circumstances listed at existing N.J.A.C. 7:13-10.4(d), proposed N.J.A.C.

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7:13-11.4(d).

The requirement to mitigate for lost aquatic biota at existing N.J.A.C. 7:13-11.12(d)3 is proposed to be amended at proposed N.J.A.C. 7:13-12.12(d)3 to require mitigation of lost aquatic habitat. Aquatic biota refers to all aquatic life, and it is not possible for an applicant to identify and mitigate for impacts to all aquatic life that may have resulted from the construction of the flood control project. However, mitigation can feasibly be provided for lost aquatic habitat.

#### Requirements for removal of fill or structures (N.J.A.C. 7:13-12.21)

Proposed N.J.A.C. 7:13-12.21 incorporates with amendments existing N.J.A.C. 7:13-11.19, which sets forth standards that apply to any proposed removal of existing fill or an existing structure in any regulated area. Amendments are proposed at N.J.A.C. 7:13-12.21(c)2 to clarify that a hydraulic analysis is not required if the Department determines from a visual inspection of submitted material that the paragraph's standards are met. Existing standards at N.J.A.C. 7:13-11.19(c)5 for removal of riparian zone vegetation are incorporated with amendments at proposed N.J.A.C. 7:13-11.2(x), as described in the summary of that subsection.

### **Impacts to fishery resources, threatened and endangered species, and aquatic biota**

#### Impacts to channels (N.J.A.C. 7:13-11.1 and related definitions at N.J.A.C. 7:13-1.2)

Existing N.J.A.C. 7:13-10.1, which sets forth requirements that must be met for the issuance of an individual permit for a regulated activity located in a channel, is proposed to be recodified to N.J.A.C. 7:13-11.1. Proposed N.J.A.C. 7:13-11.1(b) continues existing N.J.A.C.

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7:13-11.1(b), which requires that a regulated activity in a channel meet nine criteria. Proposed N.J.A.C. 7:13-11.1(b)1, which currently requires a demonstration that the purpose of the project cannot be accomplished without disturbance to the channel, is expanded to require that the applicant describe in detail the activities proposed within the channel, in order to assist the Department in evaluating the potential impacts to the channel. The requirement at N.J.A.C. 7:13-11.1(b)7 relates to restoration of the physical characteristics of a channel upon completion of work, which is necessary in order to avoid increased flooding and erosion and to minimize adverse impacts to aquatic biota. Contrary to the intent of this provision to minimize impacts from the regulated activity, applicants sometimes delay restoration of the channel for a long period of time after completion of regulated activities, which can increase erosion, threaten channel stability, and adversely impact aquatic biota. This provision is therefore proposed to be clarified to require that the channel must be restored to pre-construction conditions immediately after completion of the disturbance.

A new requirement is proposed at N.J.A.C. 7:13-11.1(b)10, which incorporates with amendments existing N.J.A.C. 7:13-11.5(c)2 prohibiting raw or unset cement from coming into contact with flowing water. As noted in the summary of proposed N.J.A.C. 7:13-6.7(b) for conditions applying to all permits-by-rule, general permits-by-certification, and general permits, certain chemicals in raw or unset cement are toxic to aquatic species, can lower the dissolved oxygen content of the water, and can raise the pH of the water, thus adversely impacting the aquatic species of the regulated water. Lime, a major component of cement that is found in all concrete products, easily dissolves in water to produce an alkaline solution that can injure and kill aquatic biota, including fish, insects, and plants. Whereas the existing requirement applies

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only to waters containing fishery resources, it is appropriately protective of aquatic biota to apply this requirement to any regulated activity within any channel or regulated water. Accordingly, the proposed paragraph applies this requirement to all regulated activities within a channel under an individual permit.

Proposed N.J.A.C. 7:13-11.1(c) is recodified from existing N.J.A.C. 7:13-10.1(c), which sets forth requirements for a channel modification. The definition of “channel modification” is proposed to be amended, as described in the summary below addressing sediment and debris removal. The existing rule permits up to 200 feet of channel modification where necessary for the construction of a bridge or culvert, provided disturbance is minimized, a bridge is constructed rather than a culvert where feasible, and the length of channel enclosed by the structure is the minimum feasible. These requirements are continued with two proposed amendments. First, rather than require disturbance to be minimized, the proposed rule clarifies that disturbance to the channel must be the minimum necessary to successfully implement the project. This amendment is necessary to underscore the importance of limiting construction activities within a channel. Second, rather than limit channel disturbance to no more than 200 feet, the proposed rule allows greater channel disturbance in cases where the applicant demonstrates that disturbance to a longer segment of channel is unavoidable. A number of factors can necessitate the disturbance of greater than 200 feet of channel, such as an irregular channel configuration which may require some additional grading within the channel to properly transition the new structure into the bed and banks and to stabilize the altered channel configuration, and thereby minimize the potential for erosion after constructed is completed.

Proposed N.J.A.C. 7:13-11.1(d) is recodified from existing N.J.A.C. 7:13-10.1(d), which

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permits the use of heavy machinery in a channel if six requirements are satisfied. Further, the existing requirement that the equipment's contact with flowing water must be minimized where possible through the use of various methods is proposed to be clarified to require minimization of contact to the maximum extent practicable and to require that any structures utilized to minimize contact be removed from the channel as soon as possible after completion of the disturbance. Finally, fording the channel is amended to be avoided to the maximum extent practicable. These requirements are necessary to minimize adverse impacts to channel stability and aquatic biota, as well as to avoid potential increases in flooding and erosion.

Proposed N.J.A.C. 7:13-11.1(e) is recodified from existing N.J.A.C. 7:13-10.1(e), which prohibits driving a vehicle across a channel except in one of three cases. This subsection is proposed to be clarified to apply to cases when a vehicle is driven within a channel, rather than driven across a channel, since operating a motorized vehicle in any portion of a channel can result in deleterious impacts if not properly controlled. Where a vehicle is driven across a lawfully existing and stable ford, the subsection is amended to require the ford to have either been constructed prior to the original proposal date of this chapter, or else constructed on agricultural lands duly authorized under this chapter. The existing paragraph requires that construction of the ford must have taken place under existing general permit 2E. However, a ford can also be constructed in some cases under an individual permit and so the existing provision is unnecessarily limiting.

Proposed N.J.A.C. 7:13-11.1(f) is a new provision that relates to dumping and discarding items or material into a channel. Individuals sometimes dump into channels waste material and other debris, which is carried away during flood events. This material clogs downstream bridges

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and culverts, reducing the normal flow capacity of the channel and increasing flooding, erosion and the need for infrastructure repair. Such material can also increase the pollutant and sediment load in the State's surface waters and result in deleterious impacts to aquatic biota. The placement of such unsecured material constitutes a regulated activity under N.J.A.C. 7:13-2.4(a)4. The permit-by-rule at existing N.J.A.C. 7:13-7.2(e) and the individual permit standards at existing N.J.A.C. 7:13-11.16 provide standards for storage of unsecured material in particular cases. However, the existing chapter does not specifically state that dumping material or debris into a channel is prohibited. In order to underscore the importance of preventing such debris from clogging and polluting surface waters, the Department is proposing to amend the chapter to clearly state that such actions are prohibited.

#### Impacts to fishery resources (N.J.A.C. 7:13-11.5)

Proposed N.J.A.C. 7:13-11.5 is recodified from existing N.J.A.C. 7:13-10.5, which sets forth requirements that must be met for the issuance of an individual permit for a regulated activity located in a regulated area along a water with fishery resources.

Existing N.J.A.C. 7:13-10.5(d) sets forth the activities that are subject to the timing restrictions of this section. Construction, excavation, filling, or grading in a riparian zone are prohibited unless the applicant demonstrates that appropriate soil erosion and sediment control measures are in place to prevent sediment from reaching the channel, in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90. However, the Department cannot perform a detailed review of soil erosion and sediment control techniques in order to determine whether a project complies with the requirements of N.J.A.C. 2:90. The

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requirement is therefore amended to clarify that that the local Soil Conservation District (or its designee) having jurisdiction over the site shall determine whether the proposed soil erosion and sediment control measures are appropriate and in accordance with N.J.A.C. 2:90. Table E, which sets forth the timing restrictions under this section, is proposed to be renamed Table 11.5 to better indicate its location within the chapter. 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.

The timing restrictions along the Delaware River are proposed to be amended to apply to two segments of the river rather than three, in order to adequately protect the anadromous species population and match the timing restrictions set forth in the FWPA rules at N.J.A.C. 7:7A-4.3(c). The central segment of river between the U.S. Route 202 crossing in Lambertville and the Interstate 276 crossing in Florence is proposed to be bifurcated and the proposed division between northern and southern segments is the U.S. Route 1 crossing in Trenton. The fall timing restriction of September 1 through November 30 is proposed to apply to the entire Delaware River. Additionally, a March 1 through June 30 timing restriction is proposed to apply to the southern portion of the river and an April 1 through June 30 timing restriction is proposed to apply to the northern portion of the river.

Proposed N.J.A.C. 7:13-11.5(e) incorporates existing N.J.A.C. 7:13-10.5(e), which sets forth the conditions under which the Department may modify the timing restrictions in Table E

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(proposed Table 11.5). It is sometimes necessary to alter timing restrictions for a variety of reasons to best protect fishery resources or in response to other mitigating factors. The proposed rule therefore clarifies that the Department shall reduce, extend, or otherwise modify a timing restriction if it determines that one or more of four requirements is satisfied. Amendments are proposed to enable the Department to exercise flexibility under this subsection apart from an applicant's request. Additionally, redundant references as to whether the applicant shall demonstrate or the Department shall make a determination under this section are removed.

Under the proposed subsection, a timing restriction can be modified in cases where potential adverse impacts to fishery resources are likely to be reduced if a regulated activity occurs during a restricted time period rather than during an unrestricted time period. A similar amendment is proposed to require the applicant to demonstrate that additional measures shall be taken to reduce potential adverse impacts to fishery resources in cases where a regulated activity is subject to more than one restricted time period. These clarifications are being made both because it is not always necessary to require an applicant to make this determination, and because such a decision would be made based on the likelihood of potential adverse impacts, since the certainty of such impacts would not likely be able to be demonstrated. Finally, additional flexibility is provided for cases where observance of a timing restriction would adversely impact public health, safety and/or welfare, provided adverse impacts to fishery resources are acceptably reduced. The existing provision limits amending timing restrictions to the reconstruction of a public road crossing that would likely cause increased risks or excessive delays to emergency vehicles and/or school buses or vans. However, the existing provision is unnecessarily limiting and does not account for additional cases that threaten public health,

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safety and welfare, such as the emergency reconstruction of private roadways, utility lines, and other infrastructure.

Updated contact information is provided for the Delaware River Basin Commission, which also may impose timing restrictions on construction activities (see proposed N.J.A.C. 7:13-11.5(f)).

#### Impacts to threatened and endangered species (N.J.A.C. 7:13-11.6)

Proposed N.J.A.C. 7:13-11.6 is recodified from existing N.J.A.C. 7:13-10.6, which sets forth requirements that must be met for the issuance of an individual permit for a regulated activity located in a regulated area with a threatened or endangered species of plant or animal or associated habitat. The section is amended to state that the standards contained therein apply to both present and documented threatened or endangered species, since a threatened or endangered species can be present, and therefore in danger of being adversely impacted, without having been documented. A similar amendment is proposed at N.J.A.C. 7:13-4.1, regarding how threatened or endangered species affect the width of a riparian zone along a regulated water, and proposed N.J.A.C. 7:13-6.7, which establishes standard conditions for all permits-by-rule, general permits-by-certification and general permits.

Proposed N.J.A.C. 7:13-11.6(b), which refers to the Department's Landscape Project method, is clarified by removing redundant language, providing a link to NJ-GeoWeb, which has replaced iMap, and updating the address for the Division of Fish and Wildlife Endangered and Nongame Species Program. Proposed N.J.A.C. 7:13-11.6(c), which discusses New Jersey's Natural Heritage Database, is proposed to be amended to remove redundant language that is

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found in proposed N.J.A.C. 7:13-11.6(b) and (f). Further, the statement that models do not exist for certain aquatic species is proposed to be removed, since aquatic endangered, threatened and special concern species are now represented in Landscape Project version 3.1.

## **Buildings**

The Department is proposing a number of amendments to the standards for new, reconstructed, substantially damaged, substantially improved, expanded, and elevated buildings in order to provide additional clarity and guidance to prospective applicants, facilitate redevelopment and recovery activities, and help ensure that buildings in flood hazard areas are flood-resistant and safe for occupation.

### Definitions related to buildings (N.J.A.C. 7:13-1.2)

The Department is proposing to amend the definitions of “building,” “habitable building,” and “lowest floor,” delete the definition of “private residence,” add a definition for “duplex,” and replace the definition of “public building” with a new definition for “critical building.”

New Jersey’s Uniform Construction Code (UCC) at N.J.A.C. 5:23-1.4 defines “building” to mean “a structure enclosed with exterior walls or fire walls, built, erected and framed of component structural parts, designed for the housing shelter, enclosure and support of individuals, animals or property of any kind. When used herein, building and structure shall be interchangeable except where the context clearly indicates otherwise.” In order to harmonize the FHACA Rules with the UCC, the first sentence of the UCC definition is proposed to be

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incorporated as the first sentence of the FHACA definition of “building.” The second sentence of the UCC definition is not proposed to be incorporated, because it would conflict with the term “structure,” which is defined broadly in the existing FHACA Rules to mean “any assemblage of material by humans...” The definition of “building” is additionally proposed to be amended to clarify that a building can have either a temporary or a permanent foundation. People have sometimes mistakenly assumed that a building constructed on a temporary foundation, such as a mobile home, is exempt from regulation under this chapter. Since a temporary foundation is generally less able to prevent lateral displacement and buoyancy during a flood event, a building constructed on a temporary foundation can have an equal or even greater flood damage potential than a building constructed on a permanent foundation. Therefore, this amendment is necessary to clarify the Department’s jurisdiction under this chapter and to ensure that buildings are suitably flood resistant. Finally, the definition of “building” is proposed to be amended to explain that a building that is intended for regular human occupation, as well as regular human residence, is considered a “habitable building,” which is a defined term that is used throughout the FHACA Rules.

The definition of “habitable building” is proposed to be amended to clarify the type of building that is subject to the lowest floor elevation standards of this chapter. A habitable building is a building that is intended for regular human occupation as well as residence. Additional examples of habitable buildings are listed, including critical buildings, the proposed new definition for which is discussed above, as well as multi-residence buildings, mobile and manufactured homes, and trailers intended for human residence, provided they are set on a foundation and/or connected to utilities, such as in a mobile home park. People sometimes

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believe that such structures are not considered habitable buildings under this chapter, and therefore do not construct them in accordance with the flood reduction standards of N.J.A.C.

7:13-12.5. Improper construction of such units can lead to immense flood damage potential and loss of life and property, since improperly constructed buildings are subject to lateral displacement and buoyancy during a flood event. The amended definition therefore seeks to clarify that the design and construction standards of this chapter apply to all such buildings. The amended definition of “habitable building” further clarifies, however, that campers and recreational vehicles are not habitable buildings under this chapter, and are therefore not subject to the design and construction standards of this chapter. The amended definition also indicates that an animal shelter that includes human access is a type of habitable building. Since the existing definition explains that an individual shelter for animals is an example of a non-habitable building, people have sometimes mistakenly concluded that animal shelters that include human access, such as offices and other amenities for the humans working with animals, were also a type of non-habitable building. The proposed amendment clarifies that this is not the case, and further clarifies that an outdoor kennel for animals is not a habitable building. Finally, a construction trailer is listed as a type of non-habitable building, since these buildings are intended for only temporary use during the construction of a proposed development, and would not likely be occupied during a flood event.

The definition of “lowest floor” is amended to clarify that any portion of a building that is used solely for parking of vehicles, building access, or storage, as set forth at proposed N.J.A.C. 7:13-12.5(p), does not constitute the lowest floor of a building. This continues the meaning of the existing definition with updated citations and terminology.

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The definition of “private residence,” which means a one or two-family dwelling, is proposed to be deleted in order to harmonize the FHACA Rules with the Department’s FWPA and CZM rules, which instead use the terms “single-family home” and “duplex.” The CZM definition of “duplex” is proposed to be adopted in the FHACA Rules.

The definition of “public building” is proposed to be deleted and its essential elements and intent are continued in the proposed definition of “critical building.” Since the term “public” can imply any building designated for public use, people sometimes misunderstand what constitutes a public building under this chapter. A critical building, therefore, is defined as one that is essential to maintaining the continuity of vital government operations and/or supporting emergency response, sheltering, and medical care functions, and/or a building that serves large numbers of people who may be unable to leave the facility through their own efforts. Examples of the former include a hospital, medical clinic, police station, fire station, emergency response center, and public shelter. Examples of the latter include a school, college, dormitory, jail or detention facility, day care center, assisted living facility, and nursing home.

#### Permits-by-rule (N.J.A.C. 7:13-7)

The proposed rules include six permits-by-rule to facilitate minor construction activities related to buildings. Five of these permits-by-rule continue existing permits-by-rule and one is new. Amendments regarding disturbance to riparian zone vegetation and proximity to top of bank under these permits-by-rule are discussed in the riparian zone section of this summary.

#### *Permit-by-rule 11*

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Proposed N.J.A.C. 7:13-7.11 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(a)3, which authorizes the reconstruction, relocation, and/or elevation of a lawfully existing building outside a floodway. The permit-by-rule is proposed to be clarified by noting that the building being reconstructed, relocated, and/or elevated must be located outside a floodway at the time of reconstruction, relocation, and/or elevation, and the building cannot be expanded within or relocated into a floodway. Structures situated within floodways are generally subject to high velocities and flood depths during flood events, and should therefore be evaluated by the Department under a general permit or individual permit before they are reconstructed, relocated, or elevated. Similarly, relocation of a building from the floodway to an area outside the floodway can have impacts on other structures in the floodway, again requiring Department evaluation and approval before such a relocation can occur. The footprint of the building is allowed to be expanded by no more than 400 square feet; an increase from the current 300 square feet expansion limit in order to achieve consistency with the coastal permit-by-rule at N.J.A.C. 7:7-7.2(a)8 which covers the expansion or relocation (with or without expansion) landward or parallel to the mean high water line of the footprint of a legally constructed residential development under those rules. The area of expansion is further specified to be a cumulative limit since the date of the adoption of this chapter, November 5, 2007, in order to ensure that any additional expansions to the building are reviewed under an authorization under a general permit or an individual permit. Any enclosure below the lowest floor of the building, whether existing or proposed, must meet proposed N.J.A.C. 7:13-12.5(p), which sets forth standards necessary to reduce flood damage to the building. Since these requirements do not allow a basement having a floor that is below grade along all adjoining

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exterior walls, any basement below a building that is being reconstructed, relocated or elevated under this permit-by-rule must be abandoned, filled-in and/or otherwise modified to conform with the individual permit requirements for a building.

The existing permit-by-rule requires that the building is not expanded or relocated closer to any regulated water. However, as noted in the May 6, 2013, Response to Comment 66 at 45 N.J.R. 1104(a), 1116 of the readoption of the Department's January 24, 2013, emergency rulemaking, this requirement is prohibitive on a barrier island or in lagoon situations where regulated waters exist in multiple directions relative to the structure. As stated in the Response to this Comment, "the intention of this provision is to limit expansion or relocation of a building closer to the regulated water to which the property containing the building borders. For example, a house that fronts on a bay cannot expand closer to the bay under this permit-by-rule. To expand or relocate a building closer to the bay, a flood hazard area individual permit from the Department would be required." The Department recognizes that cases exist where a building being reconstructed or elevated under this permit-by-rule may also be required to be relocated on the lot in order to meet current municipal zoning or other requirements. Since proposed N.J.A.C. 7:13-12.5 allows the construction of a new building if the building is at least 25 feet from the top of bank of a regulated water, and even closer to the regulated water if the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water, this standard is proposed to be incorporated.

*Permit-by-rule 12 (N.J.A.C. 7:13-7.12)*

Proposed N.J.A.C. 7:13-7.12 incorporates with clarifying and substantive amendments

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the permits-by-rule at existing N.J.A.C. 7:13-7.2(a)4 and (b)7, which authorize the construction of an addition adjacent to and above a lawfully existing building, respectively. Since these two exiting permits-by-rule are similar and are often used together, the Department is proposing to combine them to reduce redundancy.

Similar to permit-by-rule 11, permit-by-rule 12 is proposed to be clarified by noting that the building being elevated must be located outside a floodway at the time of the construction. Additionally, the addition cannot be located within a floodway, and the footprint of the building can be expanded by no more than 400 square feet (similar to permit-by-rule 11, an increase from the 300 square feet limit applicable to the existing permits-by-rule at N.J.A.C. 7:13-7.2(a)4), with the limit in expansion of the footprint being a cumulative limit since November 5, 2007, as proposed in permit-by-rule 11. A new requirement is proposed regarding the lowest floor elevation of the addition. Constructing the lowest floor of a small addition to an existing building one foot above the flood hazard area design flood elevation is often not practical. However, in consideration of the deleterious effects of flooding on a building with a lowest floor situated below the flood hazard area design flood elevation, and given that the area of the addition under this permit-by-rule is proposed to be expanded to 400 square feet, which could constitute several small rooms in a single-family home or duplex, the proposed permit-by-rule requires the lowest floor of the addition to be elevated unless otherwise approved by the local construction official having jurisdiction over the project. This exception is appropriate since the local construction official would review the addition under an application for a municipal building permit and would be aware of mitigating factors that would prevent the addition from otherwise being elevated. Finally, any enclosure below the lowest floor of the building, whether existing or

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proposed, must meet proposed N.J.A.C. 7:13-12.5(p), which set forth standards necessary to reduce flood damage to the building.

*Permit-by-rule 13 (N.J.A.C. 7:13-7.13)*

Proposed N.J.A.C. 7:13-7.13 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)8, which authorizes the construction of a non-habitable building outside a floodway. The permit-by-rule is amended to note that one or more buildings can be erected under this permit-by-rule, provided that the collective footprint of all buildings does not exceed 200 square feet. The existing permit-by-rule authorizes the construction of one building with a footprint of no more than 150 square feet. The proposed permit-by-rule provides additional flexibility while ensuring that potential adverse impacts to flooding resulting from the project remain *de minimis*. Similar to proposed permits-by-rule 11 and 12, the proposal makes clear that the limit on the footprint of the building(s) constructed under this permit-by-rule is cumulative since November 5, 2007, and not applicable to each structure constructed. Additional flexibility is also provided for disturbance of trees within 10 feet of the structure, in order to facilitate the placement or construction of the building, without adversely impacting riparian zone functionality.

*Permit-by-rule 14 (N.J.A.C. 7:13-7.14)*

Proposed N.J.A.C. 7:13-7.14 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)9, which authorizes the construction of an open structure with a roof outside a floodway. The description of the structure allowed under this

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permit-by-rule is clarified to refer to a partially-open structure, since, both under the existing rules and the proposed rules, walls can be placed around the building provided they lie above the flood hazard area design flood elevation. The existing permit-by-rule does not limit the area of disturbance, so a person could conceivably construct a very large structure that could exacerbate flooding and have deleterious impacts on the environment. The proposed permit-by-rule therefore limits the cumulative size of structures erected under this permit-by-rule in order to ensure that potential adverse impacts to flooding and the environment are *de minimis*.

*Permit-by-rule 15 (N.J.A.C. 7:13-7.15)*

Proposed N.J.A.C. 7:13-7.15 sets forth a new permit-by-rule that authorizes barrier free public access to a building. In many cases, the construction of stairs, ramps, fire-escapes, and other similar features requires an individual permit under this chapter. However, such structures are both necessary for public safety and do not result in significant flood storage displacement or riparian zone disturbance when undertaken as prescribed in this permit-by-rule. Activities covered under this permit-by-rule include any access required by a public entity, which is constructed in accordance with the Federal Americans with Disabilities Act of 1990. In order to minimize potential obstructions to flow, access must be constructed outside any channel. Additionally, if the access is unavoidably located in a floodway, it must be oriented to minimize obstruction to flow and be constructed of material that will remain open to the passage of floodwaters. These requirements will ensure that the access will have a *de minimis* impact on flooding and the environment.

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*Permit-by-rule 16 (N.J.A.C. 7:13-7.16)*

Proposed N.J.A.C. 7:13-7.16 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)13, which authorizes the construction of a deck that is connected to a lawfully existing building. The existing permit-by-rule places restrictions on enclosing a deck, which is necessary to reduce flood storage displacement and potential obstruction to floodwaters, as well as to increase the deck's structural integrity. However, since these issues are relevant only if a deck is proposed within a flood hazard area, the proposed permit-by-rule is amended to apply this standard to decks within a flood hazard area. While the proposed permit-by-rule no longer requires that a deck constructed under this permit-by-rule be entirely located in previously disturbed area, in order to avoid adverse impacts to riparian zone functionality, the proposed permit-by-rule limits the area of riparian zone vegetation that will be lost as a result of the project.

General permits-by-certification (N.J.A.C. 7:13-8, and related definition at N.J.A.C. 7:13-1.2)

The Department is proposing three general permits-by-certification to facilitate minor construction activities related to buildings. As noted in the introduction of this Summary, general permits-by-certification are a new type of authorization under this chapter, the application for which is electronically received and processed by the Department, as set forth at proposed new N.J.A.C. 7:13-6 and 8. Accordingly, a new definition is proposed for "general permit-by-certification" at N.J.A.C. 7:13-1.2 for use throughout the chapter.

*General permit-by-certification 5 (N.J.A.C. 7:13-8.5)*

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This general permit-by-certification at proposed N.J.A.C. 7:13-8.5 is similar to existing general permit 6 at existing N.J.A.C. 7:13-8.8 and is being proposed in order to facilitate the expeditious reconstruction of a building that is destroyed or damaged due to fire, flooding, or other natural disaster, as well as to encourage people voluntarily reconstructing, relocating, or elevating a building to meet the standards of this general permit-by-certification and thereby reduce flood damage potential.

Proposed N.J.A.C. 7:13-8.5(a) sets forth the requirements for obtaining authorization. The flood hazard area elevation for the site must have been determined from a Department delineation or FEMA flood mapping, which is similar to the requirement at existing N.J.A.C. 7:13-8.8(c). These maps are readily available to the public, so the design flood elevation can be easily determined and reported to the Department through the general permit-by-certification portal. In cases where no Department or FEMA flood mapping is available for a given site, a prospective applicant must determine the design flood elevation through other means, such as hiring an engineering consultant to perform detailed calculations and flood models in order to determine the depth and extent of flooding. Such analyses are beyond the scope of a general permit-by-certification and the applicant would need to seek Department approval of a verification, general permit and/or an individual permit.

The building must be located outside a floodway and, as certified by an engineer, cannot be expanded within or relocated into a floodway. Buildings located within floodways are generally subject to high velocities and flood depths during flood events, and therefore the reconstruction, relocation, expansion, and/or elevation of a building inside a floodway should be evaluated by Department staff. These activities can in some cases be authorized under general

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permit 5 at proposed N.J.A.C. 7:13-9.5 or under an individual permit in accordance with proposed N.J.A.C. 7:13-12.5.

An engineer must certify that expansion of the building's footprint is limited to 750 square feet, cumulatively since the adoption date of the existing chapter. Larger expansions must be evaluated by the Department under an individual permit, which does not set limits on the size of a building, to ensure that the expanded building remains safe for occupancy and will not exacerbate flooding. The engineering certification must also confirm that the lowest floor of the building is being reconstructed or elevated to at least one foot above the flood hazard area design flood elevation and any enclosure below the lowest floor must meet the requirements of N.J.A.C. 7:13-12.5(p). These standards are consistent with the requirements for buildings throughout the existing and proposed chapter and are necessary to reduce the flood damage potential of the building.

Limitations on the proximity to top of bank and the type and area of riparian zone vegetation that can be disturbed are also proposed in order to ensure that activities authorized under general permit-by-certification do not destabilize any top of bank or adversely impact riparian zone functionality. In order to facilitate the reconstruction, relocation and/or elevation of buildings, and because existing general permit 6, proposed general permit 5, also does not require an application fee for similar regulated activities, no application fee is proposed for an authorization under general permit-by-certification 5.

*General permit-by-certification 6 (N.J.A.C. 7:13-8.6)*

Proposed N.J.A.C. 7:13-8.6 incorporates portions of general permit 7 at existing N.J.A.C.

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7:13-8.9. Whereas existing general permit 7 authorizes the construction of a private residence as well as appurtenant structures, general permit-by-certification 6 authorizes the construction of only a single-family home or duplex. This is appropriate since the set of regulated activities covered under a general permit-by-certification are intended to be prescriptive and not as broad as activities authorized under a general permit, which is reviewed by Department staff. An addition to a single-family home or duplex can be authorized under general permit-by-certification 8 and many appurtenant structures can be authorized under proposed permits-by-rule.

Proposed N.J.A.C. 7:13-8.6(a) sets forth the requirements for obtaining authorization under this permit-by-certification. Whereas the existing general permit simply requires that the applicable individual permit requirements for a building be met, the proposed general permit-by-certification lists out the relevant requirements, in order to clarify the scope of the general permit-by-certification and assist prospective applicants. Limitations on construction within a floodway, as certified by an engineer, are necessary to ensure that the project does not exacerbate flooding or subject occupants to unsafe conditions. The home or duplex cannot be constructed as part of a residential subdivision or multi-unit development, since more stringent requirements related to access through floodwaters apply to multi-unit developments at existing N.J.A.C. 7:13-11.5, proposed N.J.A.C. 7:13-12.5. Additionally, the lot on which the single-family home or duplex is being constructed must not have been subdivided from a larger lot on or after November 5, 2007, which is the adoption date of the existing chapter. As discussed in other parts of this Summary, this limitation is necessary to assure that a property located within a flood hazard area has not been subdivided in a manner that circumvents the more stringent

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requirements of this chapter that apply to residential subdivisions under this chapter, thus increasing potential flood risks and danger to occupants of residences in the subdivision. An engineering certification must additionally confirm that the lowest floor of the building is being constructed at least one foot above the flood hazard area design flood elevation, and any enclosure below the lowest floor must meet the requirements of N.J.A.C. 7:13-12.5(p). These standards are consistent with the requirements for buildings throughout the existing and proposed chapter and are necessary to reduce the flood damage potential of the building.

Limitations on the proximity to top of bank and the area of riparian zone vegetation that can be disturbed are also proposed in order to ensure that activities authorized under this general permit-by-certification do not destabilize any top of bank or adversely impact riparian zone functionality. Finally, where the project, in combination with all proposed activities, constitutes a major development, as that term is defined in the Department's SWM rules, the applicant must obtain an engineering certification confirming that all applicable requirements of the SWM rules, N.J.A.C. 7:8 are met. This is necessary to ensure that proposed activities do not impair the quality of surface waters, increase stormwater management runoff, or decrease groundwater recharge.

*General permit-by-certification 8 (N.J.A.C. 7:13-8.8)*

Proposed N.J.A.C. 7:13-8.8 sets forth a new general permit-by-certification that authorizes the construction of an addition to a lawfully existing building. In some cases, construction of a building addition is authorized under proposed permit-by-rule 12; otherwise a prospective applicant is required to obtain an individual permit. The Department is proposing

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this general permit-by-certification to facilitate minor construction activities while providing equal flood protection and environmental preservation as if the project were reviewed under an individual permit application. This general permit-by-certification is furthermore intended to be a companion to existing general permit 8 in the Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A-5.8, which authorizes certain additions to residential structures in freshwater wetlands and/or transition areas.

Proposed new N.J.A.C. 7:13-8.8(a) sets forth the scope of the section and establishes the specific requirements for authorization under this general permit-by-certification. The proposed general permit-by-certification is identical to proposed permit-by-rule 12, with three exceptions. First, the cumulative footprint of all additions under permit-by-rule 12 is limited to a total of 400 square feet since November 5, 2007, while general permit-by-certification 8 authorizes the footprint of a building to expand by no more than 750 square feet since the same date. Second, the lowest floor of any addition under general permit-by-certification 8 must be constructed at least one foot above the flood hazard area design flood elevation, while the lowest floor of an addition under permit-by-rule 12 must be constructed at this elevation unless otherwise approved by the local construction official having jurisdiction over the project. Flexibility with respect to the lowest floor elevation of a building is not appropriate for building additions of more than 400 square feet and that building additions of larger than 400 square feet should be authorized under a general permit-by-certification or individual permit, so that Department staff can evaluate any potential safety and flooding issues resulting from a lowest floor below the design flood elevation. Finally, in order to ensure that the proposed addition will not exacerbate flooding or be subject to flooding, the applicant must obtain an engineering certification confirming that the

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addition is not being placed within a floodway and that the lowest floor of the addition is set at the correct elevation.

#### General permits (N.J.A.C. 7:13-9)

The Department is proposing two general permits as part of its efforts to provide additional clarity and guidance to prospective applicants, facilitate redevelopment and recovery activities, and help ensure that buildings in flood hazard areas are flood-resistant and safe for occupation as described below.

#### *General permit 5(N.J.A.C. 7:13-9.5)*

This proposed new general permit authorizes the reconstruction and/or elevation of a building in a floodway, which requires an individual permit under the existing rules. The general permit is being proposed in order to facilitate the reconstruction of a building in a floodway which is destroyed or damaged due to fire, flooding, or other natural disaster, as well as to encourage people voluntarily reconstructing or elevating a building to meet the standards of this general permit and thereby reduce flood damage potential.

Proposed N.J.A.C. 7:13-9.5(a) sets forth the requirements for obtaining authorization for general permit 5. In order to ensure that the reconstructed and/or elevated building is flood resistant and safe for occupancy, the lowest floor of the building must be properly elevated and any enclosure below the lowest floor must meet the requirements of proposed N.J.A.C. 7:13-12.5(p). Further, any existing enclosure below the lowest floor of the building must be modified to meet these standards. Since these requirements do not allow a basement, any basement below

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a building that is being reconstructed, relocated or elevated under this permit-by-rule must be abandoned, filled-in and/or otherwise modified to conform to the requirements of N.J.A.C. 7:13-12.5.

Buildings located within floodways are generally subject to high velocities and flood depths during flood events. Changes in the location or footprint of the building can subject the building (and other nearby buildings) to increased flood damage. As such, the location and footprint of the building cannot be altered under this general permit; any such change in location or footprint of the building must be subject to the more detailed analysis conducted under an individual permit. A licensed professional engineer must also certify that the activities under this general permit will not exacerbate flood conditions or further obstruct flood flows, and that the building is suitably flood resistant.

Similar to proposed permit-by-rule 11 and general permit-by-certification 5, limitations are placed on the building's proximity to a top of bank and disturbance to riparian zone vegetation, in order to ensure that the reconstructed and/or elevated building is stable and will not adversely impact riparian zone functionality. Finally, similar to existing general permit 6 and proposed general permit-by-certification 5, no application fee is required for an authorization under this general permit in order to assist building owners who are attempting to reduce their building's flood damage potential (see Table 20.1 at proposed N.J.A.C. 7:13-20.1).

#### *General permit 6 (N.J.A.C. 7:13-9.6)*

Proposed N.J.A.C. 7:13-9.6 sets forth a new general permit for the construction of one single-family home or duplex, and one associated driveway that does not cross a regulated water,

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in a fluvial flood hazard area. This general permit is being proposed as a companion to new general permit-by-certification 6 at proposed N.J.A.C. 7:13-8.6, which authorizes the construction of one single-family home or duplex in a tidal flood hazard area.

Proposed N.J.A.C. 7:13-9.6(a) sets forth the requirements for obtaining authorization under the new general permit. No fill or structures can be placed in a floodway, as such activities can exacerbate flooding. The residence cannot be constructed as part of a residential subdivision or multi-unit development, since more stringent access through floodwaters apply to multi-unit developments at existing N.J.A.C. 7:13-11.5, proposed N.J.A.C. 7:13-12.5. Additionally, the lot on which the single-family home or duplex is being constructed must not have been subdivided from a larger lot on or after November 5, 2007, which is the adoption date of the existing chapter to avoid a subdivision with construction of multiple homes one at a time being utilized to avoid the more stringent requirements of this chapter that apply to residential subdivisions under existing N.J.A.C. 7:13-11.5 and 11.6, proposed N.J.A.C. 7:13-12.5 and 12.6. Limitations are placed on the building's proximity to a top of bank and disturbance to riparian zone vegetation under this general permit, which matches the area of disturbance allowed under general permit-by-certification 6 for the construction of a single-family home or duplex in a tidal flood hazard area and an individual permit for a single-family home or duplex under Table 11.2 at proposed N.J.A.C. 7:13-11.2, in order to ensure that the reconstructed and/or elevated building is stable and will not adversely impact riparian zone functionality. The applicable individual permit requirements for flood storage displacement, and the construction of a building, driveway, and utility must be met for any activity under this general permit. These requirements are necessary to ensure that the authorized activities do not exacerbate flooding or impair riparian zone

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functionality. Finally, where the project, in combination with all proposed activities, constitutes a major development, all applicable requirements of the SWM rules, N.J.A.C. 7:8, must be met. This is necessary to ensure that proposed activities do not impair the quality of surface waters, increase stormwater management runoff, or decrease groundwater recharge.

Building standards under an individual permit (N.J.A.C. 7:13-2.4, 11.3 and 12.5)

Finally, the Department is proposing amendments to individual permit requirements applicable to buildings.

Proposed N.J.A.C. 7:13-12.5 recodifies with amendments existing N.J.A.C. 7:13-11.5, which sets forth specific design and construction standards that apply to any building proposed within the jurisdiction of this chapter. Additional standards for the conversion of a building are set forth at proposed N.J.A.C. 7:13-2.4(a)6 and for the conversion, elevation, or expansion of a building in a floodway at proposed N.J.A.C. 7:13-11.3(c).

Proposed N.J.A.C. 7:13-12.5(b) clarifies that, in addition to constructing and reconstructing a building, elevating and enlarging a building are also governed by this section. Enlarging a building is equivalent to expanding a building, which existing N.J.A.C. 7:13-11.5 addresses at paragraph (c)2, and refers to constructing a vertical or horizontal addition and/or otherwise changing the shape or size of a building. Elevating a building, already addressed under existing N.J.A.C. 7:13-11.5(e), refers to lifting a building to a higher elevation in order to reduce potential adverse impacts from flooding. Elevating a building generally involves detaching a building from its foundation, raising the building using hydraulic jacks or other means, and constructing a new structural support system beneath the living space of the building, such as

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pilings or a masonry crawl space, such that the lowest floor of the building is situated at a higher elevation than previously. Proposed N.J.A.C. 7:13-12.5(b) requires that a building subject to this section be designed to be suitably flood resistant. While both existing N.J.A.C. 7:13-11.4(b) and 11.5(c)4 set forth standards designed to ensure that a building's exterior walls are constructed to resist hydrostatic and hydrodynamic pressure and the structure is otherwise constructed to protect people and property, the analysis is based upon forces resulting from the flood hazard area design flood. However, given the significant flood damage that occurs annually in New Jersey and the long-term risks to public health, safety, and welfare associated with improperly flood-resistant buildings, the Department is proposing to require that each building for which an individual permit is being sought must be designed to be suitably flood resistant to loads and effects resulting from flooding to at least one foot above the flood hazard area design flood elevation. This will help ensure that the construction is both safe to occupy and unlikely to adversely impact people and property. Finally, similar to existing N.J.A.C. 7:13-11.5(c)5, proposed N.J.A.C. 7:13-12.5(b) requires that all applicable requirements contained in proposed N.J.A.C. 7:13-12.5(c) through (t) are satisfied.

Proposed N.J.A.C. 7:13-12.5(c) incorporates with amendments portions of existing N.J.A.C. 7:13-11.5(c) that set forth the requirements for buildings in proximity to a top of bank. No disturbance related to the regulated activity can be located within 25 feet of any top of bank, with one exception. The chapter generally prevents disturbance within 25 feet of any top of bank, since disturbance in this area can easily destabilize a channel, and lead to increased erosion, flooding and adverse water quality impacts. However, as noted previously in this Summary, if an activity is located adjacent to a bulkhead, retaining wall or revetment on a tidal water, such

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impacts will not occur. Accordingly, buildings that are adjacent to one of these structures that is lawfully existing on a tidal water are not subject to the requirements of proposed N.J.A.C. 7:13-12.5(c). Proposed N.J.A.C. 7:13-12.5(c)1, 2, and 3 incorporate with clarifying amendments existing N.J.A.C. 7:13-11.5(c)1, 2, and 3, respectively, with added reference to elevating buildings, consistent with the change to proposed N.J.A.C. 7:13-12.5(b) referenced above, and the addition of an exception not contained in the existing rule as proposed N.J.A.C. 7:13-12.5(d). The proposed exception allows an existing building to be expanded, elevated, or reconstructed in the protected 25-foot area where compliance with proposed N.J.A.C. 7:13-12.5(c)2 or 3 is not feasible only if the applicant demonstrates the reason compliance is not feasible and additionally provides an engineering certification that confirms that the proposed construction in this area will not exacerbate erosion or flooding, adversely impact water quality or threaten public safety or property.

Proposed N.J.A.C. 7:13-12.5(e), which provides that the Department shall not issue an individual permit for the construction of a new building in a floodway unless it is located on a pier in the Hudson River and satisfies the requirements at N.J.A.C. 7:7E-3.48, the Coastal Zone Management rules' Hudson River Waterfront Area rule, is recodified from existing N.J.A.C. 7:13-11.5(d) with clarifying amendments that do not affect the meaning of the provision, and a new requirement for an engineering certification. Given the extreme risk to buildings constructed in a floodway and the significant and lasting risks to public health, safety, and welfare associated with the construction of improperly flood-resistant buildings, the Department is proposing to require applicants to provide an engineering certification that confirms that any new building constructed in a floodway is designed to be suitably flood resistant and therefore both safe to

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occupy and unlikely to adversely impact adjacent properties with the building required to be able to withstand the loads and effects resulting from flooding to at least one foot above the flood hazard area design flood elevation. Proposed N.J.A.C. 7:13-11.3(c)1, which sets forth an exception to the general prohibition on construction in a floodway, is amended to note that the construction and conversion of a building in a floodway is permitted provided the requirements of N.J.A.C. 7:13-12.5(e) and (f) are met, as appropriate.

Proposed N.J.A.C. 7:13-12.5(f) incorporates existing N.J.A.C. 7:13-11.5(e)2, which provides that the Department shall not issue an individual permit for the reconstruction of a building in a floodway if the reconstruction converts the use of the building from non-residential to residential. Proposed N.J.A.C. 7:13-12.5(f) is expanded to cover any regulated activity that would convert any building in a floodway to a single-family home, duplex, multi-residence building or critical building. The mere presence of a habitable building in a floodway represents a certain level of risk to public safety; the Flood Hazard Area Control Act was adopted to help reduce such risks, where possible. Existing N.J.A.C. 7:13-2.4(a)6 provides that the conversion of any building into a private residence or a public building is a regulated activity. Proposed N.J.A.C. 7:13-2.4(a)6 and 12.5(f) extend the provision to cover a single-family home, duplex, multi-residence building and critical building. Both the existing and proposed rules set forth more stringent design and construction standards for such buildings than for non-residential structures. These more stringent requirements are necessary because flooding presents a greater danger to people in residential structures and critical buildings, and because critical buildings, such as hospitals and emergency response centers, must remain as safe and accessible as possible during a flood. Some people have attempted to circumvent the stricter requirements of the rules

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for these buildings by obtaining a permit for a different type of building and then converting the building to a single-family home, duplex, multi-residence building or critical building after it is constructed. Some people have also purchased buildings and converted them into a single-family home, duplex, multi-residence building or critical building without adding the necessary safeguards to protect against flooding that would be required for a residential unit. The proposed rules will help ensure that a person cannot circumvent the requirements of the rules and convert a building in a floodway to such a use unless the same standards that apply to new buildings under this chapter are met.

Proposed N.J.A.C. 7:13-12.5(g) sets forth the individual permit requirements to elevate or reconstruct a building located in a floodway. It incorporates with amendments existing N.J.A.C. 7:13-11.5(e)1 and 3, which apply to the reconstruction of a building in a floodway, and is clarified to apply to buildings being elevated, as well as buildings being reconstructed, for the reasons discussed above. All construction must take place within the same footprint as the original building, with an added exception. The amount of potential obstruction to floodwaters caused by a building situated in a floodway is related to the size, shape and location of the building, as well as the depth and velocity of floodwaters. Enlarging a building or altering its location in the floodway cannot only affect the amount of obstruction caused by the building, but can also increase the risk of flood damage to the building itself. However, some changes in the size or orientation of a building will have no effect on flooding and flood damage. For example, if an addition to a building is proposed on the downstream side of the existing structure, an applicant may be able to demonstrate that the addition will not cause additional obstruction to flow. Relocating a building to a portion of the floodway that experiences flooding to a lesser

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degree may also reduce flood impacts on the building and surrounding areas. Therefore, revision to the building's existing footprint is permitted in those cases where an applicant demonstrates that such revision will not further obstruct the flow of floodwaters, and where an engineering certification confirms that any proposed building is designed to be suitably flood resistant. Additionally, the standards for construction in a floodway at proposed N.J.A.C. 7:13-11.3(c)2 are amended to note that the elevation of a building in a floodway is permitted provided the requirements of N.J.A.C. 7:13-12.5(g) are met.

Proposed N.J.A.C. 7:13-12.5(h) recodifies with amendments existing N.J.A.C. 7:13-11.5(f) and sets forth the individual permit standards for constructing an addition to an existing building in a floodway. The subsection clarifies that an addition to a building can be either vertical, such as the construction of a new level above an existing building, or horizontal, such as the construction of a room adjacent to an existing building. The applicant must also demonstrate that the proposed addition will not further obstruct flood flows, since it is not always obvious whether a proposed addition meets this requirement. An engineering certification is necessary to confirm that the existing building in combination with the addition is designed to be suitably flood resistant and that the flood resistance must include resistance to buoyancy, which is not specifically mentioned in the existing rule. The proposed rules increase protection of public safety by requiring that the forces the building can withstand are those resulting from flooding to at least one foot above the flood hazard area design flood elevation, as opposed to the current requirement that forces due to flooding to the flood hazard area design flood elevation be analyzed. This additional foot of protection will ensure that the structural members of the lowest floor will be less likely to be impacted by flooding. For consistency throughout the chapter, the

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standards for construction in a floodway at proposed N.J.A.C. 7:13-11.3(c)3 are amended to note that the construction of an addition to a building in a floodway is permitted provided the requirements of N.J.A.C. 7:13-12.5(h) are met.

Existing N.J.A.C. 7:13-11.5(g) through (m) are proposed to be recodified at proposed N.J.A.C. 7:13-12.5(i) through (o), respectively, with the following amendments:

Proposed N.J.A.C. 7:13-12.5(i)3 and 4 are amended to clarify that the requirement to set the lowest floor of a building as close as feasible to one foot above the flood hazard area design flood elevation precludes the possibility of setting the lowest floor below grade along all adjoining exterior walls, such as constructing a building with a basement. Belowground enclosures in a flood hazard area are unsafe for occupants and can lead to increased loss of life and property during flood events. For these reasons, constructing belowground enclosures below the lowest floor of a building that will be used for habitation is prohibited under existing N.J.A.C. 7:13-11.5(n), proposed N.J.A.C. 7:13-12.5(p). Buildings with belowground enclosures to be used for habitation in a flood hazard area are additionally prohibited under the Uniform Construction Code. Proposed N.J.A.C. 7:13-12.5(j) and (k) are amended to clarify that these subsections are applicable to buildings that have been subject to “substantial damage,” as defined at N.J.A.C. 7:13-1.2. Proposed N.J.A.C. 7:13-12.5(n) is amended to list the types of structures that would be considered to fall within the residential use category currently covered by the rule and to expand the requirements contained in this subsection to include critical buildings for the reasons explained in the summary of proposed N.J.A.C. 7:13-12.5(f) above. Since the floor elevation standards set forth at proposed N.J.A.C. 7:13-12.5(i) are more stringent for a single-family home, duplex, multi-residence building, or critical building than for a non-residential

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building, it is necessary to ensure that a building being converted into one of these uses is appropriately elevated.

Proposed N.J.A.C. 7:13-12.5(p) consolidates with clarifying and substantive amendments existing N.J.A.C. 7:13-11.5(n), (o), and (p). Existing N.J.A.C. 7:13-11.5(n) sets forth standards for enclosures below the lowest floor of a habitable building, existing N.J.A.C. 7:13-11.5(o) establishes additional requirements where an enclosure is proposed to be utilized as a garage for a private residence, and existing N.J.A.C. 7:13-11.5(p) requires that the deed for the lot on which any such enclosure or garage is being constructed is modified to alert future owners of the enclosure of potential flood risks. The additional requirements for a garage at existing N.J.A.C. 7:13-11.5(o) are proposed to be expanded to apply to any enclosure below the flood hazard area design flood elevation that is intended to be used as a garage or parking area, in order to ensure that such enclosures are safe and suitably flood resistant, and to increase public awareness of potential flood damage associated with the use of such enclosures. Under existing N.J.A.C. 7:13-11.5(o), a garage constructed as part of a residential subdivision or multi-unit development could not be issued an individual permit under the existing subsection. Further, only a garage constructed on a lot that did not receive preliminary or final subdivision approval after November 5, 2007, could be granted an individual permit under the existing subsection. These standards have proven to be overly restrictive, in many cases unnecessarily preventing the construction of a new garage or the modification of an existing garage. The purpose of the existing provisions is to ensure that garages are appropriately elevated above the design flood elevation, thereby reducing flood damage potential for residents. However, in many cases, a garage constructed on a small lot cannot practicably be elevated above the design flood

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elevation. Furthermore, the Department of Community Affairs, through the Uniform Construction Code, permits the construction of enclosures below the lowest floor of a building, which are used solely for parking of vehicles, building access or storage, as reflected by existing N.J.A.C. 7:13-11.5(n)1, proposed N.J.A.C. 7:13-12.5(p)1. As a result of the additional requirements for garages at existing N.J.A.C. 7:13-11.5(o)2 and 3, constructing a garage for a single-family home or duplex is inadvertently more difficult than constructing a garage that serves a multi-residence building, such as a townhouse or condominium complex, or any other type of building. Furthermore, the elevation requirements for driveways and other roadways at existing N.J.A.C. 7:13-11.6, proposed N.J.A.C. 7:13-12.6, ensure that a roadway or parking area serving a single-family home, duplex or multi-residence building is elevated where practicable. The maximum practicable elevation of a roadway generally dictates the floor elevation of any garage or enclosure to which the driveway leads. Given that the Uniform Construction Code permits the construction of garages below the design flood elevation, and given the standards for roadways at proposed N.J.A.C. 7:13-12.6, which adequately ensure the safety of residents, the Department is not proposing to continue existing N.J.A.C. 7:13-11.5(o)2 and 3.

Existing N.J.A.C. 7:13-11.5(q) through (t), which set forth flood-proofing requirements for a building that cannot feasibly be elevated under existing N.J.A.C. 7:13-11.5(i), are recodified with the following clarifying amendments at proposed N.J.A.C. 7:13-12.5(q) through (t), respectively. The wording of these existing subsections implies that all flood-proofed buildings are subject to their requirements. This is not the case, however, as existing N.J.A.C. 7:13-11.5(n), (o) and (p), proposed N.J.A.C. 7:13-12.5(p), set forth requirements for enclosed areas beneath the lowest floor of a building and require a type of wet flood-proofing for these

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enclosures, such as the use of flood vents, in accordance with the Uniform Construction Code.

Therefore, proposed N.J.A.C. 7:13-12.5(q) through (t) are amended to clarify that the flood-proofing requirements set forth in these subsections do not apply to enclosures that meet the requirements of proposed N.J.A.C. 7:13-12.5(p).

Existing N.J.A.C. 7:13-11.5(t), which establishes that the Department shall not issue an individual permit to flood-proof a new private residence, a new public building, or any residential portions of a new multi-residence building, is proposed to be expanded to prohibit flood-proofing of existing residential buildings. Flood-proofing of residential buildings is similarly prohibited under FEMA's National Flood Insurance Program due to the high risk of creating or continuing living space below the flood elevation.

### **Roadways, parking areas, bridges and culverts**

The Department is proposing a number of amendments to the standards for new, reconstructed, improved, and expanded roadways, bridges, and culverts, in order to provide additional clarity and guidance to prospective applicants, facilitate redevelopment and recovery activities, and help ensure that these structures are flood-resistant and do not exacerbate flooding or adversely impact the environment.

#### Definitions related to roadways (N.J.A.C. 7:13-1.2)

The definition of "public roadway" is proposed to be amended to apply to a roadway that is intended for public use and is constructed by or on behalf of a government entity rather than a roadway that is maintained by a government entity. In some cases, a private developer will

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propose to construct a roadway, such as a roadway that accesses a residential subdivision, which becomes the responsibility of a public entity to maintain upon completion of the project. In order to accommodate the various State and Federal requirements that apply to the construction and improvement of public roadways, Table C at existing N.J.A.C. 7:13-10.2, proposed Table 11.2 at proposed N.J.A.C. 7:13-11.2, allows a greater area of riparian zone disturbance for public roadways than for private roadways. Further, public roadways are provided additional flexibility under existing N.J.A.C. 7:13-11.6(b), proposed N.J.A.C. 7:13-12.6(b), with regard to the elevation of the travel surface in flood hazard areas, which is not universally appropriate for private roadways. Therefore, the definition is proposed to be amended to ensure that the flexibility described above is applied to the correct set of roadways.

#### Permits-by-rule (N.J.A.C. 7:13-7)

The proposal includes four permits-by-rule to facilitate minor construction activities related to roadways, bridges and culverts. Three continue existing permits-by-rule and one is new.

#### *Permit-by-rule 40 (N.J.A.C. 7:13-7.40)*

Proposed N.J.A.C. 7:13-7.40 incorporates with amendments existing N.J.A.C. 7:13-7.2(d)1, which authorizes the repaving and/or resurfacing of a lawfully existing paved roadway or paved parking area outside a floodway. Milling pavement, which involves removing the upper layer of pavement and replacing the milled pavement with a new layer, is added to the authorized activities, since milling that meets the requirements of this permit-by-rule will not exacerbate

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flooding or adversely impact the environment.

Whereas the existing permit-by-rule specifies that the existing roadway may not be expanded, the proposed permit-by-rule clarifies that the existing area of pavement may not be expanded, since this permit-by-rule addresses milling, repaving, and resurfacing of lawfully existing pavement, which could include not only roadways, but other paved areas, such as parking areas, sidewalks, and playgrounds. Additionally, the existing limitation on raising the surface of the pavement by no more than three inches is proposed to apply only to areas mapped as a fluvial flood fringe on a Department delineation or within areas mapped by FEMA as a fluvial 100-year floodplain. Flood hazard areas exist along all regulated waters, regardless of the availability of a Department delineation or FEMA flood mapping. However, roadways and other paved areas are most likely to be inundated by floodwaters along those regulated waters having a large drainage area, in which case a Department delineation and/or FEMA flood mapping is generally available. Further, determining the flood hazard area along regulated waters having a small drainage area, where no Department delineation or FEMA flood mapping is available, involves undertaking calculations and applying for a flood hazard area verification, which generally demonstrates that the pavement is not inundated. Additionally, while some material that is milled from roadways can be reused to form new paving media, a large amount of milled material must be disposed of in accordance with the Department's Solid Waste rules. The proposed permit-by-rule therefore limits the volume of milled material that must be disposed of, while providing a clear limit within which the limitation on raising the surface of the pavement applies.

Since fill in a tidal flood fringe, or outside the flood hazard area altogether, will not

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exacerbate flooding, there is no need to limit the thickness of the pavement in these areas.

Further, whereas the existing permit-by-rule does not apply to pavement within a floodway, the proposed permit-by-rule is expanded to allow repaving in a floodway provided the travel surface elevation is not raised. In some cases, repaving can be accomplished by replacing milled pavement with a new layer. Repaving in this manner will not obstruct flood flows and is therefore authorized under this permit-by-rule. Finally, whereas the existing permit-by-rule requires that no vegetation is cleared, cut, and/or removed in a riparian zone, the Department recognizes that temporary disturbance to areas around the pavement may be necessary to facilitate repaving and/or resurfacing. As such, the requirement is proposed to be amended to restrict the clearing, cutting, and/or removal of riparian zone vegetation to actively disturbed areas within 20 feet of the pavement, where such disturbance is necessary to undertake activities authorized by the permit-by-rule.

*Permit-by-rule 41(N.J.A.C. 7:13-7.41)*

Proposed N.J.A.C. 7:13-7.41 incorporates with amendments existing N.J.A.C. 7:13-7.2(d)2, which authorizes the construction of a guardrail along a public roadway approved by a public entity. The word “guardrail” is proposed to be replaced with “guiderail” as this term is more appropriately descriptive and is preferred by the New Jersey Department of Transportation. Further, rather than require that the installation of the guiderail be approved by a public entity, the proposed permit-by-rule requires that installation of the guiderail is required and overseen by the public entity having jurisdiction over the roadway. This amendment is necessary to ensure that the public entity is responsible for activities authorized under this permit-by-rule. Whereas

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the existing permit-by-rule requires that no trees are cleared, cut, and/or removed in a riparian zone, the Department recognizes that disturbance to areas around the guiderail may be necessary to facilitate its construction. As such, riparian zone vegetation may be disturbed within four feet of the guiderail, where such disturbance is necessary to comply with all State or Federal requirements governing the placement, maintenance, and functionality of guiderails. However, due to the important functions trees provide in close proximity to a top of bank, trees cannot be disturbed within 25 feet of a top of bank under this permit-by-rule; if it is necessary in a particular circumstance for trees within this area to be disturbed, Department review of a general permit or individual permit application is appropriate. An exception is made for trees adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water, for reasons discussed in the introduction to the riparian zone summary above.

*Permit-by-rule 42 (N.J.A.C. 7:13-7.42)*

Proposed N.J.A.C. 7:13-7.42 incorporates with amendments existing N.J.A.C. 7:13-7.2(d)4, which authorizes the reconstruction of all or part of a lawfully existing bridge superstructure over a regulated water. The superstructure is the part of a bridge that rests on the piers and abutments, and generally includes its beams, stringers, decking, roadway surface, and/or parapets. The existing permit-by-rule authorizes the reconstruction of all or part of a lawfully existing bridge superstructure over a regulated water, provided the reconstructed portion lies above the flood hazard area design flood elevation. As such, the reconstructed portion need not be “in-kind,” since changing the shape or size of a bridge superstructure situated above the flood hazard area design flood elevation will not affect the flow of floodwaters through the

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bridge. In order to provide additional flexibility, the proposed permit-by-rule is expanded to allow any portion of a superstructure that lies below the flood hazard area design flood elevation to be replaced, provided the replacement is “in-kind.” This amendment will allow a greater number of bridge replacements to qualify for a permit-by-rule while ensuring that the replacement will not alter the hydraulic characteristics of the bridge. The proposed permit-by-rule additionally incorporates limits on the area of riparian zone vegetation that can be disturbed to accommodate the authorized activities, in order to avoid impairment of riparian zone functionality.

*Permit-by-rule 43 (N.J.A.C. 7:13-7.40)*

Proposed N.J.A.C. 7:13-7.43 establishes a new permit-by-rule that authorizes the placement of one or more traffic safety structures on poles, such as overhead signs, variable message signs, streetlights, traffic signal equipment, or other similar structures intended to facilitate travel safety along a public roadway. Since the existing rules have no provision for such structures, an individual permit is required for each installation. However, such structures, which are beneficial to public safety, can be erected with no adverse impact on flooding or the environment, provided the requirements of this proposed permit-by-rule are satisfied. Specifically, any footing necessary to support the structure must be constructed primarily at or below grade, such that the top of the footing lies no more than 12 inches above ground. It is customary for the top of the structure’s concrete footing to extend several inches above grade, in order to provide an elevated surface to which the structure will be connected. By limiting the top of the footing to this height, flood storage displacement will be minimal, and the structure will

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have no significant impact on flooding. The proposed permit-by-rule additionally incorporates limits on the area of riparian zone vegetation that can be disturbed to accommodate the authorized activities in order to avoid impairment of riparian zone functionality, as well as limitations on proximity of activities to a top of bank in order to preserve channel stability.

#### General permits-by-certification (N.J.A.C. 7:13-8)

The Department is proposing a general permit-by-certification to facilitate minor construction activities related to roadways, bridges and culverts. As noted in the introduction of this summary, general permits-by-certification are new to this chapter.

#### *General permit-by-certification 10 (N.J.A.C. 7:13-8.10)*

Proposed N.J.A.C. 7:13-8.10 establishes a new general permit-by-certification that authorizes the in-kind replacement of a culvert. A definition for the term “in-kind” is proposed at N.J.A.C. 7:13-1.2, as discussed in the summary of maintenance, repair, reconstruction, and redevelopment activities below. The replacement of a culvert with a structure having the same dimensions, position and location will not cause any adverse impact to flooding or the environment, provided certain requirements as outlined in this general permit-by-certification are met.

Under the proposed general permit-by-certification, the culvert being replaced must not have been removed more than one year prior to replacement. Removing a culvert will allow a channel to revert to its pre-construction condition. More than a year after the removal of a culvert, a channel will generally have reverted enough that constructing a replacement structure

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can impact flooding and the environment similar to the construction of a new structure.

Therefore, a culvert that has been removed for more than one year can be replaced only under an application for an individual permit allowing for appropriate Department review of the project and its impacts. Additionally, the channel along which the culvert is being replaced cannot be scoured, incised, or otherwise situated such that the culvert invert (the lowest point on the inside of the culvert) lies more than six inches above the invert of the regulated water. Replacing such a culvert in-kind will not likely be stable and could exacerbate erosion and flooding. As confirmed by an engineering certification, the replacement culvert must furthermore be made of the same material as the culvert being replaced, unless the width or diameter of the culvert is no more than two feet and/or the length of the culvert is no more than 20 feet. Culverts can be constructed of a variety of materials, such as concrete, galvanized steel, aluminum, or high density polyethylene, all of which have a different roughness coefficient. A change in the internal roughness of a culvert can affect the amount of water that a culvert can convey and therefore affect flood elevations upstream or downstream of the structure. However, flow through culverts having a diameter of no more than two feet and/or having a length of no more than 20 feet is governed by the diameter of the culvert rather than the internal roughness of the structure.

In order to ensure that the proposed replacement culvert is hydraulically equivalent to the culvert being replaced, the replacement culvert must also have the same wingwall configuration as the existing culvert, and the elevation of the crown of the roadway profile above the culvert and the dimensions of any parapets cannot be altered within the flood hazard area. Both of these requirements must be confirmed by an engineering certification. In some cases, a culvert may be inadequately sized to convey flows under a roadway and floodwaters will overtop the roadway

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surface. Changing the geometry of the road surface can therefore affect upstream or downstream flooding, which the Department must evaluate under a general permit or individual permit application. Finally, timing restrictions set forth at N.J.A.C. 7:13-11.5(d) must be observed for activities under this general permit-by-certification, in order to minimize impacts to fishery resources.

#### General permits (N.J.A.C. 7:13-9)

The Department is proposing four general permits to facilitate minor construction activities related to roadways, bridges, and culverts. Proposed general permit 3 incorporates with amendments existing general permit 3 for bridge or culvert scour protection activities, proposed new general permit 7 authorizes the relocation of manmade roadside ditches to facilitate public roadway improvements, proposed general permit 9 expands activities authorized under existing general permit 9 for the construction of a roadway or footbridge across a regulated water that has a drainage area of less than 50 acres, and proposed new general permit 10 authorizes the reconstruction of certain bridges and culverts across a regulated water that has a drainage area of 50 acres or more.

#### *General permit 3 (N.J.A.C. 7:13-9.3)*

Proposed N.J.A.C. 7:13-9.3 incorporates with amendments general permit 3 at existing N.J.A.C. 7:13-8.5, which authorizes the placement of stabilization material in a regulated water in order to prevent scouring of bridge abutments or footings along roadways. Scouring is a pervasive problem along many of New Jersey's bridges and culverts, where the soil, rock, and

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structures that stabilize the abutments have eroded away over time, threatening the integrity of the entire roadway. To protect public safety, State and Federal transportation authorities regularly allocate funds to stabilize banks and channels to prevent such erosion. This general permit facilitates maintenance of infrastructure and provides for undertaking an essential safety measure.

Proposed N.J.A.C. 7:13-9.3(a) sets forth the scope of the general permit. Whereas existing general permit 3 authorizes only public entities to perform scour protection activities, authorization under proposed general permit 3 is not limited to public entities. Scour can equally threaten both public and private structures. Accordingly, it is in the best interest of public health, safety, and welfare, as well as the environment, to facilitate scour protection activities along any roadway.

The types of scour protection activities that are eligible for authorization under general permit 3 differ from those eligible under existing general permit 3 because the activities that can be authorized under the existing general permit have proven to be too restrictive. Activities under the proposed general permit must be necessary for the maintenance and/or protection of an existing bridge or culvert and intended to remedy a localized scour problem within or adjacent to a bridge or culvert. The proposal clarifies that this general permit is not intended for remedying large sections of severely eroded or unstable channel that are not associated with a localized scour problem. Such activities are beyond the scope of this general permit and require the Department's review under an individual permit, since large-scale channel stabilization projects can create unintended adverse environmental impacts and exacerbate flooding if not carefully designed and undertaken.

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Requiring scour protection activities to replicate conditions present when the bridge or culvert was originally constructed is often impractical and may result in obstructions to flow and may not allow the necessary scour protections to be implemented. In light of the other conditions applicable to the proposed general permit, deleting this requirement will allow more flexibility in scour protection activities without exacerbating flooding or adversely impacting the environment.

The proposed general permit incorporates the existing limits on the amount of stabilizing material placed in the channel, and the requirement that stabilizing material must not obstruct flow in the channel or floodway, with the following amendments. Rather than limit the placement of material to that which has eroded away since the bridge or culvert was originally constructed, an applicant is required to provide an engineering certification confirming that the amount of stabilizing material placed in the channel is no greater than necessary to protect the structure from failure or collapse due to undermining of abutments or piers. The proposed provision further clarifies that the channel velocity used to determine the necessary amount of stabilizing material shall be based on bank full flow, unless the U.S. Federal Highway Administration requires another standard to be used, since relying on velocities for larger storms may result in an overestimation of the amount of stabilizing material required. The engineering certification shall also confirm that proposed stabilizing material does not obstruct flow in the channel or floodway or cause flooding outside the channel to increase.

The existing requirement regarding the use of indigenous substrate in the channel is amended to apply only where such material would be feasible and effective, rather than where possible. While it may be possible to place native substrate, this does not guarantee that its

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placement would be feasible or effective in promoting scour protection. The term “indigenous” is replaced with “native” since “native substrate” is used elsewhere in the chapter when referring to the same material. Furthermore, the depth of the native substrate is also clarified to be two feet, which is consistent with existing and proposed individual permit requirements for bridges and culverts.

Two existing requirements regarding access to the channel are proposed to be amended. Whereas the existing general permit requires that every effort is made to perform the activity from only one bank, the proposed general permit clarifies that the project, where possible, must be conducted from only one bank. Further, whereas the existing general permit requires that, where possible, vegetation and canopy on the more southerly or westerly bank is preserved for shading of the water, the proposed general permit requires that, in all cases, the existing tree canopy on the more southerly or westerly bank is preserved. By protecting the existing tree canopy, the general permit ensures that adverse impacts to riparian zone functionality are minimized.

*General permit 7 (N.J.A.C. 7:13-9.7)*

Proposed N.J.A.C. 7:13-9.7 establishes a new general permit that authorizes the relocation of manmade roadside ditches to facilitate public roadway improvements. Manmade ditches are commonly created adjacent to existing public roadways in order to provide roadway drainage. Pursuant to N.J.A.C. 7:13-2.2(a)3, manmade ditches that have a drainage area of less than 50 acres are not regulated under this chapter. However, in cases where a roadside manmade ditch has a drainage area of 50 acres or more, the ditch possesses both a riparian zone and flood

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hazard area under N.J.A.C. 7:13-2.3. Public entities sometimes find it necessary to straighten, widen, relocate or otherwise modify existing roadway geometry in order to ensure the safety of the travelling public. Such activities can require that an existing roadside ditch be relocated. Manmade roadside ditches can be relocated, without adverse impacts to flooding or the environment, provided relocation is undertaken within certain parameters as set forth in this proposed general permit.

To be eligible for this general permit, the public entity responsible for maintaining the roadway must determine that relocation of the roadside ditch is necessary for the continued safe use of the roadway, thereby justifying the need for environmental impacts. The ditch cannot be enclosed in a pipe, since that would eliminate the riparian zone of the feature under proposed N.J.A.C. 7:13-2.2(c)1v. The relocated ditch must furthermore possess equal flood carrying capacity as the existing ditch, which is necessary to ensure that the relocation of the ditch does not adversely impact upstream or downstream flooding. Finally, in order to ensure that riparian zone functionality is not significantly impacted, the project cannot result in a net loss of greater than one-quarter acre of riparian zone vegetation.

#### *General permit 9 (N.J.A.C. 7:13-9.9)*

Proposed N.J.A.C. 7:13-9.9 incorporates and expands activities authorized under existing general permit 9 at N.J.A.C. 7:13-8.11. Existing general permit 9 provides for the construction of a roadway or footbridge across a regulated water that has a drainage area of less than 50 acres. Proposed general permit 9 authorizes only bridges and culverts since a separate general permit is proposed for footbridges at proposed N.J.A.C. 7:13-9.8.

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To qualify for this general permit, in addition to the proposed structure not crossing a regulated water having a drainage area of 50 acres or greater, the structure cannot be located in the flood hazard area of any regulated water that has a drainage area of 50 acres or greater. This is necessary to ensure that the bridge or culvert will not adversely impact flooding from the second regulated water that isn't crossed. The proposed structure must additionally meet certain requirements necessary to ensure that the structure will remain stable and scour resistant, as well as resistant to displacement and/or damage. Stability and footing requirements are specified in order to ensure these criteria are met. The proposed standards are similar to the individual permit requirements for bridges and culverts at existing N.J.A.C. 7:13-11.7 and proposed N.J.A.C. 7:13-12.7.

The proposed structure must match or exceed the dimensions of the existing channel, where feasible, so that the size and shape of the natural channel is preserved throughout the structure. Low-flow aquatic passage must be preserved through a stable, natural, earthen channel, where feasible, limitations are placed on the placement of armor within the channel, all temporary disturbances to the channel must be restored, and applicable timing restrictions must be observed. These requirements incorporate the individual permit requirement for bridges and culverts and are necessary to minimize adverse impacts on aquatic biota and avoid increased erosion within the channel. Limitations are placed on the area of riparian zone vegetation that can be disturbed, in order to avoid adverse impacts to riparian zone functionality. Finally, where the project, in combination with all proposed activities, constitutes a major development, all applicable requirements of the SWM rules, N.J.A.C. 7:8, must be met. This is necessary to ensure that proposed activities do not impair quality of surface waters, increase stormwater

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management runoff, or decrease groundwater recharge.

*General permit 10 (N.J.A.C. 7:13-9.10)*

Proposed N.J.A.C. 7:13-9.10 authorizes the reconstruction of a bridge or culvert in certain circumstances that currently require an individual permit. While most bridge and culvert reconstruction projects require the Department to review detailed engineering calculations in order to ascertain whether the replacement structure will possess equivalent hydraulic characteristics as the existing structure, certain types of bridge and culvert replacements can be undertaken without an engineering analysis, in cases where the structure is replaced “in-kind,” as that term is proposed to be defined at proposed N.J.A.C. 7:13-1.2, or where the replacement structure varies only slightly in shape or dimension as compared with the structure being replaced. This general permit therefore establishes limitations on minor variations in size and dimensions that are permissible for a replacement bridge or culvert to be approvable under this general permit without the need for review of detailed engineering calculations.

To qualify for this general permit several requirements must be met. To ensure that the replacement structure will not exacerbate flooding, the applicant must provide an engineering certification confirming that the proposed bridge or culvert is designed to not increase the frequency or depth of offsite flooding during the flood events set forth at proposed N.J.A.C. 7:13-12.1(i), the summary of which explains why these flood events were selected. The proposed general permit also sets limitations on the structural alterations that can be made to the shape, size and location of the existing bridge or culvert, in order to ensure that the hydraulic capacity of the reconstructed bridge or culvert is substantially equivalent to the hydraulic capacity of the

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existing bridge or culvert. The term “hydraulic capacity” is defined at N.J.A.C. 7:13-1.2 and relates to the ability of a structure to conduct water. If a replacement bridge or culvert has a significantly greater hydraulic capacity than the structure it replaces, more floodwaters will be able to pass through the structure and increased downstream flooding can occur. Conversely, if a proposed bridge or culvert has a significantly smaller hydraulic capacity than the structure it replaces, flooding upstream of the structure could increase. A replacement structure that has a substantially equivalent hydraulic capacity as the structure it replaces will, therefore, not significantly alter flood elevations either upstream or downstream of construction. Therefore, it is essential that, for a proposed project to be approvable without detailed engineering calculations, the limitations established in this proposed general permit are met. Specifically, limitations on changes to the cross-sectional area of the structure, the width-to-height ratio of the structure, the length and orientation of the structure, and the elevation of the roadway profile above the bridge or culvert are proposed, since all of these factors affect the hydraulic capacity of a bridge or culvert. The limitations specified in the proposed rule represent changes to each of these factors determined by the Department to result in minimal impacts to flooding.

Furthermore, in some cases, an existing bridge or culvert is unable to convey the flood flows reaching it. In such an event, floodwaters eventually overtop the roadway surface, which then acts like the spillway of a dam. If the elevation of the roadway surface were to be changed, this can result in a corresponding change to the flood elevation upstream of the roadway. As such, the elevation of the crown of the roadway profile above the bridge or culvert cannot be altered within the flood hazard area, to ensure that flood flows crossing over the bridge or culvert are not altered.

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Additional requirements are proposed to ensure that the bridge or culvert is designed to remain stable, scour resistant, and resistant to displacement and/or damage, and to avoid any adverse impacts to aquatic, semi-aquatic, and terrestrial resources, which mirror the individual permit standards at existing N.J.A.C. 7:13-11.7, proposed N.J.A.C. 7:13-12.7. Low-flow aquatic passage must be preserved through a stable, natural, earthen channel, where feasible, limitations are placed on the placement of armor within the channel, all temporary disturbances to the channel must be restored, and applicable timing restrictions must be observed. These requirements incorporate the individual permit requirement for bridges and culverts and are necessary to minimize adverse impacts on aquatic biota and avoid increased erosion within the channel. Finally, limitations are placed on the area of riparian zone vegetation that can be disturbed, in order to avoid adverse impacts to riparian zone functionality.

Individual permit requirements for railroad, roadway or parking area (N.J.A.C. 7:13-12.6)

Proposed N.J.A.C. 7:13-12.6 recodifies with clarifying and substantive amendments existing N.J.A.C. 7:13-11.6, which sets forth requirements that must be met for the issuance of an individual permit for the construction of a railroad, roadway or parking area within a flood hazard area.

Under proposed N.J.A.C. 7:13-12.6(c)1, a driveway serving a new single-family home or duplex, including any associated parking area, cannot serve a building that is being constructed as part of a residential subdivision or multi-unit development, the standards for which are set forth at existing N.J.A.C. 7:13-11.6(f), proposed N.J.A.C. 7:13-12.6(e). To eliminate the possible misconception that this subsection covers a driveway serving a private residence that is being

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constructed as part of a “smaller” residential subdivision, consisting of perhaps two or three houses, the rule is reorganized and reference to a “larger” residential subdivision is eliminated. Both in the existing and proposed rules, all residential subdivision and multi-unit development are subject to the standards set forth at existing N.J.A.C. 7:13-11.6(f), proposed N.J.A.C. 7:13-12.6(e), not this section (see proposed N.J.A.C. 7:13-12.6(c)1).

Similar to changes discussed above, and consistent with existing N.J.A.C. 7:13-10.2(g)4, the Department is amending this subsection to make clear that the subdivision process cannot be utilized to circumvent the more stringent requirements of this chapter that apply to residential subdivisions and to roads that access them through flood hazard area (proposed N.J.A.C. 7:13-12.6(c)2).

Proposed N.J.A.C. 7:13-12.6(c)3 recodifies with amendments existing N.J.A.C. 7:13-11.6(c)1 and 2. The existing paragraphs require that a driveway serving a new private residence be constructed at least one foot above the design flood elevation, with limited exception where it is demonstrated that construction at that elevation is not feasible. Where it is demonstrated that it is not feasible to construct the driveway at least one foot above the design flood elevation, specific information is required to be added to the property deed to provide notice to potential future purchasers of the potential for flooding of the driveway. Requiring the disclosure of the minimum frequency flood at which the driveway will be inundated is proposed for deletion, since determining this elevation in many cases requires a detailed hydrologic and hydraulic analysis of the flood hazard area, which is unnecessarily burdensome for applicants. The permittee is instead required to disclose the depth of flooding that the driveway would experience during the FEMA 100-year flood, if available, and during the flood hazard area

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design flood. While the flood hazard area design flood elevation can be determined in accordance with the methods set forth in N.J.A.C. 7:13-3, and in most cases would need to be known before an individual permit can be issued for a single-family home or duplex, the FEMA 100-year flood elevation may not be published for a particular regulated water or location. While information on flooding during both flood events is important, the Department believes that, where the FEMA 100-year flood elevation is not available, information on flooding during the flood hazard area design flood provides sufficient information to allow future prospective purchasers of the property to make informed decisions as to potential impacts from flooding. The existing requirement to provide the Department with a copy of the modified deed, as filed with the local county clerk, within 90 calendar days of issuance of the individual permit is amended to specify that the modified deed must be recorded in the office of the County Office of the County Clerk or the registrar of deeds and mortgages of the county in which the building is located, and that proof the modified deed has been recorded must be provided to the Department prior to the sooner of either the start of any site disturbance or 90 calendar days after the issuance of the individual permit. This matches the process to record conservation restrictions under proposed N.J.A.C. 7:13-14.1(b), and generally ensures that the modified deed is recorded prior to a person entering into a contract to purchase the property, so that prospective buyers are aware of potential flood risks.

Proposed N.J.A.C. 7:13-12.6(e) incorporates with clarifying amendments the requirements at existing N.J.A.C. 7:13-11.5(f)1 and 2 for roadways not covered under proposed N.J.A.C. 7:13-12.6(c) and (d). Proposed N.J.A.C. 7:13-12.6(f) consolidates requirements for parking areas from existing N.J.A.C. 7:13-11.6(e) and (f). Under existing N.J.A.C. 7:13-11.6(e),

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a parking area that serves a public building or multi-residence building is subject to less stringent requirements than those established for parking areas for other buildings under existing N.J.A.C. 7:13-11.6(f). In order to ensure that the same level of protection is provided to people and property using any parking area covered in this subsection, the proposed amendments provide that an applicant proposing any parking area that cannot be elevated at least one foot above the flood hazard area design flood elevation must meet the requirements at proposed N.J.A.C. 7:13-12.6(g). Proposed N.J.A.C. 7:13-12.6(g), which sets forth individual permit requirements for roadways and parking areas that cannot feasibly be elevated as required in this section, incorporates existing N.J.A.C. 7:13-11.6(f)3 and (g).

#### Individual permit requirements for bridges and culverts (N.J.A.C. 7:13-12.7)

Proposed N.J.A.C. 7:13-12.7 incorporates with amendments existing N.J.A.C. 7:13-11.7, which sets forth requirements that must be met for the issuance of an individual permit for the construction of a bridge or culvert in a regulated area. The Department is proposing to reorganize this section for clarity and to make a number of amendments to reflect comments that have been received from public entities and licensed professional engineers regarding this section.

Proposed N.J.A.C. 7:13-12.7(a) clarifies the scope of the section. Under the existing rules at N.J.A.C. 7:13-11.8(c), if a structure does not meet the criteria specified in that section to qualify as a footbridge, the structure is required to meet the standards applicable to a bridge or culvert at existing N.J.A.C. 7:13-11.7. With the proposed new permit-by-rule for construction of a footbridge at N.J.A.C. 7:13-7.23 and the incorporation of the individual permit requirements for a footbridge currently codified at existing N.J.A.C. 7:13-11.8 into proposed general permit 12

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at proposed N.J.A.C. 7:13-9.12, the proposed amendment at proposed N.J.A.C. 7:13-12.7(a) clarifies that footbridges that do not qualify for the proposed permit-by-rule or the proposed general permit continue to be required to meet the standards applicable to other bridges and culverts.

Proposed N.J.A.C. 7:13-12.7(b) is new and clarifies that, in cases where an applicant prepares calculations and other analyses in conjunction with a project to construct or reconstruct a bridge or culvert, such material shall be provided to the Department in order to assist in evaluating the project. Applicants are additionally encouraged to discuss bridge and culvert projects with Division staff in order to determine whether calculations are required to demonstrate compliance with the proposed individual permit standards. Applicants sometimes assume that all bridge and culvert projects require the preparation and review of calculations. However, some bridge and culvert projects, in conjunction with the topography of a site, the drainage area of the regulated water being crossed, and the size, shape, and location of the structure, do not require a review of hydrologic or hydraulic calculations in order to determine compliance with the requirements of this section. Since the preparation of hydrologic and hydraulic calculations can be costly and time-consuming, the Department is proposing to alert prospective applicants that such calculations are not always necessary and to encourage dialog with the Department. Calculations under the section continue to be required to be rounded to nearest 0.1 foot, consistent with existing N.J.A.C. 7:13-11.7(c) and (d).

Proposed N.J.A.C. 7:13-12.7(c) incorporates with clarifying amendments existing N.J.A.C. 7:13-11.7(b)1, which sets forth basic requirements that must be met for all proposed new and reconstructed bridges and culverts. The existing provision requires any bridge, culvert,

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and embankment to be designed to remain stable, scour resistant, and resistant to displacement and/or damage during any flood event up to and including the flood hazard area design flood.

However, as satisfying this requirement would technically require an analysis of an infinite number of flood events up to the flood hazard area design flood, this provision is amended to refer to only the flood hazard area design flood. A structure that is secure during this flood will be stable for smaller floods as well.

Proposed N.J.A.C. 7:13-12.7(d)1 and 2 set forth requirements to limit the effects that new bridges and culverts can have on flood elevations offsite. The construction of a new bridge or culvert within or across a channel can affect flood elevations by causing an obstruction in the channel, which results in additional ponding of floodwaters upstream of the structure. Existing N.J.A.C. 7:13-11.7(c) requires an analysis of any flood event up to and including the flood hazard area design flood. This implies that a wide range of flood events must be analyzed in order to demonstrate compliance with these requirements. Since specific flood events are not listed, applicants interpret this requirement with great variety and provide hydrologic and hydraulic modeling of many combinations of flood events. Since the events selected by the applicant may not succeed in demonstrating compliance with the requirements of this chapter, or else are more numerous than would be required to demonstrate compliance, achieving compliance with this requirement has become unpredictable and sometimes overly costly and time-consuming for applicants. In order to provide more predictable application preparation costs, as well as more predictable review times and outcomes for submitted applications while ensuring that the proposed bridge or culvert does not exacerbate flooding, the Department is proposing to require an analysis of the specific flood events listed at proposed N.J.A.C. 7:13-

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12.1(i) for the reasons described in the summary of that section.

The proposed provision incorporates two additional requirements necessary to avoid unacceptable increases in offsite flooding. The first requirement incorporates existing N.J.A.C. 7:13-11.7(c)1 and relates to impacts that a new bridge or culvert can have on an offsite building, railroad, roadway or parking area. Whereas the existing provision applies this standard to all buildings, the proposed requirement addresses only habitable buildings. Flooding that impacts habitable buildings, such as homes, businesses, and schools, presents a much greater risk to people and property than flooding that impacts non-habitable buildings, such as sheds and utility buildings. Additionally, the proposed flood standards discussed below protect all buildings and property from the deleterious impacts of flooding, such that non-habitable buildings will be adequately protected.

The second requirement incorporates existing N.J.A.C. 7:13-11.7(c)2 and relates to impacts that the new bridge or culvert can have on all other offsite properties during the flood hazard area design flood. The existing provision requires that a new bridge or culvert cannot cause the flood hazard area design flood elevation to rise by more than 0.2 feet offsite. However, unlike the first requirement described above, the second requirement does not address flood events smaller than the flood hazard area design flood. A proposed bridge or culvert may cause little or no rise in the flood hazard area design flood elevation, but can result in significant impacts to the flood elevation during floods of less intensity. For example, a bridge or culvert may be proposed across a regulated water that possesses a very large flood hazard area. In such a case, the proposed bridge or culvert may cause little or no impact to the flood hazard area design flood elevation, which could overtop the roadway by several feet. However, the same structure

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could cause a significant increase in flood elevations during the two-year or 10-year flood. While these flood events are not generally as devastating as the flood hazard area design flood, they occur with much greater frequency. The Department is therefore proposing to require that any offsite land or structure not covered in the first requirement above be protected from the impacts of flooding for the range of storms as described at proposed N.J.A.C. 7:13-12.1(i).

Proposed N.J.A.C. 7:13-12.7(d)2 sets forth the types of hydrologic and hydraulic analyses that are conditionally acceptable for analyzing existing and proposed conditions for a new bridge or culvert, unless it is demonstrated that alternate methods would more accurately model the existing and/or proposed conditions. The existing FHACA Rules do not provide specific guidance on the types of analyses that can be submitted to the Department to demonstrate that a bridge or culvert meets the requirements of this section. The Department is therefore proposing to describe the basic parameters of such analyses, so that the calculations provided to the Department are appropriate to the type of work being proposed and include the information necessary for the Department to evaluate the project for compliance with this section.

The first type of calculation that is conditionally acceptable to analyze a proposed new bridge or culvert is a standard step backwater analysis. This type of analysis is appropriate in cases where the area upstream of the structure is not a permanent impoundment of water or would become a “level pool” of floodwaters during the flood being analyzed. In some cases, a road crossing can impound floodwaters and create a wide area of flooding with low velocity. In such a case, a hydrologic routing (described below) is a more appropriate method of analyzing flood depths. A standard step backwater analysis is a method of analyzing flow in an open

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channel in order to determine water surface elevations at various locations along that channel.

The computed water surface elevations are dependent upon the shape and slope of the channel and its overbank areas, the type of ground cover, and the peak flow rate of the watercourse. This method generally determines water surface elevations by balancing energy loss in the channel and overbank areas from one location in a watercourse to another. The analysis may be performed in either an upstream or a downstream direction depending upon the type of flow regime that exists in the watercourse. A standard step backwater analysis requires topographic data of the regulated water being studied (usually provided in the form of cross-sections at appropriate intervals), the roughness of the ground cover at each cross-section, detailed geometry of any bridge or culvert (including entrance and exit conditions) and expected tailwater (downstream flood) conditions. The most commonly used software to perform a standard step backwater analysis is known as HEC-RAS. This is a computer program developed by the U.S. Army Corps of Engineers to model the hydraulics of water flow through natural rivers and other channels and is available for download at <http://www.hec.usace.army.mil/software/hec-ras/> free of charge.

In certain cases, a hydrologic routing is acceptable to analyze a proposed new bridge or culvert. A hydrologic routing is a mathematical procedure for determining to rate at which water flows into and out of a confined area over time. This type of routing accounts for the effects of the storage of water behind an obstruction or impoundment, such as might be created upstream of a bridge or culvert. In addition to an inflow hydrograph, detailed topography of the water storage area and the configuration of the bridge or culvert must be known in order to perform the routing. Using this method, the peak elevation of water during a flood event upstream of a bridge

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or culvert can be determined.

An inlet/outlet control analysis is also in some cases conditionally acceptable. This is a relatively simple analysis performed to determine the water surface elevation upstream of a bridge or culvert. Flow through a structure is controlled by many variables, including its geometry (such as its shape, size, length, headwall configuration), the roughness of the material inside the structure, and the depth of water expected at the entrance and exit of the structure. Inlet control exists when flow through the structure is controlled by the size and shape of the entrance. Under inlet control, the most important factors used in analysis are the geometry of the inlet and the depth of water at the inlet. On the other hand, outlet control exists when flow through the culvert is limited by aspects of the culvert itself. Under outlet control, the most important factors used in analysis are the size, shape, slope, and roughness of the culvert, as well as the tailwater depth. An inlet/outlet control analysis may be done by hand using simple calculations or a series of nomographs published by the Federal Highway Administration. Alternatively, computer programs are available, some free of charge, that will perform these calculations.

Proposed N.J.A.C. 7:13-12.7(d)3 is new and requires that any new bridge or culvert and associated construction, which would cause fragmentation of habitat for terrestrial threatened or endangered species and/or any terrestrial species of special concern, must incorporate a preserved or restored natural bank of sufficient width to allow the species to pass through the structure, with artificial banks to be utilized only in limited circumstances. Numerous studies have shown that aboveground, manmade linear infrastructure such as roads, railroads, utilities and canals can create a barrier to the natural and necessary movement of wildlife, which leads to

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a number of detrimental impacts to a variety of species. For example, linear infrastructure can isolate species from food, water, shelter, and mates, and subdivide wildlife populations into smaller and more vulnerable sub-populations. Populations surrounded by roads and other infrastructure are also less likely to receive immigrants from other habitats, which results in a lack of genetic diversity. The relationship between roads and this process, known as fragmentation, is well documented and can lead to high mortality rates and even extinction if access to resources is significantly precluded or a species' gene pool is severely restricted. Wildlife-vehicle collisions resulting from species attempting to cross roadways to reach necessary resources located on the other side can furthermore present a significant hazard to both the survival of a species and the travelling public. One solution to help ameliorate these adverse impacts is to provide permanent structural openings beneath a roadway to allow species to freely cross from one side of the road to the other. Such crossings allow connections or reconnections between suitable habitats otherwise isolated by the road and reduce collisions between vehicles and animals. A successful means of incorporating wildlife crossings beneath roadways is to modify the design of bridges and culverts so that a portion of the natural bank of the channel is preserved or restored in order to allow terrestrial species to cross through the bridge or culvert on dry land adjacent to the channel. If a bridge or culvert is flowing full, terrestrial species are unlikely to attempt to walk or swim through the water to reach the other side. However, if a portion of dry bank is provided next to the channel within the bridge or culvert, the species is more likely to attempt crossing through the structure. Fencing, embankments, and other structural means of funneling wildlife to the bridge or culvert are also sometimes incorporated into the design of wildlife crossings.

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Because of the many social, economic, and environmental benefits afforded by wildlife crossings, the Department is proposing new standards to require wildlife crossings to be incorporated into any new bridge or culvert where wildlife fragmentation would occur. In such cases, each bridge or culvert authorized under an individual permit must incorporate a wildlife crossing that is accomplished by preserving or restoring a stable natural bank within the structure or, where this is not feasible, by creating an artificial bank or shelf inside the proposed bridge or culvert. Wildlife crossings can be constructed in a variety of ways inside a bridge or culvert. For example, a shelf can be attached to one or both sides of the interior of a bridge or culvert, in order to create a walkway for species above the normal water surface elevation within the structure, which connects to the ground on both sides of the roadway. Another method of providing an artificial wildlife crossing is to stack a series of gabion baskets (large wire-bound cubes filled with rock) along the sides of the interior of the bridge or culvert. Wildlife can walk along the top of these baskets and travel from one side of the road to the other. The width of the wildlife crossing, whether natural or created, must furthermore be sufficient to allow the passage of terrestrial wildlife. Since species vary from one location to another, the width of the passage should be appropriate for the species being accommodated. The applicant must additionally adopt appropriate measures, where necessary, to encourage the species to pass through the structure. This can include construction of berms and fences to discourage the species from crossing the roadway and to instead funnel the species into the proposed bridge or culvert.

The Department is additionally proposing a definition for the term “species of special concern” at N.J.A.C. 7:13-1.2 in order to identify one of the categories of species for which wildlife passage is proposed to be required. In February of 2012, the Department adopted and

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updated its Threatened and Endangered Species List. These updates included adding a new category for species of special concern, which serves as a watch list for species that warrant special attention due to population declines or vulnerability to habitat disturbances, which could result in the species becoming threatened if conditions surrounding the species continue to deteriorate. The list of species of special concern includes species of birds, invertebrates, reptiles, and amphibians. There are currently nine terrestrial species on the list of species of special concern. These species are: Eastern Box Turtle, Eastern King Snake, Northern Copperhead Snake, Spotted Turtle, Carpenter Frog, Fowlers Toad, Jefferson Salamander, Marbled Salamander, and Northern Spring Salamander. The complete list of species of special concern can be found on the Department's Division of Fish and Wildlife website at:

<http://www.nj.gov/dep/fgw/spclspp.htm>.

Proposed N.J.A.C. 7:13-12.7(e) sets forth the requirements, in addition to those established at proposed N.J.A.C. 7:13-12.7(c), for the reconstruction of an existing bridge or culvert. Reconstructing an existing bridge or culvert can affect offsite flood elevations if the bridge or culvert opening is made smaller or is constructed with a different shape. Similarly, if an existing bridge or culvert is replaced with a structure that is much larger, the new structure can allow more floodwaters to pass, which could lower upstream flood elevations but increase downstream flood elevations. The proposed subsection therefore incorporates the limitations on offsite flood impacts at existing N.J.A.C. 7:13-11.7(d), with amendments to match the proposed standards for new bridges and culverts for the same reasons as discussed in the summary above, and provides additional flexibility in cases where the incorporation of terrestrial wildlife passage into the design of the reconstructed bridge or culvert would result in increased offsite flooding.

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In such a case, flood depths are permitted to increase by no more than one foot within 500 feet of the project. This added flexibility is appropriate given the significant environmental benefits afforded by reconstructed bridges and culverts that incorporate terrestrial wildlife crossings.

Proposed N.J.A.C. 7:13-12.7(e)2 additionally sets forth the types of hydrologic and hydraulic analyses that are conditionally acceptable for analyzing existing and proposed conditions for the reconstruction of a bridge or culvert. A standard step backwater analysis is conditionally acceptable to analyze a reconstructed bridge or culvert, provided the area upstream of the structure is not a permanent impoundment of water or would become a level pool during the flood being analyzed, and provided the analysis takes into account any potential downstream impacts. For reconstructed bridges and culverts, any decrease in upstream water surface elevations indicates that more water is flowing through the replacement structure than the original structure, which can lead to increased flooding downstream. A hydrologic routing of downstream conditions in such a case can be used to model potential downstream impacts.

Alternate to a standard step backwater analysis, a hydrologic routing is conditionally acceptable to analyze a reconstructed bridge or culvert provided the analysis takes into account any potential downstream effect of a decrease in water surface elevations upstream of the bridge or culvert under proposed conditions, as noted above. An inlet/outlet control analysis is also conditionally acceptable to analyze a reconstructed bridge or culvert in the same cases described above for a new bridge or culvert, provided the analysis does not reveal a decrease in water surface elevations upstream of the bridge or culvert. In such a case, unacceptable downstream impacts could occur for the same reasons described in the Summary above.

For the same reasons discussed above regarding wildlife fragmentation related to a

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proposed new bridge or culvert, the Department is proposing to add a new requirement that any reconstructed bridge or culvert and associated construction, which currently causes fragmentation of habitat for terrestrial threatened or endangered species and/or any terrestrial species of special concern, must incorporate a preserved or restored natural bank of sufficient width to allow the passage of terrestrial wildlife through the structure, including the incorporation of additional appropriate measures to encourage the species to pass through the structure. Consistent with the requirements applicable to construction of a new structure, artificial banks may to be utilized only in the same limited circumstances.

Existing N.J.A.C. 7:13-11.7(e) divides all regulated water into three categories. Depending on the classification of the regulated water, existing N.J.A.C. 7:13-11.7(f), (g), and (h) require different levels of protection for aquatic biota. However, dividing regulated waters into these classifications has unnecessarily complicated the preparation and review of applications. While some waters, such as those supporting threatened or endangered species or containing trout resources, require special protections, the Department believes that reorganizing the existing provisions and eliminating requirements found to be problematic or unhelpful, as described below, will better protect the environment and assist applicants through the permit approval process.

Proposed N.J.A.C. 7:13-12.7(f) incorporates with amendments existing N.J.A.C. 7:13-11.7(i), which explains how spanning a regulated water is to be accomplished, as well as portions of existing N.J.A.C. 7:13-11.7(b)2. All bridges and culverts under this section must span the channel of a regulated water, unless the requirements at proposed N.J.A.C. 7:13-12.7(g) and (h) are met. The Department believes that this reorganization will simplify and clarify the cases

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when a channel should be spanned, as well as to assist applicants through the design process, while ensuring that potential adverse impacts to aquatic biota are minimized. Under the proposed requirements, the bridge or culvert must, to the extent feasible, match or exceed the dimensions of the existing channel so that the size and shape of the natural channel is preserved through the structure. Additionally, a span must be adequately sized so as not to cause a significant increase in velocity during the flood hazard area design flood. Furthermore, whereas the existing provision requires that a stable, natural, earthen channel with low-flow aquatic passage must be provided throughout the proposed bridge or culvert, the proposed rule recognizes that such stabilization may not in all cases be practicable. The proposed rule further clarifies that the stabilization should not only be provided throughout the structure itself but should extend to include any section of channel disturbed to accommodate the construction of the bridge or culvert. This is necessary to ensure that the channel more quickly reassumes its natural conditions after completion of the project.

Proposed N.J.A.C. 7:13-12.7(g) incorporates and consolidates portions of existing N.J.A.C. 7:13-11.7(f), (g), and (h), which describe the conditions that must be met to cross a regulated water when spanning a channel is not feasible, as well as the substance of existing N.J.A.C. 7:13-11.7(m), which provides a waiver from the requirement to span a channel. The proposed subsection sets forth the conditions under which a circular, elliptical, or box culvert that does not span the channel can be constructed. While spanning a channel with a bridge, arch-culvert, or three-sided culvert generally results in less environmental impact than constructing a circular, elliptical, or box culvert, the Department recognizes that there are situations when spanning a channel is not feasible for a variety of reasons. For example, meeting limitations on

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offsite flooding under this section may in some cases require that a specific size or shape of bridge or culvert be constructed at a given location, in which case the use of a span may not be possible. Additionally, spanning a channel is in some cases significantly more costly than constructing a circular, elliptical, or box culvert, and generally requires a much greater level of planning as well as a significantly longer construction time and, in certain circumstances, such as where there is no discernible channel or fishery resources, or the channel is manmade and/or lined with hard surfaces, does not result in a tangible environmental benefit, or in an environmental benefit that outweighs the social and/or economic costs associated with spanning. The circumstances in which spanning would result in little environmental benefit are identified in the proposed rules. Construction or reconstruction of a circular, elliptical, or box culvert is also proposed to be conditionally acceptable where a channel is less than 10 feet wide, since in such a case spanning the channel would not preserve the native substrate due to unavoidable construction techniques. Bridge abutments necessarily require the construction of footings that often extend several feet below ground and extend out horizontally underground around the perimeter of the abutment. If the channel is very narrow, the footings may extend under the majority of the channel and the footings from both abutments can sometimes even meet in the middle of the channel. Therefore, although the channel is technically spanned by the bridge, the footings in these cases extend under most or all of the channel, which means the channel will be fully disturbed during construction. While spanning is generally preferred because it preserves the natural channel with minimal disturbance, where the width of the stream is so small that the natural channel must be fully disturbed during construction to create the footings necessary to span the regulated water, spanning a channel with a bridge, arch culvert, or three-sided culvert

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does not provide a significant environmental benefit over constructing a circular, elliptical, or box culvert that, where possible, incorporates natural substrate within the bottom of the structure. The proposal additionally incorporates portions of existing N.J.A.C. 7:13-11.7(f), (g), and (h) that address situations where spanning the channel would not be feasible due to unstable or irregular channel characteristics, anticipated adverse hydraulic impacts to the channel, or other anticipated adverse impacts to offsite flooding, the environment, or public safety. Situations where spanning the channel would not be feasible due to a variety of physical constraints are also addressed.

Proposed N.J.A.C. 7:13-12.7(h) incorporates with clarifying amendments existing N.J.A.C. 7:13-11.7(l), which explains how to construct a single circular, elliptical, or box culvert, when such structures are allowed under the rules. The proposed standards are intended to ensure that construction will not adversely affect the environment or exacerbate flooding.

### **Maintenance, repair, and reconstruction activities**

Maintenance, repair, and reconstruction activities can have a wide range of impacts from temporary impacts during the conduct of the activities themselves, to potentially significant long-term impacts if changes are made to the structures or the activities themselves result in changes to riparian zone vegetation or channel hydrology. The Department is proposing a number of amendments to facilitate appropriate maintenance, repair, and reconstruction while assuring that these activities are performed in a manner protective of public safety, public and private property, and the environment.

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Definitions related to reconstruction (N.J.A.C. 7:13-1.2)

A new definition is proposed for “in-kind” and “in-kind replacement” to describe a type of construction activity in which all or a portion of a structure is reconstructed or replaced, without altering the location, orientation, physical dimensions, or hydraulic characteristics of the structure. An example of an in-kind replacement of a bridge or culvert is provided. If a structure is reconstructed or replaced in the manner set forth in the proposed definition, the reconstructed or replaced structure will occupy the same volume of flood storage as the original structure and, in the case of a water control structure, such as a bridge, culvert, or dam, the reconstructed or replaced structure will have the same hydraulic characteristics as the original structure. Additionally, if the structure is located within a riparian zone, the reconstructed or replaced structure will occupy the same area of land as the original structure, and therefore not affect riparian zone functionality.

Permits-by-rule (N.J.A.C. 7:13-7)

The proposed rules include five permits-by-rule to facilitate general maintenance, repair, and reconstruction activities. Four of these permits-by-rule continue existing permits-by-rule and one is new.

*Permit-by-rule 1 (N.J.A.C. 7:13-7.1)*

Proposed N.J.A.C. 7:13-7.1 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)1, which authorizes normal property maintenance. The proposed permit-by-rule authorizes property owners to service, maintain, or ensure the

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continued safe use of a lawfully existing structure, easement, right-of-way, field, lawn, park, and/or garden, while preventing an expansion of use that could exacerbate flooding or adversely impact the environment. The existing permit-by-rule does not mention easements and rights-of-way, which are added to clarify the Department's intent under both the existing and proposed permits-by-rule. This change makes clear that cutting a tree to accommodate a proposed development activity does not qualify as normal property maintenance under either the existing or the proposed permit-by-rule.

The periodic maintenance, mowing, and/or clearing of nuisance vegetation within an actively disturbed area, which is proposed to be defined at N.J.A.C. 7:13-1.2, also constitutes normal property maintenance. The existing permit-by-rule provides that maintaining a field, lawn, park, and/or easement that was lawfully established prior to October 2, 2006, and that has been maintained since that date, is an example of normal property maintenance. The existing permit-by-rule additionally provides that maintaining a garden that was lawfully established prior to October 2, 2006, constitutes normal property maintenance. As long as the garden or lawn was lawfully established, it is unnecessary for Department review to occur for the types of activity allowed by this permit-by-rule. Accordingly, references to areas established prior to October 2, 2006, are not continued. The proposed permit-by-rule therefore authorizes the periodic clearing, cutting, and/or removal of vegetation within an actively disturbed area, such as mowing and clearing nuisance vegetation, since the proposed definition of this term at N.J.A.C. 7:13-1.2 incorporates the concept of periodic disturbance of the riparian zone, which is a more accurate measurement of riparian zone functionality. Additionally, whereas the existing permit-by-rule identifies that removing vegetation to create a new lawn, garden, field, or park does not

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constitute normal property maintenance, the proposed permit-by-rule clarifies that the removal of riparian zone vegetation to accommodate any ongoing or proposed regulated activity, including removal to create new open or landscaped areas, does not constitute normal property maintenance.

*Permit-by-rule 2 (N.J.A.C. 7:13-7.2)*

Proposed N.J.A.C. 7:13-7.2 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)4, which authorizes the repair of a lawfully existing structure. The existing requirement that the chapter's timing restrictions must be observed if the structure is located in a regulated water is broadened to apply to activities listed at proposed N.J.A.C. 7:13-11.5(d), which also include activities within the riparian zone that could introduce sediment into regulated waters and thereby adversely impact fishery resources. The existing permit-by-rule requires that no vegetation is cleared, cut, or removed in a riparian zone, except where previous development or disturbance has occurred. However, structures in need of repair do not always lie completely within previously disturbed areas. For example, trees may need to be cut in order to provide access to a building or other structure in need of repair. Therefore, the proposed permit-by-rule authorizes disturbance to vegetation within 20 feet of the structure, if such disturbance is necessary to facilitate the reconstruction activity. Additionally, in order to limit impacts to riparian zone functionality under this permit-by-rule, no more than one-quarter acre of vegetation can be cleared, cut or removed in a riparian zone.

*Permit-by-rule 3 (N.J.A.C. 7:13-7.3)*

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Proposed N.J.A.C. 7:13-7.3 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(a)1, which authorizes the reconstruction of a lawfully existing structure outside a floodway. “Reconstruct” is defined at N.J.A.C. 7:13-1.2 as an activity in which “50 percent or greater of the structure is replaced and/or the size, shape or location of the structure is altered.” The existing permit-by-rule authorizes the reconstruction of a structure provided that the reconstructed structure lies within the footprint of the existing structure and is not enlarged. Since the proposed definition of “in-kind replacement” at N.J.A.C. 7:13-1.2 incorporates the reconstruction or replacement of a structure, in which the size, shape, and location of the structure is not altered, the proposed permit-by-rule is simplified to authorize the in-kind replacement of a structure. Additionally, the existing permit-by-rule requires that the structure is neither a habitable building nor a retaining wall that extends four feet or more above the ground. The proposed permit-by-rule is amended to note that the limitation on retaining walls and bulkheads applies only to those structures that are subject to the requirements of proposed N.J.A.C. 7:13-12.13, which sets forth standards for retaining walls and bulkheads in specific cases where flooding, channel stability, and riparian zone functionality could be at risk. Finally, no more than one-quarter acre of vegetation can be cleared, cut, or removed in a riparian zone, which is necessary to limit impacts to riparian zone functionality under this permit-by-rule. The existing permit-by-rule requires that reconstruction cannot constitute a major development which, as defined in the Department’s SWM rules at N.J.A.C. 7:8-1.2, involves the placement of at least one-quarter acre of impervious surface and/or the disturbance of at least one acre of land. As the proposed permit-by-rule clarifies that the scope of authorized activities is limited to the in-kind replacement of lawfully existing structures, no additional impervious surface will result

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from authorized activities, and land disturbance will result only from accessing the structures during replacement. As such, rather than reference the Department's SWM rules, the proposed permit-by-rule sets forth limitations on the net loss of riparian zone vegetation, in order to ensure that the activities under this permit-by-rule will have a *de minimis* impact on riparian zone functionality.

*Permit-by-rule 4 (N.J.A.C. 7:13-7.4)*

Proposed N.J.A.C. 7:13-7.4 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)2, which authorizes the removal of a lawfully existing structure outside a floodway. The permit-by-rule is proposed to be expanded to include the removal of fill material, such as piles of stone, earth, or debris, which was placed within the flood fringe. By expanding this permit-by-rule, the Department intends to facilitate the removal of structures and material that occupy the flood hazard area, thereby increasing available flood storage volume. A new requirement is proposed to limit the total area of vegetation that can be cleared, cut, or removed within a riparian zone. The existing permit-by-rule allows only the removal of riparian zone vegetation within close proximity to structures to facilitate their removal. However, by proposing to expand this permit-by-rule to allow the removal of fill material as well as structures, a much larger area of land could potentially be disturbed within a riparian zone. Therefore, a limit is set on the area of riparian zone vegetation that can be cleared under this permit-by-rule, in order to limit adverse impacts to riparian zone functionality. It should also be noted that the purpose of this permit-by-rule is to facilitate removal of fill and structures from flood hazard areas and not to provide a means of clearing a site of riparian zone

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vegetation to accommodate prospective development. Any future development within regulated areas must obtain prior approval under this chapter. Applicants intending to remove structures and fill in a manner that does not qualify for this permit-by-rule can in some cases obtain authorization under an individual permit at proposed N.J.A.C. 7:13-12.19.

*Permit-by-rule 19 (N.J.A.C. 7:13-7.19)*

Proposed N.J.A.C. 7:13-7.19 sets forth a new permit-by-rule that authorizes the replacement, renovation, or reconstruction of certain structures that do not require a coastal permit under N.J.A.C. 7:7-2.3(d)6 and 7. The FHACA Rules at N.J.A.C. 7:13-2.1(b)5 provide that, subject to certain conditions, obtaining a coastal permit under the CPP and CZM rules satisfies the requirement to obtain a flood hazard area approval for an activity regulated under the FHACA Rules. However, if an activity is exempt from regulation under the CPP and CZM rules but is regulated under the FHACA Rules, a flood hazard area approval is required in order to conduct the activity. The CPP rules at N.J.A.C. 7:7-2.3(d)6 and 7 establish two exemptions from the requirement to obtain a coastal permit for activities governed by the Waterfront Development Law. Prior to amendments to the CPP rules adopted effective April 16, 2013 (see emergency adoption, 45 N.J.R. 1141(a), May 6, 2013; subsequent readoption, 45 N.J.R. 1646(a), July 15, 2013), N.J.A.C. 7:7-2.3(d)6 exempted the repair, replacement, renovation, or reconstruction of a dock, wharf, pier, bulkhead, or building in the same location and size, where size was measured in three dimensions – length, width, and height. Similarly, prior to April 16, 2013, N.J.A.C. 7:7-2.3(d)7 exempted the repair, replacement, renovation, or reconstruction of a floating dock, mooring raft, or similar temporary or seasonal structure in the same location and

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size, where size was measured in three dimensions – length, width, and height.

The April 16, 2013, amendments to the CPP rules modified the exemptions to remove the dimension of height from the size restriction on the rebuilt or repaired structure. This has had the effect of expanding the activities subject to these two exemptions from coastal permitting. For instance, under N.J.A.C. 7:7-2.3(d)6 as amended, a floating dock can be replaced with a fixed dock, which can be higher than the floating dock. Since such structures are located in flood hazard areas and are exempt from the requirement to obtain a waterfront development permit, approval under the FHACA is required. However, such a rebuilt or repaired structure that is different in height from the original structure would not be covered under any flood hazard area permit-by-rule, and would therefore require a flood hazard area individual permit. For example, the flood hazard area permit-by-rule at existing N.J.A.C. 7:13-7.2(b)4, proposed permit-by-rule 2, applies to the repair of structures, where “repair” is defined, in accordance with N.J.A.C. 7:13-1.2, to mean “to patch, mend, replace, rebuild and/or restore a lawfully existing structure to a usable condition after decay or damage has occurred, in which no more than 50 percent of the structure is replaced and the size, shape or location of the structure is not altered. . .” (emphasis added). A change in the dimension of a structure would not qualify as a “repair” under the definition, and consequently changing the height of a bulkhead or other structure exempted from coastal permitting under N.J.A.C. 7:7-2.3(d)6 and 7 would not qualify for the existing FHACA permit-by-rule.

Given the need to repair, replace, renovate, and/or reconstruct many such structures after the devastation of Superstorm Sandy, applicants would incur unnecessary cost and unacceptable delay obtaining a flood hazard area individual permit in these circumstances even though altering

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the height of a structure covered by the N.J.A.C. 7:7-2.3(d)6 and 7 exemptions would not exacerbate flooding or adversely impact the environment. Therefore, the Department is proposing new permit-by-rule 19, which specifically authorizes the replacement, renovation, or reconstruction of enumerated non-habitable water dependent structures that are exempt from coastal permitting pursuant to N.J.A.C. 7:7-2.3(d)6 or 7.

With regard to buildings that are exempt from coastal permitting under N.J.A.C. 7:7-2.3(d)6 and 7 but not covered under permit-by-rule 19, the repair of any structure, including a habitable building, is authorized under proposed FHACA permit-by-rule 2. The replacement, renovation, or reconstruction of a habitable building is authorized under other FHACA permits-by-rule, general permits, or individual permit requirements tailored to include conditions appropriate to habitable buildings. For example, the reconstruction, relocation, and/or elevation of a building is authorized under proposed permit-by-rule 11, subject to conditions designed to safeguard the public and prevent adverse environmental impacts, such as the requirement that the lowest floor be elevated at least one foot above the flood hazard area design flood elevation. If the replacement, renovation, or reconstruction of a habitable building does not qualify for permit-by-rule 11, then the activity will require authorization under a general permit or an individual permit.

*Permit-by-rule 27 (N.J.A.C. 7:13-7.27)*

Proposed N.J.A.C. 7:13-7.27 incorporates with clarifying and substantive amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)18, which authorizes repair, maintenance, or dredging of the channel and/or embankments of a manmade canal, which passes through a

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regulated area. The permit-by-rule is proposed to be clarified to apply to currently serviceable canals, such as the Delaware and Raritan Canal and extant portions of the Morris Canal, which is the intention of the existing provision. This permit-by-rule is not intended to allow activities along the remnants of a long-abandoned canal.

The existing permit-by-rule requires that no fill is placed within a flood hazard area. However, it is sometimes necessary to place fill to restore a failed canal embankment. Such an activity would not reduce flood storage volume or obstruct flow if the embankment is restored to its pre-failure condition. Such restoration is therefore proposed to be authorized under this general permit-by-rule, provided the existing ground elevation is not raised in a floodway or fluvial flood hazard area. The restriction on placing fill is proposed to only be applicable to floodways and fluvial flood hazard areas. This limitation is not necessary within a tidal flood fringe area since placement of fill in that area will not exacerbate flooding. The existing permit-by-rule requires that no trees are cleared, cut or removed in a riparian zone. However, it is sometimes necessary to remove trees within a canal and along its embankments in order to facilitate its maintenance and ensure its structural integrity. This has been made evident by the number of breaches experienced along the Delaware and Raritan Canal during recent flood events. Therefore, the proposed permit-by-rule is proposed to be expanded to allow removal of trees within the canal and its embankment as long as no trees are cleared, cut or removed in any other portion of the riparian zone.

#### General permits-by-certification (N.J.A.C. 7:13-8)

The Department is proposing two new general permits-by-certification to facilitate

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general maintenance, repair, and reconstruction activities.

*General permit-by-certification 11 (N.J.A.C. 7:13-8.11)*

Proposed N.J.A.C. 7:13-8.11 incorporates with amendments existing general permit 4 at existing N.J.A.C. 7:13-8.6, which authorizes the maintenance, repair, and replacement of lawfully existing stormwater management structures and conveyance features by a public entity. The activities covered under existing general permit 4 are both necessary for the continued operation of stormwater management facilities and are commonly undertaken in response to requirements of State approvals and local ordinances. Periodically undertaking these activities is essential in ensuring that stormwater management systems continue to provide the important flood attenuation, groundwater recharge and water quality functions they were intended to perform. Given the beneficial nature of the maintenance, repair, and replacement of these structures and the frequency at which such activities are required to be performed, and in an effort to reduce regulatory burdens for entities who intend to, or are being required to, perform such activities, the Department is proposing to change general permit 4 to a general permit-by-certification not requiring Department review with clarifications and amendments as follows.

The Department is proposing to expand those eligible to seek authorization for maintenance activities covered by this general permit-by-certification. Under existing general permit 4, potentially authorized activities are limited to those conducted or supervised by a public entity. The proposed general permit-by-certification includes the conduct of the specified activities regardless of the entity performing or supervising the work. The Department has determined that maintenance of existing stormwater management structures and conveyance

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features, in the manner set forth in this general permit-by-certification, is beneficial irrespective of whether the entity performing the work is public or private. The Department is additionally proposing to amend the types of activities that qualify for authorization under the existing general permit. The existing general permit does not authorize any new stormwater discharges or the expansion of an existing stormwater management or collection system. These limitations are continued with clarifications. The existing general permit is specified to authorize maintenance, repair, and replacement activities that do not result in new stormwater discharges or expansion of the existing system and then specifies specific types of structures that may be reconstructed, repaired, and/or replace in-kind. In contrast, the proposed general permit-by-certification authorizes only the “repair and/or in-kind replacement” of certain structures. The “reconstruction” of a structure under N.J.A.C. 7:13-1.2 means an activity in which “50 percent or greater of the structure is replaced and/or the size, shape or location of the structure is altered.” Therefore, use of the term “reconstruction” in existing N.J.A.C. 7:13-8.6(b)3iii could be interpreted to mean that applicants can propose to alter the shape or size of a stormwater management structure or conveyance feature, which could significantly alter its hydraulic characteristics and lead to changes or impairment to the functionality of the feature, and thereby exacerbate offsite flooding. By specifying that the general permit authorizes only maintenance, repair, and replacement in the lead-in and further indicating there that no new discharges or expansion of the existing system could be authorized under the existing general permit, the Department intended that only the portion of the “reconstruct” definition related to 50 percent replacement is applicable in this instance and not that an applicant could significantly change the capacity or location of the system without a more complete department review. However, the

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Department recognizes that use of the term “reconstruction” in existing N.J.A.C. 7:13-8.6(b)3iii could cause confusion, so the term is not continued in the proposed general permit-by-certification. Rather, the term “in-kind replacement” is used, which, as noted in the Summary above, is proposed to be defined to require the reconstructed structures to have dimensions and other characteristics equivalent to the existing structure, thereby ensuring no adverse to flooding.

The list of activities authorized under this general permit-by-certification is also expanded to include a stormwater management basin constructed for a purpose other than to satisfy a mitigation requirement under the FWPA rules. The repair and/or in-kind replacement of an existing stormwater management basin will ensure that the basin continues to function as intended to ameliorate flooding, promote groundwater recharge, and remove suspended solids from stormwater runoff. An exception is made for basins constructed to satisfy mitigation under the FWPA rules, since such basins serve additional functions that may be impaired by repair or reconstruction activities. The repair and/or in-kind replacement of a stormwater management basin constructed to satisfy a mitigation requirement under the FWPA rules therefore requires an authorization under a general permit or an individual permit.

The applicant must additionally obtain an engineering certification confirming that the authorized activities will not exacerbate flooding.

The proposed general permit-by-certification places limitations on the amount of riparian zone vegetation that can be disturbed outside the structure or conveyance feature being maintained. Whereas the existing general permit requires that disturbance to vegetation in the riparian zone “is minimized,” the proposed general permit-by-certification applies specific limitations on the location and type of riparian zone disturbance that can occur, in order to ensure

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that riparian zone functionality is preserved.

*General permit-by-certification 15 (N.J.A.C. 7:13-8.15)*

Proposed N.J.A.C. 7:13-8.15 establishes a new general permit-by-certification that authorizes the in-kind replacement of public infrastructure, which has been damaged by flooding or other severe weather event, in cases where the Governor has declared a State of Emergency or FEMA has declared a major disaster. Public infrastructure is defined under this general permit-by-certification to mean all or any portion of a roadway, railroad, bridge, culvert, storm sewer system, utility, and associated structure maintained by a public entity. This authorization is intended to enable public entities to take immediate action to reduce the harm that may result from flooding or any related severe weather event. Infrastructure damaged by flooding can hamper relief efforts by preventing essential services from reaching residents in impacted areas and can impede the social and economic recovery of the State.

Authorization under this general permit-by-certification is available only to those counties or municipalities included in the State of Emergency or FEMA disaster declaration. To be eligible, the applicant shall obtain an engineering certification confirming that any in-kind replacement complies with all applicable individual permit standards for the structure being replaced, except that authorized activities are exempt from timing restrictions that protect fishery resources. The need to replace public infrastructure can occur at any time and adherence to such timing restrictions could possibly delay action to protect the public health, safety, welfare, and environment.

The rules specify the timeframes under which activities authorized under this general

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permit-by-certification shall be commenced and completed. Work must commence within 180 calendar days of the date of the emergency or disaster declaration, and must be completed within 180 calendar days of authorization under this general permit-by-certification. Projects that cannot meet the prescribed timeframes are likely to be large or complex in nature and are therefore appropriately reviewed by Department staff for potential impacts to flooding and the environment under an application for authorization under a general permit or an individual permit.

While Department review is not required prior to conducting the emergency activities authorized by the proposed permit-by-certification, it is necessary that compliance with the terms and limitations applicable to the permit-by-certification be confirmed. Accordingly, a written statement regarding the conducted activities must be provided to the Department within 30 calendar days of completion of activities authorized under this general permit-by-certification. The permittee must submit a detailed description of all regulated activities conducted, an engineering certification confirming that the requirements of the general permit-by-certification have been met, and site plans, photographs, mapping, or other information necessary to demonstrate that the regulated activity complies with the requirements of this general permit-by-certification. This material will assist Department staff during inspection of the replaced infrastructure so that compliance with the general permit-by-certification can be verified.

### **Sediment and debris removal**

The Department is proposing a number of amendments that facilitate the removal of sediment and debris from regulated waters in order to help reduce adverse impacts from

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localized flooding and to ensure that such projects do not adversely impact riparian zone functionality and aquatic biota.

Definition related to sediment and debris removal (N.J.A.C. 7:13-1.2)

The existing definition of “channel modification” is proposed to be amended to clarify that activities undertaken to remove sediment and debris from a stream pursuant to a stream cleaning approval under this chapter is not a channel modification. The existing definition cites existing general permits 1 and 2B, and the existing individual permit standards for sediment and debris removal. Since these citations and provisions are proposed to be amended, and since the existing definition does not mention the existing permits-by-rule for sediment and debris removal activities, the Department is proposing the deletion of these citations and to amend the definition to instead refer generally to all stream cleaning approvals under this chapter.

Permits-by-rule (N.J.A.C. 7:13-7)

The Department is proposing to continue with amendments two permits-by-rule to facilitate minor sediment and debris activities.

*Permit-by-rule 5 (N.J.A.C. 7:13-7.5)*

Proposed N.J.A.C. 7:13-7.5 incorporates with amendments existing N.J.A.C. 7:13-7.2(d)3, which authorizes the removal by hand of accumulated sediment and/or debris from a regulated water, within and/or immediately adjacent to a lawfully existing bridge, culvert, or stormwater discharge pipe along a public roadway and/or on public property. The existing

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permit-by-rule limits sediment and debris removal to within 100 feet of the structure, requires that sediment and debris removal is necessary to maintain positive flow through the structure, and specifies that the work must be performed under the supervision of the public entity that is responsible for maintaining the roadway and/or public property. Removing accumulated sediment and debris by hand does not adversely impact the environment, and may improve local drainage, regardless of the length of the channel, proximity to any structure, or ownership of property, provided the remaining requirements under the existing permit-by-rule are satisfied. Therefore, the existing requirements regarding location of the activity in relationship to the structure, demonstration of the necessity of the activity to maintain positive flow, and supervision by a public entity are not proposed to be continued. Instead, the proposed permit-by-rule authorizes the hand removal of accumulated sediment and debris by any person along any segment of regulated water, with hand removal continuing to include use of such things as shovels, hoses, and hydraulic pumps.

The existing requirement to abide by the chapter's timing restrictions is proposed to be limited to only where work is proposed along a trout production or maintenance water. Removing accumulated sediment and debris by hand does not significantly increase turbidity, and therefore is not harmful to other fishery resources that may be present in the channel.

*Permit-by-rule 6 (N.J.A.C. 7:13-7.6)*

Proposed N.J.A.C. 7:13-7.6 incorporates with amendments existing N.J.A.C. 7:13-7.2(a)5, which authorizes the use of machinery to remove one or more major obstructions from a regulated water that cannot be removed by hand. The existing requirement that machinery must

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be situated outside the channel where possible is proposed to be clarified and expanded.

Handheld equipment such as chainsaws can be used within the channel, and heavy machinery such as backhoes may reach into the regulated water, but cannot be driven or otherwise placed in the regulated water. These requirements are necessary in order to minimize adverse impacts to channel stability and aquatic biota.

Under the existing permit-by-rule, trees cannot be disturbed in a riparian zone. However, activities under this permit-by-rule often require selectively cutting or clearing trees to access the obstruction. Since removing a major obstruction from a regulated water can result in significant environmental benefits, the proposed permit-by-rule instead requires that disturbance to riparian zone vegetation is limited to situations where it is unavoidable, necessary to gain access to the regulated water, and minimized. The existing permit-by-rule requires that timing restrictions must be observed to protect fishery resources. However, preventing the removal of a major obstruction during a restricted time period can result in delaying its removal for months, during which time significant flooding and erosion and accompanying adverse impacts to fishery resources can occur. The reduction to the threat of increased flooding and erosion and the related benefits to the environment that result from removing a major obstruction from a regulated water during a restricted time period outweigh the temporary impacts to fishery resources that may occur if the obstruction is removed during a restricted time period. Therefore, this requirement is not continued in the proposed permit-by-rule.

#### General permits-by-certification (N.J.A.C. 7:13-8)

The Department is proposing three general permits-by-certification to facilitate minor

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sediment and debris removal activities. One proposed general permit-by-certification is currently a general permit, and two proposed general permits-by-certification are new.

*General permit-by-certification 1 (N.J.A.C. 7:13-8.1)*

Proposed N.J.A.C. 7:13-8.1 incorporates with amendments general permit 2B at existing N.J.A.C. 7:13-8.4(c)2, which authorizes the removal of accumulated sediment and debris from a regulated water. This general permit is proposed to be adopted as a general permit-by-certification where the removal is part of an active farming operation in order to facilitate beneficial sediment and debris projects. All activities under this proposed general permit-by-certification must be solely intended for agricultural purposes and approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or a local Soil Conservation District (or its designee), as appropriate. These agencies work in concert with the Department to ensure that such projects provide environmental benefits that will reduce both flooding and erosion, while simultaneously providing assistance to the agricultural community. Additional Department oversight through an application for authorization under a general permit for these minor and beneficial projects does not provide additional flood protection or environmental benefit.

The existing requirement that machinery must be situated outside the channel where possible is proposed to be clarified and expanded. Handheld equipment such as chainsaws can be used within the channel, and heavy machinery such as backhoes may reach into the regulated water, but cannot be driven or otherwise placed in the regulated water. These requirements are necessary in order to minimize adverse impacts to channel stability and aquatic biota. The

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proposed general permit-by-certification additionally clarifies that only accumulated sediment and debris is removed from the regulated water.

The existing general permit states that this permit does not authorize the straightening or realignment of a channel and furthermore that straightening or realignment constitutes channel modification and requires an individual permit. Since the limitations of the proposed general permit-by-certification are clear, these statements are unnecessary and are not proposed to be incorporated. The existing requirement that the project shall not disturb the channel bank or the riparian zone, unless such disturbance is unavoidable, necessary to gain access to the channel, and minimized, is amended to focus on disturbance to riparian zone vegetation, since disturbing a riparian zone that does not possess vegetation will not adversely impact the environment. Additionally, the term “channel bank” is not incorporated for two reasons. First, the regulated water from which sediment and debris is being removed may not have a discernible channel. Second, it is generally not possible to remove sediment and debris under this authorization without some disturbance to the bank of the regulated water. However, to ensure that channel stability and riparian zone functionality are maintained, no trees can be cleared, cut, or removed in a riparian zone. Additionally, the existing requirement that the activities are conducted from only one bank, where possible, is amended to eliminate the indication that conducting activities from both banks may be appropriate in some instances, in order to limit the scope of activities under the proposed general permit-by-certification; if it is necessary for activity to be conducted from both banks, Department review under a general permit or individual permit is necessary.

Since the Department is proposing to allow purely agricultural operations currently subject to the general permit to instead obtain authorization through the proposed general permit-

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by-certification without the need to submit documents for review provided the specified requirements are met, the existing requirement that all proposed access points to the water are described in writing and with color photographs is not continued.

Finally, all material removed from the regulated water must be disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local requirements, in order to ensure that the disposal of the removed material will not exacerbate flooding or adversely impact the environment. Existing general permit 2B in some cases allows removed sediment to remain in the flood hazard area. However, placing dredged sediment within a flood hazard area or riparian zone can lead to adverse impact to the environment and flooding, and must therefore be reviewed by the Department through an application for an individual permit. Consequently, the existing requirement that the placement of the removed sediment does not interfere with the positive overland drainage of the receiving area is unnecessary and is not continued.

*General permit-by-certification 7 (N.J.A.C. 7:13-8.7)*

Proposed N.J.A.C. 7:13-8.7 establishes a new general permit-by-certification for the use of machinery to remove accumulated sediment and/or debris from an engineered channel. To be considered an engineered channel for the purposes of the proposed general permit-by-certification, the channel must be lined with concrete or other armoring, or the channel must have been constructed, altered, or otherwise manipulated as part of a flood control project. Removal of accumulated sediment and debris from such channels, when conducted in accordance with the limitations applicable to this general permit-by-certification, presents no

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adverse environmental impact and helps to ameliorate local flooding.

The proposed general permit-by-certification includes limitations on the timing of conduct of activities in certain engineered channels, limitations on vegetation impact, and specifications on the materials that may be removed and how they must be disposed of to ensure only activities not requiring further Department review are authorized. Particularly, if work is proposed along an engineered channel that is a trout production or trout maintenance water, the chapter's timing restrictions must be observed in order to avoid adverse impacts to trout resources. While the removal of sediment from engineered channels is not anticipated to cause significant turbidity or other impacts likely to impact fishery resources, because of the sensitivity of trout to such impacts, if trout are present it is important for these timing restrictions to be observed.

Limitations are placed on disturbance to riparian zone vegetation in order to minimize adverse impacts to riparian zone functionality. Excavation must consist solely of accumulated sediment and/or debris to ensure that the size of the regulated water will not be altered, which could change the hydraulic capacity of the channel and potentially exacerbate flooding downstream of the project. Finally, all material removed from the regulated water must be disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local requirements, in order to ensure that the disposal of the removed material will not exacerbate flooding or adversely impact the environment.

*General permit-by-certification 9 (N.J.A.C. 7:13-8.9)*

Proposed N.J.A.C. 7:13-8.9 establishes a new general permit-by-certification for the use

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of machinery to remove accumulated sediment and/or debris from a regulated water within and/or adjacent to a lawfully existing bridge, culvert, or stormwater discharge pipe. The proposed general permit-by-certification is similar to the permit-by-rule at existing N.J.A.C. 7:13-7.2(d)3, which authorizes the removal of sediment and debris adjacent to structures along public roadways provided all work is performed by hand. Because removing sediment and/or debris from bridges, culverts, and stormwater discharge pipes is beneficial regardless of public or private ownership and often requires the use of machinery, the proposed general permit-by-certification authorizes a broader range of activities than the existing permit-by-rule.

To ensure inappropriate flooding or environmental impacts are not created by activities conducted pursuant to the proposed general permit-by-certification, the proposed section contains various limitations and requirements that must be met to qualify for authorization. Limitations on the use of machinery within the regulated water, the length of regulated water that can be disturbed, and a requirement that excavation consists solely of accumulated sediment and debris, and does not alter the natural bed and banks of the regulated water, are necessary to ensure that the project will not alter the hydraulic capacity of the regulated water or adversely impact aquatic biota. Activities under this general permit-by-certification are further limited to cases where the removal of sediment and debris is necessary to maintain positive flow through the structure and/or regulated water. Work must be performed by, or under the supervision of, a public entity, and in cases where activities are proposed on property not owned by the public entity conducting the sediment/debris removal, consent of the impacted property owner(s) must be obtained. These requirements will ensure that the authorized activities are performed with suitable oversight and that authorized activity will not occur without the knowledge and consent

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of the property owner.

Limitations on riparian zone disturbance are incorporated in order to ensure that impacts to riparian zone functionality are minimized. Where activities are proposed along a trout production or trout maintenance water, specific timing restrictions must be observed in order to minimize potential adverse impacts to trout. Similar to general permit-by-certification 7, while these activities are not anticipated to impact other fish, as trout are more sensitive to activities within the channel, it is important that the timing restrictions be observed where this species is present. Finally, all material removed must be disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local requirements, in order to ensure that the disposal of the removed material will not exacerbate flooding or adversely impact the environment.

#### General permits (N.J.A.C. 7:13-9)

The Department is proposing to amend one existing general permit and adopt one new general permit to facilitate minor sediment and debris activities.

#### *General permit 1 (N.J.A.C. 7:13-9.1)*

Proposed N.J.A.C. 7:13-9.1 incorporates with amendments general permit 1 at existing N.J.A.C. 7:13-8.3, which authorizes a county, municipality, or a designated agency thereof to desnag a channel and/or remove accumulated sediment, debris, and garbage which are obstructing flow in a channel.

Existing N.J.A.C. 7:13-8.3(b) provides that an agency that has obtained authorization

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under a freshwater wetlands general permit 26 at N.J.A.C. 7:7A-5.26 does not have to obtain a general permit authorization under this chapter for a project that would otherwise qualify for existing general permit 1. This provision is proposed for deletion. Activities that qualify for authorization under freshwater wetlands general permit 26 do not uniformly meet the requirements of existing N.J.A.C. 7:13-8.3. Therefore, it is proposed that a person intending to undertake stream cleaning activities in freshwater wetlands and under the jurisdiction of this chapter must obtain authorization under both N.J.A.C. 7:7A and this chapter.

Proposed N.J.A.C. 7:13-9.1(a) incorporates with clarifying amendments existing N.J.A.C. 7:13-8.3(d), which sets forth the substantive standards for a stream cleaning activity under this general permit. The existing requirement that the project shall not disturb the channel bank or the riparian zone, unless such disturbance is unavoidable, necessary to gain access to the channel, and minimized, is amended to focus on disturbance to riparian zone vegetation, since disturbing a riparian zone that does not possess vegetation will not adversely impact the environment. The existing requirement that the project does not alter the natural banks of the channel is consolidated with the existing and proposed requirement relating to the removal of accumulated silt, sediment, debris, and/or garbage from a channel with a natural bed.

Proposed N.J.A.C. 7:13-9.1(b) and (c) incorporate existing N.J.A.C. 7:13-8.3(e) and portions of N.J.A.C. 7:13-8.3(d)5, respectively.

Proposed N.J.A.C. 7:13-9.1(d) incorporates with amendments existing N.J.A.C. 7:13-8.3(f), which sets forth the application requirements for authorization under general permit 1. The Department is proposing to amend the application requirements for authorization under general permit 1 in order to reduce the burden of paperwork and associated costs to the applicant.

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The existing requirement to submit three sets of drawings is modified to require only one set, and the requirement to submit three copies of an application report is modified to require only one copy of certain information and materials included in the application report which are relevant to the application. Copies of a tax map, flood hazard area map, and previous approvals, which are currently required under an application report, are not proposed to be required, since the Department can access this material electronically. Clarifying amendments are also proposed to the requirement for an engineer to certify that the proposed activities qualify for this general permit. Proposed N.J.A.C. 7:13-9.1(e) explains that the application review procedures for authorization under this general permit, which are currently set forth at existing N.J.A.C. 7:13-8.3(g) through (j), are proposed to be recodified to N.J.A.C. 7:13-21 with a cross-reference added to reflect the new location of those procedures. Consistent with existing N.J.A.C. 7:13-8.3(c), no application fee or public notice of the application is required for authorization under this general permit.

Proposed N.J.A.C. 7:13-9.1(f) incorporates with clarifying and substantive amendments existing N.J.A.C. 7:13-8.3(k), which sets forth reporting requirements after completion of a project that is authorized under this general permit. A reference to the Department's website and a requirement to utilize a prescribed completion certificate are proposed to be deleted. Since there is no need to require applicants to conform to a particular format for a certification under this general permit, the requirement is proposed to be amended to instead require submittal of a written notice that the project has been completed and an engineering certification, which is similar to the existing certification requirement, stating whether each applicable requirement in proposed N.J.A.C. 7:13-9.1(b) has been satisfied.

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*General permit 2 (N.J.A.C. 7:13-9.2)*

Proposed N.J.A.C. 7:13-9.2 sets forth a new general permit to authorize mosquito control activities, as a companion to existing general permit 15 in the FWPA rules at N.J.A.C. 7:7A-5.15. The existing FHACA Rules do not provide a general permit for regulated activities related to mosquito control, and allow limited mosquito control activities under an individual permit at existing N.J.A.C. 7:13-11.15(d). Given the beneficial nature of mosquito control activities, and the fact that these projects are routinely authorized under a freshwater wetlands general permit, the Department is proposing this general permit in order to facilitate these projects in a way that will not exacerbate flooding or adversely impact the environment.

Proposed N.J.A.C. 7:13-9.2(a) sets forth the scope of the proposed general permit, which authorizes activities in flood hazard areas and riparian zones necessary for mosquito control water management activities conducted by a county mosquito control agency or a Federal agency on Federal land. This mirrors the scope of FWPA general permit 15. Activities under this general permit can be authorized for individual waters or for any number of waters within a specific county. Examples of activities that can be authorized under this general permit are provided.

Several requirements must be met for activity to be authorized under the proposed general permit. Upon review of an individual, site-specific proposal, the State Office of Mosquito Control Coordination must determine that the project is necessary to control a documented mosquito problem. This mirrors FWPA general permit requirements as well as flood hazard area individual permit requirements. Material removed from natural channels is limited to accumulated silt, sediment and debris. This parallels the existing provision for sediment debris

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removal projects under flood hazard area individual permit requirements. The proposed requirements regarding minimization of sediment transport, deposition of dredged material, timing restrictions, and limitations on the use of machinery and riparian zone disturbance mirror the individual permit requirements for sediment and debris removal described below. The project cannot disturb channel banks or riparian zone, unless such disturbance is unavoidable, necessary to gain access to the channel and minimized. Furthermore, the project must be conducted from only one bank where possible, the use of heavy equipment in the channel must be avoided, and vegetation and tree canopy on the more southerly or westerly bank must be preserved in order to shade the channel. Finally, all access points to regulated waters must be disclosed, so the Department can evaluate potential riparian zone impacts, and access points are required to be limited to actively disturbed areas, wherever possible. These requirements limit the amount of riparian zone vegetation that will be cleared, cut, or removed by the project, thus preserving riparian zone functionality to the extent possible.

The proposed general permit may not be utilized more than once every five years for a particular site. This limitation is identical to that provided in the FWPA rules for activities under FWPA general permit 15 and is necessary to limit impacts to riparian zone vegetation and aquatic biota within a given regulated water.

#### Requirements for sediment and debris removal from a regulated water (N.J.A.C. 7:13-12.15)

Proposed N.J.A.C. 7:13-12.15 recodifies with amendments existing N.J.A.C. 7:13-11.15, which sets forth requirements that must be met for the issuance of an individual permit for sediment and debris removal from a regulated water. Throughout the section, the terms

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“channel” and “water” are proposed to be replaced by the term “regulated water.” Not every water is a regulated water under N.J.A.C. 7:13-2.2, and, furthermore, not every regulated water possesses a channel.

Existing N.J.A.C. 7:13-11.15(b), which explains that the requirements set forth in this section do not apply to activities conducted under general permits 1 and 2B, or under two existing permits-by-rule, is unnecessary and is proposed for deletion. The proposed permits-by-rule, general permits-by-certification, and general permits are not subject to the individual permit standards of this section unless a standard here is specifically referenced in the particular permit-by-rule, general permit-by-certification or general permit (see, for example, general permit 2, which refers to the individual permit standards at proposed N.J.A.C. 7:13-12.15(f)).

Existing N.J.A.C. 7:13-11.15(c) sets forth the specific standards that apply to an individual permit for sediment and debris removal from a channel. The existing standards require that an applicant proposing a sediment removal project must demonstrate there is a flooding problem, mosquito control problem, or any other threat to public health, safety, and welfare that cannot otherwise be remedied without removing the sediment and/or debris from the water. However, applicants cannot demonstrate that stream cleaning alone will ameliorate flooding, a mosquito control problem, or other threat to public health, safety, or welfare. Stream cleaning is one of many tools municipalities can use to mitigate localized flooding and/or other problems. The existing requirement is therefore amended to instead require the applicant to demonstrate there is a documented history of flooding, a mosquito control problem, or any other threat to public health, safety, or welfare, which necessitates removal of the sediment and/or debris. Additionally, the existing requirement that the applicant demonstrate that the problem or threat

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cannot be remedied without removing the sediment or debris is proposed for deletion because it is very difficult for applicants to prove that removing sediment and debris alone will remedy the identified problem. Accordingly, the requirement to make this demonstration has been an impediment to carrying out necessary removal of sediment and debris from a channel.

Additionally, proposed N.J.A.C. 7:13-12.15(b) is expanded to apply not just to channels, but to all regulated waters, with corresponding changes made to reflect this change. As a result, several of the requirements currently codified at N.J.A.C. 7:13-11.15(e) are now covered under proposed N.J.A.C. 7:13-12.15(b).

The existing requirement that material removed from a regulated water consist solely of accumulated silt, sediment, and debris is amended to not apply to impounded regulated waters, since enlarging an impounded water will not affect flooding or adversely impact the environment if the requirements set forth at proposed N.J.A.C. 7:13-12.5(c) are met. The requirement to minimize the downstream transport of sediment during dredging is clarified and expanded to include means of isolating sediment within an impounded water that is being dredged.

Requirements applicable to removal of sediment and debris contained in existing N.J.A.C. 7:13-11.15(c), which are designed to limit the amount of riparian zone vegetation that will be disturbed and preserve the integrity of the banks of the regulated water, thus preserving riparian zone functionality and avoiding erosion and instability along the regulated water to the extent possible, are continued with limited amendment at proposed N.J.A.C. 7:13-11.2(w). Existing N.J.A.C. 7:13-11.15(d), which sets forth the requirements for sediment removal for mosquito control purposes, is proposed to be deleted and incorporated under proposed new general permit 2 at proposed N.J.A.C. 7:13-9.2 as discussed above.

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Existing N.J.A.C. 7:13-11.5(e) sets forth standards applicable to removal of sediment and debris from an impounded regulated water. As described above, the requirement to minimize sediment transport during dredging, limits on machinery access to the regulated water, and the requirement to properly dispose of dredged material are incorporated at proposed N.J.A.C. 7:13-12.15(b).

Existing N.J.A.C. 7:13-11.15(f) sets forth standards for depositing sediment that has been removed from a regulated water. The existing subsection requires that any sediment which is removed from a regulated water may be deposited only on land that lies below both the seasonal high water table and the normal water surface elevation of the nearest regulated water, unless the applicant demonstrates that the sediment cannot feasibly be deposited on such land. This requirement is unnecessarily restrictive and is therefore proposed for deletion from proposed N.J.A.C. 7:13-12.15(d). Other requirements of the existing subsection are continued in the proposed subsection. The requirements will ensure that the placement of sediment will not exacerbate flooding or adversely impact the environment.

Existing N.J.A.C. 7:13-11.15(g) provides for issuance of an individual permit authorizing repeated projects to remove sediment and debris from the same water over the five-year term of the permit. The reporting requirements at existing N.J.A.C. 7:13-11.15(g)4 and 5 are proposed to be amended and deleted, respectively, from proposed N.J.A.C. 7:13-12.15(e) since necessary reporting appropriately varies according to the project. The Department is instead proposing to require applicants to report on the timing and conduct of regulated activities in accordance with the schedule provided in the individual permit, should the Department determine that such a schedule is necessary to ensure that adverse impacts to the environment are avoided.

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Proposed new N.J.A.C. 7:13-12.15(f) provides that the Department may require testing of dredged material if there is reason to suspect that the material is contaminated to ensure that the removal of dredged sediment does not spread hazardous substances or pollution. This potential requirement is also contained in FWPA general permit 13.

### **Trails, boardwalks, and footbridges**

The Department is proposing a number of amendments to facilitate the construction of trails, boardwalks, and footbridges in a manner that will not exacerbate flooding or adversely impact the environment. Except for a trail constructed at or below grade in the flood hazard area and located within a previously disturbed riparian zone, which qualifies for an existing permit-by-rule, and the construction of a footbridge along a stream that drain less than 50 acres, which qualifies for existing general permit 9, the construction of trails, boardwalks, and footbridges requires an individual permit and, in some cases, requires a hardship exception request.

However, trails, boardwalks, and footbridges constructed as set forth in the proposed permits-by-rule and general permits described below will have a *de minimis* impact on flooding and the environment. All proposed permits-by-rule and general permits contain limitations on disturbance to riparian zone vegetation and/or proximity to top of bank as necessary to ensure channel stability and minimize impacts to riparian zone functionality. Provisions regarding disturbance to riparian zone vegetation and proximity to top of bank under these permits are discussed in more detail in the riparian zone section of this Summary.

#### Permits-by-rule (N.J.A.C. 7:13-7)

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The Department is proposing two new permits-by-rule to authorize the construction of trails, boardwalks, and footbridges.

*Permit-by-rule 22 (N.J.A.C. 7:13-7.22)*

Proposed N.J.A.C. 7:13-7.22 establishes a new permit-by-rule that authorizes creation of a trail or boardwalk provided certain limitations are satisfied. The trail or boardwalk can be no more than six feet wide, which ensures that disturbance to riparian zone vegetation and flood storage displacement is *de minimis*. The existing ground elevation cannot be raised in a fluvial flood hazard area or floodway, which ensures that there is no obstruction to flow or lost flood storage displacement. The Department recognizes that boardwalk planks are typically constructed above ground. Boardwalks may therefore be elevated above the ground, provided that the area underneath remains open to the passage of floodwaters if constructed in a flood hazard area.

In order to ensure that stream channels are not adversely impacted by the proposed trail or boardwalk, no disturbance can be located within 25 feet of any top of bank unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water. An exception is made where the trail or boardwalk connects to a footbridge, dock, or pier, since such structures are necessarily located within a regulated water. To ensure no adverse impact to riparian zone functionality, no trees can be cleared, cut, or removed in a riparian zone and the net loss of riparian zone vegetation cannot exceed one-quarter acre. As discussed below, trails and boardwalks that exceed one or more requirements of this permit-by-rule may qualify for new general permit 13 at proposed new N.J.A.C. 7:13-9.13.

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*Permit-by-rule 23 (N.J.A.C. 7:13-7.23)*

Proposed N.J.A.C. 7:13-7.23 establishes a new permit-by-rule that authorizes construction of a footbridge across a regulated water in specified circumstances. In order to ensure that the proposed footbridge will not result in an obstruction to flow or significantly reduce flood storage volume, the footbridge can be no more than eight feet wide and six inches thick and any pinning or anchoring of the footbridge must be accomplished without construction in the channel. The area above and below the footbridge must remain open to the passage of floodwaters and the existing ground elevation cannot be raised to accommodate or provide access to the structure, which will ensure that the footbridge will not unnecessarily obstruct flow or displace excessive flood storage volume. Finally, in order to preserve riparian zone functionality to the maximum extent, no trees can be cleared, cut, or removed in a riparian zone.

General permits (N.J.A.C. 7:13-9)

The Department is proposing two new general permits to authorize the construction of trails, boardwalks, and footbridges.

*General permit 12 (N.J.A.C. 7:13-9.12)*

Proposed N.J.A.C. 7:13-9.12 sets forth a new general permit that authorizes the construction of one or more footbridges over a regulated water, or across other features such as manmade canals and roadways, which lie within the flood hazard area or riparian zone of a regulated water. The existing FHACA Rules authorize the construction of a footbridge in limited

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circumstances under general permit 9. However, since a footbridge is eligible under existing general permit 9 only when the regulated water has a drainage area of less than 50 acres, most footbridge construction requires prospective applicants to apply for an individual permit under existing N.J.A.C. 7:13-11.8, which can be unnecessarily time-consuming for both applicants and Department staff given the generally minor nature of the activity. This general permit is therefore being proposed to authorize the construction of a footbridge in a manner that will not exacerbate flooding or adversely impact the environment. Proposed general permit 12 furthermore incorporates and expands certain of the individual permit requirements of existing N.J.A.C. 7:13-11.8, which currently specifies the requirements necessary for an applicant to obtain an individual permit to construct or reconstruct a footbridge. However, while existing N.J.A.C. 7:13-11.8 is indicated to specify standards applicable to any footbridge proposed in any regulated area (see N.J.A.C. 7:13-11.8(a)), uncertainty has been created by reference in N.J.A.C. 7:13-11.8(b)1 to the structure passing over a regulated water. Because footbridges are not only constructed across regulated waters, but are also constructed to provide access across canals, roadways, and other features, in cases where such features lie within the flood hazard area or riparian zone of a regulated water, the applicability of proposed general permit 12 to footbridges crossing these other features has been specifically stated in the proposed section. An applicant proposing a footbridge that does not qualify for proposed permit-by-rule 23 or proposed general permit 12 must obtain an individual permit under proposed N.J.A.C. 7:13-12.7, which sets forth standards for bridges and culverts. This is consistent with the requirements at existing N.J.A.C. 7:13-11.8(c).

To be eligible for authorization under this proposed general permit, the structure must be

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used exclusively to carry pedestrians, livestock and/or light vehicles such as bicycles, golf carts, or lawn tractors. Construction of a bridge that carries motorized vehicles generally results in greater impacts to riparian zone vegetation and flooding, and is therefore beyond the scope of this general permit. The footbridge must furthermore be situated as nearly perpendicular as possible to any channel being crossed, in order to minimize impacts to channel stability and riparian zone vegetation. For similar reasons, the proposed general permit sets limitations on the width of a footbridge, with an exception where the footbridge must be wider to comply with the Americans with Disabilities Act and the Barrier Free Subcode of the Uniform Construction Code. In cases where the footbridge is designed as part of a multiple-use path, bollards or similar devices must be installed to prevent automobiles and other large vehicles from utilizing the structure, and the footbridge must be no wider than 10 feet. As indicated above, structures that are adequate to carry automobiles generally require more significant impacts to regulated areas than are intended to be authorized under this general permit.

Additional standards are set forth for footings and abutments, which are intended to ensure the stability of the proposed footbridge while minimizing impacts to the channel. A provision not part of the existing individual permit requirements is proposed, which addresses the construction of stairs, ramps, or other structures necessary for access to the footbridge. The existing individual permit does not provide for such structures, which has resulted in confusion as to whether such structures are permissible. The Department is therefore proposing to explicitly specify that such structures are authorized under this general permit, provided certain requirements are met to ensure that obstruction to flow is minimized. Specifically, any stairs, ramps, or other structures must remain open underneath to allow floodwaters to pass freely, and

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such structures cannot require the existing ground elevation to be raised in a flood hazard area in order to be constructed. Finally, any stairs, ramps, or other structures must be oriented to minimize obstruction to flow, such as by being set into the bank, where possible. These requirements are necessary in order to minimize flood storage displacement and potential obstruction to flood flows.

The timing restrictions for fishery resources at proposed N.J.A.C. 7:13-11.5(d) must also be observed. These requirements will enable the Department to ensure that aquatic species are not adversely impacted. Finally, in order to limit impacts to riparian zone functionality, the width of disturbance to riparian zone vegetation to construct the footbridge cannot exceed 20 feet.

*General permit 13 (N.J.A.C. 7:13-9.13)*

Proposed N.J.A.C. 7:13-9.13 sets forth a new general permit that authorizes the construction of a trail and/or boardwalk for use by pedestrians, livestock, and/or light vehicles such as bicycles, golf carts, or lawn tractors, as a companion to existing general permits 17 and 17A in the FWPA rules. The existing FHACA Rules do not have general permit or specific individual permit standards for regulated activities related to trails and boardwalks. In many cases, the limitations of the permit-by-rule at existing N.J.A.C. 7:13-7.2(a)2 require prospective applicants to apply for an individual permit, which can be unnecessarily time-consuming for both applicants and Department staff. This general permit is therefore being proposed to authorize riparian zone disturbance in order to facilitate these projects, with appropriate protections in order to ensure that the project will not exacerbate flooding or adversely impact the environment.

The proposed general permit closely parallels activities authorized under freshwater

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wetlands general permits 17 and 17A. However, rather than propose two separate general permits to cover these activities, the Department has decided to propose one general permit under this chapter, which will authorize activities that would qualify for either freshwater wetlands general permit 17 or general permit 17A.

To be eligible for authorization under this general permit, various conditions must be satisfied. A trail or boardwalk intended for pedestrian use alone can be no more than six feet wide unless it must be wider to comply with the Americans with Disabilities Act of 1990 and the Barrier Free Subcode of the Uniform Construction Code. This provision, which mirrors FWPA GP17 with an added reference to the Americans with Disabilities Act of 1990, is necessary to limit disturbance to riparian zone vegetation and potential impacts to flooding. The Department is proposing to limit the width of trails and boardwalks under this general permit to no more than 10 feet in order to minimize disturbance to riparian zone vegetation and potential impacts to flooding. Applicants proposing wider trails and boardwalks must apply for an individual permit to provide the Department with information sufficient to ensure that any impact from a wider trail or boardwalk is necessary and the proposed width is the minimum necessary.

The existing ground elevation cannot be raised in a floodway or fluvial flood hazard area to ensure that the trail or boardwalk will not obstruct flood flows or significantly reduce flood storage volume within a flood hazard area. Additionally, a trail or boardwalk cannot be closer than 10 feet from the top of bank, except in the immediate vicinity of a footbridge, dock or pier that connects to the trail or footbridge, since access to these structures would not otherwise be possible. Trees and other vegetation closest to the top of bank provide the most important riparian zone functions, such as preserving channel integrity, shading surface waters, and

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providing water quality treatment. Accordingly, no trees may be cleared, cut or removed within 25 feet of any top of bank to protect the important functions they perform. Furthermore, a licensed professional engineer must certify that any proposed disturbance within 25 feet of a top of bank will not cause increased channel erosion or exacerbate flooding offsite. This type of certification is proposed throughout the chapter, and is intended to provide additional assurance that the applicant has engaged an individual with the appropriate expertise to design the project, review the impacts likely to occur from the proposed design, and certify that the level of impact that will result from the proposed project will comply with that allowed by the rules.

The proposed general permit incorporates limitations on disturbance to riparian zone vegetation to reduce impacts to riparian zone functionality by encouraging activities to be located within actively disturbed areas, restricting impacts to riparian zone vegetation necessary to construct the trail or boardwalk, and setting an upper limit to the amount of riparian zone vegetation that can be cleared, cut, or removed under this general permit. Limiting overall disturbance within the riparian zone to no more than six square feet of trees per linear foot of trail or boardwalk and no more than a total of one-half acre of disturbance will allow the construction of most trails and boardwalks to be undertaken, while minimizing impacts to riparian zone functionality. It should be noted that the overall limit of disturbance of one-half acre of riparian zone vegetation is higher than for most other activities under this chapter. However, due to the linear nature of trails and boardwalks, the fact that riparian zone disturbance is very narrow and is spread out over a large area as compared with most other types of disturbance, the fact that use of the trail or boardwalk is limited to vehicles no larger than golf carts and lawn tractors, and in light of the other requirements and restrictions of this section, the

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Department believes that the proposed amount of riparian zone disturbance is appropriate for this use. Finally, any trail or boardwalk intended for public use must incorporate educational features, as is also required under FWPA general permit 17.

### **Environmental enhancement activities**

The Department is proposing a number of amendments to facilitate regulated activities that will improve habitat, water quality, and riparian zone functionality, with appropriate protections to ensure that the activities will not exacerbate flooding or adversely impact the environment. All proposed permits-by-rule, general permits-by-certification, and general permits contain limitations on disturbance to riparian zone vegetation and/or proximity to top of bank as necessary to ensure channel stability and minimize impacts to riparian zone functionality. Provisions regarding disturbance to riparian zone vegetation and proximity to top of bank under these permits are discussed in more detail in the riparian zone section of this Summary.

#### Permits-by-rule (N.J.A.C. 7:13-7)

The Department is proposing to continue with amendments two existing permits-by-rule and is proposing one new permit-by-rule to promote environmental enhancement activities.

#### *Permit-by-rule 28 (N.J.A.C. 7:13-7.28)*

Proposed N.J.A.C. 7:13-7.28 incorporates the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)17, which authorizes the filling of an abandoned raceway adjacent to a regulated water,

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provided certain conditions are met. In some cases, these raceway structures, which are manmade conveyance structures intended to divert water for the purpose of providing hydrology or providing hydraulic power before returning the water to the channel, have been partially blocked and abandoned for years and sometimes pose a public safety threat and/or provide a breeding ground for mosquitoes. In many cases where the raceway is no longer functioning to convey water from the adjacent channel, there is no longer any hydraulic or environmental benefit served by the structure. Therefore, allowing abandoned raceways to be filled will not adversely impact flooding or the environment, provided the limitations set forth in this permit-by-rule are met. Existing N.J.A.C. 7:13-7.2(b)17v is not proposed to be continued as replanting of temporarily disturbed areas is required under proposed N.J.A.C. 7:13-6.7, which the proposed rule requires be satisfied. Accordingly, it is no longer necessary to specify this requirement in the permit-by-rule.

*Permit-by-rule 31 (N.J.A.C. 7:13-7.31)*

Proposed N.J.A.C. 7:13-7.31 establishes a new permit-by-rule that authorizes the placement of a floating aerator within an impounded water, provided no trees are cleared, cut, or removed in a riparian zone to facilitate its installation. Floating aerators generally increase the oxygen level of surface waters, which is beneficial to aquatic life. Since no trees are allowed to be disturbed in a riparian zone, and as the aerator itself will not significantly obstruct flood flows, activities under this permit-by-rule will have a *de minimis* impact on flooding and the environment while providing a beneficial impact to aquatic life.

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*Permit-by-rule 32 (N.J.A.C. 7:13-7.32)*

Proposed N.J.A.C. 7:13-7.32 incorporates with amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(a)7, which authorizes the construction of an aquatic habitat enhancement device. The existing reference to the Bureau of Freshwater Fisheries is proposed for deletion, since any bureau within the Department's Division of Fish and Wildlife can approve this activity. The permit-by-rule is additionally proposed to be expanded to include aquatic habitat enhancement devices approved by the U.S. Fish and Wildlife Service, since this agency develops and oversees environmentally beneficial aquatic habitat enhancement projects. The existing provision requires that any device placed under this permit-by-rule will not cause any existing building to be subject to increased flooding during any flood event up to and including the flood hazard area design flood. For the reasons outlined in the summary of requirements related to adverse offsite impacts, this requirement is amended to require that increased flooding will not occur during any flood event described in N.J.A.C. 7:13-12.1(i). Finally, similar to several of the permits-by-rule contained in the existing rules, including permit-by-rule 28, described above, the existing provision requiring replanting of temporarily disturbed vegetation is not continued as it is no longer necessary since this same requirement is contained in proposed N.J.A.C. 7:13-6.7, to which this permit-by-rule is subject.

General permits-by-certification (N.J.A.C. 7:13-8 and related definition at N.J.A.C. 7:13-1.2)

The Department is proposing a new general permit-by-certification to promote environmental enhancement activities.

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*General permit-by-certification 4 (N.J.A.C. 7:13-8.4)*

Proposed N.J.A.C. 7:13-8.4 establishes a new general permit-by-certification that authorizes enhancing a riparian zone area by planting native, non-invasive species, provided certain conditions are met. “Invasive plant species,” which is proposed to be defined at N.J.A.C. 7:13-1.2, refers to an exotic plant species whose introduction into an ecosystem where the species is not native causes or is likely to cause environmental or economic harm, or harm to human health. Invasive plant species are harmful to natural resources because they can greatly disrupt natural communities and ecological processes. Invasive plant species generally out-compete native species for essential resources, which can inhibit the growth of native species and, in some cases, even cause their extinction. This results in an ecosystem that is less diverse and therefore more susceptible to disease and natural disasters. Specifically, according to the U.S. Fish and Wildlife Service, invasive plant species can:

- Reduce the ability of streams to make historic water deliveries (such as by reducing channel capacity and losing flow to evapotranspiration);
- Displace native plant communities and/or radically change the nature of the habitats they invade;
- Compete for the same natural resources and life requirements (such as food, water, space and shelter) as native species and degrade local ecologies by disrupting the food chain;
- Cause the extinction of native species;
- Increase soil erosion and fire hazard;
- Decrease the quality of understory habitat in forests and facilitate the spread of

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other invasive plant species;

- Decrease the quality and amount of range for wildlife and range animals; and
- Degrade aquatic habitats and clog waterways. (Source: U.S. Fish and Wildlife Service, “Invasive Species,” <http://www.fws.gov/invasives/faq.html#q2>)

Given the above, the Department believes that enhancing riparian zone areas by authorizing replacing invasive plant species with native, non-invasive plant species in a riparian zone can result in a clear net benefit to the environment, without adversely impacting flooding, provided the requirements specified in the proposed general permit-by-certification are met.

Enhancement activities are authorized under the proposed general permit-by-certification only in cases where the riparian zone is devoid of vegetation, the riparian zone consists of an actively disturbed area, or the riparian zone contains predominantly non-native and/or invasive plant species. In order to ensure that the project will not result in flood storage displacement or an obstruction to flow within the flood hazard area, the applicant must obtain an engineering certification confirming that the existing ground elevation is not being raised in a floodway or fluvial flood hazard area. Additionally, no work can be located within a channel. Such projects can cause sedimentation or destabilize stream banks and should therefore be reviewed by the Department under an individual permit application. In order to ensure that impacts to riparian zone functionality are minimal, and to preserve bank integrity, no trees can be cleared, cut, or removed within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water. Furthermore, trees cannot be removed along Pinelands, Category One or trout production waters in order to avoid potential impacts to these high quality surface waters. The removal of invasive trees within close proximity to a top

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of bank or along waters with these classifications is more appropriately reviewed by the Department under a general permit or individual permit. A new definition is proposed for “pinelands water,” which incorporates the designation of such waters under the Department’s Surface Water Quality Standards at N.J.A.C. 7:9B, in order to clarify the set of waters being referenced. Finally, in order to ensure that riparian zone functionality remains unimpaired, the plant community habitat type cannot be adversely altered, meaning, for example, that invasive shrubs must be replaced with native shrubs, and no more than one-quarter acre of riparian zone vegetation can be disturbed.

General permits (N.J.A.C. 7:13-9 and related definition at N.J.A.C. 7:13-1.2)

The Department is proposing a new general permit to promote creation, restoration, and enhancement of habitat and water quality values and functions.

*General permit 4 (N.J.A.C. 7:13-9.4)*

Proposed N.J.A.C. 7:13-9.4 sets forth a new general permit to authorize activities for creation, restoration, and enhancement of habitat and water quality values and functions, as a companion to existing general permit 16 in the FWPA rules. The existing FHACA Rules do not have general permit or specific individual permit standards for regulated activities related to creation, restoration, and enhancement of habitat and water quality values and functions. In some cases, such activities can qualify for a permit-by-rule. However, in many cases the limitations of the permit-by-rule require prospective applicants to apply for an individual permit, which can be unnecessarily time-consuming for both applicants and Department staff. This general permit is

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therefore being proposed to facilitate these environmentally beneficial projects, in a way that will not exacerbate flooding or adversely impact the environment.

The regulated activities that can be authorized under this general permit are similar to those listed under FWPA general permit 16 and include restoration plans, since the Department has determined that these activities are beneficial to the environment if conducted within the limitations of this general permit. Proposed general permit 4 includes examples of habitat creation and enhancement activities that may be authorized. These examples are identical to those listed at FWPA general permit 16, except for the FWPA general permit uses the terms “fish habitat” and “human-made,” which are replaced with the equivalent terms “aquatic habitat” and “manmade,” respectively, since the latter terms are used throughout the FHACA Rules. Whereas FWPA general permit 16 authorizes the removal of a dike or berm, proposed FHACA general permit 4 additionally authorizes the removal of a low dam, which is a defined term. Since a low dam is a type of dike or berm, its removal would be eligible under FWPA general permit 16. It is proposed to be added to FHACA general permit 4 in order to alert applicants that this type of structure is eligible for removal under this general permit.

Activities under proposed general permit 4 must be approved by a government entity that typically sponsors, develops, or has oversight for such projects, or by a charitable conservancy, as proposed to be defined at N.J.A.C. 7:13-1.2, or the plan must be required by a government agency under a mitigation plan. The proposed definition of “charitable conservancy” is identical to the definition in the FWPA rules at N.J.A.C. 7:7A-15.1 and the CPP rules at N.J.A.C. 7:7-1.3, both of which establish that it is a corporation or trust that meets the definition of a charitable conservancy at N.J.S.A. 13:8B-2, and amendments thereto. The rule additionally notes that a

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riparian zone mitigation plan submitted to the Department to satisfy the requirements and/or conditions of an individual permit does not require the submittal of a separate application for an authorization or permit.

The requirements that an activity must satisfy in order to be eligible for authorization under this general permit are similar to the requirements under FWPA general permit 16 at N.J.A.C. 7:7A-5.16(c) and (f), with additional requirements relevant to this chapter, as follows. Under proposed FHACA general permit 4, it is explicitly required that the Department must determine that the project has a reasonable likelihood of success and that the project will improve the values and functions of the ecosystem, to ensure that activities authorized under this general permit will only result in temporary environmental impacts if the impacts are outweighed by the anticipated long-term environmental benefits. General permit 4 additionally requires that appropriate timing restrictions must be observed and that, where possible, the use of heavy equipment in any channel must be avoided in order to ensure that adverse impacts to channel stability and aquatic biota will not occur as a result of activities under this general permit. Additionally, where regulated activities result in the placement of fill material in a flood hazard area or regulated activities are proposed within a channel or floodway, an engineering certification must be submitted confirming that the appropriate individual permit requirements regarding flood storage displacement and offsite flooding are met.

While some projects, such as the construction of a detention basin for stormwater management, may incidentally result in habitat creation or enhancement, only projects whose primary goal is creation, restoration, or enhancement of habitat and water quality values and functions may be authorized under proposed general permit 4, similar to FWPA general permit

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16.

Individual permits (N.J.A.C. 7:13-11.3 and 12.14)

Due to its geology, topography, and climate, New Jersey contains thousands of natural streams, lakes, and waterways. As the State's population steadily increased after colonization, pressure to provide more arable land, as well as suitable locations for roads, railroads, homes, business, and industry, led to the alteration of these natural surface waters. In many communities, natural streams have been channelized, straightened, lined with structures, or fully enclosed in pipes and culverts. Natural waterways are dynamic systems that reached equilibrium over thousands of years. By altering the natural characteristics of these features, floodplains were filled and disconnected from waterways, causing increased erosion, channel migration, and larger areas of land subject to periodic inundation. In many cases, human intervention in the path, size, and location of waterways has ultimately led to significant water quality impairment, lost aquatic and terrestrial habitat, increased flooding, and lost aesthetic resources. Recently, as recognition of the many benefits provided by natural waterways has increased, communities have begun to seek ways to restore to a natural condition waterways that have been enclosed by structures or have otherwise lost their natural characteristics. As evidenced by the success of such projects, particularly in urban areas, "daylighting" streams that have long been enclosed can provide numerous benefits to a community.

While the Department has historically recognized the many benefits of these projects, obtaining authorization under the FHACA Rules for daylighting streams has often proven to be difficult. Restoring streams to their original path and sinuosity generally involves removing

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manmade structures, strategically placing rocks and boulders within newly-reclaimed stream channels to replicate natural pools and riffles, and reconnecting the channel with its floodplain.

These actions often alter flood depths around the channel, which sometimes represents a loss in flood storage or a change in flood elevations in communities adjacent to the project.

Unfortunately, the existing restrictions in the FHACA Rules, which are designed to protect people and property from the deleterious impacts of flooding that can result from development, often make daylighting streams difficult to authorize.

In order to promote these beneficial projects, while ensuring that offsite flooding is not adversely impacted, the Department is proposing to amend the restrictions on development within floodways at proposed N.J.A.C. 7:13-11.3 and to adopt new design and construction standards for daylighting streams at proposed N.J.A.C. 7:13-12.14. Existing N.J.A.C. 7:13-10.3, which sets forth requirements that must be met for the issuance of an individual permit for a regulated activity located in a floodway, is proposed to be recodified to N.J.A.C. 7:13-11.3 and amended as follows.

Due to the depth and velocity of flood waters, construction in a floodway can exacerbate flooding and seriously threaten public safety. As such, fill and aboveground construction activities are generally prohibited, with certain exceptions specified at existing N.J.A.C. 7:13-10.3(c), proposed N.J.A.C. 7:13-11.3(c). Existing N.J.A.C. 7:13-10.3(c)6 provides an exception for restoration and/or stabilization of a bank or channel, which allows the placement of fill in a floodway to protect structures or trees from undermining or failure, or to restore or improve the ecological health or habitat value of a regulated water. This provision is expanded to allow the restoration to a natural condition of a regulated water that is enclosed by a structure, such as a

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pipe or culvert, or which has been previously straightened, channelized, or lined with revetments.

The existing requirement that the cross-sectional area of the channel open to flow must not be reduced to less than the pre-eroded condition of the channel is proposed for deletion. The purpose of the existing provision is to ensure that the hydraulic capacity of the channel is not significantly altered by the restorative activities. However, this provision is not necessary, as proposed N.J.A.C. 7:13-12.14 includes new requirements regarding offsite flood impacts, which are discussed below.

Proposed N.J.A.C. 7:13-12.14 recodifies with amendments existing N.J.A.C. 7:13-11.14, which sets forth individual permit standards that apply to any bank stabilization or channel restoration project proposed in any regulated area. Proposed N.J.A.C. 7:13-12.14(b) sets forth requirements that apply to any project subject to this section. Language duplicative with existing N.J.A.C. 7:13-11.14(c) is proposed for deletion, and clarifying and substantive changes are proposed as follows. In order to assist the Department in its review of the proposed project, an applicant seeking an individual permit under this section must provide a complete written description of the problem they seek to address. This requirement is proposed to be clarified to explain that the description of the problem must include information on existing erosion, instability, or ecological degradation that is intended to be ameliorated. The term “drainage area” is proposed to be replaced with the term “watershed,” as this term more accurately describes the area of land upstream from the site that is required to be analyzed under this section. Existing N.J.A.C. 7:13-11.14(c)1 and (d) are also incorporated into proposed N.J.A.C. 7:13-12.14(b).

Existing N.J.A.C. 7:13-11.14(c), proposed N.J.A.C. 7:13-12.14(c), sets forth individual permit standards applicable to a project to restore to a stable condition a bank or channel, which

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has become eroded, unstable, and/or ecologically degraded. The existing provisions are clarified and detail is added. Where feasible, a localized eroded bank or destabilized channel shall be restored solely by cutting back the bank to a stable slope. The Department is proposing to clarify that planting required for stabilization must be accomplished utilizing native, non-invasive plant species. A reference to limitations on riparian zone disturbance at existing N.J.A.C. 7:13-11.14(c)3 is proposed for deletion, as impacts to riparian zone vegetation are addressed in proposed N.J.A.C. 7:13-11.2. Existing N.J.A.C. 7:13-11.14(c)4 provides for bank stabilization or channel restoration, not accomplished solely using vegetation or soil bioengineering, in cases where the applicant demonstrates specific conditions exist. Proposed N.J.A.C. 7:13-12.14(c)3 incorporates the existing provision with added description related to the types of stabilization and restoration techniques that are conditionally acceptable under the paragraph. Existing N.J.A.C. 7:13-11.14(c)5, which provides that the Department will issue an individual permit for lining or piping the channel, is proposed for deletion, as lining or piping a stream can result in serious adverse environmental impacts that should be considered only in emergent situations and under a request for hardship exception.

Proposed N.J.A.C. 7:13-12.14(d) is a new provision that sets forth individual permit standards applicable to projects designed to restore to a natural condition a regulated water that is significantly ecologically degraded. Examples are given of the types of projects that are covered by the proposed new provision. An individual permit will only be approved if the project will result in ecological enhancement or riparian zone creation or restoration. Further, to the maximum extent practicable, all manmade features must be removed and the original characteristics of the regulated water restored. This ensures that the maximum environmental

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benefit will be gained from the project. In order to promote the natural quality of the restored channel, only vegetation or soil-bioengineering may be used to stabilize the channel. Soil bioengineering refers to a method developed by the USDA Natural Resource Conservation Service for stabilizing eroded banks using vegetation, sometimes in conjunction with other natural materials, such as rock and stone.

Proposed N.J.A.C. 7:13-12.14(d)5 sets forth standards designed to minimize adverse impacts to offsite flooding that could result from daylighting a stream. As noted above, restoring to a natural condition a regulated water that is enclosed by a structure can alter local flood depths and flood storage volume. In many cases, daylighting a stream will lower flood elevations adjacent to the project. However, the increased hydraulic capacity of the newly-restored open channel can sometimes cause floodwaters to reach downstream areas more efficiently and, in limited cases, can exacerbate flooding in downstream communities. In order to limit such adverse impacts, restrictions on increases to offsite flooding are proposed. These limits are less stringent than the limits set forth for bridges and culverts under this chapter. However, since stream reclamation projects seek to restore natural hydraulic conditions that have been artificially altered by human intervention, allowing additional flexibility for these beneficial project is appropriate. Furthermore, unlike a bridge or culvert, the construction of which can alter the natural flood elevation of a waterway, daylighting a stream generally restores offsite flood elevations closer to their original depths. The Department anticipates that the proposed amendments set forth in this section will encourage stream daylighting projects and effect a significant positive environmental benefit in urban communities and other developed areas.

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### **Public utilities**

The Department is proposing a number of amendments to facilitate regulated activities associated with the construction, placement, replacement and maintenance of public utilities, such as telephone and electric transmission lines, cell phone towers, and water, sewer, and gas pipelines, with appropriate protections to ensure that the activities will not exacerbate flooding or adversely impact the environment.

#### Permits-by-rule (N.J.A.C. 7:13-7)

The Department is proposing to recodify and amend six existing permits-by-rule and is proposing one new permit-by-rule to facilitate regulated activities associated with the construction, placement, replacement and maintenance of public utilities.

#### *Permit-by-rule 33 (N.J.A.C. 7:13-7.33)*

Proposed N.J.A.C. 7:13-7.33 incorporates with amendments existing N.J.A.C. 7:13-7.2(c)1, which authorizes the placement of one or more utility poles, which are not open-frame towers. Open-frame towers are covered by proposed permit-by-rule 34. While not specifically referenced in the existing permit-by-rule, monopole towers, which are generally much larger in diameter than a typical utility pole, such as a telephone pole, are not covered by the existing permit-by-rule. Monopole towers are covered by proposed permit-by-rule 35.

The existing requirement that no disturbance related to the regulated activity is located within 25 feet of any top of bank is proposed to be amended so that utility poles may be placed within 10 feet of any top of bank. Further, where the project lies adjacent to a lawfully existing

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bulkhead, retaining wall or revetment along a tidal water, no set back is required. Utility poles are often placed along existing roadways, which can parallel regulated waters. In such a case, it is often not possible to place the utility poles more than 25 feet from any top of bank. The installation of a utility pole does not require a significant area of land disturbance, and in many cases no excavation is required for its placement. Given the small size of a utility pole and the lack of a foundation, such as would be required for a building, a utility line installed at least 10 feet from the top of bank does not destabilize the channel or increase erosion or flooding. The requirement that all wires or cables connected to the utility poles must be situated at least one foot above the flood hazard area design flood elevation is proposed to be clarified to refer to the wires and cables that are supported by the utility pole. Wires and cables attached to the side of the utility pole, such as to help support the pole or as necessary to connect to wiring at the top of the utility pole, are not required to be elevated above the design flood elevation, since such a requirement would preclude the placement of nearly all utility poles in a flood hazard area.

*Permit-by-rule 34 (N.J.A.C. 7:13-7.34)*

Proposed N.J.A.C. 7:13-7.34 incorporates with amendments existing N.J.A.C. 7:13-7.2(c)2, which authorizes the placement of one or more open-frame towers outside a floodway to support a utility line. The permit-by-rule is proposed to be expanded to include open-frame towers that provide cellular telephone service, since the impact to flooding and the environment are no different for open-frame cellular telephone towers than for open-frame towers that support wires, provided the requirements of this permit-by-rule are satisfied. The existing permit-by-rule requires that each tower's footing is constructed at or below grade. However, it is customary for

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the top of the tower's footing to extend several inches above grade in order to provide a dry surface to which the tower can be connected. The permit-by-rule therefore requires each tower's footing to be constructed primarily at or below grade, such that the top of the footing lies no more than 12 inches above ground. By limiting the top of the footing to this height, flood storage displacement will be minimal and the tower will have no significant impact on flooding. Finally, the requirement that all wires or cables connected to the utility poles must be situated at least one foot above the flood hazard area design flood elevation is proposed to be amended to refer to the wires and cables that are supported by the tower, for the reasons described in permit-by-rule 33 above.

*Permit-by-rule 35 (N.J.A.C. 7:13-7.35)*

Proposed N.J.A.C. 7:13-7.35 establishes a new permit-by-rule that authorizes the placement of one or more monopole towers to provide cellular service or to support a utility line, provided certain conditions are met. As with utility poles and open-frame towers, which are authorized under proposed permits-by-rule 33 and 34, respectively, monopole towers can be constructed in such a way that impacts to flooding and the environment are *de minimis*, provided construction is undertaken within certain parameters as described in this proposed new permit-by-rule. The tower and associated structures cannot be located in a floodway, in order to ensure that no obstruction to floodwaters is created. Similar to permits-by-rule 33 and 34, all wires or cables supported by to the monopole towers must be situated at least one foot above the flood hazard area design flood elevation, in order to ensure that the wires and cables are not damaged during a flood and also so the wires and cables do not obstruct floodwaters. No disturbance

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related to the regulated activity can be located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water. Unlike utility poles authorized under proposed permit-by-rule 33, which are small in diameter and do not generally require excavation or the construction of a foundation to install, the construction of monopoles, which are much taller than utility poles, generally requires the construction of a significant foundation to ensure that the monopole is stable. Such construction within 25 feet of the top of bank can destabilize its banks or subject the regulated water to high risk of future exposure due to potential channel migration. Further, in order to ensure that the monopole towers do not displace a significant volume of flood storage, the diameter of monopole towers under this permit-by-rule is limited to no more than five feet. Limitations on disturbance to riparian zone vegetation are also proposed, in order to ensure that the placement of a monopole tower within a riparian zone does not adversely impact riparian zone functionality.

*Permit-by-rule 36 (N.J.A.C. 7:13-7.36)*

Proposed N.J.A.C. 7:13-7.36 incorporates with amendments existing N.J.A.C. 7:13-7.2(c)3, which authorizes the placement of an underground utility line beneath a regulated water through directional drilling or jacking. An exception is proposed to be added to the existing requirement that the regulated water is not disturbed in any way as a result of activities under this permit-by-rule. It is sometimes necessary for a small amount of temporary disturbance to take place within or adjacent to the regulated water to accommodate soil borings to investigate subsurface geology in order to ensure that jacking under the channel is viable. Given the limitations of this permit-by-rule, allowing borings to be taken within or adjacent to the regulated

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water will not adversely impact flooding or the environment. The existing requirement that no manhole is constructed within 10 feet of any top of bank or edge of water (unless situated within a paved surface) is incorporated with two amendments. First, for the reasons discussed in the section of this summary that address the riparian zone, an exception is made for projects located adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water. Second, the existing exemption for manholes in paved surfaces is not continued. Except for projects located adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water, manholes constructed within 10 feet of a top of bank are subject to damage and displacement during flood events, irrespective of the presence of pavement. Finally, the existing requirement that any manhole along a sanitary sewer must be constructed with a watertight cover in the flood hazard area is proposed to be expanded to cover all manholes proposed in the flood hazard area, in order to prevent leakage of material out of the system, or leakage of floodwaters into the system, during a flood event.

*Permit-by-rule 37 (N.J.A.C. 7:13-7.37)*

Proposed N.J.A.C. 7:13-7.37 incorporates with amendments existing N.J.A.C. 7:13-7.2(c)4, which authorizes the placement of an underground utility line beneath existing pavement within a regulated area. Requirements related to the construction of a manhole are amended to match identical requirements under permit-by-rule 36 as described above. An additional standard is proposed to address cases where the proposed utility line runs parallel to a regulated water, in order to preserve channel integrity. In such a case, the line cannot be constructed within 10 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall

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or revetment along a tidal water.

*Permit-by-rule 38 (N.J.A.C. 7:13-7.38)*

Proposed N.J.A.C. 7:13-7.38 incorporates with amendments existing N.J.A.C. 7:13-7.2(c)5, which authorizes the attachment of a utility line to a lawfully existing roadway that crosses a regulated water. Whereas the existing permit-by-rule requires that the proposed utility line is situated, where possible, at least one foot above the flood hazard area design flood elevation, the proposed permit-by-rule requires that, in all cases, the portion of utility line attached to the roadway or railroad is situated at least one foot above the flood hazard area design flood elevation. This amendment is being proposed because the portion of the utility line attached to the roadway or railroad is subject to the most potential flood damage and therefore requires adequate protection through properly elevating the line. Requirements related to the construction of a manhole are amended to match identical requirements under permits-by-rule 36 and 37 as described above.

*Permit-by-rule 39 (N.J.A.C. 7:13-7.39)*

Proposed N.J.A.C. 7:13-7.39 incorporates with amendments existing N.J.A.C. 7:13-7.2(c)6, which authorizes the placement of an underground utility line in a flood hazard area outside a riparian zone. The permit-by-rule is proposed to be expanded to allow the placement of an underground utility line to have limited riparian zone impacts provided that the utility line does not cross a regulated water.

The existing permit-by-rule requires that the proposed utility line is placed outside a

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riparian zone. Since most regulated waters are surrounded by a riparian zone, with limited exceptions identified in existing and proposed N.J.A.C. 7:13-2.3, the existing permit-by-rule in most cases precludes placement of a utility line within a regulated water, since the utility line would need to cross the riparian zone to get to the regulated water. In order to ensure that a proposed utility line does not potentially destabilize any regulated water, as discussed below, the proposed permit-by-rule is explicitly made inapplicable to the placement of a utility line across a regulated water. Additionally, the proposed permit-by-rule authorizes activities within a riparian zone provided the proposed limitations on riparian zone disturbance are met. Specifically, in order to ensure that the placement of an underground utility line within a riparian zone does not adversely impact riparian zone functionality, any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas. Requirements related to the construction of a manhole are amended to match identical requirements under permits-by-rule 36, 37, and 38 as described above. An additional requirement is proposed to ensure that no disturbance related to the regulated activity is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water. This requirement is necessary to ensure that construction of the underground utility line in proximity to a channel does not destabilize its banks, or subject the utility line to high risk of future exposure due to potential channel migration.

#### Requirements for a utility line under an individual permit (N.J.A.C. 7:13-12.8)

Proposed N.J.A.C. 7:13-12.8 recodifies with amendments existing N.J.A.C. 7:13-11.9, which sets forth requirements that must be met for the issuance of an individual permit for the

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construction of a utility line in a regulated area.

Proposed N.J.A.C. 7:13-12.8(b) incorporates with amendments certain provisions within existing N.J.A.C. 7:13-11.9(b) and (c) and applies them to all utility lines for which an individual permit is requested. All disturbed areas in the flood hazard area must be restored to pre-construction topography, which is necessary to ensure that the proposed utility line will not exacerbate flooding.

The existing rules require that any utility line must be sealed to ensure that there will be no leakage or discharge in a regulated area (see existing N.J.A.C. 7:13-11.9(b)8). Because of the potentially significant impacts a leak of a gas or liquid could have, the Department is proposing to continue to require that utility lines conveying a gas or liquid be sealed and additionally require that the applicant provide an engineering certification confirming that this standard is met. Utility lines that do not convey a gas or liquid, such as cables that transmit electricity or data, do not pose a risk of leaking potentially hazardous material into a regulated area. Accordingly, the Department is not proposing to continue the requirement that these other utility lines be sealed. For reasons described in the summary of the proposed permits-by-rule above, a utility line cannot be constructed within 10 feet of any top of bank, except in the immediate vicinity of a crossing of a regulated water, where such proximity is necessary. These standards are appropriately applied to all utility lines to ensure that regulated activities under this section do not exacerbate flooding or adversely impact the environment.

Under the existing requirements, any manhole must be constructed at least 10 feet from any top of bank, unless the manhole is situated in a paved surface. For the same reasons discussed in the summary of permit-by-rule 36 above, the proposed rule no longer allows

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manhole covers situated in a paved surface to be constructed closer than 10 feet of a top of bank and requires all manholes proposed in the flood hazard area to be constructed with a watertight cover.

Proposed N.J.A.C. 7:13-12.8(g) incorporates with added detail and clarifications existing N.J.A.C. 7:13-11.9(f), which provides an individual permit for periodic maintenance, repair, or replacement of a utility line.

### **Soil erosion and sediment control standards and stormwater management**

As described below, this rulemaking clarifies that the Department will rely on Soil Conservation Districts for compliance with the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90 and clarifies the entities considered to be included as a “soil conservation district” under this chapter. The Department is also proposing to clarify which activities under this chapter are subject to the requirements of the SWM rules at N.J.A.C. 7:8. Finally, the Department is relocating with clarifying amendments general permit 10 at existing N.J.A.C. 7:13-8.12, for a stormwater outfall along a water with a drainage area of less than 50 acres, as general permit 11 at proposed N.J.A.C. 7:13-9.11.

#### Soil erosion standards (N.J.A.C. 7:13-1.2, 12.1, and 12.9)

All existing and proposed references to Soil Conservation Districts, such as set forth at proposed N.J.A.C. 7:13-12.1(c) and (d), are clarified to remove references to Soil Conservation District designees. While certain exempt municipalities are authorized to enforce the Standards for Soil Erosion and Sediment Control by ordinance pursuant to N.J.S.A. 4:24-48, these

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municipalities are not considered to be designees. The Department is proposing to delete the existing definition of “Soil Conservation District” and adopt a new definition at N.J.A.C. 7:13-1.2 to more accurately reflect the status of these municipalities and to provide additional detail regarding the scope and authority of all Soil Conservation Districts.

Existing N.J.A.C. 7:13-11.1(e) requires that any project not subject to either the Soil Conservation District or Natural Resource Conservation Service review must implement certain basic soil erosion and sediment control measures in accordance with the “Standards for Soil Erosion and Sediment Control in New Jersey” at N.J.A.C. 2:90. Since many large projects fall under the jurisdiction of one of these agencies, this provision primarily applies to projects with less than 5,000 feet of disturbance, single-family homes, and small in-stream disturbances. However, under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 et seq., the standards set forth in N.J.A.C. 2:90 are not intended to apply to types of small projects. Therefore, this provision is proposed to be amended to remove references to N.J.A.C. 2:90. The requirements of proposed N.J.A.C. 7:13-12.1(e) therefore do not rely on N.J.A.C. 2:90 and the Department has determined that the basic sediment control measures listed in subsection (e) are sufficient to prevent erosion and sediment discharge to ensure that sediment does not enter waters during and after construction and degrade water quality or negatively affect the riparian zone.

Similarly, proposed N.J.A.C. 7:13-12.9 recodifies with amendments existing N.J.A.C. 7:13-11.10, which sets forth design and construction standards that apply to any stormwater outfall structure proposed in any regulated area. Existing N.J.A.C. 7:13-11.10(b) references the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90 and may imply

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that the Department will perform a review of soil erosion and sediment control measures in accordance with the requirements set forth at N.J.A.C. 2:90. Accordingly, this provision is proposed to be amended to clarify that compliance with N.J.A.C. 2:90 is determined by the entity having jurisdiction over the site under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39, et seq.

Stormwater management (N.J.A.C. 7:13-7.8, 7.9, 7.10, 7.29, 8.6, 9.6, 9.8, 9.9, 9.11, and 12.2)

The Department's SWM rules at N.J.A.C. 7:8-1.2 define a "major development" as any project that "provides for ultimately disturbing one or more acres of land or increasing impervious surface by one-quarter acre or more." In some cases, activities authorized under this chapter constitute a major development and are therefore subject to the design, maintenance, and operational requirements of N.J.A.C. 7:8. Due to the differing scope of FHACA permits-by-rule, general permits, and individual permits, authorization or approval under these permit types appropriately addresses activities constituting a major development differently.

The permits-by-rule under the existing and proposed FHACA Rules are limited to regulated activities that are below the threshold for a major development under the SWM rules. Since the permits-by-rule at existing N.J.A.C. 7:13-7.2(a)1, 2, and 6, and (b)19 have a broad scope, to ensure that only appropriately limited activities are authorized under the permits-by-rule, these permits-by-rule specifically require that authorized activities cannot constitute a major development. As discussed in the summary of proposed N.J.A.C. 7:13-7.8, 7.9, 7.10, and 7.29, this requirement is continued for these proposed permits-by-rule. The remaining existing and proposed permits-by-rule are limited in size and scope so that impacts to surface water quality,

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runoff quantity, and groundwater recharge cannot occur and a detailed review of stormwater management calculations, generally required for any project that constitutes a major development, is not necessary. This is consistent with the general requirements for authorization under a permit-by-rule at existing N.J.A.C. 7:13-7.1(b)1, proposed N.J.A.C. 7:13-6.7(c), which specify that the conditions of each permit-by-rule must be satisfied without requiring the Department to review engineering calculations.

The proposed general permit-by-certification at N.J.A.C. 7:13-8.6, and the proposed general permits at N.J.A.C. 7:13-9.6, 9.8, and 9.9, authorize activities that could potentially constitute a major development. In the case of the proposed general permit-by-certification for an activity that constitutes a major development, the applicant must obtain a certification from an engineer that the project complies with the requirements of N.J.A.C. 7:8. For authorizations under a general permit, due to the broader scope and potential impacts of regulated activities covered by these proposed general permits, the Department will determine compliance with N.J.A.C. 7:8 through a site-specific review of the overall project. Under the existing FHACA Rules, where activities under a general permit constitutes a major development, existing N.J.A.C. 7:13-8.1(b)7 requires that the Department must have previously determined, through the approval of a coastal or FWPA permit, that the overall project with which the general permit activity is associated complies with the SWM rules at N.J.A.C. 7:8. This is appropriate given the limited scope of the existing general permits and the Department's 45-calendar-day application review time for a general permit authorization. As this rulemaking proposes to adopt new general permits covering a broader scope of activities, and as the application review time for a general permit authorization is proposed to be increased to 90 calendar days, as discussed in the

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summary of proposed N.J.A.C. 7:13-21.3 below, where activities under the general permits at proposed N.J.A.C. 7:13-9.6, 9.8, and 9.9, in combination with all proposed activities, constitute a major development, the applicant must demonstrate to the Department that all applicable stormwater requirements are met. The remaining general permits-by-certification and general permits are limited in size and scope so that impacts to surface water quality, runoff quantity, and groundwater recharge cannot occur.

For regulated activities associated with a major development requiring an individual permit, the requirements of existing N.J.A.C. 7:13-11.2, proposed N.J.A.C. 7:13-12.2, apply. Proposed N.J.A.C. 7:13-12.2(a) is amended to clarify that the requirements of the section apply to any regulated activity associated with a major development which requires an individual permit. For example, where a person proposes to undertake a development activity that constitutes a major development and any portion of the development activity requires a FHACA individual permit, then the Department will review the entire development activity to ensure that it complies with N.J.A.C. 7:8. This reflects the intent of the exiting provision and the Department's practice.

### **Dams and low dams**

The Department's Dam Safety Standards, N.J.A.C. 7:20, are administered by the Bureau of Dam Safety and Flood Control and set forth detailed design and construction standards for dams. A dam is defined at N.J.A.C. 7:20-1.2 to mean "any artificial dike, levee or other barrier, together with appurtenant works, which is constructed for the purpose of impounding water on a permanent or temporary basis, that raises the water level five feet or more above the usual, mean,

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low water height when measured from the downstream toe-of-dam to the emergency spillway crest or, in the absence of an emergency spillway, the top-of dam.”

Given the Department’s oversight of dams under N.J.A.C. 7:20, dams are regulated under the FHACA Rules only in specific cases where the Department has determined that compliance with N.J.A.C. 7:13 is necessary to ensure that a new or reconstructed dam does not exacerbate flooding or adversely impact the environment. Existing N.J.A.C. 7:13-11.11 therefore sets forth standards for dams in these cases.

A low dam is defined at existing N.J.A.C. 7:13-1.2 as “an artificial dike, levee or other barrier, which is constructed for the purpose of impounding water on a permanent or temporary basis, but which does not raise the water surface elevation enough to meet the definition of a dam.” Low dams are not subject to the requirements of N.J.A.C. 7:20 and therefore do not receive Department oversight through the Bureau of Dam Safety and Flood Control. As such, existing N.J.A.C. 7:13-11.11 sets forth standards for all low dams proposed in a flood hazard area or riparian zone to ensure that new and reconstructed low dams do not exacerbate flooding or adversely impact the environment. Existing N.J.A.C. 7:13-11.11, which addresses both dams and low dams, has proven confusing for prospective applicants. Accordingly, the Department is proposing to repeal existing N.J.A.C. 7:13-11.11 and to bifurcate its substance into proposed N.J.A.C. 7:13-12.10, which sets forth requirements for low dams, and proposed N.J.A.C. 7:13-12.11, which sets forth the requirements for dams. The Department is also proposing to correct unintended conflicts within existing N.J.A.C. 7:13-11.11 related to dams and to eliminate duplication of effort with the Bureau of Dam Safety and Flood Control, as described in the summary below.

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Requirements for a low dam (N.J.A.C. 7:13-11.3 and 12.10)

Existing N.J.A.C. 7:13-10.3, which sets forth requirements that must be met for the issuance of an individual permit for a regulated activity located in a floodway, is recodified to proposed N.J.A.C. 7:13-11.3. The floodway is the inner portion of the flood hazard area, which is characterized by faster and deeper flows as compared with the outer portion of the flood hazard area, known as the flood fringe. Due to the depth and velocity of flood waters, construction in a floodway can exacerbate flooding and seriously threaten public safety. As such, fill and aboveground construction activities are prohibited, with certain exceptions provided at existing N.J.A.C. 7:13-10.3(c), proposed N.J.A.C. 7:13-11.3(c). Included among these exceptions is the construction in a floodway of a “water control structure, such as a bridge, culvert, footbridge, dam or flood control project.” These structures typically must be located within or along a regulated water in order to serve their intended purpose and often result in some fill or obstruction within the floodway. The Department recognizes that construction within the floodway is often unavoidable for these projects and, accordingly, has proposed requirements at proposed N.J.A.C. 7:13-12.1 and 12.7 to ensure that offsite flooding will not increase as a result. The term “low dam” is unintentionally omitted from the list of exceptions in the existing rules and is proposed to be added at proposed N.J.A.C. 7:13-11.3(c)4 in order to clarify that a low dam is a type of water control structure that can be permitted within a floodway. Under the proposal, the individual permit standards for footbridges at existing N.J.A.C. 7:13-11.8 are proposed for deletion and a footbridge can instead be constructed under permit-by-rule 23 at proposed N.J.A.C. 7:13-7.23 or general permit 12 at proposed N.J.A.C. 7:13-9.12. Proposed

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N.J.A.C. 7:13-12.7(a) explains that a footbridge that does not meet the requirements of permit-by-rule 23 or general permit 12 is subject to the individual permit requirements for a bridge or culvert under proposed N.J.A.C. 7:13-12.7. Therefore, the existing reference to a footbridge at existing N.J.A.C. 7:13-11.3(c)4 is proposed for deletion.

Requirements applicable to activities on a low dam, including construction, replacement, repair, or removal, are proposed at N.J.A.C. 7:13-12.10. The proposed section applies only to the low dam itself; any regulated activities performed in connection with the low dam are reviewed in accordance with the appropriate requirements for those activities under this chapter.

The FHACA Rules generally prohibit disturbance within 25 feet of any top of bank, since disturbance in this area can easily destabilize a channel and lead to increased erosion, flooding and adverse water quality impacts. Consistent with this concern, generally, all disturbance related to the low dam must be located at least 25 feet from any top of bank. For example, the berm or embankment around a stormwater management basin, which is being constructed near a regulated water, could constitute a low dam. However, a low dam may be permitted within 25 feet of a top of bank if the applicant demonstrates there is a compelling need to construct the low dam, which cannot be met without such disturbance. Additionally, all disturbance must be located outside a channel with fishery resources, unless the applicant demonstrates that disturbance to the channel is unavoidable and that the low dam is modified to permit fish to pass the structure in either direction. This incorporates the substance of the existing requirements for low dams with regard to impacts to fishery resources.

Individual permit standards to reconstruct, replace, repair, or remove a low dam are additionally specified in the proposed new section. Such activities will only be permitted if any

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proposed disturbance located within 25 feet of any top of bank is the minimum necessary to meet the applicable State and Federal requirements governing the proposed activities. This is necessary to ensure that the low dam will not exacerbate flooding or adversely impact the environment.

Requirements for a dam (N.J.A.C. 7:13-12.11)

As noted above, proposed N.J.A.C. 7:13-12.11 incorporates the substance of existing N.J.A.C. 7:13-11.11 with regard to individual permit standards for dams. Existing N.J.A.C. 7:13-11.11(a) provides that this section applies to any dam or low dam proposed in any regulated area. However, existing N.J.A.C. 7:13-11.11(c) provides that the construction of a dam is subject to N.J.A.C. 7:13 only if the dam serves as a stormwater management basin that is located in a regulated area, or which discharges in a regulated area. Any dam that is constructed for another purpose is not subject to the requirements of this chapter, but is subject to the Dam Safety Standards at N.J.A.C. 7:20. The structural stability, safety, and flooding impacts of the dams themselves are therefore reviewed under the Dam Safety Standards at N.J.A.C. 7:20. Thus, there is no need to review these characteristics of a dam under the FHACA Rules. However, stormwater management basins often meet the definition of a dam. The construction a stormwater management basin in a regulated area can displace flood storage volume and disturb riparian zone vegetation, which can exacerbate flooding and lead to adverse impacts to riparian zone functionality. Further, a stormwater management basin located within or discharging into a regulated area must also meet the stormwater management requirements at existing N.J.A.C. 7:13-11.2, proposed N.J.A.C. 7:13-12.2. Since the Dam Safety Standards do not include

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standards for flood storage volume displacement and riparian zone disturbance, and since N.J.A.C. 7:20-1.3 specifies that only Class IV dams are required to meet the Department's SWM rules, it is necessary for stormwater basins that are dams to be reviewed under the FHACA Rules in addition to the Dam Safety Standards.

In order to harmonize existing N.J.A.C. 7:13-11.11(a) and (c), proposed N.J.A.C. 7:13-12.11(a) clarifies that this section sets forth design and construction standards that apply to any dam that serves as a component of a stormwater management basin. The subsection also incorporates with amendments existing N.J.A.C. 7:13-11.11(b), which explains that construction activities that are related to a dam, but which are not actually part of the dam structure, are regulated separately under the chapter. For example, excavation of a basin behind the dam, the diversion of a stream around the dam, or the construction of storm sewers that tie into the dam are all considered separate project elements and are subject to the design and construction standards that apply to each particular regulated activity under this chapter.

Proposed N.J.A.C. 7:13-12.11(b) sets forth activities associated with dams that are not subject to this chapter. The construction, replacement, repair or removal of any dam that does not serve as a component of a stormwater management basin is not subject to the requirements of this chapter, which is appropriate since the Department's Dam Safety Standards ensure that such dams will not exacerbate flooding or adversely impact the environment. Regulated activities performed in association with the removal of a dam that does not serve as a stormwater management basin are similarly not subject to the FHACA Rules. This is appropriate because N.J.A.C. 7:20-1.7(h) contains standards for the removal of a dam and associated activities, such as channel modification and restoration, which ensure that the dam removal will not exacerbate

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flooding or adversely impact the environment. The proposed subsection additionally indicates that dams are regulated by the Department's Dam Safety Section and provides contact information for this section.

Proposed N.J.A.C. 7:13-12.11(c) mirrors the standards at proposed N.J.A.C. 7:13-12.10(b) for low dams and requires that a dam subject to this section must be located at least 25 feet from any top of bank, unless the applicant satisfies two requirements. The rationale for these requirements is the same as applicable to proposed N.J.A.C. 7:13-12.10(b), as summarized above.

Proposed N.J.A.C. 7:13-12.11(d) mirrors the standards at proposed N.J.A.C. 7:13-12.10(c) for low dams and sets forth standards to reconstruct, replace or repair a dam that is subject to this section, for the same reasons summarized above.

### **Docks, piers, retaining walls, and bulkheads**

The Department is proposing a number of amendments to facilitate the construction of docks, piers, retaining walls and bulkheads with appropriate protections to ensure that these activities will not exacerbate flooding or adversely impact the environment.

#### Permits-by-rule (N.J.A.C. 7:13-7)

##### *Permit-by-rule 17 (N.J.A.C. 7:13-7.17)*

Existing N.J.A.C. 7:13-7.2(b)14 authorizes the construction of a dock along an impounded water, such as a lake, pond, or reservoir. The permit-by-rule is proposed to be

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relocated to proposed N.J.A.C. 7:13-7.17 and expanded to allow the construction of piers and boathouses as well as docks, since these structures have equivalent and *de minimis* impacts on flooding if constructed as set forth under this permit-by-rule. The proposed permit-by-rule also clarifies that authorization applies to both fixed and floating docks, which codifies the Department's interpretation of the existing permit-by-rule. Authorization under this permit-by-rule is additionally proposed to be expanded to allow the construction of docks, piers, and boathouses along tidal regulated waters, as discussed below, and along impounded fluvial regulated waters, such as a lake, pond, or reservoir, in two cases. In the first case, the impounded regulated water must have a surface area of one acre or more. Since the volume of such an impounded water is extremely large in comparison to the volume of the proposed dock, pier, or boathouse, construction in accordance with this proposed permit-by-rule will not exacerbate flooding or subject the dock, pier, or boathouse to damaging flood velocities. In the second case, the size of the impounded water is not specified, but the impounded water must be situated along a regulated water that has a drainage area of less than one square mile. The drainage area of the regulated water is limited in order to ensure that the velocity within the impounded water is relatively low during flood events, therefore ensuring that construction in accordance with this proposed permit-by-rule will not exacerbate flooding or subject the dock, pier, or boathouse to damaging flood velocities,

The proposed reference to tidal regulated waters is also being incorporated to address an unintended conflict between the FHACA Rules and the Department's coastal rules at N.J.A.C. 7:7 and 7:7E. Construction in New Jersey's coastal zone is subject to the requirements of the Department's Coastal rules. Existing N.J.A.C. 7:7E-3.25 sets forth standards for activities within

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flood hazard areas, which incorporates by reference the standards of the FHACA Rules. As a result, projects that require a coastal permit, and which are located within a flood hazard area, must also satisfy the requirements of the FHACA Rules as part of the Department's coastal permit review. However, N.J.A.C. 7:7E-3.25(b) provides that the requirements of the FHACA Rules apply only to the development of "habitable buildings and the construction of railroads, roadways, bridges and/or culverts" below the mean high water line. Other types of construction below the mean high water line in a tidal flood hazard area, such as docks and piers, are not subject to the requirements of the FHACA Rules. Generally, only a portion of a dock or pier lies below the mean high water line. The portion of a dock or pier that extends above the mean high water line is therefore subject to the requirements of the FHACA Rules. However, the existing FHACA Rules do not contain standards for the placement of docks and piers in tidal areas and, in fact, generally prevent in-water structures, except for bridges, culverts, and other structures listed at existing N.J.A.C. 7:13-10.3(c), proposed N.J.A.C. 7:13-11.3(c). Therefore, to ensure that a dock, pier, or boathouse that has been authorized under a coastal permit can be constructed without requiring a FHACA hardship exception, while also ensuring that the dock, pier, or boathouse does not exacerbate flooding, obstruct flow, or adversely impact the environment, the Department is proposing to expand the existing permit-by-rule to cover these structures in tidal areas, with appropriate limitations described below.

The existing permit-by-rule, which authorizes a dock of no more than 1,000 square feet, is unnecessarily limiting. In fluvial areas, a dock, pier, or boathouse of no more than 2,000 square feet will have an insignificant impact on flooding. The size of a dock, pier, or boathouse does not need to be limited in tidal areas, since flood storage displacement does not occur in tidal

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flood hazard areas and the Coastal rules place appropriate limits on the size of docks, piers, and boathouses.

A new provision is proposed, which addresses the construction of stairs or other structures necessary for access to the dock, pier, or boathouse. The existing permit-by-rule does not mention such structures, which has resulted in confusion as to whether such structures are permissible under this authorization. The Department is therefore proposing to clarify that such structures are authorized under this permit-by-rule, provided certain requirements are met to ensure that obstruction to flow is minimized. Specifically, any stairs or other structures must remain open underneath to allow floodwaters to pass freely, and such structures cannot require the existing ground elevation to be raised in a fluvial flood hazard area in order to be constructed. Finally, any stairs or other structures must be oriented to minimize obstruction to flow, such as by being set into the bank, where possible. These requirements are necessary in order to minimize flood storage displacement and potential obstruction to flood flows.

The existing requirement that no more than 1,000 square feet of vegetation can be cleared, cut, or removed in a riparian zone is proposed to be replaced with a more flexible provision. This proposed permit-by-rule provides that no vegetation can be cleared, cut or removed in a riparian zone, except for vegetation within 10 feet of the structure if such disturbance is necessary to facilitate its construction. This will limit the removal of vegetation to less than the existing amount in cases where disturbance is not justified, but will allow more disturbances in cases where the construction of the dock or pier necessitates greater disturbance.

Construction in a floodway (N.J.A.C. 7:13-11.3)

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Existing N.J.A.C. 7:13-10.3, which sets forth requirements that must be met for the issuance of an individual permit for a regulated activity located in a floodway, is proposed to be recodified to N.J.A.C. 7:13-11.3. Due to the depth and velocity of flood waters, construction or placement of fill in a floodway can exacerbate flooding and seriously threaten public safety. Accordingly, fill and aboveground construction activities are prohibited, with certain exceptions provided at existing N.J.A.C. 7:13-10.3(c), proposed N.J.A.C. 7:13-11.3(c).

Since the floodway includes the channel of any regulated water, retaining walls and bulkheads along regulated waters are necessarily situated within a floodway. Further, the construction of a retaining wall or bulkhead along a regulated water in some cases requires the placement of additional fill within the floodway. Accordingly, without an appropriate exception under proposed N.J.A.C. 7:13-11.3(c), retaining walls and bulkheads would be prohibited along regulated waters. Proposed N.J.A.C. 7:13-12.13 incorporates existing N.J.A.C. 7:13-11.13 and sets forth standards necessary to ensure that a retaining wall or bulkhead within a regulated water or floodway and/or which is located within 25 feet of any top of bank is designed to remain stable during flood conditions and, along with the requirements at proposed N.J.A.C. 7:13-12.1, additionally to ensure that a proposed retaining wall or bulkhead will not exacerbate flooding. Because of the requirements incorporated in proposed N.J.A.C. 7:13-12.1 and 12.13, the Department is proposing to add retaining walls and bulkheads that meet the requirements of these sections to the list of activities that are permitted in floodways at proposed N.J.A.C. 7:13-11.3(c)6.

Requirements for a retaining wall or bulkhead (N.J.A.C. 7:13-12.13)

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Proposed N.J.A.C. 7:13-12.13 incorporates with amendments existing N.J.A.C. 7:13-11.13, which is proposed for repeal. Existing N.J.A.C. 7:13-11.13 sets forth requirements that must be met for the issuance of an individual permit for a retaining wall or bulkhead. The design and construction standards under existing N.J.A.C. 7:13-11.13 apply to all retaining walls and bulkheads proposed in any regulated area. However, broadly applying the standards of this section is in some cases duplicative of other requirements of this chapter and the requirements of the Department's Coastal rules, as discussed below. Therefore, proposed N.J.A.C. 7:13-12.13 reduces the scope of the section and clarifies which retaining walls and bulkheads are subject to the standards of this section.

Proposed N.J.A.C. 7:13-12.13(a) sets forth the scope of the section, which is narrower than the scope of existing N.J.A.C. 7:13-11.13. In contrast to the existing section, the requirements of this section apply to a more limited group of retaining walls and bulkheads. Particularly, the proposed section applies to retaining walls or bulkheads that are located within a regulated water, within a floodway, or within 25 feet of any top of bank. A retaining wall and a bulkhead are both types of structures, and individual permit standards for all structures under the jurisdiction of this chapter are set forth at existing N.J.A.C. 7:13-11.4, proposed N.J.A.C. 7:13-12.4. The individual permit standards for structures specified in proposed N.J.A.C. 7:13-12.4 are sufficient to ensure that a retaining wall or bulkhead not listed at proposed N.J.A.C. 7:13-12.13(a) is designed and constructed to be sufficiently stable and flood resistant. Accordingly, it is not necessary that the structures no longer proposed to be included within the scope of this section meet the specific additional requirements in this section.

Proposed N.J.A.C. 7:13-12.13(b) provides that the requirements of this section do not

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apply to any retaining wall or bulkhead permitted or exempt under the Department's Coastal rules. Existing N.J.A.C. 7:7E-3.25 in the Coastal Zone Management rules sets forth standards for activities within flood hazard areas in the coastal zone. This section incorporates by reference the standards of N.J.A.C. 7:13. Since the Department's review under its Coastal rules would ensure that a retaining wall or bulkhead is stable, and does not obstruct navigation or impair coastal resources, a retaining wall or bulkhead that receives a CAFRA or waterfront development permit would not adversely impact flooding.

Proposed N.J.A.C. 7:13-12.13(c) and (d) incorporate with amendments the requirements of existing N.J.A.C. 7:13-11.13(b), and set forth design and construction standards necessary to ensure the stability of retaining walls and bulkheads subject to this section. Retaining walls and bulkheads must be designed with stable footings that extend at least three feet below grade unless it is demonstrated that such a footing is either not possible to construct or not necessary for stability. The applicant must also demonstrate that the retaining wall or bulkhead is designed to withstand displacement, overturning, and failure due to undermining and/or pressure from soil, water, and frost and, if located within or immediately adjacent to a regulated water, to be resistant to erosion and any future shifting bed and/or bank. In cases where a retaining wall or bulkhead is four feet in height or greater, the applicant must provide an engineering certification confirming that these requirements are met. This requirement is appropriate because retaining walls and bulkheads that are four feet in height or greater are subject to greater sliding and overturning forces, and can therefore cause greater environmental damage and adverse impacts to flooding should they fail, than retaining walls and bulkheads of less than four feet in height.

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**Site monitoring, investigation and remediation activities, and the placement, storage, and processing of hazardous substances**

The Department is proposing a number of amendments to facilitate various regulated activities associated with site monitoring, investigation and remediation activities, and the placement, storage, and processing of hazardous substances, with appropriate protections to ensure that the activities will not exacerbate flooding or adversely impact the environment.

Definitions related to hazardous substance storage and remediation activities (N.J.A.C. 7:13-1.2)

As discussed below in the proposed amendments to the permit requirements related to the placement, storage or processing of hazardous substances, the existing definition of “hazardous waste facility” in some cases unintentionally limits the application of requirements under this chapter to facilities that are licensed to place, store, and process such material. However, individuals can place, store, and process hazardous substances in a flood hazard area or riparian zone without being part of a facility that is licensed to do so. Given the severe environmental harm that can result from unchecked placement of such materials in a regulated area, the Department is proposing to delete the definition of “hazardous waste facility” and to make associated amendments to the permitting requirements for these activities.

Additionally, the definition of “temporary” is proposed to be amended to reflect that disturbance associated with certain regulated activities, such as hazardous substance remediation or solid waste facility closure, may necessarily exceed six months in duration. The definition is being amended to clarify that the Department may consider an activity temporary where it that lasts more than six months where such longer duration is necessary to complete activities

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required to meet statutory or regulatory standards that cannot otherwise be completed within six months, provided appropriate restoration of disturbed regulated areas is undertaken.

Permits-by-rule (N.J.A.C. 7:13-7)

The Department is proposing to recodify and amend two existing permits-by-rule and is proposing three new permits-by-rule to promote site monitoring and investigation activities, and activities related to the placement, storage and processing of hazardous substances.

*Permit-by-rule 44 (N.J.A.C. 7:13-7.44)*

Proposed N.J.A.C. 7:13-7.44 establishes a new permit-by-rule that authorizes surveying in a regulated area, provided certain conditions are met. This proposed permit-by-rule mirrors the provision in the FWPA rules at N.J.A.C. 7:7A-2.2(c)1 exempting surveying and wetlands investigation activities within a freshwater wetlands or transition area. The permit-by-rule requires that all work must be done by hand and that no trees can be cleared, cut, or removed in a riparian zone except for cutting of branches or dead trees necessary to provide an adequate site line. Furthermore, the width of clearing in a riparian zone, such as to establish survey lines and related investigations, may not be more than five feet. These proposed limitations are necessary to ensure that adverse impacts to riparian zone functionality are minimized.

*Permit-by-rule 45 (N.J.A.C. 7:13-7.45)*

Proposed N.J.A.C. 7:13-7.45 establishes a new permit-by-rule that authorizes subsurface sampling or geotechnical investigation, such as conducting survey borings or excavation to

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obtain information on subsurface conditions, determining the presence or extent of contamination in subsurface soils or groundwater, and/or obtaining seismic information, provided certain conditions are met. Like proposed permit-by-rule 44, this proposed new permit-by-rule also mirrors the exemption in the FWPA rules at N.J.A.C. 7:7A-2.2(c)1 for surveying and wetlands investigation activities within a freshwater wetlands or transition area. The permit-by-rule requires that no grading or changes in topography can occur in a flood hazard area in order to ensure that the authorized activities do not obstruct flood flows or displace flood storage volume. Additionally, no regulated activity can be conducted within a regulated water or within 25 feet of any top of bank, since such work can destabilize the banks of the regulated water. In order to limit impacts to riparian zone vegetation, each excavated area must be no more than three feet in diameter. Finally, no trees can be cleared, cut or removed in a riparian zone, except for cutting of branches or dead trees necessary to provide access. This requirement is being proposed in order to minimize possible impairment of riparian zone functionality.

*Permit-by-rule 46 (N.J.A.C. 7:13-7.46)*

Proposed N.J.A.C. 7:13-7.46 establishes a new permit-by-rule that authorizes the installation of one or more monitoring wells, provided certain conditions are met. No grading or changes in topography can occur in a flood hazard area in order to ensure that the authorized activities do not obstruct flood flows or displace flood storage volume. In order to limit impacts to riparian zone vegetation, no vegetation can be cleared, cut, or removed in a riparian zone, except for vegetation within five feet of the well if such disturbance is necessary to facilitate its placement. Finally, in order to minimize possible impairment of riparian zone functionality, no

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trees can be cleared, cut, or removed in a riparian zone, except for cutting of branches or dead trees necessary to provide access.

*Permit-by-rule 47 (N.J.A.C. 7:13-7.47)*

Existing N.J.A.C. 7:13-7.2(a)8, which authorizes the construction of a gauge, weir, or other device to measure the depth, velocity, and/or rate of flow in a regulated water, provided certain conditions are met. is proposed to be relocated to N.J.A.C. 7:13-7.47 with amendments. The existing permit-by-rule requires that the device be approved by the United States Geological Survey. The proposed permit-by-rule additionally authorizes devices approved by the New Jersey Water Supply Authority or New Jersey Geological Survey, since these agencies authorize, oversee and construct similar structures. Whereas the existing permit-by-rule requires that a device cannot cause any existing building to be subject to increased flooding during any flood event up to and including the flood hazard area design flood, the proposed permit-by-rule requires that increased flooding will not occur during any flood event described in N.J.A.C. 7:13-12.1(i). Compliance with the existing requirement would, in theory, require an analysis of every flood event up to and including the flood hazard area design flood, which is impractical. Since proposed N.J.A.C. 7:13-12.1(i) sets forth the flood events that the Department requires to be analyzed for bridges and culverts under proposed N.J.A.C. 7:13-12.7, as well as to evaluate offsite impacts under proposed N.J.A.C. 7:13-12.1(f) and (g), an analysis of the flood events listed at proposed N.J.A.C. 7:13-12.1(i) is sufficient to demonstrate that any device authorized under this permit-by-rule will not exacerbate offsite flooding.

In order to avoid adverse impacts to riparian zone functionality, no more than 2,000

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square feet of vegetation may be cleared, cut, and/or removed in a riparian zone. Finally, the existing requirement that timing restrictions must be met is continued from the existing permit-by-rule, which will ensure that aquatic species are not adversely impacted. Existing N.J.A.C. 7:13-7.2(a)8vii is not proposed to be continued as replanting of temporarily disturbed areas is required under proposed N.J.A.C. 7:13-6.7, which the proposal requires be satisfied.

Accordingly, it is no longer necessary to specify this requirement in the permit-by-rule.

*Permit-by-rule 52 (N.J.A.C. 7:13-7.52)*

Existing N.J.A.C. 7:13-7.2(e)5, which authorizes the placement, storage, or processing of hazardous substances at a lawfully existing hazardous waste facility located in a regulated area, is proposed to be relocated to proposed N.J.A.C. 7:13-7.52 with amendments. The existing permit-by-rule limits the placement, storage, and processing of hazardous substances to “hazardous waste facilities,” which is defined at existing N.J.A.C. 7:13-1.2 to mean a “facility that is licensed by the State to receive, store and/or process hazardous substances, and which is operating in accordance with all applicable Federal, State and local laws.” However, any number of facilities may seek to place, store, and process such material, such as fuel distribution centers, automobile repair shops, and dry cleaners. The proposed permit-by-rule therefore addresses such facilities that were established prior to the adoption date of the existing chapter, have been in continuous operation since that date, and are operating in compliance with all Federal, State, and local requirements. The existing permit-by-rule references the proposal date of the existing chapter. However, in order to address facilities that lawfully began placing, storing, or processing hazardous substances in a regulated area between the proposal and adoption date of

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the chapter, the proposed permit-by-rule references the adoption date.

Under the proposed permit-by-rule, the footprint of the area in which the hazardous substances is stored within the riparian zone must not increase and no trees can be cleared, cut or removed in the riparian zone. This clarifies the Department's intention regarding the permit-by-rule, which is to allow existing uses within the flood hazard area and riparian zone to remain, provided the size of the facility and the peak volume of material stored in the flood hazard area are not increased, while also preserving existing riparian zone functionality.

#### General permits-by-certification (N.J.A.C. 7:13-8)

The Department is proposing two general permits-by-certification to facilitate regulated activities associated with site monitoring and investigation.

#### *General permit-by-certification 12 (N.J.A.C. 7:13-8.12)*

Proposed N.J.A.C. 7:13-8.12 sets forth a new general permit-by-certification for surveying and subsurface investigation, which is intended as a companion to existing general permit 12 in the FWPA rules at N.J.A.C. 7:7A-5.12. The existing FHACA Rules do not have specific standards for surveying and subsurface investigation activities. In some cases, such activities can qualify for a permit-by-rule, provided no trees are cut and disturbance is limited to previously disturbed areas such as lawns and gardens. However, in cases where trees or a significant area of other riparian zone vegetation needs to be cleared or cut to provide access to investigate a site, an individual permit application is generally required, which can be unnecessarily time-consuming for both applicants and Department staff. This general permit-by-

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certification is therefore being proposed to authorize a minor amount of riparian zone disturbance in order to facilitate undertaking these minor projects in a way that will not adversely impact flooding or the environment.

The proposed general permit-by-certification allows surveying and subsurface investigation within a flood hazard area or riparian zone. Examples of activities that can be authorized under this general permit-by-certification include clearing vegetation in order to create survey lines, taking soil borings, excavating exploratory pits, and other temporary activities necessary for a geotechnical or archaeological investigation.

In addition to the requirements applicable to all general permits-by-certification at N.J.A.C. 7:13-6.7, the general permit-by-certification sets forth standards necessary to preserve channel integrity and to reduce potential for bank erosion as a result of activities under this general permit-by-certification, as well as to ensure that riparian zone functionality is not adversely impacted. Activities may not be conducted within a regulated water or result in grading or changes in topography within a flood hazard area. Disturbance to riparian zone vegetation must be limited to the minimum necessary to obtain the desired information, which mirrors the requirement in the FWPA rules at N.J.A.C. 7:7A-5.12(b). Furthermore, activities must be located in actively disturbed areas such as lawns and actively farmed areas wherever possible, since disturbance to vegetation within these areas can typically be easily restored. Finally, the path of disturbance to riparian zone vegetation can be no more than 10 feet wide. This will ensure that disturbance to riparian zone vegetation will be minimal.

*General permit-by-certification 14 (N.J.A.C. 7:13-8.14)*

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Proposed N.J.A.C. 7:13-8.14 sets forth a new general permit-by-certification to authorize a number of activities related to monitoring and measuring the depth, velocity, flow, and quality of water both on the surface and below ground. This general permit-by-certification is intended as a companion to existing general permit 14 in the FWPA rules at N.J.A.C. 7:7A-5.14. The existing FHACA Rules do not have general permit or individual permit standards for regulated activities related to constructing water monitoring devices. In some cases, such activities can qualify for a permit-by-rule. However, in many cases the limitations of the permit-by-rule preclude installation of such devices without an individual permit, which can be unnecessarily time-consuming for both applicants and Department staff. This general permit-by-certification is therefore being proposed to authorize a minor amount of riparian zone disturbance in order to facilitate these beneficial projects, in a way that will not adversely impact flooding.

The proposed general permit-by-certification authorizes a number of devices including weirs, gauges, flumes, and wells. These devices are useful for monitoring the amount, movement, and quality of surface and ground waters, which helps the Department and others in analyzing watersheds, predicting floods, and more effectively applying mitigation tools to improve water quality. The devices listed are identical to the devices authorized under FWPA rules general permit 14.

In addition to the requirements applicable to all general permits at N.J.A.C. 7:13-6.7, any device placed under this general permit-by-certification must not significantly disrupt the movement of aquatic species native to the regulated water, or of species which normally migrate through the area. The placement of structures in a channel can sometimes create a barrier to normal movement and migration of aquatic life, which can be detrimental to species due to

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removal of access to habitat, food sources and spawning areas. The timing restrictions for fishery resources at proposed N.J.A.C. 7:13-11.5(d) must also be observed. These requirements will enable the Department to ensure that aquatic species are not adversely impacted.

The proposed general permit-by-certification sets forth several standards necessary to ensure that riparian zone functionality is not adversely impacted. Disturbance to riparian zone vegetation must be limited to the minimum necessary to obtain the desired information, and activities must be located in actively disturbed areas such as lawns and actively farmed areas wherever possible, since disturbance to vegetation within these areas can typically be easily restored. These requirements mirror provisions under proposed general permit-by-certification 12 for surveying and subsurface investigation. Further, the path of disturbance to riparian zone vegetation can be no more than five feet wide, unless the device cannot feasibly be constructed by hand and machinery is required, in which case the path of disturbance can be no more than 10 feet wide. The applicant must also obtain an engineering certification confirming that the device will not cause erosion in the regulated water or exacerbate flooding, as this is sometimes a concern with certain devices that measure channel flow and velocity.

The proposed general permit-by-certification also provides for the construction of a utility building or shelter necessary to house and protect the equipment authorized by this permit-by-rule. As confirmed by an engineering certification, the building must be constructed outside the channel, since a building in the channel will unnecessarily obstruct flow. The building or shelter must also be constructed outside the floodway, where possible. Since the building or shelter is intended to house or protect equipment that must necessarily be located in close proximity to a channel, the Department recognizes that it may sometimes necessarily be located

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within a floodway. However, since the building or shelter must also be oriented to minimize obstruction to flow, and must be no larger than 100 square feet in area, the Department believes that the benefits of constructing and protecting a gauge, weir or other device to measure the depth, velocity and/or rate of flow in a regulated water, which provide useful data on flooding and the environment, outweigh any potential minor obstructions to flow caused by such a shelter.

Individual permits (N.J.A.C. 7:13-12.17 and 12.18)

The existing FHACA Rules do not contain specific standards for regulated activities associated with the investigation, cleanup, or removal of hazardous substances within a regulated area. This lack of standards has resulted in numerous requests for hardship exceptions in order to undertake these environmentally beneficial activities. In order to facilities these activities while ensuring minimal impact on riparian zone functionality, water quality, and flooding, the Department is proposing to adopt standards for regulated activities necessary for the investigation, cleanup, or removal of hazardous substances. Requirements related to disturbance to riparian zone vegetation are proposed at N.J.A.C. 7:13-11.2(r), as discussed in the summary of amendments to riparian zone standards. Requirements related to displacement of flood storage volume are proposed at N.J.A.C. 7:13-11.4(d)10, as discussed in the summary of amendments relating to impacts to flooding. General standards related to the temporary and permanent placement of materials necessary to remediate contaminated sites are proposed at N.J.A.C. 7:13-12.17 and requirements for the placement, storage, or processing of hazardous substances in all other cases are proposed at N.J.A.C. 7:13-12.18.

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Requirements for the investigation, cleanup, or removal of hazardous substances (N.J.A.C. 7:13-12.17)

Proposed N.J.A.C. 7:13-12.17 sets forth the standards that must be satisfied for an individual permit to issue for the investigation, cleanup, or removal of hazardous substances in a regulated area. Compliance with these standards must be demonstrated by the applicant or by a certification from a licensed site remediation professional. The requirements are designed to ensure that the activity does not expose hazardous substances to floodwaters, potentially resulting in impacts to public safety and the environment both on and off site.

The project must take steps to comply with the Department's regulations governing site remediation and adequate precautions must be taken to ensure that hazardous substances will not be transported off the site by floodwaters during both the conduct of site remediation activities and upon completion of such activities. Material cannot be stored or stockpiled in a floodway, as this would result in an obstruction to flood flows and would likely introduce a large amount of sediment and pollutants to floodwaters. In order to limit the likelihood that floodwaters will contact stored or stockpiled material, such material must be placed as far as practicable from any regulated water and, where practicable, within flood-resistant containment areas. Finally, in order to further minimize the potential that hazardous substances will be transported off the site by floodwaters, any stored or stockpiled material that does not meet the Department's residential standards for pollutants must be situated above the 10-year flood elevation, since land above this elevation is subject to flooding less frequently than land below this elevation.

Upon completion of the project, all material permanently placed within a flood hazard area must additionally meet residential standards unless this requirement cannot be practicably

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met. In such a case, all material that does not meet residential standards shall be permanently placed above the 10-year flood elevation, to the maximum extent practicable. Additionally, all material that does not meet residential standards shall be stabilized and/or covered with suitable material such that the material will not be eroded, displaced, or transported off site during the flood hazard area design flood.

Requirements for the placement, storage, or processing of hazardous substances (N.J.A.C. 7:13-12.18)

Existing N.J.A.C. 7:13-11.17, which sets forth standards for the placement, storage, or processing of hazardous substances, is proposed for recodification with amendments at proposed N.J.A.C. 7:13-12.18. The scope of the section is proposed to be clarified to specify that the section provides individual permit standards that apply to any placement, storage, or processing of hazardous substances in a regulated area, other than site remediation activities, which are covered under proposed N.J.A.C. 7:13-12.17. The existing reference to “design and construction standards” is proposed for deletion since, unlike the design and construction of a building or a bridge, this phrase does not appropriately apply to the placement, storage, or processing of hazardous substances.

Prior to specifying the conditions applicable to authorization to conduct activities under this section, the rule continues to provide prospective applicants a description of permits-by-rule and general permits-by-certification described above, which address minor regulated activities associated with placement, storage, or processing of hazardous substances. Activities not covered by one of the identified permits-by-rule or general permits-by-certification are required

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to comply with the requirements in this section.

Proposed N.J.A.C. 7:13-12.18(c) incorporates individual permit standards that apply to any placement, storage or processing of hazardous substances in a regulated area, currently contained in existing N.J.A.C. 7:13-11.17(c) and (d), with clarifying amendments. The existing provision requires that no vegetation is cleared, cut, or removed in a riparian zone. However, this requirement is unnecessarily restrictive, since disturbance to riparian zone vegetation is sometimes required to undertake these regulated activities. Furthermore, appropriate standards for disturbance to riparian zone vegetation are incorporated at proposed N.J.A.C. 7:13-11.2, which ensure that riparian zone functionality is not impaired. Therefore, the existing requirement is proposed for deletion.

Whereas the existing standards limit the placement, storage, or processing of hazardous substances to a lawfully existing hazardous waste facility established on or before October 2, 2006, which was the proposal date of the existing chapter, the proposed standards instead require that the placement, storage, or processing of hazardous substances necessary for the normal conduct of a facility, which must additionally be operating in compliance with all Federal, State, and local requirements. Limiting the placement, storage, or processing of hazardous substances to facilities that have existed since 2006 is unnecessarily restrictive, since the requirements of this section minimize the likelihood of hazardous substances being transported offsite during flood conditions. Further, as noted above, individuals necessarily must place, store, and process hazardous substances in regulated areas both within and outside of hazardous waste facilities, such as fuel distribution centers, automobile repair shops, and dry cleaners. Therefore, to ensure that hazardous substances are not transported offsite by floodwaters and thereby impair the

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environment and/or exacerbate flooding, the proposed section clarifies that the structures that isolate the hazardous substances from floodwaters must be flood-resistant.

### **Solid waste, recyclable materials, and storage of unsecured material**

The Department is proposing a number of amendments to the standards related to solid waste, recyclable materials, and storage of unsecured material in a flood hazard area or riparian zone, with appropriate protections to ensure that the activities will not exacerbate flooding or adversely impact the environment. The existing FHACA Rules do not specifically address recyclable materials. The Department's practice under this chapter is to consider the storage and processing of recyclable materials in a regulated area to be equivalent to the storing and processing solid waste. However, recyclable materials are not subject to the Solid Waste Regulations, N.J.A.C. 7:26, and are instead subject to N.J.A.C. 7:26A. Since recyclable materials placed in a flood hazard area can displace flood storage volume, could present an obstruction to flow in a floodway, and may become buoyant during a flood event, the Department is proposing to clarify that the proposed requirements related to the storage and processing of solid waste also apply to recyclable materials in order to ensure that the storage and processing of recyclable materials does not exacerbate flooding or adversely impact the environment.

#### Definitions related to solid waste (N.J.A.C. 7:13-1.2)

As discussed below in the proposed amendments to the permit requirements related to solid waste, the existing definition of "solid waste facility" in some cases unintentionally limits the application of requirements under this chapter to facilities that are licensed to place, store,

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and process such material. However, individuals can place, store, and process solid waste in a flood hazard area or riparian zone without being part of a facility that is licensed to do so. For example, a business may need to place large trash receptacles or recycling bins in a regulated area in order to temporarily contain waste material and recyclable materials that are necessary for the continued operation of the facility. Given the severe environmental harm that can result from unchecked placement of such materials in a regulated area, the Department is proposing to delete the definition of “solid waste facility” and to make associated amendments to the permitting requirements for these activities.

#### Permits-by-rule (N.J.A.C. 7:13-7)

The Department is proposing to recodify with amendments five permits-by-rule that authorize the storage of material in a regulated area in certain circumstances.

#### *Permit-by-rule 48 (N.J.A.C. 7:13-7.48)*

The permit-by-rule at existing N.J.A.C. 7:13-7.2(e)1, which authorizes temporary storage of unsecured material necessary for a lawful construction activity outside a floodway, is proposed for relocation to N.J.A.C. 7:13-7.48 with amendments. The existing permit-by-rule provides that no vegetation can be cleared, cut, or removed in a riparian zone, except where previous development or disturbance has occurred. This provision is proposed to be amended to require that any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas, since this proposed new term more accurately describes the intent of the existing provision. A new provision is proposed, which requires the stored material to be

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removed from the site within six months of its placement and also requires that all disturbed areas in the flood hazard area are restored to their original topography. This requirement is necessary to ensure that the storage of material meets the definition of “temporary” at N.J.A.C. 7:13-1.2 and also to reduce potential impacts to flooding and the environment resulting from the storage of construction material.

*Permits-by-rule 49 and 50 (N.J.A.C. 7:13-7.49 and 7.50)*

The permit-by-rule at existing N.J.A.C. 7:13-7.2(e)2, which authorizes storage in a regulated area of unsecured material incidental to the use or maintenance of a lawfully existing private residence, is proposed to be relocated to N.J.A.C. 7:13-7.49 with amendments. The existing permit-by-rule includes a list of examples of types of storage not authorized under this permit-by-rule. This list is not continued as some misinterpreted it as an exhaustive list and because it is unnecessary as the indication that the unsecured material is of an amount and nature typical for a single-family home or duplex is sufficiently descriptive. Other amendments are made consistent with changes described above, including amending the reference to the proposal date of the existing rules to the adoption date and creating an exception to the prohibition of placement of material within 25 feet of top of bank where the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water or impounded fluvial water. Consistent with changes described above, terminology is additionally amended to reflect proposed new more descriptive terminology, such as actively disturbed areas.

The permit-by-rule at existing N.J.A.C. 7:13-7.2(e)3, which authorizes storage in a regulated area of unsecured material incidental to the use or maintenance of a lawfully existing

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business or other non-residential facility, is proposed to be recodified to proposed N.J.A.C. 7:13-7.50 with amendments. Amendments proposed to this permit-by-rule are similar to those proposed to proposed permit-by-rule 49, described above.

*Permit-by-rule 51 (N.J.A.C. 7:13-7.51)*

Existing N.J.A.C. 7:13-7.2(e)4, which authorizes storage in a regulated area of unsecured material that is necessary for the operation of a lawfully existing business or other non-residential facility, the primary function of which is to store and distribute material, is proposed to be recodified to proposed N.J.A.C. 7:13-7.51 with amendments. The scope of the permit-by-rule is simplified to refer to a facility that stores and distributes material. The proposed permit-by-rule requires that the footprint of disturbance within the riparian zone is not increased and that no trees are cleared, cut or removed in the riparian zone. This clarifies the Department's intention regarding this permit-by-rule, which is to allow existing uses within the flood hazard area and riparian zone to remain, provided the size of the facility and the peak volume of material stored in the flood hazard area are not increased, while also preserving existing riparian zone functionality. Consistent with changes proposed elsewhere, references to the proposal date of the existing chapter have been amended to reflect the adoption date of the chapter.

*Permit-by-rule 53 (N.J.A.C. 7:13-7.53)*

Existing N.J.A.C. 7:13-7.2(e)6, which authorizes placement, storage, or processing of solid waste at a lawfully existing solid waste facility, provided certain conditions are met, is proposed to be recodified to N.J.A.C. 7:13-7.53 with amendments. The existing permit-by-rule,

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by using the currently defined term “solid waste facility,” assumes that solid waste is placed, stored, and processed only at a facility that is licensed to do so. However, as noted above, many facilities may place, store, and process such material without the need to be licensed.

Accordingly, the proposed permit-by-rule simply requires that facilities were established prior to the adoption date of the existing chapter, have been in continuous operation since that date, and are operating in compliance with all Federal, State, and local requirements. Consistent with changes proposed elsewhere, references to the proposal date of the existing chapter have been amended to reflect the adoption date of the chapter.

The permit-by-rule additionally is amended to explicitly address recyclable materials that are placed, stored, and processed in a regulated area, for the reasons noted above. Consistent with changes proposed to permit-by-rule 51, the proposed permit-by-rule requires that the footprint of area in which the solid waste and/or recyclable materials is stored within the riparian zone is not increased and that no trees are cleared, cut or removed in the riparian zone. This clarifies the Department’s intention regarding the permit-by-rule, which is to allow existing uses within the flood hazard area and riparian zone to remain, provided the size of the facility and the peak volume of material stored in the flood hazard area are not increased, while also preserving existing riparian zone functionality.

Individual permit requirements (N.J.A.C. 7:13-12.16, 12.19 and 12.20)

Existing N.J.A.C. 7:13-11.16, which sets forth requirements that must be met for the issuance of an individual permit for the storage of unsecured material in a flood hazard area, is proposed for recodification to N.J.A.C. 7:13-12.16 with amendments. The existing provision

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requires that no vegetation is cleared, cut, or removed in a riparian zone. However, this requirement is unnecessarily restrictive, since disturbance to riparian zone vegetation is sometimes required to undertake these regulated activities. Furthermore, appropriate standards for disturbance to riparian zone vegetation are incorporated at proposed N.J.A.C. 7:13-11.2, which ensure that riparian zone functionality is not impaired. Therefore, the existing requirement is proposed for deletion.

Proposed N.J.A.C. 7:13-12.19 sets forth standards for activities authorized through a solid waste landfill closure and post-closure plan or disruption approval issued by the Department, where such activities are proposed in any regulated area. The existing FHACA Rules do not contain specific standards for regulated activities associated with a solid waste landfill closure and post-closure plan or disruption approval. This lack of standards has resulted in numerous requests for hardship exceptions in order to undertake these environmentally beneficial activities. In order to facilitate these activities while ensuring minimal impact on riparian zone functionality, water quality, and flooding, the Department is proposing to adopt standards for activities regulated under the FHACA Rules associated with these Department solid waste regulation approvals. Proposed N.J.A.C. 7:13-12.19 and 12.20 are part of a series of proposed amendments intended to provide the necessary standards for these activities.

Requirements related to disturbance to riparian zone vegetation are proposed at N.J.A.C. 7:13-11.2(s), as discussed in the summary of amendments to riparian zone standards. Requirements related to displacement of flood storage volume are proposed at N.J.A.C. 7:13-11.4(d)11, as discussed in the summary of amendments relating to impacts to flooding. General standards related to the placement of materials necessary for activities authorized through a solid waste

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landfill closure and post-closure plan or disruption approval are proposed at N.J.A.C. 7:13-12.19, and requirements for the placement, storage, or processing of solid waste and recyclable materials in all other cases are proposed at N.J.A.C. 7:13-12.20.

Under proposed N.J.A.C. 7:13-12.19, to qualify for authorization under the FHACA Rules, activities authorized through a solid waste landfill closure and post-closure plan or disruption approval in a regulated area must comply with the Department's Solid and Hazardous Waste rules and must additionally handle materials utilized in a manner that will ensure that solid waste will not be transported off the site by floodwaters during both the conduct of such activities and after their completion. To accomplish this, material cannot be stored or stockpiled in a floodway, as this would result in an obstruction to flood flows and would likely introduce a large amount of sediment and pollutants to floodwaters. In order to limit the likelihood that floodwaters will contact stored or stockpiled material, such material must be placed as far as practicable from any regulated water and, where practicable, within flood-resistant containment areas. Upon completion of the project, all material permanently placed within a flood hazard area must be stabilized and/or covered with suitable material such that the material will not be eroded, displaced or transported off site during the flood hazard area design flood.

Existing N.J.A.C. 7:13-11.18, which sets forth standards for the placement, storage, or processing of solid waste, is proposed to be recodified to N.J.A.C. 7:13-12.20 with amendments. The scope of the section is proposed to be amended to make clear that it does not address activities authorized through a solid waste landfill closure and post-closure plan or disruption approval, which are covered under proposed N.J.A.C. 7:13-12.19. Consistent with changes summarized above, at several points, the proposed section is also amended to explicitly include

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the placement of recyclable materials in the flood hazard area.

Proposed N.J.A.C. 7:13-12.20(c), which sets forth individual permit standards for the placement, storage, or processing of solid waste or recyclable materials in a regulated area, incorporates existing N.J.A.C. 7:13-11.18(c) and (d) with clarifying amendments. The Department is not proposing to continue the existing requirement that no vegetation is cleared, cut, or removed in a riparian zone, because this requirement has proven to be unnecessarily restrictive, since disturbance to riparian zone vegetation is sometimes required to undertake these regulated activities. Furthermore, appropriate standards for disturbance to riparian zone vegetation are incorporated at proposed N.J.A.C. 7:13-11.2, which ensure that riparian zone functionality is not impaired.

The Department is additionally proposing to amend the existing limitation on the placement, storage, or processing of solid waste that restricts these activities to a lawfully existing solid waste facility established on or before October 2, 2006, to instead require that the placement, storage, or processing of solid waste and recyclable materials be necessary for the normal conduct of the facility, which must additionally be operating in compliance with all Federal, State and local requirements. Limiting the placement of storage or processing of solid waste and recyclable materials to facilities that have existed since 2006 is unnecessarily restrictive, since the requirements of this section minimize the likelihood of such substances being transported offsite during flood conditions.

### **Agricultural activities**

The Department is proposing a number of amendments to facilitate various regulated

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activities associated with agriculture, with appropriate protections to ensure that the activities will not exacerbate flooding or adversely impact the environment.

Permits-by-rule (N.J.A.C. 7:13-7)

The Department is proposing to recodify and amend four existing permits-by-rule and is proposing one new permit-by-rule. Additionally, the Department is proposing to convert four existing general permits to permits-by-rule with amendments.

*Permit-by-rule 54 (N.J.A.C. 7:13-7.54)*

The permit-by-rule at existing N.J.A.C. 7:13-7.2(f)1, which authorizes the continuation of lawfully existing agricultural activities, is proposed to be relocated to N.J.A.C. 7:13-7.54 with amendments. The proposed permit-by-rule clarifies that the activities must occur on land that is “actively farmed,” as that term is defined at N.J.A.C. 7:13-1.2. The existing reference to forestry activities is not proposed for incorporation, since forestry activities are proposed to be covered under proposed permit-by-rule 63. The existing permit-by-rule requires that activities do not result in the displacement of flood storage volume or the construction of an aboveground structure. However, an aboveground structure located outside a flood hazard area will not adversely impact flooding. Therefore, authorization is proposed to be expanded to allow aboveground structures located outside a flood hazard area. The existing limitation to activities on land that has been actively farmed since the October 2, 2006, is also proposed for deletion. The existing provision was adopted to ensure that people did not undertake unlawful clearing of vegetation between the proposal of this chapter on October 2, 2006, and its adoption on

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November 5, 2007. However, this provision is now unnecessarily burdensome, since it does not provide for continuing agricultural activities that were lawfully established on or after October 2, 2006.

*Permit-by-rule 55 (N.J.A.C. 7:13-7.55)*

The permit-by-rule at existing N.J.A.C. 7:13-7.2(f)2, which authorizes the commencement of new agricultural activities on land that is not actively farmed, is proposed to be recodified to N.J.A.C. 7:13-7.55 with amendment. For the same reasons described in permit-by-rule 54 above, the existing reference to forestry activities is not proposed for incorporation and authorization is proposed to be expanded to allow aboveground structures located outside a flood hazard area. The proposed permit-by-rule requires that the existing ground elevation is not raised in a floodway, which ensures that no obstruction to flow will occur. The existing requirement that aboveground structures cannot be constructed is amended to apply only to the flood hazard area, since the construction of aboveground structures outside a flood hazard area will not affect flooding. The existing permit-by-rule requires that no vegetation is cleared, cut or removed in a riparian zone, except where previous development or disturbance has occurred. This provision is proposed to be amended to require that any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas, since this proposed new term more accurately describes the intent of the existing provision.

*Permit-by-rule 56 (N.J.A.C. 7:13-7.56)*

The permit-by-rule at existing N.J.A.C. 7:13-7.2(f)3, which authorizes the continuation or

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commencement of soil conservation practices outside a floodway, is proposed to be recodified to proposed N.J.A.C. 7:13-7.56 with amendments. It has been determined that the existing permit-by-rule is unnecessarily restrictive and that certain beneficial soil conservation practices are unintentionally prevented. Authorization under this permit-by-rule is therefore proposed to be expanded to cover natural resource conservation practices associated with agricultural activities, which are approved by the USDA Natural Resource Conservation Service and/or local Soil Conservation District, as appropriate. The existing requirement that approval from these agencies must be in writing is proposed for deletion, since the Department does not require applications to be submitted for authorization under a permit-by-rule. While this requirement is no longer necessary, since the activity must be approved by one of these agencies, the person conducting the activity must be able to demonstrate that such approval has been obtained should a Department compliance inspection occur. The list of examples of activities authorized under this permit-by-rule is not continued to avoid any potential misinterpretation of the list of activities as exhaustive.

The proposed permit-by-rule authorizes activities in a floodway, provided the ground is not raised in a floodway, which ensures that no obstruction to flow will occur. The existing requirement that authorized activities must be undertaken on land that has been actively farmed since October 2, 2006, is not incorporated into the proposed permit-by-rule, for the reasons outlined in proposed permit-by-rule 54 above. The existing requirement that no disturbance related to the regulated activity is located within 25 feet of any top of bank is proposed for deletion, since there is no need to restrict the beneficial activities authorized under the proposed permit-by-rule within close proximity to a top of bank. Finally, the existing permit-by-rule

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requires that no vegetation is cleared, cut, or removed in a riparian zone, except where previous development or disturbance has occurred. This provision is proposed to be amended to require that any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas, since this proposed new term more accurately describes the intent of the existing provision.

*Permit-by-rule 57 (N.J.A.C. 7:13-7.57)*

The permit-by-rule at existing N.J.A.C. 7:13-7.2(f)4, which authorizes the construction of a building with no foundation outside a floodway, is proposed to be recodified to N.J.A.C. 7:13-7.57 with amendments. The existing requirement that the building must be constructed on land that has been actively farmed since October 2, 2006, is not incorporated into the proposed permit-by-rule, for the reasons outlined in proposed permit-by-rule 54 above.

The existing requirement that the building have a footprint of no more than 1,000 square feet is proposed to be expanded to allow the placement of a building with a footprint of no more than 2,000 square feet. An agricultural building of 2,000 square feet or less, which is constructed accordance with the requirements of this permit-by-rule, will not adversely impact flooding or the environment. Further, the existing requirement that the building must have no foundation is not incorporated, because this requirement can result in the erection of buildings that cannot withstand flooding and can therefore easily become buoyant and dislodged during a flood event and cause offsite damage.

The existing requirement that the building be designed for agricultural use and the list of examples is redundant and is not incorporated, since the description of the permit-by-rule

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authorizes only agricultural activities. The proposed permit-by-rule further clarifies that the building must be non-habitable, since the FHACA Rules incorporate more stringent requirements for habitable buildings in order to protect public safety.

The existing permit-by-rule requires that no vegetation is cleared, cut or removed in a riparian zone, except where previous development or disturbance has occurred. As with other provisions, this is amended to refer to the proposed defined term “actively disturbed areas”, since this proposed new term more accurately describes the intent of the existing provision.

*Permits-by-rule 58 through 61 (N.J.A.C. 7:13-7.58 through 7.61)*

Proposed N.J.A.C. 7:13-7.58, 7.59, 7.60, and 7.61 set forth new permits-by-rule for activities that are currently addressed by general permits 2D, 2E, 2F, and 2G, respectively, at N.J.A.C. 7:13-8.4(c)4 through 7. Activities covered under general permits 2D, 2E, 2F, and 2G can be appropriately authorized under permits-by-rule because of the requirements that are commonly applicable to each. Particularly, all activities under existing N.J.A.C. 7:13-8.4, including general permits 2D, 2E, 2F, and 2G, must be solely intended for agricultural purposes and activities under all four existing general permits/proposed permits-by-rule must be approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or a local Soil Conservation District (or its designee), as appropriate. These agencies work in concert with the Department to ensure that such projects provide environmental benefits that will reduce both flooding and erosion, while simultaneously providing assistance to the agricultural community. Additional Department oversight through an authorization under a general permit for these minor, beneficial activities does not provide additional flood protection or

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environmental benefit. The Department is amending proposed permits-by-rule 2E, 2F, and 2G to replace the existing term “channel” used in the existing general permits with the term “regulated water” since, pursuant to N.J.A.C. 7:13-2.2, a regulated water does not always possess a discernible channel.

Proposed permit-by-rule 58 incorporates existing general permit 2D and authorizes filling or modification of a manmade regulated water for the purpose of freshwater wetlands restoration. The proposed permit-by-rule, as well as permits-by-rule 59, 60, and 61, does not continue the existing requirement that activities authorized under general permit 2D must be solely intended for agricultural purposes, since the Natural Resource Conservation Service or local Soil Conservation District may undertake these beneficial activities in areas that are not actively farmed. The proposed permit-by-rule is further amended to specify that the proposed activities will not only not adversely affect overland drainage on adjoining properties, but that they will also not increase off-site flooding and that any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas. Therefore, the existing requirement that the regulated water originate on site is not necessary, as the proposed amendments ensure that activities under this permit-by-rule have minimal impacts on riparian zone functionality and neighboring properties.

Proposed permit-by-rule 59 incorporates existing general permit 2E and authorizes the creation of a ford to allow livestock to cross a regulated water. The existing requirement that the perpendicular path of disturbance through the riparian zone must be no more than 20 feet in width is proposed to be replaced with a limitation on the total area of riparian zone vegetation that can be disturbed, which is more flexible for small projects and ensures that the total area of

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disturbance will not significantly affect riparian zone functionality. The existing requirement that no trees can be cleared, cut, and/or removed in a riparian zone is not continued, as the construction of a ford is many times not possible without the removal of some trees along the regulated water being crossed. Adherence to the appropriate timing restrictions is also required, which is equivalent to the requirement that applies to all general permits at existing N.J.A.C. 7:13-8.1(b)1, since permit-by-rule 59, unlike permits-by-rule 58, 60, and 61, authorizes activities within a channel that could adversely impact fishery resources if undertaken during a restricted time period.

Proposed permit-by-rule 60 incorporates with amendments existing general permit 2F and authorizes the construction of a fence along and/or across a regulated water to limit or manage livestock access to a regulated water, or to prevent livestock or other animals from accessing certain areas. The existing requirement that the fence is used to prevent livestock or other animals from accessing agricultural areas is proposed for deletion, since fences are sometimes constructed around agricultural areas in order to ensure that animals do not wander off into roadways or private property. The existing requirement that the fence will not impede bank-full flow in the channel is proposed for deletion. It is difficult for applicants to demonstrate compliance with the existing requirement, and this limitation is unnecessary as the limitations placed on the type and location of the proposed fence will ensure that it will not impeded flow within the regulated water.

Flexibility is proposed to be added to the existing requirement that no trees are cleared, cut, or removed in a riparian zone to accommodate cases where the fence crosses a regulated water, since selective tree removal is generally unavoidable in such cases. In many cases, a

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regulated water through an agricultural area is bordered by trees and other woody vegetation. In such a case, a fence could be easily constructed parallel to the regulated water outside the trees, but could not be constructed across the regulated water without clearing some trees. The proposed permit-by-rule additionally limits the area of riparian zone vegetation that can be cleared, cut, and/or removed, in order to ensure that impacts to riparian zone functionality are not significant. Finally, rather than require the fence to be placed parallel to the channel where possible, the proposed permit-by-rule simply requires the fence to be placed generally parallel to the regulated water, since fences that are generally parallel to the direction of flow will not obstruct flood flows.

Proposed permit-by-rule 61 incorporates with amendments existing general permit 2G and authorizes the construction of a pump and/or water intake structure in or along a regulated water. The existing requirement that fill in the flood hazard area is minimized is clarified to require that fill within the flood hazard area is the minimum necessary to successfully implement the project. The existing permit-by-rule requires that no trees are cleared, cut, or removed in a riparian zone. However, due to the general proximity of pumps and water intake structures to the top of bank, selective tree removal is often unavoidable. Therefore, in order to provide flexibility for such projects while also ensuring that authorized activities will not significantly affect riparian zone functionality the proposed permit-by-rule allows up to 1,000 square feet of riparian zone vegetation to be cleared, cut, and/or removed.

*Permit-by-rule 62 (N.J.A.C. 7:13-7.62)*

Proposed N.J.A.C. 7:13-7.62 sets forth a new permit-by-rule, which authorizes the

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construction of a manure management structure, provided certain requirements are met.

Agricultural operations often include horses, livestock, and other animals. The waste products produced by these animals can be carried into nearby surface waters, thereby raising organic pollutant levels and potentially resulting in the spread of disease. Allowing the construction of manure management structures significantly reduces the volume of waste material entering surface waters and therefore greatly benefits the environment. Accordingly, the Department is proposing to authorize the placement of manure management structures within flood hazard areas and riparian zones, in cases where it is not possible to locate these structures outside these areas.

Under the proposed permit-by-rule, all work must be approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local Soil Conservation District, as appropriate, which is common to the permits-by-rule for agricultural activities. The permit-by-rule includes additional requirements intended to reduce flood storage displacement, obstruction to flood flows, and impairment to riparian zone functionality resulting from the placement of structures. The structure must be located as far from any regulated water as feasible, and, where it is not feasible to locate outside a floodway, the structure must be oriented to minimize obstruction to flood flows. A restriction on clearing, cutting, and removing trees in a riparian zone, limitations on disturbance in proximity to top of bank, and limitations on the size of the structure are also proposed in order to ensure that the placement of the structure will not exacerbate flooding or result in environmental degradation.

General permits-by-certification (N.J.A.C. 7:13-8)

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The Department is proposing to convert two existing general permits to general permits-by-certification in order to facilitate agricultural activities.

*General permit-by-certification 2 (N.J.A.C. 7:13-8.2)*

Proposed N.J.A.C. 7:13-8.2 incorporates with amendments requirements currently applicable under existing general permit 2C at N.J.A.C. 7:13-8.4(c)3, and authorizes the construction of a roadway across a regulated water on land that is actively farmed, provided certain requirements are met. The term “channel” is replaced with the term “regulated water” since, pursuant to N.J.A.C. 7:13-2.2, a regulated water does not always possess a discernible channel. The proposed general permit-by-certification requires minimization of disturbance, rather than construction, in the regulated water since disturbance of the bed of the regulated water is the impact that is sought to be avoided and not all construction activities lead to disturbance. The requirement prohibiting the use of unset or raw cement is proposed for deletion since it is included in the conditions that apply to all permits-by-rule, general permits-by-certification, and general permits at proposed N.J.A.C. 7:13-6.7. The existing general permit requires that it must be clear to the Department from a visual inspection of submitted drawings that the proposed roadway crossing will not increase flooding offsite. Since the Department does not perform project-specific reviews of activities undertaken through a general permit-by-certification, this standard is proposed to be amended to simply require that the applicant obtains an engineering certification confirming that the proposed roadway crossing does not increase flooding offsite. The term “perpendicular path” is proposed to be amended to reference the “width of disturbance” for clarity. Finally, adherence to the appropriate timing restrictions is

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required, which is equivalent to the requirement that applies to all general permits at existing N.J.A.C. 7:13-8.1(b)1, since this general permit-by-certification authorizes activities within a regulated water that could adversely impact fishery resources if undertaken during a restricted time period.

*General permit-by-certification 3 (N.J.A.C. 7:13-8.3)*

Proposed N.J.A.C. 7:13-8.3 incorporates with amendments existing general permit 2A, and authorizes bank stabilization and/or bank restoration activities, provided certain requirements are met. The reference to soil erosion control activities under existing general permit 2A is proposed for deletion, since these activities are authorized under proposed permit-by-rule 56. The use of re-sloping and planting vegetation to stabilize an eroded bank is required where feasible, rather than where possible, to provide additional flexibility since a project can be possible but not feasible to undertake. Additional specificity is provided as to how stabilization is to be conducted to ensure that the re-sloping and planting the bank will remain stable, including methods to be used and a recommended slope for a stabilized bank. The methods and slope specified are similar to the proposed requirements at N.J.A.C. 7:13-12.14(c)1. In addition to the requirement that cutting back the bank and planting with native, non-invasive vegetation be the method of stabilization to be used when feasible, the proposed general permit-by-certification requires that soil bioengineering be utilized if stabilization by cutting back and planting is not feasible or more than 2,000 square feet of trees would be impacted, since soil bioengineering can generally stabilize a bank with less area of disturbance than cutting back a bank and planting vegetation. The proposal further clarifies that in no case shall greater than

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2,000 square feet of trees be cleared, cut, and/or removed under this general permit-by-certification. Applicants proposing bank stabilization or restoration projects that result in greater disturbance to trees must obtain an individual permit pursuant to proposed N.J.A.C. 7:13-12.14.

In order to ensure that the project will not exacerbate flooding, the applicant must obtain an engineering certification confirming that the activity will not obstruct flow in the regulated water or floodway. The term “channel” is replaced with the term “regulated water” since, pursuant to N.J.A.C. 7:13-2.2, a regulated water does not always possess a discernible channel. The existing requirement that disturbance to the riparian zone is minimized is clarified to specify that impact to the vegetation must be the minimum amount necessary to implement the project. Finally, adherence to the appropriate timing restrictions is required, which is equivalent to the requirement that applies to all general permits at existing N.J.A.C. 7:13-8.1(b)1, since this general permit-by-certification authorizes activities within a regulated water that could adversely impact fishery resources if undertaken during a restricted time period.

### **Forest management activities**

The Department is proposing amendments to facilitate various regulated activities associated with forest management, with appropriate protections to ensure that the activities will not exacerbate flooding or adversely impact the environment. The permits-by-rule at existing N.J.A.C. 7:13-7.2(f)1 and 2 cover certain forest management activities that do not include the clear cutting of trees. All other regulated activities associated with forest management require an individual permit under the existing rules and, in some cases, must rely on the approval of a hardship exception request. However, forest management activities performed in accordance

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with the New Jersey Forestry and Wetlands Best Management Practices Manual do not adversely impact flooding, have a negligible or temporary impact on riparian zone functionality, and in some cases benefit the environment. In order to facilitate the undertaking of these forest management activities, the Department is proposing a new permit-by-rule discussed below. The New Jersey Forestry and Wetlands Best Management Practices Manual is available free of charge from the Department at the link provided in the permit-by-rule.

Permits-by-rule (N.J.A.C. 7:13-7)

*Permit-by-rule 63 (N.J.A.C. 7:13-7.63)*

Proposed N.J.A.C. 7:13-7.63 authorizes certain forest management activities that are approved by the New Jersey State Forester or designee. A link is provided for guidance and further information relating to forest management activities in flood hazard areas and riparian zones.

The proposed permit-by-rule authorizes a variety of enumerated forest management activities. Any type of silvicultural prescription including planting trees and other vegetation, is authorized, provided no grading or changes in topography occur in a fluvial flood hazard area, which is necessary to ensure the activities will not reduce flood storage volume or obstruct flood flows. Harvesting cultivated forest products is authorized, provided disturbance to riparian zone vegetation is limited to the area specified in the forest management plan, and provided the harvested area is regenerated through planting and/or natural regeneration such that the regenerated vegetation has equal or greater ecological function and value as the vegetation that was disturbed. This will ensure that any temporary impacts to riparian zone functionality are

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fully compensated. The construction and maintenance of a fence to exclude deer and/or control other unwanted intrusions is additionally authorized, with exceptions for any fence located in a channel and/or which would obstruct flows in a floodway.

The proposed permit-by-rule may also authorize the construction or maintenance of a forest road, provided certain conditions are met. This authorization incorporates many provisions applicable to approval of farm or forest roads set forth in the FWPA rules at N.J.A.C. 7:7A-2.8(c)3. The road must be used solely to support or provide access for forestry activities and must be no greater than 14 feet wide. In order to preserve the integrity of the regulated water being crossed, and to minimize impacts to flooding, no grading or changes in topography may occur in a flood hazard area, except where unavoidable to accommodate the installation of a crossing of a regulated water. In order to further reduce environmental impacts, disturbance to riparian zones and channels must be minimized, and temporary mats must be used where possible. Any crossing must also be located as far downstream of the upstream property boundary of the site as feasible, and must be designed to not increase the frequency or depth of offsite flooding for a specified variety of flood events. In order to ensure additional channel stability without allowing permanent impacts to the regulated water being crossed, any crossing must be accomplished through the placement of a temporary span across the channel in a stable location, without disturbance to the channel. Where such construction is not feasible, crossing the channel with one or more pre-cast culverts in the channel, without permanent footings or abutments, is acceptable. Stable material may be placed above each culvert, to enable the roadway to be used, provided the surface of the roadway is not paved. Finally, if the land is no longer used for forestry, or once the property no longer qualifies for a farmland assessment, all

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roads authorized by this general permit shall be removed within 30 days of the change in land use. This requirement is necessary to ensure that the construction of the forest road will not result in any long-term impacts to flooding or the environment.

In order to preserve the stability of land within riparian zones as well as to provide detritus, which benefits forest ecosystems, tree stumps may not be removed as part of the activities conducted under the proposed permit-by-rule.

Finally, because of the potentially significant impact both on riparian zone function and stability of the riparian zone area, clear-cutting of trees in a riparian zone under the proposed permit by rule is prohibited except in limited, specifically enumerated circumstances. Particularly, clear-cutting of trees in a riparian zone may only be authorized under this permit-by-rule if it is an unavoidable part of a prescription for (1) Atlantic white-cedar restoration, (2) regeneration of declining or fragmented forest stands or of vegetation damaged by wildfire, storms, flooding, beaver activity, or other factors, which requires human intervention, or (3) sanitation, suppression, or salvage, where trees have experienced insect damage, disease outbreaks and/or death from drought or other conditions.

Atlantic white-cedar ecosystems provide many ecological benefits, such as helping to filter and purify water, and stabilizing stream flows by temporarily storing floodwaters and mitigating the effects of drought. Atlantic white-cedar swamps also provide a unique environment throughout the year and benefit a wide range of plant and animal species. In particular, they provide important winter habitat for deer and other wildlife. Cedar swamps also provide habitat for several threatened and endangered plant and animal species and, to some degree, act as natural firebreaks. However, over the last two centuries, the area occupied by

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Atlantic white-cedar has declined drastically. The Department is therefore proposing this permit-by-rule to promote restoration and long-term sustainability of this forest type. Additionally, a link is provided for guidance and further information relating to Atlantic white-cedar restoration.

Regeneration of declining or fragmented forest stands or of vegetation damaged by wildfire, storms, flooding, beaver activity, or other factors, is additionally authorized in cases where human intervention is necessary to ensure proper and timely regeneration. Similarly, sanitation, suppression, or salvage activities, where trees have experienced insect damage, disease outbreaks, and/or death from drought or other conditions, is authorized. These activities are necessary to ensure the long-term health and sustainability of the State's forests, as well as the benefits they provide in riparian zone areas.

### **Solar panels**

The Department is proposing a new permit-by-rule and a new general permit-by-certification to facilitate the placement of solar panels and associated equipment, with appropriate protections to ensure that the activities will not exacerbate flooding or adversely impact the environment.

#### Permits-by-rule (N.J.A.C. 7:13-7)

##### *Permit-by-rule 30 (N.J.A.C. 7:13-7.30)*

Proposed N.J.A.C. 7:13-7.30 establishes a new permit-by-rule that authorizes the installation of solar panels. Solar panels, when constructed in accordance with the requirements of the proposed permit-by-rule, do not adversely impact flooding or the environment.

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Under the proposed permit-by-rule, no structures can be placed in a floodway, since such structures would present an obstruction to flow. In order to further ensure that no adverse impacts to flooding will occur as a result of activities under this permit-by-rule, the existing ground elevation cannot be raised in any floodway or fluvial flood hazard area. All panels, cross-bracing, and other structural components, and all associated equipment (except for vertical support poles) must be elevated to at least one foot above the flood hazard area design flood elevation. This will increase the system's flood resistance and ensure that the panels and associated equipment will not displace a significant volume of flood storage. This permit-by-rule does not authorize the placement of solar panels that rely on ballast systems or concrete foundations for support, since such systems can displace a significant volume of flood storage and may become dislodged or buoyant during a flood. No disturbance related to the project can be located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water, which is necessary to preserve the integrity of the banks of nearby surface waters. Finally, similar to other permits-by-rule discussed above, any clearing, cutting, and/or removal of riparian zone vegetation must be limited to actively disturbed areas to ensure that riparian zone functionality is not impaired by the placement of solar panels or associated equipment.

#### General permits-by-certification (N.J.A.C. 7:13-8)

##### *General permit-by-certification 13 (N.J.A.C. 7:13-8.13)*

Proposed N.J.A.C. 7:13-8.13 sets forth a new general permit-by-certification to authorize the placement of solar panels and associated equipment, including poles, support structures,

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inverter pads, and electrical apparatus, provided certain conditions are met.

The proposed general permit-by-certification includes specific conditions that must be met to ensure that impacts authorized are appropriately minimized. No panels or associated equipment can be placed in a floodway, since such structures would present an obstruction to flow. In order to further ensure that no adverse impacts to flooding will occur as a result of activities under this general permit-by-certification, the existing ground elevation cannot be raised in any floodway or flood hazard area and the flood storage displacement requirements of the chapter must be met. The applicant must additionally obtain an engineering certification confirming that these requirements are met. Any panels placed in a flood fringe must furthermore be elevated to at least one foot above the flood hazard area design flood elevation. However, associated equipment is permitted below this elevation where elevating is not feasible.

No disturbance related to the project can be located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water, which is necessary to preserve the integrity of the banks of nearby surface waters. Limitations are additionally placed on disturbance to riparian zone trees, which is necessary to ensure that riparian zone functionality is not impaired by the placement of solar panels. Specifically, only trees which are surrounded by actively disturbed areas may be disturbed. Isolated pockets of trees, such as may be found within a hedgerow or parking lot landscape islands, do not provide the same riparian zone functions as trees located contiguous to forested areas or other large expanses of woody vegetation. Finally, in order to limit potential riparian zone degradation, no more than one-quarter of an acre of vegetation can be cleared, cut, or removed within a riparian zone.

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## **Other minor activities and site improvements**

### Permits-by-rule (N.J.A.C. 7:13-7)

In addition to the other permits-by-rule discussed in this Summary, which are categorized according to specific topics such as building, public utilities, and sediment and debris removal, the Department is proposing 11 permits-by-rule to authorize a variety of minor activities and site improvements, with appropriate protections to ensure that the activities will not exacerbate flooding or adversely impact the environment. Ten of the proposed permits-by-rule are existing permits-by-rule proposed to be recodified with amendment and one is new.

### *Permit-by-rule 7 (N.J.A.C. 7:13-7.7)*

Proposed N.J.A.C. 7:13-7.7 incorporates with amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)3, which authorizes the placement of no more than five cubic yards fill outside a floodway, provided certain conditions are met. The proposed permit-by-rule explains that the material authorized under this permit-by-rule must consist of landscaping material, which clarifies the intent of this permit-by-rule. The existing and proposed permits-by-rule limit disturbance of riparian zone vegetation to previously disturbed areas. While the proposed permit-by-rule continues to limit vegetation impacts to disturbed area, the Department has determined that within this area the area of vegetation allowed to be impacted should be limited. Accordingly, the proposed permit-by-rule limits clearing, cutting, or removal of riparian zone vegetation to no more than 2,000 square feet, an amount determined by the Department to

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appropriately protect riparian zone functionality.

*Permit-by-rule 8 (N.J.A.C. 7:13-7.8)*

Proposed N.J.A.C. 7:13-7.8 incorporates with amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(a)2, which authorizes construction activities at or below ground within flood hazard areas, as well as construction activities within riparian zones that are previously disturbed. Proposed permit-by-rule 8 is limited to construction in a fluvial flood hazard area. Proposed permits-by-rule 9 and 10, discussed below, address construction activities within a tidal flood hazard area and construction activities within a riparian zone outside a flood hazard area, respectively, with limitations and conditions tailored to concerns applicable to these other regulated areas.

Unlike existing N.J.A.C. 7:13-7.2(a)2, which includes a list of activities that could potentially qualify for authorization, permit-by-rule 8 does not include a list of qualifying activities, since applicants often mistake the existing list as being exhaustive. Any number of regulated activities can be undertaken through this permit-by-rule provided the requirements listed therein are satisfied.

To qualify for authorization under this proposed permit-by-rule, all construction must be situated at or below grade and the existing ground elevation cannot be raised. This is necessary to ensure that the activities under the permit-by-rule do not exacerbate flooding or obstruct flood flows. Certain types of development are prohibited under the proposed permit-by-rule, since construction of the identified structures may pose an environmental or flooding risk, which must be evaluated under a general permit or individual permit, or are covered under other proposed

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permits-by-rule that place necessary restrictions on development to ensure the purposes of the chapter are met. Activities under this permit-by-rule, in combination with all other activities that may have been conducted onsite since the adoption date of the existing chapter, cannot result in a net loss of greater than one-quarter acre of riparian zone vegetation and cannot constitute a major development, as defined in the Department's stormwater management rules at N.J.A.C. 7:8-1.2. This is similar to the existing requirement that the project cannot constitute a major development, which involves the placement of at least one-quarter acre of impervious surface and/or the disturbance of at least one acre of land. Rather than simply link authorization under this permit-by-rule to the definition of major development, the proposed permit-by-rule additionally sets forth limitations on the net loss of riparian zone vegetation, in order to ensure that the activities under this permit-by-rule will have a *de minimis* impact on riparian zone functionality.

*Permit-by-rule 9 (N.J.A.C. 7:13-7.9)*

Proposed N.J.A.C. 7:13-7.9 incorporates with amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)6 which currently covers construction activities in a tidal flood hazard area that are not regulated under the Department's Coastal rules. Certain activities, such as aboveground fill in the flood fringe, can adversely impact flooding in fluvial flood hazard areas, but will not affect tidal flood hazard areas, since tidal flooding is not increased due to flood storage displacement. Therefore, while proposed permit-by-rule 9 incorporates limitations from the existing permit-by-rule, which are similar to those contained in proposed permit-by-rule 8 for activities in a fluvial flood hazard area, proposed permit-by-rule 9 authorizes a broader set of activities.

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The existing reference to the Coastal rules is proposed for deletion. Pursuant to N.J.A.C. 7:7E-3.25, activities within the coastal zone proposed within a flood hazard area must comply with the requirements of the FHACA Rules. Therefore, because flooding impacts of construction activities subject to the Coastal rules are analyzed under the FHACA Rules, it is unnecessary to differentiate activities in a tidal flood hazard area subject to the Coastal rules from similar activity not subject to the Coastal rules. Under the existing and proposed permits-by-rule, any work proposed in a floodway must be situated at or below grade, and the existing ground elevation cannot be raised, since fill in any floodway, fluvial or tidal, can cause obstructions to flow and exacerbate flooding. Finally, for the same reasons noted in the summary of permit-by-rule 8 above, certain types of development (including fuel tanks and solar panels) are prohibited under proposed permit-by-rule 9 because these activities are otherwise addressed by the rules or engender risks more appropriately subject to Department review under a general or individual permit, and activities under this permit-by-rule, in combination with all other activities that may have been conducted onsite since the adoption date of the existing chapter, cannot constitute a major development or result in a net loss of greater than one-quarter acre of riparian zone vegetation.

*Permit-by-rule 10 (N.J.A.C. 7:13-7.10)*

Proposed N.J.A.C. 7:13-7.10 set forth a new permit-by-rule that authorizes any regulated activity located outside a flood hazard area, but within a riparian zone, provided certain conditions are met. In some cases, the riparian zone along a regulated water can be larger than the water's flood hazard area. Since activities under this permit-by-rule are located outside a

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flood hazard area, only standards related to protecting the riparian zone apply. Therefore, permit-by-rule 10 is identical to permit-by-rule 9, with the exception of the provisions related to construction within a floodway, since any activity located outside a flood hazard area is necessarily located outside a floodway and therefore cannot obstruct flood flows or exacerbate flooding.

*Permit-by-rule 18 (N.J.A.C. 7:13-7.18)*

Proposed N.J.A.C. 7:13-7.18 incorporates with amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(a)6, which authorizes the construction of a boat launching ramp, provided certain conditions are met. The existing permit-by-rule requires that no more than 2,000 square feet of vegetation is cleared, cut, or removed in a riparian zone. This requirement is proposed to be replaced with a more flexible provision that allows disturbance to riparian zone vegetation within 10 feet of the boat launching ramp if such disturbance is necessary to facilitate its construction. This will limit the removal of vegetation to less than the existing amount in cases where disturbance is not justified, but will allow more disturbances in cases where the construction necessitates greater disturbance, while also ensuring that riparian zone functionality is not impaired.

*Permit-by-rule 20 (N.J.A.C. 7:13-7.20)*

Proposed N.J.A.C. 7:13-7.20 incorporates with amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)5, which authorizes the construction of a fence, provided certain conditions are met. The existing permit-by-rule requires that no vegetation is cleared, cut, or

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removed in a riparian zone, except where previous development or disturbance has occurred.

This requirement is proposed to be amended to require that no trees are cleared, cut, or removed in a riparian zone in order to provide necessary flexibility in the construction of fences, while assuring that the functions provided by trees are not impacted. Additionally, clarifying changes to the requirements related to a fence in a floodway are proposed.

*Permit-by-rule 21 (N.J.A.C. 7:13-7.21)*

Proposed N.J.A.C. 7:13-7.21 incorporates with amendments the permits-by-rule at existing N.J.A.C. 7:13-7.2(b)11 and 12, which authorize the construction of an aboveground and an in-ground swimming pool, respectively. These permits-by-rule are proposed to be simplified and combined into one permit-by-rule for clarity.

In order to ensure that a pool will not obstruct flood flows, the existing ground elevation cannot be raised and no aboveground pool can be placed in a floodway. Additional requirements for a pool in a fluvial flood hazard area are proposed, which continue several requirements of the existing permits-by-rule, in order to minimize flood storage displacement. However, these requirements are not necessary for a pool in a tidal flood hazard area, since the chapter does not regulate flood storage displacement in a tidal flood hazard area. Added flexibility is provided for incidental grading and minor appurtenant structures associated with an in-ground pool.

Experience has shown that it is often difficult to construct an in-ground pool without incidental grading necessary for its installation. Further, certain portions of the pool structure itself necessarily lie aboveground, such as railings and diving boards. The proposed permit-by-rule is amended to clarify that such activities are acceptable, since they are generally unavoidable and

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will cause a *de minimis* impact on flooding. Material excavated to construct the pool must furthermore be removed from the flood hazard area, in order to preserve existing drainage patterns and flood storage volume.

The existing permits-by-rule limit vegetation impacts to areas that have been previously developed or disturbed, but do not limit the area of riparian zone vegetation that can be disturbed, which can lead to unacceptable riparian zone impacts. Since the Department has determined through its experience that 5,000 square feet of riparian zone disturbance is appropriate amount of disturbance that will accommodate most proposed pools, while only having minimal impact on riparian zone functionality, these standards are proposed to be added to limit adverse impacts to riparian zone functionality.

*Permit-by-rule 24 (N.J.A.C. 7:13-7.24)*

Proposed N.J.A.C. 7:13-7.24 incorporates with amendments the permits-by-rule at existing N.J.A.C. 7:13-7.2(b)15 and 16, which authorize the construction of an aboveground fuel tank and underground fuel tank, respectively. These permits-by-rule are nearly identical, and are therefore proposed to be simplified and combined into one permit-by-rule for clarity, with amendment to provide added flexibility. Whereas the existing permits-by-rule reference only fuel tanks, it is sometimes necessary to place tanks within a regulated area that store materials other than fuel. Because the requirements designed to protect the public and the environment from fuel tanks in a regulated area are equally effective in protecting the public and environment from potential impacts from tanks storing other substances, the permit-by-rule authorizes the construction of any tank, provided the proposed requirements are met. A tank under the existing

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permits-by-rule must be located within or adjacent to the building it serves. However, proximity to a building is relevant only to aboveground tanks, which would be protected from floating debris during a flood if constructed within or immediately adjacent to a building. For an underground tank, proximity to a building does not affect flood damage potential.

The existing permit-by-rule does not limit the area of disturbance to riparian zone vegetation. It is conceivable that a person could propose a very large structure under the existing permit-by-rule, which could have deleterious impacts on flooding or the environment under this permit-by-rule. As such, the proposed permit-by-rule provides that the cumulative footprint of all tanks, which have been constructed under any authorization or permit under this chapter, does not exceed 5,000 square feet since November 5, 2007. This limitation will ensure that any authorized tanks will not displace significant flood storage volume and, in conjunction with the requirement that impacts to riparian zone vegetation only occur in actively disturbed areas, will ensure that only minimal impacts occur to existing riparian zone functionality.

*Permit-by-rule 25 (N.J.A.C. 7:13-7.25)*

Proposed N.J.A.C. 7:13-7.25 incorporates with amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)10, which authorizes the construction of a recreational structure (such as a backstop, bleacher, picnic table or playground equipment), provided certain conditions are met. Furthermore, the type of structure that is authorized is proposed to be amended to include athletic structures, since this is a helpful description of the type of structures that are covered by this permit-by-rule. The existing requirement that a structure authorized under this permit-by-rule is not a building is clarified to simply require that no buildings are constructed in

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a flood hazard area, since a building constructed outside a flood hazard area is not subject to the elevation and access requirements of the chapter. The requirement that the existing ground elevation is not raised is proposed to be limited to the fluvial flood hazard area and floodways, since raising the ground outside a flood hazard area or in a tidal flood fringe does not adversely impact flooding.

The existing permit-by-rule does not limit the area of disturbance, which could have deleterious impacts on flooding or the environment. To prevent this from happening, the proposed permit-by-rule provides that the cumulative footprint of all structures erected under any authorization or permit under this chapter may not exceed one-quarter acre since the adoption date of this chapter. This limitation will ensure that any authorized structures will not displace significant flood storage volume and, in conjunction with the requirement that impacts to riparian zone vegetation only occur in actively disturbed areas, will ensure that only minimal impacts occur to existing riparian zone functionality.

*Permit-by-rule 26 (N.J.A.C. 7:13-7.26)*

Proposed N.J.A.C. 7:13-7.26 establishes a new permit-by-rule that authorizes the placement of artificial turf on an existing athletic field, provided certain conditions are met. In recent years, many schools have become interested in replacing existing natural turf athletic fields with artificial turf for a number of reasons. Artificial turf is a surface manufactured from synthetic fibers and made to look like natural grass, which provides more resistance under heavy use than natural turf, and which requires no irrigation, trimming or fertilization. The proposed permit-by-rule is intended to authorize the placement of artificial turf in a manner that will not

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impact flooding and will have a *de minimis* impact on riparian zone functionality. To ensure that these impacts are minimal, the proposed permit-by-rule specifies that the existing ground elevation cannot be raised in any floodway or flood hazard area, which is necessary to avoid obstructions to flow and to preserve existing flood storage volume. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas, which is necessary to ensure that riparian zone functionality is not impaired by the placement of artificial turf. Finally, no disturbance related to the project can be located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water, which is necessary to preserve the integrity of nearby surface waters.

*Permit-by-rule 29 (N.J.A.C. 7:13-7.29)*

Proposed N.J.A.C. 7:13-7.29 incorporates with amendments the permit-by-rule at existing N.J.A.C. 7:13-7.2(b)19, which authorizes the placement of one to three wind turbines, provided certain conditions are met. Clarifying amendments that do not change the meaning of any provision are proposed throughout the permit-by-rule in order to improve grammar and to match the structure of the other FHACA permits-by-rule. The existing permit-by-rule provides that no vegetation may be cleared, cut, or removed in a riparian zone, except where previous development or disturbance has occurred. This provision is proposed to be amended to require that any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas, since this term more accurately describes the existing provision.

General permits (N.J.A.C. 7:13-9)

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The Department is proposing one general permit associated with minor activities and site improvements.

*General permit 8 (N.J.A.C. 7:13-9.8)*

The Department is proposing a new general permit at N.J.A.C. 7:13-9.8 to address the placement of storage tanks in a regulated area. Existing N.J.A.C. 7:13-7.2(b)15 and 16, proposed to be incorporated under proposed permit-by-rule 24, authorize the placement of aboveground and underground fuel tanks in limited cases. Since the FHACA Rules do not contain design and construction standards for storage tanks that do not meet these permits-by-rule, a person seeking to place a storage tank in a regulated area would need to request a hardship exception under an individual permit. Therefore, in order to provide for the construction of storage tanks that cannot meet the permits-by-rule, and to reduce the burden of paperwork and associated costs to an applicant seeking to place a storage tank in such cases, the Department is proposing design and construction standards under general permit 8.

The proposed general permit includes specific conditions that must be met to ensure that impacts associated with the placement of storage tanks eligible for authorization under the general permit are appropriately minimized. Proposed N.J.A.C. 7:13-9.8(a) sets forth the scope of the general permit and establishes the specific requirements under which the placement of storage tanks is eligible for authorization. It must be demonstrated that the storage tank cannot feasibly be located outside the flood hazard area and riparian zone to ensure that impacts to regulated areas are avoided where possible. Additionally, a storage tank cannot be placed or situated in a floodway, unless three requirements are met. Structures located within floodways

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are generally subject to high velocities and flood depths during flood events. Therefore, the construction of a new structure within a floodway is generally prohibited under this chapter, and the reconstruction or replacement of a structure in a floodway must meet specific requirements to ensure that the reconstructed or replaced structure is suitably flood-resistant and will not exacerbate existing flood conditions. Therefore, in order for a storage tank to be authorized in a floodway under this general permit, the storage tank must replace a lawfully existing storage tank associated with a currently occupied building or operating facility. Furthermore, the storage tank cannot feasibly be located outside the floodway and the storage tank and all support structures must be oriented to minimize obstruction to flow.

The bottom of the storage tank must be situated above the flood hazard area design flood elevation, where feasible. Further, any tank in a flood hazard area must be designed to remain watertight during a flood and, if the storage tank is situated aboveground, has a volume of greater than 2,000 gallons, and is intended to store hazardous substances, the storage tank must either be isolated from floodwaters by berms or situated in a specially designed containment area onsite. This is necessary so that, in the event of a flood, the hazardous substances within the storage tank will not be transported off the site by floodwaters. In order to ensure that the storage tank and any such containment area do not exacerbate flooding, the flood storage displacement requirements of N.J.A.C. 7:13-11.4 must be satisfied.

No disturbance related to the regulated activity can be located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall or revetment along a tidal water. The chapter generally prevents disturbance within 25 feet of any top of bank, since disturbance in this area can easily destabilize a channel, and lead to increased erosion,

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flooding and adverse water quality impacts. Limitations on disturbance to riparian zone vegetation are also incorporated in order to minimize adverse impacts to riparian zone functionality. Finally, where the project, in combination with all proposed activities, constitutes a major development, all applicable requirements of the SWM rules N.J.A.C. 7:8 must be met. This is necessary to ensure that proposed activities do not impair quality of surface waters, increase stormwater management runoff, or decrease groundwater recharge.

### **Hardship exceptions**

Proposed N.J.A.C. 7:13-15.1 recodifies with amendments N.J.A.C. 7:13-9.8, which provides for the issuance of an individual permit based on a hardship exception. The Department recognizes that situations exist when strict compliance with the requirements of this chapter would create an undue hardship on an applicant. The standards of this chapter are designed to capture nearly all situations that could come before the Department. However, for those cases that are not specifically addressed by the proposed text, the Department believes that it is appropriate to include this section in order to allow for those unanticipated, special, and/or unique situations that could arise. Several citations throughout the section will be amended to reflect recodification of the referenced sections. Substantive amendments are also proposed as follows.

#### Hardship exception for an individual permit (N.J.A.C. 7:13-15.1)

Proposed N.J.A.C. 7:13-15.1(a) clarifies that the standards of this section apply to regulated activities, as well as any collection of regulated activities that constitute a project.

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Individual regulated activities may independently meet the requirements of this chapter, while a combination of regulated activities may not collectively meet the requirements of this chapter.

The structure of the section is additionally rearranged for clarity to highlight the threshold requirement that must be met to qualify for consideration for a hardship exception and the specific requirements that must be met for grant of the exception once it is found that the initial threshold has been satisfied.

Proposed N.J.A.C. 7:13-15.1(c) recodifies with clarifications existing N.J.A.C. 7:13-9.8(b), which specifies the conditions that must be met for a project or regulated activity to qualify for a waiver of strict compliance under a hardship exception. This subsection is amended both for clarity and substantively. Proposed N.J.A.C. 7:13-15.1(c)1 recodifies with amendments existing N.J.A.C. 7:13-9.8(b)1, with an additional basis under which the Department can grant a hardship exception. Existing N.J.A.C. 7:13-9.8(b)1 requires an applicant to demonstrate that, due to an extraordinary situation of the applicant or site condition, compliance with N.J.A.C. 7:13 would result in an exceptional and/or undue hardship for the applicant. However, strict compliance with the requirements of this chapter can sometimes adversely impact public health, safety, and welfare, without resulting in an exceptional or undue hardship for the applicant. For example, a prospective applicant could be a public entity that is intending to reconstruct a public roadway that has been damaged during a storm, or a public utility that is mandated to upgrade a pipe, cable, or transmission line to meet current State and Federal standards. While the design and construction standards of this chapter are intended to minimize adverse impacts to flooding and the environment, it has sometimes been the case that strict compliance with these standards can prevent an applicant from undertaking necessary safety upgrades or from performing

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construction activities in order to ameliorate a present or anticipated risk to public health, safety, or welfare. In such a case, the Department may agree that the proposed activities are necessary and will benefit the public, and therefore warrant a waiver of strict compliance with one or more requirements of this chapter, even though the applicant cannot demonstrate that strict compliance would result in an exceptional and/or undue hardship for the applicant. Proposed N.J.A.C. 7:13-15.1(c)1 therefore includes this situation as a circumstance under which the Department can grant a hardship exception.

The Department is additionally proposing to amend the current provision providing that a hardship exception will not be granted if the hardship was created by any action or inaction of the applicant or its agents. People may sometimes undertake actions that inadvertently make strict compliance with the requirements of this chapter infeasible. For example, a person may obtain a permit to construct a building in a flood hazard area, or undertake the construction of an addition to a building under a permit-by-rule, which requires the building or addition to be situated at least 25 feet from any top of bank. However, due to a miscalculation in surveying or other error in measurement, the location of a building or addition could inadvertently be constructed 24 feet from the top of bank. Correcting this error would likely require relocating the building or addition by one foot which may very likely cost the building's owner an extremely large amount of money in order to achieve a relatively small environmental gain. In some cases, this could present an insurmountable hardship upon the owner, while the effects on persons using the building or addition are not necessarily significant. In such a situation, the Department may, for example, agree to instead require certain flood-proofing or bank stabilization measures to be undertaken to protect the structure from potential flood damage rather than relocate the building

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or addition. In order to provide appropriate flexibility in such cases, the Department is proposing to delete existing N.J.A.C. 7:13-9.8(b)4, and to incorporate a new provision at proposed N.J.A.C. 7:13-15.1(d), explaining that, during its review of a hardship exception request, the Department will consider the extent to which the applicant, property owner, and/or their agents may have directly caused or contributed to the hardship. This will allow the Department to use its discretion in cases where an applicant or its agents take actions that unintentionally lead to severe consequences for a property owner seeking an exception from strict compliance with this chapter.

Proposed N.J.A.C. 7:13-15.1(e) recodifies with amendments existing N.J.A.C. 7:13-9.8(c), which sets forth the information required to support a hardship exception. Proposed N.J.A.C. 7:13-15.1(e)1i is a new provision that requires an applicant to provide a narrative explaining how the project meets the requirements of the section. The Department is proposing to clarify the application requirements applicable to an application for consideration for a hardship exception to explicitly specify that the application has to include a narrative explaining how the applicant qualifies for consideration for the hardship exception (satisfaction of the threshold determination and specific requirements referenced above). Applicants sometimes do not explain why they are seeking a hardship exception, or in what ways strict compliance with this chapter creates an exception or undue hardship. Without a full description of the applicant's situation, the Department is often unable to properly evaluate the hardship exception request. Proposed N.J.A.C. 7:13-15.1(e)1ii further requires applicants to demonstrate that alternate designs and/or locations have been explored, which could have avoided the need for a hardship exception request, but which have proven to be not feasible. This will help the Department to

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better evaluate the merits of the hardship exception request.

Proposed N.J.A.C. 7:13-15.1(e)3 is a new provision that requires applicants to provide all supporting information related to any purported inability to achieve strict compliance with the standards for buildings at proposed N.J.A.C. 7:13-12.5. This will help the Department to better evaluate the merits of the hardship exception request.

Proposed N.J.A.C. 7:13-15.1(e)7 recodifies existing N.J.A.C. 7:13-9.8(c)5 with clarification that the required description of potential impacts on development applies to the proposed project or regulated activity.

Existing N.J.A.C. 7:13-9.8(d), which identifies the application review process for individual permits with hardship exception requests, is proposed to be recodified to N.J.A.C. 7:13-15.1(f) with amendment. Reference to the Department's procedure in cases where a hardship exception request is denied is proposed for deletion, since this provision will be replaced with the requirements at proposed N.J.A.C. 7:13-22.6 and 22.7.

## **PERMITTING PROCESS**

As noted in the Introduction of this proposal Summary, one of the Department's goals with this rulemaking is to align certain aspects of the FHACA Rules with the CZM and FWPA rules, to the extent the respective enabling statutes allow. This rules 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 existing FHACA 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

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covering the same subject matter in the pending CZM proposal (see 46 N.J.R. 1051(a); June 2, 2014).

**General provisions for permits-by-rule, general permits-by-certification, and general permits (N.J.A.C. 7:13-6)**

Proposed new Subchapter 6 is headed “General Provisions for Permits-by-Rule, General Permits-by-Certification, and General Permits.” The subchapter contains provisions that apply to all flood hazard permits-by-rule, general permits-by-certification, and general permits promulgated as part of the FHACA Rules.

Purpose and scope; standards for issuance (N.J.A.C. 7:13-6.1 and 6.2)

The general provisions included in this subchapter are the standards for issuance by rulemaking of these permits, the use of these permits to conduct regulated activities, the use of more than one of these permits on a single site, the duration of an authorization under a general permit-by-certification or general permit, and the conditions that apply to these permits.

Before the Department issues a permit-by-rule, general permit-by-certification, or a general permit as part of the FHACA Rules through rulemaking, the Department will determine that the regulated activity will cause only minimal adverse impacts on flooding and the environment and that the regulated activity, when performed separately, and will have only minimal cumulative adverse impacts on flooding and the environment. The Department will provide public notice and an opportunity for public comment with respect to the proposed rule

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establishing the permit through the public comment component of the rulemaking process under the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq.

Once a permit-by-rule, general permit, or general permit-by-certification has been promulgated, the Department will not hold public hearings on individual applications for authorizations under a general permit-by-certification or general permit, since the opportunity for public comment regarding the limits and conditions of the general permit will have been provided during the rulemaking process.

Each permit-by-rule, general permit-by-certification, or general permit issued through rulemaking will describe the size and type of regulated activity that can be authorized under it, and any additional limitations on the activity necessary to ensure that adverse impacts on flooding and the environment are appropriately minimized.

Should the Department determine that a promulgated permit-by-rule, general permit-by-certification, or general permit no longer meets the criteria for promulgation relating to minimal impacts on flooding and the environment, it may repeal, by rulemaking, the particular permit. In such an instance, the Department may require that an individual permit be obtained for the regulated activity that would have been subject to the permit-by-rule, general permit-by-certification, or general permit prior to its repeal.

Use of permits-by-rule and authorizations under a general permit or a general permit-by-certification (N.J.A.C. 7:13- 6.3 and 6.4)

An activity that meets the requirements of a permit-by-rule may be conducted without prior approval from the Department. Under the existing rules at N.J.A.C. 7:13-7.1(d), persons

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intending to conduct regulated activities under any of eight specified permits-by-rule must notify the Department at least 14 days prior to initiating the activity. The requirement for prior notice was intended to facilitate the tracking of these particular activities on a property to help ensure that the permit-by-rule limits on clearing, cutting, and/or removal of riparian zone vegetation and displacement of flood storage volume on that property were not exceeded. However, tracking the regulated activities by prior notice for these permits-by-rule has not proven to be practical or necessary. In cases where the notice was provided to the Department, inspection of the complete work showed the activities did comply with the applicable permit-by-rule. Therefore, in order to simplify the use of these permits-by-rule and to reduce the Department's administrative workload, none of the flood hazard permits-by-rule will require prior notice to the Department.

A general permit-by-certification requires that an application be submitted through the Department's e-permitting system (see proposed N.J.A.C. 7:13-18.2 and 18.3); once that process is completed, the covered activity may be conducted. A general permit requires an application for authorization be submitted for the Department's review and approval (see proposed N.J.A.C. 7:13-18.2 and 18.4); once the authorization has been received, the activity may be conducted.

The person conducting the regulated activities under a permit-by-rule or an authorization under a general permit-by-certification or general permit is not relieved from the necessity of obtaining all other applicable permits or approvals required by law.

A person may undertake a given regulated activity more than once on a single site, each time under a single permit-by-rule, or a single authorization under a general permit-by-certification or general permit, so long as the individual limits and conditions of the particular permit-by-rule, general permit, or general permit-by-certification are not exceeded. To illustrate,

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a person could elevate a building under the permit-by-rule at proposed N.J.A.C. 7:13-7.11, construct an addition to the building under the permit-by-rule at proposed N.J.A.C. 7:13-7.12, and build a fence around the building under the permit-by-rule at proposed N.J.A.C. 7:13-7.20, provided each activity meets the requirements of the respective permit-by-rule. A person may also undertake a given regulated activity more than once on a single site, each time under a single permit-by-rule, or a single authorization under a general permit-by-certification or general permit, so long as the individual limits and conditions of each particular permit-by-rule, general permit, or general permit-by-certification are not exceeded. To illustrate, a person could construct multiple additions to a building under the permit-by-rule at proposed N.J.A.C. 7:13-7.12, provided the cumulative footprint of all additions does not exceed the 400-square-foot limit set forth in the permit-by-rule.

Once the limits and conditions of a given permit-by-rule, or of a general permit-by-certification or a general permit, have been met on a single site, no additional activities may be authorized under that particular permit on that site, regardless of how much time passes or whether the site is subdivided or transferred to a new owner. A person intending to undertake a regulated activity under a permit-by-rule, or to seek authorization under a general permit-by-certification or general permit, where any limit or condition of the permit would be exceeded by doing so on that site, must therefore obtain an individual permit in order to undertake the activity. This requirement is necessary to ensure that the cumulative total of any adverse environmental impacts on a given site as a result of the use of the permit is minimal and to ensure that a person does not exceed or circumvent a particular limit or condition of a given permit when various authorizations that pertain to one site are considered collectively.

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Any permit-by-rule or authorization under any general permit-by-certification or general permit may be used in combination with an individual permit on a single site, provided the individual limits and conditions of each permit are not exceeded.

Duration of an authorization under a general permit-by-certification or general permit (N.J.A.C. 7:13-6.5 and 6.6)

An authorization under a general permit-by-certification is valid for five years from the issuance date and cannot be extended. If the activity is not completed within the five-year term of the authorization and the authorization expires, all regulated activities authorized must stop. If the authorization has expired and the person to whom the authorization was issued intends to start the activities, or continue activities already begun, the person must either obtain a new authorization under the general permit-by-certification or obtain another type of permit under the FHACA Rules. An authorization under a general permit-by-certification applies to a tightly circumscribed set of regulated activities that the Department has determined are simple and straightforward in nature and therefore easily able to be undertaken and completed within five years. Since the on-line application process can be completed with little difficulty and authorization is automatic on completion, reapplying for authorization under the general permit-by-certification does not present a burden to the applicant but will help ensure that the regulated activity the applicant intends to conduct still meets the requirements of the general permit-by-certification.

An authorization under a general permit is valid for five years from the issuance date. Whereas under the existing rules at N.J.A.C. 7:13-8.1(i), an authorization under a general permit

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is valid for five years and cannot be extended, the Department is proposing to allow one five-year extension of the authorization. Because the activities that can be authorized under general permits are limited in size and scope, five years is usually a sufficient period of time to complete those activities. However, one five-year extension, for a total of ten years to complete the activity, will be available where the applicant makes the demonstration required under proposed N.J.A.C. 7:13-22.3 that regulated activities approved under the authorization have not been revised or amended, unless a modification of the authorization was obtained in order to do so, and there has been no significant change in the overall conditions of the site.

All regulated activities authorized under the general permit must stop if the authorization expires and an extension is not obtained or the period of extension expires. If the person to whom the authorization was issued intends to start the activities or to continue the activities started before the authorization expired, the person must obtain a new authorization under the general permit, or obtain another type of permit under the FHACA Rules. If the regulated activities have not been started, the Department will issue a new authorization under the general permit only if the project is revised where necessary to comply with the requirements of the FHACA Rules in effect when the application for the new authorization is declared complete for review. If the FHACA Rules applicable to the activity or the general permit were not amended during the time the authorization was in effect and up until the time the application is declared complete for review, then no changes to the project would be necessary so long as site conditions have not changed to the extent that different requirements under the general permit would apply to the authorized activity. For example, if the location and depth of flooding were to change after the authorization was issued, such that a larger area of the project is located in a flood

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hazard area, or such that proposed buildings are subject to greater flood depths than anticipated, the project may no longer comply with the requirements of the general permit. In the situation where a regulated activity was conducted before expiration of the authorization, the Department will issue a new authorization under the general permit only if the project is revised where feasible to comply with the requirements of the FHACA Rules in effect when the application for the new authorization is declared complete for review. Again, if the rules were not amended while the authorization was in effect and up until the time the application is declared complete for review, no changes to the project would be necessary so long as site conditions have not changed to the extent that different requirements would apply under the general permit. However, if the rules were amended in that period such that the project as approved or extended would not meet the modified requirements, the Department will determine the feasibility of revising the project to come into compliance in consideration of the amount of construction completed prior to the expiration of the authorization, the amount of the reasonable financial investment made in the design consistent with the requirements applicable under the approved or extended authorization, and whether continuing construction as approved under the authorization would have an adverse impact on flooding or the environment.

Conditions applicable to a permit-by-rule, or to an authorization under a general permit-by-certification or general permit (N.J.A.C. 7:13-6.7)

A person conducting regulated activities pursuant to a permit-by-rule or an authorization under a general permit-by-certification or general permit must comply with the specific conditions set forth in the permit itself, that is, in the rule that establishes the particular permit-

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by-rule, general permit-by-certification, or general permit, as well as the conditions set forth at proposed N.J.A.C. 7:13-22.2, which apply to every authorization or permit (including individual permits).

To streamline the rules and avoid unnecessary repetition, the Department is proposing conditions at N.J.A.C. 7:13-6.7(b) that are incorporated by reference into each one of the rules that establishes a permit-by-rule, general permit-by-certification, or general permit. The conditions at proposed N.J.A.C. 7:13-6.7(b) are the conditions at existing N.J.A.C. 7:13-7.1(b) applicable to permits-by-rule, the conditions at existing N.J.A.C. 7:13-8.1(b) applicable to general permits, and the conditions in existing Subchapters 10 and 11 applicable to individual permits, with the amendments described below.

Existing N.J.A.C. 7:13-7.1(b)2 and 8.1(b)4 require that any proposed structure must be suitably anchored. As discussed in the Technical Requirements and Permit Standards part of this Summary, the Department is proposing to delete the definition of “suitably anchored.” The Department is replacing the term “suitably anchored” in the condition at proposed N.J.A.C. 7:13-6.7(b)1 with a requirement that the new, reconstructed, enlarged, or elevated structure must be secured to resist flotation, collapse, and displacement due to hydrostatic and hydrodynamic forces from floodwaters. This condition applies only to permits for structures located within a flood hazard area because it addresses impacts from floodwaters.

The condition that a regulated activity cannot adversely affect low-flow aquatic passage within any regulated water currently applies to all general permits through existing N.J.A.C. 7:13-8.1(b)2. During dry periods of the year, water typically collects in small rivulets in the stream bed, thereby allowing aquatic species to migrate upstream and downstream in search of

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food or for spawning. Man-made structures can sometimes eliminate this passage and form a barrier to aquatic species, causing them to be trapped on one side of the structure until flow in the stream increases again. Several proposed permits-by-rule and general permits-by-certification authorize activities within a channel, such as bridge and culvert replacements and sediment removal activities, which could adversely affect low-flow aquatic passage if not undertaken with the proper precautions. Accordingly, to ensure that aquatic species are not adversely impacted, under proposed N.J.A.C. 7:13-6.7(b)2, this condition is made applicable to permits-by-rule, general permits-by-certification, and general permits.

The condition that a regulated activity cannot expose any unset or raw cement to flowing water in a channel or regulated water during construction at proposed N.J.A.C. 7:13-6.7(b)3 is currently applicable to individual permits for activities in the channel or riparian zone of a regulated water containing fishery resources through existing N.J.A.C. 7:13-10.5(c)2. Lime, a major component of cement that is found in all concrete products, easily dissolves in water to produce an alkaline solution that can injure and kill aquatic biota, including fish, insects, and plants. In order to ensure that water contacting unset or raw concrete does not adversely impact aquatic biota in all regulated waters, and not only within waters containing fishery resources, the Department has determined it is appropriate to make this condition applicable to all permits-by-rule, general permits-by-certification, and general permits. For the same reason, this condition is proposed to be made applicable to individual permits for activities in any channel or regulated water, rather than only in waters containing fishery resources, as explained in the Technical Requirements and Permit Standards part of this Summary with respect to impacts to fishery resources, threatened and endangered species, and aquatic biota at proposed N.J.A.C. 7:13-

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11.1(b)10.

The proposed condition at N.J.A.C. 7:13-6.7(b)4 provides that the regulated activity shall not destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species, and shall not jeopardize the continued existence of any local population of a threatened or endangered species. This represents a tightening of the similar condition protecting threatened or endangered species and their habitat that applies to all general permits under existing N.J.A.C. 7:13-8.1(b)3. To ensure that such species are not adversely affected by any regulated activity, the Department has determined it is appropriate to make this condition applicable to all permits-by-rule, general permits-by-certification, and general permits. The change in the standard is explained in the Technical Requirements and Permit Standards part of this Summary with respect to impacts to fishery resources, threatened and endangered species, and aquatic biota at proposed N.J.A.C. 7:13-11.6.

The existing rules require that all temporarily disturbed riparian zone vegetation be replanted with native, non-invasive vegetation. This condition is stated in each existing permit-by-rule and general permit that is likely to result in temporary impacts to riparian zone vegetation, as well as at existing N.J.A.C. 7:13-10.2(d)3 for activities under an individual permit. The condition proposed at N.J.A.C. 7:13-6.7(b)5 expands the existing condition by requiring the immediate replanting of riparian zone vegetation that is cleared, cut, or removed to accommodate a regulated activity, and specifying the quality and type of vegetation to be replanted. In many cases, undertaking a regulated activity will result in the temporary disturbance of vegetation within the riparian zone. For example, a person removing debris from a channel may need to clear some vegetation along the stream bank in order to allow machinery necessary for the

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project to reach the channel. To ensure that the regulated activities performed under any of these permits will have a *de minimis* impact on flooding and the environment, the Department has determined it is appropriate to apply this condition to all permits-by-rule, general permits-by-certification, and general permits, except for proposed permit-by-rule 1 for normal property maintenance at proposed N.J.A.C. 7:13-7.1. Normal property maintenance conducted in accordance with this permit-by-rule includes the clearing, cutting, and/or removal of riparian zone vegetation necessary to service, maintain, or ensure the continued safe use of a lawfully existing structure, easement, right-of-way, field, lawn, park, and/or garden. A requirement to replant the vegetation cleared, cut, and/or removed would contradict the purpose of the permit-by-rule. The proposed condition also makes it clear that portions of the riparian zone occupied by an authorized structure need not be replanted.

The replanted vegetation must consist of vegetation that has equal or greater ecological functions and values as the vegetation that was cleared, cut, or removed. For example, herbaceous vegetation may be replaced with the same types of vegetation or with trees, since trees generally provide greater riparian zone functions and values than herbaceous vegetation. However, the trees in forested areas must be replaced with trees of equal type and density as the existing forest, since any other type of vegetation may adversely impact the functionality of the riparian zone. This requirement helps ensure that the impacts to riparian zone vegetation will be ameliorated once the replanted vegetation has reached maturity.

The replanted vegetation must consist of native, non-invasive vegetation, except in actively disturbed areas, which may be replanted with the same type of vegetation that was disturbed. The existing rules require that all temporarily disturbed riparian zone vegetation be

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replanted with native, non-invasive vegetation. However, in some instances this requirement has proven unreasonable. For example, a house or business is typically surrounded by a grass lawn or landscaping, which may contain non-native and/or invasive species. To replace lawn or landscaping with only native, non-invasive vegetation would not be consistent with conditions at the site. In agricultural fields, some crops could not be replanted because of this restriction. The Department is proposing to allow the vegetation in such areas to be replaced with the same type of vegetation because this will have no net adverse impact on the functionality of the riparian zone. For the same reason, the vegetation in an actively disturbed area may be replaced with another kind of vegetation that is typical of an actively disturbed area. For example, garden plants can replace lawn grass.

In cases where the replanting of native, non-invasive vegetation of equal or greater ecological function and value as the vegetation cleared, cut, or removed would interfere with access to or maintenance of a structure, or would impede activities permitted under a forest management plan in accordance with proposed permit-by-rule 63 for forestry activities (N.J.A.C. 7:13-7.63), this requirement must be met to the extent feasible. For example, vegetation may have to be removed within a certain perimeter around a structure, or under or above a proposed utility line, in order to provide access to the structure or utility during its construction. To preserve necessary, safe access to the structure or utility line, the vegetation in the area required for access may be replanted with grass or other vegetation that would not impede access. However, elsewhere on the site where vegetation in the riparian zone was cleared, cut, or removed the replanted vegetation would have to meet the otherwise applicable vegetation quality and type requirements.

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A person undertaking a regulated activity governed by a permit-by-rule or a general permit-by-certification is responsible for ensuring each condition of the permit is met. The Department will not entertain a request to review engineering calculations, in the context of an applicability determination or otherwise, for the purpose of determining that a proposed activity will meet the conditions of a permit-by-rule or general permit-by-certification. This is the intent of existing N.J.A.C. 7:13-7.1(b)1, which applies to activities subject to a permit-by-rule. No submittal to or review by the Department is required under a permit-by-rule. The application for authorization under a general permit-by-certification requires that the applicant certify that the activity to be undertaken meets the requirements of the general permit-by-certification. Involving the Department in reviewing calculations for purposes of seeing whether a person's proposed activity meets the conditions of a permit-by-rule or a general permit-by-certification defeats the purpose of these two types of simplified permits, which are specifically intended to streamline permitting requirements relating to the specified activities of small scope and environmental impact and at the same time relieve the Department of the necessity to review the activities so that it may focus its resources on the review of proposed activities having greater potential for impacts to flooding and the environment.

In addition to the specific conditions in the rule that establishes a general permit the Department may establish additional conditions in an authorization it issues under a general permit as necessary on a case-by-case basis to ensure the authorized regulated activity meets the requirements of the FHACA Rules and the enabling statutes. This requirement is currently found at existing N.J.A.C. 7:13-8.2(c).

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### **Individual permits (N.J.A.C. 7:13-10)**

Existing Subchapter 10, Individual permit requirements within various regulated areas, is proposed to be recodified, with amendments, at Subchapter 11, Area-specific requirements for individual permits. Proposed new Subchapter 10, Individual Permits, contains rules that are relocated, with amendments, from existing N.J.A.C. 7:13-9.1, General provisions for individual permits, and from existing N.J.A.C. 7:13-9.4, Duration of an individual permit.

#### Requirement to obtain an individual permit (N.J.A.C. 7:13-10.1)

A person seeking to undertake a regulated activity that does not meet the requirements for a flood hazard area permit-by-rule, general permit-by-certification, or general permit, or a coastal permit in the circumstances set forth at N.J.A.C. 7:13-2.1(b), must obtain a flood hazard area individual permit. (The exceptions to the permit requirement are those noted at N.J.A.C. 7:13-2.1(c) for “grandfathered” activities and at N.J.A.C. 7:13-2.1(e) for railroad activities exempt from State regulation under Federal law.) The regulated activity or project subject to an individual permit must meet the area-specific (location) and activity-specific (type of activity) requirements of the FHACA Rules applicable to individual permits in Subchapters 11 and 12, respectively.

#### Duration of and conditions applicable to an individual permit (N.J.A.C. 7:13-10.2 and 10.3)

An individual permit for a linear activity or project 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

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issuance and may not be extended. An individual permit for any other regulated activity is valid for five years, and may be extended one time for another five years.

Under the existing rules, every individual permit has a five year term that cannot be extended. However, based on its observation that site conditions generally did not change significantly over time where activities were approved under flood hazard area individual permits 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 quarry or mining operations, as discussed below) allows construction to continue with less burden to permittees while not undermining protections against increased flooding and adverse impacts to riparian zone functionality. The permittee must, in accordance with N.J.A.C. 7:13-22.3, timely submit a request for the extension and must demonstrate that no significant changes in the overall conditions of the site have occurred, such as the location of any regulated waters, riparian zones, and flood hazard areas on site, that the regulated activities for which the permit was issued have not been revised, and that the FHACA Rules applicable to the activities covered by the permit have not been amended such that the activities no longer meet the requirements of the rules.

Under the existing rules, the individual permit for a public roadway, railroad, or flood control project can be valid for 10 years if the permittee is a public entity and demonstrates that the size and scope of the project is likely to prevent completion within five years. The proposed rule provides that an individual permit for a linear activity or project greater than 10 miles in length (for example, a roadway or railroad), a flood control project, or a quarry or mining operation is valid for 10 years. Because of their inherent size and scope, these types of activities

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generally cannot be completed within five years from the date of permit issuance, whether publicly or privately constructed. Consequently, the proposed rule does not require that the applicant be a public entity, or that the applicant demonstrate that the activities are of such size and scope that a 10-year permit term should apply.

If an individual permit expires and an extension is not obtained or the period of extension expires, the regulated activities authorized under the permit must stop. If the person to whom the permit was issued intends to begin the activities or to continue the activities begun before the permit expired, the person must obtain a new individual permit. If the regulated activities have not been started, the Department will issue a new individual permit only if the activity or project is revised where necessary to comply with the requirements of the FHACA Rules in effect when the application for the new permit is declared complete for review. If the FHACA Rules applicable to the activity were not amended during the time the individual permit was in effect and up until the time the application is declared complete for review, then no changes to the project would be necessary so long as site conditions have not changed to the extent that different requirements under the individual permit would apply to the authorized activity. For example, if the location and depth of flooding were to change after the permit was issued, such that a larger area of the project is located in a flood hazard area, or such that proposed buildings are subject to greater flood depths than anticipated, the project may no longer meet the applicable requirements. In the situation where a regulated activity was conducted before expiration of the permit, the Department will issue a new permit only if the project is revised where feasible to comply with the requirements of the FHACA Rules in effect when the application for the new permit is declared complete for review. Again, if the rules were not amended while the permit

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was in effect and up until the time the application is declared complete for review, no changes to the project would be necessary so long as site conditions have not changed to the extent that different requirements would apply. However, if the rules were amended in that period such that the project as approved or extended would not meet the modified requirements, the Department will determine the feasibility of revising the project to come into compliance in consideration of the amount of construction completed prior to the expiration of the permit, the amount of the reasonable financial investment made in the design consistent with the requirements applicable under the approved or extended permit, and whether continuing construction as approved under the permit would have an adverse impact on flooding or the environment.

A person conducting regulated activities pursuant to an individual permit must comply with the conditions in the individual permit as well as the conditions at proposed N.J.A.C. 7:13-22.2 that apply to all permits. In addition, the Department may establish conditions in a particular individual permit as necessary on a case-by-case basis to ensure the authorized regulated activity meets the requirements of the FHACA Rules and the enabling statutes. This requirement is currently found at existing N.J.A.C. 7:13-9.5(c).

### **Emergency authorizations (N.J.A.C. 7:13-16)**

Proposed new Subchapter 16, Emergency Authorizations, replaces existing N.J.A.C. 7:13-12, Emergency Permits. 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

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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.

The standard for issuance of an emergency permit at existing N.J.A.C. 7:13-12.1(b) is continued at proposed N.J.A.C. 7:13-16.1, but is rephrased for clarity and to be consistent with the language of the standard for issuing an emergency authorization in the pending CZM proposal. An emergency authorization will be issued only in extraordinary circumstances when the 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 procedure for requesting an emergency authorization at proposed new N.J.A.C. 7:13-16.2 tracks that at existing N.J.A.C. 7:13-12.1(c), with amendments that, again, align the requirements with those included in the provision for requesting an emergency authorization in the pending CZM proposal. The person seeking an emergency authorization must telephone the Division of Land Use Regulation and also submit a request for the authorization in writing to the Division by fax, electronic mail, or letter, unless the emergency is so immediate that only a telephone call is feasible. The information that must be included in the written request relates to the identity of and contact information for the property owner; ensures that permission to conduct the activity has been obtained; and establishes the location of the property, the nature and cause of the threat to life, severe loss of property, or environmental degradation that conducting the regulated activity will address, the specifics of the regulated activity that will be conducted, the existing site conditions, and the anticipated impacts of the activity to flood hazard

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areas and riparian zones. The requester need not provide public notice of the request for emergency authorization or submit an application fee. 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 the verbal decision to the requester (see N.J.A.C. 7:13-16.3). However, the requester must provide notice and submit an application fee at the time it applies for the general permit authorization or individual permit for the activities covered by the emergency authorization (see N.J.A.C. 7:13-16.3).

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 of the authorization within five working days thereafter.

The written confirmation of the verbal decision will include a description of the authorized activities, the timeframe within which the activities must be commenced and conducted, a requirement for updates on progress of activities, any limits or criteria necessary to ensure compliance with the FHACA Rules, and a requirement for mitigation of impacts to riparian zones, as appropriate.

As under the existing rules, certain timeframes apply after an emergency authorization has been issued. The activities must be commenced within 30 calendar days after the verbal approval of the emergency authorization, unless the Department establishes a different deadline. If the activities are not commenced by the deadline, the emergency authorization is automatically void as of the 30th calendar day after the verbal approval or as of the alternate deadline date. All

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emergency activities, including any restoration, must be completed within 60 calendar days after the verbal approval of the emergency authorization, unless the Department establishes a different deadline. If they are not completed timely, the activities must cease until a general permit authorization or individual permit, or another emergency authorization, is obtained. A complete application for a general permit authorization or individual permit must be submitted within 90 calendar days after verbal approval of the emergency authorization, unless the Department establishes a different deadline. Alternate deadlines can be established if the person requesting the emergency authorization demonstrates that the timeframe set in the rule cannot feasibly be met for all or a portion of the authorized activities, or if the Department determines that a different timeframe is necessary to facilitate the regulated activities.

In addition to meeting the application requirements otherwise applicable for the general permit or individual permit applied for, the application must include a demonstration that the regulated activities conducted under the emergency authorization meet the requirements of the FHACA Rules or else an explanation as to why compliance could not be achieved, as well as “as-built” site plans showing the regulated activities that were or are being conducted under the emergency authorization. These submittal requirements are continued from the existing rule.

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 FHACA Rules 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 FHACA Rules to the maximum extent practicable.

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Should the regulated activity performed under the emergency authorization result in unanticipated impacts, the Department may modify or terminate the emergency authorization if it determines that doing so is necessary to protect public health, safety and welfare, and/or the environment.

Any regulated activities conducted without having been authorized under the emergency authorization or the permit issued thereafter are subject to enforcement action as violations of the FHACA Rules.

#### **Pre-application conferences (N.J.A.C. 7:13-17)**

Proposed new Subchapter 17, Pre-application Conferences, replaces existing N.J.A.C. 7:13-15.2, and presents a simplified and updated approach to pre-application conferences for purposes of the flood hazard area program.

A pre-application conference provides a prospective applicant with a forum in which to discuss a proposed project with the Department prior to submittal of a permit application. The pre-application conference may take the form of a meeting, or may be handled through a telephone conversation or email. There is no fee for a pre-application conference. While not mandatory, a pre-application conference is recommended for large and/or complicated projects. Guidance provided by the Department at a pre-application conference does not constitute a commitment by the Department to approve or deny an application. Prospective applicants with projects that will require approvals from several Department programs are encouraged to contact the Department's Office of Permit Coordination and Environmental Review for assistance in coordinating the various applications.

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A request for a pre-application conference by e-mail is to be directed to the Division of Land Use Regulation's technical assistance group, and a request by mail is to be sent to the attention of the supervisor in the Division of Land Use Regulation of the region in which the project would be proposed. For dredging projects or projects involving dredged material management, the request is to be submitted by mail to the supervisor of the Department's Office of Dredging and Sediment Technology. 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 applicable, the address of the site, and a copy of any letter of interpretation or any flood hazard area verification issued for the site. If neither of these has been issued, the requester must provide the general location of freshwater wetlands, freshwater wetland transition areas, State open waters, and flood hazard areas and/or riparian zones.

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 the questions in writing or by telephone. 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.

#### **Application requirements (N.J.A.C. 7:13-18)**

The application requirements for verifications, general permit authorizations, and individual permits currently found in various provisions in existing N.J.A.C. 7:13 are proposed

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to be consolidated in new Subchapter 18, Application Requirements. There are general requirements that apply to all the applications, as well as additional requirements for each type of application.

Purpose and scope; general application requirements (N.J.A.C. 7:13-18.1 and 18.2)

Proposed new N.J.A.C. 7:13-18 establishes the requirements for submitting an application for a verification, an authorization under a general permit-by-certification or a general permit (except general permit 1 for channel cleaning under the Stream Cleaning Act), or an individual permit. The application requirements for other approvals and determinations are found elsewhere in the chapter.

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.state.nj.us/dep/landuse](http://www.state.nj.us/dep/landuse) or by contacting the Department at the address set forth at N.J.A.C. 7:13-1.3. The level of detail and documentation required for an application will be commensurate with the size and impact of the proposed activity, its proximity to environmentally sensitive areas, and its potential for impacts to the environment and flooding.

Only the person who owns the property that will be the subject of the verification or where the activity will be conducted under an authorization or permit, or an agent designated by

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the owner, or a public entity proposing an activity within a right-of-way or easement may submit an application.

The submitted application must be certified, by either the applicant or a duly authorized representative of the applicant. Where the applicant is a corporation, a principal executive officer of at least the level of vice president must certify. Where the applicant is a partnership or sole proprietorship, a general partner or the proprietor, respectively, must certify. Where the applicant is a municipality, State, Federal, or other public entity, either a principal executive officer or ranking elected official must certify. Where the applicant is an entity other than one of these, all individual owners of record of the property must certify. A duly authorized representative must be designated in writing as such by the applicant, and the authorization must 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 verification 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.

Should the authorization of a representative to certify an application or report no longer be accurate because a different individual or position has overall responsibility to obtain the verification and/or to operate, construct, or complete the activity, a new authorization must be submitted to the Department prior to or concurrent with any reports, information, or applications requiring certification under the FHACA Rules. This ensures that the Department is at all times aware of the individual responsible for obtaining the verification and/or the operation, construction, or completion of the proposed activity.

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If an application includes activities within a right-of-way or easement, the application must include written consent for the activity from the holder(s) of the right-of-way or easement.

All site plans submitted under this subchapter must be signed and sealed by a New Jersey licensed professional engineer, surveyor, or architect, as appropriate, with one exception. Where the applicant proposes the construction of a single-family home or duplex or an accessory structure, such as a patio, garage, or shed on his or her own property for his or her own use; and where the proposed activity is one for which no survey, topography, or calculations are necessary to demonstrate compliance with the requirements of the FHACA Rules, the applicant may prepare his or her own site plan.

Any professional report, survey, calculation, environmental impact statement, or other document prepared by a consultant, engineer, architect, surveyor, attorney, scientist, or other professional must be certified, in order to ensure that the information in the application as well as any submitted documents is truthful, accurate, and complete. This certification is separate from the certification by the applicant of the application itself. The language of the certification that must be provided by the applicant or duly authorized representative, as well as by the preparer of any of the documents submitted as part of the application, is set forth in the rule.

The failure to provide complete and accurate information may result in denial of an application, or the termination of the authorization under a general permit-by-certification or general permit or of the individual permit. It may also result in enforcement action.

An applicant may submit one application where more than one approval is required under the FHACA Rules or where an approval under the FWPA or CZM rules is required in addition to the FHACA approval. All of the respective application requirements for each of the approvals

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included in the single application must be met. Applications for authorization under general permits by certification are excepted from this provision allowing combined applications, since they are processed electronically through a dedicated on-line system and are not reviewed by the Department.

Additional application requirements for an authorization under a general permit-by-certification (N.J.A.C. 7:13-18.3)

The application for an authorization under a general permit-by-certification must be submitted electronically through the Department's online permitting system at <http://nj.gov/dep/online>. As mentioned in the Introduction of this Summary, the general permits-by-certification are promulgated as rules, and each one applies to a tightly circumscribed subset of the broader range of activities that might be able to be authorized under one of the general permits. The applicant for an authorization under a general permit-by-certification must certify that the conditions of the general permit-by-certification will be met, thus enabling an automated application and issuance process.

To start the process of applying for authorization under a general permit-by-certification, an 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.

The applicant must provide the number and subject matter of the general permit-by-certification under which authorization is sought; the name of or other identifier for the proposed development or project; specific location information for the proposed regulated activity or

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project; information specific to the proposed project that relates to the requirements of the general permit-by-certification under which the application is being submitted; and contact information for both the applicant and the property owner.

The application requires a certification that the site identified in the application is the actual location of the project site, that public notice of the application has been provided, that 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 specific to the general permit-by-certification under which the application for authorization is being submitted are or will be met. To accomplish the certification, the applicant must use the PIN that was issued to the applicant upon registering with the online permitting system.

The applicant must also submit the application fee (see proposed N.J.A.C. 7:13-21) for a general permit-by-certification.

Once the application process is successfully completed, the authorization will be accessible to the applicant through the online permitting system.

Additional application requirements for a verification, for an authorization under a general permit, or for an individual permit (N.J.A.C. 7:13-18.4)

To apply for a verification, an authorization under a general permit, or an individual permit, the applicant must submit a completed application form. The application form requires basic information regarding the proposed delineation, regulated activity, or project, including the name and address of the applicant and any designated agent(s), the specific location of the delineation, regulated activity, or project, the types of approvals being sought, a brief description

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of the proposed delineation, regulated activity, or project, and certifications as to the truth and accuracy of the information provided and as to the ownership of the property.

Documentation that public notice of the application has been provided must be submitted, as well as the appropriate application fee (see proposed N.J.A.C. 7:13-21).

The application must include certified site plans that identify, both on the site and adjacent to the site, the relevant information necessary to demonstrate that the proposed delineation, regulated activity, or project meets the requirements of the FHACA Rules. This information includes existing features; all proposed regulated activities, such as changes in lot lines, the size, location, and details of any proposed structures, roads, or utilities; details of any clearing, grading, filling, and excavation; the location and area of any riparian zone vegetation that will be disturbed; cross sections of regulated waters or water control structures being analyzed; and anticipated limits of disturbance; existing and proposed topography, details of proposed soil erosion and sediment control measures, the location of riparian zones and any proposed mitigation; a metes and bounds description of existing and proposed flood hazard area and floodway limits, and the method used to determine them; the flood hazard area design flood; and a description of the proposed construction methods and a timetable for any disturbances to the regulated water. (The respective application checklists include guidance on the specific information that must be provided on the site plans.)

The application must provide the State plane coordinates for the site that is the subject of the verification or on which the activity or project is proposed. While State plane coordinates are not required under the existing rules for an application for the construction of a private residence or the construction of a building appurtenant to a private residence, such as a garage, barn, or

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shed, the Department is proposing to require the State plane coordinates for all sites, including single family and duplex lots. The State plane coordinates for a site are easily obtainable by the public through the Department's i-MapNJ DEP interactive mapping application, which displays the State plane coordinates for a point in the lower left hand corner of the screen. An applicant can also obtain the State plane coordinates for a site by contacting the Department's GIS help desk at (609)777-0672. The State plane coordinates assist the Department in locating project sites and properly recording the location of regulated activities in its database.

In addition to the site plan, other visual representations, such as photographs, graphs, and tables necessary to illustrate existing site conditions and the proposed delineation, activity, or project, must be submitted, as well as calculations and data to demonstrate compliance with the requirements of the FHACA Rules, and when applicable, with stormwater requirements also. Information concerning the anticipated impacts of the proposed activity or project, including any monitoring or reporting methods, is required to be submitted. The applicant must provide the any information necessary to ensure compliance with State and/or Federal law, and/or to determine whether an application for a verification, or for an authorization under a general permit or for an individual permit meets State and/or Federal standards. Last, the application must include the consent of the property owner allowing the Department to enter and inspect the site. This consent will continue in effect for the duration of the Department's review of the application and decision-making process, including for the duration of any appeal made from the decision on the application. This consent is necessary to enable the Department to fully assess the proposed delineation, activity, or project and to address issues raised in comments or objections regarding the application received by the Department from interested persons.

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An application for an individual permit for a regulated activity or project located within an area under the jurisdiction of the New Jersey Pinelands Commission must include relevant documentation.

If a proposed activity for which an authorization under a general permit or an individual permit is sought requires mitigation, the applicant may submit a mitigation proposal with the application, or, if not then, at least 90 calendar days before the start of the authorized activities. This requirement ensures that the mitigation proposal can be reviewed and approved prior to the start of construction of the regulated activities. The substantive mitigation requirements for flood hazard area permits are found at proposed N.J.A.C. 7:13-13.

Engineering report requirement for an application for a verification based on Methods 4, 5, or 6 or for an individual permit (N.J.A.C. 7:13-18.5)

An engineering report must be submitted with an application for a verification based on Methods 4, 5, or 6 (these three flood hazard delineation methods are described in Subchapter 3 at N.J.A.C. 7:13-3.4(f), 3.5, and 3.6, respectively), and with an application for an individual permit. The engineering report provides detailed engineering data and calculations that the Department evaluates to determine compliance with the hydrologic, hydraulic, flood storage displacement, stability, and stormwater management standards in the FHACA Rules. Under the existing rules, an engineering report is required for all applications for verifications. However, the Department is proposing to require the report only for verifications based on Methods 4, 5, and 6 because only these three methods require the preparation of calculations.

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The content of the engineering report described at existing N.J.A.C. 7:13-15.4 is continued in the new rule, with minor changes that do not affect meaning, with the addition at N.J.A.C. 7:13-18.5(a)9 of the requirement from existing N.J.A.C. 7:13-9.2(d) regarding documentation of fill credits for projects located in the Central Passaic Basin.

Environmental report requirement for an application for an individual permit (N.J.A.C. 7:13-18.6)

An environmental report must be submitted with an individual permit application. The environmental report provides detailed information related to the potential environmental impact of a regulated activity or project that the Department evaluates to determine compliance with standards of the FHACA Rules related to impacts to riparian zone vegetation, fishery resources, aquatic biota, threatened or endangered species, and water quality. The content of the environmental report described at existing N.J.A.C. 7:13-15.5 is continued in the new rule, with minor changes that do not affect meaning.

**Requirements for an applicant to provide public notice of an application (N.J.A.C. 7:13-19)**

The requirements for an applicant to provide public notice of an application currently found in existing N.J.A.C. 7:13-16 are proposed to be repealed. Proposed new Subchapter 19, Requirements for an Applicant to Provide Public Notice of an Application, replaces those requirements with rules that align as much as possible in content and organization with the notice requirements included in the pending CZM proposal.

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Purpose and scope; timing of public notice (N.J.A.C. 7:13-19.1 and 19.2)

The applicant for a verification based on Methods 4, 5, or 6 (these three flood hazard delineation methods are described in Subchapter 3 at N.J.A.C. 7:13-3.4(f), 3.5, and 3.6, respectively), an authorization under a general permit-by-certification or a general permit, an individual permit, a major technical modification, or a mitigation proposal must provide public notice of the application in accordance with the requirements in this subchapter. While under the existing FHACA Rules, the applicant is not required to provide public notice for an application for authorization under any general permit or for any modification (which is referred to as a revision in the existing rules) of a verification, authorization, or permit, the Department is proposing to require notice for applications for authorization under general permits and general permits-by-certification, and for applications for major technical modifications for purposes of the procedural alignment between the land use permitting programs, as well as to enhance the opportunity for members of the public who may be impacted to comment on proposed activities and projects governed by the FHACA Rules. Several exceptions to the requirement for the applicant to provide public notice of its application are described below.

The “Stream Cleaning Act” provisions of the FHACA at N.J.S.A. 58:16A-67 establish specific notice requirements for government entities undertaking stream cleaning activities, which the Department has incorporated in the application requirements and review process under general permit 1 at existing N.J.A.C. 7:13-8.3, proposed N.J.A.C. 7:13-9.1. The Department has determined that the specific statutory notice requirements set by the Legislature are sufficient for the limited set of projects authorized by the Stream Cleaning Act, such that the applicant need not provide public notice of its application for authorization under the stream cleaning general

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permit. The stream cleaning activities authorized by the Stream Cleaning Act can be undertaken only by government entities and are narrowly defined to ensure that they will not adversely impact the environment or exacerbate flooding; therefore, these activities do not impact the public or the surrounding property owners in a manner that necessitates public notice beyond that published by the Department in the DEP Bulletin (where notice of every application is published).

An applicant seeking a verification based on Methods 1, 2, or 3 is not required to provide public notice of the application because these methods are based on existing Department delineations and FEMA flood mapping on which the public has its opportunity to review and comment. All Department delineations are adopted through rulemaking, which provides an opportunity for public input, and revisions to delineations are made in accordance with existing N.J.A.C. 7:13-13.5 and proposed N.J.A.C. 7:13-3.8. The revision process entails the Department's publication in the New Jersey Register and newspapers of notice of its intent to revise the delineation as well as the conducting of a public hearing. The Department takes into account any data presented by the public on the accuracy of the proposed revision of the Department delineation. FEMA follows a similar process to promulgate and amend its flood mapping, including publication of notice in the Federal Register and review of public comment, pursuant to the procedures set forth at 44 CFR Parts 66 and 67. In issuing this type of verification, the Department merely confirms the location on a particular site of the prior-delineated flood hazard area design flood and floodway limits based on established, previously reviewed data; a verification does not authorize any regulated activities. Accordingly, the potential impact is minimal and additional public input in this limited context unnecessary.

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However, if an applicant seeks an individual permit or an authorization under a general permit to undertake regulated activities on the site to which the verification applies, it must provide public notice of that permit application.

Public notice is also not required for applications for administrative modifications and minor technical modification because, unlike major technical modifications, these modifications do not alter the substance or potential impact of the verification, authorization, or permit. Public notice and an opportunity to comment would have been provided for the initial application for the permit sought to be modified. Last, applicants seeking to revise a Department delineation are not required to provide public notice, as the process to revise a Department delineation, described above, ensures that interested parties are notified of the revision and provided the opportunity to comment.

In situations where a proposed regulated activity or project requires more than one approval under the FHACA Rules or where an approval under the CZM rules or FWPA rules is also required, an applicant may provide combined public notice for all of the applications submitted, provided the combined notice meets all of the requirements that apply to each application. The failure to provide public notice as required is cause for the Department to cancel an application.

As under the existing rules, public notice must be provided no more than 30 calendar days prior to submitting the application and no later than the date the application is submitted to the Department.

Contents and recipients of public notice; newspaper notice (N.J.A.C. 7:13-19.3 and 19.4)

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Under the existing rules, the applicant must provide three copies of the completed application form and a cover letter providing basic information regarding the approval being sought to the clerk of each municipality in which the site is located along with a letter requesting that the clerk distribute one copy to the planning board and one copy to the environmental commission, with the third copy maintained in the clerk's office. To streamline these notice requirements, the Department is proposing that a complete copy of the application be provided only to the clerk of each municipality in which the site is located. Notice to the planning board and environmental commission of the municipality(ies) will consist of a brief description of the subject of the delineation, regulated activity, or project, a site plan, and the form notice letter that the Department makes available on its website (see N.J.A.C. 7:13-19.3(d)). Should interested persons want to review the information contained in the application, they may contact the municipal clerk or the Department.

If an application for a verification, an authorization under a general permit, an individual permit, or a major technical modification is for a delineation, regulated activity, or project located within the Pinelands Preservation Area, the Protection Area, or the Pinelands National Reserve, the applicant must provide a copy of the entire application to the New Jersey Pinelands Commission. This new provision is intended to facilitate coordination between the Department and the Pinelands Commission.

In addition to providing the application itself to the municipal clerk(s) (and to the Pinelands Commission if applicable), and providing notice to the environmental commission and planning board of each municipality in which the project is located, the applicant must provide notice to the construction official in each municipality in which the site is located, the planning

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board of each county in which the site is located, and the local Soil Conservation District (for projects disturbing at least 5,000 square feet). Notice must also be provided to all owners of real property, including easements, located within 200 feet of the property boundary of the site, except if the application relates to a delineation of one-half mile or longer, a mosquito control activity subject to general permit 2, a linear project of one-half mile or longer, a public project on a site of 50 acres or more, or an industrial or commercial project on a site of 100 acres or more. In these instances, the applicant must publish newspaper notice and send individual notice to those owners of property, including easements, within 200 feet of any above ground structure that is part of the proposed development, excluding any conveyance lines suspended above the ground or small utility support structures such as telephone poles.

The notice provided to property owners must be provided in the manner set forth in the Municipal Land Use Law (MLUL) at N.J.S.A. 40:55D-12.b. The Department is citing to this aspect of the MLUL because it makes clear how notice to certain property owners can be provided. For instance, notice to owners of condominium units can be provided to the condominium association rather than to each unit owner. The individual property owners to whom notice is provided must be those on a list certified by the municipality. To ensure the accuracy of the list, the date of certification of the list can be no earlier than one year prior to the date the application is submitted to the Department.

The rules separately specify the content of the public notice provided to the various government entities and to individual property owners, and the content of the newspaper notice. The public notice to government entities and individuals must include a brief description of the proposed project; a site plan, which may be on a 8½ by 11 inch sheet of paper rather than a full

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set of plans, showing the location and boundaries of the site as well as the proposed delineation, regulated activity, or project in relation to existing site conditions; and a copy of the form notice letter that the Department will make available on its website. Rather than including the language of the form notice letter in the text of the rules as is done in the existing rules, the Department is proposing to streamline the notice requirements by posting the form notice letter on its website and referencing the form notice letter in the rules. The form notice letter explains to readers of the letter that an application will be submitted to the Department for the specific delineation, regulated activity or project depicted on the enclosed site plan, 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 delineation, regulated activity, or project and site may be submitted to the Department within 15 calendar days of receipt of the letter.

For an individual permit based on a hardship exception, the notice must also include a description of the nature of the hardship and the citation and subject matter of each requirement in the FHACA Rules for which the hardship exception is being sought.

The notice must be sent by certified mail or by a form of delivery where the signature of the person to whom the notice is delivered is obtained. An applicant may secure from the specific municipal or county entity to whom notice must be provided written permission to submit the notice to that entity electronically instead of by certified mail or personal delivery. This alternative reflects the Department's initiative to facilitate electronic communication with the public where appropriate.

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As under the existing rules, the newspaper notice 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. 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 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 a verification, authorization under a general permit, or individual permit for the specific delineation, regulated activity, or project, 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 delineation, regulated activity or project and site may be submitted to the Department within 15 calendar days of the date of the notice. For an application for an individual permit based on a hardship exception, the newspaper notice must also include a description of the nature of the hardship the applicant is asserting as well as the citation and subject matter of each requirement in the FHACA Rules for which the hardship exception is being requested.

Documenting public notice of an application (N.J.A.C. 7:13-19.5)

As part of its application, an applicant must demonstrate that the required public notice has been provided. The proposed documentation requirements are continued from the existing rules, with

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clarifying changes that reflect the updated notice requirements explained above. Also, the proof of mailing of notice to individuals is simplified to the submittal of a copy of the United States Postal Service mailing receipt, or other written receipt.

### **Application review (N.J.A.C. 7:13-21)**

The review procedures for applications for authorizations under general permits, and for applications for verifications and individual permits currently found at N.J.A.C. 7:13-8.1(c) through (f) and 9.3, respectively, are proposed to be consolidated, with amendments, in new Subchapter 21, Application Review.

#### General application review provisions (N.J.A.C. 7:13-21.1; and related definitions at N.J.A.C. 7:13-1.2)

Proposed new N.J.A.C. 7:13-21 establishes the requirements for the review of applications for verifications, authorizations under general permits, and individual permits. The procedures for reviewing applications for other determinations and approvals under the FHACA Rules are found elsewhere in the chapter.

The Department is proposing definitions at N.J.A.C. 7:13-1.2 for three terms used in these application review requirements. The term “administratively complete” means all information requested on the application checklist for the respective type of application (verification, general permit authorization, individual permit) has been submitted to the Department. The term “technically complete” means that each item included in the application provides sufficient information for the Department to declare the application complete for

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review. The term “complete for review” means that the application is administratively and technically complete and is ready for evaluation by the Department for compliance with the standards applicable to the verification, general permit authorization, or individual permit being sought.

Applications for flood hazard area general permit authorizations and individual permits are subject to the procedures and timeframes established for “construction permits” under the Construction Permits Law, N.J.S.A. 13:1D-9 et seq. As under the existing FHACA Rules, the default approval timeframes at proposed N.J.A.C. 7:13-21.3 (described below), which implement the Construction Permits Law requirements, do not apply flood hazard area general permit or individual permit applications for electric generating facilities or petroleum processing or storage facilities, including liquefied natural gas facilities, with a storage capacity of over 50,000 barrels. The Construction Permits Law at N.J.S.A. 13:1D-29.b exempts the approvals or permits for such facilities from the ambit of construction permits subject to the review timeframes in the Law. Also not subject to the Construction Permits Law timeframes at N.J.A.C. 7:13-21.3 are applications for authorization under general permit 1 for channel cleaning under the Stream Cleaning Act at N.J.A.C. 7:13-9.1. The “Stream Cleaning Act” provisions of the FHACA at N.J.S.A. 58:16A-67 establish specific review and decision timeframes for the applications by government entities undertaking stream cleaning activities, which the Department has incorporated into existing N.J.A.C. 7:13-8.3, proposed N.J.A.C. 7:13-21.4.

The majority of verification applications are submitted concurrently with applications for an authorization under a general permit or an individual permit. Consequently, the Department reviews applications for verifications according to the same timeframes and requirements as

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apply through these rules for applications for general permit authorizations and individual permits.

An applicant may submit a revised application at any time during the review process. To ensure notice of the revised application is provided to those to whom notice of the initial application was provided, the rule requires the applicant who submits a revised application to send a copy of the revised portions of the application to the same municipal clerk(s) to whom the initial application was provided as required by the notice provisions at proposed N.J.A.C. 7:13-19. For the same reason, the applicant must send notice explaining the revisions to any of those persons who were sent notice of the original application (those listed at N.J.A.C. 7:13-19.3(b)) whom the Department determines would likely be affected by the revised application. The applicant must document that this notice was provided. 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.

The proposed rule includes a “time of decision” provision, which provides that the rules in effect at the time a permit application is declared complete for review will govern the review of the application. This 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 FHACA Rules that might be promulgated after the point of technical completeness.

An application for a general permit authorization or individual permit cannot be declared complete for review unless the applicant possesses all tidelands instruments required for

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occupation of State-owned tidelands or has submitted a complete application for a tidelands instrument or has submitted a complete application for a tidelands instrument. The Department will be able to verify the receipt or approval of an application for a tidelands instrument by checking the NJEMS database. If the tidelands instrument is not obtained by the applicant prior to the approval of the permit application, the issued general permit authorization or individual permit will contain a condition that states that regulated activities authorized under the authorization or permit shall not commence unless and until the required tidelands instrument to use and occupy State-owned tidelands is obtained.

The Department will publish in the DEP Bulletin notice of receipt of each new application, the status of the application during review (that is, administratively complete, technically complete, and so on), and the decision to approve or deny the application. Publication in the DEP Bulletin constitutes constructive notice to interested persons of Department actions on flood hazard area verifications and permits. Actual notice of the decision on an application will be provided to the applicant and to persons who have requested specific notice of the decision.

#### Completeness review (N.J.A.C. 7:13-21.2)

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

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Department will issue notification to the applicant and request the necessary information. If the application is determined to be administratively incomplete, the Department will return it to the applicant.

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 does submit all of the information requested in this notification, the Department will determine the application complete for review. If the applicant does not timely submit the information, the application is subject to cancellation. Whereas the existing rules provide that the Department has 20 calendar days to review information submitted in response to notice of a technically incomplete application, the Department is proposing to reduce that period to 15 calendar days in order to align the review periods for flood hazard area applications with those in the coastal rules as reflected in the pending CZM proposal.

The declaration that an application is complete for review triggers the provision in the Construction Permits Law that either the Department must issue a decision to approve or deny the application within 90 days (plus one 30-day extension if applicable), or the application is deemed to have been approved as of that 90th day (or as extended). (See N.J.A.C. 7:13-21.3, described below.) In the situation where the Department does not, within 20 days of receiving the application, declare the application complete for review or request necessary additional information, the application will be declared complete for review effective as of the date the

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Department received the application. Similarly, in the situation where the Department does not, within 15 days after receiving information from the applicant in response to a notice of technical incompleteness, either declare the application complete for review or again request additional information, the application will be declared complete for review as of the date the information in response to the initial notice of technical incompleteness was received. These requirements establishing a default date that the application is complete for review should the Department not take affirmative action to either make the declaration or request further information, are new to the flood hazard rules. They align with those in the proposed CZM rules and are intended to ensure that the start of the 90-calendar-day review period for the Department to reach its decision to approve or deny the application is unambiguous.

The applicant must send the additional information necessary to complete the application to the municipal clerk of the municipality(ies) in which the project is located, and also send notice explaining that additional information has been submitted to the Department to any of those persons who were sent notice of the original application (those listed at N.J.A.C. 7:13-19.3(b)) whom the Department determines would likely be affected by the additional information. The applicant must document that the additional information and notice were provided.

The applicant has 90 calendar days 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.

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The existing rule provides that the Department may hold a public hearing on an application for a verification or individual permit if it receives relevant written comments from at least 10 different persons, or if the Department determines a hearing is in the public interest because of an unusual condition or high likelihood of adverse impacts. Under the proposed rule, the Department will hold a fact-finding meeting on an application for a verification or individual permit when it determines that, based on public comment received regarding the application and/or its review of the scope and/or environmental impact of the project for which the permit is sought, additional information is necessary to assist in the evaluation of the potential impacts, and this information can only be obtained by holding a fact finding meeting. This provision aligns with that included in the pending CZM rule amendments, and provides the appropriate flexibility for the Department to obtain additional pre-decision comments from the public where the circumstances of a particular application warrant.

Department decision on an application that is complete for review (N.J.A.C. 7:13-21.3)

Within 90 calendar days after declaring an application complete for review, the Department must take action on the application. If the application meets the requirements of the FHACA Rules, the Department will issue an approval of the application in writing. The approval will include conditions necessary to ensure compliance with the rules. If the application does not meet the requirements of the FHACA Rules, the Department will deny the application in writing, including the reasons for the denial.

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The 90-day deadline for decision may be extended once by 30 calendar days by mutual agreement of the applicant and the Department. An applicant consenting to an extension must do so in writing. A deadline cannot be extended by less than or more than 30 calendar days.

If the Department does not make a decision to approve or deny an application within the 90-day timeframe, or within the extension period if applicable, the application will be deemed approved as of the date of the missed deadline. However, for activities that require a tidelands instrument, regulated activities cannot commence unless and until all required tidelands instruments to use and occupy State-owned tidelands are obtained. A general permit authorization or individual permit issued “by default” will include the standard conditions set forth at N.J.A.C. 7:13-22.2. A verification, general permit authorization, or individual permit issued by default does not prevent the Department from taking enforcement action for any regulated activity undertaken in violation of the FHACA Rules.

The Department will publish notice of its decision on an application in the DEP Bulletin and will provide notice to any person who specifically requested notice of the decision on a particular application.

The Department will not waive the timeframes for review and decision on general permit and individual permit applications as they are statutorily mandated by the Construction Permits Law. Since, as noted above, the Department reviews applications for verifications according to the same timeframes and requirements as apply through these rules for applications for general permit authorizations and individual permits, the Department similarly will not waive the review and decision timeframes for applications for verifications.

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Department review and decision on an application for authorization under general permit 1 for channel cleaning under the Stream Cleaning Act (N.J.A.C. 7:13-21.4)

As noted previously, the review of applications for authorization for stream cleaning activities conducted by local governments under general permit 1 are not governed by the Construction Permits Law timeframes because of the specific requirements included in the “Stream Cleaning Act” provisions of the FHACA at N.J.S.A. 58:16A-67. Under the Stream Cleaning Act, the local government entity (a county, municipality, or designated agency) seeking to clean, clear, or desnag a stream within its jurisdiction must submit a written notice of intent to the Department along with an engineer’s certification that certain criteria set forth in the statute are met. The Department has either 15 or 60 days (depending on whether sediment removal will be involved) from the date the notice is received to notify the local government entity that the project cannot be undertaken because of site-specific or project-specific circumstances. If the Department does not issue such notice, the project may be undertaken. On completion, the local government agency must provide the Department with written notice and an engineer’s certification that the statutory criteria were met.

The Department incorporated the Stream Cleaning Act provisions into the FHACA Rules as a general permit. The general permit for these activities at existing N.J.A.C. 7:13-8.3 is continued in the new rules at N.J.A.C. 7:13-9.1, and the provisions for reviewing applications for authorization under that general permit at existing N.J.A.C. 7:13-8.3 are continued in the new rules at N.J.A.C. 7:13-21.4 with amendments to conform them in format and terminology with the generally applicable review requirements in Subchapter 21 but not affecting meaning.

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Cancellation, withdrawal, resubmittal of an application; fee refund or credit (N.J.A.C. 7:13-21.5, 21.6, 21.7, and 21.8)

The Department will cancel an application in several circumstances: (1) if the applicant does not submit the 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 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.

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.

If the Department denies or cancels an application, or the applicant withdraws its application, the applicant may re-submit the application in accordance with the application requirements of N.J.A.C. 7:13-18. The Department will treat a resubmitted application as new application, and review it in accordance with the requirements of N.J.A.C. 7:13-21.

The Department will refund an application fee in certain circumstances and the applicant requests the refund in writing. The Department will fully refund a fee if the Department returns

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an application because it is not administratively complete; or the applicant withdraws the application within 60 calendar days of submitting it to the 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 just described, 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 in accordance with the requirements of N.J.A.C. 7:13-18.

**Permit conditions; extension, modification, transfer, suspension, and termination of verifications, authorizations, and permits (N.J.A.C. 7:13-22)**

Proposed new Subchapter 22, Permit Conditions; Extension, Modification, Transfer,

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Suspension, and Termination of Verifications, Authorizations, and Permits, contains rules that are relocated, with amendments that align the rules with those in the pending CZM rules, from existing N.J.A.C. 7:13-8 and 9 (conditions applicable to all general permit authorizations and individual permits), as well as from existing N.J.A.C. 7:13-14 (transfers, suspensions, and terminations). In addition, the subchapter contains proposed new rules regarding extensions that align with those in the pending CZM proposal.

Purpose and scope; conditions that apply to all permits (N.J.A.C. 7:13-22.1 and 22.2)

The Department is proposing to refine the conditions in the existing FHACA Rules and to establish new conditions based on its experience implementing the flood hazard permitting program and for consistency with the FWPA and coastal rules. The permit conditions set forth in Subchapter 22 are those that apply to all FHACA permits. They apply in addition to specific conditions contained in an issued individual permit (see N.J.A.C. 7:13-10.3), and in addition to the specific conditions applicable to permits-by-rule, general permits-by-certification, and general permits found in Subchapter 6. Once a permittee undertakes any regulated activity approved under a permit, that action constitutes acceptance of the permit in its entirety, including all conditions.

There are 14 conditions listed at N.J.A.C. 7:13-22.2(c) that apply to all flood hazard area permits. They 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 or life or property that may occur as a result of the activity or development.

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(2) A permit does not convey any property rights or any other exclusive privilege.

(3) A permittee must obtain all Federal, State, and local approvals prior to commencing activities under the permit.

(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.

(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.

(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.

(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.

(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.

(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.

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(10) The permittee must minimize noise during construction.

(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 the public's right to access and use tidal waters and their shores.

(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, and inspect at reasonable times any facilities, equipment, or operations regulated or required under the permit. Failure to do so will be considered a violation of the FHACA Rules and subject the permittee to an enforcement action.

(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 from all regulated areas.

At proposed N.J.A.C. 7:13-22.2(d), there are 13 conditions that are additional to those listed in N.J.A.C. 7:13-22.2(c) and that apply to all flood hazard area permits except permits-by-rule. These conditions do not apply to a permit-by-rule because the conditions address issues such as compliance with site plans and documents approved under a permit, recordation, mitigation, monitoring, modification, transfer, suspension, and termination. A permit-by-rule does not involve the issuance by the Department of a document authorizing a particular person to

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conduct regulated activities. There is no approval of site plans, or imposition of monitoring or mitigation under a permit-by-rule. A permit-by-rule cannot be transferred or suspended, and it can be terminated only by rulemaking. The 13 additional conditions are as follows:

(1) 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.

(2) 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.

(3) 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 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 or so 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.

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The condition requiring that the permit be recorded puts 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, for instance, conditions that require flood protections such as flood vents or that restrict the habitability of the basement of a building, or conditions requiring that a portion of a site be revegetated and preserved from future development. This condition requiring a permit to be recorded does not apply to an authorization under general permit 1 for channel cleaning under the Stream Cleaning Act because stream cleaning activities (removal of sediment and debris) do not constrain the future use of the property(ies) on which they are performed.

(4) Where mitigation is required, it must be conducted prior to, or concurrently with, the regulated activity in order to ensure that mitigation is accomplished as near in time as possible to the occurrence of the impacts.

(5) 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.

(6) If a permit condition does not set a specify timeframe within which the condition must be satisfied, then the condition must be satisfied within six months of the effective date of the permit.

(7) 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.

(8) The permittee must provide monitoring results to the Department at the intervals specified in the permit.

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(9) 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. 7:13-22.4).

(10) A permit can be suspended or terminated by the Department for cause.

(11) 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.

(12) 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. 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 FHACA 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.

(13) The permittee must notify the Department in writing at least three working days before the start of regulated activities.

Extensions of verifications, general permit authorizations, and individual permits (N.J.A.C. 7:13-22.3)

As noted previously with respect to the provisions governing the duration of authorizations under general permits in Subchapter 6, and of individual permits in Subchapter 10, as well as those governing the duration of verifications in Subchapter 5, the Department is proposing that the five-year term of these approvals, with certain exceptions set forth in the respective duration provisions, can be extended one time for another five years.

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The Department will issue an extension only if: (1) it receives an extension request prior to the expiration of the verification, authorization under a general permit, or individual permit; (2) the person requesting the extension demonstrates that there has been no significant change in the overall conditions of the site, including regulated waters, flood hazard areas, and riparian zones; (3) the person requesting the extension demonstrates that the regulated activities approved under the verification, authorization, or individual permit have not been revised or amended unless the permittee has obtained a permit modification for the changes; and (4) 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.

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 the applicable rules have not been amended such that the activities do not meet the rule requirements as amended.

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 a verification or an individual permit, the Department will either determine the request meets the requirements and issue the extension, or deny the extension request.

The Department will deny an extension request if it is for a verification, authorization, or individual permit that cannot be extended under the rules, is received more than one year prior to the expiration date of the verification, authorization or permit; or is received after the expiration

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date of the verification, authorization, or permit. The Department will also deny a request for extension if the verification, authorization, or permit has been extended before; the applicant fails to make the 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 verification, authorization, or individual permit has been terminated.

If the Department denies a request for extension, the verification, 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. Any approved extension will be for one five-year period, beginning on the original expiration date of the verification, authorization, or permit. The extension will be in writing and will include any conditions necessary to ensure continued compliance with the FHACA Rules.

Transfers of emergency authorizations, general permit authorizations, individual permits, and verifications (N.J.A.C. 7:13-22.4)

The Department is proposing to simplify and streamline the requirements for transferring a flood hazard area verification or permit when there is a change in ownership of the property. Rather than require prior Department approval of the transfer, the verification, emergency authorization, general permit authorization, or individual permit, including all conditions, is automatically transferred, provided the verification, 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 verification, authorization, or permit applies, the new owner must submit, within 30

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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 FHACA Rules.

Modification of verifications, general permit authorizations, and individual permits; applications for modifications (N.J.A.C. 7:13-22.5 and 22.6)

The existing FHACA Rules term changes to issued verifications, general permit authorizations, and individual permits "revisions." As part of the alignment of the FHACA Rules with permitting process rules in the pending CZM proposal, the Department is proposing to replace the term "revision" with "modification" with respect to changes to verifications, general permit authorizations, and individual permits. Changes to Department flood hazard area delineations continue to be termed revisions, and the requirements governing them are located at proposed N.J.A.C. 7:13-3.7.

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.

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There are three types of modifications: administrative, minor technical, and major technical. An authorization or permit may be modified at any time while it continues to be valid, but the term of a verification, an authorization, or an individual permit cannot be extended by a modification.

An administrative modification applies to a change to a site plan or other document on which the original authorization, individual permit, or verification was based but which does not alter the design or layout of the project, or the flood hazard area design flood elevation, floodway limits or riparian zone width. 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 verification 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.

A minor technical modification applies to a change in the design or layout of a project or the flood hazard area design flood elevation, floodway limits, or riparian zone width, including any associated changes to an approved site plan or other document, provided the applicant demonstrates, without engineering calculations, that the change does not result in new or additional impacts to the flood hazard area or riparian zone. The Department will not review engineering calculations in the context of an application for a minor technical modification in order to determine if the modified regulated activity, project, or delineation continues to comply with the requirements of the FHACA Rules. Minor technical 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

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reduction in the footprint of the regulated activities or project.

Any modification for which calculations are necessary to demonstrate compliance with the rules must be evaluated as a major technical modification. Under the existing rules, a major revision to a verification is required when the proposed change modifies the flood hazard area design flood elevation, flood hazard area limit, floodway limit, and/or other related feature such that the Department must review detailed engineering calculations in order to determine that the revision is accurate. Since only verifications based on Methods 4 and 6 (see N.J.A.C. 7:13-3.4(f) and 3.6, respectively) can involve a detailed review of engineering calculations, a major revision is necessary only for those verifications. Similarly, under the existing rules, if the revision to an individual permit involves a proposed change in a project element such that the Department must review detailed engineering calculations in order to determine whether the revised project element complies with the FHACA Rules, a major revision is necessary. The proposed rule simply identifies a major technical modification as one that applies to any change in a delineation or regulated activity or project, including any associated change to an approved site plan or other document, that does not meet the definition of an administrative modification or a minor technical modification and that does not require a new verification, authorization, or individual permit.

The determination that a new verification, authorization, or individual permit must be obtained, instead of a modification, turns on whether the applicant is proposing a change that constitutes a substantial redesign of the delineation or regulated activities or project or that will significantly increase the environmental impact of the regulated activities or project. Where the proposed change meets that standard, a new verification, authorization, or individual permit is

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required. For verifications, a redelineation of a verified flood hazard area and/or floodway limit based on new hydrologic and hydraulic calculations, or the addition of any previously unverified sections of a regulated water would require a new verification. For changes to an authorization or permit, a new authorization or individual permit would be 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 project or its stormwater management system 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 to the flood hazard area or riparian zone; or a change that would result in impacts to a site not owned or controlled by the permittee.

The person to whom the modified verification, modified authorization, or modified individual permit has been issued must record the modified approval with the Office of the County Clerk in the county(ies) in which the site is located. Under the existing rules, only a modified verification must be recorded. The expansion of this requirement to modifications of general permit authorizations and individual permits will ensure that there is a clear public record of the Department's actions relating to a specific property.

The information required as part of an application for an administrative modification of a verification, authorization under a general permit, or individual permit includes a description of the proposed change; the site plans approved as part of the verification, authorization, or

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individual permit revised to illustrate the proposed change; a copy of the previously issued verification, 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 verification, authorization, or permit, the information to be submitted is essentially the same as under the existing rules, except that the proposed rule requires visual representations, such as photographs, graphs, and tables, that illustrate the proposed change, and any information necessary to ensure compliance with State and/or Federal law. This information will assist the Department in ensuring that the proposed change does not result in new or additional impacts to the flood hazard area or riparian zone.

For a major technical modification, the information that must be submitted is the same as required under the existing rules with the addition of the submittal of other visual representations, as applicable, such as photographs, sketches, graphs, and tables, to illustrate the proposed project changes, as well as engineering calculations and related materials necessary to demonstrate that the modified project will comply with the FHACA Rules as well as the Department's SWM rules at N.J.A.C. 7:8, if applicable. This information will assist the Department in ensuring that the proposed change does not constitute a substantial redesign of the regulated activity project or significantly increase the environmental impact of the regulated activity or project or exacerbate flooding.

Suspension and termination of verifications, general permit authorizations, individual permits, and emergency authorizations (N.J.A.C. 7:13-22.7 and 22.8)

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As under the existing rules, the Department will suspend a verification, an authorization, and an individual permit for good cause. Good cause includes the approval having been based on false or inaccurate information; the permittee undertaking activities on the site that violate the FHACA Rules; the permittee or recipient of the verification having violated a condition of the permit; the permittee or recipient of the verification having misrepresented or failed to fully disclose all relevant facts pertaining to the approval; the permittee having failed to correctly identify impacts of the regulated activity or project in the permit application; the regulated activities having unanticipated environmental impacts; changes having been made in the delineation and/or project that require modification of the verification, authorization under a general permit, or individual permit and such modification has not been obtained; and emergency reasons or the need to protect public health, safety, and welfare, or the environment.

The Department will furnish notice of a suspension by certified mail to the permittee or person to whom the verification was issued. If the permit or verification is suspended for emergency reasons, the Department will instead contact the permittee or person to whom the verification was issued by telephone or by any practical method, and will follow up with a written notice.

The notice of the suspension will state that the approval is suspended upon the receipt of the notice by the permittee or person to whom the verification was issued; include the reasons for the suspension; 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 or person to whom the verification was issued of the right to, within 10 calendar days after receiving the

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notice, either request a meeting with the Department to discuss the suspension and/or request an adjudicatory hearing.

The permittee or person to whom the verification was issued must offer a plan to remedy the violations that prompted the suspension notice and a timeframe for its implementation. 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 FHACA Rules; and identify a timeframe within which the permittee or person to whom the verification was issued will execute the strategy.

Within 30 calendar days of receiving a written strategy from the permittee or person to whom the verification was issued the Department will: (1) accept the strategy, reinstate the suspended approval, and require the permittee or person to whom the verification was issued 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 or person to whom the verification was issued of the Department's intent to terminate the approval. Where the permittee or person to whom the verification was issued 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 or person to whom the verification was issued to implement the strategy within the prescribed timeframe, or else determine that the strategy is unacceptable and/or insufficient and notify the permittee or person to whom the verification was issued of its intent to terminate the verification or permit.

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The Department will terminate a suspended verification, authorization under a general permit, individual permit, or emergency authorization for good cause. Three examples of good cause are listed: if the permittee has not ceased all regulated activities authorized by the suspended approval as required; if the permittee or person to whom the verification was issued 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. An approval will be terminated only after the permittee or person to whom the verification was issued has been given every reasonable opportunity to present and act on a strategy to correct the problem that gave rise to the suspension.

The Department will provide notification by certified mail of its intent to terminate a verification, authorization under a general permit, individual permit or emergency authorization. An adjudicatory hearing may be requested within 10 calendar days after receipt of the notice of intent to terminate. If the permittee or person to whom the verification was issued does not request a hearing, or if the hearing request is denied, the verification, authorization under a general permit, individual permit, or emergency authorization will automatically terminate, effective 10 calendar days after the permittee or person to whom the verification was issued received the notice of the Department's intent to terminate the verification or permit.

Should the Department terminate a verification, authorization under a general permit, individual permit or emergency authorization, the permittee or person to whom the verification was issued must remedy any changes to the site made in violation of the FHACA Rules; remedy any adverse impacts to flooding 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

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these actions will constitute a violation and subject the permittee or person to whom the verification was issued to enforcement action.

### **Requests for adjudicatory hearings (N.J.A.C. 7:13-23)**

Proposed new Subchapter 23, Requests for Adjudicatory Hearings, describes the process and requirements for requesting a hearing to contest the Department's decision on applications for verifications and approvals, and replaces existing Subchapter 18, which is proposed to be repealed. The proposed rules align with the hearing provisions in the pending CZM proposal, and present the hearing request requirements 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.

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 Subchapter 24.

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. The hearing request must be submitted to the Department's Office of Legal Affairs, with a copy to the Division of Land Use Regulation, and must include the requester's name and address as well as those 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. 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

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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 request was provided to that person.

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](http://www.nj.gov/dep/landuse).

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.

The Department will notify the requester if the hearing request is granted or denied. If the hearing 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 final decision issued by the DEP Commissioner after the proceedings in the Office of Administrative Law is a final agency action for purposes of the APA, and is appealable to the Superior Court, Appellate Division, in accordance with the Court rules.

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

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collaborative problem-solving, which, in the appropriate case, can obviate the need for potentially lengthy formal legal proceedings and the attendant costs.

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.

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 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.

## **APPLICATION FEES**

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Existing N.J.A.C. 7:13-17, Application Fees, is proposed to be recodified at N.J.A.C. 7:13-20, with amendments. On February 2, 2015, the Department promulgated amendments, repeals, and new rules concerning flood hazard application fees as part of a rulemaking that also modified the application fees for the coastal (CZM) and freshwater wetlands (FWPA) 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. 7:13-17 with new fee rules.

The Department now proposes amendments in N.J.A.C. 7:13-17 that reflect the recodification of various provisions elsewhere within the FHACA Rules, as well as fee amounts for categories of applications established with this rulemaking, and changes in terminology reflected in this rulemaking.

#### **Application fees (N.J.A.C. 7:13-20.1 and Table 20.1)**

To the list of applications at N.J.A.C. 7:13-20.1 for which fees are imposed, the Department is proposing to add revisions of Department delineations, authorizations under general permit-by-certifications, and extensions and modifications of verifications, general permit authorizations, and individual permits. Revisions of approvals are deleted because this category is now covered by either the category revision of a Department delineation or modifications. Since an application to the Department to transfer a verification, an authorization under a general permit, or an individual permit will no longer be required (see the Permitting Process section of this Summary regarding proposed N.J.A.C. 7:13-22.4), these applications are also proposed to be deleted from the list of applications for which a fee is imposed.

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To the list of applications for which no fee is imposed, the Department is proposing to add authorizations under proposed general permit-by-certification 4 for enhancement of a riparian zone through the planting of native, non-invasive vegetation, in order to encourage applicants to undertake this environmentally beneficial activity. The Department is also proposing to add to the list authorizations under general permit-by-certification 5 for reconstruction, relocation, expansion, and/or elevation of a building outside a floodway, in order to lessen the burden on applicants of restoring damaged buildings to a safer location and elevation. For similar reasons (to encourage undertaking a beneficial activity and/or to lessen the burden on applicants), the Department is adding to the list authorizations under proposed general permit 4 for creation, restoration, and enhancement of habitat and water quality values and functions; and general permit 5 for reconstruction and/or elevation of a building in a floodway. Transfers are added to this list for the reason noted above, and the existing fees for transfers are proposed to be deleted at Table F, which is recodified as Table 20.1.

As discussed in the Technical Requirements and Permit Standards part of the summary with regard to proposed amendments related to buildings, reference to “one private residence” is being replaced throughout the FHACA Rules by “single-family home or duplex.” Accordingly, the term is replaced in Table 20.1.

Table 20.1 includes several new fees. A fee of \$1,000 is proposed for a verification in cases where an applicant requests a verification of only the riparian zone. Since a review of calculations is not necessary to determine if an application for a riparian zone-only verification meets the requirements of the rules, the Department is proposing that the fee be the same as the application fee for a verification based on methods 1, 2, 3, and 5, for which the Department

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likewise does not review calculations in order to determine if the application meets the requirements.

A fee of \$1,000 is proposed for an authorization under a general permit-by-certification (other than general permits-by-certification 4 and 5, for which there is no fee, as noted above).

The fee is necessary to cover costs associated with creating and maintaining the on-line system for processing these applications.

Because the Department is proposing to allow one extension of a verification, general permit authorization, or individual permit, as explained in the Permitting Process summary with respect to proposed N.J.A.C. 7:13-22.3, application fees are proposed for these extensions. For the extension of a verification that does not require the review of calculations (verifications based on methods 1, 2, 3, or 5, and verifications of the riparian zone only) and for the extension of a general permit authorization, the proposed fee is \$240.00, which is the amount of the application fee to extend a general permit authorization under the FWPA rules (see N.J.A.C. 7:7A-11.1). The Department anticipates that an equivalent level of effort will be needed to review and process these extension requests. For the extension of a verification that does require the review of calculations (verifications based on methods 4 or 6), the fee is proposed to be 25 percent of the original application fee. This is consistent with the existing fee for the extension of a freshwater wetlands letter of interpretation (LOI) under the FWPA rules (see N.J.A.C. 7:7A-11.1), which is \$240.00 (the initial application fee for the simplest type of LOI) or 25 percent of the original application fee, whichever is greater. For the extension of LOIs for which the initial application fee is greater than \$240.00 because those LOIs involve more detailed applications and thus more effort to review, the fee is 25 percent of the original application fee. Since the

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initial application fee for these two categories of verifications is \$4,000 plus \$400.00 for each additional 100 linear feet of channel, the Department is establishing the fee for their extension at 25 percent of the original application fee, which will necessarily exceed \$240.00 because it will be at least \$1,000 (25 percent of \$4,000). The same fee, 25 percent of the original application fee, is proposed for the extension of an individual flood hazard area permit because, like the extension of the more complex verifications, more effort is required to review these applications.

With respect to the additional application fees that apply when the permit is for a major development pursuant to the SWM rules at N.J.A.C. 7:8, the Department is proposing to delete the fee applicable when vegetation is removed within a Special Water Resource Protection Area (SWRPA) since, as described in the Riparian Zone and Mitigation section of the summary, the provisions in the SWM rules at N.J.A.C. 7:8-5.5(h) regarding SWRPAs are proposed to be deleted.

With respect to the application fees for a revision of a verification, authorization under a general permit, or an individual permit, the Department is proposing amendments, explained in the Permitting Process summary regarding proposed N.J.A.C. 7:13-22.5, which are reflected in Table 20.1. The term “revision” is proposed to be replaced with “modification” for consistency in terminology with the FWPA and CZM rules. Further, where the existing rules describe two categories of revisions (minor and major), under the proposed rules there are three categories of modifications: administrative (no technical review involved), minor technical, and major technical. The proposed fee for an administrative modification of an approval is the same as the existing fee for the revision of one project element. The proposed fee for a minor technical modification applies to each project element being modified, as does the existing fee for a minor

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revision. The proposed fee for a major technical modification is the same as the existing fee for a major revision.

## **ENFORCEMENT**

Existing N.J.A.C. 7:13-19, Enforcement, is proposed to be relocated at N.J.A.C. 7:13-24, with the amendments described below.

The new subchapter includes provisions that implement the Environmental Enforcement Enhancement Act (EEEA), P.L. 2007, c. 246. The EEEA became effective January 4, 2008, and modified and enhanced the Department's enforcement powers under various environmental protection statutes, including the FHACA (N.J.S.A. 58:16A-63, Section 10 of P.L. 2007, c. 246). Among the several changes effected in the FHACA by the EEEA are the increase in maximum penalties from \$2,500 to \$25,000, the ability to issue administrative enforcement orders and civil administrative penalty assessments, the ability to bring criminal actions, through the Office of the Attorney General, against knowing, purposeful or reckless violators, the ability to assess any economic benefits from the violation gained by the violator, and the ability to record a notice concerning a violation on the deed of the property affected. During the period prior to promulgation of the proposed amendments, the Department will continue to, on a case-by-case basis, use the criteria set forth in the FHACA as amended by the EEEA (see N.J.S.A. 58:16A-63(d)) to assess civil administrative penalties up to a maximum of \$25,000 per day for each violation.

The new subchapter also aligns the enforcement provisions of the flood hazard area permitting program with the coastal permitting and freshwater wetlands permitting programs to

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the extent the respective enabling statutes allow.

### **Taking enforcement action (N.J.A.C. 7:13-24.1, 24.2, and 24.3)**

When the Department finds a person in violation of the FHACA, or any regulation, rule, permit, or order adopted or issued pursuant to the FHACA, 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 Department may enter and inspect property to investigate any potential noncompliance with the law, and a permit applicant or a permittee must provide information the Department requests in order to determine the applicant or permittee's compliance. Under this subchapter, 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 FHACA.

Should the Department find that a person has violated any provision of the FHACA, or any regulation, rule, permit, or order adopted or issued pursuant to FHACA, the Department may issue an order specifying the provision(s) that the person cited has violated, and ordering compliance and restoration 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 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.

To assess a civil administrative penalty, the Department will notify the violator by

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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, noting that interest may be due should the penalty not be paid timely, and advising the violator of the right to request an adjudicatory hearing.

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 administrative 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 on the penalty, payment is due when the notice of civil administrative penalty assessment becomes a final order on the 36th 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 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 to the Department interest on the amount of the penalty if, as explained above, 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.

The Department may settle any assessed civil administrative penalty, based on extenuating circumstances not previously considered when the penalty was assessed, the violator's timely implementation of restoration or mitigation measures, the violator's timely

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payment of a specified part of the penalty, and any other terms or conditions the Department accepts.

**Requesting an adjudicatory hearing on an administrative order and/or civil administrative penalty (N.J.A.C. 7:13-24.4)**

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 required information is not included in the hearing request, the Department may deny the request.

The specific information that must be included in a request for hearing includes the violator's contact information and any authorized representative's contact information, a copy of the administrative order and/or notice of a civil administrative penalty assessment being challenged, the date the order or notice was received by the violator, 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, a statement as to whether the violator agrees to delay the transfer of a granted hearing request to the Office of Administrative Law in order to engage in settlement negotiations, including requesting mediation through the Department's Office of Dispute Resolution if desired, information supporting the request, an estimate of the time required for the hearing, and if necessary a request for a barrier free hearing location. The request must be submitted to the Office of Legal Affairs in the Department as well as to the Department's Bureau

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of Coastal and Land Use Compliance and Enforcement.

Any adjudicatory hearing will be conducted in accordance with the Administrative Procedure Act, and the Uniform Administrative Procedure Rules promulgated by the Office of Administrative Law.

**Civil administrative penalties for failing to obtain a permit before conducting regulated activities (N.J.A.C. 7:13-24.5)**

The procedure for assessing a civil administrative penalty for violations where a permit has not been obtained prior to the regulated activities being conducted is similar to that in the coastal and freshwater wetlands program rules, and takes into account the conduct of the violator and the seriousness of the violation. Each violation of N.J.A.C. 7:13-2.1, which establishes when a permit is required under the FHACA, constitutes an additional, separate and distinct violation, and each day a violation continues or remains in place without the required permit constitutes an additional, separate and distinct offense.

Conduct and seriousness are assigned points, as described below, which are then totaled to determine the base penalty amount per day. The base penalty amount per day can be adjusted, as described below. The total penalty is the daily penalty multiplied by the number of calendar days during which each violation continued or remained in place without the required permit. Notwithstanding the \$25,000 maximum penalty otherwise applicable, as provided by the EEEA, 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.

Five points are assigned for major conduct (intentional, deliberate, purposeful, knowing,

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or willful act or omission), emphasizing the importance of this factor in the overall penalty assessment. The points assigned to moderate conduct (unintentional but foreseeable act or omission) and minor conduct (any conduct not considered moderate or major) are two and one, respectively. The Department believes that persons who knew, or should have known, that the activities they were conducting were in contravention of the FHACA should be assessed a higher penalty than persons who did not realize their actions were in violation.

Points for seriousness of the violation are assessed based on the type, size, and location of the violation, whether the activity also constitutes a Tidelands violation, and whether the activity was impacted a resource of concern. More points are assigned where the impacts to flooding or the environmental features protected under the FHACA Rules are greater.

The points assigned to a violation because of its impact to a channel, such as excavation, channelization, or dredging, are based on the length of the channel disturbed. A violation that disturbed greater than 300 linear feet of channel is assigned five points. A violation that disturbed greater than 75 linear feet up to and including 300 linear feet of a channel is assigned three points. A violation that disturbed up to and including 75 linear feet is assigned one point.

The points assigned to a violation because of its impact to a floodway, such as the construction or placement of structures, fill or obstruction within the floodway, are based on the type and volume of fill or obstruction constructed or placed within the floodway, whether the fill constitutes a habitable building, and the area of the footprint of the structure. A violation comprising the placement of greater than 100 cubic yards of fill or obstruction within a floodway is assigned five points. A violation comprising the placement of more than 25 cubic yards and up to and including 100 cubic yards of fill or obstruction within a floodway is assigned three

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points. A violation comprising the placement of 25 cubic yards or less of fill or obstruction within a floodway is assigned one point. The unauthorized construction of a habitable structure or building addition within the floodway not only can result in serious adverse impacts to flooding, but also places the occupants at great risk; accordingly, such a violation is assigned five points. A violation comprising the unauthorized construction of any other structure or building addition greater than 150 square feet within the floodway is assigned three points.

The points assigned to a violation because of its impact to a flood fringe, such as the construction or placement of structures, fill or obstruction within the flood fringe, are based on the volume of fill or obstruction constructed or placed within the flood fringe, whether the structure complies with the FHACA Rules notwithstanding the fact that a flood hazard area permit was not obtained for its construction and, in the case of a building, the elevation of the lowest floor in relation to the minimum elevation required for the type of building. The placement of fill or obstruction in a flood fringe reduces the volume of flood storage within the flood hazard area and results in increased flood depths and velocities. The adverse impacts to flooding resulting from flood storage displacement are generally commensurate with the volume of fill material or obstruction being placed within the flood fringe. A violation comprising the placement of greater than 200 cubic yards of fill or obstruction in a flood fringe is assigned five points. A violation comprising the placement of greater than 50 cubic yards up to and including 200 cubic yards of material in a flood fringe is assigned three points. A violation comprising the placement of greater than five cubic yards up to and including 50 cubic yards is assigned one point. The unauthorized construction of a habitable building in the flood fringe is assigned points based on the as-built lowest floor elevation, since the requirements for minimum elevation

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of the lowest floor of habitable buildings is intended to protect the occupants to the extent practicable from personal injury and property damage during floods. Where the as-built lowest floor elevation is below the minimum elevation required for the type of building, the violation is assigned five points. Where the as-built lowest floor elevation is at or above the minimum elevation required for the type of building, the violation is assigned two points. Where the violation comprises the unauthorized construction of any other structure in the flood fringe, if the structure that was built without a permit does not comply with the FHACA Rules, the violation is assigned three points. If the structure as built without a permit does comply with the FHACA Rules, the violation is assigned one point.

The points assigned to a violation because of its impact to a riparian zone, such as the clearing, cutting, or removal of vegetation, the construction, reconstruction, relocation, or enlargement of the footprint of a structure, and site preparation, are based on the area disturbed and the type of vegetation disturbed. The destruction of riparian zone vegetation can greatly impair riparian zone functionality and lead to significant adverse impacts to water quality, channel stability, and aquatic biota. A violation that disturbed greater than 15,000 square feet of riparian zone is assigned three points. A violation that disturbed more than 7,000 square feet and up to and including 15,000 square feet of riparian zone is assigned two points. A violation that disturbed greater than 400 square feet up to and including 7,000 square feet of riparian zone is assigned one point. Because woody vegetation generally provides the highest level of riparian zone functionality, a violation where woody vegetation is cleared and stumped, roots are removed, and/or vegetation is otherwise destroyed by being buried under fill, is assigned three points. A violation where woody vegetation is removed but stumps remain, and thus the

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topography of the area is not generally altered, which reduces the threat of erosion and channel destabilization and results in less impairment to riparian zone functionality, is assigned two points. A violation where an existing shrub layer within the riparian zone is removed but trees remain, is assigned one point.

In addition to the points assigned as described above, one additional point is assigned to the violation if the violation is located in a State-owned tidelands area for which a current tidelands instrument has not been obtained or for which payment is in arrears.

In addition to the points assigned as described above, if the violation impacts a resource of concern, one additional point will be assigned to the violation for each resource of concern affected. Resources of concern are regulated waters that are identified as trout production or trout maintenance, or that contain fishery resources; that are designated as category one; that are located within the Central Passaic Basin; or that are present or documented habitat for threatened and endangered species (plant or wildlife). The channel and the floodway of any regulated water, and the portion of a riparian zone within 25 feet of the top of bank of a regulated water, are also a resource of concern for purposes of assigning the additional one point.

To calculate the base penalty for a violation for failing to obtain a permit before conducting regulated activities, the points assigned for conduct and seriousness are totaled. The base penalties range from \$500.00 to the maximum penalty allowed for under the EEEA of \$25,000.00.

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

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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 riparian zone 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 Department may adjust, upward or downward, the amount of the base penalty assessed based upon the compliance history of the violator, the frequency with which a violation has occurred, the deterrent effect of the penalty, and/or other mitigating, extenuating, or aggravating circumstances.

**Civil administrative penalties for violations other than failing to obtain a permit before conducting regulated activities (N.J.A.C. 7:13-24.6)**

Like the procedure at N.J.A.C. 7:13-24.5 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 freshwater wetlands program rules for these violations. Each violation for which a penalty is assessed under this section constitutes an additional, separate, and distinct violation. Also, if a requirement of the FHACA, or of a provision of the FHACA Rules, or of a permit or condition or order issued by the Department under FHACA 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,

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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.

As under N.J.A.C. 7:13-24.5, 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 flood hazard 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 restoration. Notwithstanding the \$25,000 maximum penalty otherwise applicable, the Department may, as provided by the EEEA, 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

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cause serious harm to human health or safety, property, the environment, or the flood hazard area 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 adversely impact flooding, flood hazard area habitat for threatened or endangered species, the pattern of riparian zone vegetation, or water quality; as well as filling, excavating, or grading within a flood hazard area or clearing, cutting, and/or removal of vegetation within the riparian zone. Violations of major seriousness also include failure to adhere to timing restrictions with respect to conducting activities in waters containing fishery resources, failure to timely record a conservation restriction or other required instrument and the property has been sold or transferred, and failure to provide information on request for purposes of determining compliance.

Violations of moderate seriousness are violations that have caused or have the potential to cause substantial harm to human health, safety, property, the environment, or the flood hazard area 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. Violations of moderate seriousness include the failure to record a conservation restriction or other required instrument and the property has not been sold or transferred and the failure to properly remediate and restore impacts caused under a terminated permit or approval.

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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 rule establishes a rebuttable presumption that a violation of a Department permit or applicability determination, and/or a Tidelands instrument is a knowing violation. 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. 7:13-24.7, 24.8, and 24.9)**

In addition to the imposition of a civil administrative penalty, a person who violates the FHACA or any rule, permit, or order issued pursuant to the FHACA, or who fails to pay a civil administrative penalty, or who knowingly makes a false or misleading statement in an application or other document submitted to the Department is subject to a civil penalty of up to \$25,000 per violation where the Department has brought an action in the Superior Court and the Court orders the penalty be imposed.

The Department may institute an action in the Superior Court for injunctive and other relief for any violation of the FHACA, or any rule, permit, order, or settlement agreement by the Department pursuant to the FHACA.

For certain violations of the FHACA, the Department may petition the Attorney General to bring a criminal action against a violator. 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.

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**Recording a notice concerning violation with the deed for the property (N.J.A.C. 7:13-24.10)**

The Commissioner of the Department may order that the clerk or registrar of deeds and mortgages of the county where the property on which a violation occurred record a notice concerning the FHACA violation with the deed for the property. The notice will remain attached to the property deed until the violation has been remedied and the Commissioner orders the clerk to remove the notice, which the Commissioner is to do as soon as the violation is remedied or when other conditions the Commissioner establishes are met.

**Grace period applicability and procedures (N.J.A.C. 7:13-24.11)**

The grace period applicability and procedures in the existing rules are recodified from N.J.A.C. 7:13-19.2, with amendments that update cross-references and add clarity but do not affect meaning. In addition, in the table in which violations are designated as minor (which qualify for a “grace period” in which the violator may correct the violation and so would not result in imposition of a penalty) or non-minor (which do not qualify for a grace period), proposed amendments bring the descriptions of the violations into conformance with the rules as they are proposed to be amended as explained elsewhere in this summary, and add several new violations. The violations newly added in the table are described below.

Failure to conduct Department-required mitigation and failure to comply with conditions of a mitigation plan are non-minor violations, since successfully undertaking mitigation is essential to maintaining riparian zone functionality. Failure to place land intended for mitigation

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within a conservation restriction is also proposed as a non-minor violation, since mitigation on land that without a conservation restriction will not be adequately protected from future development, which could impair riparian zone functionality. Failure to submit proof that a conservation restriction has been recorded is a minor violation, since the lack of proper documentation can be easily remedied and does not result in an environmental impairment.

Failure to comply with the terms of an emergency authorization, not including the requirement to apply for a permit after the authorized activities are undertaken, such as the timeframe under which activities are conducted, is a minor violation, but undertaking emergency activities not authorized by the Department or undertaking emergency activities that do not meet the design and construction standards of the FHACA Rules are non-minor violations, since improperly constructed structures, excess removal of riparian zone vegetation, and unauthorized flood storage volume displacement and obstructions to flood flow can significantly exacerbate flooding, threaten public health, safety, and welfare, and adversely impact the environment.

Submittal of false information by the applicant, its consultants, and/or agents and failure to provide the Department with complete and accurate information of which an applicant or its agents are aware, or reasonably should have been aware, are non-minor violations. Intentionally misleading the Department can result the issuance of authorizations and permits that do not meet the requirements of the FHACA Rules, which are designed to ameliorate the effects of flooding and protect public health, safety, welfare and the environment. Failure to provide timely public notice of an application is a minor violation, as this can be remedied without affecting flooding or the environment. Failure to submit to the Department an application for modification of a general permit authorization or individual permit, should a permittee propose a change in the

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development, failure to comply with the terms of a suspension or termination notice, and failure to properly remediate and restore impacts caused under a terminated permit or approval are non-minor violations, since these actions can lead to significant exacerbation to flooding and detrimental environmental impacts.

### **Social Impact**

The proposed amendments, repeals, and new rules will have a positive social impact in several ways. It is well documented that flooding causes major social disruption due to the need to relocate flood victims and provide emergency services to affected residents, which necessarily diverts emergency personnel from other essential tasks, as well as the long-term social, economic, and emotional impact on residents as a result of damaged or destroyed homes, schools, businesses, and infrastructure upon which residents rely. The proposed amendments, repeals, and new rules will allow the Department to more effectively and efficiently administer the flood hazard area program, which therefore affords better flood protection for the residents of the State. The proposed amendments, repeals, and new rules additionally reorganize the chapter for clarity and substantially improve the flood hazard area permitting process by relocating sections, consolidating similar provisions, simplifying language, and aligning procedural requirements with other Department land use rules. The proposed amendments, repeals, and new rules also incorporate additional detail and description regarding the substantive standards that must be met to undertake regulated activities. This will promote better consistency within the chapter and with the Department's other land use rules, as well as facilitate understanding and compliance by prospective applicants.

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The proposed amendments, repeals, and new rules furthermore introduce additional permits-by-rule and general permits-by-certification to facilitate a variety of residential, commercial, and public projects that result in *de minimis* impacts to flooding and the environment. Additionally, the existing permits-by-rule are amended for clarity, reorganized for ease of use, and aligned with other Department land use regulations. The proposed amendments, repeals, and new rules add new general permits for minor construction projects and reorganizes and simplify existing general permits that are not proposed for conversion to permits-by-rule or general permits-by-certification. The added flexibility created by these proposed amendments, repeals, and new rules will help encourage projects that benefit the environment and reduce the impacts of flooding, such as riparian zone enhancement and habitat restoration activities, sediment and debris removal projects, and the repair and replacement of critical infrastructure after a flood event. These new options will make it easier for the regulated community to comply with the proposed amendments, repeals, and new rules and will better protect the public from the risks and damages associated with flooding. This provides a positive social benefit, since it is the Department's expectation that the public will experience fewer impacts from periodic, localized flooding as a result of the changes.

Added flexibility for projects in riparian zones and a wider array of mitigation options provide additional opportunities for responsible development of impaired riparian zones and appropriate restoration and enhancement of riparian zone functionality. Repealing requirements applicable to areas containing acid producing soil deposits from the rules will eliminate duplication of effort and overlap with longstanding requirements of the New Jersey Department of Agriculture and local soil conservation districts. Repealing the SWM rules' special water

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resource protection area and amending the FHACA 300-foot riparian zone will provide a single uniform set of design and construction standards for work along Category One waters and their tributaries. Locating these standards in a single set of rules will eliminate existing regulatory conflicts, reduce confusion among the regulated community, and clarify the Department's goals for protecting these high quality waters.

### **Economic Impact**

The existing FHACA Rules establish standards for development in flood hazard areas and adjacent to surface waters in order to mitigate the adverse impacts to flooding and the environment that can be caused by such development. These standards help reduce the substantial economic cost that results from flooding. The proposed amendments, repeals, and new rules, which streamline procedural requirements, eliminate unnecessary restrictions on responsible development in proximity to the State's surface waters, facilitate the repair of infrastructure after a flood, and eliminate duplication of effort with other public entities, are anticipated to have a positive economic impact.

The proposed amendments, repeals, and new rules implement several process improvements that will reduce expense for both applicants and the Department. The activities regulated under the current rules are not proposed to be expanded. Certain activities are proposed to be permitted through the less complicated permit mechanisms of permits-by-rule, general permits, and general permits-by-certification. The new permits-by-rule will result in fewer permit applications made to the Department, as well as associated savings for prospective applicants, since permits-by-rule do not require the submittal of any application or fee to the

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Department. The general permits-by-certification and additional general permits will reduce the number of individual permit applications submitted to the Department. This will lower the cost of preparing and submitting permit applications, and reduce the time and cost of the Department's review, since general permits-by-certification require only an online certification to be submitted to the Department and general permits require simpler applications and lower fees as compared with individual permits. The procedures associated with the submission of an application to the Department will be streamlined to be consistent with those in other Department land use rules. Overall, the Department anticipates that simpler procedural and technical requirements will result in applications that will require less involvement by licensed professionals and consultants, and thus will cost less to prepare.

The Department also expects a positive economic benefit through the proposed improved construction standards that are designed to further reduce the potential for loss of life and property from flooding. The Department anticipates that facilitating beneficial projects and activities with *de minimis* impacts will reduce the frequency and depth of periodic, localized flooding, and therefore result in an economic benefit to the owners and users of buildings located within flood hazard areas.

Proposed amendments to the location of riparian zones along regulated waters, as well as added flexibility for construction within riparian zones, will reduce restrictions on responsible development in proximity to the State's surface waters. Repealing requirements applicable to areas with acid producing soil deposits will eliminate duplication of effort with other public entities and will reduce riparian zone widths from 150 feet to 50 feet along approximately 1,270 miles of regulated waters. Repealing the special water resource protection area from the

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Department's SWM rules and incorporating appropriate riparian zone protections in the FHACA Rules will provide a single uniform set of design and construction standards for work within 300 feet of Category One waters and tributaries, and eliminate redundant and conflicting regulatory standards. As a result, these amendments are expected to have a potential economic benefit for individuals and businesses.

The existing and proposed FHACA Rules require applicants to provide suitable mitigation in cases where a project justifiably exceeds the limits established for riparian zone disturbance. The proposed amendments, repeals, and new rules increase the available mitigation options by expanding the locations where restoration and enhancement may occur and also by providing additional means by which mitigation can be performed, specifically, riparian zone creation and preservation. It is anticipated that these proposed changes will decrease the overall cost of undertaking appropriate development in riparian zones.

The proposed amendments, repeals, and new rules will facilitate the repair of infrastructure after a flood, resulting in a positive economic impact for State and local government entities, which will be able to plan and execute repairs to roads, bridges, and utilities more quickly. Specifically, the Department is proposing general permits-by-certification for sediment and debris removal adjacent to a bridge, culvert, or outfall, for the in-kind replacement of certain culverts, and for in-kind replacement of public infrastructure after a flood, thus facilitating the restoration of critical infrastructure and restoring the flood-carrying capacity of regulated waters after severe storm events. The Department is also proposing to expand the scope of the existing general permits for bridge scour projects and for bridge and culvert replacements along streams draining less than 50 acres, and to establish new general permits for

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the relocation of manmade roadside ditches to facilitate public roadway improvements and for the reconstruction of a bridge or culvert across regulated water that has a drainage area of 50 acres or more. The savings resulting from the proposed amendments, repeals, and new rules related to bridge and roadway drainage projects will positively impact public entities by reducing permit application requirements, fees, and review time. Residents using roads, bridges, and utilities will furthermore realize a positive economic benefit, since the Department anticipates that such infrastructure will be more quickly and efficiently restored after a flood event, which will provide more immediate access to schools, businesses, and government services.

As indicated in the Summary above, the proposed amendments include provisions that implement the Environmental Enforcement Act, which has been effective since January 4, 2008. The amendments reflect the authority granted by that Act, including the change in the maximum penalty amount that has been effective since 2008. Accordingly, these amendments will not have any economic impact.

### **Environmental Impact**

The Department anticipates that the proposed amendments, repeals, and new rules will have an overall positive environmental impact. The new permits-by-rule and general permits-by-certification that encourage development having a *de minimis* adverse impact on the environment, such as activities located in lawns, gardens and other actively disturbed or significantly degraded riparian zones, combined with standards promoting increased protection of forested riparian zones under general permits and individual permits, will provide incentives for redevelopment and reduce adverse impacts to riparian zone functionality. The proposed new

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options for riparian zone mitigation will provide additional opportunities for individuals to restore and enhance degraded riparian zones and will promote the creation of new riparian zones through “daylighting” streams, wherein waterways that have been previously piped or otherwise enclosed by structures are restored to a natural condition. Provisions encouraging riparian zone preservation and the creation of riparian zone mitigation banks will provide additional incentives for individuals to protect forested riparian zones and contiguous areas and to prospectively enhance degraded riparian zones to offset proposed new development.

Repealing the special resource protection area provisions (SWRPA) from the SWM rules and amending the standards for the 300-foot riparian zone in the FHACA Rules will appropriately regulate development near Category One waters and their tributaries and more effectively protect and promote the many benefits of near-stream vegetation. Whereas the SWRPA applies only when a proposed project is deemed a major development, the requirements for development within the FHACA 300-foot riparian zone apply irrespective of the size of development. Furthermore, while the SWRPA applies only to features depicted on a USGS or soil survey map, a FHACA 300-foot riparian zone exists along a broader set of surface waters. Finally, while unrestricted redevelopment is permitted in impaired portions of the outer 150 feet of the SWRPA, the FHACA 300-foot riparian zone establishes appropriate limits on disturbance to riparian zone vegetation commensurate with the type of proposed development, and only where disturbance to vegetation is demonstrated to be avoided, minimized, justified, and not situated in close proximity to any top of bank without cause. The Department anticipates that the proposed standards for development within a 300-foot riparian zone will provide better

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protection of vegetation along surface waters, thereby strengthening the attendant benefits to water quality and flood protection.

The repeal of standards related to acid producing soil deposits and amendments related to the discharge of stormwater within riparian zones will promote water quality by reducing the potential for discharged stormwater to cause erosion, thereby reducing the total volume of suspended solids in surface waters. The proposed reduction of the riparian zone from 150 feet to 50 feet along waters that flow through areas containing acid producing soil deposits will reduce the total area of riparian zones in the State. However, the Standards for Soil Erosion and Sediment Control, N.J.A.C. 2:90, which are administered by New Jersey's soil conservation districts and their designees, contain requirements appropriate to mitigate potential adverse impacts of the exposure of acid producing soil deposits to oxygen. Therefore, the Department anticipates that the proposed reduction of the riparian zone width in these areas will not adversely impact the temperature, quality, stability, and habitat of surface waters.

Proposed new standards for bridges and culverts requiring the incorporation of wildlife passage features, where feasible, will encourage species to cross under roadways rather than over them. This will reduce habitat fragmentation and decrease wildlife mortality along the State's roadways. Proposed new standards that facilitate site remediation activities, landfill closure plans, and repair of malfunctioning subsurface sewage disposal systems will help protect groundwater quality and reduce the transport of pollutants into surface waters during flood events. Finally, the incorporation of standards to prevent adverse impacts to threatened and endangered species from activities conducted under a permit-by-rule will ensure that these activities will have a *de minimis* impact on these species and their habitat.

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### **Federal Standards Statement**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c.65) require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law.

The Department's authority for regulating development within flood hazard areas and riparian zones comes solely from State statute, specifically N.J.S.A. 58:16A-50 et seq., 58:10A-1 et seq., 58:11A-1 et seq., and 13:1D-1 et seq. The Flood Hazard Area Control rules are not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal laws, Federal standards, or Federal requirements. The Federal Emergency Management Agency (FEMA) delineates flood hazard areas in the State for the purposes of the National Flood Insurance Program (NFIP). However, there is no Federal agency or program that directly regulates activities in flood prone areas based on their potential flooding impacts. The Code of Federal Regulations, at 44 CFR Part 60, enables FEMA to require municipalities who participate in the NFIP to adopt certain flood hazard reduction standards for construction and development in 100-year flood plains. However, a community's participation in the NFIP is voluntary, and FEMA does not otherwise regulate land uses in flood hazard areas. Furthermore, the Federal flood reduction standards at 44 CFR Part 60 are administered by local governments. The proposed amendments, repeals, and new rules do not derive authority from any Federal law or under any State statute that incorporates or refers to Federal laws, standards or requirements.

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### **Jobs Impact**

The FHACA 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 help applicants demonstrate compliance with the rules.

The proposed repeal of riparian zone requirements applicable to areas containing acid producing soil deposits will reduce the total area of land within the State subject to the riparian zone rules. As a result, fewer development projects will be subject to the riparian zone requirements of the new rules as compared with the existing rules. Additionally, in cases where the riparian zone is wider than the flood hazard area, reduction of the riparian zone width will result in projects no longer being subject to the FHACA Rules.

Demonstrating compliance with the simplified standards established through the proposed amendments, repeals, and new rules will likely require a person seeking to construct within flood hazard areas and riparian zones to employ consultants to a lesser extent as compared with the existing rules. Thus the proposed amendments, repeals, and new rules may reduce job opportunities for consultants, engineers, surveyors, and other professionals for projects in flood hazard areas or riparian zones. However, since the proposed amendments, repeals, and new rules add flexibility for project design and remove unnecessary restrictions on development in flood hazard areas and riparian zones, the overall amount of development in these areas might

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increase, which could have a positive impact on jobs in construction. It is also anticipated that investors will be more attracted to invest in projects that are designed and built to reduce flood damage potential and the subsequent loss of life and property.

### **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 by reducing the number of FHACA permit applications required for agricultural activities in flood hazard areas and riparian zones, and reducing project delays, fees, and other administrative costs.

The benefits of reduced flood-damage potential afforded by the FHACA Rules are realized by all landowners in and near flood hazard areas, including farmers, since the inappropriate development of flood hazard areas exacerbates the frequency and extent of flooding. In order to facilitate agricultural activities that have a *de minimis* impact on flooding and the environment, added flexibility is proposed under four permits-by-rule that authorize ongoing agricultural activities and certain new agricultural activities in flood hazard areas and riparian zones.

The existing FHACA Rules contain seven general permits for agricultural activities conducted under USDA oversight, including sediment and debris removal and bank stabilization activities, the construction of a roadway, wetlands restoration, and various livestock management activities. USDA oversight ensures that activities undertaken pursuant to these general permit

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authorizations will not exacerbate flooding or adversely impact the environment. In order to reduce duplication of effort and facilitate these necessary and beneficial projects, three of these general permits are proposed as general permits-by-certification, and the remaining four are proposed as permits-by-rule. An additional permit-by-rule for manure management structures developed in consultation with USDA is also proposed.

### **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.

The proposed amendments, repeals, and new rules apply to any person or entity owning property containing a flood hazard area and/or riparian zone, 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 FHACA Rules regulate new development and other activities in flood hazard areas based on impacts to and from flooding and in riparian zones based on loss of riparian zone functionality. As such, these rules will have the same impact on a small business as on any person proposing such activities in a flood hazard area or riparian zone.

The existing rules require persons intending to build within flood hazard areas and riparian zones 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

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costs to small businesses in this regard are the same as to any person seeking to construct within flood hazard areas and riparian zones, including surveying costs, engineering and environmental consultant fees, and permit application fees.

The actual costs vary depending upon the size of the development and the particular site conditions. Furthermore, a copy of the permit and approved drawings must be maintained at the worksite and available for inspection, and the rules require reporting to the Department if unanticipated flooding or environmental damage occurs during or after construction, as well as any change in construction plans, transfer of ownership or any noncompliance with the rules. 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 undertaking activities in a flood hazard area or riparian zone. 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 that previously required an individual permit now qualify for a permit-by-rule, which requires no application to the Department, a general permit-by-certification, which requires a simplified, online application

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resulting in an instant permit, or a general permit, which requires fewer application materials and application fees than an individual permit.

Since the amendments, repeals, and new rules are the minimum necessary to protect public safety, health, and the environment, adopting differing standards applicable to small businesses would not sufficiently protect the residents of New Jersey from the deleterious impacts of flooding.

### **Housing Affordability 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 the affordability of housing. As indicated in the Economic Impact statement, the proposed amendments, repeals, and new rules will make the FHACA Rules easier to understand and use, having a positive economic impact by reducing the overall cost of compliance. However, the Department believes that it is unlikely that the economic impacts associated with proposed amendments, repeals, and new rules would evoke a change in the average costs associated with 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

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indicated in the Economic Impact Statement, the proposed amendments, repeals, and new rules will make the FHACA 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.

**Full text** of the rules proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 7:7E-3.26; and 7:13-1.3, 1.7, 5, 6, 7, 8, 9.1 through 9.7, 10.2, 10.7, 11.7, 11.8, 11.11, 11.13, 12, 13.1 through 13.3, 14, 15, 16, 18, and 19.1.

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

## CHAPTER 7E

### COASTAL ZONE MANAGEMENT

#### SUBCHAPTER 3. SPECIAL AREAS

##### **7:7E-3.26 Riparian zones**

**(a) A riparian zone is the land and vegetation within and adjacent to a regulated water. A riparian zone exists along both sides of every regulated water and includes the regulated water itself, except as provided in (b) below. The extent of a riparian zone is determined in accordance with (c), (d), and (e) below.**

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**(b) There is no riparian zone within or along the following:**

- 1. The Atlantic Ocean;**
- 2. The barrier island complex;**
- 3. Any lawfully existing manmade lagoon;**
- 4. Any lawfully existing stormwater management basin or wastewater treatment pond;**
- 5. Any segment of a regulated water enclosed within a lawfully existing pipe, culvert or bridge; and**
- 6. Any lawfully existing, manmade open channel that was created to convey stormwater, provided the channel is fully lined with manmade impervious material, such as a concrete low-flow channel within a stormwater basin or a ditch completely lined with concrete or asphalt.**

**(c) The portion of the riparian zone located outside of a regulated water is measured landward from the top of bank. For the purposes of this section, the top of bank means the upper limit of the bank of a regulated water, which is typically characterized by an observable change or break in the slope of the land.**

**(d) Where the top of bank as defined in (c) above is not discernible along the regulated water, the top of bank shall be considered:**

- 1. The centerline of the regulated water, for a linear regulated water that has a drainage area of less than 150 acres;**
- 2. The limits of the two-year flood, for a linear regulated water that has a drainage area of 150 acres or more, except as provided in (d)3 below;**

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- 3. The normal water surface limit, for:**
  - i. A linear fluvial regulated water that contains water at all times and has a drainage area of 10 square miles or more; or**
  - ii. A non-linear fluvial regulated water, such as a lake or pond;**
- 4. The mean high water line, for a non-linear tidal regulated water, such as a bay or inlet; and**
- 5. The feature's centerline, for an amorphous or irregularly-shaped feature, such as a wetland complex through which a regulated water flows but lacks a discernible or coherent channel.**

**(e) The width of the riparian zone is as follows:**

- 1. The width of the riparian zone along any regulated water designated as a Category One water, and all upstream regulated waters situated within the same HUC-14 watershed, is 300 feet;**
- 2. Except for the regulated waters listed at (e)1 above, the width of the riparian zone along the following regulated waters is 150 feet:**
  - i. Any trout production water and all upstream regulated waters;**
  - ii. Any trout maintenance water and all upstream regulated waters located within one mile of a trout maintenance water (measured along the length of the regulated water); and**
  - iii. Any segment of a regulated water flowing through an area that contains endangered or threatened wildlife or plant species habitat, which is critically dependent on the regulated water for survival, and all upstream regulated**

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waters located within one mile of such habitat (measured along the length of the regulated water). A list of critically dependent species is available from the Department at the website set forth at N.J.A.C. 7:7-1.6; and

3. For all other regulated waters not identified in (e)1 or 2 above, the width of the riparian zone is 50 feet.

(f) The extent of the riparian zone shall be determined in accordance with the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13-4.1(d) through (h), where:

1. A regulated water:
  - i. Naturally forms, begins, or ends within a site;
  - ii. Lies in proximity to a railroad or roadway; or
  - iii. Enters or exits a pipe, culvert, or bridge;
2. An impoundment has been constructed along a regulated water; or
3. Coastal wetlands are located along or adjacent to a regulated water.

(g) The riparian zones established under this chapter are separate from, and in addition to, any other similar zones or buffers established to protect surface waters. For example, the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, establish a 50-foot and 150-foot transition area along freshwater wetlands and other features that are also regulated under this chapter. Compliance with the riparian zone requirements of this chapter does not constitute compliance with the requirements of any other Federal, State, or local statute, regulation, or ordinance.

(h) Development in riparian zones shall conform with the requirements of the Flood Hazard Area Control Act Rules for a permit-by-rule at N.J.A.C. 7:13-6 and 7, a general

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**permit-by-certification at N.J.A.C. 7:13-6 and 8, a general permit at N.J.A.C. 7:13-6 and 9, or an individual permit at N.J.A.C. 7:13-10, 11, and 12, as applicable.**

**(i) If endangered and/or threatened wildlife or species habitat is present within a riparian zone the requirements of N.J.A.C. 7:7E-3.38, Endangered or threatened wildlife or plant species habitats, shall apply.**

**(j) For the purposes of this section, if a term is defined in this chapter and in the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, the definition in N.J.A.C. 7:13 shall govern. For any term used in this section that is not defined or otherwise described in this chapter but that is defined or described in the Flood Hazard Area Control Act Rules, the definition or description in N.J.A.C. 7:13 shall apply.**

**(k) Rationale: Healthy riparian systems are essential to the natural environment. Loss of soil and plant life that occurs adjacent to regulated waters not only threatens public and private property, but directly impacts water quality and the health of fish and wildlife. The extreme importance of preserving and restoring adequate stream corridor buffers has been well documented in recent decades. Riparian zone functions include stream bank stabilization, removal of sediment, nutrients and contaminants, flood storage, wildlife habitat, aesthetics, and recreation and education.**

## CHAPTER 8

### STORMWATER MANAGEMENT

#### SUBCHAPTER 3. REGIONAL STORMWATER MANAGEMENT PLANNING

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#### 7:8-3.3 Regional stormwater management plan and elements

- (a) (No change.)
- (b) The regional stormwater management plan may also include:
  - 1. (No change.)
  - 2. A stream corridor protection plan to address protection of areas adjacent to waterbodies. [For waterbodies subject to N.J.A.C. 7:8-5.5(h), the plan shall provide, at a minimum, protections equivalent to those provided at N.J.A.C. 7:8-5.5(h) and demonstrate that the functional value and overall condition of the special water resource protection area will be maintained or enhanced.]

### SUBCHAPTER 4. MUNICIPAL STORMWATER MANAGEMENT PLANNING

#### 7:8-4.2 Municipal stormwater management plan and elements

- (a) – (b) (No change.)
- (c) A municipal stormwater management plan shall, at a minimum:
  - 1. – 12. (No change.)
  - 13. The municipal stormwater management plan may also include a stream corridor protection plan to address protection of areas adjacent to waterbodies. [For waterbodies subject to N.J.A.C. 7:8-5.5(h), the plan shall provide, at a minimum, protections equivalent to those provided at N.J.A.C. 7:8-5.5(h) and be approved by the Department.]

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## SUBCHAPTER 5. DESIGN AND PERFORMANCE STANDARDS FOR STORMWATER MANAGEMENT MEASURES

### 7:8-5.5 Stormwater runoff quality standards

(a) – (g) (No change.)

[(h) Special water resource protection areas shall be established along all waters designated Category One at N.J.A.C. 7:9B and perennial or intermittent streams that drain into or upstream of the Category One waters as shown on the USGS Quadrangle Maps or in the County Soil Surveys, within the associated HUC 14 drainage. These areas shall be established for the protection of water quality, aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, and exceptional fisheries significance of those established Category One waters. These areas shall be designated and protected as follows:

1. The applicant shall preserve and maintain a special water resource protection area in accordance with one of the following:
  - i. A 300-foot special water resource protection area shall be provided on each side of the waterway, measured perpendicular to the waterway from the top of bank outwards, or from the centerline of the waterway where the bank is not defined, consisting of existing vegetation or vegetation allowed to follow natural succession is provided.
  - ii. Encroachment within the designated special water resource protection area under (h)1i above shall only be allowed where previous development or disturbance has occurred (for example, active agricultural use, parking area or maintained lawn

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area). The encroachment shall only be allowed where applicant demonstrates that the functional value and overall condition of the special water resource protection area will be maintained to the maximum extent practicable. In no case shall the remaining special water resource protection area be reduced to less than 150 feet as measured perpendicular to the top of bank of the waterway or centerline of the waterway where the bank is undefined. All encroachments proposed under this subparagraph shall be subject to review and approval by the Department.

2. All stormwater shall be discharged outside of but may flow through the special water resource protection area and shall comply with the Standard For Off-Site Stability in the “Standards for Soil Erosion and Sediment Control in New Jersey,” established under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 et seq. (see N.J.A.C. 2:90-1.3).
3. If stormwater discharged outside of and flowing through the special water resource protection area cannot comply with the Standard For Off-Site Stability in the “Standards for Soil Erosion and Sediment Control in New Jersey,” established under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 et seq., (see N.J.A.C. 2:90-1.3), then the stabilization measures in accordance with the requirements of the above standards may be placed within the special water resource protection area, provided that:
  - i. Stabilization measures shall not be placed within 150 feet of the waterway;
  - ii. Stormwater associated with discharges allowed by this paragraph shall achieve a 95 percent TSS post construction removal rate;

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- iii. Temperature shall be addressed to ensure no impact on receiving waterway;
  - iv. The encroachment shall only be allowed where the applicant demonstrates that the functional value and overall condition of the special water resource protection area will be maintained to the maximum extent practicable;
  - v. A conceptual project design meeting shall be held with the appropriate Department staff and Soil Conservation District staff to identify necessary stabilization measures; and
  - vi. All encroachments proposed under this section shall be subject to review and approval by the Department.
4. A stream corridor protection plan may be developed by a regional stormwater management planning committee as an element of a regional stormwater management plan, or by a municipality through an adopted municipal stormwater management plan. If a stream corridor protection plan for a waterway subject to this subsection has been approved by the Department, then the provisions of the plan shall be the applicable special water resource protection area requirements for that waterway. A stream corridor protection plan for a waterway subject to this subsection shall maintain or enhance the current functional value and overall condition of the special water resource protection area as defined above in (h)1i. In no case shall a stream corridor protection plan allow reduction of the Special Water Resource Protection Area to less than 150 feet as measured perpendicular to the waterway subject to this subsection.
5. This subsection does not apply to the construction of one individual single family dwelling that is not part of a larger development on a lot receiving preliminary or final

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subdivision approval on or before February 2, 2004, provided that the construction begins on or before February 2, 2009.]

**(h) Pursuant to the Flood Hazard Area Control Act Rules at N.J.A.C. 7:13-11.2(j)4, runoff from the water quality design storm that is discharged within a 300-foot riparian zone shall be treated in accordance with this section to reduce the post-construction load of total suspended solids by 95 percent of the anticipated load from the developed site, expressed as an annual average.**

## CHAPTER 13

### FLOOD HAZARD AREA CONTROL ACT RULES

#### SUBCHAPTER 1. GENERAL PROVISIONS

##### 7:13-1.1 Purpose and scope

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

(c) The purpose of this chapter is to minimize damage to life and property from flooding caused by development within [fluvial and tidal] flood hazard areas, to preserve the quality of surface waters, and to protect the wildlife and vegetation that exist within and depend upon such areas for sustenance and habitat.

- 1. Flooding presents a significant risk to the public health, safety, and welfare due to loss of life, injury, and property damage.** Unless properly controlled, development within flood hazard areas [increases the intensity and frequency of flooding by reducing flood storage, increasing stormwater runoff and obstructing the movement of

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floodwaters. Damage] **obstructs and displaces floodwaters, which exacerbates the frequency, intensity, duration, and extent of flooding. Loss of life, injury, and property damage** also [occurs] **result** from [fallen] **collapsed** structures, unsecured materials, and other debris carried by floodwaters. Furthermore, improperly built structures are subject to **severe and repetitive** flood damage, [and threaten the health, safety and welfare of those who use them. Increased flooding results in increased risk of loss of life and property damage] **resulting in the displacement of residents and prolonged economic disruption or loss.**

2. [Healthy vegetation] **Vegetation** adjacent to surface waters is essential for maintaining bank stability and water quality. The indiscriminate disturbance of such vegetation destabilizes the [banks of] channels and [other] **banks of** surface waters, which leads to increased erosion and sedimentation that exacerbates the intensity and frequency of flooding. The loss of vegetation adjacent to surface waters also reduces filtration of stormwater runoff and [thus degrades the quality of these waters] **subjects surface waters to increased sun exposure, which causes water temperatures to rise and dissolved oxygen content to fall.** Such impacts adversely affect the health and habitat of fish and wildlife that depend upon clean surface waters and therefore disrupt the ecological balance that is necessary for life. Humans are ultimately affected by this imbalance, since clean water is essential for all life.

(d) (No change.)

[(e) Activities regulated under this chapter may also be subject to other Federal, State and/or local rules, plans and ordinances. Authorization to undertake a regulated activity under this

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chapter does not indicate that the activity also meets the requirements of any other rule, plan or ordinance. It is the applicant's responsibility to obtain all necessary approvals for a proposed project.

(f) Information and forms relating to this chapter can be obtained from:

Street address (for meetings and hand delivery of material):

State of New Jersey

Department of Environmental Protection

Division of Land Use Regulation

501 East State Street

Station Plaza 5, 2nd Floor

Trenton, New Jersey 08609

Postal address:

State of New Jersey

Department of Environmental Protection

Division of Land Use Regulation

P.O. Box 439

Trenton, New Jersey 08625-0439

Telephone: (609) 292-0060

Fax: (609) 777-3656

Website: [www.nj.gov/dep/landuse/](http://www.nj.gov/dep/landuse/)

(g) USGS quad maps and Flood Hazard Area Technical Manuals can be obtained from the Department's Office of Maps and Publications at the address below. The Flood Hazard Area

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Technical Manual can also be downloaded from the website listed in (f) above.

State of New Jersey

Department of Environmental Protection

Office of Maps and Publications

428 East State Street

P.O. Box 438

Trenton, New Jersey 08625-0438

Telephone: (609) 777-1039

Fax: (609) 292-3285]

#### 7:13-1.2 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. 7:13-13, Mitigation, are set forth at N.J.A.C. 7:13-13.1.**

["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 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.]

**“Actively disturbed area” means any expanse of land within a riparian zone in which vegetation has been permanently or periodically cleared, cut, removed, or otherwise**

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**altered by humans to accommodate an ongoing, lawfully existing land use. Forested areas and areas of non-ornamental woody vegetation are not part of an actively disturbed area.**

**Examples of an actively disturbed area include:**

- 1. Any area occupied by lawfully existing impervious surface;**
- 2. Any actively farmed area; and**
- 3. Any portion of an easement, right-of-way, field, lawn, park, or garden, which is periodically maintained, such as through seasonal mowing or cultivation.**

...

**“Administratively complete” means that every item required on the application checklist for a verification, an authorization under a general permit, or an individual permit is included in the application.**

"Anadromous water" means a **regulated** water that supports anadromous fish, as identified by the Department's Division of Fish and Wildlife. Anadromous fish travel between salt water and fresh water or upstream to spawn, and N.J.A.C. 7:13-[10.5(b)]**11.5(b)** indicates how to determine which waters support anadromous fishery resources.

"Applicability determination" [is the Department's official statement of the whether an activity requires permit under this chapter, as described at N.J.A.C. 7:13-5.1] **means the Department's official written statement of the applicability of this chapter to a water, proposed activity, and/or project described at N.J.A.C. 7:13-2.5.**

...

**“Barrier island complex” means the landforms surrounded by both bay and ocean, including barrier islands, spits, and peninsulas, which are situated along New Jersey's**

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**Atlantic coastline, and which extend from the northern tip of Sandy Hook, in Monmouth County, to the southern tip of Cape May County. The barrier island complex includes the barrier island corridor, as defined in the Department's Coastal Zone Management rules at N.J.A.C. 7:7E-3.20, as well as any associated wetland complex adjacent to the corridor. A barrier island is a long, narrow island that generally lies parallel to the mainland and serves to protect the coast from erosion. A spit is a long, narrow depositional landform projecting outward from the shoreline associated with a barrier island corridor. A peninsula is a narrow expanse of land surrounded by both bay and ocean waters, which is connected to the mainland. The barrier island complex does not include the entire Cape May peninsula, but the Cape May peninsula does include barrier islands, spits and peninsulas along its Atlantic coastline. The barrier island complex does not include bay islands, which are islands or filled areas surrounded by tidal waters, wetlands, beaches, or dunes, lying between the mainland and barrier islands, but which may be connected to the mainland or barrier islands by elevated or fill-supported roads.**

...

"Building" means a structure [with walls and a roof, which is designed, constructed and/or intended for storage, shelter or occupation] **enclosed with exterior walls or fire walls, erected and framed of component structural parts, designed for the housing, shelter, enclosure, and support of individuals, animals, or property of any kind. A building may have a temporary or a permanent foundation.** A building that is intended for regular human occupation **and/or residence** is considered a habitable building.

...

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"Channel" means a linear topographic depression that continuously or intermittently confines and/or conducts surface water, not including transient erosional gullies and other ephemeral features that temporarily form after heavy rainfall. A channel can be naturally occurring or can be of human origin through excavation or construction, **in which case it is referred to as "manmade."** A channel includes both bed and banks.

"Channel modification" means the reconfiguration or reconstruction of all or part of a channel, such as by straightening, relocating, lining, or excavating the channel, or by enclosing the channel within a structure such as a pipe or culvert. The removal of accumulated sediment and debris in accordance with [N.J.A.C. 7:13-8.3, 8.4(c)2 or 11.15] **a stream cleaning approval under this chapter** is not a channel modification.

**"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 {date of this amendment}, 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.)**

**"Coastal permit" means a permit or an authorization issued under the Coastal Permit Program Rules, N.J.A.C. 7:7, and the Coastal Zone Management Rules, N.J.A.C. 7:7E, pursuant to the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., or the Waterfront Development Law, N.J.S.A. 12:5-3.**

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**“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 verification, an authorization under a general permit, or an individual 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” 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 state, scenic or open or wooded condition, or for conservation of soil or wildlife, or for outdoor recreation or park use, or for public access to tidal waterways and their shores, or as suitable habitat for fish or wildlife, to forbid or limit any or all of the following:**

- 1. Construction or placing of buildings, roads, signs, billboards, or other advertising, or other structures on or above the ground;**
- 2. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste, or unsightly or offensive materials;**
- 3. Removal or destruction of trees, shrubs, or other vegetation;**
- 4. Excavation, dredging or removal of loam, peat, gravel, soil, rock, or other mineral substance;**
- 5. Surface use except for the purposes permitting the land or water area to remain predominantly in its natural condition;**
- 6. Activities detrimental to drainage, flood control, water conservation, erosion**

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**control, or soil conservation, or fish and wildlife habitat preservation; and/or**

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

**"Critical building" means a building that:**

- 1. Is essential to maintaining continuity of vital government operations and/or supporting emergency response, sheltering, and medical care functions before, during, and after a flood, such as a hospital, medical clinic, police station, fire station, emergency response center, or public shelter; or**
- 2. Serves large numbers of people who may be unable to leave the facility through their own efforts, thereby hindering or preventing safe evacuation of the building during a flood event, such as a school, college, dormitory, jail or detention facility, day care center, assisted living facility, or nursing home.**

...

["Drawing" means 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.]

**"Duplex" means a residential structure of two attached units in which the interior living space of one unit directly abuts the interior living space of the other unit, either in a side-by-side arrangement sharing a common wall or in a lower unit-upper unit arrangement.**

"Emergency [permit] **authorization**" means an authorization to undertake a regulated

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activity, which is issued by the Department when certain conditions exist that warrant immediate action to protect the environment and/or public health, safety, and welfare, as described at N.J.A.C. 7:13-[12]16.

...

**“Engineering certification” means a document, signed and sealed by a New Jersey licensed professional engineer, which confirms that one or more requirements of this chapter are met, and which is accompanied by all supporting documentation, calculations, and other information upon which the certification is based. Upon clear and compelling evidence of a threat to public health, safety, welfare, and the environment, a New Jersey licensed professional engineer employed by the Department can reject an engineering certification submitted under this chapter.**

...

["FEMA flood insurance study" means a document providing various information regarding the potential for a water to flood, published by FEMA for certain waters in certain municipalities. A FEMA flood insurance study can include flood profiles, floodway maps, flow rates and other information related to flooding along the water covered by the FEMA study. FEMA maps can be viewed at <https://msc.fema.gov>. Requests for copies of the available FEMA flood insurance studies, as well as any questions regarding their use, derivation or modification, should be directed to FEMA at (800) 358-9616.

"FEMA flood profile" means a graphic depiction of the 100-year water surface elevation of a given water, published by FEMA as part of a FEMA flood insurance study. FEMA flood profiles are not included in all FEMA flood insurance studies.

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"FEMA floodway map" means a map showing the limits of the floodway for a given water, published by FEMA as part of a FEMA flood insurance study. FEMA floodway maps are not included in all FEMA flood insurance studies.]

“FEMA 100-year flood elevation” means the 100-year water surface elevation at a given location, most recently released as an effective FEMA base flood elevation, or any more recent advisory or proposed (**preliminary**) flood elevation, if either elevation is higher than the effective base flood elevation. [These elevations are available from FEMA at the address provided in the definition elsewhere in this section of "FEMA flood insurance study."]

**“FEMA flood mapping” means information published or publicly released by FEMA regarding the frequency, location, and/or extent of flooding in a community, such as flood elevations, flood profiles, flow rates, and floodway limits, and including FEMA 100-year flood elevation as defined above. For the purposes of this chapter, such information shall include only that information adopted as part of the most recent effective FEMA Flood Insurance Study, dated on or after January 31, 1980, or any more recent advisory or proposed (preliminary) flood mapping, if the more recent advisory or proposed (preliminary) mapping results in higher flood elevations, wider floodway limits, or greater flow rates than depicted in the most recent effective FEMA Flood Insurance Study. Effective FEMA flood mapping can be viewed at <https://msc.fema.gov> and advisory or proposed (preliminary) flood mapping for coastal areas can be viewed at <http://www.region2coastal.com/bestdata>. Questions regarding the availability, use, derivation, or modification of FEMA flood mapping should be directed to FEMA at (800) 358-9616.**

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...

["Flood Hazard Area Technical Manual" means the version of the Department publication entitled "Flood Hazard Area Technical Manual" in effect at the time an application is submitted. The manual can be obtained from the Department at the address listed at N.J.A.C. 7:13-1.1(g). The manual includes a copy of this chapter, various application checklists and other information helpful for understanding the requirements of this chapter and the application review process.]

...

"General permit" means a flood hazard area permit to undertake a regulated activity for which the terms and conditions are established in [a] rules promulgated under this chapter at N.J.A.C. 7:13-[8]6 and 9, and for which a person must submit an application for authorization.

**“General permit-by-certification” means a flood hazard area 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. 7:13-6 and 8, and which may be conducted upon Department approval through the electronic permitting process set forth at N.J.A.C. 7:13-18.3.**

...

"Habitable building" means a building that is intended for regular human occupation **and/or residence**. Examples of a habitable building include a [private residence] **single-family home, duplex, multi-residence building**, or [public] **critical** building [as defined below]; a commercial building such as a retail store, restaurant, office building, or gymnasium; an [appurtenant] **accessory** structure that is regularly occupied, such as a garage, barn, or workshop; **mobile and manufactured homes, and trailers intended for human residence, which are set**

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**on a foundation and/or connected to utilities, such as in a mobile home park (not including campers and recreational vehicles);** and any other building that is regularly occupied, such as a house of worship, community center, or meeting hall, **or animal shelter that includes regular human access and occupation.** Examples of a non-habitable building include a bus stop shelter, utility building, storage shed, self-storage unit, **construction trailer**, or an individual shelter for animals such as a doghouse **or outdoor kennel.**

...

["Hazardous waste facility" means a facility that is licensed by the State to receive, store and/or process hazardous substances, and which is operating in accordance with all applicable Federal, State and local laws.]

...

"Impervious surface" means a surface that is covered with a layer of material so that it is highly resistant to infiltration by water. [Examples of an impervious surface include asphalt, brick, buildings, concrete, metal and most structures. In some instances, the Department will also consider densely packed gravel or stone roadways and parking areas to be impervious for the purposes of this chapter.]

"Individual permit" means a flood hazard area permit to undertake a regulated activity issued by the Department after submittal of an application, and after the Department conducts a project-specific review under the applicable requirements at N.J.A.C. 7:13-[9, 10 and 11]**10, 11, and 12.**

**“In-kind” or “in-kind replacement” means the reconstruction or replacement of all or a portion of a lawfully existing structure without altering the location, orientation, physical**

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**dimensions, and hydraulic capacity of the structure. For example, the in-kind replacement of a bridge or culvert is one in which the reconstructed or replaced structure is the same shape, cross-sectional area, width, height, and length as the existing structure, is constructed of materials hydraulically equivalent to the existing structure, and is situated in the same location, and at the same orientation and invert elevation, as the existing structure.**

**“Invasive plant species” means a plant species that is non-native (or alien) to the ecosystem under consideration and whose introduction causes or is likely to cause economic or environmental harm or harm to human health.**

...

"Lowest floor" means the [lowest floor of a building, including a basement or any other enclosed area, which is or may be used for permanent or temporary occupation by humans. An unfinished enclosure, such as a crawl space, entryway and/or garage serving a private residence, which is useable solely for building access, storage and/or parking, is not considered the lowest floor of a building, provided that such enclosure is constructed in compliance with all applicable design standards of N.J.A.C. 7:13-11.5(n), (o) and (p)] **floor of the lowest enclosed area of a building, including basement, but excluding any unfinished or flood-resistant enclosure, usable solely for vehicle parking, building access, or limited storage, which is constructed in compliance with this chapter.**

...

"Method 2" or the "FEMA tidal method" means the method of determining the tidal flood hazard area design flood elevation and floodway limit from FEMA [Flood Insurance Studies]

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**flood mapping**, as described at N.J.A.C. 7:13-3.4(d).

"Method 3" or the "FEMA fluvial method" means the method of determining the fluvial flood hazard area design flood elevation and floodway limit from FEMA [Flood Insurance Studies] **flood mapping**, as described at N.J.A.C. 7:13-3.4(e).

"Method 4" or the "FEMA hydraulic method" means the method of determining the flood hazard area design flood elevation and floodway limit by calculation using flow rate data from FEMA [Flood Insurance Studies] **flood mapping**, as described at N.J.A.C. 7:13-3.4(f).

...

**“Mitigation bank” means an operation in which riparian zone vegetation is created, restored, enhanced, or preserved by a mitigation bank operator, for the purpose of providing compensatory mitigation for disturbances to riparian zone vegetation.**

**"Modification" means a document issued by the Department to revise a valid, previously issued verification, authorization under a general permit, or individual permit as described at N.J.A.C. 7:13-22.5 and 6.**

...

**“Multi-residence building” means any building intended to provide three or more units of temporary or permanent residence for humans. Examples of a multi-residence building include an apartment building, condominium complex, townhouse complex, hotel, motel, and any mixed-use building that contains three or more units of temporary or permanent residence. A [private residence] **single-family home, duplex**, or [a public] **critical** building as defined in this section is not a multi-residence building.**

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...

"Permit-by-rule" means a flood hazard area permit to undertake a regulated activity for which the terms and conditions are established in a rule promulgated under this chapter at N.J.A.C. 7:13-6 and 7 and that is effective without prior written approval from the Department, provided all requirements established for that activity in the applicable permit-by-rule are satisfied.

...

**“Pinelands water” means a water designated as such in the Department’s Surface Water Quality Standards at N.J.A.C. 7:9B.**

[“Private residence” means a one or two-family dwelling.]

...

**“Project” means all regulated activities occurring and proposed on a site, whether undertaken concurrently or in phases.**

...

["Public building" means a habitable building that serves as one or more of the following:

1. An assisted living facility or nursing home;
2. A day care center;
3. A dormitory;
4. A hospital or medical clinic;
5. A jail or detention facility;
6. A police station, fire station or emergency response center;
7. A public shelter;

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8. A school or college; and

9. Any other building designed for a public use that is similar to 1 through 8 above.]

"Public roadway" means a roadway for use by vehicles, including a driveway or access road, which is [constructed] **intended** for public use and is [maintained] **constructed by or on behalf** of the Federal, State, county, or municipal government. **A public roadway does not include a roadway constructed as part of a private development, regardless of whether the roadway is ultimately to be dedicated to and/or maintained by a governmental entity.**

...

"Regulated activity" or "**activity**" means an activity that is regulated under this chapter as described at N.J.A.C. 7:13-2.4. Some regulated activities, when performed in a certain manner or to a specified degree, are permitted-by-rule at N.J.A.C. 7:13-**6 and 7**. All regulated activities which are not permitted-by-rule require a general permit-**by-certification** under N.J.A.C. 7:13-**6 and 8**, a **general permit under N.J.A.C. 7:13-6 and 9**, an individual permit under N.J.A.C. 7:13-[9, 10 and 11]**10, 11, and 12**, an emergency [permit] **authorization** under N.J.A.C. 7:13-[12]**16**, or a coastal permit under N.J.A.C. 7:7 and [N.J.A.C.] 7:7E, prior to commencement.

...

"Revision" means a document issued by the Department to revise a [valid, previously issued verification, general permit authorization, individual permit or] Department delineation as described at N.J.A.C. 7:13-[13]**3.7 and 3.8**.

...

**"Site plan"** means a **graphic depiction of land, vegetation, water, structures, and other physical features on paper, such as a blueprint, construction plan, cross-section,**

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**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 division of the New Jersey Department of Agriculture (NJDA), authorized under N.J.S.A. 4:24-1 et seq. Each Soil Conservation District administers NJDA programs for one or more counties. 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 at N.J.A.C. 2:90.]

**"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.**

...

["Solid waste facility" means a facility that is licensed by the State to receive, store and/or process solid waste.]

**"Species of special concern" means a species that warrants special attention because of inherent vulnerability to environmental deterioration or habitat modification that would**

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**result in its becoming threatened if conditions surrounding the species begin or continue to deteriorate. Factors that can lead to classification as special concern include, but are not limited to, species rarity in the State, highly specialized food and/or habitat requirements, low reproductive rate, isolated populations of the species within the State, and/or other characteristics that make the species particularly susceptible to environmental or habitat changes. This category includes a species that meets the foregoing criteria and for which there is little understanding of its current population status in the State.**

...

"Structure" means any assemblage of material by humans, including, but not limited to, a berm, bridge, bulkhead, building, cable, causeway, culvert, dam, dike, embankment, fence, **guiderail**, jetty, levee, pavement, piling, pipe, post, railroad, retaining wall, roadway, stormwater management basin **or facility**, tower, utility pole, or wire. Vegetation is not a structure. Soil bioengineering material that includes vegetation as well as other material is a structure.

...

["Suitably anchored" means secured to resist flotation, collapse and displacement due to floodwaters. A structure shall be considered to be suitably anchored if the structure is erected in accordance with the requirements for flood-resistant construction in the International Building Code, incorporated herein by reference. Copies of the International Building Code can be obtained at the following address:

International Code Council, Inc.

4051 West Flossmoor Road

Country Club Hills, Illinois 60477

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Telephone: (888) 422-7233]

**“Technically complete” means that each item included in an application for a verification, an authorization under a general permit, or an individual permit provides sufficient information for the Department to declare the application complete for review.**

"Temporary" means a regulated activity that occupies, persists, and/or occurs on a site for no more than six months. For example, a fill or structure is temporary if, within six months of its placement, the fill or structure is removed from the site, all disturbed regulated 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.

**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 nature of the activity, the Department will consider the disturbance to be temporary for purposes of this chapter 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.**

...

**“Top of bank” means the upper limit of the bank of a regulated water, which is typically characterized by an observable change or break in the slope of the land. Where the top of bank is not discernible along the regulated water, the top of bank shall be considered:**

- 1. The feature’s centerline, for a linear regulated water that has a drainage area of**

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**less than 150 acres;**

- 2. The limits of the two-year flood, for a linear regulated water that has a drainage area of 150 acres or more;**
- 3. The normal water surface limit, for:**
  - i. A linear fluvial regulated water that contains water at all times and has a drainage area of 10 square miles or more; or**
  - ii. A non-linear fluvial regulated water, such as a lake or pond;**
- 4. The mean high water line, for a non-linear tidal regulated water, such as a bay or inlet; and**
- 5. The feature's centerline, for an amorphous or irregularly-shaped feature, such as a wetland complex through which a regulated water flows but lacks a discernible or coherent channel.**

[“Tree” means a woody plant which is five inches or greater in diameter at a height of 4.5 feet above the ground.]

...

"Unsecured material" means the following:

- 1. A structure that is not [suitably anchored] secured to resist flotation, collapse, and displacement due to hydrostatic and hydrodynamic forces from floodwaters; and**
- 2. Material placed on the surface of the ground, which would likely become buoyant, mobile, or lifted by water during a flood, or otherwise be transported offsite by floodwaters. Examples include building material, construction equipment,**

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landscaping material, patio furniture, piles of soil, stone, or wood, trash, vegetation in planters or root balls, and vehicles.

...

"USGS quad map" means a topographic quadrangle map issued by the United States [Geologic] **Geological** Survey (USGS), 7.5 minute series, drawn at a scale of 1:24,000[, available from the Department at the address listed in N.J.A.C. 7:13-1.1(g)].

...

"Verification" means a document issued by the Department under N.J.A.C. 7:13-[6]**5.1**, which establishes the flood hazard area design flood elevation, flood hazard area limit, floodway limit, and/or riparian zone limit on a site **or any portion of a site**.

"Water" means a collection of water on the surface of the ground, including, but not limited to, a bay, brook, creek, ditch, lake, pond, reservoir, river, or stream. A water also includes the path or depression through which the water flows or is confined. A water **can be either naturally-occurring or resulting from human activity, in which case it is referred to as "manmade."** A **naturally-occurring water** that is piped, relocated, or otherwise modified remains a **naturally-occurring water for the purposes of this chapter**. [A storm sewer] **An underground pipe or culvert that conveys stormwater runoff** is not a water unless [it] **the pipe or culvert** was constructed to **enclose**, replace, or divert a previously existing, **naturally-occurring water**. (Note: Not all waters are regulated.)

...

**7:13-1.3 Forms, checklists, information, technical manual; Department address and**

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**website**

**(a) Forms, checklists, and other information related to this chapter can be obtained from the Division of Land Use Regulation at the address in (c) below, by telephone at (609) 984-0162, or through the Division’s website at [www.nj.gov/dep/landuse](http://www.nj.gov/dep/landuse). Further information about the Department can be accessed at [www.nj.gov/dep](http://www.nj.gov/dep).**

**(b) The Division has prepared a Flood Hazard Area Technical Manual, which provides guidance concerning the basic engineering and environmental concepts that are the foundation of this chapter, as well as guidance and examples for performing calculations and analyses under this chapter. The manual is available from the Division’s website listed at (a) above.**

**(c) Applications, fees, and other correspondence shall be submitted to the following addresses:**

**1. For regular mail:**

**New Jersey Department of Environmental Protection  
Division of Land Use Regulation  
Mail Code 501-02A, P.O. Box 420  
Trenton, NJ 08625;**

**2. For hand delivery, courier service, and overnight delivery:**

**New Jersey Department of Environmental Protection  
Division of Land Use Regulation  
501 East State Street  
5 Station Plaza, Second Floor**

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**Trenton, NJ 08609; and**

- 3. For submittal of an application for authorization under a general permit-by-certification, refer to the Department's website at [www.nj.gov/dep/online](http://www.nj.gov/dep/online).**

**(d) 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](mailto:LURTechSupport@dep.nj.gov), or by using an online contact form at [www.nj.gov/dep/landuse/contact.html](http://www.nj.gov/dep/landuse/contact.html).**

**(e) Applications or other materials sent or delivered to the Department at an address other than those listed in (c) above shall not be deemed to have been received for the purposes of calculating application review deadlines or other time periods under this chapter.**

7:13-1.4 Delegation of authority

(a) – (c) (No change.)

(d) A county governing body that has assumed delegation shall not charge fees greater than those provided at N.J.A.C. 7:13-[17]20.

(e) The Department shall not delegate authority to approve any of the following:

1.-2. (No change.)

3. An application under this chapter for an individual permit that involves a hardship exception pursuant to N.J.A.C. 7:13-[9.8]15.

7:13-1.6 Liberal construction

This chapter shall be liberally construed to [enable the Department to fulfill its statutory

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obligations. The Commissioner can amend, repeal or rescind this chapter or any part thereof in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.] **effectuate the purpose of the Acts under which it was adopted.**

### **7:13-1.7 Severability**

**If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any person, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, provision, clause, portion, or application directly involved in the controversy in which the judgment was rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.**

## **SUBCHAPTER 2. [EXTENT OF REGULATORY AUTHORITY] APPLICABILITY AND ACTIVITIES FOR WHICH A PERMIT OR AUTHORIZATION IS REQUIRED**

### **7:13-2.1 [Permit requirement] When a permit or authorization is required**

(a) No person shall engage in a regulated activity in a regulated area without a flood hazard area **authorization or permit** as required by this chapter, or a coastal permit as required by N.J.A.C.

7:7 and 7:7E, as set forth in (b) and (c) below. Initiation of a regulated activity in a regulated area without a flood hazard area **authorization or permit** or a coastal permit as set forth at (b) below (except as provided in (c) below) shall be considered a violation of this chapter and shall subject the party or parties responsible for the regulated activity to enforcement action, as set forth at

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N.J.A.C. 7:13-[19]24. Regulated areas are set forth at N.J.A.C. 7:13-2.3 and regulated activities are set forth at N.J.A.C. 7:13-2.4.

(b) Except as provided in (c) or (e) below, a person undertaking any regulated activity in a regulated area shall do so only in accordance with one of the following:

1. A permit-by-rule, pursuant to N.J.A.C. 7:13-6 and 7;
2. **An authorization under a general permit-by-certification, pursuant to N.J.A.C. 7:13-6 and 8;**

[2.] 3. An authorization under a general permit, pursuant to N.J.A.C. 7:13-[8]6 and 9;

[3.] 4. An individual permit, pursuant to N.J.A.C. 7:13-[9, 10 and 11]10, 11, and 12;

[4.] 5. An emergency [permit] **authorization**, pursuant to N.J.A.C. 7:13-[12]16; or

[5.] 6. A [CAFRA or waterfront development] **coastal** permit, pursuant to N.J.A.C. 7:7 and 7:7E, provided:

- i. The [CAFRA or waterfront development] **application for the coastal** permit was declared by the Department as complete for final review on or after November 5, 2007; and
- ii. If activities are proposed in a fluvial flood hazard area, the applicant meets one of the four conditions at N.J.A.C. 7:13-[9.6(a)]5.5(a) regarding the need for a verification of the flood hazard area and/or floodway onsite.

(c) Undertaking a regulated activity in a regulated area does not require an approval listed at (b) above in the cases listed in (c)1 through 4 below. For the purpose of this subsection, each distinct construction activity in a project, such as each building, road, or utility crossing, is considered a distinct regulated activity.

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1. – 3. (No change.)

4. The regulated activity is part of a project that was subject to neither the requirements of this chapter, nor N.J.A.C. 7:7 and [N.J.A.C.] 7:7E, prior to November 5, 2007, and one of the following applies:

i. The regulated activity is authorized under [a valid municipal approval, issued prior to November 5, 2007, which enables commencement of construction of the regulated activity on a specific lot and/or easement; or] **one or more of the following approvals pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.), prior to November 5, 2007:**

**(1) Preliminary or final site plan approval;**

**(2) Final municipal building or construction permit;**

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

**(4) Final subdivision approval where no subsequent site plan approval is required; or**

**(5) Preliminary subdivision approval where no subsequent site plan approval is required; or**

ii. (No change.)

(d) If a regulated activity is approved under a qualifying approval listed at (c) above, and the regulated activity is subsequently revised [by the issuing entity], the original approval continues to satisfy the requirements of (c) above provided the Department determines that the revision will not result in one or more of the following:

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1. – 2. (No change.)

3. For regulated activities under a qualifying approval under (c)1 or 2 above, additional regulated activities within a regulated area that have not been previously reviewed by the Department under N.J.A.C. 7:7, 7:7E, and/or this chapter, as applicable; [and/or] **or**

4. (No change.)

(e) If railroad activities proposed in a flood hazard area or riparian zone are exempt from State regulation under Federal law, no permit shall be required under this chapter for that activity. However, the railroad shall provide the Department with the application material normally required for the proposed activity at least 90 calendar days prior to the railroad commencing the activity. For emergency activities, the information described at N.J.A.C. 7:13-[12.1(c)]**16.2(a)** shall be provided to the Department via telephone and/or fax[, as listed at N.J.A.C. 7:13-1.1(f),] as soon as possible after the emergency is discovered, and in no event later than the day the activity is authorized or commences, whichever occurs first. **Contact information for the Department is set forth at N.J.A.C. 7:13-1.3.**

#### 7:13-2.2 Regulated waters

(a) All waters in New Jersey are regulated under this chapter except [for the following] **those described at (a)1 through 4 below. Every regulated water possesses a flood hazard area and/or a riparian zone as set forth at N.J.A.C. 7:13-2.3:**

1. (No change.)

2. In accordance with N.J.S.A. 58:16A-60, any coastal wetlands regulated under the Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.); [and]

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3. Any segment of water that has a drainage area of less than 50 acres, provided one or more of the following applies:

**i. The water is not a “State open water” as defined in the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-1.4;**

[i.] **ii. The water has no discernible channel, such as a “swale” as defined in the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-1.4;**

[ii.] **iii. The water is confined within a lawfully existing, manmade [conveyance structure or] drainage feature, such as a [pipe, culvert,] ditch, channel, or basin (not including any water that historically possessed a naturally-occurring, discernible channel, which has been [piped, culverted,] ditched or similarly modified); [and/or]**

**iv. The water is confined within a lawfully existing conveyance structure, such as a pipe, culvert, or bridge; or**

[iii.] **v. The water is not connected to a regulated water by a channel or pipe, such as an isolated pond or depression that has no outlet[.]; and**

**4. Any water-filled depression created in dry land incidental to construction or remediation activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of “waters of the United States” in the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-1.4.**

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7:13-2.3 Regulated areas

(a) For each regulated water, as described at N.J.A.C. 7:13-2.2, the Department identifies and regulates the water and the area surrounding it in two different ways, resulting in the regulated areas described at [(a)1 and 2] **(b) and (c)** below[:].

[1.] **(b)** A flood hazard area exists along every regulated water that has a drainage area of 50 acres or [more] **greater**. If a regulated water has a drainage area of less than 50 acres, the water does not [have] **possess** a flood hazard area that is regulated under this chapter.

1. The flood hazard area is comprised of a flood fringe and a floodway, except for the Atlantic Ocean and other non-linear tidal waters such as bays and inlets, which do not have a floodway. Therefore, the entire flood hazard area along these tidal waters is considered to be a flood fringe for the purposes of this chapter.
2. The methods for determining the limits of the flood fringe and floodway are described at N.J.A.C. 7:13-3[; and].

[2. A riparian zone exists along every regulated water, except there is no riparian zone along Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula. The regulated water itself is also part of the riparian zone. The methods for determining the limits of the riparian zone are described at N.J.A.C. 7:13-4.1.]

**(c) A riparian zone exists along both sides of every regulated water and includes the regulated water itself, except as provided in (c)1 below.**

1. **There is no riparian zone within or along the following:**
  - i. **The Atlantic Ocean;**
  - ii. **New Jersey's barrier island complex;**

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- iii. Any lawfully existing manmade lagoon;
- iv. Any lawfully existing stormwater management basin or wastewater treatment pond;
- v. Any segment of a regulated water enclosed within a lawfully existing pipe, culvert, or bridge; and
- vi. Any lawfully existing, manmade open channel that was created to convey stormwater, provided the channel is fully lined with manmade impervious material, such as a concrete low-flow channel within a stormwater basin or a ditch completely lined with concrete or asphalt.

2. The extent of a riparian zone is determined in accordance with N.J.A.C. 7:13-4.

[(b)](d) The flood hazard area and riparian zone described at [(a)1 and 2] (b) and (c) above generally overlap. Figures [A and B] **2.3A and 2.3B** below (not drawn to scale) illustrate a typical **regulated water, flood hazard area,** and [each of these regulated areas] **riparian zone.** This chapter sets forth the specific requirements applicable to activities in each **of these** regulated areas.

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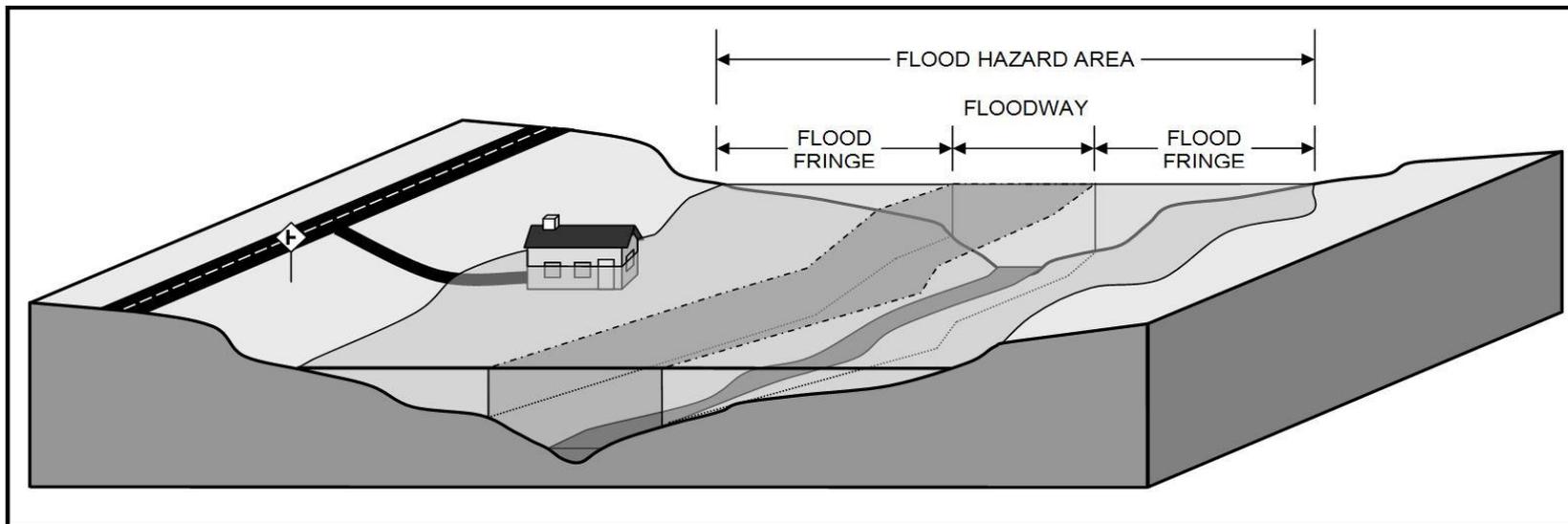


FIGURE 2.3A: THE FLOOD HAZARD AREA IS COMPRISED OF THE FLOODWAY AND FLOOD FRINGE

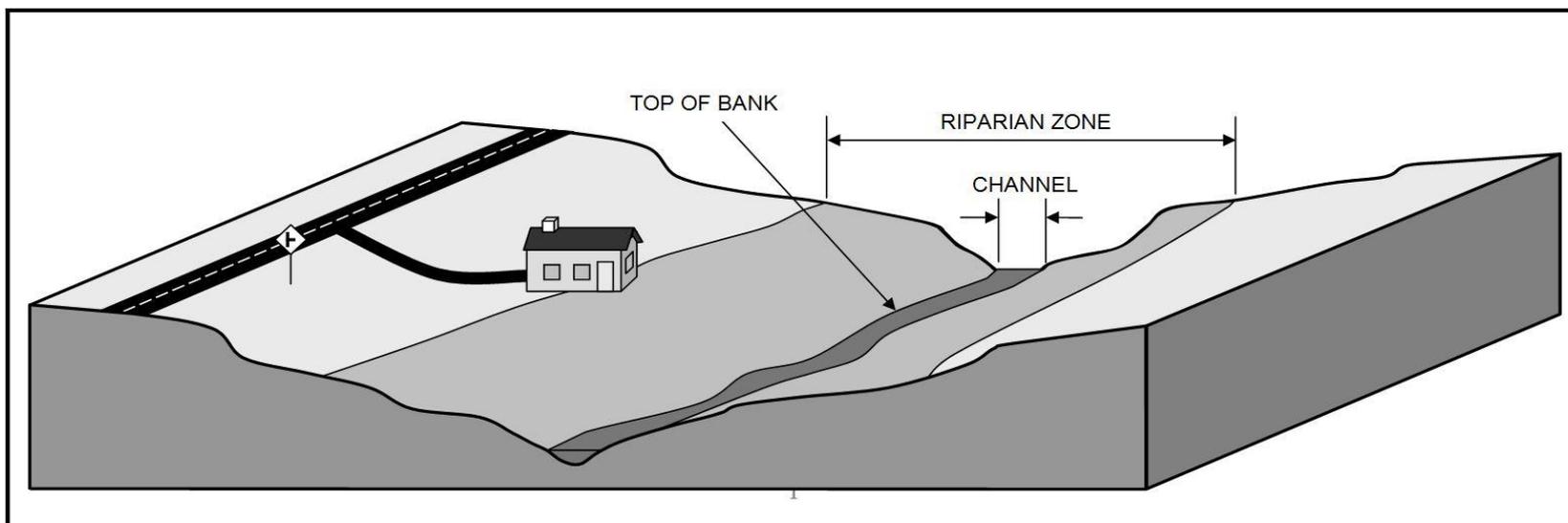


FIGURE 2.3B: THE RIPARIAN ZONE IS COMPRISED OF THE CHANNEL AND LAND WITHIN 50, 150, OR 300 FEET OF THE CHANNEL

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#### 7:13-2.4 Regulated activities

(a) Any action that includes or results in one or more of the following constitutes a regulated activity under this chapter if undertaken in a regulated area, as described at N.J.A.C. 7:13-2.3:

1. (No change.)
2. The clearing, cutting, and/or removal of vegetation in a riparian zone. **Areas containing vegetation for a portion of the year, such as agricultural areas that are periodically plowed and cultivated, are considered vegetated for the purposes of this chapter;**
3. – 4. (No change.)
5. The construction, reconstruction, [and/or] **repair, alteration**, enlargement, **elevation, or removal** of a structure; and
6. The conversion of a building into a [private residence] **single-family home or duplex, multi-residence building**, or [a public] **critical** building.

(b) **An activity not listed in (a) above does not require an approval under this chapter, even if the activity is undertaken within a flood hazard area or riparian zone. An activity regulated under this chapter may also be subject to other Federal, State, and/or local rules, plans, and ordinances. It is the applicant's responsibility to obtain all necessary approvals for a proposed project.**

#### 7:13-2.5 Applicability determination

(a) **A person may request an applicability determination from the Department to determine the applicability of this chapter to a segment of water or to one or more proposed activities, subject to the limitations in (b) below. An applicability determination**

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is optional, but the Department encourages persons to request one if there is uncertainty about whether a particular water or activity is regulated, since conducting unauthorized activities may result in enforcement action.

(b) The Department will not undertake a site inspection or review engineering calculations in the context of an applicability determination.

(c) A person requesting an applicability determination shall submit to the Department, at the address set forth at N.J.A.C. 7:13-1.3, the following:

1. A completed application form as described at N.J.A.C. 7:13-18.4(a)1 and available from the Department at the address set forth at N.J.A.C. 7:13-1.3;
2. A copy of a USGS quad map with the segment of water in question indicated and/or the site in question clearly outlined to scale; and
3. A copy of any available Department delineation and FEMA flood mapping, with the segment of water in question indicated and/or the site in question clearly outlined to scale.

(d) In addition to the information listed at (c) above, a request for an applicability determination to determine if a water is regulated shall include a copy of the best available topographic mapping for the drainage area of the water in question, with the limits of the drainage area depicted.

(e) In addition to the information listed at (c) above, a request for an applicability determination to determine if one or more proposed activities is regulated shall include the following:

1. A written description of the site and the proposed activities, including the location,

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**dimension, number, and uses of any proposed structures;**

- 2. Color photographs of the location of the proposed activities; and**
- 3. Site plans, signed and sealed by an engineer, land surveyor, or architect, detailing the proposed activities. If fill or grading is proposed, the site plans shall depict both existing and proposed topography unless the Department determines that topography is not necessary to determine applicability. All topography shall reference NGVD, or include the appropriate conversion factor to NGVD, unless the person requesting the applicability determination demonstrates that such reference is not necessary.**

**(f) After reviewing a request for an applicability determination, the Department shall:**

- 1. Notify the person requesting the applicability determination that the request did not include all applicable material required at (c), (d), and/or (e) above and request the missing material. Upon receipt of the requested material, the Department shall take one of the actions set forth at (f)2 below. The Department may cancel the request for an applicability determination if the missing material is not provided within 60 calendar days of the date of the Department's request; or**
- 2. Issue an applicability determination in writing, stating that, as of the date of issuance:**
  - i. The Department has determined that this chapter does not apply to the water in question and/or the proposed activities and no flood hazard area permit or authorization is required;**
  - ii. The Department has determined that this chapter applies to the water in**

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**question and/or proposed activities, and the recipient of the applicability determination is advised to submit an application for an authorization or permit unless the proposed activities meet the requirements of a permit-by-rule; or**

- iii. The Department is not able to determine whether this chapter applies to the water in question and/or the proposed activities without reviewing calculations or inspecting the site, and the recipient of the applicability determination is advised to submit an application for a verification.**

**(g) The applicability determination issued under (f)2 above shall be based on the rules in effect and the information provided in the application regarding the site conditions and the proposed activities as of the date of issuance. The recipient of the applicability determination is on notice that subsequent amendments to this chapter, changes in site conditions, changes to the limits of the flood hazard area, floodway, or riparian zone, and/or changes to proposed activities may result in the water in question or proposed activities becoming regulated. The recipient remains solely responsible for determining whether any such changes have occurred and remains liable for any violation of this chapter resulting from activities conducted in reliance on the applicability determination where such changes have occurred and the determination is no longer accurate.**

### SUBCHAPTER 3. DETERMINING THE FLOOD HAZARD AREA AND FLOODWAY

7:13-3.1 General provisions for determining the flood hazard area and floodway along a

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regulated water

(a) – (b) (No change.)

[(c) In most cases, the Department shall issue an individual permit under this chapter only if the applicant has determined the flood hazard area and floodway limits on the site, and has received a verification for these limits from the Department pursuant to N.J.A.C. 7:13-6.1. However, under certain conditions as set forth at N.J.A.C. 7:13-9.6, the flood hazard area and/or floodway limits need not be verified in order for the Department to be able to determine whether a regulated activity complies with this chapter. Furthermore, a verification is not required prior to obtaining a general permit authorization under this chapter, except for certain cases as noted under general permits 5, 6 and 7 at N.J.A.C. 7:13-8.7, 8.8 and 8.9, respectively.]

[(d)] (c) (No change in text.)

7:13-3.2 Selecting a method for determining the flood hazard area and floodway along a regulated water

(a) There are a number of factors that influence the selection of a method for determining the flood hazard area and floodway on a given site, as set forth in (b) through (e) below. These factors include the existence of a Department delineation or FEMA flood [insurance study] **mapping**, whether the applicant prefers to calculate the flood hazard area and/or floodway limits, and what type of project is proposed. Furthermore, each method has certain limitations on its usefulness and availability as described in this subchapter. Applicants are encouraged to carefully review the entire subchapter before selecting a method.

(b) (No change.)

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(c) Where a Department delineation for a regulated water has been promulgated prior to January 24, 2013, an applicant may:

1. Determine the flood hazard area and/or floodway in accordance with (c)1i or ii below, whichever results in a higher flood hazard area design flood elevation and wider floodway limit:
  - i. (No change.)
  - ii. FEMA **flood** mapping, in accordance with Method 2 in a tidal flood hazard area or Method 3 in a fluvial flood hazard area, as set forth at N.J.A.C. 7:13-3.4(d) and (e), respectively; or
2. Determine the flood hazard area and/or floodway by calculation, in accordance with **either of the following, as appropriate:**
  - i. Method[s] 4 [or 6], as set forth at N.J.A.C. 7:13-3.4(f) [and 3.6, respectively.], **provided the flow rate used to determine the flood hazard area design flood elevation and floodway limit is no less than the flow rate used to determine the flood hazard area design flood elevation and floodway limit under the Department delineation described in (c)1 above, in accordance with Method 1, as set forth at N.J.A.C. 7:13-3.3; or**
  - ii. **Method 6, as set forth at N.J.A.C. 7:13-3.6.**

(d) Where no Department delineation exists for a regulated water, an applicant may:

1. Determine the flood hazard area and/or floodway using FEMA **flood** mapping, provided such mapping exists for the section of regulated water in question, in accordance with Methods 2, 3, or 4, as set forth at N.J.A.C. 7:13-3.4(d), (e), and (f), respectively;

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2. Determine the approximate limit of the flood hazard area in accordance with Method 5, as set forth at N.J.A.C. 7:13-3.5, provided no FEMA **flood** mapping exists for the section of regulated water in question; or
3. (No change.)

(e) The flood hazard area and floodway shall be determined using only one method for each regulated water on a site, except in the following cases:

1. [If] **Where** a Department delineation or FEMA flood [insurance study] **mapping** terminates within a site, the flood hazard area on the remainder of the site may be delineated using another applicable method described in this subchapter; and
2. [If] **Where** Method 3 is used to delineate the flood hazard area but [no] FEMA **flood mapping does not provide a** floodway [map exists] **limit** for the section of regulated water in question, and determining the floodway **limit** is necessary to demonstrate compliance with the requirements of this chapter, the applicant shall use Method 4 to calculate the floodway **limit**.

#### 7:13-3.3 Flood hazard area and floodway based on a Department delineation (Method 1)

(a) – (b) (No change.)

(c) The flood hazard design elevation and floodway limits for a regulated water depicted on [a] FEMA [map] **flood mapping** that includes the Department's flood hazard area design flood elevation and that reflects FEMA's final determination of the 100-year flood elevation (base flood elevation) effective pursuant to 44 CFR 67.10 are incorporated into this chapter as the Department delineation of the regulated water.

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1. (No change)

(d) An applicant seeking to modify a Department delineation shall submit an application for a revision as provided at N.J.A.C. 7:13-[13.4]**3.7**.

(e) (No change.)

7:13-3.4 Flood hazard area and floodway based on [a] FEMA flood [insurance study] **mapping**  
(Methods 2 through 4)

(a) This section sets forth the procedure for determining a flood hazard area design flood elevation and floodway limit from [a] FEMA flood [insurance study] **mapping**. [FEMA flood maps can be viewed at <https://msc.fema.gov>. Requests for copies of the available FEMA flood insurance studies, as well as any questions regarding their use, derivation, or modification should be directed to FEMA at (800) 358-9616.]

(b) The methods set forth in this section for determining the flood hazard area and floodway along a regulated water may be used only if [the following requirements are satisfied:

1. A] FEMA flood [insurance study] **mapping** exists for the section of regulated water in question, which [is dated January 31, 1980, or later, and] includes the information needed for the Method that is being used. For example, Methods 2 and 3 below require that the FEMA flood [insurance study] **mapping** includes the regulated water's 100-year flood elevation, and Method 4 below requires that the FEMA [study] **flood mapping** includes the regulated water's 100-year flow rate.]; and
2. The floodway limits and 100-year flow rate being used are the most recently released by FEMA for the municipality in which the site is located, including any advisory,

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proposed or effective mapping.]

(c) There are three methods by which [a] FEMA flood [insurance study] **mapping** may be used to determine the flood hazard area and floodway limit along a regulated water as follows:

1. Method 2 (FEMA tidal method), set forth at (d) below, which applies to a tidal flood hazard area for which a [FEMA] flood profile exists for the section of regulated water in question. If [the] FEMA flood [insurance study] **mapping** does not provide a 100-year flood elevation, it is not possible to use this method;
2. Method 3 (FEMA fluvial method), set forth at (e) below, which applies to a fluvial flood hazard area for which a [FEMA] flood profile exists for the section of regulated water in question. If [the] FEMA flood [insurance study] **mapping** does not provide a 100-year flood elevation, it is not possible to use this method; and
3. Method 4 (FEMA hydraulic method), set forth at (f) below. This method may be used only if the following requirements are satisfied:
  - i. [The] FEMA flood [insurance study] **mapping** provides a 100-year flow rate for the regulated water. In most tidal flood hazard areas a large area is inundated due to flooding from the Atlantic Ocean, and therefore FEMA does not provide a 100-year flow rate for the regulated water itself. In such a case, it is not possible to use this method; and
  - ii. The applicant proposes a regulated activity in the flood hazard area and applies for an individual permit under this chapter, for which the Department requires hydraulic calculations comparing pre-construction and post-construction water surface elevations within the regulated water, in order to demonstrate that the

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regulated activity complies with this chapter. Examples of activities that require such an analysis are detailed at N.J.A.C. 7:13-[11.1(f), 11.1(g), 11.7(c) and 11.7(d)]**12.1(f), 12.1(g), and 12.7.**

(d) Under Method 2 (FEMA tidal method):

1. (No change.)
2. The floodway limit shall be determined as follows:
  - i. [If a] **Where FEMA flood mapping provides a** floodway [map exists] **limit** for the section of regulated water in question, the floodway limit shall be equal to the floodway limit [shown on the FEMA floodway map] **depicted by FEMA**; or
  - ii. [If no] **Where FEMA flood mapping does not provide a** floodway [map exists] **limit** for the section of regulated water in question, the floodway limit shall be equal to the [limits of the] **top of bank along the regulated water or** channel. The Atlantic Ocean and other non-linear tidal waters such as bays and inlets do not have a floodway.

(e) Under Method 3 (FEMA fluvial method):

1. (No change.)
2. The floodway limit shall be determined as follows:
  - i. [If a] **Where FEMA flood mapping provides a** floodway [map exists] **limit** for the section of regulated water in question, the floodway limit shall be equal to the floodway limit [shown on the FEMA floodway map] **depicted by FEMA**; or
  - ii. [If no] **Where FEMA flood mapping does not provide a** floodway [map exists] **limit** for the section of regulated water in question, the floodway limit cannot be

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determined using this method. The applicant shall instead calculate the floodway limit using Method 4 as described in (f) below. In such a case, applicants are encouraged to first contact the Department to discuss whether it is necessary to determine the floodway limit on a site for a given project.

(f) Under Method 4 (FEMA hydraulic method):

[1. The flood hazard area design flood elevation and floodway limit shall be based on a standard step backwater analysis and determined as follows:

i. For a tidal flood hazard area, a hydraulic analysis shall be performed to determine the flood hazard area design flood elevation using the 100-year flow rate reported by FEMA for the regulated water (see (c)3i above);]

[ii.] **1.** For a **regulated water in a** fluvial flood hazard area[, a]:

i. A hydraulic analysis, **such as a standard step backwater analysis**, shall be performed to determine the flood hazard area design flood elevation using 125 percent of the 100-year flow rate reported by FEMA **flood mapping** for the regulated water (**see (c)3i above**); and

[iii.] **ii.** A hydraulic analysis, **such as a standard step backwater analysis**, shall be performed to determine the floodway limit using the 100-year flow rate reported by FEMA **flood mapping** for the regulated water, assuming a maximum rise of 0.2 feet in the 100-year flood elevation[.] **as follows:**

(1) The floodway limits shall be calculated assuming equal conveyance reduction, unless the applicant demonstrates (prior to the submission of an application for a verification to the Department) that due to the topography of the area, the

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proximity of structures to the channel and/or other physical characteristics of the watershed or flood hazard area, use of another method will more optimally calculate the floodway limits at a given location[.]; **and**

**(2) In cases where floodway calculations indicate a decrease in water surface elevations, the entire flood hazard area in the area of the calculated decrease shall be considered to be a floodway;**

**2. For a regulated water in a tidal flood hazard area:**

**i. A hydraulic analysis, such as a standard step backwater analysis, shall be performed to determine the flood hazard area design flood elevation using the 100-year flow rate reported by FEMA flood mapping for the regulated water (see (c)3i above); and**

**ii. The floodway limits along a linear tidal water shall be calculated in accordance with (f)1ii above. Non-linear tidal waters do not possess a floodway, pursuant to N.J.A.C. 7:13-2.3(b)1;**

**3. In cases where both fluvial and tidal flooding occurs, such as along a linear regulated water which is inundated by tidal backwater during the 100-year flood but is fluvial for more frequent flood events, compliance with the offsite impact limitations of N.J.A.C. 7:13-12.1(f), 12.1(g), and/or 12.7 may necessitate undertaking a fluvial analysis under (f)1 above in addition to relying upon and/or recalculating tidal flood elevations under (f)2 above; and**

**4. Demonstrating compliance with the flood storage displacement limitations of N.J.A.C. 7:13-11.4 and/or the offsite impact limitations at N.J.A.C. 7:13-12.1(f),**

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**12.1(g), and/or 12.7 may require the computation of additional peak flow rates for more frequent flood events. In such a case, the same methodologies detailed in this subsection shall be used, as appropriate for the site conditions, to determine the flow rates and water surface elevations for the desired flood events.**

7:13-3.5 Flood hazard area determined by approximation (Method 5)

(a) This section sets forth the procedure for approximating a flood hazard area design flood elevation using the method described in chapter Appendix 1. This method does not provide a floodway limit. Therefore, the Department shall issue an **authorization under a general permit or an individual permit** for a regulated activity within an approximated flood hazard area only if the project meets the requirements at [N.J.A.C. 7:13-9.7] **(f) below**.

(b) The flood hazard area design flood elevation for a regulated water can be approximated under Method 5, provided the following requirements are satisfied:

1. (No change.)
2. Methods 2 through 4 (FEMA fluvial, FEMA tidal, and FEMA hydraulic methods) set forth at N.J.A.C. 7:13-3.4 cannot be used because no qualifying FEMA flood [insurance study] **mapping** exists for the section of regulated water in question; and
3. (No change.)

(c) (No change.)

(d) Method 5 is intended to be conservative and may in some cases overestimate the actual limits of flooding onsite to ensure that public health, safety, and welfare is adequately protected in absence of a Department delineation or FEMA flood [insurance study] **mapping**.

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(e) (No change.)

**(f) The Department shall issue an authorization under a general permit or an individual permit for a regulated activity in a flood hazard area approximated under Method 5 only if the flood hazard area is verified under N.J.A.C. 7:13-5 and the Department determines, based on a visual inspection of submitted site plans and without a review of calculations, that one of the following requirements is satisfied:**

- 1. No fill or aboveground structure is proposed within a flood hazard area; or**
- 2. Both of the following are true:**
  - i. Any proposed fill and/or aboveground structure is located outside a floodway; and**
  - ii. The flood storage displacement requirements of N.J.A.C. 7:13-11.4 are satisfied.**

7:13-3.6 Flood hazard area and floodway determined by calculation (Method 6)

(a) (No change.)

(b) If the following conditions exist, Method 6 is the only method by which an applicant may determine the flood hazard area and floodway along a regulated water:

1. (No change.)
2. Methods 2 through 4 (FEMA fluvial, FEMA tidal, and FEMA hydraulic methods) set forth at N.J.A.C. 7:13-3.4 cannot be used because no qualifying FEMA flood [insurance study] **mapping** exists for the section of regulated water in question; and
3. Method 5 (approximation method) set forth at N.J.A.C. 7:13-3.5 cannot be used for one

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of the following reasons:

i. – ii. (No change.)

iii. The applicant is proposing a regulated activity for which the requirements at N.J.A.C. 7:13-[9.7]5.4 are not satisfied.

(c) Under Method 6[, the flood hazard area design flood elevation and floodway limit shall be based on a standard step backwater analysis and determined as follows]:

**1. For a regulated water in a fluvial flood hazard area:**

**i. Except as provided in (c)1ii below, the flood hazard area design flood elevation shall be determined as follows:**

[1.] (1) A hydrologic analysis shall be performed to determine the peak flow rate for the 100-year flood for the regulated water. The hydrologic analysis shall assume existing [development conditions] **land use coverage** in the drainage area, as of the date of the **verification** application to the Department; **and**

[2. For a tidal flood hazard area, a hydraulic analysis shall be performed to determine the flood hazard area design flood elevation using the 100-year flow rate determined under (c)1 above;]

[3.] (2) [For a fluvial flood hazard area, a] **A hydraulic analysis, such as a standard step backwater analysis**, shall be performed to determine the flood hazard area design flood elevation using 125 percent of the 100-year flow rate determined under (c)1i(1) above; [and]

**ii. The use of calculations not described in (c)1i above to determine the flood hazard area design flood elevation is conditionally acceptable provided:**

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**(1) The Department determines that the use of the proposed calculations will more accurately model the hydrologic and hydraulic conditions on the site being analyzed; and**

**(2) The flood hazard area design flood elevation is determined using a flood that is no less than 125 percent of the peak flow and volume of a 100-year flood; and**

[4.] **iii.** A hydraulic analysis, **such as a standard step backwater analysis**, shall be performed to determine the floodway limit using the 100-year flow rate determined under (c)1i(1) above, assuming a maximum rise of 0.2 feet in the 100-year flood elevation[.] **as follows:**

**(1)** The floodway limits shall be calculated assuming equal conveyance reduction, unless the applicant demonstrates (prior to the submission of an application for a verification to the Department) that due to the topography of the area, the proximity of structures to the channel and/or other physical characteristics of the watershed or flood hazard area, use of another method will more optimally calculate the floodway limits at a given location[.]; **and**

**(2) In cases where floodway calculations indicate a decrease in water surface elevations, the entire flood hazard area in the area of the calculated decrease shall be considered to be a floodway;**

**2. For a regulated water in a tidal flood hazard area:**

**i. A flood hazard area analysis shall be developed, which is based on the data and methodologies utilized by FEMA to determine its most recent 100-year**

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- flood elevation, but which includes new topographic or other relevant data for the region and/or site being analyzed, in order to determine the flood hazard area design flood elevation; and**
- ii. The floodway limits along a linear tidal water shall be determined as set forth in (c)1iii above. Non-linear tidal waters do not possess a floodway, pursuant to N.J.A.C. 7:13-2.3(b)1;**
- 3. In cases where both fluvial and tidal flooding occurs, such as along a linear regulated water which is inundated by tidal backwater during the 100-year flood but is fluvial for more frequent flood events, compliance with the offsite impact limitations of N.J.A.C. 7:13-12.1(f), 12.1(g), and/or 12.7 may necessitate undertaking a fluvial analysis under (c)1 above in addition to relying upon and/or recalculating FEMA tidal flood elevations under (c)2 above; and**
- 4. Demonstrating compliance with the flood storage displacement limitations of N.J.A.C. 7:13-11.4 and/or the offsite impact limitations at N.J.A.C. 7:13-12.1(f), 12.1(g), and/or 12.7 may require the computation of additional peak flow rates for more frequent flood events. In such a case, the same methodologies detailed in this subsection shall be used, as appropriate for the site conditions, to determine the flow rates and water surface elevations for the desired flood events.**

7:13-[13.4]3.7 Revision of a Department delineation by application

- (a) This section applies to the revision of a flood hazard area design flood elevation, flood hazard area limit, floodway limit, and/or other related feature on a flood hazard area delineation

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that has been promulgated by the Department, **in response to an application made to the Department by any person.** Appendix 2 of this chapter lists the Department delineated waters of New Jersey.

(b) – (c) (No change.)

(d) An application for a minor revision of a Department delineation shall include the following:

1. The application fee required under N.J.A.C. 7:13-[17]**20**;
2. [One LURP application form completed as described at N.J.A.C. 7:13-15.1(f)] **A completed application form as described at N.J.A.C. 7:13-18.4(a)1 and available from the Department at the address set forth at N.J.A.C. 7:13-1.3;**

3. – 4. (No change.)

5. Three copies of revised [drawings] **site plans**, signed and sealed by [a] **an** engineer or land surveyor, as appropriate, depicting the existing and the revised flood hazard area design flood elevations, flood hazard area limits, floodway limits, and/or other related features. These [drawings] **site plans** shall be of the same scale as the Department delineation that is the subject of the revision, unless otherwise requested by the Department.

(e) – (f) (No change.)

(g) An application for a major revision of a Department delineation shall include the following:

1. (No change.)
2. All supporting hydrologic and hydraulic calculations, which are necessary to demonstrate that the proposed revision meets the requirements of this chapter[. The Flood Hazard Area Technical Manual, available from the Department at the address

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listed at N.J.A.C. 7:13-1.1(g), provides guidance in how to perform the calculations required for various delineation revisions];

3. – 4. (No change.)

(h) (No change.)

(i) If the Department determines that a major delineation revision is accurate and necessary, the Department shall proceed with the revision as follows:

1. – 2. (No change.)

3. Upon consideration of the available information and public comments, if the Department concludes that revising the delineation is in the best interest of public health, safety, and welfare, the Department shall:

i. – iii. (No change.)

iv. Provide the applicant and affected municipalities with a copy of the revised flood hazard area and/or floodway map (except in cases where the Department initiates the revision pursuant to N.J.A.C. 7:13-[13.5]**3.8**).

(j) (No change.)

7:13-[13.5]**3.8** Revision or suspension of a Department delineation by the Department

(a) If the Department determines, independent of an application pursuant to N.J.A.C. 7:13-[13.4]**3.7**, that an existing Department delineation as listed in chapter Appendix 2 underestimates the extent of the floodway and/or flood hazard area, and that it is in the best interest of public health, safety, and welfare to revise a delineation, the Department shall do one of the following:

1. If the Department has sufficient topographic, hydrologic, and hydraulic data to

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adequately revise the delineation, the Department shall initiate a revision as follows:

- i. For a minor delineation revision as described at N.J.A.C. 7:13-[13.4(b)1]**3.7(b)1**, the Department shall revise the delineation as necessary; or
- ii. For a major delineation revision as described at N.J.A.C. 7:13-[13.4(b)2]**3.7(b)2**, the Department shall follow the procedure described at N.J.A.C. 7:13-[13.4(i)]**3.7(i)**; or

2. (No change.)

(b) (No change.)

(c) During the suspended period described in (b)2 above, any application made under this chapter shall not reference the flood hazard area and/or floodway of the suspended delineation. Applicants must instead rely on another delineation method to determine the extent of the flood hazard area and/or floodway as provided at N.J.A.C. 7:13-3. Furthermore, the Department shall review all valid verifications, general permits and individual permits issued for the flood hazard area of the suspended delineation and will suspend or terminate such approvals where necessary to protect public safety, in accordance with N.J.A.C. 7:13-[14]**22.7 and 22.8**.

(d) – (e) (No change.)

#### SUBCHAPTER 4. DETERMINING THE RIPARIAN ZONE

##### 7:13-4.1 The riparian zone

(a) A riparian zone [exists] **is the land and vegetation within and adjacent to a regulated water. Riparian zones exist along both sides of every regulated water and include the**

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**regulated water itself**, except [there is no riparian zone along the Atlantic Ocean nor along any manmade lagoon, stormwater management basin, or oceanfront barrier island, spit or peninsula] **as provided at N.J.A.C. 7:13-2.3(c)1. The extent of a riparian zone is determined in accordance with (b) through (h) below.**

(b) [The riparian zone includes the land and vegetation within each regulated water described in (a) above, as well as the land and vegetation within a certain distance of each regulated water as described in (c) below.] The portion of the riparian zone [that lies] **located** outside of a regulated water is measured landward from the top of bank. [If a discernible bank is not present along a regulated water, the portion of the riparian zone outside the regulated water is measured landward as follows:

1. Along a linear fluvial or tidal water, such as a stream, the riparian zone is measured landward of the feature's centerline;
2. Along a non-linear fluvial water, such as a lake or pond, the riparian zone is measured landward of the normal water surface limit;
3. Along a non-linear tidal water, such as a bay or inlet, the riparian zone is measured landward of the mean high water; and
4. Along an amorphously-shaped feature, such as a wetland complex, through which a regulated water flows but which lacks a discernible channel, the riparian zone is measured landward of the feature's centerline.]

(c) The width of the riparian zone [along each regulated water described in (a) above] is as follows:

1. The **width of the** riparian zone [is 300 feet wide] along [both sides of] any **regulated**

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**water designated as a Category One water, and all upstream [tributaries] regulated waters situated within the same HUC-14 watershed, is 300 feet;**

2. [The] **Except for regulated waters listed at (c)1 above, the width of the riparian zone along the following regulated waters** is 150 feet [wide along both sides of the following waters not identified in (c)1 above]:

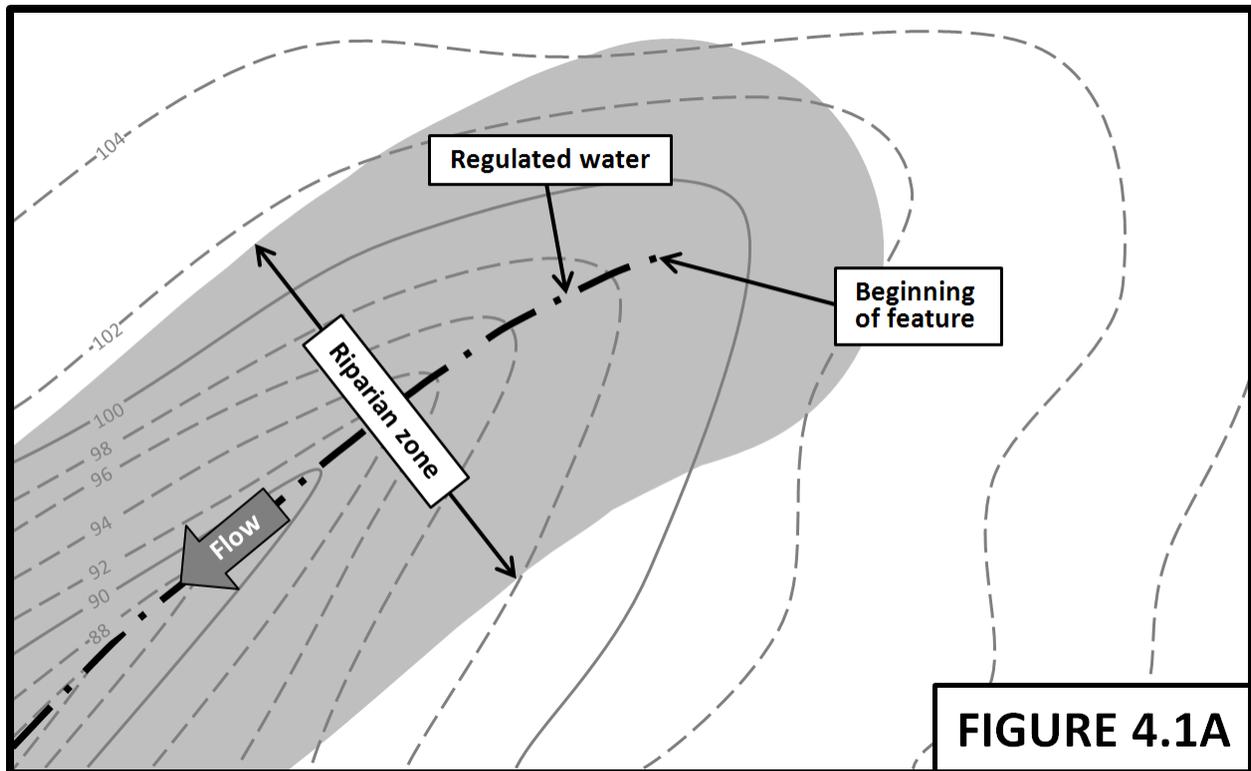
- i. Any trout production water and all upstream **regulated** waters [(including tributaries)];
- ii. Any trout maintenance water and all upstream **regulated** waters [(including tributaries) within one linear mile as measured along the length of the regulated water] **located within one mile of a trout maintenance water (measured along the length of the regulated water); and**
- iii. Any segment of a **regulated** water flowing through an area that contains [documented habitat for] a threatened or endangered species [of plant or animal], **and/or present or documented habitat for those species**, which is critically dependent on the regulated water for survival, and all upstream **regulated** waters [(including tributaries) within one linear mile as measured along the length of the regulated water;] **located within one mile of such habitat (measured along the length of the regulated water). A list of critically dependent species is available from the Department at the website set forth at N.J.A.C. 7:13-1.3; and**
- iv. Any segment of a water flowing through an area that contains acid producing soils; and]

3. [The] **For all other regulated waters not identified in (c)1 or 2 above, the width of**

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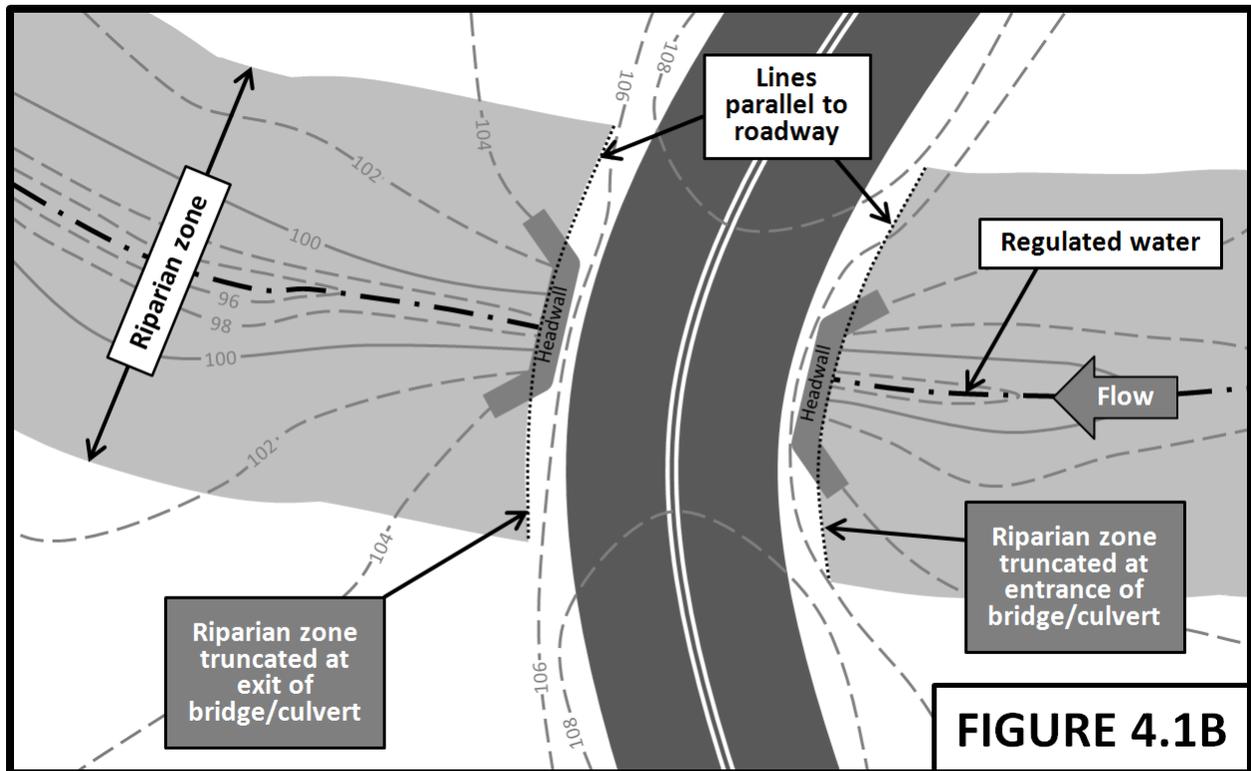
the riparian zone is 50 feet [wide along both sides of all waters not identified in (c)1 or 2 above].

(d) Where a regulated water naturally forms, begins, or ends within a site, the riparian zone arcs around the end of the feature. (See Figure 4.1A below)



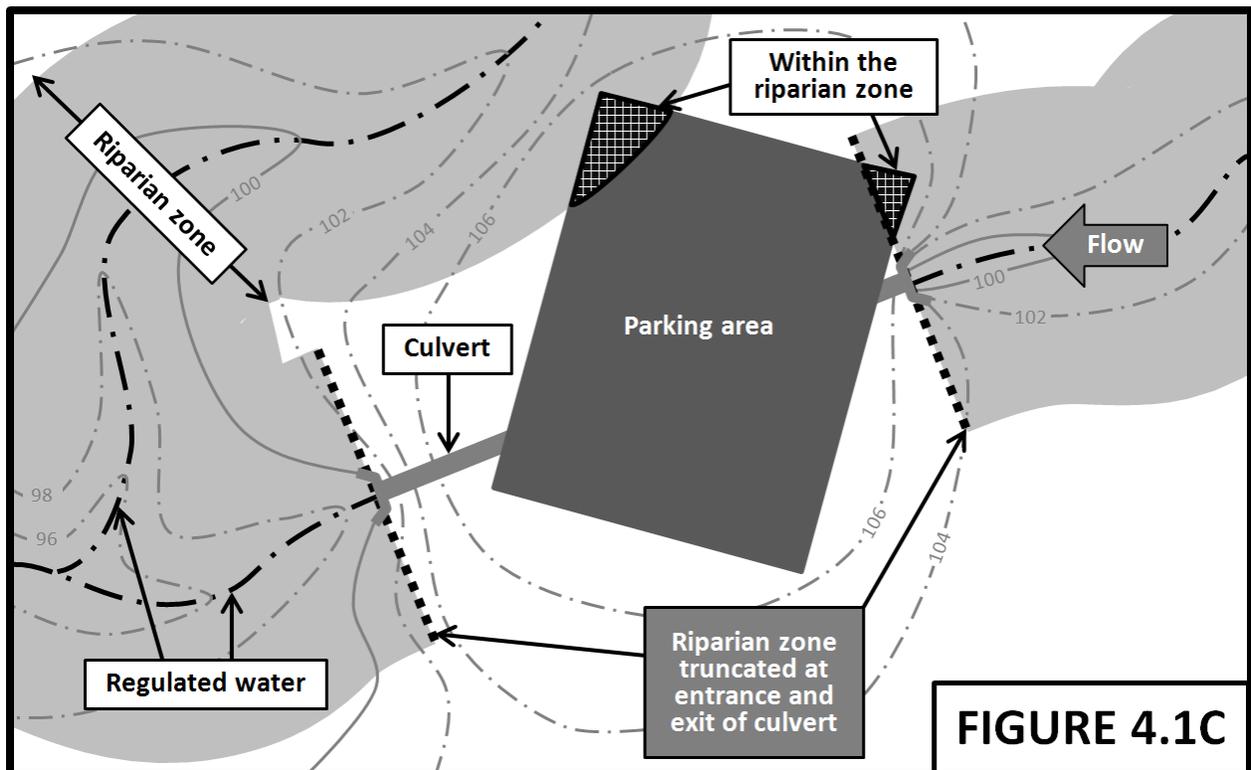
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(e) Where a roadway or railroad crosses over a lawfully existing pipe, culvert, or bridge, the riparian zone is truncated at the entrance and exit of the structure. The lines of truncation run parallel to the direction of traffic, and curve with the roadway, such that the roadway is not located within a riparian zone. (See Figure 4.1B below)



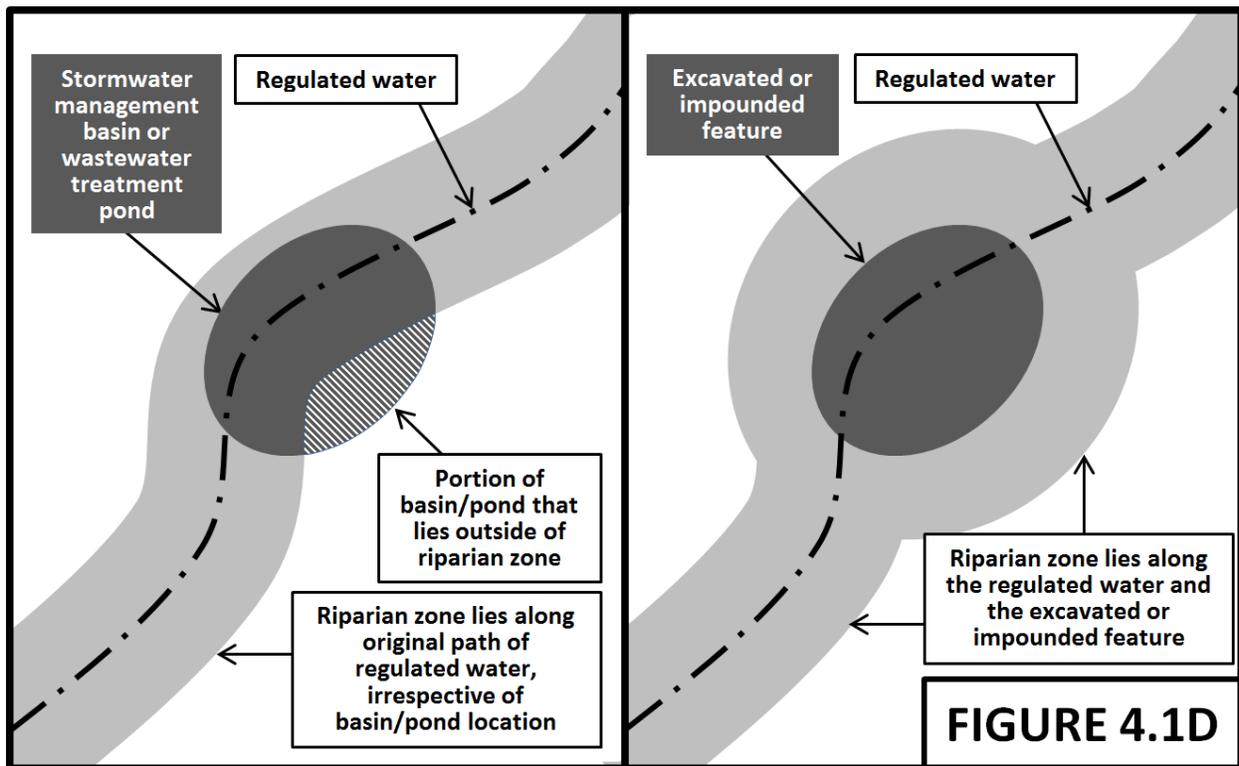
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(f) Where a regulated water enters or exits a lawfully existing pipe, culvert, or bridge, which is not part of a roadway or railroad as described in (e) above, the riparian zone is truncated at the entrance and exit of the structure, at a straight line that runs perpendicular to the predominant direction of flow in the regulated water. (See Figure 4.1C below)



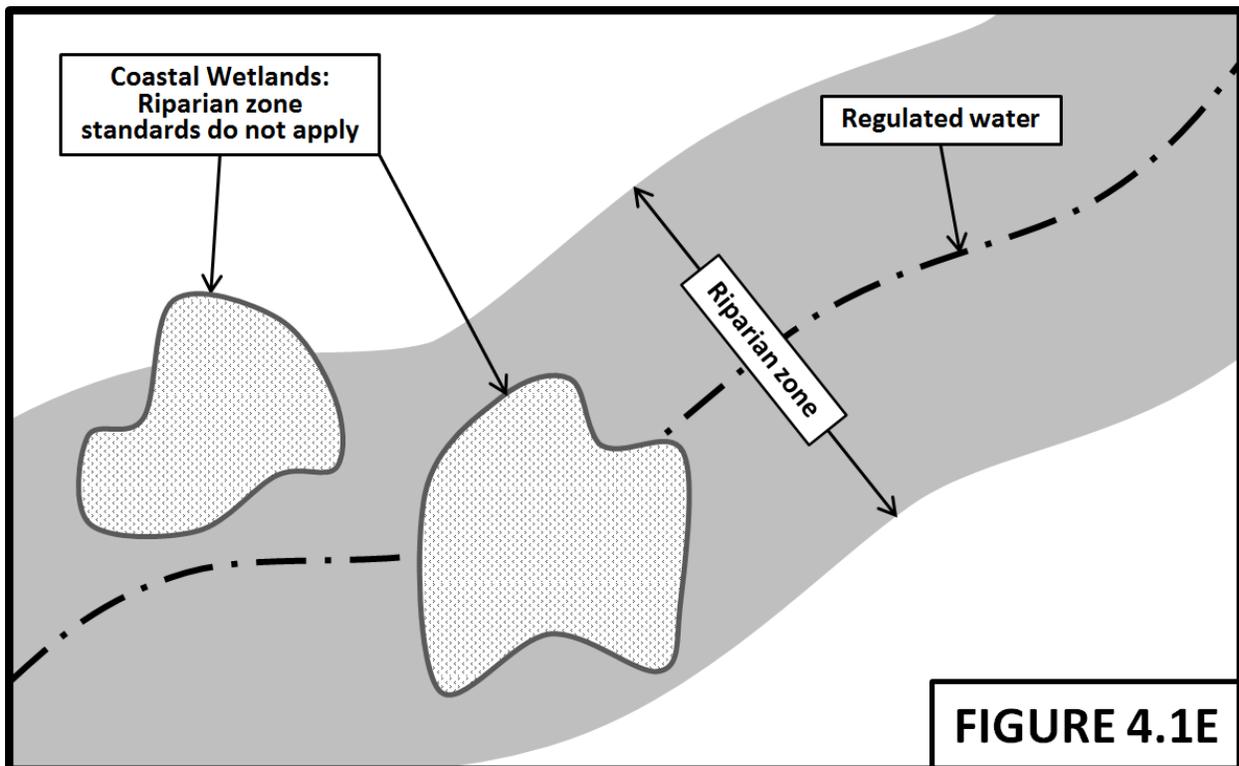
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(g) Where a lawfully existing excavated area or impoundment filled with water lies along a regulated water, the riparian zone shall be measured outward from the top of bank of the excavated or impounded feature, with the exception of stormwater management basins and wastewater treatment ponds, since such features do not possess a riparian zone pursuant to N.J.A.C. 7:13-2.3(c)1. (See Figure 4.1D below)



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(h) Where a coastal wetland regulated under the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., lies within a riparian zone, the riparian zone standards of this chapter do not apply within the wetland. (See Figure 4.1E below)



[(d)] (i) The riparian zones established by this chapter are separate from, and in addition to, any other similar zones or buffers established to protect surface waters. For example, [the Stormwater Management rules at N.J.A.C. 7:8 and] the Highlands Water Protection and Planning Act [rules] **Rules** at N.J.A.C. 7:38 establish 300-foot [Special Water Resource Protection Areas and] buffers[, respectively,] along certain waters. Furthermore, the Freshwater Wetlands Protection Act [rules] **Rules** at N.J.A.C. 7:7A establish 50-foot and 150-foot transition areas along freshwater wetlands and other features that are also regulated under this chapter.

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Compliance with the riparian zone requirements of this chapter does not constitute compliance with the requirements [imposed under] of any other Federal, State, or local statute, regulation, or ordinance.

#### **7:13-4.2 Determining if a riparian zone is forested or unforested**

**(a) This section specifies the process for determining if an area is classified as forested or unforested. Once an area is determined to be forested in accordance with (b) or (c) below, the limit of the forested area is determined pursuant to (d) below.**

**(b) To determine if a riparian zone or portion of a riparian zone is forested:**

- 1. The limit of the forest shall be identified using aerial photographs obtained from the Department at [www.nj.gov/dep/gis/](http://www.nj.gov/dep/gis/); and**
- 2. If the aerial photograph contains areas of sporadic coverage that have not been identified as forest by the applicant, the applicant shall overlay a one-half acre grid system provided by the Department on its website at [www.nj.gov/dep/landuse/guidance.html](http://www.nj.gov/dep/landuse/guidance.html). For any grid block containing 33 percent or greater forest cover, the limit of the forested area shall be determined pursuant to (d) below, unless the applicant demonstrates in accordance with (c) below that the size and density of the trees in the area are not sufficient for the area to be considered forest.**

**(c) If the Department identifies forest areas within a riparian zone that have not been so identified by the applicant, or the applicant disputes the identification of an area as forested area in accordance with (b)2 above, the applicant shall measure the trees and**

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**determine the density of the trees on the lot using the following method:**

- 1. Select two 25-foot by 25-foot plots in each acre of the site as follows:**
  - i. The plots shall be located in the portion of each acre with the highest density of trees, based on a visual inspection;**
  - ii. If the tree size and density are uniform over some or all of the site, one 25-foot by 25-foot plot may be selected within the area of uniformity. Where only one plot is measured, the point total from the one plot shall be doubled to determine the total point value for the sampled acre under (b)5 below;**
- 2. In each plot, measure the diameter of each tree at four and one-half feet above ground;**
- 3. Score each tree as follows:**

<b><u>Diameter of Tree</u></b>	<b><u>Points</u></b>
<b>One to three inches</b>	<b>2</b>
<b>&gt;Three to seven inches</b>	<b>4</b>
<b>&gt;Seven to 12 inches</b>	<b>6</b>
<b>&gt;12 inches</b>	<b>8</b>

- 4. Add together the scores for all of the trees in each of the plots;**
- 5. If the total score for both plots is equal to or greater than 16, the sampled acre is considered to be forested, with the limit of the forested area to be determined pursuant to (d) below. For example, if the two 25-foot by 25-foot plots contain a total of three trees which are two inches in diameter, two trees which are six inches**

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**in diameter, and one tree which is 15 inches in diameter, the score for the sampled acre would be:  $(3 \times 2) + (2 \times 4) + (1 \times 8) = 22$ , and the sampled acre is considered forested;**

**6. If a sampled acre is forested, an area totaling one-half acre (21,780 square feet) surrounding the sampled acre shall also be considered to be forested with the limit of the forested area to be determined pursuant to (d) below, except for the surrounding areas that are sampled by the applicant and score under 16 utilizing the analysis specified in (c)1 through 5 above. In that case, a sufficient number of plots shall be sampled to delineate the forested portion of the surrounding area; and**

**7. If a plot is unforested, an area totaling one-half acre (21,780 square feet) surrounding the plot shall also be considered unforested, unless a site visit, photographs, or other information indicates that it contains forested areas.**

**(d) The limit of the forested area shall be the outermost edge of the canopy of the forest within the areas identified in (b) and (c) above, including the portion of the canopy of the forest that extends outside of the area analyzed pursuant to (b)2 or (c) above.**

## **SUBCHAPTER 5. VERIFICATIONS**

### **7:13-5.1 Purpose and scope**

**This subchapter sets forth the general provisions relating to a verification; the duration of a verification; the reissuance of a verification; when a verification is required for issuance of an authorization under a general permit or an individual permit; and the**

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**conditions that apply to a verification.**

#### **7:13-5.2 General provisions**

**(a) A verification provides the Department's official determination of one or more of the following and can be issued for either an entire site or portion of a site:**

- 1. The flood hazard area design flood elevation;**
- 2. The flood hazard area limits, or a determination that the entire verified area lies within a flood hazard area;**
- 3. The floodway limits, or a determination that the entire verified area lies within a floodway; and/or**
- 4. The riparian zone limits, or a determination that the entire verified area lies within a riparian zone.**

**(b) A verification is required prior to, or concurrent with, an authorization under a general permit or an individual permit as set forth at N.J.A.C. 7:13-5.5.**

**(c) The flood hazard area design flood elevation, flood hazard area, and floodway limits on a site shall be determined in accordance with N.J.A.C. 7:13-3. The riparian zone limits on a site shall be determined in accordance with N.J.A.C. 7:13-4.**

#### **7:13-5.3 Duration of a verification**

**(a) Except as provided at (b) below, a verification is valid for five years from the date of issuance.**

**(b) A verification is valid for 10 years from the date of issuance where the verification is**

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**issued concurrently with an individual permit that is valid for 10 years, pursuant to N.J.A.C. 7:13-10.2(b).**

**(c) A verification can be automatically reissued one time with the issuance of a permit for a regulated activity that relies on the verification, pursuant to N.J.A.C. 7:13-5.4.**

**(d) A verification can be extended one time for five years pursuant to N.J.A.C. 7:13-22.3(c), provided that it was not previously reissued under N.J.A.C. 7:13-5.4 or issued concurrently with a 10-year individual permit as described in (b) above.**

**(e) A person who is issued a verification pursuant to this subchapter shall be entitled to rely on the determination of the Department, concerning the presence, absence, or extent of flood hazard areas, riparian zones, or floodways for the term specified at (a) through (d) above, unless the Department determines that the verification is based on inaccurate or incomplete information, in which case the Department may void the original verification and issue a new verification reflecting the actual conditions on the site. For example, the verification may be revised to reflect additional flood hazard areas or riparian zones identified after verification issuance; or if a threatened or endangered species habitat is disclosed or discovered after the verification was issued, the Department may correct the width of the riparian zone.**

#### **7:13-5.4 Reissuance of a verification**

**(a) If the Department issues a verification that is valid for five years and subsequently approves an authorization under a general permit or an individual permit for a regulated activity that references or relies upon the verification, the Department shall automatically**

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**reissue the verification upon approval of the authorization or permit to align the expiration date of the verification with the expiration date of the authorization or permit, provided:**

- 1. The Department has not previously extended or reissued the verification;**
- 2. The reissued verification reflects any alterations to the flood hazard area design flood elevation, flood hazard area limit, and/or floodway limit that will result from the authorization or permit; and**
- 3. All pre- and post-construction flood hazard area elevations, floodway limits, and riparian zone limits, as applicable, are delineated on site plans approved under the reissued verification.**

**(b) A verification that is reissued pursuant to (a) above shall not be extended.**

**7:13-5.5 When a verification is required for issuance of an authorization under a general permit or an individual permit**

**(a) Except as provided at (b) and (c) below, the flood hazard area design flood elevation, and floodway limit, where present, must be known and verified within the project area pursuant to N.J.A.C. 7:13-5.2 in order for the Department to determine compliance with the requirements of this chapter and issue an authorization under a general permit or an individual permit. An applicant for an authorization under a general permit or an individual permit shall therefore demonstrate that:**

- 1. The applicant possesses a valid verification of the flood hazard area design flood elevation, and also the floodway limit, if present, for the project area;**
- 2. The applicant has applied for a verification of the flood hazard area design flood**

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elevation, and also the floodway limit, where present, for the project area, and the Department subsequently approves the verification either prior to or concurrent with the issuance of the authorization under a general permit or individual permit;

3. The project meets the conditions of (b)1, 2, or 3 below, in which case no verification is required in order to obtain an authorization under a general permit or an individual permit; or
4. The project meets the conditions of (c) below, in which case a verification of only the flood hazard area design flood elevation is required either prior to or concurrent with the issuance of an authorization under a general permit or an individual permit.

(b) Obtaining a verification is not required prior to the issuance of an authorization under a general permit or an individual permit, provided the Department determines, based on a visual inspection of submitted site plans and without a review of calculations, that one or more of the following requirements is satisfied:

1. No fill or aboveground structure is proposed within a flood hazard area;
2. The project consists solely of the construction, replacement, enlargement, repair, or removal of a bridge or culvert along a railroad or public roadway; or
3. All of the following are true:
  - i. No habitable building, railroad, roadway, or parking area is proposed, which requires knowledge of the flood hazard area design flood elevation to determine compliance with this chapter;
  - ii. Any proposed fill and/or aboveground structure is located outside a floodway;

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**and**

- iii. The flood storage displacement requirements of N.J.A.C. 7:13-11.4 are satisfied.**

**(c) Obtaining a verification of only the flood hazard area design flood elevation and not the floodway limit is required prior to the issuance of an authorization under a general permit or an individual permit, provided the Department determines, based on a visual inspection of submitted site plans and without a review of calculations, that the following requirements are satisfied:**

- 1. No fill or aboveground structure is proposed within a floodway; and**
- 2. Compliance with the flood storage displacement requirements of N.J.A.C. 7:13-11.4 does not require knowledge of the location of the floodway.**

**7:13-5.6 Conditions that apply to an issued or reissued verification**

**(a) Within 90 calendar days after the Department issues or reissues a verification on a privately owned lot, or on a publicly owned lot other than a right-of-way, the recipient of the 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 verification:**

- 1. The Department file number for the verification;**
- 2. The approval and expiration dates of the verification;**
- 3. A metes and bounds description of any flood hazard area limit and/or floodway**

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**limit approved under the verification;**

- 4. The flood hazard area design flood elevation, or range of elevations if variable, approved under the verification;**
- 5. The width and location of the any riparian zone approved under the verification; and**
- 6. The following statement: “The State of New Jersey has determined that all or a portion of this lot lies in a flood hazard area and/or riparian zone. Certain activities in flood hazard areas and riparian zones are regulated by the New Jersey Department of Environmental Protection and some activities may be prohibited on this site or may first require a flood hazard area permit. Contact the Division of Land Use Regulation at (609) 292-0060 or [www.nj.gov/dep/landuse](http://www.nj.gov/dep/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 verification 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 verification.**

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## **SUBCHAPTER 6. GENERAL PROVISIONS FOR PERMITS-BY-RULE, GENERAL PERMITS-BY-CERTIFICATION, AND GENERAL PERMITS**

### **7:13-6.1 Purpose and scope**

**This subchapter sets forth the standards for the Department to issue, by rulemaking, permits-by-rule, 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.**

### **7:13-6.2 Standards for issuance, by rulemaking, of permits-by-rule, general permits-by-certification, and general permits**

**(a) 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 permit-by-rule, general permit-by-certification, or general permit after publication of a notice of rule proposal in the New Jersey Register and consideration of public comment.**

**(b) The Department will promulgate a permit-by-rule, general permit-by-certification, or general permit only if:**

- 1. The Department determines that the regulated activity will cause only minimal adverse impacts on flooding and the environment when performed separately, and will have only minimal cumulative adverse impacts on flooding and the environment; and**
- 2. The Department has provided public notice and an opportunity for public**

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**comment with respect to the proposed permit-by-rule, 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) Each permit-by-rule, general permit-by-certification, or general permit shall contain a specific description of the type(s) of regulated activity(s) which are authorized, including limitations for any single operation, to ensure that the conditions of (b)1 above are satisfied.**

**At a minimum, these limitations shall include:**

- 1. The size and type of regulated activity that may be undertaken; and**
- 2. A precise description of the geographic area to which the permit-by-rule, general permit-by-certification, or general permit applies.**

**(d) The Department will include in each permit-by-rule, general permit-by-certification, or general permit promulgated pursuant to this subchapter appropriate conditions applicable to particular types of sites or development which must be met in order for a proposed development or activity to qualify for authorization under the permit-by-rule, general permit-by-certification, or general permit.**

**(e) The Department may, by undertaking rulemaking in accordance with (a) above, repeal a permit-by-rule, general permit-by-certification, or general permit, and thereafter require individual permits for development previously covered by the permit-by-rule, general permit-by-certification, or general permit, if it finds that the permit-by-rule, general permit-by-certification, or general permit no longer meets the conditions of (b)1 above.**

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**7:13-6.3 Use of a permit-by-rule, or an authorization pursuant to a general permit-by-certification or a general permit to conduct regulated activities**

**(a) An activity that meets the requirements of a permit-by-rule may be conducted without prior Department approval.**

**(b) 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. 7:13-18.3.**

**(c) 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. 7:13-21.**

**(d) A permit-by-rule or 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.**

**7:13-6.4 Use of more than one permit on a single site**

**(a) A person may undertake a regulated activity more than once on a single site. The activity may be authorized each time under a single permit-by-rule, general permit-by-certification, or general permit, provided the individual limits and conditions of the permit are not exceeded.**

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**(b) A person may undertake more than one regulated activity on a single site. The activities may be authorized under one or more permit-by-rule, general permit-by-certification, and/or general permit, provided the individual limits and conditions of each permit are not exceeded.**

**(c) Once the limits and conditions of a permit-by-rule, general permit-by-certification, and/or general permit have been reached on a single site:**

- 1. No further activities under that permit can be authorized on that site, regardless of how much time passes, or whether the site is subsequently subdivided or transferred to a new owner; and**
- 2. A person seeking to undertake the regulated activity on that site must obtain an individual permit under this chapter authorizing the regulated activity.**

**(d) On a single site, one or more permits-by-rule, general permits-by-certification, and/or general permits may be used in combination with an individual permit, provided the individual limits and conditions of each permit are not exceeded.**

#### **7:13-6.5 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.**

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**(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.**

#### **7:13-6.6 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. 7:13-22.3.**

**(c) All regulated activities being conducted pursuant to an authorization under a general permit shall immediately cease if the authorization expires, including any extension thereof under N.J.A.C. 7:13-22.3.**

**(d) 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 or permit 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**

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**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 construction as approved under the original authorization would have an adverse impact on flooding or the environment.**

**7:13-6.7 Conditions applicable to a permit-by-rule, or to an authorization pursuant to a general permit-by-certification or a general permit**

**(a) A person conducting regulated activities pursuant to a permit-by-rule, or pursuant to an authorization under a general permit-by-certification or general permit shall comply with:**

- 1. The specific conditions set forth in the permit-by-rule, general permit-by-certification, or general permit itself, including the conditions incorporated by reference into each of those permits set forth at (b) below; and**
- 2. The conditions that apply to conducting regulated activities under any authorization or permit, set forth at N.J.A.C. 7:13-22.2.**

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**(b) The following conditions are incorporated by reference in each permit-by-rule, general permit-by-certification, or general permit:**

- 1. Any new, reconstructed, enlarged, or elevated structure within a flood hazard area shall be secured to resist flotation, collapse, and displacement due to hydrostatic and hydrodynamic forces from floodwaters;**
- 2. The regulated activity shall not adversely affect low-flow aquatic passage in any regulated water;**
- 3. The regulated activity shall not expose unset or raw cement to flowing water within any channel or regulated water during construction;**
- 4. The regulated activity shall not destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species, and shall not jeopardize the continued existence of any local population of a threatened or endangered species;**
- 5. Except for normal property maintenance conducted in accordance with permit-by-rule 1 at N.J.A.C. 7:13-7.1, all riparian zone vegetation that is cleared, cut, and/or removed to conduct a regulated activity, access an area where regulated activities will be conducted, or otherwise accommodate a regulated activity shall be replanted immediately after completion of the regulated activity, unless prevented by seasonal weather, in which case the vegetation shall be replanted as soon as conditions permit. Portions of the riparian zone occupied by an authorized structure need not be replanted.**
  - i. Except as provided in (b)5ii below, the vegetation replanted shall:**

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- (1) Consist of vegetation of equal or greater ecological function and value as the vegetation that was cleared, cut, or removed. For example, herbaceous vegetation may be replaced with the same type of vegetation or with trees, but the trees in forested areas must be replaced with trees of equal or greater density and ecological function and value; and**
  - (2) Consist of native, non-invasive vegetation, except in an actively disturbed area. In an actively disturbed area, the vegetation may be replaced with the same type of vegetation that was cleared, cut, or removed, or with another kind of vegetation typical of an actively disturbed area. For example, lawn grass may be replaced with garden plants or agricultural crops.**

    - ii. In cases where replanting in accordance with (b)5i above would interfere with continued access to or maintenance of a structure that is required by Federal, State, or local law, or would impede forest management activities under permit-by-rule 63 (N.J.A.C. 7:13-7.63), the vegetation replanted shall meet the requirements of (b)5i above to the extent feasible.**
- (c) The person undertaking a regulated activity under a permit-by-rule, or seeking authorization under a general permit-by-certification, is responsible for ensuring that each condition of the permit-by-rule or general permit-by-certification applicable under (a) above is met. The Department will not entertain a request to review engineering calculations, in the context of an applicability determination or otherwise, for the purpose**

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**of determining that a proposed activity will meet any condition of a permit-by-rule or general permit-by-certification.**

**(d) In addition to the conditions that apply to every authorization pursuant to a general permit under (a) above, the Department shall establish conditions in a specific authorization pursuant to a general permit, on a case-by-case basis, as required to ensure the authorized regulated activity meets all applicable requirements of this chapter and its enabling statutes.**

## **SUBCHAPTER 7. PERMITS-BY-RULE**

### **7:13-7.1 Permit-by-rule 1 – normal property maintenance**

**(a) Permit-by-rule 1 authorizes clearing, cutting, and/or removal of riparian zone vegetation which is necessary to service, maintain, or ensure the continued safe use of a lawfully existing structure, easement, right-of-way, field, lawn, park, and/or garden.**

**Normal property maintenance includes:**

- 1. Pruning;**
- 2. Selective tree cutting, such as removing a dead, fallen, or unsafe tree;**
- 3. Planting native, non-invasive plant species;**
- 4. Periodic clearing, cutting, and/or removal of vegetation within an actively disturbed area, such as mowing and clearing nuisance vegetation; and**
- 5. Removing trash, debris, and dead vegetation by hand.**

**(b) This permit-by-rule does not authorize the following activities:**

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- 1. Burning or applying herbicide to riparian zone vegetation;**
- 2. Grading and other changes in topography;**
- 3. Construction of structures, or placement of fill or impervious surfaces; and**
- 4. Removal of riparian zone vegetation not listed in (a) above, such as removal of vegetation to accommodate an ongoing or proposed regulated activity or to create new open or landscaped areas.**

**7:13-7.2 Permit-by-rule 2 – repair of a lawfully existing structure**

**(a) Permit-by-rule 2 authorizes the repair of a lawfully existing structure, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed;**
- 2. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the structure, where such disturbance is necessary to facilitate its repair; and**
- 3. No more than one-quarter acre of riparian zone vegetation is cleared, cut, and/or removed.**

**7:13-7.3 Permit-by-rule 3 – in-kind replacement of a lawfully existing structure**

**(a) Permit-by-rule 3 authorizes the in-kind replacement of a lawfully existing structure, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The structure is not located within a floodway;**
- 2. The structure being replaced is not a retaining wall or bulkhead subject to the**

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**requirements of N.J.A.C. 7:13-12.13 or a habitable building;**

- 3. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the structure, where such disturbance is necessary to facilitate its replacement; and**
- 4. No more than one-quarter acre of riparian zone vegetation is cleared, cut, and/or removed.**

**7:13-7.4 Permit-by-rule 4 – removal of any lawfully existing fill or structures**

**(a) Permit-by-rule 4 authorizes the removal of any lawfully existing fill or structure, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The fill or structure is not located within a floodway;**
- 2. The fill or structure is disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local requirements;**
- 3. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the fill or structure, where such disturbance is necessary to facilitate its removal; and**
- 4. No more than one-quarter acre of riparian zone vegetation is cleared, cut, and/or removed.**

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**7:13-7.5 Permit-by-rule 5 – removal of accumulated sediment and debris from a regulated water by hand**

**(a) Permit-by-rule 5 authorizes the removal of accumulated sediment and debris by hand, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No machinery is used within the regulated water except for handheld equipment such as hoses and hydraulic pumps;**
- 2. The material removed consists solely of accumulated sediment and debris and does not alter the natural bed and banks of the regulated water;**
- 3. Where work is proposed along a trout production or maintenance water, the appropriate timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed;**
- 4. No riparian zone vegetation is cleared, cut, and/or removed, unless such disturbance is unavoidable, necessary to gain access to the regulated water, and minimized;**
- 5. No trees are cleared, cut, and/or removed in a riparian zone; and**
- 6. All material removed from the regulated water is disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local requirements.**

**7:13-7.6 Permit-by-rule 6 – removal of major obstructions from a regulated water with machinery**

**(a) Permit-by-rule 6 authorizes the use of machinery to remove one or more major obstructions from a regulated water that cannot be removed by hand, such as a fallen tree,**

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**abandoned vehicle, furniture, and other large debris, provided the conditions at N.J.A.C.**

**7:13-6.7 are met and:**

- 1. All machinery is situated outside the regulated water, except for handheld equipment such as chainsaws. Heavy machinery such as backhoes may be used to reach into the regulated water to remove material, but cannot be driven or otherwise placed in the regulated water;**
- 2. No fill material or accumulated sediment is removed from the regulated water;**
- 3. No riparian zone vegetation is cleared, cut, and/or removed, unless such disturbance is unavoidable, necessary to gain access to the regulated water, and minimized; and**
- 4. All material removed from the regulated water is disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local laws.**

**7:13-7.7 Permit-by-rule 7 – placement of no more than five cubic yards of landscaping material**

**(a) Permit-by-rule 7 authorizes the placement of no more than five cubic yards of landscaping material, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The landscaping material is not placed within a floodway;**
- 2. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 3. The landscaping material does not constitute a structure. For example, five cubic**

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**yards of stone, topsoil, wood chips, or other landscaping material can be placed under this permit-by-rule but the construction of a building that displaces five cubic yards of flood storage volume cannot;**

- 4. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas; and**
- 5. No more than 2,000 square feet of riparian zone vegetation is cleared, cut, or removed.**

**7:13-7.8 Permit-by-rule 8 – construction at or below grade in a fluvial flood hazard area**

**(a) Permit-by-rule 8 authorizes construction at or below grade construction in a fluvial flood hazard area, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. All construction is situated at or below grade and the existing ground elevation is not raised;**
- 2. No habitable building, fuel tank, solar panel, or underground utility line that conveys a gas or liquid is constructed;**
- 3. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 4. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas;**

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5. **The project, in combination with all activities onsite since November 5, 2007, will not result in a net loss of greater than one-quarter acre of riparian zone vegetation; and**
6. **The project, in combination with all proposed activities, does not constitute a major development, as defined in the Stormwater Management rules at N.J.A.C. 7:8-1.2.**

**7:13-7.9 Permit-by-rule 9 – general construction activities in a tidal flood hazard area**

**(a) Permit-by-rule 9 authorizes general construction activities in a tidal flood hazard area, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The existing ground elevation is not raised in any floodway;**
2. **No aboveground structure is constructed in any floodway;**
3. **No habitable building, fuel tank, solar panel, or underground utility line that conveys a gas or liquid is constructed;**
4. **No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
5. **Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas;**
6. **The project, in combination with all activities onsite since November 5, 2007, will not result in a net loss of greater than one-quarter acre of riparian zone vegetation; and**

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7. **The project, in combination with all proposed activities, does not constitute a major development, as defined in the Stormwater Management rules at N.J.A.C.**

**7:8-1.2.**

**7:13-7.10 Permit-by-rule 10 – general construction activities located outside a flood hazard area in a riparian zone**

**(a) Permit-by-rule 10 authorizes general construction activities located outside a flood hazard area in a riparian zone, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **No habitable building, fuel tank, solar panel, or underground utility line that conveys a gas or liquid is constructed;**
2. **No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
3. **Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas;**
4. **The project, in combination with all activities onsite since November 5, 2007, will not result in a net loss of greater than one-quarter acre of riparian zone vegetation; and**
5. **The project, in combination with all proposed activities, does not constitute a major development, as defined in the Stormwater Management rules at N.J.A.C.**

**7:8-1.2.**

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**7:13-7.11 Permit-by-rule 11 – reconstruction, relocation, and/or elevation of a lawfully existing building**

**(a) Permit-by-rule 11 authorizes the reconstruction, relocation, and/or elevation of a lawfully existing building located outside a floodway at the time of reconstruction, relocation, and/or elevation, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The building is not expanded within or relocated into a floodway;**
- 2. The footprint of the existing building does not increase by more than 400 square feet, cumulatively, since November 5, 2007;**
- 3. The lowest floor of the building is reconstructed or elevated to at least one foot above the flood hazard area design flood elevation;**
- 4. Any new enclosure below the lowest floor of the building is not used for habitation, remains open to floodwaters, and is constructed in accordance with N.J.A.C. 7:13-12.5(p);**
- 5. Any existing enclosure below the lowest floor of the building, which does not conform to the requirements of N.J.A.C. 7:13-12.5(p), such as a basement having a floor that is below grade along all adjoining exterior walls, is abandoned, filled-in, and/or otherwise modified to conform with the requirements of N.J.A.C. 7:13-12.5;**
- 6. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 7. Any building being relocated is either moved outside a riparian zone or located**

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**within an actively disturbed area; and**

- 8. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the building, where such disturbance is necessary to access the building and facilitate its reconstruction, relocation, and/or elevation.**

**7:13-7.12 Permit-by-rule 12 – construction of an addition(s) to a lawfully existing habitable building**

**(a) Permit-by-rule 12 authorizes the construction of one or more additions above or adjoining a lawfully existing habitable building located outside a floodway at the time of the construction, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The addition is not located within a floodway;**
- 2. The footprint of the existing building does not increase by more than 400 square feet, cumulatively, since November 5, 2007;**
- 3. The lowest floor of the addition is constructed at least one foot above the flood hazard area design flood elevation, unless otherwise approved by the local construction official having jurisdiction over the project;**
- 4. The construction of the addition, in combination with all other proposed improvements, does not result in a substantial improvement to the building;**
- 5. Any enclosure below the lowest floor of the addition is not used for habitation, remains open to floodwaters, and is constructed in accordance with N.J.A.C. 7:13-12.5(p);**
- 6. No disturbance is located within 25 feet of any top of bank, unless the project lies**

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**adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**

- 7. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the building, where such disturbance is necessary to access the building and facilitate the construction of the addition.**

#### **7:13-7.13 Permit-by-rule 13 – construction of a non-habitable building(s)**

**(a) Permit-by-rule 13 authorizes the construction of one or more non-habitable buildings, such as a shed, animal shelter, or storage area, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The building is not located within a floodway;**
- 2. The footprint of all buildings constructed under this permit-by-rule does not exceed 200 square feet, cumulatively, since November 5, 2007;**
- 3. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**
- 4. No trees are cleared, cut, and/or removed in a riparian zone except within 10 feet of a proposed building, where such disturbance is necessary for its placement or construction.**

#### **7:13-7.14 Permit-by-rule 14 – construction of a partially-open structure(s)**

**(a) Permit-by-rule 14 authorizes the construction of one or more partially-open structures**

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**with a roof, such as a car port, covered patio, or pole barn, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The structure is not located within a floodway;**
- 2. The structure is not enclosed with walls on any side below the flood hazard area design flood elevation;**
- 3. The roof is supported solely by poles or is cantilevered from an adjoining structure;**
- 4. The footprint of all structures constructed under this permit-by-rule does not exceed 5,000 square feet, cumulatively, since November 5, 2007;**
- 5. No fill is placed in the flood hazard area except for any poles necessary to support the roof;**
- 6. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas; and**
- 7. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water.**

**7:13-7.15 Permit-by-rule 15 – construction of barrier-free access to a building**

**(a) Permit-by-rule 15 authorizes the construction of barrier-free access to a building, such as stairs, ramps, or fire-escapes, provided the conditions at N.J.A.C. 7:13-6.7 are met and the access is:**

- 1. Required by a public entity;**

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**2. Constructed in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq.;**

**3. Constructed outside any channel; and**

**4. Constructed outside a floodway, unless location in the floodway is unavoidable.**

**Where the access is unavoidably located in a floodway, it shall be oriented to minimize obstruction to flow and shall be constructed of material that will remain open to the passage of floodwaters, such as stairs and ramps that are open underneath and not placed on fill material.**

#### **7:13-7.16 Permit-by-rule 16 – construction of a deck**

**(a) Permit-by-rule 16 authorizes the construction of a deck that is connected to a lawfully existing building, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

**1. The deck, if located in a flood hazard area, is not enclosed with walls either above or below its floor, except for protective or decorative fencing, banisters, or latticework that allow floodwaters to pass freely;**

**2. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**

**3. The project will not result in a net loss of greater than 2,000 square feet of riparian zone vegetation.**

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**7:13-7.17 Permit-by-rule 17 – construction of a dock, pier, or boathouse**

**(a) Permit-by-rule 17 authorizes the construction of a fixed or floating dock, pier, or boathouse in tidal regulated waters and certain impounded fluvial regulated waters, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. Where the dock, pier, or boathouse is situated along a fluvial regulated water, the following requirements are satisfied:**
  - i. The dock, pier, or boathouse is constructed within an impounded regulated water, such as a lake, pond or reservoir, which:**
    - (1) Has a surface area of one acre or more; or**
    - (2) Is situated along a regulated water that has a drainage area of less than one square mile;**
  - ii. The dock, pier, or boathouse covers no more than 2,000 square feet including all decking and pilings; and**
  - iii. The dock, pier, or boathouse does not extend more than 20 percent across the width of the regulated water;**
- 2. Any fixed dock, pier, or boathouse is built on pilings and remains open underneath to allow floodwaters to pass freely;**
- 3. Any stairs or other structures necessary for access to the dock, pier, or boathouse:**
  - i. Remain open underneath to allow floodwaters to pass freely;**
  - ii. Do not require the existing ground elevation to be raised in a fluvial flood hazard area; and**

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- iii. Are oriented to minimize obstruction to flow, such as by being set into the bank; and
4. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 10 feet of the dock, pier, or boathouse where such disturbance is necessary to facilitate its construction.

#### **7:13-7.18 Permit-by-rule 18 – construction of a boat launching ramp**

**(a) Permit-by-rule 18 authorizes the construction of a boat launching ramp, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. The ramp is constructed at or below grade;
2. The ramp has a footprint of no more than 2,000 square feet;
3. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed; and
4. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 10 feet of the ramp, where such disturbance is necessary to facilitate its construction.

#### **7:13-7.19 Permit-by-rule 19 – replacement, renovation, or reconstruction of certain water dependent structures**

**(a) Permit-by-rule 19 authorizes the replacement, renovation, or reconstruction of one or more of the following water dependent structures, provided the conditions at N.J.A.C.**

**7:13-6.7 are met, the timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed, and the structure is not a habitable building:**

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1. Any dock, wharf, pier, or bulkhead that meets the requirements of N.J.A.C. 7:7-2.3(d)6; and
2. Any floating dock, mooring raft, or similar temporary or seasonal improvement or structure that meets the requirements of N.J.A.C. 7:7-2.3(d)7.

**7:13-7.20 Permit-by-rule 20 – construction of a fence**

**(a) Permit-by-rule 20 authorizes the construction of a fence, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. No disturbance is located within 25 feet of any top of bank, unless the fence lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;
2. No trees are cleared, cut, and/or removed in a riparian zone; and
3. Any fence located in a floodway has sufficiently large openings so as not to catch debris during a flood and thereby obstruct floodwaters, such as a barbed-wire, split-rail, or strand fence. A fence with little or no open area, such as a chain link, lattice, or picket fence, does not meet this requirement.

**7:13-7.21 Permit-by-rule 21 – construction of a swimming pool associated with residential use**

**(a) Permit-by-rule 21 authorizes the construction of a swimming pool associated with residential use, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

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- 1. The existing ground elevation is not raised in a floodway;**
- 2. No aboveground pool is constructed in a floodway;**
- 3. For a pool within a fluvial flood hazard area:**
  - i. Any aboveground pool does not displace more than 100 cubic yards of flood storage volume (see N.J.A.C. 7:13-11.4);**
  - ii. Any in-ground pool lies at or below existing grade, except for incidental grading necessary for installation and portions of the pool structure itself that lie aboveground, such as railings and diving boards; and**
  - iii. Any material excavated to construct the pool is removed from the flood hazard area;**
- 4. No disturbance is located within 25 feet of any top of bank, unless the pool lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 5. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas; and**
- 6. The activity will not result in a net loss of greater than 5,000 square feet of riparian zone vegetation.**

**7:13-7.22 Permit-by-rule 22 – construction of a trail and/or boardwalk**

**(a) Permit-by-rule 22 authorizes the creation of a trail and/or boardwalk, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The trail or boardwalk is no more than six feet wide;**

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2. **The existing ground elevation is not raised in any floodway or fluvial flood hazard area. Boardwalk planks may be elevated above the ground, provided that the area underneath remains open to the passage of floodwaters, if constructed in a flood hazard area;**
3. **No disturbance is located within 25 feet of any top of bank, except:**
  - i. **Where necessary to access a footbridge, dock, or pier connected to the trail and/or boardwalk; or**
  - ii. **When the trail and/or boardwalk is located adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
4. **No trees are cleared, cut, and/or removed in a riparian zone; and**
5. **The trail and/or boardwalk will not result in a net loss of greater than one-quarter acre of riparian zone vegetation.**

**7:13-7.23 Permit-by-rule 23 – construction of a footbridge**

**(a) Permit-by-rule 23 authorizes the construction of a footbridge across a regulated water, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The footbridge is no more than eight feet wide and six inches thick;**
2. **Any pinning or anchoring of the footbridge is accomplished without construction in the channel;**
3. **The area above and below the footbridge remain open to the passage of floodwaters;**

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4. **The existing ground elevation is not raised to accommodate or provide access to the footbridge; and**
5. **No trees are cleared, cut, and/or removed in a riparian zone.**

**7:13-7.24 Permit-by-rule 24 – construction of a tank**

**(a) Permit-by-rule 24 authorizes the construction of a tank, either above or below ground, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **Any tank located in a flood hazard area is designed to remain watertight during a flood;**
2. **For any tank situated aboveground:**
  - i. **The tank is not located within a floodway;**
  - ii. **The tank is located within or adjacent to a lawfully existing building; and**
  - iii. **The capacity of the tank does not exceed 2,000 gallons;**
3. **No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
4. **Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas; and**
5. **The cumulative footprint of all tanks, which have been constructed under any authorization or permit under this chapter, does not exceed 5,000 square feet since November 5, 2007.**

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**7:13-7.25 Permit-by-rule 25 – construction of an aboveground athletic and/or recreational structure**

**(a) Permit-by-rule 25 authorizes the construction of one or more aboveground athletic and/or recreational structures, such as a backstop, bleacher, picnic table, or playground equipment, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No buildings are constructed in a flood hazard area;**
- 2. Any structure placed in a floodway is constructed of material that will remain open to the passage of floodwaters;**
- 3. The existing ground elevation is not raised in any floodway or fluvial flood hazard area;**
- 4. The cumulative footprint of all structures described in (a) above, which have been erected under any authorization or permit under this chapter, does not exceed one-quarter acre since November 5, 2007;**
- 5. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas; and**
- 6. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water.**

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**7:13-7.26 Permit-by-rule 26 – placement of artificial turf on an existing athletic field**

**(a) Permit-by-rule 26 authorizes the placement of artificial turf on an existing athletic field, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The existing ground elevation is not raised in any floodway or fluvial flood hazard area;**
- 2. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas; and**
- 3. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water.**

**7:13-7.27 Permit-by-rule 27 – repair, maintenance, and/or dredging of a manmade canal**

**(a) Permit-by-rule 27 authorizes the repair, maintenance, and/or dredging of the channel and/or embankments of a currently serviceable, manmade canal, which passes through a regulated area, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. A public entity having jurisdiction over the canal determines that the proposed repair, maintenance, and/or dredging is necessary for proper operation of the canal;**
- 2. No fill is placed in any floodway or fluvial flood hazard area, except where necessary to restore a failed embankment to its pre-failure condition;**
- 3. No dredge material is placed in a flood hazard area; and**

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- 4. No trees are cleared, cut, and/or removed in a riparian zone outside the canal and its embankment.**

#### **7:13-7.28 Permit-by-rule 28 – filling of an abandoned raceway**

**(a) Permit-by-rule 28 authorizes the filling of an abandoned raceway adjacent to a regulated water, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. For the purposes of this permit-by-rule, a raceway is a conveyance structure that was created to divert water from a channel for the purpose of providing hydrology or hydraulic power before returning the water to the channel;**
- 2. The raceway is blocked at one or both ends so that water from the channel is not able to flow through the raceway under normal flow conditions;**
- 3. The raceway does not supply hydrology to an otherwise isolated freshwater wetlands complex; and**
- 4. The raceway is filled up to, but not above, the surrounding topography and the entire disturbed area is properly graded so as not to interfere with overland drainage.**

#### **7:13-7.29 Permit-by-rule 29 – placement of one to three wind turbines**

**(a) Permit-by-rule 29 authorizes the placement of one to three wind turbines, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. Each wind turbine is less than 200 feet tall, measured from the ground surface to the tip of the blade at its highest position;**

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- 2. The rotor swept area of each wind turbine does not exceed a cumulative area of 2,000 square feet. Rotor swept area means the area of the circle delineated by the tips of the blades of the wind turbine for a horizontal axis wind turbine, and the area determined by multiplying the rotor radius times the rotor height times 3.14 for a vertical axis wind turbine;**
- 3. No wind turbine tower or site disturbance is located in a floodway;**
- 4. No portion of any wind turbine, including blades, tower, and site disturbance, is located within an area mapped as threatened or endangered species habitat on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife (Landscape Maps) except as provided at (a)4i and ii below.**

**Landscape Maps are available on the Department's interactive mapping website at [www.nj.gov/dep/gis](http://www.nj.gov/dep/gis):**

  - i. The wind turbine is located within 120 feet of an existing building on an actively maintained lawn or area of land that has been manipulated by contouring of the soil and/or by intentional planting of flowers, grasses, shrubs, trees, or other ornamental vegetation, which is maintained in such a condition by regular and frequent (at least one time per year) cutting, mowing, pruning, planting, weeding, or mulching; or**
  - ii. The wind turbine is located on a lawfully existing building or on lawfully existing impervious surface;**

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- 5. Where the wind turbine is more than 120 feet tall, measured from the ground surface to the tip of the blade at its highest position, the tower is a freestanding monopole;**
- 6. No lighting is placed on or directed at the wind turbine except for lighting required by the Federal Aviation Administration. Shielded ground level security lighting may be used. Lighting is shielded when it is covered in a way that light rays are not emitted above the horizontal plane of the light;**
- 7. Development under this permit-by-rule does not result in construction of more than three wind turbines on a site, either solely or in conjunction with a previous wind turbine development;**
- 8. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 9. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas;**
- 10. With the exception of guy wires on turbines 120 feet tall or less, all wires or cables that connect the wind turbine to an existing transmission line, are located underground; and**
- 11. The project, in combination with all proposed activities, does not constitute a major development, as defined in the Stormwater Management rules at N.J.A.C. 7:8-1.2.**

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**7:13-7.30 Permit-by-rule 30 – placement of solar panels and associated equipment**

**(a) Permit-by-rule 30 authorizes the placement of solar panels and associated equipment, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No panels and associated equipment are placed in a floodway;**
- 2. The existing ground elevation is not raised in any floodway or fluvial flood hazard area;**
- 3. Except for vertical support poles, all panels, cross-bracing, and other structural components, and all associated equipment are elevated to at least one foot above the flood hazard area design flood elevation. This permit-by-rule does not authorize the placement of solar panels that rely on ballast systems or concrete foundations for support;**
- 4. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**
- 5. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.**

**7:13-7.31 Permit-by-rule 31 – placement of a floating aerator**

**Permit-by-rule 31 authorizes the placement of a floating aerator in an impounded water or naturally occurring lake, pond, or reservoir, provided the conditions at N.J.A.C. 7:13-6.7 are met and no trees are cleared, cut, and/or removed in a riparian zone.**

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**7:13-7.32 Permit-by-rule 32 – construction of an aquatic habitat enhancement device**

**(a) Permit-by-rule 32 authorizes the construction of an aquatic habitat enhancement device, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The device is approved by the U.S. Fish and Wildlife Service and/or the Department's Division of Fish and Wildlife;**
- 2. The device will not cause erosion in the regulated water;**
- 3. The device will not cause any rise in the flood hazard area design flood elevation outside the regulated water;**
- 4. The device will not cause any existing building to be subject to increased flooding during any flood event described in N.J.A.C. 7:13-12.1(i);**
- 5. No more than 2,000 square feet of riparian zone vegetation is cleared, cut, and/or removed; and**
- 6. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed.**

**7:13-7.33 Permit-by-rule 33 – placement of one or more utility poles**

**(a) Permit-by-rule 33 authorizes the placement of one or more utility poles for utility lines, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No disturbance is located within 10 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**

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2. All wires and cables supported by the utility poles are situated at least one foot above the flood hazard area design flood elevation; and
3. No trees are cleared, cut, and/or removed in a riparian zone.

(b) This permit-by-rule does not authorize the placement of monopole towers or open-frame towers.

**7:13-7.34 Permit-by-rule 34 – placement of one or more utility open-frame towers**

(a) Permit-by-rule 34 authorizes the placement of one or more open-frame towers to provide cellular telephone service or to support a utility line, provided the conditions at N.J.A.C. 7:13-6.7 are met and:

1. No tower and associated equipment is located within a floodway;
2. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;
3. The footing of each tower is constructed primarily at or below grade, such that the top of the footing lies no more than 12 inches aboveground;
4. All wires and cables supported by the towers are situated at least one foot above the flood hazard area design flood elevation; and
5. No trees are cleared, cut, and/or removed in a riparian zone.

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**7:13-7.35 Permit-by-rule 35 – placement of one or more utility monopole towers**

**(a) Permit-by-rule 35 authorizes the placement of one or more monopole towers to provide cellular service or to support a utility line, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No tower and associated equipment is located within a floodway;**
- 2. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 3. The diameter of each monopole tower is no greater than five feet;**
- 4. All wires and cables supported by the towers are situated at least one foot above the flood hazard area design flood elevation; and**
- 5. No trees are cleared, cut, and/or removed in a riparian zone.**

**7:13-7.36 Permit-by-rule 36 – placement of an underground utility line using directional drilling or jacking**

**(a) Permit-by-rule 36 authorizes the placement of an underground utility line beneath a regulated water through directional drilling or jacking, provided the conditions at N.J.A.C.**

**7:13-6.7 are met and:**

- 1. The regulated water is not disturbed in any way except for temporary disturbance associated with soil borings necessary to ensure that the project is viable;**
- 2. No trees are cleared, cut, and/or removed in a riparian zone;**

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- 3. All disturbed areas in the flood hazard area are restored to their original topography upon completion of the regulated activity;**
- 4. Where the utility line is drilled or jacked beneath a bridge or culvert, all work is accomplished without displacing or damaging the bridge or culvert;**
- 5. Where the utility line is drilled or jacked beneath an open channel, the top of the line is placed at least four feet below the channel invert and remains nominally horizontal at this depth at least 10 feet beyond the top of each bank;**
- 6. The utility line is sealed to ensure that there will be no leakage or discharge in a regulated area;**
- 7. No manhole is constructed within 10 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 8. The top of any manhole in a floodway is flush with the ground;**
- 9. The top of any manhole in a flood fringe is flush with the ground, where feasible;**  
**and**
- 10. Any manhole in a flood hazard area has a watertight cover.**

**7:13-7.37 Permit-by-rule 37 – placement of an underground utility line beneath existing pavement**

**(a) Permit-by-rule 37 authorizes the placement of an underground utility line beneath existing pavement within a regulated area, such as under an existing parking lot in the**

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**flood hazard area or under an existing roadway that crosses a regulated water, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The regulated water is not disturbed;**
- 2. No riparian zone vegetation is cleared, cut, and/or removed;**
- 3. All disturbed areas in the flood hazard area are restored to pre-construction topography upon completion of the regulated activity;**
- 4. Where the utility line is placed under a roadway, either above or below a culvert or within a bridge, all work is accomplished without displacing or damaging the bridge or culvert;**
- 5. Where the utility line is placed under a roadway, either above or below a culvert, the line is encased within a larger steel pipe, or is placed with at least one foot vertical clearance above or below the culvert;**
- 6. The utility line is sealed to ensure that there will be no leakage or discharge in a regulated area;**
- 7. No manhole is constructed within 10 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 8. Where the utility line runs parallel to a regulated water, the line is not constructed within 10 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 9. The top of any manhole in a floodway is flush with the ground;**

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**10. The top of any manhole in a flood fringe is flush with the ground, where feasible;**

**and**

**11. Any manhole in the flood hazard area has a watertight cover.**

**7:13-7.38 Permit-by-rule 38 – attachment of a utility line to a lawfully existing roadway or railroad that crosses a regulated water**

**(a) Permit-by-rule 38 authorizes the attachment of a utility line to a lawfully existing roadway or railroad that crosses a regulated water, provided the conditions at N.J.A.C.**

**7:13-6.7 are met and:**

- 1. The regulated water is not disturbed;**
- 2. No more than 1,000 square feet of riparian zone vegetation is cleared, cut, and/or removed, and all such vegetation lies within an existing right-of-way that is periodically mowed and/or cleared;**
- 3. All disturbed areas in the flood hazard area are restored to pre-construction topography upon completion of the regulated activity;**
- 4. No part of the utility line, its encasement, or any attachment device extends above the profile of the roadway or railroad or across the opening of any bridge or culvert;**
- 5. The portion of the utility line attached to the roadway or railroad is situated at least one foot above the flood hazard area design flood elevation;**
- 6. Where a predominant direction of flow in the regulated water is discernible, the utility line is attached to the downstream face of the roadway or railroad crossing;**

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7. All work is accomplished without displacing or damaging any bridge or culvert under the roadway or railroad;
8. The utility line is sealed to ensure that there will be no leakage or discharge in a regulated area;
9. No manhole is constructed within 10 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;
10. The top of any manhole in a floodway is flush with the ground;
11. The top of any manhole in a flood fringe is flush with the ground, where feasible;  
and
12. Any manhole in a flood hazard area has a watertight cover.

**7:13-7.39 Permit-by-rule 39 – placement of an underground utility line that does not cross a regulated water**

(a) Permit-by-rule 39 authorizes the placement of an underground utility line that does not cross a regulated water, provided the conditions at N.J.A.C. 7:13-6.7 are met and:

1. All disturbed areas in the flood hazard area are restored to pre-construction topography upon completion of the regulated activity;
2. The utility line is sealed to ensure that there will be no leakage or discharge in a regulated area;
3. The top of any manhole in a floodway is flush with the ground;
4. The top of any manhole in a flood fringe is flush with the ground, where feasible;

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5. Any manhole has a watertight cover in the flood hazard area;
6. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and
7. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.

**7:13-7.40 Permit-by-rule 40 – milling, repaving, and/or resurfacing of a lawfully existing pavement**

**(a) Permit-by-rule 40 authorizes the milling, repaving, and/or resurfacing of a lawfully existing pavement, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. The elevation of the surface of the pavement is not raised in a floodway;
2. The elevation of the surface of the pavement is raised by no more than three inches in any area mapped as a fluvial flood fringe on a Department delineation or within any area mapped by FEMA as a fluvial 100-year floodplain. Multiple milling, repaving, and/or resurfacing is permissible provided the cumulative impact of the activity does not result in raising the pavement by a total of more than three inches;
3. The area of pavement is not expanded; and
4. No riparian zone vegetation is cleared, cut, and/or removed, except for actively disturbed areas within 20 feet of the pavement, where such disturbance is necessary to facilitate milling, repaving, and/or resurfacing.

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**7:13-7.41 Permit-by-rule 41 – placement of a guiderail along a lawfully existing public roadway**

**(a) Permit-by-rule 41 authorizes the placement of a guiderail adjacent to a lawfully existing public roadway, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The installation of the guiderail is required and overseen by the public entity having jurisdiction over the roadway;**
- 2. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within four feet of the guiderail, where such disturbance is necessary to comply with all State or Federal laws, requirements, or guidelines governing the placement, maintenance, and functionality of guiderails; and**
- 3. No trees are cleared, cut, and/or removed in a riparian zone within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water.**

**7:13-7.42 Permit-by-rule 42 – reconstruction of all or part of a lawfully existing bridge superstructure**

**(a) Permit-by-rule 42 authorizes the reconstruction of all or part of a lawfully existing bridge superstructure over a regulated water, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. Any portion of the superstructure to be reconstructed that lies below the flood hazard area design flood elevation is replaced in-kind; and**

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2. **No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the structure, where such disturbance is necessary to facilitate its reconstruction.**

**7:13-7.43 Permit-by-rule 43 – placement of traffic safety structures on poles**

**(a) Permit-by-rule 43 authorizes the placement of one or more traffic safety structures on poles, such as overhead signs, variable message signs, streetlights, traffic signal equipment, and other similar structures intended to facilitate travel safety along a public roadway, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **Any footing necessary to support the structure is constructed primarily at or below grade, such that the top of the footing lies no more than 12 inches above ground;**
2. **No disturbance is located within 10 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**
3. **No riparian zone vegetation is cleared, cut, and/or removed, except for:**
  - i. **Vegetation within 10 feet of the structure, where such disturbance is necessary to facilitate the placement and continued operation of the structure; and**
  - ii. **Disturbance necessary to provide proper line of sight to the structure from the roadway it serves, provided no more than 2,000 square feet riparian zone vegetation is cleared, cut, and/or removed.**

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**7:13-7.44 Permit-by-rule 44 – surveying activities**

**(a) Permit-by-rule 44 authorizes surveying activities, provided the conditions at N.J.A.C.**

**7:13-6.7 are met and:**

- 1. All work is accomplished using hand-held equipment;**
- 2. No trees are cleared, cut, and/or removed in a riparian zone, except for cutting branches or clearing damaged, dying, or dead trees, where such disturbance is necessary to provide an adequate site line; and**
- 3. The width of clearing, cutting, and/or removal of riparian zone vegetation is no more than five feet.**

**7:13-7.45 Permit-by-rule 45 – geotechnical and archeological investigation activities**

**(a) Permit-by-rule 45 authorizes geotechnical and archeological investigation activities, such as conducting survey borings or excavation for the purpose of obtaining information on subsurface conditions, determining the presence or extent of contamination in subsurface soils or groundwater, and/or obtaining seismic information, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No regulated activity is conducted within a regulated water or within 25 feet of any top of bank;**
- 2. No grading or changes in topography occur in a flood hazard area;**
- 3. Each excavated area is no more than three feet in diameter; and**

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4. **No trees are cleared, cut, and/or removed in a riparian zone, except for cutting branches or clearing damaged, dying, or dead trees, where such disturbance is necessary to provide access.**

**7:13-7.46 Permit-by-rule 46 – installation of one or more monitoring wells**

**(a) Permit-by-rule 46 authorizes the installation of one or more monitoring wells, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **No grading or changes in topography occur in a flood hazard area;**
2. **No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within five feet of the well, where such disturbance is necessary to facilitate its installation; and**
3. **No trees are cleared, cut, and/or removed in a riparian zone, except for cutting branches or clearing damaged, dying, or dead trees, where such disturbance is necessary to provide access.**

**7:13-7.47 Permit-by-rule 47 – construction of a gauge, weir, or similar device**

**(a) Permit-by-rule 47 authorizes the construction of a gauge, weir, or other similar device to measure the depth, velocity, and/or rate of flow in a regulated water, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The device is approved by the United States Geological Survey, New Jersey Water Supply Authority, and/or New Jersey Geological Survey;**
2. **The device will not cause erosion in the regulated water;**

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3. The device will not cause any rise in the flood hazard area design flood elevation outside the regulated water;
4. The device will not cause any existing building to be subject to increased flooding during any flood event described in N.J.A.C. 7:13-12.1(i);
5. No more than 2,000 square feet of riparian zone vegetation is cleared, cut, and/or removed; and
6. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed.

**7:13-7.48 Permit-by-rule 48 – temporary storage of unsecured construction material outside a floodway**

(a) Permit-by-rule 48 authorizes the temporary storage of unsecured construction material outside a floodway, which is necessary to facilitate a lawful construction activity, provided the conditions at N.J.A.C. 7:13-6.7 are met and:

1. No hazardous substances are stored on the site;
2. No storage area is located within 25 feet of any top of bank, unless the area lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;
3. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas; and
4. All material is removed from the site and all disturbed areas are restored to pre-storage topography within six months of the placement of the material.

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**7:13-7.49 Permit-by-rule 49 –storage of unsecured material associated with a single-family home or duplex**

**(a) Permit-by-rule 49 authorizes the storage of unsecured material associated with the use or maintenance of a lawfully existing single-family home or duplex, such as lawn and garden equipment and materials, shelters for animals, trash receptacles, toys, vehicles, and wood piles, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No hazardous substances are stored on the site;**
- 2. The unsecured material is of an amount and nature typical for a single-family home or duplex;**
- 3. No unsecured material is located within a floodway unless the material was lawfully situated there prior to November 5, 2007;**
- 4. No unsecured material is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water and/or the material was lawfully situated there prior to November 5, 2007; and**
- 5. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.**

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**7:13-7.50 Permit-by-rule 50 –storage of unsecured material associated with a habitable building or facility, other than a single family home or duplex**

**(a) Permit-by-rule 50 authorizes the storage of unsecured material associated with the use or maintenance of a lawfully existing habitable building or facility, such as dumpsters, vehicles, and equipment, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No hazardous substances are stored unless:
  - i. The storage of hazardous substances is essential to the operation of the building or facility;**
  - ii. The hazardous substances are isolated from potential contact with floodwaters; and**
  - iii. The hazardous substances are stored in accordance with all Federal, State, and local requirements;****
- 2. The unsecured material is of an amount and nature typical for the subject building or facility;**
- 3. No unsecured material is located within a floodway unless the material was lawfully situated there prior to November 5, 2007;**
- 4. No unsecured material is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water and/or the material was lawfully situated there prior to November 5, 2007; and**
- 5. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.**

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**7:13-7.51 Permit-by-rule 51 – storage of unsecured material associated with a facility that stores and distributes material**

**(a) Permit-by-rule 51 authorizes the storage of unsecured material necessary for the operation of a lawfully existing facility, the primary function of which is to store and distribute material, such as a gravel pit, junk yard, landscaping business, lumber yard, vehicle dealership, rental facility, or impoundment area, provided the conditions at**

**N.J.A.C. 7:13-6.7 are met and:**

- 1. No hazardous substances are stored unless:
  - i. The storage of hazardous substances is essential to the operation of the facility;**
  - ii. The hazardous substances are isolated from potential contact with floodwaters;**  
**and**
  - iii. The hazardous substances are stored in accordance with all Federal, State, and local requirements;****
- 2. The facility was established prior to November 5, 2007;**
- 3. The facility has been in continuous operation since November 5, 2007;**
- 4. The size of the facility and the peak volume of material stored in the flood hazard area have not increased since November 5, 2007;**
- 5. The footprint of the material stored within the riparian zone is not increased; and**
- 6. No trees are cleared, cut, and/or removed in a riparian zone.**

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**7:13-7.52 Permit-by-rule 52 – placement, storage, or processing of hazardous substances**

**(a) Permit-by-rule 52 authorizes the placement, storage, or processing of hazardous substances at a lawfully existing facility, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The facility was established prior to November 5, 2007;**
- 2. The facility has been in continuous operation since November 5, 2007;**
- 3. The facility is operating in compliance with all Federal, State, and local requirements;**
- 4. The size of the facility and the peak volume of hazardous substances in the flood hazard area have not increased since November 5, 2007;**
- 5. The footprint of the area in which the hazardous substances is stored within the riparian zone is not increased; and**
- 6. No trees are cleared, cut, and/or removed in a riparian zone.**

**7:13-7.53 Permit-by-rule 53 – placement, storage, or processing solid waste or recyclable materials at a lawfully existing facility**

**(a) Permit-by-rule 53 authorizes the placement, storage, or processing of solid waste or recyclable materials at a lawfully existing facility, such as a composting facility, landfill, or recycling center, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The facility was established prior to November 5, 2007;**
- 2. The facility has been in continuous operation since November 5, 2007;**

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3. **The facility is operating in compliance with all Federal, State, and local requirements;**
4. **The size of the facility and the peak volume of solid waste and/or recyclable materials in the flood hazard area have not increased since November 5, 2007;**
5. **The footprint of the area in which the solid waste and/or recyclable materials is stored within the riparian zone is not increased; and**
6. **No trees are cleared, cut, and/or removed in a riparian zone.**

**7:13-7.54 Permit-by-rule 54 – continuation of lawfully existing agricultural activities**

**Permit-by-rule 54 authorizes the continuation of lawfully existing agricultural activities, such as grazing, harvesting, horticulture, irrigation, planting, tilling, viticulture, and watering, on land that is actively farmed, provided the conditions at N.J.A.C. 7:13-6.7 are met and the activities do not result in the displacement of flood storage volume or the construction of an aboveground structure within a flood hazard area.**

**7:13-7.55 Permit-by-rule 55 – commencement of new agricultural activities**

**(a) Permit-by-rule 55 authorizes the commencement of new agricultural activities, such as grazing, harvesting, horticulture, irrigation, planting, tilling, viticulture, and watering, on land that is not actively farmed, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The existing ground elevation is not raised in any floodway;**
2. **The activities do not result in the displacement of flood storage volume or the construction of an aboveground structure within a flood hazard area; and**

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- 3. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.**

**7:13-7.56 Permit-by-rule 56 – continuation or commencement of natural resource conservation practices associated with agricultural activities**

**(a) Permit-by-rule 56 authorizes the continuation or commencement of natural resource conservation practices associated with agricultural activities, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The activities are approved by the USDA Natural Resource Conservation Service and/or local Soil Conservation District, as appropriate;**
- 2. The existing ground elevation is not raised in any floodway;**
- 3. The activities do not result in the displacement of flood storage volume or the construction of an aboveground structure within a flood hazard area; and**
- 4. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.**

**7:13-7.57 Permit-by-rule 57 – construction of a non-habitable building for agricultural purposes**

**(a) Permit-by-rule 57 authorizes the construction of a non-habitable building for agricultural purposes, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The footprint of the building is no more than 2,000 square feet;**
- 2. The building is located outside any floodway;**

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3. **No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**
4. **Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.**

**7:13-7.58 Permit-by-rule 58 – filling or modification of a manmade regulated water for freshwater wetlands restoration**

**(a) Permit-by-rule 58 authorizes the filling or modification of a manmade regulated water for the purpose of freshwater wetlands restoration, provided the conditions at N.J.A.C.**

**7:13-6.7 are met and:**

1. **All work is approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local Soil Conservation District, as appropriate;**
2. **The filling of the regulated water will not adversely affect overland drainage or flooding on adjoining properties; and**
3. **Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.**

**7:13-7.59 Permit-by-rule 59 – creation of a ford across a regulated water to manage livestock**

**(a) Permit-by-rule 59 authorizes the creation of a ford across a regulated water to manage**

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**livestock on actively farmed land, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. All work is approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local Soil Conservation District, as appropriate;**
- 2. Livestock cross the regulated water on a regular basis prior to creation of the ford under this permit;**
- 3. The creation of a stable ford will reduce ongoing damage to the regulated water caused by the existing access to the regulated water by livestock;**
- 4. The ford is situated at or below the existing bed so that the ford will not obstruct flow;**
- 5. The ford is designed to remain stable during the flood hazard area design flood;**
- 6. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed; and**
- 7. No more than 2,000 square feet of riparian zone vegetation is cleared, cut, and/or removed.**

**7:13-7.60 Permit-by-rule 60 – construction of a fence along and/or across a regulated water to manage livestock**

**(a) Permit-by-rule 60 authorizes the construction of a fence along and/or across a regulated water on actively farmed land, in order to limit or manage livestock access to a regulated water and/or to prevent livestock or other animals from accessing certain areas, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. All work is approved by and performed under the supervision of the USDA**

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**Natural Resource Conservation Service and/or local Soil Conservation District;**

- 2. Any fence crossing or situated within a regulated water, or located in a floodway, has sufficiently large openings so as not to catch debris during a flood and thereby obstruct floodwaters, such as a barbed-wire, split-rail, or strand fence. A fence with little or no open area, such as a chain link, lattice, or picket fence, does not meet this requirement.**
- 3. No trees are cleared, cut, and/or removed in a riparian zone, except where necessary to accommodate the placement of a fence across a regulated water;**
- 4. Except in the immediate vicinity of any fence crossing a regulated water, the fence is placed generally parallel to the regulated water; and**
- 5. No more than 2,000 square feet of riparian zone vegetation is cleared, cut, and/or removed.**

**7:13-7.61 Permit-by-rule 61 – construction of a pump and/or water intake structure in or along a regulated water for livestock**

**(a) Permit-by-rule 61 authorizes the construction of a pump and/or water intake structure in or along a regulated water on actively farmed land, in order to provide water for livestock outside the regulated water (and thereby limit livestock access to the regulated water), provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. All work is approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local Soil Conservation District, as appropriate;**

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- 2. Fill within the flood hazard area is the minimum necessary to successfully implement the project;**
- 3. The pump or structure will not impede bank-full flow in the regulated water; and**
- 4. No more than 1,000 square feet of riparian zone vegetation is cleared, cut, and/or removed.**

**7:13-7.62 Permit-by-rule 62 – construction of a manure management structure for livestock or horses**

**(a) Permit-by-rule 62 authorizes the construction of a manure management structure for livestock or horses, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. All work is approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local Soil Conservation District;**
- 2. The footprint of the structure is no more than 1,000 square feet;**
- 3. The structure is situated as far from any regulated water as feasible;**
- 4. Where it is not feasible to locate the structure outside a floodway, the structure is oriented to minimize obstruction to flow;**
- 5. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**
- 6. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas.**

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**7:13-7.63 Permit-by-rule 63 – forest management activities**

**(a) Permit-by-rule 63 authorizes the forest management activities identified at (b) below, provided they are conducted in accordance with a forest management plan that has been approved by the New Jersey State Forester or designee before the activities are undertaken. Information and guidance related to forest management activities in flood hazard areas and riparian zones are provided in the document entitled, “New Jersey Forestry and Wetlands Best Management Practices Manual,” dated October 1995, which is available at [www.state.nj.us/dep/parksandforests/forest/nj\\_bmp\\_manual1995.pdf](http://www.state.nj.us/dep/parksandforests/forest/nj_bmp_manual1995.pdf).**

**(b) This permit-by-rule authorizes the following forest management activities, provided the conditions at N.J.A.C. 7:13-6.7 are met:**

- 1. Silvicultural prescriptions, including planting trees and other vegetation, provided no grading or changes in topography occur in a fluvial flood hazard area;**
- 2. Harvest of trees and other vegetation cultivated as forest products, provided:**
  - i. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to the area specified in the forest management plan; and**
  - ii. Regeneration of the harvested area with vegetation, which is determined by the State Forester to be of equal or greater ecological function and value as the vegetation that was cleared, cut, and/or removed, is accomplished through replanting, natural regeneration, or a combination thereof;**
- 3. Construction and maintenance of a fence to exclude deer and/or control other unwanted intrusions, provided:**

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- i. The fence is not constructed within any channel; and**
  - ii. Any fence located in a floodway has sufficiently large openings so as not to catch debris during a flood and thereby obstruct floodwaters, such as a barbed-wire, split-rail, or strand fence. A fence with little or no open area, such as a chain link, lattice, or picket fence, does not meet this requirement; and**
- 4. Construction and maintenance of a temporary forest road, provided:**
  - i. The sole purpose of the road is to support or provide access for forestry activities;**
  - ii. The road is no greater than 14 feet wide;**
  - iii. No grading or changes in topography occur in a fluvial flood hazard area, except where unavoidable to accommodate the installation of a crossing of a regulated water. In such a case, grading and changes in topography shall be the minimum necessary to install the crossing;**
  - iv. Any clearing, cutting, and/or removal of riparian zone vegetation and disturbance to channels is kept to the minimum necessary to successfully implement the project;**
  - v. Temporary mats are used where feasible to minimize potential erosion and adverse impacts to riparian zone vegetation; and**
  - vi. Any crossing of a regulated water is:**
    - (1) Located as far downstream of the upstream property boundary of the site as feasible;**



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and G. L. Zimmermann, dated 2000, which is available from the Department at:

[www.nj.gov/dep/parksandforests/forest/njfs\\_awc\\_bmps.html](http://www.nj.gov/dep/parksandforests/forest/njfs_awc_bmps.html), unless the State

Forester provides written approval authorizing modification of a practice in the manual where necessary to ensure the success of a given project;

2. **Regeneration, where either of the following conditions creates the need for salvage and regrowth of trees and other vegetation, and the site would likely not naturally reestablish a healthy native ecosystem and therefore requires human intervention for proper and timely regeneration:**
  - i. **A forest stand is in decline or fragmenting; or**
  - ii. **Trees and other vegetation have been damaged by wildfire, storms, flooding, beaver activity, or other damage-causing factors; or**
3. **Sanitation, suppression, or salvage, where trees have experienced insect damage, disease outbreaks and/or death from drought or other conditions. This includes a situation where immediate suppression is necessary to remove the infested and/or infected host species, as well as the trees and vegetation in a surrounding buffer area, to prevent the adverse spread of the damage causing agent and reduce the corresponding potential future mortality in adjacent forest.**

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## **SUBCHAPTER 8. GENERAL PERMITS-BY-CERTIFICATION**

**7:13-8.1 General permit-by-certification 1 - removal of accumulated sediment and debris from a regulated water for agricultural purposes**

**(a) General permit-by-certification 1 authorizes the removal of accumulated sediment and debris from a regulated water on land that is actively farmed, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The activities are intended solely for agricultural purposes;**
- 2. The activities are approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local Soil Conservation District;**
- 3. All machinery is situated outside the regulated water, except for handheld equipment such as hydraulic pumps. Heavy machinery such as backhoes may be used to reach into the regulated water to remove material, but cannot be driven into or otherwise operated within in the regulated water;**
- 4. The material to be removed consists solely of accumulated sediment and debris and does not alter the natural bed and banks of the regulated water;**
- 5. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed;**
- 6. No riparian zone vegetation is cleared, cut, and/or removed, unless such disturbance is unavoidable, necessary to gain access to the regulated water, and minimized;**
- 7. No trees are cleared, cut, and/or removed in a riparian zone;**

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8. **The project is conducted from only one bank, and the existing tree canopy on the more southerly or westerly bank is preserved in order to shade the regulated water; and**
9. **All material removed from a regulated water is disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local requirements.**

**7:13-8.2 General permit-by-certification 2 – construction of an agricultural roadway crossing**

**(a) General permit-by-certification 2 authorizes the construction of a roadway across a regulated water on land that is actively farmed, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The activities are intended solely for agricultural purposes;**
2. **The activities are approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local Soil Conservation District, as appropriate;**
3. **Disturbance within the regulated water is minimized;**
4. **Where the crossing is accomplished with a culvert, the culvert is stabilized with headwalls that have footings which extend at least three feet below grade, and which will prevent the culvert from displacement during the flood hazard area design flood;**

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5. Where the crossing is accomplished with a bridge, the bridge is constructed with abutments that have footings which extend at least three feet below grade, and which will prevent the bridge from displacement during the flood hazard area design flood;
6. The proposed roadway surface and all embankments are designed to remain stable during the flood hazard area design flood;
7. The applicant obtains an engineering certification confirming that the proposed roadway crossing will not increase flooding offsite;
8. The width of disturbance for the construction of the roadway through the riparian zone is no more than 25 feet; and
9. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed.

**7:13-8.3 General permit-by-certification 3 - agricultural bank stabilization and/or bank restoration activities**

**(a) General permit-by-certification 3 authorizes bank stabilization and/or bank restoration activities along a regulated water on land that is actively farmed, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. The activities are intended solely for agricultural purposes;
2. The activities are approved by and performed under the supervision of the USDA Natural Resource Conservation Service and/or local Soil Conservation District, as appropriate;

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3. **Where feasible, the project is accomplished by cutting back the bank to a stable slope and planting with native, non-invasive plant species suitable for stabilization. Generally a slope of no greater than 50 percent (a ratio of two horizontal to one vertical) is recommended to stabilize an eroded bank. Where vegetation alone cannot feasibly stabilize erosion, or would require greater than 2,000 square feet of trees to be cleared, cut, and/or removed, soil bioengineering shall be used to stabilize the erosion. In no case shall greater than 2,000 square feet of trees be cleared, cut, and/or removed;**
4. **The cross-sectional area of the regulated water is not significantly altered;**
5. **The applicant obtains an engineering certification confirming that the activity will not obstruct flow in the regulated water or floodway;**
6. **Clearing, cutting, and/or removal of riparian zone vegetation is the minimum necessary to successfully implement the project; and**
7. **The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed.**

**7:13-8.4 General permit-by-certification 4 - enhancement of a riparian zone through the planting of native, non-invasive plant species**

**(a) General permit-by-certification 4 authorizes the enhancement of a riparian zone through the planting of native, non-invasive plant species, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The riparian zone to be enhanced consists of an actively disturbed area, an area of predominantly non-native vegetation, and/or an area of invasive plant species;**

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2. **The applicant obtains an engineering certification confirming that the existing ground elevation is not being raised in any floodway or fluvial flood hazard area;**
3. **No activities are conducted in a channel;**
4. **No trees are cleared, cut, and/or removed within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
5. **No trees are cleared, cut, and/or removed within the riparian zone of a Pinelands water, Category One water, or trout production water;**
6. **The plant community habitat type is not adversely altered. For example, invasive shrubs must be replaced with native shrubs or trees; and**
7. **No more than one-quarter acre of riparian zone vegetation is cleared, cut, and/or removed.**

**7:13-8.5 General permit-by-certification 5 - reconstruction, relocation, expansion, and/or elevation of a building outside a floodway**

**(a) General permit-by-certification 5 authorizes the reconstruction, relocation, expansion, and/or elevation of a lawfully existing building located outside a floodway, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The flood hazard area elevation for the site has been determined by a Department delineation or FEMA flood mapping, under Methods 1, 2, or 3 (at N.J.A.C. 7:13-3.3, 3.4(d), and 3.4(e), respectively);**
2. **The building is not located in a floodway;**

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- 3. The applicant obtains an engineering certification confirming that the building is not being expanded within or relocated into a floodway;**
- 4. The footprint of the building has not increased by more than 750 square feet, cumulatively, since November 5, 2007;**
- 5. The applicant obtains an engineering certification confirming that the lowest floor of the building is being reconstructed or elevated to at least one foot above the flood hazard area design flood elevation;**
- 6. Any new enclosure below the lowest floor of the building is not used for habitation, remains open to floodwaters, and is constructed in accordance with N.J.A.C. 7:13-12.5(p);**
- 7. Any existing enclosure below the lowest floor of the building, which does not conform to the requirements of N.J.A.C. 7:13-12.5(p), such as a basement having a floor that is below grade along all adjoining exterior walls, is abandoned, filled-in, and/or otherwise modified to conform with the requirements of N.J.A.C. 7:13-12.5;**
- 8. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 9. Any building to be relocated is either moved outside a riparian zone or located within an actively disturbed area; and**
- 10. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the building, where such disturbance is necessary to access the building and facilitate its reconstruction, relocation, expansion, and/or elevation.**

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**7:13-8.6 General permit-by-certification 6 - construction of one single-family home or duplex in a tidal flood hazard area**

**(a) General permit-by-certification 6 authorizes the construction of one single-family home or duplex in a tidal flood hazard area, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The applicant obtains an engineering certification confirming that no fill or structures are being placed within a floodway;**
- 2. The single-family home or duplex is not being constructed as part of a residential subdivision or multi-unit development;**
- 3. The lot on which the single-family home or duplex is being constructed was not created or subdivided after November 5, 2007;**
- 4. The applicant obtains an engineering certification confirming that the lowest floor of the single-family home or duplex is being constructed at least one foot above the flood hazard area design flood elevation;**
- 5. Any enclosure below the lowest floor of the single-family home or duplex is not used for habitation, remains open to floodwaters, and is constructed in accordance with N.J.A.C. 7:13-12.5(p);**
- 6. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 7. No more than 7,000 square feet of riparian zone vegetation is cleared, cut, and/or**

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**removed; and**

- 8. Where the project, in combination with all proposed activities, constitutes a major development, as defined at N.J.A.C. 7:8-1.2, the applicant obtains an engineering certification confirming that all applicable requirements of the Stormwater Management rules, N.J.A.C. 7:8, are met.**

**7:13-8.7 General permit-by-certification 7 - removal of accumulated sediment and debris from an engineered channel**

**(a) General permit-by-certification 7 authorizes the use of machinery to remove accumulated sediment and debris from an engineered channel. For the purposes of this general permit-by-certification, an engineered channel is a channel that is fully lined with concrete or other armoring and/or which has been constructed, altered, or otherwise manipulated as part of a flood control project. The use of machinery to remove accumulated sediment and debris from an engineered channel is authorized provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. Where work is proposed along a trout production or trout maintenance waters, the timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed;**
- 2. No riparian zone vegetation is cleared, cut, and/or removed, unless such disturbance is unavoidable, necessary to gain access to the regulated water and minimized;**
- 3. No trees are cleared, cut, and/or removed in a riparian zone;**
- 4. The material removed consists solely of accumulated sediment and/or debris; and**

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- 5. All material removed is disposed of outside of any regulated area and in accordance with all applicable Federal, State and local requirements.**

**7:13-8.8 General permit-by-certification 8 - construction of an addition to a lawfully existing building**

**(a) General permit-by-certification 8 authorizes the construction of an addition to a lawfully existing building, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The applicant obtains an engineering certification confirming that the addition is not being located within a floodway;**
- 2. The footprint of the existing building has not increased by more than 750 square feet, cumulatively, since November 5, 2007;**
- 3. The applicant obtains an engineering certification confirming that the lowest floor of the addition is constructed at least one foot above the flood hazard area design flood elevation;**
- 4. The construction of the addition, in combination with all other proposed improvements, does not result in a substantial improvement to the building;**
- 5. Any enclosure below the lowest floor of the addition is not used for habitation, remains open to floodwaters, and is constructed in accordance with N.J.A.C. 7:13-12.5(p);**
- 6. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**

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7. **No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the building, where such disturbance is necessary to access the building and facilitate the construction of an addition.**

**7:13-8.9 General permit-by-certification 9 - sediment and debris removal within and/or adjacent to a bridge, culvert, or outfall by a public entity**

**(a) General permit-by-certification 9 authorizes a public entity to use machinery to remove accumulated sediment and debris from a regulated water, within and/or adjacent to a lawfully existing bridge, culvert, or stormwater discharge pipe, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **All machinery is situated outside the regulated water, except for handheld equipment such as hydraulic pumps. Heavy machinery such as backhoes may be used to reach into the regulated water to remove material, but cannot be driven or otherwise placed in the regulated water;**
2. **The sediment and debris removal is necessary to maintain positive flow through the structure and/or regulated water;**
3. **The material to be removed consists solely of accumulated sediment and debris and does not alter the natural bed and banks of the regulated water;**
4. **Work is limited to within 100 feet of the structure;**
5. **All work is performed by, or under the supervision of, a public entity;**
6. **All work is performed with the full consent of the owner of any property upon which the project is undertaken;**

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7. **No riparian zone vegetation is cleared, cut, and/or removed, unless such disturbance is unavoidable, necessary to gain access to the regulated water, and minimized;**
8. **No trees are cleared, cut, and/or removed in a riparian zone;**
9. **The project is conducted from only one bank, and the existing tree canopy on the more southerly or westerly bank is preserved in order to shade the regulated water;**
10. **Where work is proposed along a trout production or trout maintenance waters, the timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed; and**
11. **All material removed is disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local requirements.**

**7:13-8.10 General permit-by-certification 10 - in-kind replacement of a culvert**

**(a) General permit-by-certification 10 authorizes the in-kind replacement of a culvert along a regulated water, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The culvert being replaced was not removed more than one year prior to replacement;**
2. **The channel is not scoured, incised, or otherwise situated such that the invert of the culvert being replaced lies more than six inches above the invert of the regulated water;**
3. **The applicant obtains an engineering certification confirming that:**

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- i. The replacement culvert is made of the same material as the existing culvert, unless the width or diameter of the culvert is no more than two feet or the length of the culvert is no more than 20 feet;**
  - ii. The replacement culvert has the same wingwall configuration as the existing culvert; and**
  - iii. The elevation of the crown of the roadway profile above the culvert and the dimensions of any parapets are not being altered within the flood hazard area;**
- 4. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the culvert, where such disturbance is necessary to facilitate its replacement; and**
- 5. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed.**

**7:13-8.11 General permit-by-certification 11 – maintenance of existing manmade stormwater management structures and conveyances**

**(a) General permit-by-certification 11 authorizes the maintenance of one or more lawfully existing manmade stormwater management structures and conveyances, such as a pipe, culvert, ditch, channel, or basin, not including natural channels that were previously modified, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. All work occurs within and is necessary for the maintenance of the stormwater management structure or conveyance;**
- 2. The existing stormwater management system is not expanded, enlarged, or otherwise modified to receive additional sources of stormwater runoff or include**

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**additional discharge points;**

- 3. The activities are limited to one or more of the following:**
  - i. The removal of accumulated sediment, debris, or nuisance vegetation;**
  - ii. The stabilization of an eroded structure; or**
  - iii. The repair and/or in-kind replacement of one or more of the following:**
    - (1) A culvert along a manmade channel;**
    - (2) A stormwater pipe, manhole, inlet, or catch basin;**
    - (3) A headwall, discharge structure, or associated conduit outlet protection;**
    - (4) A tidegate, levee, or pump station along a regulated water that is separated from tidal influence by these structures; or**
    - (5) A stormwater management basin constructed for a purpose other than to satisfy a mitigation requirement under N.J.A.C. 7:7A;**
- 4. The applicant obtains an engineering certification confirming that the activities will not increase the frequency or depth of flooding during any flood event up to and including the flood hazard area design flood, either upstream or downstream of the site;**
- 5. No riparian zone vegetation is cleared, cut, and/or removed outside the structure or conveyance feature, unless such disturbance is unavoidable, necessary to gain access to the structure or conveyance feature and minimized; and**
- 6. No trees are cleared, cut, and/or removed in a riparian zone outside the structure or conveyance feature.**

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**7:13-8.12 General permit-by-certification 12 - surveying and geotechnical and archeological investigation activities**

**(a) General permit-by-certification 12 authorizes surveying and geotechnical and archaeological investigation activities, such as creating survey lines, survey borings, or excavation for the purpose of obtaining information on subsurface conditions, determining the presence or extent of contamination in subsurface soils or groundwater, and/or obtaining seismic information, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. No regulated activity is conducted within a regulated water;**
- 2. No grading or changes in topography occur in a flood hazard area;**
- 3. Clearing, cutting, and/or removal of riparian zone vegetation is the minimum necessary to obtain the desired information and, where possible, is limited to actively disturbed areas; and**
- 4. Where a pathway through riparian zone vegetation is necessary to accomplish the activities, it is limited to no greater than 10 feet in width.**

**7:13-8.13 General permit-by-certification 13 - placement of solar panels**

**(a) General permit-by-certification 13 authorizes the placement of solar panels and associated equipment, including poles, support structures, inverter pads, and electrical apparatus, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The applicant obtains an engineering certification confirming that:**
  - i. No panels or associated equipment are being placed in a floodway;**





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**water monitoring device is:**

- i. Constructed outside the channel;**
- ii. Constructed outside the floodway, where possible;**
- iii. Oriented to minimize obstruction to flow; and**
- iv. No larger than 100 square feet in area.**

### **7:13-8.15 General permit-by-certification 15 - in-kind replacement of public infrastructure**

**(a) General permit-by-certification 15 authorizes the in-kind replacement of public infrastructure, which has been damaged by flooding or other severe weather event that resulted in the Governor of New Jersey declaring a State of Emergency or FEMA declaring a major disaster in New Jersey and applies only to those counties and municipalities included in such a declaration. This general permit-by-certification authorizes the in-kind replacement of public infrastructure where a public entity has determined that immediate action is warranted to protect public health, safety, welfare, or the environment. For the purposes of this general permit-by-certification, public infrastructure means any roadway, railroad, bridge, culvert, storm sewer system, utility, and associated structure that are maintained by a public entity.**

**(b) In addition to satisfying the requirements applicable to all general permits-by-certification at N.J.A.C. 7:13-6.7, the applicant shall obtain an engineering certification confirming that any in-kind replacement of public infrastructure complies with all applicable design and construction standards of N.J.A.C. 7:13-10, 11, and 12, except for timing restrictions pursuant to N.J.A.C. 7:13-11.5(d).**

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**(c) All regulated activities authorized under this general permit-by-certification shall:**

- 1. Commence within 180 calendar days of the date the State of Emergency or FEMA disaster declaration was announced; and**
- 2. Be completed within 180 calendar days of the date that the permittee submitted the required certifications resulting in authorization under general permit-by-certification 15.**

**(d) Within 30 calendar days of the completion of regulated activities authorized under this general permit-by-certification, the permittee shall provide to the Department a written statement that includes:**

- 1. A detailed description of all regulated activities conducted;**
- 2. An engineering certification confirming that the requirements of (a), (b), and (c) above have been met; and**
- 3. Site plans, photographs, mapping, or other information necessary to demonstrate that the regulated activity complies with the requirements of this general permit-by-certification.**

#### **SUBCHAPTER 9. [INDIVIDUAL] 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:**

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- 1. The project's sole purpose is to remove obstructions to flow or desnag a channel;**
- 2. The project is necessary and in the public interest;**
- 3. The project consists solely of either:**
  - i. The removal of accumulated silt, sediment, debris, and/or garbage from a channel with a natural bed and does not alter the natural bed or banks of the channel; or**
  - ii. The removal of any accumulated material from a channel previously lined with concrete or similar artificial material;**
- 4. The project does not disturb the channel bank or result in any clearing, cutting, and/or removal of riparian zone vegetation, unless such disturbance is unavoidable, necessary to gain access to the channel, and minimized;**
- 5. 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 regulated water;**
- 6. The use of heavy equipment in the channel is avoided; and**
- 7. If the project involves sediment removal from a channel with a natural bed, the following requirements are satisfied:**
  - i. The channel reach is less than 500 feet in length;**
  - ii. The average width of the channel bed does not exceed 15 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;**

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- 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.**

**(b) All materials, including dredged material, removed from a channel during activities authorized under this general permit shall be placed outside of any regulated area and also any freshwater wetlands, transition areas, and State open waters, as those terms are defined in the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.4, unless it is demonstrated that this would cause more environmental harm or flooding risk than the placement of the material in these areas. For example, if removal of dredged material requires construction of a long temporary roadway through a wetlands with a very high water table to enable trucks to transport the dredged material offsite, this may cause more environmental harm than spreading the dredged material thinly over a large area.**

**(c) 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. 7:13-11.1(c).**

**(d) An application for authorization under this general permit shall be submitted to the Department by mail at the address set forth at N.J.A.C. 7:13-1.3, and shall include the following (photocopies of maps and documents are acceptable):**

- 1. A completed application form as described at N.J.A.C. 7:13-18.4(a)1 and available from the Department at the address set forth at N.J.A.C. 7:13-1.3;**
- 2. One set of site plans prepared by an engineer, which clearly depict the segments of channel to be cleaned;**

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3. **The location of the affected portion of the channel or stream, including the county and municipality, and the block(s) and lot(s);**
  4. **One copy of a USGS quad map showing the affected portion of the stream;**
  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;**
  6. **The classification, under the Department's Surface Water Quality Standards, N.J.A.C. 7:9B, for the affected portion of the channel or stream;**
  7. **A description of the nature of the project and the methods that will be used;**
  8. **A description of the proposed methods that will be used to remove material from the channel or stream and the location where the dredged material will be placed;**  
**and**
  9. **A certification, signed by the county or municipal engineer, or an engineer employed by the local Soil Conservation District, that lists each requirement in (a) above that applies to the project, and states how the requirement has been or will be satisfied.**
- (e) **The application review procedures for authorization under this general permit are set forth at N.J.A.C. 7:13-21. No application fee or public notice of the application are required for an authorization under this general permit.**
- (f) **Within 15 calendar days after the completion of a project under this general permit that involves the removal of sediment, the permittee shall submit to the Department:**
1. **A written notice that the project has been completed; and**

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2. **A certification, signed by the county or municipal engineer, or an engineer employed by the local Soil Conservation District, that lists each requirement in (a) above that applies to the project, and states how the requirement has been satisfied.**

**7:13-9.2 General permit 2 - mosquito control water management activities**

**(a) General permit 2 authorizes activities in flood hazard areas and riparian zones necessary for mosquito control water management activities conducted by a county mosquito control agency or a Federal agency on Federal land. Mosquito control water management activities authorized under this general permit include:**

1. **Removal of accumulated silt, sediment, and debris from any water;**
2. **Creation of ditches and channels where appropriate for mosquito control; and**
3. **Improvements to flow in manmade waters, such as the excavation of an existing manmade ditch or channel to provide positive drainage.**

**(b) Mosquito control water management activities described at (a) above are acceptable provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **The activities are necessary to control a documented mosquito problem, as determined by the State Office of Mosquito Control Coordination;**
2. **The material to be removed from the regulated water consists solely of accumulated silt, sediment, and debris and does not alter the natural bed and banks of the regulated water;**
3. **In order to minimize the downstream transport of sediment during dredging, all**

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**areas to be dredged must be isolated from flowing water, where possible, through:**

- i. Erecting temporary berms or sheet-piles around the areas to be dredged and pumping the flow within the regulated water around the work area; or**
  - ii. If flow is low, by blocking off sections of the regulated water being dredged and allowing the sediment to settle;**
- 4. All material removed from the regulated water is placed in accordance with the following:**
- i. Sediment removed can be placed in a regulated area provided the requirements at N.J.A.C. 7:13-12.15(f) are satisfied; and**
  - ii. All trash and debris removed must be placed outside any flood hazard area or riparian zone and in accordance with all applicable Federal, State, and local requirements;**
- 5. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed;**
- 6. The project does not disturb the channel bank or result in any clearing, cutting, and/or removal of riparian zone vegetation, unless such disturbance is unavoidable, necessary to gain access to the regulated water, and minimized;**
- 7. 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 regulated water;**
- 8. The use of heavy equipment in the regulated water is avoided unless it is demonstrated that there is no feasible alternative that would result in less environmental damage; and**

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**9. Access points to each regulated water are:**

- i. Identified; and**
- ii. Limited to actively disturbed areas, where possible.**

**(c) The Department shall not authorize activities under this general permit more frequently than once every five years for a particular site.**

**7:13-9.3 General permit 3 - scour protection activities at bridges and culverts**

**(a) General permit 3 authorizes scour protection activities at one or more existing bridges or culverts, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The activities are necessary for the maintenance and/or protection of an existing bridge or culvert;**
- 2. The activities are intended to remedy a scour problem within or adjacent to a bridge or culvert and not to remedy large sections of severely eroded or unstable channel;**
- 3. The applicant provides an engineering certification confirming that:**
  - i. The amount of stabilizing material to be placed in the channel is no greater than necessary to protect the structure from failure or collapse due to undermining of abutments or piers. In general, the channel velocity used to determine the necessary amount of stabilizing material shall be based on bank full flow, unless otherwise required by the U.S. Federal Highway Administration; and**
  - ii. The stabilizing material does not obstruct flow in the channel or floodway or**

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**cause flooding outside the channel to increase;**

- 4. The stabilizing material consists of native substrate, or is buried beneath at least two feet of native substrate, where placement of the native substrate is feasible and effective in stabilizing the channel and protecting aquatic habitat under expected flood conditions;**
- 5. The activities do not disturb the channel bank or the riparian zone, unless such disturbance is unavoidable, necessary to gain access to the channel, and minimized. If access to the channel results in topographic changes to the bank, such as ruts from trucks or other machinery, the grade of the bank shall be restored to its pre-construction topography;**
- 6. 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 regulated water; and**
- 7. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed.**

**7:13-9.4 General permit 4 - creation, restoration, and enhancement of habitat and water quality values and functions**

**(a) General permit 4 authorizes regulated activities necessary to implement a plan for the creation, restoration, or enhancement of habitat and water quality functions and values in a regulated area. Activities authorized under this general permit include, but are not limited to:**

- 1. Altering hydrology to create, restore, or enhance wetlands, such as by blocking,**

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**removing, or disabling a manmade drainage ditch or other drainage structure such as a tile, culvert, or pipe;**

**2. Breaching a structure such as a dike, berm, or low dam in order to allow water into an area. Breaching or removing a dam is not regulated under this chapter, pursuant to N.J.A.C. 7:13-12.11;**

**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**

**5. Removing, planting, cutting, burning, or otherwise managing vegetation in order to increase habitat diversity or control nuisance flora.**

**(b) Creation, restoration, and enhancement activities are eligible for authorization under this general permit, provided the conditions at N.J.A.C. 7:13-6.7 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 U.S. Fish and Wildlife Service;**

**(4) The USDA Natural Resources Conservation Service;**



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**activity is habitat creation, restoration, or enhancement of habitat and water quality values and functions is a primary goal of the project. For example, this general permit does not authorize construction of a detention basin for stormwater management or a flood control project that may also incidentally result in water quality benefits or the creation, restoration, or enhancement of some wildlife habitat.**

#### **7:13-9.5 General permit 5 - reconstruction and/or elevation of a building in a floodway**

**(a) General permit 5 authorizes the reconstruction and/or elevation of a lawfully existing building in a floodway, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The lowest floor of the building is reconstructed and/or elevated to at least one foot above the flood hazard area design flood elevation;**
- 2. Any new enclosure below the lowest floor of the building is not used for habitation, remains open to floodwaters, and is constructed in accordance with N.J.A.C. 7:13-12.5(p);**
- 3. Any existing enclosure below the lowest floor of the building that does not conform to the requirements of N.J.A.C. 7:13-12.5(p), such as a basement having a floor that is below grade along all adjoining exterior walls, is abandoned, filled-in, and/or otherwise modified to conform with the requirements of N.J.A.C. 7:13-12.5;**
- 4. The location and footprint of the building is not altered;**
- 5. The applicant provides an engineering certification confirming that:**
  - i. The proposed reconstruction and/or elevation will not increase offsite flooding or flood damage potential;**

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- ii. **The proposed reconstruction and/or elevation will not result in any additional obstruction to the flow of floodwaters; and**
  - iii. **The building is modified wherever necessary to withstand hydrostatic and hydrodynamic loads and the effects of buoyancy resulting from flooding to at least one foot above the flood hazard area design flood elevation;**
6. **No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water; and**
7. **No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the building, where such disturbance is necessary to access the building and facilitate its reconstruction and/or elevation.**

**7:13-9.6 General permit 6 - construction of one single-family home or duplex, and one associated driveway that does not cross a regulated water, in a fluvial flood hazard area**

**(a) General permit 6 authorizes the construction of one single-family home or duplex, and one associated driveway that does not cross a regulated water, in a fluvial flood hazard area, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

1. **No fill or structures are located within a floodway;**
2. **The single-family home or duplex is not being constructed as part of a residential subdivision or multi-unit development;**
3. **The lot on which the single-family home or duplex is being constructed was not created or subdivided after November 5, 2007;**

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- 4. The lowest floor of the single-family home or duplex is constructed at least one foot above the flood hazard area design flood elevation;**
- 5. Any enclosure below the lowest floor of the single-family home or duplex is not used for habitation, remains open to floodwaters, and is constructed in accordance with N.J.A.C. 7:13-12.5(p);**
- 6. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 7. No more than 7,000 square feet of riparian zone vegetation is cleared, cut, and/or removed;**
- 8. The applicant provides an engineering certification confirming that the flood storage displacement requirements of N.J.A.C. 7:13-11.4 are satisfied;**
- 9. The applicable requirements at N.J.A.C. 7:13-12.6(c) are satisfied for any proposed driveway; and**
- 10. Where the project, in combination with all proposed activities, constitutes a major development, as defined at N.J.A.C. 7:8-1.2, all applicable requirements of the Stormwater Management rules N.J.A.C. 7:8 are met.**

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**7:13-9.7 General permit 7 - relocation of manmade roadside ditches to facilitate public roadway improvements**

**(a) General permit 7 authorizes the relocation of one or more manmade roadside ditches to facilitate public roadway improvements, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The public entity responsible for maintaining the roadway has determined that the relocation of a ditch is necessary for the continued safe use of the roadway;**
- 2. The ditch is not being enclosed in a pipe, culvert, or bridge;**
- 3. The relocated ditch possesses equivalent flood carrying capacity as the existing ditch; and**
- 4. The project will not result in a net loss of greater than one-quarter acre of riparian zone vegetation.**

**(Agency Note:** N.J.A.C. 7:13-9.8 is proposed for recodification with amendments as N.J.A.C. 7:13-15.1.)

**7:13-9.8 General permit 8 - placement of storage tanks**

**(a) General permit 8 authorizes the placement of one or more storage tanks and associated support structures, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The tank cannot feasibly be located outside a regulated area;**
- 2. The tank is not located in a floodway unless all the following apply:**

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- i. The tank is intended to replace a lawfully existing tank associated with a currently occupied building or operating facility;**
  - ii. The tank cannot feasibly be located outside the floodway; and**
  - iii. The tank and any support structures are oriented to minimize obstruction to flow;**
- 3. Any tank located in a flood hazard area is designed to remain watertight during a flood;**
- 4. The bottom of the tank is situated above the flood hazard area design flood elevation, where feasible;**
- 5. Where an aboveground tank is intended for the storage of hazardous substances and has a volume of greater than 2,000 gallons, the tank is isolated from floodwaters by berms, or is located in a specially designed containment area onsite, so that in the event of a flood, the hazardous substances will not be transported offsite by floodwaters;**
- 6. The flood storage displacement requirements of N.J.A.C. 7:13-11.4 are satisfied for both the tank and any containment areas within the flood hazard area;**
- 7. No disturbance is located within 25 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 8. Any clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas;**
- 9. No trees are cleared, cut, and/or removed in a riparian zone;**

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- 10. No more than 2,000 square feet of vegetation is cleared, cut, and/or removed in a riparian zone, per tank; and**
- 11. Where the project, in combination with all proposed activities, constitutes a major development, as defined at N.J.A.C. 7:8-1.2, all applicable requirements of the Stormwater Management rules, N.J.A.C. 7:8, are met.**

**7:13-9.9 General permit 9 - construction or reconstruction of a bridge or culvert across a regulated water with a drainage area of less than 50 acres**

**(a) General permit 9 authorizes the construction or reconstruction of one bridge or culvert that crosses a regulated water that has a drainage area of less than 50 acres, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The bridge or culvert is not located in the flood hazard area of an additional regulated water that has a drainage area of 50 acres or greater;**
- 2. The bridge or culvert and any associated construction, such as embankments, abutments, footings, and travel surfaces, are designed to remain stable, scour resistant, and resistant to displacement and/or damage. At a minimum, a bridge shall have stable abutments, a culvert shall have stable headwalls, and any abutment and headwall shall have footings that extend no less than three feet below the invert of the channel;**
- 3. The bridge or culvert, to the extent feasible, matches or exceeds the dimensions of the existing channel so that the size and shape of the natural channel is preserved**

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**through the structure in order to avoid potential adverse impacts to channel stability and aquatic, semi-aquatic, and terrestrial resources;**

- 4. No armoring is placed under or across the channel bed, unless such armoring is necessary to prevent scour along the proposed abutments or footings. In such a case, the armoring shall be buried beneath at least two feet of native substrate, where placing such substrate is feasible and effective in stabilizing the channel and protecting aquatic habitat under expected flood conditions;**
- 5. Any temporarily disturbed sections of the channel are restored to pre-construction conditions immediately after completion of the disturbance. Characteristics that shall be replicated include channel shape, width, and meandering, ratio of shallow areas to deep areas, anticipated flow rate, and velocity and substrate type;**
- 6. Clearing, cutting, and/or removal of riparian zone vegetation is the minimum necessary to successfully implement the project and is limited to actively disturbed areas where possible;**
- 7. No more than 2,500 square feet of riparian zone vegetation is cleared, cut, and/or removed;**
- 8. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed; and**
- 9. Where the project, in combination with all proposed activities, constitutes a major development, as defined at N.J.A.C. 7:8-1.2, all applicable requirements of the Stormwater Management rules, N.J.A.C. 7:8, are met.**

**7:13-9.10 General permit 10 - reconstruction of a bridge or culvert across a regulated**

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**water with a drainage area of 50 acres or more**

**(a) General permit 10 authorizes the reconstruction of one existing bridge or culvert that crosses a regulated water that has a drainage area of 50 acres or more, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The applicant provides an engineering certification confirming that the proposed bridge or culvert is designed to not increase the frequency or depth of offsite flooding during any flood event described in N.J.A.C. 7:13-12.1(i);**
- 2. In order to ensure that the hydraulic capacity of the reconstructed bridge or culvert is substantially equivalent to the hydraulic capacity of the existing bridge or culvert, all the following are met:**
  - i. The cross-sectional area of the new structure is at least equal to, and not more than five percent greater than, the cross-sectional area of the existing structure;**
  - ii. The width-to-height ratio of the new structure does not deviate by more than 10 percent from the width-to-height ratio of the existing structure;**
  - iii. The length of the new structure does not deviate by more than 10 feet from the length of the existing structure or more than 10 percent of the length of the existing structure, whichever is greater;**
  - iv. The orientation of any new abutments and headwalls is aligned as closely as feasible to the orientation of the existing abutments and headwalls; and**
  - v. The elevation of the crown of the roadway profile above the bridge or culvert is not altered within the flood hazard area;**

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- 3. The bridge or culvert is designed to remain stable, scour resistant, and resistant to displacement and/or damage. At a minimum, each bridge shall have stable abutments, each culvert shall have stable headwalls, and each abutment and headwall shall have footings that extend no less than three feet below the invert of the channel;**
- 4. The bridge or culvert is designed to avoid any adverse impacts to aquatic, semi-aquatic, and terrestrial resources. Where possible, a stable, natural, earthen channel with low-flow aquatic passage shall be preserved and/or provided within the bridge or culvert as well as any section of channel disturbed to accommodate its construction;**
- 5. No armoring is placed under or across the channel bed, unless such armoring is necessary to prevent scour along the proposed abutments or footings. In such a case, the armoring shall be buried beneath at least two feet of native substrate, where feasible;**
- 6. Any temporarily disturbed sections of the channel are restored to pre-construction conditions immediately after completion of the disturbance. Characteristics that shall be replicated include channel shape, width, and meandering, ratio of shallow areas to deep areas, anticipated flow rate, and velocity and substrate type;**
- 7. No riparian zone vegetation is cleared, cut, and/or removed, except for vegetation within 20 feet of the bridge or culvert, where such disturbance is necessary to facilitate its reconstruction;**
- 8. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed; and**

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9. Where the project, in combination with all proposed activities, constitutes a major development, as defined at N.J.A.C. 7:8-1.2, all applicable requirements of the Stormwater Management rules N.J.A.C. 7:8 are met.

**7:13-9.11 General permit 11 for a stormwater outfall along a regulated water with a drainage area of less than 50 acres**

**(a) General permit 11 authorizes the construction of one stormwater outfall structure along a regulated water that has a drainage area of less than 50 acres, provided the conditions at N.J.A.C. 7:13-6.7 are met and the structure:**

1. Is not located in the flood hazard area or riparian zone of any regulated water that has a drainage area of 50 acres or greater;
2. Is authorized under a valid freshwater wetlands general permit 11, pursuant to N.J.A.C. 7:7A-5.11;
3. Meets the requirements for disturbance in the riparian zone at N.J.A.C. 7:13-11.2, including any justification that may be required for the activity and any limitations on the area of vegetation that can be cleared, cut, or removed in the riparian zone; and
4. Meets the requirements at N.J.A.C. 7:13-11.11 for the construction of a stormwater outfall structure.

**7:13-9.12 General permit 12 – construction of footbridges**

**(a) General permit 12 authorizes the construction of one or more footbridges across a**

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**regulated water, or across another feature such as a manmade canal or roadway that lies within the flood hazard area or riparian zone of a regulated water, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

- 1. The footbridge is used exclusively to carry pedestrians, livestock, and/or light vehicles such as bicycles, golf carts, or lawn tractors;**
- 2. Where the footbridge crosses a regulated water, it is designed and constructed to be as nearly perpendicular to the channel as possible;**
- 3. Where the footbridge is designed for pedestrian use, the width of the footbridge is no more than six feet, unless it is demonstrated that a wider width is necessary in order to comply with the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., and the Barrier Free Subcode of the Uniform Construction Code at N.J.A.C. 5:23-7;**
- 4. Where the footbridge is designed as part of a multiple-use path for bicycles, skate boards, rollerblades, and other methods of transport:**
  - i. The width of the footbridge is no more than 10 feet; and**
  - ii. Bollards or similar devices are installed to prevent automobiles and other large vehicles from utilizing the footbridge;**
- 5. Where the footbridge provides access to a critical building, its travel surface is constructed at least one foot above the flood hazard area design flood elevation, or as close to that elevation as feasible;**
- 6. All footings and abutments proposed within 10 feet of the top of bank extend at least three feet below the channel invert;**

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- 7. All footings and abutments proposed more than 10 feet beyond the top of bank extend at least three feet below grade;**
- 8. All stairs, ramps, or other structures necessary for access to the footbridge:**
  - i. Remain open underneath to allow floodwaters to pass freely;**
  - ii. Do not require the existing ground elevation to be raised in a flood hazard area; and**
  - iii. Are oriented to minimize obstruction to flow, such as by being set into the bank, where possible;**
- 9. The footbridge is designed to pass floodwaters by either:**
  - i. Setting the low chord of the footbridge above the flood hazard area design flood elevation; or**
  - ii. Using handrails instead of a parapet, with sufficiently large openings so as not to catch debris during a flood and thereby obstruct floodwaters, and setting the vertical distance between the low chord and the top of the footbridge deck, including any curbing, at no more than eight inches;**
- 10. The timing restrictions set forth at N.J.A.C. 7:13-11.5(d) are observed; and**
- 11. The width of any clearing, cutting, and/or removal of riparian zone vegetation associated with the construction of the footbridge does not exceed 20 feet.**

#### **7:13-9.13 General permit 13 - construction of trails and boardwalks**

**(a) General permit 13 authorizes the construction of a trail and/or boardwalk, provided the conditions at N.J.A.C. 7:13-6.7 are met and:**

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- 1. The trail or boardwalk is used exclusively to carry pedestrians, livestock, and/or light vehicles such as bicycles, golf carts, or lawn tractors;**
- 2. Where the trail or boardwalk is designed solely for pedestrian use, the width of the trail or boardwalk is no more than six feet, unless it is demonstrated that a wider width is necessary in order to comply with the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., and the Barrier Free Subcode of the Uniform Construction Code at N.J.A.C. 5:23-7;**
- 3. The existing ground elevation is not raised in any floodway or fluvial flood hazard area. A boardwalk constructed in a flood hazard area shall be constructed at or below the existing ground elevation or elevated so that the area underneath the boardwalk remains open to the passage of floodwaters;**
- 4. The setbacks at (a)4i through iii below are met, except in the immediate vicinity of a footbridge or a dock or pier connected to the trail or boardwalk, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water:**
  - i. No disturbance is located within 10 feet of any top of bank;**
  - ii. No trees are cleared, cut, and/or removed within 25 feet of any top of bank;**  
**and**
  - iii. Where disturbance within 25 feet of any top of bank is proposed, the applicant provides an engineering certification confirming that the location of the project is stable and suitable for the proposed activities, and not subject to erosion or undermining due to its proximity to the top of bank;**

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5. **Clearing, cutting, and/or removal of riparian zone vegetation is the minimum necessary to successfully implement the project and is limited to actively disturbed areas, where possible;**
6. **No more than six square feet of trees is cleared, cut, and/or removed per linear foot of trail or boardwalk in a riparian zone, including the total area of canopy affected by activities under this general permit. For example, the construction of a trail or boardwalk that is 1,000 feet long can impact no more than 6,000 square feet of canopy;**
7. **No more than one-half of an acre of riparian zone vegetation is cleared, cut, and/or removed; and**
8. **Any public trail or boardwalk incorporates features designed to educate the user on the importance of riparian zones, flood hazard areas, and stream corridors. Such features may include signs identifying plants and animals or explaining hydrology, ecology, or other significant environmental features.**

## **SUBCHAPTER 10. INDIVIDUAL PERMITS**

### **7:13-10.1 Requirement to obtain an individual permit**

**(a) A person shall obtain an individual permit under this subchapter in order to undertake any activity that does not meet the requirements of a permit-by-rule pursuant to N.J.A.C.**

**7:13-7, an authorization under a general permit-by-certification pursuant to N.J.A.C. 7:13-8, an authorization under a general permit pursuant to N.J.A.C. 7:13-9, or a coastal permit**

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**under the circumstances set forth at N.J.A.C. 7:13-2.1(b)6.**

**(b) A regulated activity or project subject to an individual permit shall meet:**

- 1. The applicable area-specific requirements at N.J.A.C. 7:13-11; and**
- 2. The applicable activity-specific requirements at N.J.A.C. 7:13-12.**

#### **7:13-10.2 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. 7:13-22.3.**

**(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 expires, including any extension thereof under N.J.A.C. 7:13-22.3. 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.**

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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 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 flooding or the environment.**

#### **7:13-10.3 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. 7:13-22.2.**

**(b) In addition to the conditions that apply to every individual permit under (a) above, the Department shall establish conditions 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.**

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SUBCHAPTER [10.] **11. AREA-SPECIFIC REQUIREMENTS FOR INDIVIDUAL PERMITS** [REQUIREMENTS WITHIN VARIOUS REGULATED AREAS]

7:13-[10.1]**11.1** Requirements for a regulated activity in a channel

(a) (No change.)

(b) The Department shall issue an individual permit for a regulated activity in a channel only if the following requirements are satisfied:

1. **The applicant describes in detail the regulated activities proposed within the channel, including the equipment proposed to be utilized, and demonstrates that** [The] **the** basic purpose of the project cannot be accomplished without the disturbance to the channel;
2. – 6. (No change.)
7. All temporarily disturbed sections of the channel are restored to pre-construction conditions **immediately after completion of the disturbance**. Characteristics that shall be replicated include channel shape, width, and meandering, ratio of shallow areas to deep areas, anticipated flow rate and velocity, and substrate type;
8. Aquatic habitat is preserved where possible; [and]
9. Aquatic habitat is enhanced where preservation is not possible, such as through the placement of habitat enhancement devices, replacement of vegetation removed during construction, creation of tree canopy along the channel where no canopy exists, and/or enhancement of existing tree canopy along the channel[.]; **and**

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**10. The project does not expose unset or raw cement to flowing water within any channel or regulated water during construction;**

(c) The Department shall issue an individual permit for a channel modification only if the applicant demonstrates that, in addition to meeting the requirements of (b) above, the channel modification meets at least one of the following requirements:

1. (No change.)
2. The channel modification is necessary for the construction of a bridge or culvert, and the following requirements are satisfied:
  - i. The disturbance to the channel is [minimized] **the minimum necessary to successfully implement the project;**
  - ii. – iii. (No change.)
  - iv. No more than 200 linear feet of channel (including the bridge or culvert) is disturbed **unless the applicant demonstrates that disturbance to a longer segment of channel cannot feasibly be avoided.**

(d) The Department shall [allow] **authorize** the use of construction equipment to perform regulated activities in a channel (whether situated in a channel, reaching into a channel, or driven across a channel) only if, in addition to meeting the requirements of (b) above, the following requirements are satisfied:

1. – 2. (No change.)
3. Contact with flowing water is minimized [where possible] **to the maximum extent practicable** through the use of temporary bridges, culverts, coffer dams, and/or sediment control devices, which are removed **from the channel as soon as possible**

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after completion of the [project] **disturbance**;

4. Forging the channel is avoided **to the maximum extent practicable**;

5. – 6. (No change.)

(e) A person shall not drive or operate a vehicle [across] **within** a channel except in the following cases:

1. – 2. (No change.)

3. The vehicle is driven across a lawfully existing and stable ford that was either constructed prior to October 2, 2006, or which is constructed on agricultural lands [under general permit 2E at N.J.A.C. 7:13-8.4(c)5] **and authorized under this chapter**.

(f) **No person shall dump or discard into a channel any material that could be carried away during a storm and/or obstruct the normal flow of water, such as trash, debris, construction material, leaf piles, lawn clippings, and landscaping material.**

#### **7:13-11.2 Requirements for a regulated activity in a riparian zone**

(a) **This section sets forth the design and construction standards under which the Department will issue an individual permit for any regulated activity proposed in a riparian zone.**

(b) **The Department shall issue an individual permit for any regulated activity that results in clearing, cutting, and/or removal of vegetation in a riparian zone provided:**

1. **The basic purpose of the regulated activity or project cannot be accomplished onsite without clearing, cutting, and/or removal of vegetation in the riparian zone;**

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2. **Clearing, cutting, and/or removal of riparian zone vegetation is minimized through methods including situating the regulated activity or project as far from any regulated water as feasible and limiting construction to areas devoid of vegetation, actively disturbed areas, or other areas wherein the benefits and functions of a riparian zone are considerably deteriorated and impaired as a result of previous development, such as abandoned pavement that has partially revegetated, areas of dirt and gravel that are primarily devoid of vegetation, eroded embankments, areas covered with structures or other impervious surface, and landscape islands within a paved parking area;**
3. **The requirements for each specific regulated activity described in (g) through (y) below are satisfied, including mitigation in accordance with N.J.A.C. 7:13-13, as applicable;**
4. **All areas from which riparian zone vegetation is temporarily cleared, cut, or removed are replanted in accordance with (z) below; and**
5. **All additional requirements for each specific regulated activity described elsewhere in this chapter are satisfied.**

**(c) The Department shall issue an individual permit for a regulated activity that results in clearing, cutting, and/or removal of vegetation within 25 feet of any top of bank only in the following circumstances:**

1. **The regulated activity lies within an actively disturbed area adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**

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- 2. Clearing, cutting, and/or removal of riparian zone vegetation within 25 feet of a top of bank is necessary to undertake riparian zone, freshwater wetlands, and/or habitat restoration and enhancement activities;**
- 3. Clearing, cutting, and/or removal of riparian zone vegetation within 25 feet of a top of bank is necessary to undertake sediment removal activities in accordance with N.J.A.C. 7:13-12.15; or**
- 4. Clearing, cutting, and/or removal of riparian zone vegetation within 25 feet of a top of bank is necessary to construct, reconstruct, or improve a structure that crosses a regulated water or requires proximity to a regulated water.**
  - i. For the purposes of this paragraph, examples of structures that cross a regulated water include new and reconstructed infrastructure projects such as roadways, railroads, utility lines, and footbridges.**
  - ii. For the purposes of this paragraph, examples of structures that require proximity to a regulated water include stormwater discharges, bank stabilization projects, public trails and boardwalks, and improvements to existing infrastructure that are necessary to maintain public safety and which cannot feasibly be improved at a location greater than 25 feet from any top of bank.**
  - iii. The construction of buildings, parking areas, stormwater management facilities, and all other non-water dependent activities, as well as clearing, cutting, and/or removal of vegetation to store vehicles and equipment, does not satisfy this paragraph, except for the reconstruction of a lawfully existing**

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**structure currently situated within 25 feet of the top of bank, which cannot feasibly be relocated further from the top of bank.**

**(d) The Department shall issue an individual permit for a regulated activity within a riparian zone only if all existing onsite impervious surfaces located within 25 feet of the top of bank are removed and the riparian zone is replanted with vegetation in accordance with**

**(z) below, except in the following cases:**

- 1. The regulated activity lies within an actively disturbed area adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water;**
- 2. The applicant demonstrates that removing and/or preventing the replacement of the existing impervious surface would likely exacerbate flooding or erosion, expose hazardous substances or solid waste, or otherwise threaten public health, safety, welfare, and/or the environment. In such a case, all other portions of the riparian zone within 25 feet of the top of bank shall, to the extent feasible and protective of public health, safety, and welfare, and the environment, be replanted with vegetation in accordance with (z) below; or**
- 3. The applicant demonstrates that removing and/or preventing the replacement of the existing impervious surface under this subsection would prevent reasonable use or access to the site and/or cause an unreasonable burden upon the applicant. For example, lawfully existing pavement around a building, which is located within 25 feet of a top of bank, may provide essential access to and around the building and the removal of such impervious surface would result in**

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**noncompliance with local building or fire codes and/or disrupt normal access to and throughout the facility. In such cases, all other portions of the riparian zone within 25 feet of the top of bank shall, to the extent feasible, be replanted with vegetation in accordance with (z) below.**

**(e) Table 11.2 below establishes the maximum allowable area of riparian zone vegetation that can be temporarily or permanently cleared, cut, and/or removed associated with the regulated activities identified at (g) through (y) below without Department approval based upon additional justification as set forth in (g)1, (h)1, (i)2, (j)1, (k)1, (q)1, (t), (u)1, (v), or (w)1 below or Department approval of a hardship exception. Where the area of riparian zone vegetation being cleared, cut, and/or removed exceeds a limit in Table 11.2, or where vegetation is cleared, cut, and/or removed pursuant to (g)3, (h)3, (j)4, (r)2, (s)3, and/or (y)3 below, mitigation, in accordance with N.J.A.C. 7:13-13, is required. Activities within riparian zones that are not subject to the limits set forth in Table 11.2 are identified in (f) below.**

- 1. Except as provided in (f) below, the total area of riparian zone vegetation cleared, cut, and/or removed for a given regulated activity is calculated by adding the following:**
  - i. The area of any vegetation within the project's limit of disturbance shown on the site plans submitted by the applicant;**
  - ii. The area under the canopy of any trees to be cleared, cut, or removed; and**
  - iii. All other areas not included under (e)1i or ii above, from which vegetation is to be temporarily or permanently cleared, cut, and/or removed to conduct the**

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**regulated activity. Areas containing vegetation for a portion of the year, such as agricultural areas that are periodically plowed and cultivated, are considered vegetated for the purposes of this chapter;**

- 2. A person may undertake more than one regulated activity subject to the individual permit requirements identified in Table 11.2 on a single site, provided the requirements in this section for each separate regulated activity are met.**
- 3. Except for the construction of an addition to an existing single-family home or duplex or the construction of an accessory structure under (n) below, the limits listed in Table 11.2 apply to each individual occurrence of a proposed regulated activity on a site or as part of a project. For example, Table 11.2 establishes limits on the amount of vegetation that can be cleared, cut, and/or removed for the construction of a stormwater outfall structure within a riparian zone. A person can obtain an individual permit for multiple stormwater outfall structures on a single site, provided the limits in Table 11.2 and all other requirements of this section are met for each individual outfall structure.**

**(f) The following regulated activities are not subject to the limits set forth in Table 11.2 below, and shall not be included when calculating the total area of vegetation to be cleared, cut, and/or removed under (e)1 above:**

- 1. The cumulative net loss of up to one-quarter acre of riparian zone vegetation within an actively disturbed area per site since November 5, 2007;**
  - i. The subdivision, sale, or transfer of ownership of a site after November 5, 2007, does not reduce or increase the area of riparian zone vegetation that can**

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**be cleared, cut, and/or removed under this paragraph;**

- 2. Any regulated activity that will not result in clearing, cutting, and/or removal of riparian zone vegetation, such as construction on a lawfully existing impervious surface, or within a gravel roadway or parking area;**
- 3. Converting riparian zone vegetation within an actively disturbed area from one type to another, such as converting an actively farmed area into a lawn or garden;**
- 4. Any temporary clearing, cutting, and/or removal of riparian zone vegetation within an actively disturbed area, provided all disturbed areas are adequately stabilized and replanted with vegetation in accordance with (z) below;**
- 5. Relocating a lawfully existing structure, which is situated within a riparian zone, to an actively disturbed area on the same site, provided the area formerly occupied by the structure is stabilized and replanted with vegetation in accordance with (z) below;**
- 6. Any disturbance to riparian zone vegetation that is completely submerged during normal flow conditions in a regulated water;**
- 7. Any regulated activity along an existing public roadway, provided the activity is:**
  - i. Located within an actively disturbed area;**
  - ii. Located within an existing right-of-way or easement;**
  - iii. Undertaken by a public entity;**
  - iv. Necessary for the continued, safe use of the roadway; and**
  - v. Situated on an existing roadway embankment, or within an area adjacent to an existing roadway, which was disturbed for the initial construction of the**

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roadway; and

8. Any clearing, cutting, and/or removal of riparian zone vegetation within a truncated portion of a riparian zone. For the purposes of this paragraph, an area is considered to be a truncated portion of a riparian zone if:
- i. The area is separated from a regulated water by a railroad or public roadway;
  - ii. The area does not slope toward the regulated water; and
  - iii. Stormwater runoff from the area does not drain into the regulated water.

Table 11.2

**MAXIMUM ALLOWABLE AREA OF RIPARIAN ZONE VEGETATION THAT CAN BE TEMPORARILY OR PERMANENTLY CLEARED, CUT, AND/OR REMOVED WITHOUT ADDITIONAL JUSTIFICATION, MITIGATION, AND/OR A HARDSHIP EXCEPTION REQUEST, IN ACCORDANCE WITH (e) ABOVE**

Proposed Regulated Activity	See Subsection Below for Additional Requirements	Allowable Disturbance Based on the Width of the Riparian Zone		
		50-foot Riparian Zone	150-foot Riparian Zone	300-foot Riparian Zone

• Railroad or public roadway					
New	Crossing a water	(g)	6,000 ft <sup>2</sup>	18,000 ft <sup>2</sup>	36,000 ft <sup>2</sup>
	Not crossing a water		3,000 ft <sup>2</sup>	9,000 ft <sup>2</sup>	18,000 ft <sup>2</sup>
Reconstructed	Crossing a water		3,000 ft <sup>2</sup>	9,000 ft <sup>2</sup>	18,000 ft <sup>2</sup>
	Not crossing a water		1,500 ft <sup>2</sup>	4,500 ft <sup>2</sup>	9,000 ft <sup>2</sup>
• Private driveway serving one single-family home or duplex					
New	Crossing a water	(h)	2,000 ft <sup>2</sup>	6,000 ft <sup>2</sup>	12,000 ft <sup>2</sup>
	Not crossing a water		1,000 ft <sup>2</sup>	3,000 ft <sup>2</sup>	6,000 ft <sup>2</sup>
Reconstructed	Crossing a water		1,000 ft <sup>2</sup>	3,000 ft <sup>2</sup>	6,000 ft <sup>2</sup>
	Not crossing a water		500 ft <sup>2</sup>	1,500 ft <sup>2</sup>	3,000 ft <sup>2</sup>

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<b>• All other roadways not listed above</b>					
<b>New</b>	<b>Crossing a water</b>	<b>(h)</b>	<b>4,000 ft<sup>2</sup></b>	<b>12,000 ft<sup>2</sup></b>	<b>24,000 ft<sup>2</sup></b>
	<b>Not crossing a water</b>		<b>2,000 ft<sup>2</sup></b>	<b>6,000 ft<sup>2</sup></b>	<b>12,000 ft<sup>2</sup></b>
<b>Reconstructed</b>	<b>Crossing a water</b>		<b>2,000 ft<sup>2</sup></b>	<b>6,000 ft<sup>2</sup></b>	<b>12,000 ft<sup>2</sup></b>
	<b>Not crossing a water</b>		<b>1,000 ft<sup>2</sup></b>	<b>3,000 ft<sup>2</sup></b>	<b>6,000 ft<sup>2</sup></b>
<b>• Bank stabilization and channel restoration</b>					
<b>Areas stabilized with vegetation and/or soil bioengineering</b>		<b>(i)</b>	<b>No limit if disturbance is justified</b>		
<b>Areas stabilized using other methods</b>			<b>10 ft<sup>2</sup> per linear foot of armoring</b>		
<b>Access to the project</b>			<b>1,000 ft<sup>2</sup></b>	<b>3,000 ft<sup>2</sup></b>	<b>6,000 ft<sup>2</sup></b>
<b>• Stormwater discharge</b>					
<b>Headwall and outlet protection</b>		<b>(j)</b>	<b>2,000 ft<sup>2</sup></b>	<b>2,000 ft<sup>2</sup></b>	<b>2,000 ft<sup>2</sup></b>
<b>Stormwater pipe</b>			<b>1,000 ft<sup>2</sup></b>	<b>3,000 ft<sup>2</sup></b>	<b>6,000 ft<sup>2</sup></b>
<b>• Utility line</b>					
<b>New</b>		<b>(k)</b>	<b>30 ft<sup>2</sup> per linear foot of utility line</b>		
<b>Access to the project (per crossing)</b>			<b>1,000 ft<sup>2</sup></b>	<b>3,000 ft<sup>2</sup></b>	<b>6,000 ft<sup>2</sup></b>
<b>Reconstruction, upgrade, expansion, or maintenance</b>		<b>(l)</b>	<b>No limit if disturbance is justified</b>		
<b>Access to the project (per crossing)</b>			<b>1,000 ft<sup>2</sup></b>	<b>3,000 ft<sup>2</sup></b>	<b>6,000 ft<sup>2</sup></b>
<b>• Single-family home or duplex</b>					
<b>New</b>		<b>(m)</b>	<b>3,500 ft<sup>2</sup></b>	<b>7,000 ft<sup>2</sup></b>	<b>7,000 ft<sup>2</sup></b>
<b>Reconstruction</b>			<b>2,000 ft<sup>2</sup></b>	<b>2,000 ft<sup>2</sup></b>	<b>2,000 ft<sup>2</sup></b>
<b>Addition</b>		<b>(n)</b>	<b>2,000 ft<sup>2</sup> for all additions, cumulatively since November 5, 2007</b>		
<b>Accessory structure</b>			<b>4,000 ft<sup>2</sup> for all accessory structures, cumulatively since November 5, 2007</b>		
<b>• Tidal development</b>					
<b>Public access</b>		<b>(o)</b>	<b>No limit if disturbance is justified</b>		
<b>Water dependent development</b>		<b>(p)</b>	<b>No limit if disturbance is justified</b>		

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<b>• Other projects</b>				
<b>Individual subsurface sewage disposal system</b>	(q)	<b>5,000 ft<sup>2</sup></b>	<b>5,000 ft<sup>2</sup></b>	<b>5,000 ft<sup>2</sup></b>
<b>Hazardous substance remediation</b>	(r)	<b>No limit if disturbance is justified</b>		
<b>Solid waste facility closure</b>	(s)	<b>No limit if disturbance is justified</b>		
<b>Trail or boardwalk</b>	(t)	<b>10 ft<sup>2</sup> per linear foot of trail or boardwalk, not to exceed one acre</b>		
<b>Footbridge</b>	(u)	<b>1,000 ft<sup>2</sup></b>	<b>1,000 ft<sup>2</sup></b>	<b>1,000 ft<sup>2</sup></b>
<b>Flood control project</b>	(v)	<b>3,000 ft<sup>2</sup></b>	<b>9,000 ft<sup>2</sup></b>	<b>18,000 ft<sup>2</sup></b>
<b>Removing sediment and/or debris from a regulated water</b>	(w)	<b>1,000 ft<sup>2</sup> per access point</b>		
<b>Removing existing fill and/or an existing structure</b>	(x)	<b>Within 20 feet of the fill or structure, not to exceed one acre</b>		
<b>• Any regulated activity not listed in this table above</b>				
<b>Where total disturbance associated with all regulated activities under this category is:</b>	<b>No greater than 2,000 ft<sup>2</sup></b>	(y)	<b>No mitigation required</b>	
	<b>Greater than 2,000 ft<sup>2</sup></b>		<b>One-quarter acre, all of which requires mitigation</b>	

(g) The Department shall issue an individual permit for the construction of a new railroad or public roadway, or the expansion, reconstruction, or improvement of a lawfully existing railroad or public roadway, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:

1. The total area of riparian zone vegetation to be cleared, cut, and/or removed does not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates that compliance with all Federal, State, and local requirements governing railroads and public roadways cannot be achieved, and that public safety cannot be adequately ensured, without exceeding these limits;
2. For the construction of a new railroad or public roadway within a 50-foot or 150-

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**foot riparian zone, and for the expansion, reconstruction, or improvement of a lawfully existing railroad or public roadway within any riparian zone, which exceeds the limits set forth in Table 11.2, the applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2;**

- 3. For the construction of a new railroad or public roadway within a 300-foot riparian zone, the applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the total area of vegetation that is cleared, cut, and/or removed;**
- 4. The width of disturbance associated with the construction, expansion, reconstruction, or improvement of the railroad or public roadway is minimized;**
- 5. Any new crossing of a regulated water is designed and constructed to be as nearly perpendicular to the channel as possible; and**
- 6. If the project impacts a 150-foot or 300-foot riparian zone, the applicant demonstrates that there is a compelling public need for the project, which cannot be satisfied without impacting the riparian zone. This demonstration shall include an analysis of alternate routes and other alternative projects that would avoid impacting the riparian zone.**

**(h) The Department shall issue an individual permit for the construction of a new private roadway, or the expansion, reconstruction, or improvement of a lawfully existing private roadway, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. The total area of riparian zone vegetation to be cleared, cut, and/or removed does**

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**not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates that safe, adequate access into the site, which meets all Federal, State and local requirements governing roadways, cannot be provided without exceeding these limits;**

- 2. For any construction within a 50-foot or 150-foot riparian zone that exceeds the limits set forth in Table 11.2, the applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2;**
- 3. For any construction within a 300-foot riparian zone, the applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the total area of vegetation that is cleared, cut, and/or removed;**
- 4. The width of disturbance associated with the construction, expansion, reconstruction, or improvement of the roadway is minimized;**
- 5. The applicant demonstrates that any proposed expansion, reconstruction, or improvement to the roadway is necessary for the continued safe access to the site;**
- 6. For the construction of a new roadway that serves or accesses a lot that was created or subdivided after November 5, 2007, the applicant demonstrates that:**
  - i. None of the lots created in the subdivision are currently served or accessed by a roadway;**
  - ii. None of the lots created in the subdivision possess a valid authorization from the Department to construct a new roadway in the riparian zone; and**
  - iii. The area of riparian zone vegetation to be cleared, cut, and/or removed to**

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**construct the roadway does not exceed the area of riparian zone vegetation that would have been allowed by this chapter to be cleared, cut, and/or removed to construct a roadway to serve or access the original parcel prior to its subdivision;**

- 7. For the construction of a new roadway that does not cross a regulated water, the applicant demonstrates that there is no other means of constructing a roadway to access the developable area onsite, which would reduce or eliminate the impact to the riparian zone; and**
- 8. For the construction of a new roadway that crosses a regulated water, the applicant demonstrates that**
  - i. There is developable land onsite that cannot feasibly be accessed without crossing the regulated water, including accessing the site through neighboring properties; and**
  - ii. The crossing is designed and constructed to be as nearly perpendicular to the channel as possible.**

**(i) The Department shall issue an individual permit for the restoration to a stable condition of a bank or channel that has become eroded, unstable, ecologically degraded, and/or enclosed within a structure, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. For a project to stabilize and/or restore a bank and/or channel with vegetation in accordance with N.J.A.C. 7:13-12.14(c)1 and/or using soil bioengineering in accordance with N.J.A.C. 7:13-12.14(c)2, the applicant demonstrates that the area**

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**of vegetation cleared, cut, and/or removed within the riparian zone is the minimum necessary to successfully implement the project;**

- 2. For a project to stabilize a bank and/or channel using revetments, retaining walls, or other armoring in accordance with N.J.A.C. 7:13-12.14(c)3, or for a project to line or pipe a channel in accordance with N.J.A.C. 7:13-12.14(c)4, the total area of vegetation cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates that the bank or channel cannot feasibly be stabilized without exceeding these limits. In such a case, the applicant shall provide mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2; and**
- 3. For a project to restore a regulated water that is enclosed by a structure to a natural condition in accordance with N.J.A.C. 7:13-12.14(d), only the limits set forth in Table 11.2 to access the project shall apply.**

**(j) The Department shall issue an individual permit for the construction or reconstruction of a stormwater discharge, including the stormwater pipe leading to the discharge as well as any associated conduit outlet protection and/or conveyance swale, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. The total area of riparian zone vegetation to be cleared, cut, and/or removed does not exceed the limits set forth in Table 11.2 above, unless the Soil Conservation District having jurisdiction over the site determines that exceeding these limits is necessary to meet the requirements of the Standards for Soil Erosion and**

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**Sediment Control in New Jersey at N.J.A.C. 2:90;**

- 2. Where the stormwater discharge, conduit outlet protection, and/or conveyance swale is located within a 50-foot riparian zone, the applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2;**
- 3. Where the stormwater discharge, conduit outlet protection, and/or conveyance swale is located within a 150-foot riparian zone, the applicant:**
  - i. Demonstrates that situating the stormwater discharge and associated disturbance outside the riparian zone is likely to result in greater erosion or other deleterious environmental impacts than situating the stormwater discharge and associated disturbance within the riparian zone; and**
  - ii. Provides mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2;**
- 4. Where the stormwater discharge, conduit outlet protection, and/or conveyance swale is located within a 300-foot riparian zone, the applicant:**
  - i. Demonstrates that situating the stormwater discharge and its associated disturbance outside the riparian zone is likely to result in greater erosion or other deleterious environmental impacts than situating the stormwater discharge and associated disturbance within the riparian zone;**
  - ii. Provides mitigation, in accordance with N.J.A.C. 7:13-13, for the total area of vegetation that is cleared, cut, and/or removed within the riparian zone; and**

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**iii. Where the stormwater discharge is associated with a major development, as defined at N.J.A.C. 7:8-1.2, demonstrates that all runoff from the water quality design storm, as defined at N.J.A.C. 7:8-5.5(a), is infiltrated outside the riparian zone and/or discharged outside the riparian zone, to the maximum extent practicable.**

**(1) Where all runoff from the water quality design storm cannot practicably be infiltrated outside the riparian zone and/or discharged outside the riparian zone, all runoff from the water quality design storm that is discharged within the riparian zone shall be treated, in accordance with the methods set forth at N.J.A.C. 7:8-5.5, to reduce the post-construction load of total suspended solids by 95 percent of the anticipated load from the developed site, expressed as an annual average.**

**(k) The Department shall issue an individual permit to construct a new aboveground or underground utility line, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

**1. The total area of riparian zone vegetation to be cleared, cut, and/or removed does not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates that there is a compelling public need to construct the utility line that cannot feasibly be accomplished without exceeding these limits. In such a case, the applicant shall provide mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2;**

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- 2. The applicant demonstrates, pursuant to N.J.A.C. 7:13-12.9(b)1 through 4, that clearing, cutting, and/or removal of riparian zone vegetation is unavoidable;**
  - 3. The area of riparian zone vegetation that is cleared, cut, and/or removed is the minimum necessary to meet the applicable requirements of the New Jersey Board of Public Utilities and all other State and Federal requirements governing the construction of the utility line;**
  - 4. Staging, storing, and stockpiling materials and equipment shall, to the maximum extent practicable, be accomplished outside the riparian zone. Where it is necessary to conduct these activities in the riparian zone, these activities, as well as access to the utility line during construction, shall, to the maximum extent practicable, be undertaken in actively disturbed areas;**
  - 5. To the maximum extent practicable, forested areas are not disturbed; and**
  - 6. No trees within 25 feet of any top of bank are cleared, cut or removed, unless the applicant demonstrates that such disturbance cannot feasibly be avoided to conduct the project.**
- (l) The Department shall issue an individual permit to reconstruct, replace, repair, or maintain an existing aboveground or underground utility line, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**
- 1. Clearing, cutting, and/or removal of riparian zone vegetation is limited to the utility line's existing easement or right-of-way. Any disturbance to riparian zone vegetation proposed outside the existing easement or right-of-way of the utility line is subject to the requirements of (k) above;**

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- 2. Clearing, cutting, and/or removal of riparian zone vegetation is limited to actively disturbed areas, unless the applicant demonstrates that there is a compelling public need to reconstruct, replace, repair, or maintain the line that cannot feasibly be accomplished without clearing, cutting, and/or removal of riparian zone vegetation outside of these areas;**
- 3. The area of riparian zone vegetation that is cleared, cut, and/or removed is the minimum necessary to meet the applicable requirements of the New Jersey Board of Public Utilities and all other State and Federal requirements governing the reconstruction, replacement, repair, or maintenance of the utility line, as appropriate;**
- 4. Staging, storing, and stockpiling materials and equipment shall, to the maximum extent practicable, be accomplished outside the riparian zone. Where it is necessary to conduct these activities in the riparian zone, these activities, as well as access to the utility line during construction, shall, to the maximum extent practicable, be undertaken in actively disturbed areas;**
- 5. To the maximum extent practicable, forested areas are not disturbed; and**
- 6. No trees within 25 feet of any top of bank are cleared, cut, or removed, unless the applicant demonstrates that such disturbance cannot feasibly be avoided to conduct the project.**

**(m) The Department shall issue an individual permit for the construction of a new single-family home or duplex, or the reconstruction of a lawfully existing single-family home or duplex, including the creation of any lawn or landscaped area around the building, which**

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**results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. The total area of riparian zone vegetation to be cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above;**
- 2. For the construction of a new single-family home or duplex on a lot that was created or subdivided after November 5, 2007, the applicant demonstrates that none of the lots created in the subdivision contain a habitable building or possess a valid authorization from the Department to construct a habitable building in the riparian zone; and**
- 3. The single-family home or duplex is not being constructed as part of a residential subdivision or multi-unit development.**

**(n) The Department shall issue an individual permit for the construction of an addition to a lawfully existing single-family home or duplex, or the construction of an accessory structure to an existing single-family home or duplex, such as a barn, deck, detached garage, fence, pool, or shed, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if the total area of riparian zone vegetation to be cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above, cumulatively since November 5, 2007.**

**(o) The Department shall issue an individual permit for the construction of a public access area along a tidal water, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. The public access area is designed in accordance with the public access to the waterfront rule, N.J.A.C. 7:7E-8.11; and**

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2. For any proposed public access parking area, the applicant demonstrates that there is no other feasible location onsite to construct the parking area that would reduce or eliminate the clearing, cutting, and/or removal of riparian zone vegetation.

(p) The Department shall issue an individual permit for the construction of a water dependent development, as defined in the Coastal Zone Management rules at N.J.A.C. 7:7E-1.8, along a tidal water, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:

1. The water dependent development is designed in accordance with the Coastal Zone Management rules, N.J.A.C. 7:7E; and
2. For any proposed water dependent development, the applicant demonstrates that there is no other feasible location onsite to construct the development that would reduce or eliminate the area of riparian zone vegetation to be cleared, cut, and/or removed.

(q) The Department shall issue an individual permit to construct an individual subsurface sewage disposal system that serves one new single-family home or duplex, or to repair or alter a lawfully existing, malfunctioning individual subsurface sewage disposal system that serves any building, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:

1. The total area of vegetation cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates all State and local requirements governing the construction, repair,

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**or alteration of an individual subsurface sewage disposal system, as applicable, cannot feasibly be satisfied without exceeding these limits. In such a case, the applicant shall provide mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2;**

- 2. The area of riparian zone vegetation to be cleared, cut, and/or removed is the minimum necessary to comply with the Department's Standards for Individual Subsurface Sewage Disposal Systems at N.J.A.C. 7:9A;**
- 3. For the construction of a new individual subsurface sewage disposal system under N.J.A.C. 7:9A, the applicant demonstrates that:**
  - i. The system serves one new single-family home or duplex;**
  - ii. No disturbance is located within 50 feet of any top of bank; and**
  - iii. If the new individual subsurface sewage disposal system is proposed to serve a single-family home or duplex being constructed on a lot that was created or subdivided after November 5, 2007, the applicant demonstrates that none of the lots created in the subdivision contain a habitable building or possess a valid authorization from the Department to construct a habitable building in the riparian zone; and**
- 4. For the repair or alteration of a malfunctioning individual subsurface sewage disposal system that serves any building, the applicant demonstrates that:**
  - i. The need for repair or alteration is not directly or indirectly caused by an expansion of the building footprint or square footage of habitable space that**

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**the individual subsurface sewage disposal system serves;**

- ii. The repair or alteration is to a system that was authorized in accordance with N.J.A.C. 7:9A or the standards applicable at the time the system was constructed and the repair or alteration does not increase the estimated volume of sanitary sewage necessary for the structure the authorized system was originally designed to serve, calculated in accordance with N.J.A.C. 7:9A-7.4;**
- iii. The use of the building is not being changed, including a change from disuse or abandonment to any type of use; and**
- iv. No disturbance is located within 50 feet of any top of bank unless the malfunctioning system is located within this area. In such a case, the repaired or altered system shall be relocated, where feasible, so that it is located more than 50 feet from any top of bank and as far from the regulated water as possible.**

**(r) The Department shall issue an individual permit for the investigation, cleanup, or removal of hazardous substances as defined in the Department's Discharges of Petroleum and other Hazardous Substances rules, N.J.A.C. 7:1E, Appendix A, and/or pollutants, as defined in the New Jersey Pollutant Discharge Elimination System (NJPDES) Rules, N.J.A.C. 7:14A, which is conducted in accordance with the Department's rules governing the remediation of contaminated site at N.J.A.C. 7:26C, and which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. The applicant demonstrates, or provides a certification from a licensed site**

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**remediation professional pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, that the area of riparian zone vegetation to be cleared, cut, and/or removed is the minimum necessary for 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 riparian zone vegetation to be cleared, cut, and/or removed, with an explanation for why these remediation methods were not chosen; and**
- 2. The applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the total area of vegetation that is cleared, cut, and/or removed.**

**(s) The Department shall issue an individual permit for regulated activities authorized under a solid waste landfill closure and post-closure plan or disruption approval issued by the Department pursuant to N.J.A.C. 7:26-2A.8 or 2A.9, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. The Department determines that clearing, cutting, and/or removal of riparian zone vegetation is necessary to undertake the solid waste landfill closure and post-closure plan or disruption approval and to properly maintain and monitor the site after closure;**
- 2. The applicant demonstrates that the area of riparian zone vegetation to be cleared,**

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**cut, and/or removed is the minimum necessary to adequately close and/or maintain the landfill. This demonstration shall include:**

- i. An exploration of alternative methods acceptable under N.J.A.C. 7:26; and**
- ii. An identification of any methods that would result in less area of riparian zone vegetation to be cleared, cut, and/or removed, with an explanation for why these methods were not chosen; and**

- 3. The applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the total area of vegetation that is cleared, cut, and/or removed.**

**(t) The Department shall issue an individual permit to construct a trail and/or boardwalk for use by pedestrians, bicycles, and other non-motorized methods of transport, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if the total area of vegetation cleared, cut, and/or removed does not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates that there is a compelling public need to construct the trail or boardwalk that cannot feasibly be accomplished without exceeding these limits. In such a case, the applicant shall provide mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2.**

**(u) The Department shall issue an individual permit to construct a footbridge, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. The total area of vegetation cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates that there is a compelling public need to construct the footbridge**

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**that cannot feasibly be accomplished without exceeding these limits. In such a case, the applicant shall provide mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2;**

- 2. The width of the area of riparian zone vegetation to be cleared, cut, and/or removed for the construction of the footbridge is minimized; and**
- 3. The crossing of the regulated water is designed and constructed as perpendicular to the channel as possible.**

**(v) The Department shall issue an individual permit for the construction of a flood control project, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if the total area of vegetation cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates that there is a compelling public need to construct the flood control project that cannot feasibly be accomplished without exceeding these limits. In such a case, the applicant shall provide mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2.**

**(w) The Department shall issue an individual permit to remove sediment and/or debris from a regulated water, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

- 1. The total area of vegetation cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above, unless the applicant demonstrates that there is a compelling public need to remove sediment and/or**

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**debris from the regulated water that cannot feasibly be accomplished without exceeding these limits. In such a case, the applicant shall provide mitigation, in accordance with N.J.A.C. 7:13-13, for the area of vegetation that is cleared, cut, and/or removed in excess of the limits set forth in Table 11.2;**

- 2. The number of proposed access points is the minimum necessary to conduct the project;**
- 3. Where possible, the project is conducted within actively disturbed areas and from only one bank;**
- 4. The use of heavy equipment in the regulated water is avoided unless the applicant demonstrates that there is no feasible alternative that would result in less environmental damage;**
- 5. Vegetation and tree canopy on the more southerly or westerly bank is preserved in order to shade the regulated water; and**
- 6. All proposed access points to the regulated water are described in writing and with color photographs.**

**(x) The Department shall issue an individual permit to remove existing fill or an existing structure, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if the total area of vegetation cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above.**

**(y) The Department shall issue an individual permit for a regulated activity that is not listed in (g) through (x) above, which results in clearing, cutting, and/or removal of riparian zone vegetation, only if:**

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- 1. The total area of vegetation cleared, cut, and/or removed within the riparian zone does not exceed the limits set forth in Table 11.2 above;**
- 2. The applicant demonstrates that there is no other feasible use of the site that would reduce the area of riparian zone vegetation to be cleared, cut, and/or removed, such as constructing a different type of project onsite, reducing the size or scope of the project, or relocating the project to a different portion of the site; and**
- 3. Where the area of riparian zone vegetation to be cleared, cut, and/or removed associated with regulated activities under this subsection is greater than 2,000 square feet, the applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the total area of vegetation that is cleared, cut, and/or removed.**

**(z) All riparian zone vegetation that is cleared, cut, and/or removed to conduct a regulated activity, access an area where regulated activities will be conducted, or otherwise accommodate a regulated activity shall be replanted immediately after completion of the regulated activity, unless prevented by seasonal weather, in which case the vegetation shall be replanted as soon as conditions permit. Portions of the riparian zone occupied by an authorized structure need not be replanted.**

- 1. Except as provided in (z)2 below, the vegetation replanted shall:**
  - i. Consist of vegetation of equal or greater ecological function and value as the vegetation that was cleared, cut, or removed. For example, herbaceous vegetation may be replaced with the same type of vegetation or with trees, but the trees in forested areas must be replaced with trees of equal or greater density and ecological function and value; and**

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ii. **Consist of native, non-invasive vegetation, except in an actively disturbed area.**

**In an actively disturbed area, the vegetation may be replaced with the same type of vegetation that was cleared, cut, or removed, or with another kind of vegetation typical of an actively disturbed area. For example, lawn grass may be replaced with garden plants or agricultural crops.**

2. **In cases where replanting in accordance with (z)1 above would interfere with continued access to or maintenance of a structure that is required by Federal, State, or local law, the vegetation replanted shall meet the requirements of (z)1 above to the extent feasible.**

7:13-[10.3]11.3 Requirements for a regulated activity in a floodway

(a) – (b) (No change.)

(c) Notwithstanding (b) above, the Department shall issue an individual permit for the following regulated activities in a floodway, provided all other requirements of this chapter are satisfied for each activity:

1. The construction **or conversion** of a building on a pier in the Hudson River, provided the requirements of the Coastal Zone Management rules at N.J.A.C. 7:7E-3.48 are satisfied, **in accordance with N.J.A.C. 7:13-12.5(e) or (f), as appropriate;**
2. The **elevation or** reconstruction of a lawfully existing building, in accordance with N.J.A.C. 7:13-[11.5(e)]**12.5(g);**
3. The construction of [an] **a horizontal and/or vertical** addition to a lawfully existing building, in accordance with N.J.A.C. 7:13-[11.5(f)]**12.5(h);**

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4. The construction of a water control structure, such as a bridge[,] **or** culvert, [footbridge], **low dam**, dam, or flood control project, in accordance with N.J.A.C. 7:13- [11.7, 11.8, 11.11 and 11.12]**12.7, 12.10, 12.11, and 12.12**, respectively;
  5. The construction of a stormwater outfall structure, in accordance with N.J.A.C. 7:13- [11.10]**12.9**;
  6. **The construction of a retaining wall or bulkhead, in accordance with N.J.A.C. 7:13-12.13;**
- [6.] 7. The restoration and/or stabilization of a bank or channel, in accordance with N.J.A.C. 7:13-[11.14]**12.14**, which requires the placement of fill **in a floodway**, provided **the fill is necessary to**:
- i. [The placement of the fill is necessary to protect] **Protect** nearby structures or trees from undermining or failure[, or to restore]; or
  - ii. **Restore or** improve the ecological health or habitat value of a regulated water, [and not simply to reclaim land that has been lost due to erosion] **such as the restoration to a natural condition a regulated water that is enclosed by a structure, such as a pipe or culvert, or which has been previously straightened, channelized or lined with revetments;** [and
  - ii. The cross-sectional area of the channel open to flow will not be reduced to less than the pre-eroded condition of the channel;]
- [7.] 8. The placement of dredged material adjacent to the water from which the material was removed, in accordance with N.J.A.C. 7:13-[11.15(f)]**12.15(f)**;
- Recodify existing 8. and 9. as **9. and 10.** (No change in text.)

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7:13-[10.4]11.4 Requirements for a regulated activity in a flood fringe

(a) – (b) (No change.)

(c) The Department shall issue an individual permit for a regulated activity (or combination of regulated activities) in a flood fringe only if one of the following is satisfied:

1.- 2. (No change.)

3. The regulated activity will displace no more than 20 percent of the flood storage volume onsite, as calculated for both the volume between the flood hazard area design flood and the 10-year flood, and the volume between the 10-year flood and the ground, and all flood storage displacement onsite will be compensated offsite as follows:

i. (No change.)

ii. If the regulated activity is a [Major] **major** Highlands [Development] **development**, as defined at N.J.A.C. 7:38-1.4, the requirements at (h) below shall be met; or

iii. If the regulated activity is not located within the Central Passaic Basin and is not a [Major] **major** Highlands [Development] **development**, the requirements at (i) below shall be met.

(d) The following regulated activities (or combination of regulated activities) are not subject to the flood storage volume displacement limits of this section, provided the activity is not associated with a [Major] **major** Highlands [Development] **development**:

1. – 2. (No change.)

3. The reconstruction, **enlargement, or other improvement** of a lawfully existing

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railroad [or], public roadway [including any improvement or enlargement], **or driveway that serves only one single-family home or duplex**, provided flood storage volume displacement is minimized;

4. The construction [or improvement] of a **new** driveway across a regulated water provided:

i. The driveway serves only one [private residence] **single-family home or duplex**, which is not being constructed as part of a larger residential subdivision **or multi-unit development**;

ii. **The lot on which the single-family home or duplex is being constructed was not created or subdivided after November 5, 2007**;

[ii.] **iii.** [In the case of the construction of a new driveway, the] **The** applicant demonstrates that there is developable land onsite that cannot feasibly be accessed without crossing the water, including accessing the site through neighboring properties; and

[iii.] **iv.** (No change in text.)

5. The construction, **reconstruction, relocation, elevation, or enlargement** of one [private residence] **single-family home or duplex** provided:

i. The [residence] **single-family home or duplex** is not being constructed as part of a [larger] residential subdivision **or multi-unit development**;

ii. **The lot on which the single-family home or duplex is being constructed was not created or subdivided after November 5, 2007**;

[ii.] **iii.** Any enclosed area beneath the flood hazard area design flood elevation meets

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the requirements of N.J.A.C. 7:13-[11.5(n), (o), and (p)]**12.5(p)**; and

[iii.] **iv.** Except for the construction of a driveway across a regulated water, which meets the requirements of (d)4 above, the site is not graded to accommodate the construction of the [residence] **single-family home or duplex** in such a way that flood storage volume would be displaced;

6. The construction **or maintenance** of a flood control project, **which meets the requirements of N.J.A.C. 7:13-12.12**, provided flood storage volume displacement is minimized; [and]

7. **The restoration of a regulated water to a natural condition that meets the requirements of N.J.A.C. 7:13-12.14(d), provided lost or displaced flood storage volume is minimized;**

[7.] **8.** The depositing of sediment removed from a channel, which meets the requirements of N.J.A.C. 7:13-[11.15(f)]**12.15(f)**[.];

9. **The repair, modification, or reconstruction of a malfunctioning individual subsurface sewage disposal system, provided:**

i. **The need for 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;**

ii. **Any 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;**



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**closure plan or disruption approval issued by the Department pursuant to N.J.A.C. 7:26-2A.8 or 2A.9, provided:**

- i. The applicant demonstrates that the volume of flood storage displacement is the minimum necessary to properly close the landfill and to properly maintain and monitor it after closure;**
- ii. All flood storage displacement is compensated for, either onsite or offsite, to the maximum extent practicable, and in accordance with the methods set forth in this section; and**
- iii. After all feasible flood storage compensation is provided, the project does not displace more than 20 percent of the flood storage volume existing at the time of application.**

(e) (No change.)

(f) Table [D] 11.4 below sets forth the percentage of flood storage volume that a regulated activity (or combination of activities) can lawfully displace in various geographic areas of New Jersey. As described in further detail in this section below, a project cannot displace more than 20 percent of the flood storage volume that originally existed onsite, and all proposed displacement onsite must ultimately be compensated offsite. Table [D] 11.4 indicates the dates from which the original and proposed flood storage volumes should be calculated for different geographic areas. Flood storage calculations shall be performed for both the volume between the flood hazard area design flood and the 10-year flood, and the volume between the 10-year flood and the ground, as described at (j) below, to show that the 20-percent and zero-percent limitations are met for both of these areas.

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Table [D] 11.4

ALLOWABLE PERCENTAGES OF FLOOD STORAGE VOLUME DISPLACEMENT  
(Which shall be met for both the volume between the flood hazard area design flood and the 10-year flood, and the volume between the 10-year flood and the ground)

Geographic Area	Maximum onsite percentage of flood storage volume that a project can lawfully displace (P <sub>ONSITE</sub> )	Maximum total percentage of flood storage volume that a project can lawfully displace including all offsite credits (P <sub>TOTAL</sub> )
Central Passaic Basin	20 percent of flood storage that existed onsite on March 25, 1977	0 percent of flood storage that existed onsite on March 25, 1977
Highlands Preservation Area*	20 percent of flood storage that existed onsite on January 31, 1980	0 percent of flood storage that existed onsite on August 10, 2004
Remainder of State	20 percent of flood storage that existed onsite on January 31, 1980	0 percent of flood storage that existed onsite on November 5, 2007

\*If associated with [Major] **major** Highlands [Development] **development**, as defined at N.J.A.C. 7:38-1.4.

(g) (No change.)

(h) The following shall apply to any [Major] **major** Highlands [Development] **development** within the Highlands Preservation Area that does not meet the requirements of (d) or (e) above:

1. – 2. (No change.)

(i) The following shall apply to any project located outside the Central Passaic Basin (except for [Major] **major** Highlands [Development] **development** as described at (h) above) that does not meet the requirements of (d) or (e) above:

1. – 2. (No change.)

(j) The following factors shall be considered when calculating flood storage volumes under this section:

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1. **A flood fringe is a dynamic system in which floodwaters flow into and out of a given area during the course of a flood event. Therefore, in order to effectively compensate for flood storage displacement caused by construction activities, compensatory flood storage created under this section must be designed to remain open to flow, such that floodwaters can freely enter and exit the area during the entire flood event. Examples of ineffective flood storage include:**
  - i. **The creation of belowground pipes or chambers connected to the flood hazard area by pipes, which fill with floodwaters at the onset of flooding and generally remain full until the flood recedes; and**
  - ii. **The creation of isolated depressions or other similar aboveground areas on the edge of a flood fringe, unless the area is connected to the flood hazard area with open channels or pipes of sufficient hydraulic capacity to allow floodwaters to freely enter and exit the area, and to rise and fall at the same elevation as the flood event.**

[1.] **2.** (No change in text.)

[2.] **3.** [Flood] **Except as provided in (j)4 below, flood** storage displacement proposed above the 10-year flood elevation onsite must be compensated for by the creation of flood storage above the 10-year flood elevation. Similarly, flood storage displacement proposed below the 10-year flood elevation onsite must be compensated for by the creation of flood storage below the 10-year flood elevation. This applies whether the compensation occurs onsite, as described at (m) below, or offsite, as described at (o) below.

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**4. In cases where a site lies predominately below the 10-year flood elevation and it is demonstrated that it is not possible to compensate onsite for all flood storage displacement proposed above the 10-year flood elevation, the applicant shall pursue the following options in the order listed below:**

- i. The applicant shall create onsite flood storage volume above the 10-year flood elevation, in accordance with (m) below, to the maximum extent practicable;**
- ii. If the applicant cannot fully compensate onsite for all flood storage displacement under (j)4i above, offsite flood storage volume shall be created above the 10-year flood elevation in accordance with (o) below to the maximum extent practicable; and**
- iii. If the applicant cannot fully compensate for flood storage displacement under either (j)4i and ii above, flood storage volume shall be created below the 10-year flood elevation, either onsite or offsite, for all flood storage displacement that is unable to be created in accordance with (j)4i and ii above.**

[3.] **5.** In cases where the 10-year flood elevation is not provided on State or Federal flood maps, calculations can instead be performed using a flood depth halfway between the flood hazard area design flood elevation and the lowest ground elevation within the flood fringe onsite. For example, at a given cross-section through a site, if the flood hazard area design flood elevation is 90.0 feet NGVD and the lowest ground elevation within the flood fringe is 80.0 feet NGVD, flood storage calculations can be performed at that cross-section using a flood elevation of 85.0 feet NGVD at that location, if the 10-year flood elevation is unknown. Furthermore, this halfway depth must be

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determined separately for each cross-section in the flood fringe, and at close intervals throughout the site in order to provide an accurate estimate of the upper and lower flood storage volumes. [An illustration of how to properly calculate these volumes is provided in the Flood Hazard Area Technical Manual.]

Recodify existing 4. and 5. as **6. and 7.** (No change in text.)

[6.] **8.** The volume inside a building [that prevents floodwaters from entering] is considered displaced flood storage volume **except for the space inside an enclosure below the lowest floor of a building that conforms to the requirements at N.J.A.C. 7:13-12.5(p).**

[7.] **9.** (No change in text.)

(k) The base flood storage volume onsite ( $V_{1977}$ ,  $V_{1980}$ ,  $V_{2004}$ , and/or  $V_{2007}$ ) is the volume of floodwater that was able to occupy the flood fringe onsite on the appropriate date shown in Table [D] **11.4** depending on the geographic location of the project. To determine the base flood storage volume, calculate the volume of space within the flood fringe between the flood elevation and the ground surface as it existed on the appropriate date in Table [D] **11.4**, and subtract the volume occupied by any structures that lawfully existed on that date.

(l) (No change.)

(m) Additional flood storage volume may be created onsite to compensate for proposed flood storage displacement only on land that meets the requirements of (n) below and in **one or both** of the following ways:

1. Removing material that has been previously lawfully placed within the flood fringe, such as fill or structures, and properly disposing the material outside a flood hazard

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area, as described in (q) below; [and/or] **or**

2. (No change.)

(n) Flood storage volume may be created onsite to compensate for regulated activities that displace flood storage as described in (m) above provided the onsite compensation:

1. – 2. (No change.)

3. Is not created within **either of** the following areas, unless the area where the compensation will be created has been subject to previous, lawful disturbance:

i. Within a riparian zone, pursuant to N.J.A.C. 7:13-4.1 and [10.2] **11.2; or**

ii. Within 300 feet of a Highlands open water, if the project is a major Highlands development as defined in the Highlands Water Protection and Planning Act rules at N.J.A.C. 7:38-1.4; [and/or] **and**

[iii. Within a Special Water Resource Protection Area, if the project is a major development as defined in the Stormwater Management rules at N.J.A.C. 7:8-1.2; and]

4. (No change.)

(o) Offsite compensation ([VC]  $V_C$ ) is additional flood storage volume created offsite to compensate for proposed flood storage displacement onsite. Offsite compensation can [only] be created **only** on land that meets the requirements of (p) below[,] and only in **one or more of** the following ways:

1. (No change.)

2. Excavating material from below the surface of the ground and properly disposing the material outside a flood hazard area, as described in (r) below; [and/or] **or**

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3. (No change.)

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

1. – 4. (No change.)

5. Is not created within **either of** the following areas, unless the area where the compensation will be created has been subject to previous, lawful disturbance:

- i. Within a riparian zone, pursuant to N.J.A.C. 7:13-4.1 and [10.2] **11.2; or**
- ii. Within 300 feet of a Highlands open water, if the project is a major Highlands development as defined in the Highlands Water Protection and Planning Act rules at N.J.A.C. 7:38-1.4; [and/or
- iii. Within a Special Water Resource Protection Area, if the project is a major development as defined in the Stormwater Management rules at N.J.A.C. 7:8-1.2;]

6. – 8. (No change.)

(q) For the purposes of (m)1 and (o)1 above, flood storage volume can be created by removing material previously placed within the flood fringe, such as fill or structures, provided:

1. (No change.)

2. The material to be removed is not associated with an activity permitted-by-rule under N.J.A.C. 7:13-[7]6;

3. – 5. (No change.)

(r) (No change.)

(s) For the purposes of (o)3 above, offsite compensation in the Central Passaic Basin can be accomplished in certain cases described in (t) below through the purchase of fill credits. A fill

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credit is a unit of flood storage volume that has been created in the Central Passaic Basin by excavation and/or removal of fill, and which can be sold to a permittee to compensate for proposed fill elsewhere in the Central Passaic Basin. The Department has previously permitted several facilities to create fill credits. However, [the Department shall no longer accept new applications to allow a] **no person or facility [to] shall create new or additional fill credits in this manner. [In order for fill credits to be valid under this section, an application to create the fill credits must have been received by the Department prior to October 2, 2006, and the fill credits, once approved, must be lawfully created by the applicant prior to October 2, 2011.] A person or facility shall furthermore buy or sell a fill credit only if it has been lawfully created under a permit previously approved by the Department as noted above.** Once all **previously** approved fill credits have been purchased, offsite compensation in the Central Passaic Basin will no longer be possible through fill credits.

(t) (No change.)

(u) If the percentage of flood storage volume displacement on a site already exceeds a limit at Table [D] **11.4** above due to activities that were previously undertaken in accordance with this chapter, the Department shall issue an individual permit for a new regulated activity on the site only if an equal amount of flood storage volume is created to compensate onsite for any displaced flood storage volume that would result from the new regulated activity, in accordance with (e) above. Compensatory flood storage volume shall not be created offsite in such a case, and shall only be created onsite, as described in (m) above. The volume of fill in excess of the limits in Table [D] **11.4** does not need to be removed from the site.

(v) If the percentage of flood storage volume displacement on a site already exceeds a limit at

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Table [D] **11.4** above due to activities that were previously undertaken in violation of this chapter, the Department shall issue an individual permit for a new regulated activity on the site only if the following requirements are satisfied:

1. (No change.)
2. All displaced flood storage volume in excess of the limit in Table [D] **11.4** is restored onsite; and
3. (No change.)

(w) (No change.)

7:13-[10.5]**11.5** Requirements for a regulated activity in or along a **regulated** water with fishery resources

(a) This section sets forth specific design and construction standards that apply to any regulated activity proposed in the channel and/or riparian zone of a regulated water containing fishery resources. Further standards for the construction of a bridge or culvert in or along waters with fishery resources are described at N.J.A.C. 7:13-[11.7]**12.7**.

(b) The waters identified by the Department as containing fishery resources are listed in the Department's Surface Water Quality Standards at N.J.A.C. 7:9B, and are further supplemented by the following reports as updated, which are included here by reference. Copies of these reports are [included in the Flood Hazard Area Technical Manual,] available from the Department at the [address listed] **website set forth** at N.J.A.C. 7:13-[1.1(g)]**1.4**:

1. – 3. (No change.)

(c) The Department shall issue an individual permit for a regulated activity in the channel

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and/or riparian zone of a regulated water containing fishery resources only if the following requirements are satisfied:

1. (No change.)
- [2. Unset or raw cement is not allowed to come into contact with water in the channel during construction;]

Recodify existing 3. and 4. as **2. and 3.** (No change in text.)

(d) Except as provided at (e) below, certain activities are prohibited during times when fish are breeding or are especially sensitive to disturbance. The following activities are prohibited during the restricted periods listed in Table [E] **11.5** below:

1. (No change.)
2. Any construction, excavation, filling, or grading in the riparian zone, unless the applicant demonstrates that appropriate soil erosion and sediment control measures, **as determined by the local Soil Conservation District having jurisdiction over the site,** are in place [which will] **to** prevent sediment from reaching the channel. [All proposed measures shall meet the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90.]

Table [E] **11.5**  
RESTRICTED TIME PERIODS FOR **REGULATED** WATERS WITH FISHERY RESOURCES

Water and classification	Time period (inclusive) during which activities are prohibited
<b>1. Trout Waters</b>	
• All trout production waters except rainbow trout	September 15 through March 15
• Rainbow trout production waters	February 1 through April 30

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<ul style="list-style-type: none"> <li>• Trout stocked waters</li> <li>• Trout maintenance waters</li> <li>• [Any] <b>All regulated</b> waters located within one mile upstream of a trout stocked or a trout maintenance water</li> </ul>	March 15 through June 15
<b>2. Non-Trout Waters</b>	
<ul style="list-style-type: none"> <li>• <b>Regulated waters that support general game fish located north of Interstate 195</b></li> </ul>	<b>May 1 through July 31</b>
<ul style="list-style-type: none"> <li>• [Waters] <b>Regulated waters</b> that support general game fish <b>located south of Interstate 195</b></li> </ul>	May 1 through June 30
<ul style="list-style-type: none"> <li>• [Waters] <b>Regulated waters</b> that support pickerel</li> </ul>	Ice out through April 30
<ul style="list-style-type: none"> <li>• [Waters] <b>Regulated waters</b> that support walleye</li> </ul>	March 1 through May 30
<b>3. Anadromous Waters</b>	
<ul style="list-style-type: none"> <li>• All unimpeded tidal <b>regulated</b> waters open to the Atlantic Ocean or any coastal bay</li> <li>• All <b>regulated</b> waters identified as anadromous migratory pathways</li> </ul>	April 1 through June 30
<ul style="list-style-type: none"> <li>• Delaware River upstream of U.S. Route [202] <b>1</b></li> </ul>	April 1 through June 30 and September 1 through November 30
<ul style="list-style-type: none"> <li>• Delaware River between U.S. Route 202 and Interstate 276 (Pennsylvania Turnpike Bridge)</li> </ul>	[March 1 through June 30]
<ul style="list-style-type: none"> <li>• Delaware River between [Interstate 276 (Pennsylvania Turnpike Bridge)] <b>U.S. Route 1</b> and Interstate 295 (Delaware Memorial Bridge)</li> <li>• Tidal portions of Raccoon <b>Creek</b>, Rancocas Creek, Crosswicks Creek[s], and Cooper River</li> </ul>	March 1 through June 30 and September 1 through November 30
<ul style="list-style-type: none"> <li>• All unimpeded tidal <b>regulated</b> waters open to the Delaware River downstream of Interstate 295 (Delaware Memorial Bridge)</li> <li>• Tidal portions of the Maurice River, Cohansey River, and Salem River</li> </ul>	March 1 through June 30 and October 1 through November 30

(e) [An applicant may request that the Department reduce, extend or otherwise modify a timing restriction listed in Table E.] The Department shall [grant such a request] **reduce, extend, or**

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**otherwise modify a timing restriction listed in Table 11.5 if it determines that** one or more of the following requirements is satisfied:

1. [The applicant demonstrates that the] **Potential** adverse impacts to fishery resources [will be less] **are likely to be reduced** if a regulated activity occurs during [the] a restricted time period rather than during an unrestricted time period;
2. A regulated activity is subject to more than one restricted time period, the combined effect of which would limit the regulated activity to fewer than 183 calendar days per year. In such a case, the Department shall allow the regulated activity to occur for up to 183 calendar days, provided the applicant demonstrates that additional measures shall be taken to reduce **potential** adverse impacts to 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] observance of a timing restriction [for the reconstruction of a public road crossing would cause increased risks or excessive delays to school buses or vans] **would adversely impact public health, safety, and/or welfare**, and the applicant demonstrates that additional measures [shall be taken] **are taken where necessary** to reduce adverse impacts to fishery resources to an acceptable level; or
4. [The Department determines that, due] **Due** to the nature of the project or an unusual circumstance onsite, the timing restriction must be modified in order to prevent a

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substantial adverse impact to the fishery resource or to the environment.

(f) The Delaware River Basin Commission (DRBC) may impose timing restrictions in addition to those listed in Table [E] **11.5** above 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.] **Information related to the DRBC and its requirements can be obtained at [www.nj.gov/drbc](http://www.nj.gov/drbc) or by calling (609) 883-9500.**

7:13-[10.6]**11.6** Requirements for a regulated activity in **or affecting a present or** documented habitat for threatened or endangered species

(a) This section sets forth specific design and construction standards that apply to any regulated activity proposed in **or affecting a present or** documented habitat for a threatened or endangered species.

(b) For the purposes of this chapter, the Department identifies present [and/or] **and** documented habitat for most threatened or endangered wildlife species using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened and endangered wildlife species. [This method is further described in the Flood Hazard Area Technical Manual, available from the Department at the available from the Department at the address listed at N.J.A.C. 7:13-1.1(g).] The report entitled New Jersey's Landscape Project, **which is updated periodically**, provides additional information on mapping methodology and is available at [the website] [www.nj.gov/dep/fgw/ensphome.htm](http://www.nj.gov/dep/fgw/ensphome.htm) [or by contacting the address given below. The Department's Landscape Maps may be updated periodically and may be

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obtained via file download from [www.nj.gov/dep/fgw/ensphome.htm](http://www.nj.gov/dep/fgw/ensphome.htm) or through the Interactive I-map NJ website: [www.state.nj.us/dep/gis/imapnj/imapnj.htm](http://www.state.nj.us/dep/gis/imapnj/imapnj.htm)] or **through the Department's interactive website at [www.nj.gov/dep/gis/geoweb splash.htm](http://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:

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**

P.O. Box [400] **420**

Trenton, NJ 08625-[0400]**0420**.

(c) For endangered or threatened plant species and for those wildlife species for which a landscape model in the Landscape Project has not been developed [(models do not exist for certain aquatic species)], the Department shall rely on the New Jersey Natural Heritage Database for site-specific information. To determine which animal species are not included in the Landscape Project, see [Appendix IV] **the latest version** of the New Jersey Landscape Mapping Project[, Version 2.0 report, available at [www.nj.gov/dep/fgw/ensphome.htm](http://www.nj.gov/dep/fgw/ensphome.htm)] **at the website listed in (b) above**. [Information regarding the Natural Heritage Program Database is available at: [www.nj.gov/dep/parksandforests/natural/heritage/](http://www.nj.gov/dep/parksandforests/natural/heritage/).]

(d) (No change.)

(e) The Department shall require a survey and/or a habitat assessment for threatened or endangered species as part of an environmental report, as described at N.J.A.C. 7:13-

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[15.5(c)]**18.5(c)**, for an individual permit for any regulated activity which is likely to do either of the following:

1. – 2. (No change.)

(f) Persons seeking information pertaining to threatened or endangered species sightings on or near a particular site can contact:

State of New Jersey

Department of Environmental Protection

**The New Jersey** Natural Heritage Program

**Mail Code 501-04**

P.O. Box [404] **420**

Trenton, NJ 08625-**0420**

Telephone: (609) 984-1339

Website: [www.nj.gov/dep/parksandforests/natural/heritage/](http://www.nj.gov/dep/parksandforests/natural/heritage/)

(g) (No change.)

SUBCHAPTER [11.] **12. ACTIVITY-SPECIFIC REQUIREMENTS FOR INDIVIDUAL PERMITS [REQUIREMENTS FOR VARIOUS REGULATED ACTIVITIES]**

7:13-[11.1]**12.1** Requirements that apply to all regulated activities

(a) – (b) (No change.)

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(c) A permittee shall obtain all necessary approvals from the local Soil Conservation District [or its designee] prior to commencing any activity approved in an individual permit issued under this chapter.

(d) A permittee shall obtain all necessary approvals from the USDA Natural Resource Conservation Service [or its designee] prior to commencing any activity designed or overseen by the NRCS, which is approved in an individual permit issued under this chapter.

(e) If neither the Soil Conservation District nor the USDA Natural Resource Conservation Service has jurisdiction over an activity approved in an individual permit issued under this chapter, the permittee shall commence the activity only if the following [soil erosion and sediment control standards, as specified in the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90, are implemented] **requirements are met:**

1. – 3. (No change.)

4. Permanent, [indigenous, non-invasive vegetation] **native, non-invasive plant species** shall be established on all exposed soils immediately following construction. The applicant shall monitor and maintain all such vegetation for at least three growing seasons to ensure proper establishment and survival.

(f) The Department shall issue an individual permit for a regulated activity that adversely impacts a property not owned by an applicant **as set forth in (g) below**, only if the applicant demonstrates that one or more of the **following** requirements [at N.J.A.C. 7:13-9.2(f)] are satisfied for each adversely impacted property[.]:

**1. The applicant is a public entity that intends to appropriate the adversely impacted property through its power of eminent domain;**

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2. **The applicant has entered into a contract to purchase the adversely impacted property;**
3. **The applicant has obtained an easement that encompasses the entire area that will be adversely impacted by the proposed activity, which specifically allows the applicant to undertake the proposed activity; or**
4. **The applicant has obtained written permission from the owners of the adversely impacted property. Written permission shall include the following:**
  - i. **An explanation of the nature and purpose of the project;**
  - ii. **An estimate of the length of time regulated activities will occur;**
  - iii. **An estimate of the extent to which the adversely impacted property will be affected by flooding or stormwater discharges and the frequency at which these impacts are expected to occur; and**
  - iv. **The notarized signature of all owners of the adversely impacted property.**

**(g) [A] The Department shall consider a regulated activity [shall be considered] to adversely impact a property not owned by an applicant if the activity meets [any of the following requirements (for) **one or more of the following.** For the purpose of determining compliance with [(f)3,] **(g)4 and 5 below, calculations shall be rounded to the nearest 0.1 feet[]]:****

1. (No change.)
2. A stormwater discharge is directed overland onto property that is not owned by the applicant and the Department determines that the discharge will significantly increase **or concentrate** overland flow **and/or cause erosion or increased flooding** on the property not owned by the applicant;

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- [3. The regulated activity will cause a building situated on property not owned by the applicant to be subject to increased frequency or depth of flooding during any flood event up to and including the flood hazard area design flood;
4. The applicant owns (or has development rights on) both sides of a regulated water, and the regulated activity will cause the flood hazard area design flood elevation to increase by more than 0.2 feet on any property not owned by the applicant; and/or;
5. The applicant owns (or has development rights) on only one side of a regulated water, and the regulated activity will cause the flood hazard area design flood elevation to increase by more than 0.1 feet on any property not owned by the applicant.]
- 3. The applicant relocates a regulated water or otherwise alters its top of bank such that the limit of the riparian zone encroaches further onto an offsite property;**
- 4. The applicant proposes to undertake one or more of the following regulated activities:**
  - i. The construction of a new bridge or culvert, which does not meet the offsite flood requirements of N.J.A.C. 7:13-12.7(e);**
  - ii. The reconstruction of an existing bridge or culvert, which does not meet the offsite flood requirements of N.J.A.C. 7:13-12.7(f); or**
  - iii. The restoration of a regulated water to a natural condition, which does not meet the offsite flood requirements of N.J.A.C. 7:13-12.14(d);**
- 5. The applicant proposes to undertake a regulated activity not listed in (g)4 above, and the regulated activity will result in one or more of the following offsite impacts during any flood event described in (i) below:**

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- i. The regulated activity subjects any offsite habitable building, railroad, roadway, or parking area to increased depth or frequency of flooding;**
- ii. The regulated activity increases offsite flood depths by more than 0.2 feet, in cases where the applicant owns or has development rights on both sides of a regulated water; or**
- iii. The regulated activity increases offsite flood depths by more than 0.1 feet, in cases where the applicant owns or has development rights on only one side of a regulated water.**

[(g)] **(h)** If a project results in a significant change in the cross-sectional area and/or hydraulic capacity of a channel or floodway, the Department shall presume that the project has the potential to adversely impact a property not owned by the applicant, as described at [(f)] **(g)** above. In such a case, the Department shall require the applicant to provide hydrologic and/or hydraulic calculations that identify the properties that would be adversely impacted, or which demonstrate that such impacts will not in fact occur. Examples of projects that may require such an analysis include a channel modification, flood control project, the construction or removal of a water control structure, and the placement of a significant volume of fill in a floodway.

**(i) Where this chapter requires consideration of potential offsite flooding impacts, the following flood events shall be analyzed:**

- 1. The flood hazard area design flood;**
- 2. The 100-year flood;**
- 3. The 50-year flood;**
- 4. The 25-year flood;**

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**5. The 10-year flood; and**

**6. The two-year flood.**

7:13-[11.2]12.2 Requirements for stormwater management

(a) This section sets forth stormwater management requirements and specific design and construction standards that apply to any **regulated activity associated with a** major development, as defined [at] **in the Stormwater Management rules at N.J.A.C. 7:8-1.2**[, which requires an individual permit under this chapter].

(b) (No change.)

(c) The Department shall issue an individual permit for a stormwater management basin located within or discharging within a flood hazard area only if the following requirements are satisfied:

1. (No change.)

2. The effects of flooding and tailwater conditions on any proposed discharge are accounted for in the stormwater management calculations for the proposed basin.

Tailwater conditions refer to situations where the discharge pipe will be submerged during a flood in such a way that floodwaters prevent the basin from draining properly.

The effects of flooding and tailwater conditions are of particular concern in **one or more of** the following cases:

i. – ii. (No change.)

iii. The basin reaches its maximum storage volume during or near the time flooding peaks within the water receiving the proposed discharge; [and/or] **or**

iv. (No change.)

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3. – 4. (No change.)

7:13-[11.3]12.3 (No change in text.)

7:13-[11.4]12.4 Requirements for a structure

(a) (No change.)

(b) The Department shall issue an individual permit to construct or reconstruct a structure only if the entire structure is designed and constructed to [be suitably anchored in order to]:

1. – 4. (No change.)

7:13-[11.5]12.5 Requirements for a building

(a) This section sets forth specific design and construction standards that apply to any building proposed [in the areas listed in (b) below. Subsection (c) below establishes standards that apply to all buildings, and subsections (d) through (t) below provide additional standards for various types of buildings.

(b) The requirements in this section apply to a building that is constructed or reconstructed in the following areas] **within:**

1. – 2. (No change.)

[(c) The Department shall issue an individual permit to construct or reconstruct a building of any kind only if the following requirements are satisfied:

1. Any new building is located at least 25 feet from any top of bank or edge of water;
2. If an existing building located near any top of bank or edge of water is to be expanded,

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the expanded portion is located at least 25 feet from the top of bank or edge of water, where possible;

3. If an existing building located near any top of bank or edge of water is to be reconstructed, the new building shall be relocated at least 25 feet from the top of bank or edge of water, where possible;
4. Any exterior wall being constructed or reconstructed is designed to resist hydrostatic and hydrodynamic pressure caused by flooding up to the flood hazard area design flood elevation; and
5. All applicable requirements contained in (d) through (t) below are satisfied.]

**(b) The Department shall issue an individual permit to construct, elevate, enlarge, or reconstruct a building of any kind, only if the following requirements are met:**

- 1. The building is designed to resist hydrostatic and hydrodynamic loads and effects of buoyancy resulting from flooding to at least one foot above the flood hazard area design flood elevation; and**
- 2. All applicable requirements set forth in (c) through (t) below are satisfied.**

**(c) The Department shall issue an individual permit to construct, elevate, enlarge, or reconstruct a building only if the following setbacks are satisfied, unless the building lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water, in which case the following setbacks do not apply:**

- 1. Any new building is located at least 25 feet from any top of bank;**
- 2. If an existing building is to be enlarged, such as through the construction of an addition, the enlarged portion of the building is located at least 25 feet from the top**

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**of bank, unless the applicant meets the requirements of (d) below; and**

- 3. If an existing building located less than 25 feet from the top of bank is to be elevated or reconstructed, the building shall be relocated so that it is situated at least 25 feet from the top of bank, unless the applicant meets the requirements of (d) below.**

**(d) In cases where an compliance with the requirements of (c)2 and/or 3 above is not feasible, the applicant shall:**

- 1. Demonstrate in writing the reasons why compliance with (c)2 and/or 3 above, as appropriate, is not feasible; and**
- 2. Provide an engineering certification confirming that the location of proposed construction is stable and suitable for the proposed building, and not subject to erosion or undermining due to its proximity to the top of bank.**

[(d)] (e) The Department shall [not] issue an individual permit for the construction of a new building in a floodway, [except for the construction of a building] **only if the following requirements are satisfied:**

- 1. The building is located** on a pier in the Hudson River [satisfying the];
- 2. The requirements of the Department's Coastal Zone Management rules at N.J.A.C. 7:7E-3.48 are met[.]; and**
- 3. The applicant provides an engineering certification confirming that the proposed building is designed to resist hydrostatic and hydrodynamic loads and effects of buoyancy resulting from flooding to at least one foot above the flood hazard area design flood elevation.**

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**(f) The Department shall issue an individual permit to convert an existing building located in a floodway into a single-family home, duplex, multi-residence building, or critical building only if the requirements of (e)1, 2, and 3 above are satisfied.**

[(e)] **(g)** The Department shall issue an individual permit to elevate or reconstruct a lawfully existing building in a floodway only if the following requirements are satisfied:

1. The building has [not] been [unoccupied for more than] **occupied within** five years prior to the date of application to the Department to reconstruct;
- [2. The reconstruction shall not convert a non-residential use to a residential use; and]
- [3.] **2.** All construction takes place within the same footprint as the original building[.], **unless the applicant demonstrates that an expanded, reduced, or otherwise revised footprint will not result in any further obstruction to the flow of floodwaters; and**
- 3. The applicant provides an engineering certification confirming that the elevated or reconstructed building is designed and constructed to resist hydrostatic and hydrodynamic loads and effects of buoyancy resulting from flooding to at least one foot above the flood hazard area design flood elevation.**

[(f)] **(h)** The Department shall issue an individual permit for the construction of [an] **a horizontal and/or vertical** addition to a lawfully existing building in a floodway only if the following requirements are satisfied:

1. The building has [not] been [unoccupied for more than] **occupied within** five years prior to the date of application to the Department to construct the addition;
2. The **applicant demonstrates that the** addition does not result in any further obstruction to the flow of floodwaters; and

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3. The **applicant provides an engineering certification confirming that the** existing building, in combination with the **proposed** addition, is modified to [withstand the hydrodynamic and hydrostatic forces due to flooding up to] **resist hydrostatic and hydrodynamic loads and the effects of buoyancy resulting from flooding to at least one foot above** the flood hazard area design flood elevation.

[(g)] (i) The Department shall issue an individual permit to construct a new habitable building only if the following requirements are satisfied:

1. The lowest floor of a [private residence] **single-family home or duplex** is set at least one foot above the flood hazard area design flood elevation;
2. The lowest floor of a [public] **critical** building is set at least one foot above the flood hazard area design flood elevation;
3. The lowest floor of a multi-residence building is set at least one foot above the flood hazard area design flood elevation, unless all of the following are satisfied:
  - i. – iii. (No change.)
  - iv. The lowest floor of the non-residential portions of the building identified in [(g)3iii] (i)3iii above is set as close as feasible to one foot above the flood hazard area design flood elevation. **In no case shall the lowest floor of the building be set below grade along all adjoining exterior walls;** and
  - v. An architect or engineer certifies that the non-residential portions of the building identified in [(g)3iii] (i)3iii above will be constructed in accordance with the flood-proofing requirements at (q) below; and
4. The lowest floor of any habitable building not identified in [(g)1] (i)1, 2, or 3 above,

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such as a commercial business, house of worship, office complex, or shopping center, is set at least one foot above the flood hazard area design flood elevation, unless all of the following are satisfied:

- i. The applicant demonstrates that it is not feasible to [construct] **set** the lowest floor of any or all portions of the building at least one foot above the flood hazard area design flood elevation;
- ii. The lowest floor of the portions of the building identified in [(g)4i] **(i)4i** above is [constructed] **set** as close as feasible to one foot above the flood hazard area design flood elevation. **In no case shall the lowest floor of the building be set below grade along all adjoining exterior walls;** and
- iii. An architect or engineer certifies that the portions of the building identified in [(g)4i] **(i)4i** above will be constructed in accordance with the flood-proofing requirements at (q) below.

[(h)] **(j)** The Department shall issue an individual permit to undertake the substantial improvement of a lawfully existing habitable building that has been [damaged by] **subject to substantial damage as a result of** fire, flooding, or other natural disaster only if the following requirements are satisfied:

1. The lowest floor of the entire building is constructed or modified where necessary to meet the requirements of [(g)] **(i)** above to the extent feasible. In no case shall the lowest floor be set below the FEMA 100-year flood elevation, except as provided in [(g)3] **(i)3** and 4 above; and
2. Any enclosed area beneath the lowest floor of the entire building is modified as

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necessary to meet the requirements of [(n), (o), and] (p) below[, as appropriate].

[(i)] **(k)** The Department shall issue an individual permit to undertake the substantial improvement of a lawfully existing building that has not been [damaged by] **subject to substantial damage as a result of** fire, flooding, or other natural disaster only if the following requirements are satisfied:

1. The lowest floor of any constructed, elevated, enlarged, or modified portion of the building meets the requirements of [(g)] **(i)** above;
2. The lowest floor of the remainder of the building is modified where necessary to meet the requirements of [(g)] **(i)** above to the extent feasible. In no case shall the lowest floor of this portion of the building be set below the FEMA 100-year flood elevation, except as provided in [(g)3] **(i)3** and 4 above; and
3. Any enclosed area beneath the lowest floor of the entire building is modified as necessary to meet the requirements of [(n), (o), and] (p) below[, as appropriate].

[(j)] **(l)** The Department shall issue an individual permit to elevate, enlarge, or otherwise modify all or a portion of a lawfully existing building, which does not result in a substantial improvement, only if the following requirements are satisfied:

1. The lowest floor of the elevated, enlarged, or modified portion of the building meets the requirements of [(g)] **(i)** above.
  - i. Where only a portion of a building is elevated, enlarged, or modified, the lowest floor of the remainder of the building is not required to be elevated or otherwise modified to meet the requirements of [(g)] **(i)** above; and
2. Any enclosed area beneath the lowest floor of the elevated, enlarged, or modified

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portion of the building is modified as necessary to meet the requirements of [(n), (o), and] (p) below[, as appropriate].

[(k)] **(m)** The Department shall issue an individual permit to reconstruct, elevate, enlarge, or otherwise modify a habitable building that was constructed in violation of this chapter only if the existing building is modified as necessary to meet the requirements of [(g) through (j)] **(i) through (l)** above, as applicable.

[(l)] **(n)** The Department shall issue an individual permit to convert an existing building [from a non-residential use to a residential use] **into a single-family home, duplex, multi-residence building, or critical building** only if the lowest floor of the converted building is modified as necessary to meet the requirements of [(g)] **(i)** above.

[(m)]**(o)** The Department shall issue an individual permit to construct a [public] **critical** building or multi-residence building, or to convert an existing building to one of these uses, only if the following requirements are [met] **satisfied**:

1. – 2. (No change.)

[(n)] **(p)** The Department shall issue an individual permit to [enclose an area] **construct an enclosure** that lies below the lowest floor of a habitable building, **or to construct an enclosure that lies below the flood hazard area design flood elevation that is either attached to or detached from a habitable building and is intended to be used as a garage or parking area,** only if the following requirements are satisfied:

1. (No change.)

2. The floor of the enclosure is situated at or above the adjoining exterior grade along at least one entire exterior wall, in order to provide positive drainage of the enclosed area;

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[and]

3. The enclosure is constructed with permanent flood openings that meet the requirements of the Uniform Construction Code at N.J.A.C. 5:23[.]; **and**
4. **Where the enclosure is greater than six feet in height, the following requirements are satisfied:**
  - i. **The deed for the lot on which the enclosure is constructed is modified to:**
    - (1) **Explain that the enclosure is likely to be inundated by floodwaters, which may result in damage and/or inconvenience;**
    - (2) **Disclose the depth of flooding that the enclosure would experience during the FEMA 100-year flood, if available, and the flood hazard area design flood;**
    - (3) **Prohibit habitation of the enclosure; and**
    - (4) **Explain that converting the enclosure into a habitable area may subject the property owner to enforcement under this chapter; and**
  - ii. **The modified deed is recorded in the Office of the County Clerk or the registrar of deeds and mortgages of the county in which the building is located, and proof that the modified deed has been recorded is provided to the Department prior to the sooner of either:**
    - (1) **The start of any site disturbance (including pre-construction earth movement, removal of vegetation or structures, or construction of the project); or**

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**(2) The date that is 90 calendar days after the issuance of the individual permit.**

[(o) The Department shall issue an individual permit for an enclosure that lies below the flood hazard area design flood elevation and that is intended to be used as a garage for one private residence, whether the enclosure is attached to or below a private residence or is freestanding, only if the following requirements are satisfied:

1. The garage meets the requirements for an enclosure under (n)1, 2, and 3 above;
2. The garage is not being constructed as part of a residential subdivision or multi-unit development; and
3. The lot on which the garage is being constructed did not receive preliminary or final subdivision approval after November 5, 2007.

(p) The Department shall issue an individual permit for an enclosure under (n) above that is greater than six feet in height, or for a garage under (o) above, only if:

1. The deed for the lot on which the enclosure or garage is constructed is modified to:
  - i. Explain that the enclosure or garage is likely to be inundated by floodwaters, which may result in damage and/or inconvenience.
  - ii. Disclose the depth of flooding that the enclosure or garage would experience during the FEMA 100-year flood and flood hazard area design flood, if either elevation is known;
  - iii. Prohibit habitation of the enclosure or garage; and
  - iv. Explain that converting the enclosure or garage into a habitable area may subject the property owner to enforcement under this chapter; and

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2. Within 90 calendar days of the issuance of the individual permit for the enclosure or garage, a copy of the modified deed as filed with the local county clerk is provided to the Department at the address set forth at N.J.A.C. 7:13-1.1(f).]

(q) [The] **Except for an enclosure that meets the requirements of (p) above, the** Department shall issue an individual permit for a building that is flood-proofed only if one of the following requirements is satisfied:

1. -2. (No change.)

(r) The Department shall issue an individual permit to dry flood-proof a building **under (q)1 above** only if the building is designed and constructed with measures to prevent floodwaters from entering the building during a flood depth of at least one foot above the flood hazard area design flood elevation.

(s) The Department shall issue an individual permit to wet flood-proof a building **under (q)2 above** only if the building is designed and constructed to be flood-resistant during a flood depth of at least one foot above the flood hazard area design flood elevation, so that floodwaters can enter the building through permanent openings, while not damaging the structural integrity of the building.

(t) The Department shall not issue an individual permit **under (q) above** to flood-proof a [new private residence] **single-family home, duplex**, [a new public] **or critical** building, or any residential portions of a [new] multi-residence building.

7:13-[11.6]**12.6** Requirements for a railroad, roadway, [or] **and** parking area

(a) – (b) (No change.)

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(c) The Department shall issue an individual permit to construct or reconstruct a [driveway] **private roadway** that [only] serves **as a driveway to** one [private residence, which is not being constructed as part of a larger residential subdivision] **single-family home or duplex, including any associated parking area**, only if [one of] the following requirements [is] **are** satisfied:

1. **For the construction of a new single-family home or duplex on a lot that was created or subdivided after November 5, 2007, the applicant demonstrates that none of the lots created in the subdivision contain a habitable building or possess a valid authorization from the Department to construct a habitable building in the flood hazard area;**

2. **The single-family home or duplex is not being constructed as part of a residential subdivision or multi-unit development; and**

[1.] 3. [The] **Either the travel surface of the driveway and any associated parking area** is constructed at least one foot above the flood hazard area design flood elevation[;] or

[2. The applicant does ] the following **requirements are satisfied:**

i. [Demonstrates] **The applicant demonstrates** that it is not feasible to construct the travel surface of the proposed driveway **and any associated parking area** at least one foot above the flood hazard area design flood elevation pursuant to (g) below, and instead constructs the travel surface as close to this elevation as feasible; [and]

ii. [Modifies the deed of the property to disclose (c)2ii(1) through (3) below. The modified deed shall be filed with the local county clerk, a copy of which shall be provided to the Department within 90 calendar days of the issuance of the individual permit.] **The deed for the lot on which the driveway is constructed is**

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**modified to:**

(1) [That] **Explain that** the driveway **and any associated parking area** is likely to be inundated by floodwaters, which may result in damage and/or inconvenience; **and**

[(2) The minimum frequency storm at which the driveway will be inundated; and]

[(3)] (2) [The] **Disclose the** depth of flooding **that the driveway and any associated parking area would experience** during the **FEMA 100-year flood, if available, and the** flood hazard area design flood[.]; **and**

iii. **The modified deed is recorded in the Office of the County Clerk or the registrar of deeds and mortgages of the county in which the single family home or duplex is located, and proof that the modified deed has been recorded is provided to the Department prior to the sooner of either:**

(1) **The start of any site disturbance (including pre-construction earth movement, removal of vegetation or structures, or construction of the project); or**

(2) **The date that is 90 calendar days after the issuance of the individual permit.**

(d) The Department shall issue an individual permit to construct or reconstruct a private roadway that serves a [public] **critical** building or multi-residence building only if one of the following requirements is satisfied:

1. (No change.)

2. For a new private roadway in a fluvial flood hazard area, the applicant demonstrates that the [public] **critical** building or multi-residence building is already served by one or

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more roadways having a travel surface at least one foot above the flood hazard area design flood elevation, which is of adequate size and capacity to serve the building, and instead constructs the travel surface of the roadway as close to this elevation as feasible;

or

3. (No change.)

**(e) The Department shall issue an individual permit to construct or reconstruct a private roadway that serves a building, or group of buildings, not covered by (c) or (d) above, such as a commercial business, house of worship, office complex, shopping center, or residential subdivision of two or more single-family home or duplexes, only if one of the following requirements is satisfied:**

- 1. The travel surface of the private roadway is constructed at least one foot above the flood hazard area design flood elevation; or**
- 2. The applicant demonstrates that each building or group of buildings is already served by one or more roadways having a travel surface at least one foot above the flood hazard area design flood elevation, which is of adequate size and capacity to serve the building or group of buildings, or that is not feasible to construct the travel surface of each private roadway at least one foot above the flood hazard area design flood elevation pursuant to (g) below, and instead constructs travel surface of each private roadway as close to this elevation as feasible.**

**[(e)] (f) The Department shall issue an individual permit to construct or reconstruct a parking area that serves [a public building or multi-residence] any building other than a single family home or duplex under (c) above only if one of the following requirements is satisfied:**

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1. – 2. (No change.)

[(f) The Department shall issue an individual permit to construct or reconstruct a private roadway and/or parking area that serves a building, or group of buildings, not covered by (c), (d) or (e) above, such as a commercial business, house of worship, office complex, shopping center or residential subdivision of two or more private residences, only if one of the following requirements is satisfied:

1. The travel surface of each proposed private roadway and parking area that serve the building or group of buildings is constructed at least one foot above the flood hazard area design flood elevation;
2. The applicant demonstrates the following:
  - i. Each building or group of buildings is already served by one or more roadways having a travel surface at least one foot above the flood hazard area design flood elevation, which is of adequate size and capacity to serve the building or group of buildings;
  - ii. The travel surface of each proposed roadway is constructed as close to one foot above the flood hazard area design flood elevation as feasible; and
  - iii. The travel surface of each proposed parking area is constructed at least one foot above the flood hazard area design flood elevation; or
3. The applicant demonstrates the following:
  - i. It is not feasible to construct the travel surface of each private roadway and parking area at least one foot above the flood hazard area design flood elevation pursuant to (g) below;

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- ii. The travel surface of each private roadway and parking area is constructed as close to one foot above the flood hazard area design flood elevation as feasible;
- iii. Every effort has been taken to provide some parking areas or sections of roadway in the overall development that are situated at least one foot above the flood hazard area design flood elevation so that vehicles can be moved to higher ground during a flood;
- iv. No extraordinary risk is posed to any person using each private roadway or parking area that is constructed at an elevation less than one foot above the flood hazard area design flood elevation; and
- v. An adequate number of permanent signs are posted in prominent locations indicating which private roadways and parking areas are subject to flooding in the following cases:
  - (1) The roadway and/or parking area serves a residential subdivision of two or more private residences; or
  - (2) The parking area has 10 spaces or more.]

(g) An applicant seeking to demonstrate that it is not feasible to construct the travel surface of a railroad, roadway, or parking area at least one foot above the flood hazard area design flood elevation, as is required for various activities in this section, shall [prove]:

1. **Demonstrate** that strict compliance with [this] **the elevation requirements of this section** would result in one or more of the following:

Recodify existing 1. and 2. as **i. and ii.** (No change in text.)

[3.] **iii.** A design that necessitates excessive volumes of fill that exceed the flood

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storage displacement limits at N.J.A.C. 7:13-[10.4]11.4, for which flood storage cannot feasibly be created in compensation either onsite or offsite; [and/or] **or**

[4.] **iv.** A design that causes unavoidable and adverse impacts to the environment (such as to the channel, riparian zone, or fishery resources), or which would cause unavoidable and significant increases in the flood hazard area design flood elevation[.];

- 2. Demonstrate that every reasonable effort has been taken to situate portions of each proposed roadway or parking area at least one foot above the flood hazard area design flood elevation so that vehicles can move to higher ground during a flood;**
- 3. Demonstrate that no extraordinary risk is posed to any person using each proposed roadway or parking area that is constructed at an elevation less than one foot above the flood hazard area design flood elevation; and**
- 4. Provide an adequate number of permanent signs are posted in prominent locations indicating which proposed roadways and parking areas are subject to flooding in the following cases:**
  - i. The roadway and/or parking area serves a critical building, a multi-residence building or a residential subdivision of two or more single-family home or duplexes; or**
  - ii. The parking area has 10 spaces or more.**

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#### **7:13-12.7 Requirements for a bridge or culvert**

**(a) This section sets forth the design and construction standards under which the Department will issue an individual permit for the construction or reconstruction of a bridge or culvert in any regulated area. A footbridge that does not meet the requirements of permit-by-rule 23 at N.J.A.C. 7:13-7.23 or general permit 12 at N.J.A.C. 7:13-9.12 is subject to the requirements of this section.**

**(b) To demonstrate compliance with this section, all calculations and analyses used in the design of a bridge or culvert shall be submitted to the Department. Applicants are encouraged to discuss prospective bridge and culvert projects with Division staff prior to undertaking detailed calculations and analyses under this section. The Department can offer assistance regarding the types of calculations and analyses most appropriate for a given site and project, and in some cases, may be able to determine that the requirements of this section are satisfied without review of detailed calculations or analyses.**

- 1. For the purpose of determining compliance with this section, all calculations shall be rounded to the nearest 0.1 feet.**

**(c) The Department shall issue an individual permit to construct a new bridge or culvert or to reconstruct an existing bridge or culvert only if the bridge or culvert and any associated construction, such as embankments, abutments, footings, and travel surfaces, are designed to remain stable, scour resistant, and resistant to displacement and/or damage during the flood hazard area design flood. At a minimum, a bridge shall have stable abutments, a culvert shall have stable headwalls, and any abutment and headwall shall have footings that extend no less than three feet below the invert of the channel.**

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**(d) In addition to meeting the requirements at (c) above, the Department shall issue an individual permit to construct a new bridge or culvert only if the following requirements are met:**

- 1. The anticipated impacts to offsite flooding associated with the construction of the bridge or culvert comply with (d)1i and ii below for each flood event described at N.J.A.C. 7:13-12.1(i):**
  - i. The proposed construction does not subject any offsite habitable building, railroad, roadway, or parking area to increased depth or frequency of flooding; and**
  - ii. For all areas not identified in (d)1i above, the proposed construction does not increase offsite flood depths by more than 0.2 feet at any location;**
- 2. It is demonstrated, through one or more of the following hydrologic and hydraulic analyses comparing existing and proposed conditions, that the bridge or culvert complies with (d)1 above, unless it is demonstrated that alternate methods would more accurately model the existing and/or proposed conditions:**
  - i. A standard step backwater analysis, which is generally capable of modeling both existing and proposed conditions, provided the area upstream of the project is not a permanent impoundment of water or would become a level pool during the flood being analyzed;**
  - ii. A hydrologic routing, which is generally capable of modeling only proposed conditions; and**

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**iii. An inlet/outlet control analysis, which is generally capable of modeling only proposed conditions; and**

**3. Where a new bridge or culvert and/or the railroad or roadway it serves would cause fragmentation of habitat for terrestrial threatened or endangered species and/or any terrestrial species of special concern, the bridge or culvert incorporates a preserved or restored natural bank of sufficient width to allow the species to pass through the structure. Where a natural bank is not present or feasible to preserve or restore, the applicant shall create an artificial bank or shelf of sufficient width to allow the species to pass through the structure. The applicant shall additionally adopt appropriate measures where necessary to encourage the species to pass through the structure.**

**(e) In addition to meeting the requirements at (c) above, the Department shall issue an individual permit to reconstruct an existing bridge or culvert only if the following requirements are met:**

**1. The anticipated impacts to offsite flooding associated with the reconstruction of the bridge or culvert comply with (e)1i through iii below for each flood event described at N.J.A.C. 7:13-12.1(i):**

**i. The proposed construction does not subject any offsite habitable building, railroad, roadway, or parking area to increased depth or frequency of flooding;**

**ii. The proposed construction does not increase offsite flood depths within 500 feet upstream and downstream of the project by more than 0.2 feet, unless**

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- compliance with (e)3 below necessarily results in greater increases. In no case shall the project increase offsite flood depths by more than one foot within 500 feet upstream and downstream of the project; and**
- iii. The proposed construction does not increase offsite flood depths in areas located more than 500 feet upstream and downstream of the project.**
- 2. It is demonstrated through one or more of the following hydrologic and hydraulic analyses comparing existing and proposed conditions, that the bridge or culvert complies with (e)1 above, unless it is demonstrated that alternate methods would more accurately model existing and/or proposed conditions:**
- i. A standard step backwater analysis, which is generally capable of modeling both existing and proposed conditions, provided:**
- (1) The area upstream of the project is not a permanent impoundment of water, or would become a level pool during the flood being analyzed. In such a case a hydrologic routing is generally more effective; and**
- (2) The analysis takes into account any potential downstream effect of a decrease in water surface elevations upstream of the bridge or culvert, as described in (e)2ii below;**
- ii. A hydrologic routing, provided the analysis takes into account any potential downstream effect of a decrease in water surface elevations upstream of the bridge or culvert under proposed conditions. A significant loss of upstream flood storage can occur in such cases, which can result in increased flow rates downstream of the bridge or culvert. Generally, such impacts can be**

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**effectively analyzed by performing a hydrologic routing of existing and proposed structures to determine downstream flow rates, modeling these flow rates in a standard step backwater analysis, and then comparing the water surface profile under existing and proposed conditions; and**

**iii. An inlet/outlet control analysis, provided the analysis does not indicate a decrease in water surface elevations upstream of the bridge or culvert during any flood event described at N.J.A.C. 7:13-12.1(i).**

**3. Where the existing bridge or culvert and/or the railroad or roadway it serves currently causes fragmentation of habitat for terrestrial threatened or endangered species and/or any terrestrial species of special concern, the bridge or culvert incorporates a preserved or restored natural bank of sufficient width to allow the species to pass through the structure. Where a natural bank is not present or feasible to preserve or restore, the applicant shall create an artificial bank or shelf of sufficient width to allow the species to pass through the structure. The applicant shall additionally adopt appropriate measures where necessary to encourage the species to pass through the structure.**

**(f) The Department shall issue an individual permit to construct a new bridge or culvert or to reconstruct an existing bridge or culvert only if the new or reconstructed structure is a bridge, arch culvert, or three-sided culvert that meets the requirements of (f)1 through 4 below, unless the applicant demonstrates that a circular, elliptical, or box culvert is acceptable under (g) and (h) below.**

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1. **The bridge or culvert completely spans the regulated water and, to the extent feasible, matches or exceeds the dimensions of the existing channel so that the size and shape of the natural channel is preserved through the structure;**
2. **The bridge or culvert is adequately sized to convey the flood hazard area design flood without a significant increase in the velocity of water in the channel;**
3. **Any existing stable, natural, earthen channel with low-flow aquatic passage is preserved, to the maximum extent practicable, and stable, earthen low-flow aquatic passage is provided within the bridge or culvert as well as any section of channel disturbed to accommodate its construction; and**
4. **No armoring is placed under or across the channel bed, unless such armoring is necessary to prevent scour along the proposed abutments or footings. In such a case, the armoring shall be buried beneath at least two feet of native substrate, where placement of the native substrate is feasible and effective in stabilizing the channel and protecting aquatic habitat under expected flood conditions.**

**(g) The construction or reconstruction of a circular, elliptical, or box culvert is conditionally acceptable where one or more of the conditions listed at (g)1 through 6 below exist and the culvert meets the construction standards at (h) below.**

1. **The regulated water does not possess a discernible channel;**
2. **The channel does not contain fishery resources;**
3. **The channel is manmade (not including any water that historically possessed a naturally-occurring, discernible channel, which has been modified by humans);**

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4. **The channel is fully lined with manmade impervious material such as cement or concrete;**
5. **The channel is less than 10 feet in width as measured between the top of bank of each side of the channel; or**
6. **Spanning the channel under (f) above would not be practicable due to one or more of the following physical constraints:**
  - i. **Unstable substrate, which would likely undermine any proposed footing within or adjacent to the channel;**
  - ii. **Irregular channel configuration;**
  - iii. **Anticipated adverse hydraulic impact to the channel; or**
  - iv. **Anticipated adverse impacts to offsite flooding, the environment, or public safety.**

**(h) Where a circular, elliptical, or box culvert is found acceptable under (g) above, the culvert shall be constructed as follows:**

1. **The invert of the culvert shall be installed at least two feet below the invert of the natural channel. In order to create a contiguous flow-path through the culvert that meets and matches the bottom inverts, cross-sections, and profile of the channel beyond the culvert, the culvert shall be filled with native substrate up to the invert of the natural channel; or**
2. **Where it is demonstrated that the culvert cannot be constructed as described at (h)1 above due to unstable substrate or other physical constraints, the floor of the culvert shall be constructed to incorporate an artificial low-flow treatment, such as**

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**a V-notch or key-notch, baffles to hold substrate in place, or a concave floor. For example, an artificial low-flow treatment can be used where the placement of two feet of substrate within the culvert would not be feasible or effective in stabilizing the channel and protecting aquatic habitat under expected flood conditions.**

7:13-[11.9]12.8 Requirements for a utility line

(a) (No change.)

**(b) The Department shall issue an individual permit to construct or reconstruct a utility line in a regulated area only if the following requirements are satisfied:**

- 1. All disturbed areas in the flood hazard area are restored to pre-construction topography;**
- 2. The applicant provides an engineering certification confirming that any utility line that conveys a gas or liquid is sealed to ensure that there will be no leakage or discharge in a regulated area; and**
- 3. Except in the immediate vicinity of a crossing of a regulated water, the utility line shall not be constructed within 10 feet of any top of bank, unless the project lies adjacent to a lawfully existing bulkhead, retaining wall, or revetment along a tidal water.**

[(b)] (c) The Department shall issue an individual permit to construct or reconstruct a utility line across or under a channel or water only if the following requirements are satisfied, as applicable:

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1. The applicant demonstrates that it is not feasible to directionally drill or "jack" the proposed utility line under the channel or water[, as permitted-by-rule] **under permit-by-rule 36** at N.J.A.C. 7:13-[7.2(c)3]**7.36**;
  2. The applicant demonstrates that it is not feasible to construct the utility line within a roadway that already crosses the channel or water[, as permitted-by-rule] **under permit-by-rule 37** at N.J.A.C. 7:13-[7.2(c)4]**7.37**;
  3. The applicant demonstrates that it is not feasible to attach the utility line to a bridge that already crosses the channel or water[, as permitted-by-rule] **under permit-by-rule 38** at N.J.A.C. 7:13-[7.2(c)5]**7.38**;
  4. (No change.)
  - [5. All disturbed areas in the flood hazard area are restored to pre-construction topography;]
  - [6.] **5.** (No change in text.)
  - [7.] **6.** A utility line that does not convey a gas or liquid is covered by at least three feet of stable material consisting of native substrate in the channel or water, where feasible;  
**and**
  - [8. The utility line is sealed to ensure that there will be no leakage or discharge in a regulated area; and]
  - [9.] **7.** (No change in text.)
- [(c)] **(d)** The Department shall issue an individual permit to construct or reconstruct a utility line above a channel or floodway, which is not attached to a roadway or railroad crossing, or which is

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attached to such a crossing but does not meet [the] permit-by-rule **38** at N.J.A.C. 7:13-

[7.2(c)5]**7.38**, only if the following requirements are satisfied:

1. The applicant demonstrates that it is not feasible to attach the utility line to a bridge that already crosses the channel or water[, as permitted-by-rule at N.J.A.C. 7:13-7.2(c)5] **under permit-by-rule 38;**
2. (No change.)
3. The utility line is [suitably anchored and] protected from damage by impact from floating debris;
4. The utility line is sealed to ensure that there will be no leakage or discharge in a regulated area; and]
- [5.] **4.** (No change in text.)

[(d)] **(e)** The Department shall issue an individual permit to construct or reconstruct a manhole associated with a utility line in a regulated area only if the following requirements are satisfied:

1. The manhole is constructed at least 10 feet from any top of bank [or edge of water (unless situated within a paved surface)];
2. [The] **Any manhole in a flood hazard area** has a watertight cover [if constructed along a sanitary sewer line];
3. – 4. (No change.)

[(e)] **(f)** The Department shall issue an individual permit for the placement of a cable directly on the bed of a channel or water only if the following requirements are satisfied:

1. The channel or water is large enough in both width and depth that the cable will not interfere with **navigation and/or** the normal flow of the channel or water; and

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2. (No change.)

[(f)] (g) The Department shall issue an individual permit that allows, over the five-year term of the permit, the necessary and periodic maintenance, repair, or replacement of any section of a lawfully existing above or below ground utility line in a regulated area only if the following requirements are satisfied:

1. The applicant submits an application for an individual permit which, in addition to the normal application requirements, includes the following:
  - i. (No change.)
  - ii. [Details] **A detailed description** of the types of maintenance, repair, and/or replacement activities that can be expected to occur during the [five-year period, including typical drawings of any anticipated repairs and a construction sequence] **duration of the individual permit, such as construction details of typical, anticipated activities and associated construction sequences;**
2. The applicant agrees to provide public notice pursuant to N.J.A.C. 7:13-[16.3(d)]**19** at least five working days before performing any repair or replacement;
3. The applicant agrees to replant all disturbed areas in the riparian zone with [indigenous, non-invasive vegetation] **native, non-invasive plant species** after each repair or replacement;
4. (No change.)
5. The applicant agrees to submit a report to the Department each January which includes the following:
  - i. – ii. (No change.)

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iii. The fee for each repair or replacement, as provided at N.J.A.C. 7:13-[17]20.

7:13-[11.10]12.9 Requirements for a stormwater outfall structure

(a) (No change.)

(b) The Department shall issue an individual permit to construct or reconstruct a stormwater outfall structure only if the following requirements are satisfied [(examples of acceptable designs are provided in the Flood Hazard Area Technical Manual, available from the Department at the address listed at N.J.A.C. 7:13-1.1(g))]:

1. – 2. (No change.)

3. The structure includes adequate conduit outlet protection where required by the Standards for Soil Erosion and Sediment Control in New Jersey at N.J.A.C. 2:90, as **determined by the local Soil Conservation District having jurisdiction over the site;**

4. – 5. (No change.)

**7:13-12.10 Requirements for a low dam**

**(a) This section sets forth specific design and construction standards that apply to the construction, replacement, repair, or removal of a low dam in any regulated area.**

**Regulated activities associated with the construction, replacement, repair, or removal of a low dam, such as channel modification, the excavation of a stormwater management basin, or the creation of a stormwater collection and discharge system, shall be reviewed in accordance with the appropriate requirements for those activities under this chapter. This section applies only to the low dam itself.**

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**(b) The Department shall issue an individual permit to construct a new low dam only if all proposed disturbance is located at least 25 feet from any top of bank unless the applicant demonstrates that:**

- 1. There is a compelling need to construct the low dam, which cannot be met without disturbance within 25 feet of any top of bank; and**
- 2. All disturbance is located outside any channel with fishery resources, as set forth at N.J.A.C. 7:13-11.5, except where:**
  - i. The disturbance is unavoidable; and**
  - ii. The low dam is modified where necessary to include a fish ladder or other similar mechanism that permits fish to pass the structure in either direction.**

**(c) The Department shall issue an individual permit to reconstruct, replace, repair, or remove a low dam only if all proposed disturbance located within 25 feet of any top of bank is the minimum necessary to meet the applicable Federal and State requirements.**

#### **7:13-12.11 Requirements for a dam**

**(a) This section sets forth specific design and construction standards for the construction, replacement, repair, or removal of a dam that serves as a component of a stormwater management basin within any regulated area. Regulated activities associated with the construction, replacement, or repair of a dam, such as channel modification, the excavation of a stormwater management basin, or the creation of a stormwater collection and discharge system, shall be reviewed in accordance with the appropriate requirements for those activities under this chapter. This section applies only to the dam itself.**

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**(b) The activities at (b)1 and 2 below do not require a flood hazard area approval under this chapter, provided all applicable requirements of the Dam Safety Standards at N.J.A.C. 7:20 are met. Dams and certain associated activities are subject to the Department's Dam Safety Standards at N.J.A.C. 7:20, administered by the Department's Bureau of Dam Safety and Flood Control. For additional information concerning the regulation of dams see [www.nj.gov/dep/damsafety/index.htm](http://www.nj.gov/dep/damsafety/index.htm).**

- 1. The construction, replacement, repair, or removal of any dam that does not serve as a component of a stormwater management basin; and**
- 2. Any regulated activity performed in association with the removal of a dam that does not serve as a component of a stormwater management basin.**

**(c) The Department shall issue an individual permit to construct a new dam only if all proposed disturbance is located at least 25 feet from any top of bank, unless the applicant demonstrates that:**

- 1. There is a compelling need to construct the dam, which cannot be met without disturbance within 25 feet of any top of bank; and**
- 2. All disturbance is located outside any channel with fishery resources, as set forth at N.J.A.C. 7:13-11.5, except where:**
  - i. The disturbance is unavoidable; and**
  - ii. The dam is modified, as necessary, to include a fish ladder or other similar mechanism that permits fish to pass the structure in either direction.**

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**(d) The Department shall issue an individual permit to reconstruct, replace, or repair a dam only if all proposed disturbance located within 25 feet of any top of bank is the minimum necessary to meet the applicable Federal and State requirements.**

7:13-[11.12]12.12 Requirements for a flood control project

(a) – (b) (No change.)

(c) The Department shall issue an individual permit for a flood control project that results in disturbance to a channel and/or riparian zone only if the requirements of (b) above are satisfied and provided the applicant demonstrates that there is no feasible alternative project located outside the channel and riparian zone that would satisfactorily reduce flooding. At minimum, this analysis shall include the following:

1. – 2. (No change.)

[3. A demonstration that the following steps have been taken to ensure that the flooding problem will not reoccur after the flood control project has been constructed:

- i. Analysis of local stormwater management ordinances within the drainage area and modification, where necessary, or the ordinances to ensure that flows within the channel will not increase over time; and
- ii. Development of a regional plan to preserve the existing flood storage within the drainage area.]

**3. A demonstration that local stormwater ordinances have been analyzed and modified, to the extent necessary and appropriate, to help ameliorate future flooding within the watershed.**

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(d) The Department shall issue an individual permit for the lining or piping of a channel as part of a flood control project only if the project meets the requirements at (b) and (c) above, and provided the applicant demonstrates the following:

1. – 2. (No change.)
3. Adequate mitigation for all lost vegetation and aquatic [biota] **habitat** will occur.

### **7:13-12.13 Requirements for a retaining wall or bulkhead**

(a) **Except as provided in (b) below, this section sets forth specific design and construction standards that apply to any retaining wall or bulkhead which is located within a regulated water, a floodway, or within 25 feet of any top of bank.**

(b) **This section does not apply to any retaining wall or bulkhead in a tidal flood hazard area that is authorized under a valid coastal permit, or is exempt from requiring a coastal permit under N.J.A.C. 7:7-2.3(d)6.**

(c) **The Department shall issue an individual permit to construct or reconstruct a retaining wall or bulkhead subject to this section only if the following requirements are satisfied:**

1. **The retaining wall or bulkhead is designed with stable footings. In general, footings shall extend at least three feet below grade, unless such footings are not possible to construct or necessary for stability;**
2. **The retaining wall or bulkhead is designed to withstand displacement, overturning, and failure due to undermining and/or pressure from soil, water, and frost; and**

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3. **If located within a regulated water or within 25 feet of any top of bank, the retaining wall or bulkhead is designed to be resistant to erosion as well as the possibility of a shifting bed and/or bank over time.**

**(d) The Department shall issue an individual permit to construct or reconstruct a retaining wall or bulkhead subject to this section, which is four feet in height or greater, only if the applicant provides an engineering certification confirming that the requirements of (c) above are satisfied.**

7:13-[11.14]12.14 Requirements for bank stabilization and channel restoration

(a) (No change.)

(b) The Department shall issue an individual permit [to restore to a stable condition a bank or channel, which has become eroded, unstable and/or ecologically degraded, only if the applicant provides a detailed analysis of the specific problem that is to be corrected. At minimum, this analysis shall include the following] **under this section only if the following requirements are satisfied:**

1. [A] **The applicant provides:**

i. A complete **written** description of the existing [problem onsite] **erosion, instability, or ecological degradation** including:

[i.] (1) A history of the site and the [drainage area] **watershed**[, including];

(2) An **explanation of** any previous attempts to **stabilize or** restore the bank or channel; and

[ii.] (3) The likely causes of any erosion, instability, or ecological degradation

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**proposed to be remedied;**

- [2.] **ii.** A demonstration of why the selected stabilization or restoration methods (as described at (c) below) are the most suitable for the site. At a minimum, this demonstration should include and discuss the following [(see Flood Hazard Area Technical Manual, available from the Department at the address listed at N.J.A.C. 7:13-1.1(g), for examples)]:

Recodify existing i. and ii. as **(1) and (2)** (No change in text.)

- [iii.] **(3)** How future development in the [drainage area] **watershed** could impact the bank and/or channel and the proposed stabilization and/or restoration;

[iv.] **(4)** (No change in text.)

- [3.] **iii.** A maintenance and monitoring plan to ensure the success of the proposed stabilization or restoration, which includes:

[i.] **(1)** (No change in text.)

- [ii.] **(2)** A plan to reduce the likelihood of future erosion, instability and ecological degradation onsite[.];

- 2. The project is designed by an individual with experience in fluvial geomorphology (and soil bioengineering if used on site), as evidenced by documentation supplied with the individual permit application; and**
- 3. In cases where nuisance flooding is a related issue, flood capacity outside the regulated water is increased by terracing the overbank areas where appropriate, so that the channel is not forced to convey excessive flows.**

(c) The Department shall issue an individual permit to restore to a stable condition a bank or

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channel, which has become eroded, unstable, and/or ecologically degraded, only if the project is accomplished as follows:

- [1. The project is designed by an individual with experience in fluvial geomorphology (and soil bioengineering if used on site), as evidenced by documentation supplied with the individual permit application;]
- [2.] **1.** Where [possible] **feasible**, a localized eroded bank or destabilized channel is restored solely by cutting back the bank to a stable slope and planting with [vegetation] **native, non-invasive plant species** suitable for stabilization. Generally a slope of no greater than 50 percent (a ratio of two horizontal to one vertical) is recommended to stabilize an eroded bank;
- [3.] **2.** [If] **Where the applicant demonstrates that** cutting the bank and planting vegetation as described in (c)[2]**1** above cannot adequately restore the channel and/or fully prevent erosion due to excessive channel velocity, [or if cutting the bank would destroy vegetation in excess of that which is allowed at N.J.A.C. 7:13-10.2(i),] soil bioengineering [is] **shall be** used to stabilize the eroded bank and/or restore the channel. In designing soil bioengineering installations, the existing soil characteristics, the bank and/or channel's physical structure, and the hydrologic conditions on site shall be considered; **and**
- [4.] **3.** [The Department shall issue an individual permit for bank stabilization or channel restoration that is not accomplished solely using vegetation or soil bioengineering, as described in (c)2 and (c)3 above, respectively, only if] **Where** the applicant demonstrates that, given the velocity and configuration of the adjacent channel and/or

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other conditions of the site, vegetation and/or soil bioengineering alone are not adequate to stabilize the bank and/or restore the channel, **the use of revetments, retaining walls, or other armoring to stabilize the bank or channel is conditionally acceptable.[]** and

5. The Department shall issue an individual permit for the lining or piping of a channel in order to stabilize erosion only if the applicant demonstrates the following:
  - i. There is no feasible alternative project that would satisfactorily reduce the erosion, which would avoid lining or piping the channel;
  - ii. Lining or piping the channel is necessary to protect public health, safety and welfare; and
  - iii. Adequate mitigation for all lost vegetation and aquatic biota will occur.

(d) In cases where nuisance flooding is a related issue, flood capacity outside the regulated water shall be increased by terracing the overbank areas where appropriate, so that the channel is not forced to convey excessive flows (see the Flood Hazard Area Technical Manual, available from the Department at the address listed at N.J.A.C. 7:13-1.1(g), for examples.)]

**(d) The Department shall issue an individual permit to restore to a natural condition a regulated water that is significantly ecologically degraded, such as a channel enclosed by a pipe or culvert, a channel that has been previously straightened, channelized, or lined with revetments, retaining walls, or other armoring, or a channel that has relocated or become significantly eroded or incised through natural processes, only if the following requirements are satisfied:**

- 1. The project will result in:**

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- i. Ecological enhancement, including habitat creation, restoration, or enhancement;**
  - ii. Riparian zone creation in accordance with N.J.A.C. 7:13-13.9; and/or**
  - iii. Riparian zone restoration in accordance with N.J.A.C. 7:13-13.10;**
- 2. To the maximum extent practicable, all structures enclosing or lining the regulated water are removed;**
- 3. To the maximum extent practicable, the regulated water is restored to its natural condition and configuration, including channel geometry, sinuosity, aquatic habitat, and benthic characteristics;**
- 4. The channel is stabilized using vegetation in accordance with (c)1 above and/or soil bioengineering in accordance with (c)2 above; and**
- 5. The project is designed to minimize adverse impacts to flooding offsite, such that the following requirements are satisfied for any flood event described in N.J.A.C. 7:13-12.1(i). For the purpose of determining compliance with this subsection, calculations shall be rounded to the nearest 0.1 feet:**
  - i. The proposed construction does not subject any habitable building to increased depth or frequency of flooding;**
  - ii. The proposed construction does not increase offsite flood depths within 500 feet upstream and downstream of the project by more than one foot; and**
  - iii. The proposed construction does not increase offsite flood depths in areas located more than 500 feet upstream and downstream of the project by more than 0.2 feet.**

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7:13-[11.15]12.15 Requirements for sediment and debris removal from a **regulated** water

(a) (No change.)

[(b) This section does not apply to the removal of sediment and/or debris by a county or municipality in accordance with general permit 1 at N.J.A.C. 7:13-8.3, or the removal of sediment and/or debris conducted for agricultural purposes in accordance with general permit 2B at N.J.A.C. 7:13-8.4(c)2. In addition, the removal of trash and obstructions from a channel are permitted-by-rule under certain circumstances pursuant to N.J.A.C. 7:13-7.2(a)5 and (d)3.]

[(c)] (b) [Except as provided in (d) below, the] **The** Department shall issue an individual permit for the removal of sediment and debris from a [channel] **regulated water** only if the following requirements are satisfied:

1. The applicant demonstrates [the following:
  - i. That] **that** there is a **documented history of** flooding [problem], a mosquito control problem, or other threat to public health, safety, or welfare [that cannot otherwise be remedied without removing the] **that necessitates removal of** sediment and/or debris from the **regulated** water; [and
  - ii. That removing the sediment and/or debris will remedy the problem identified in (c)1i above;]
2. [The] **Except for activities along an impounded regulated water, such as a lake, pond, or reservoir, the** material to be removed from the **regulated** water consists solely of accumulated silt, sediment, and debris. Removal of material beyond or below the natural [channel] **limits of a linear regulated water** constitutes a channel modification and is subject to the requirements at N.J.A.C. 7:13-[10.1(c)]11.1(c);

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3. In order to minimize the downstream transport of sediment during dredging, all areas being dredged are isolated from flowing water where possible. Means of isolation include erecting temporary berms or sheet-piles around the areas being dredged and, **for a linear regulated water such as a stream or river**, pumping [the normal channel] flow around the work area, or, if [channel] flow **within the regulated water** is low, by blocking off [sections of the channel] **the areas** being dredged and allowing the sediment to settle. **For an impounded regulated water, sediment transport can be reduced by lowering the water level, plugging the downstream discharge of the water, and/or pumping the incoming water around the impoundment; and**
4. The applicant properly disposes of all material removed from the [channel] **regulated water**. Removed sediment can be disposed of in a regulated area provided the requirements at [(f)] **(d)** below are satisfied. All removed trash and debris shall be disposed of in accordance with all applicable Federal, State, and local [laws] **requirements** outside any flood hazard area or riparian zone[;].
- [5. The project does not disturb the channel bank or the riparian zone, unless such disturbance is unavoidable, necessary to gain access to the channel, and minimized;
6. The project is conducted from only one bank where possible;
7. The use of heavy equipment in the channel is avoided ;
8. Vegetation and tree canopy on the more southerly or westerly bank is preserved in order to shade the channel;
9. All access points to the water are described in writing and with color photographs; and
10. All disturbed areas in the riparian zone are replanted with indigenous, non-invasive

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vegetation upon completion of the project.

(d) The Department shall issue an individual permit for the removal of sediment and debris from a channel, which does not meet one or more of the requirements at (c) above, only if the following requirements are satisfied:

1. The applicant is a public entity;
2. The project is intended solely for mosquito control;
3. The applicant demonstrates that the mosquito control problem cannot be solved by any other feasible methods;
4. The applicant submits an individual, site-specific proposal to the Administrator of the State Office of Mosquito Control Coordination, and said office determines that the project is necessary to control a documented mosquito problem;
5. The applicant explains in its public notice that the project does not meet the normal requirements under this chapter for sediment removal and that the applicant is seeking an exception for mosquito control purposes;
6. The applicant convenes a public hearing to discuss the project in cases of significant public interest; and
7. The applicant demonstrates that all adverse environmental impacts are minimized.]

[(e)] (c) The Department shall issue an individual permit for the removal of sediment and debris from an impounded **regulated** water, such as a lake, pond, or reservoir, only if the **requirements of (b) above and the** following requirements are satisfied:

- [1. In order to minimize the transport of sediment during dredging, all areas being dredged are isolated from flowing water where possible. Means of isolation include erecting

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temporary berms or sheet-piles around the areas being dredged, lowering the water level if controlled by a dam, plugging the downstream discharge of the water and pumping the incoming water around the impoundment;]

[2.] **1.** (No change in text.)

[3.] **2.** The applicant obtains any necessary approvals the Department's Dam Safety Section; **and**

[4. Machinery access to the water is restricted in order to minimize disturbance to the riparian zone;

5. The applicant properly disposes of all material removed from the impounded water. Removed sediment can be disposed of in a regulated area provided the requirements at (f) below are satisfied. All removed trash and debris shall be disposed of in accordance with all applicable Federal, State and local laws outside any flood hazard area or riparian zone; and]

[6.] **3.** (No change in text.)

[(f)] **(d)** The Department shall issue an individual permit to deposit sediment that has been removed from a regulated water, only if the following requirements are satisfied:

1. – 2. (No change.)

3. The sediment is deposited at least 25 feet from any top of bank [or edge of water];

4. The placement of the sediment does not interfere with the positive overland drainage of the receiving area; **and**

5. Sediment deposited in a floodway is placed no more than three inches deep.; and

6. Sediment deposited is placed on land that lies below both the seasonal high water table

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and the normal water surface elevation of the nearest regulated water, unless the applicant demonstrates that the sediment cannot feasibly be deposited on such land.]

[(g)] (e) The Department shall issue an individual permit that allows an applicant to repeatedly remove sediment and debris from a regulated water during the term of the permit, only if the applicant does the following:

1. – 2. (No change.)
3. Demonstrates that repeated cleanings will not adversely impact fishery resources in the water; **and**
4. Agrees to notify the Department in writing [no less than 10 calendar days] prior to each proposed sediment removal activity[; and], **in accordance with the timeframe established in the individual permit.**
- [5. Agrees to submit a report to the Department within 30 calendar days of the completion of each sediment removal activity. This report shall include color photographs of the work area and shall describe how the sediment removal was accomplished, where the dredged material was deposited and to what extent disturbed vegetation in the riparian zone was restored.]

**(f) The Department may require testing of dredged material if there is reason to suspect that the material is contaminated.**

7:13-[11.16]12.16 Requirements for the storage of unsecured material

- (a) (No change.)
- (b) This section governs the storage of unsecured material not addressed by the following:

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1. [The permits-by-rule at N.J.A.C. 7:13-7.2(e)1 through 4] **Permits-by-rule 48 through 53 at N.J.A.C. 7:13-7.48 through 7.53, respectively**, which cover the storage of unsecured materials for construction activities, and for certain ongoing residential and commercial uses; and
2. The requirements at N.J.A.C. 7:13-[11.17 and 11.18]**12.17 through 12.20**, which cover the placement of hazardous substances and solid waste in a regulated area, [respectively,] whether secured or unsecured.

(c) (No change.)

(d) The Department shall issue an individual permit for the storage of unsecured material in a regulated area outside a floodway only if the following requirements are satisfied:

[1. No vegetation is cleared, cut or removed in a riparian zone;]

Recodify existing 2. – 4. as **1. – 3.** (No change in text.)

[5.] **4.** The applicant discloses the maximum volume of unsecured material that will be stored in the flood fringe and includes this volume in calculating the maximum flood storage volume displacement on the site pursuant to N.J.A.C. 7:13-[10.4]**11.4**; and

[6.] **5.** (No change in text.)

### **7:13-12.17 Requirements for the investigation, cleanup, or removal of hazardous substances**

(a) **This section sets forth the requirements for the investigation, cleanup, or removal of hazardous substances as defined in the Department’s Discharges of Petroleum and other Hazardous Substances rules, N.J.A.C. 7:1E, Appendix A, and/or pollutants, as defined in**

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**the New Jersey Pollutant Discharge Elimination System (NJPDES) Rules, N.J.A.C. 7:14A, where proposed in any regulated area.**

**(b) The Department shall issue an individual permit for the investigation, cleanup, or removal of hazardous substances only if the Department determines, or a licensed site remediation professional pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, certifies, that:**

- 1. The project complies 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;**
- 2. In order to minimize the potential that hazardous substances will be transported offsite by floodwaters during the conduct of site remediation activities, all material necessary to facilitate the investigation, cleanup, or removal of hazardous substances is stored and stockpiled as follows:**
  - i. Outside any floodway;**
  - ii. As far as practicable from any regulated water;**
  - iii. Where practicable, within flood-resistant containment areas; and**
  - iv. Where such material does not meet the Residential Direct Contact Soil Remediation Standards at N.J.A.C. 7:26D, above the 10-year flood elevation;**
- 3. In order to minimize the potential that hazardous substances will be transported offsite by floodwaters after the completion of site remediation activities, the following requirements are satisfied:**
  - i. To the maximum extent practicable, all material permanently placed within a**

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**flood hazard area meets the Residential Direct Contact Soil Remediation Standards at N.J.A.C. 7:26D;**

- ii. **To the maximum extent practicable, the permanent placement of any material that does not meet the Residential Direct Contact Soil Remediation Standards at N.J.A.C. 7:26D is limited to areas situated outside any floodway and above the 10-year flood elevation; and**
- iii. **Any material that does not meet the Residential Direct Contact Soil Remediation Standards at N.J.A.C. 7:26D is stabilized and/or covered with suitable material such that the material will not be eroded, displaced, or transported offsite during the flood hazard area design flood.**

7:13-[11.17]**12.18** Requirements for the placement, storage, or processing of hazardous substances

(a) This section sets forth specific [design and construction standards] **requirements** that apply to [any] **the** proposed placement, storage, or processing of hazardous substances in any regulated area, **which is not associated with the investigation, cleanup, or removal of hazardous substances pursuant to N.J.A.C. 7:13-12.17.**

(b) A [hazardous waste] **lawfully existing** facility established on or before [October 2, 2006] **November 5, 2007**, may be eligible to place, store, or process hazardous substances under [the] permit-by-rule **52 for the placement, storage, or processing of hazardous substances** at N.J.A.C. 7:13-[7.2(e)5]**7.52**, provided the size or capacity of the facility is not increased. In addition, the placement of a fuel **or storage** tank [is permitted-by-rule under] **may be**

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**authorized in** certain [conditions pursuant to] **circumstances under permit-by-rule 22 for the construction of a fuel tank at N.J.A.C. 7:13-[7.2(b)15 and 16]7.22 or general permit-by-certification 15 for storage tanks at N.J.A.C. 7:13-8.15.** All other placement, storage, or processing of hazardous substances **in a regulated area** is subject to this section.

[(c) The Department shall not issue an individual permit for the placement, storage or processing of hazardous substances in a floodway.]

[(d)] (c) The Department shall issue an individual permit for the placement, storage, or processing of hazardous substances in a regulated area [outside a floodway] only if the following requirements are satisfied:

1. [No vegetation is cleared, cut or removed in a riparian zone] **Hazardous substances are not placed, stored, or processed in a floodway;**
2. The placement, storage, or processing of hazardous substances is [part of an increase in the size or capacity of a lawfully existing hazardous waste facility established on or before October 2, 2006] **necessary for the normal conduct of a facility, which is operating in compliance with all Federal, State, and local requirements.** The individual permit application shall include copies of all relevant State permits, licenses, and authorizations in order to demonstrate that the facility is operating lawfully;
3. (No change.)
4. The hazardous substances to be placed, stored, or processed [is] **onsite are** isolated from floodwaters by **constructing flood-resistant berms around the substances,** or [will be situated in a specially designed] **by situating the substances within a flood-resistant** containment area [onsite], so that in the event of a flood, the hazardous

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substances will not be transported [off the site] **offsite** by floodwaters;

5. The applicant discloses the maximum volume of hazardous substances to be placed, stored, or processed in the flood fringe and includes this volume in calculating the maximum flood storage displacement volume on [the] site pursuant to N.J.A.C. 7:13-~~[10.4]~~**11.4**; and
6. (No change.)

### **7:13-12.19 Requirements for solid waste landfill closure**

- (a) **This section sets forth the requirements for activities authorized under a solid waste landfill closure and post-closure plan or disruption approval issued by the Department under N.J.A.C. 7:26-2A.8 and 2A.9, when the activities are proposed in any regulated area.**
- (b) **The Department shall issue an individual permit for regulated activities under (a) above only if the applicant demonstrates that:**

1. **The project complies with the Department's Solid Waste Regulations, N.J.A.C. 7:26;**
2. **In order to minimize the potential that solid waste will be transported offsite by floodwaters during the conduct of activities under this section, all material necessary to facilitate the regulated activities is stored and stockpiled as follows:**
  - i. **Outside any floodway;**
  - ii. **As far as practicable from any regulated water; and**
  - iii. **Where practicable, within flood-resistant containment areas;**
3. **In order to minimize the potential that hazardous substances will be transported**

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**offsite by floodwaters after the completion of the landfill closure or disruption activities, all material permanently placed within a regulated area is stabilized and/or covered with suitable material such that the material will not be eroded, displaced, or transported offsite during the flood hazard area design flood.**

7:13-[11.18]**12.20** Requirements for the placement, storage, or processing of solid waste **or recyclable materials**

(a) This section sets forth [specific standards that apply to any] **the requirements that apply to the** proposed placement, storage, or processing of:

1. [solid] **Solid** waste in any regulated area, **which is not associated with a solid waste landfill closure and post-closure plan or disruption approval that is addressed under N.J.A.C. 7:13-12.19; and**
2. **The placement of recyclable materials in any regulated area, pursuant to N.J.A.C. 7:26A.**

(b) A [solid waste] **lawfully existing** facility established on or before [October 2, 2006] **November 5, 2007**, may be eligible to continue to place, store, or process solid waste **or recyclable materials** under [the] permit-by-rule **53 for the placement storage or processing of solid waste** at N.J.A.C. 7:13-[7.2(e)6]**7.53**, provided the size or capacity of the facility is not increased. All other placement storage or processing of solid waste **or recyclable materials in a regulated area** is subject to this section.

[(c) The Department shall not issue an individual permit for the placement, storage or processing of solid waste in a floodway.]

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[(d)] (c) The Department shall issue an individual permit for the placement, storage, or processing of solid waste **or recyclable materials** in a regulated area [outside a floodway] only if the following requirements are satisfied:

1. [No vegetation is cleared, cut or removed in a riparian zone] **The solid waste and recyclable materials are not placed, stored, or processed in a floodway;**
2. The placement, storage, or processing of solid waste is [part of an increase in the size or capacity of a lawfully existing solid waste facility established on or before October 2, 2006] **necessary for the normal conduct of a facility, which is operating in compliance with all Federal, State, and local requirements.** The individual permit application shall include copies of all relevant State permits, licenses, and authorizations in order to demonstrate that the facility is operating lawfully;
3. The applicant demonstrates that the solid waste **or recyclable materials** cannot feasibly be placed, stored, or processed outside the flood hazard area and riparian zone onsite;
4. The solid waste **or recyclable materials** to be placed, stored, or processed [is] **onsite are** isolated from floodwaters by **constructing flood-resistant berms around the materials**, or [will be situated in a specially designed] **by situating the materials within a flood-resistant** containment area onsite, so that in the event of a flood, the solid waste **or recyclable materials** will not be transported [off the site] **offsite** by floodwaters;
5. The applicant discloses the maximum volume of solid waste **or recyclable materials** to be placed, stored, or processed in the flood fringe for the purpose of calculating the maximum flood storage displacement on the site pursuant to N.J.A.C. 7:13-[10.4]**11.4;**

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and

6. The Department determines that the placement, storage, or processing of solid waste **or recyclable materials** in the flood hazard area and riparian zone will not pose a threat to the environment or to public health, safety, or welfare.

7:13-[11.19]**12.21** Requirements for the removal of existing fill or an existing structure

(a) (No change.)

(b) The removal of existing fill or an existing structure is subject to the requirements of this section only as follows:

1. (No change.)
2. The fill or structure to be removed lies in a regulated area outside a floodway, but does not qualify for [the] permit-by-rule **4** at N.J.A.C. 7:13-[7.2(b)2]**7.4**.

(c) The Department shall issue an individual permit for the removal of existing fill or an existing structure as described in (b) above only if the following requirements are satisfied:

1. (No change)
2. If the [removed] fill or structure **to be removed** lies in a floodway, the applicant demonstrates through a hydraulic analysis that the removal will not adversely impact a property not owned by the applicant, pursuant to N.J.A.C. 7:13-[11.1(f)]**12.1(f)** and (g), unless [it is clear to] the Department **determines, based on a visual inspection of submitted site plans and without a review of calculations**, that the proposed removal poses no threat to offsite properties;
3. Any removed fill is disposed of in accordance with all applicable Federal, State, and

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local laws; **and**

4. Any removed structure is disposed of outside of any regulated area and in accordance with all applicable Federal, State, and local laws[; and].
- [5. No vegetation is cleared, cut or removed in a riparian zone, unless the following apply:
  - i. Vegetation in the riparian zone must be cleared, cut or removed in order to access the fill or structure;
  - ii. The area of disturbance within the riparian zone is minimized; and
  - iii. All vegetation cleared, cut or removed in the riparian zone is replanted with indigenous, non-invasive species, except where the removed material is to be replaced by a new structure. (Any replacement fill or structure is subject to the requirements of this chapter.)]

## SUBCHAPTER 13. [REVISION OF AN APPROVAL] **RIPARIAN ZONE MITIGATION**

### **7:13-13.1 Definitions**

**In addition to the terms defined at N.J.A.C. 7:13-1.2, the following words and terms, when used in this subchapter, shall have the following meanings.**

**“Creation” means restoring to a natural condition a regulated water that is enclosed by a structure, such as a pipe or culvert.**

**“Credit purchase” means the purchase of credits from a mitigation bank, as that term is defined at N.J.A.C 7:13-1.2, as a substitute for performance of creation, restoration, enhancement, or preservation by a permittee. Once a credit is applied to satisfy a**

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**mitigation obligation under this subchapter, it is exhausted and may not be sold or used again.**

**“Enhancement” means the improvement of the functions and values of a degraded riparian zone or certain lands outside the riparian zone as described at N.J.A.C. 7:13-13.10, such as the removal of invasive plant species or the planting of native, non-invasive vegetation.**

**“Fee simple” means absolute ownership in land, unencumbered by any other interest or estate.**

**“Mitigation” means activities carried out in accordance with this subchapter in order to compensate for the loss or disturbance of riparian zones.**

**“Mitigation area” means the portion of a site or piece of property upon which mitigation is proposed or performed.**

**“Mitigation banking instrument” means documentation of Department approval of the objectives and administration of the bank including, as applicable:**

- 1. Bank goals and objectives;**
- 2. Ownership of bank lands;**
- 3. Bank size and type of riparian zone resources or channel type proposed for inclusion in the bank; including a site plan and specifications;**
- 4. Description of baseline conditions at the bank site;**
- 5. Geographic service area;**
- 6. Riparian zone disturbance suitable for compensation;**
- 7. Methods for determining credits and debits;**

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8. Accounting procedures;
9. Performance standards for determining credit availability and bank success;
10. Reporting protocols and monitoring plan;
11. Contingency and corrective actions and responsibilities;
12. Financial assurances;
13. Compensation ratios; and
14. Provisions for long-term management and maintenance.

“Mitigation bank site” means the portion of a site, or piece of property upon which a mitigation bank is proposed or developed.

“Preservation” means the permanent protection of undeveloped land, in its natural state, from disturbance or development, through the execution of a conservation easement in accordance with N.J.A.C 7:13-14.

“Restoration” means the reestablishment of the functions and values of a riparian zone or certain lands outside the riparian zone as described at N.J.A.C. 7:13-13.10, such as the removal of impervious surfaces and planting the area with native, non-invasive vegetation species or restoring a regulated water that has been previously straightened, channelized, or lined with revetments, retaining walls, or other armoring to a natural condition.

“Service area” means the geographic area within which impacts can be mitigated at a specific mitigation bank.

#### **7:13-13.2 General mitigation requirements**

(a) Mitigation shall fully compensate for any ecological loss.

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**(b) Mitigation proposals may be submitted as part of an individual permit application for concurrent review in accordance with (c)1 below. However, 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 an individual permit application for an otherwise approvable project and this chapter requires mitigation for riparian zone vegetation 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) When mitigation is required in order to compensate for riparian zone disturbance resulting from regulated activities, the Department shall authorize any regulated activities required to undertake and complete the mitigation through:**

- 1. An individual permit;**
- 2. Approval of a mitigation proposal submitted to comply with a condition of an individual permit;**
- 3. An enforcement document specifying mitigation requirements; or**
- 4. Approval of a mitigation proposal submitted to comply with the requirements of an enforcement document.**

**(d) Mitigation shall not commence until the Department has approved a mitigation proposal through one of the approvals listed at (c) above.**

**(e) Mitigation approved under this subchapter may also require additional State or Federal permits or approvals, such as a coastal permit or a permit issued pursuant to the**

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**Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, and Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., from the Department. Mitigation shall not commence until all necessary permits or approvals are obtained.**

**(f) If the Department requires mitigation as part of a remedy for a violation under this chapter, the Department shall determine the amount of mitigation necessary and the particular alternative required, in consideration of the extent (area) and severity of the violation and the functions and values provided by the proposed mitigation. A mitigation proposal submitted as part of a 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 under an individual permit. The Department may require a greater amount of mitigation than that required under an individual permit where necessary to provide at least equal ecological value due to the duration of time that the environment was impaired as a result of the particular regulated activities undertaken in violation of this chapter.**

**(g) A mitigation area shall be permanently protected from future development by a conservation restriction in accordance with N.J.A.C. 7:13-14.**

**(h) Mitigation may consist of one or more mitigation alternatives set forth under this subchapter.**

**(i) 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.**

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**(j) Mitigation provided to satisfy a mitigation requirement of a Federal or local law or another State law shall not substitute for or otherwise satisfy any mitigation requirement under this chapter unless the mitigation project also meets the requirements of this subchapter. For example, a mitigation project proposed to meet a mitigation requirement of the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A shall satisfy a mitigation requirement imposed under this chapter only if the proposed mitigation project meets the requirements of this subchapter.**

**(k) Specific requirements for each type of mitigation project are specified in the following sections of this subchapter:**

- 1. Creation mitigation - N.J.A.C. 7:13-13.9;**
- 2. Restoration mitigation - N.J.A.C. 7:13-13.10;**
- 3. Enhancement mitigation - N.J.A.C. 7:13-13.10;**
- 4. Preservation mitigation - N.J.A.C. 7:13-13.12; and/or**
- 5. Purchase of credits from a mitigation bank - N.J.A.C. 7:13-13.13.**

#### **7:13-13.3 Timing of mitigation**

**(a) Mitigation shall be performed within the applicable time period below:**

- 1. Except for restoration of a temporary disturbance under (a)2 below, mitigation required under an individual permit shall be performed prior to or concurrently with the regulated activity that causes the disturbance;**
- 2. Mitigation for any temporary disturbance shall commence immediately upon completion of the regulated activity that caused the disturbance and shall continue**

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**until completion, which shall not exceed six months after the cessation of the regulated activities that caused the disturbance; and**

- 3. Mitigation required as part of an enforcement action shall be performed in accordance with the schedule set forth in the enforcement document.**

**(b) In addition to the timing set forth in (a) above, all mitigation shall be continued until completion according to the schedule in the approved mitigation proposal.**

**(Agency Note: N.J.A.C. 7:13-13.4 and 13.5 are proposed for recodification with amendments as N.J.A.C. 7:13-3.7 and 3.8, respectively.)**

#### **7:13-13.4 Property suitable for mitigation**

**(a) Mitigation under this subchapter may be carried out on private or public property.**

**(b) Except as provided in (c) below, 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.**

**(c) The Department shall approve mitigation on public property only if:**

- 1. The public entity agrees to record a conservation restriction on the area of the mitigation project, in accordance with N.J.A.C. 7:13-14, or can demonstrate that an existing conservation restriction will protect the mitigation project area in perpetuity; and**

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2. Where the land was acquired using Green Acres funding or is encumbered with Green Acres restrictions, as defined at N.J.A.C. 7:36-2.1, the use of the area for mitigation purposes is approved by the Green Acres Program.

(d) If the proposed mitigation area is affected by an easement or other encumbrance, the portion of the property affected by the encumbrance will not be considered in calculating the total amount of mitigation provided, unless the applicant demonstrates that the encumbrance will not prohibit compliance or otherwise interfere with the mitigation requirements of this chapter.

(e) The following shall not constitute mitigation under this subchapter:

1. The installation of, or improvement to, an existing public facility intended for human use, such as a ball field, nature trail, or boardwalk; or
2. A stormwater management facility, such as a basin.

(f) The Department shall not approve creation, restoration, or enhancement in an area that the Department has determined is currently of high ecological value, for example if the area contains a mature, dense, natural forested community and approving a mitigation project in that area will not result in increased riparian zone functionality.

(g) The Department shall not approve mitigation that would:

1. Destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species; or
2. In any way jeopardize the continued existence of any local population of a threatened or endangered species.

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**(h) The Department shall not approve creation or restoration 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 and that the proposed mitigation satisfies the requirements of this subchapter, the Department shall approve the mitigation and the mitigator shall proceed with the mitigation project.**
- 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 pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E-4.8, 5.1, and 5.2. The mitigator shall 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.**

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#### **7:13-13.5 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. 7:13-13.20(a) and (b).**

**(b) The Department encourages applicants to obtain the conceptual review of any land being considered as a potential mitigation area, prior to purchase of land for mitigation purposes and/or prior to submittal of a mitigation proposal.**

**(c) To obtain the conceptual review of a mitigation area, the applicant shall submit a written request to the address set forth at N.J.A.C. 7:13-1.3, including:**

- 1. A brief description of the area and the mitigation project being considered;**
- 2. A map showing the location and extent of the prospective mitigation area, including topography if available; and**
- 3. Consent from the owner of the prospective mitigation area allowing Department representatives to enter the property in a reasonable manner and at reasonable times to inspect the site.**

**(d) 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 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.**

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#### **7:13-13.6 Basic requirements for mitigation proposals**

- (a) A mitigation proposal under this chapter shall be submitted at least 90 calendar days prior to the commencement of regulated activities authorized by a permit.**
- (b) A mitigation proposal to remedy a violation under this chapter shall be submitted by the deadline set forth in the Department's enforcement document.**
- (c) A mitigation proposal shall include all information necessary for the Department to determine if the requirements of this subchapter are met.**
- (d) The information required to be submitted in a mitigation proposal for the creation, restoration, enhancement, and/or preservation of riparian zones is set forth at (f) and (g) below and is summarized in the appropriate mitigation proposal checklist, available from the Department at the address set forth at N.J.A.C. 7:13-1.3.**
- (e) A mitigation proposal for the purchase of bank credits shall consist of a description of the type and quantity of riparian zone 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.**
- (f) The following information, which is reflected on the mitigation proposal checklists referenced in (d) above, shall be submitted to the Department as part of the request for approval of the mitigation proposal:**
  - 1. Basic information regarding the applicant, the disturbance for which the mitigation is intended to mitigate, and a copy of the permit (if issued) or enforcement document that is the source of the mitigation requirement;**

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- 2. The following material sufficient to explain and illustrate the existing and proposed conditions at the mitigation site, including:**
  - i. Visual materials such as maps, site plans, planting plans, surveys, topography diagrams, delineations, and/or photographs;**
  - ii. A narrative describing the existing conditions and proposed mitigation; 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;**
- 3. A specific breakdown of each resource for which mitigation is being proposed and the type and quantity of proposed mitigation for each resource;**
- 4. Schedules describing in detail the sequence of mitigation activities and estimated dates for completion for each mitigation activity;**
- 5. For creation and restoration projects, a preliminary characterization and assessment of the site in accordance with N.J.A.C. 7:13-13.4(h) to enable the Department to determine if contamination is present and if the proposed mitigation activities pose an ecological risk;**
- 6. A description of post-construction activities, including schedules for monitoring, maintenance and reporting;**
- 7. Contingency measures that will be followed if the mitigation project fails or shows indications of failing;**
- 8. Information regarding the presence or absence of endangered and/or threatened species wildlife and plant species habitat;**

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9. Any letters, contracts, agreements, easements, conservation restrictions, or other draft or executed documents necessary to ensure compliance with this chapter;
10. A certification of truth and accuracy in accordance with N.J.A.C. 7:13-18.2(j);  
and
11. 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.

(g) For restoration and creation mitigation projects, the following additional information shall be submitted as part of the request for approval of the mitigation proposal:

1. All calculations necessary to demonstrate that a mitigation proposal for riparian zone creation meets the requirements of this chapter;
2. Information regarding relevant features of other properties in the vicinity of the mitigation area, such as whether nearby properties are publicly owned or contain preserved open space, or significant natural resources; and
3. Cost estimates to perform the mitigation and maintain the mitigation area after construction and/or transfer is completed.

#### **7:13-13.7 Department review and approval of a mitigation proposal**

(a) The Department shall, within 30 calendar days of receipt of a mitigation proposal submitted to comply with a condition of an individual permit, review the proposal for completeness in accordance with N.J.A.C. 7:13-13.6, and:

1. Request any necessary additional information; or

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**2. Declare the mitigation proposal complete for further review.**

**(b) The Department shall approve a mitigation proposal only if it meets all of the applicable requirements of this subchapter.**

#### **7:13-13.8 Riparian zone mitigation options and mitigation location**

**(a) This section governs the mitigation alternatives available to compensate for riparian zone vegetation disturbances and the location of the mitigation in relation to the area where disturbance to riparian zone vegetation is proposed to occur, or, in the case of a violation, has occurred.**

**(b) Mitigation for a riparian zone vegetation disturbance shall be provided in one or more of the following means, as determined in consultation with the Department:**

- 1. Purchase of credits from a mitigation bank with a service area that includes the location of the disturbance;**
- 2. Onsite creation, restoration, enhancement, or preservation; and/or**
- 3. Offsite creation, restoration, enhancement, or preservation in the same watershed management area as the disturbance.**

**(c) If mitigation for riparian zone vegetation disturbance within the same watershed management area at (b)3 above is not feasible, mitigation may occur in another watershed management area, provided the mitigation is as close as possible to the watershed management area where the disturbance is to occur, as approved by the Department, and provided the mitigation fully compensates for the disturbance in accordance with N.J.A.C.**

**7:13-13.2.**

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### **7:13-13.9 Riparian zone creation**

**(a) This section sets forth specific requirements for riparian zone creation plans.**

**(b) If creation is the mitigation alternative, the Department shall require creation at a creation to loss ratio of 1:1 unless the applicant demonstrates in accordance with (b)1 below that creation at a ratio of less than 1:1 will provide equal ecological functions and values.**

- 1. A mitigator may create riparian zones at a ratio of less than 1:1 if the mitigator demonstrates through the use of productivity models or other similar studies that creating a smaller area of riparian zone will result in replacement riparian zones of equal ecological value to those lost or disturbed. However, in no case shall the Department approve a creation to loss ratio of less than 0.5:1. In order to demonstrate equal ecological value, the mitigator shall survey the conditions on the site of disturbance and on the proposed mitigation area and provide written documentation regarding the proposed type and density of vegetation, the sediment and pollution removal ability of the proposed riparian zone vegetation, all proposed bank stability and erosion protection measures, and any anticipated wildlife habitat conditions. The documentation shall detail how the mitigation proposal will fully replace the ecological values of the riparian zone lost or disturbed.**

**(c) The Department shall approve a riparian zone creation plan only if a regulated water, which is enclosed by a structure, such as a pipe or culvert, is restored to a natural condition**

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such that:

1. All structures enclosing the regulated water are removed;
2. The regulated water is restored to a natural condition and configuration, including channel geometry, sinuosity, and benthic characteristics to the maximum extent practicable; and
3. The channel is stabilized and planted with native, non-invasive vegetation in accordance with N.J.A.C. 7:13-12.14(c)1 or using soil bioengineering in accordance with N.J.A.C. 7:13-12.14(c)2.

(d) The area of mitigation for which the mitigator receives credit under a riparian zone creation plan shall be calculated as the sum of:

1. The area of land that lies between the tops of bank of the restored regulated water; and
2. Any created riparian zone located outside of the tops of bank, provided the area is:
  - i. Restored to a natural condition, free from any gravel, impervious surface, or other structures and manmade materials, except for soil bioengineering or other structures necessary to support the proposed plan; and
  - ii. Planted with native, non-invasive vegetation of equivalent or superior density and ecological functions and values as the disturbed area for which mitigation is being provided.

#### **7:13-13.10 Riparian zone restoration and enhancement**

(a) This section sets forth specific requirements for riparian zone restoration and

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**enhancement plans.**

**(b) If restoration is the mitigation alternative, the Department shall require restoration at a restoration to loss ratio of 2:1, unless the applicant demonstrates in accordance with (b)1 below that restoration at a ratio of less than 2:1 will provide equal ecological functions and values.**

- 1. A mitigator may restore riparian zones, or land adjacent to riparian zones in accordance with (d) below, at a ratio of less than 2:1 if the mitigator demonstrates through the use of studies that restoring a smaller area of riparian zone will result in replacement riparian zones of equal ecological value to those lost or disturbed. However, in no case shall the Department approve a restoration ratio of less than 1:1. In order to demonstrate equal ecological value, the mitigator shall survey the conditions on the site of disturbance and on the proposed mitigation area and provide written documentation regarding the existing and proposed type and density of vegetation, the sediment and pollution removal ability of the existing and proposed riparian zone vegetation, all proposed bank stability and erosion protection measures, and any anticipated wildlife habitat conditions. The documentation shall also detail how the mitigation proposal will replace the ecological values of the riparian zone lost or disturbed.**

**(c) If enhancement is the mitigation alternative, the Department shall require enhancement at an enhancement to loss ratio of 3:1, unless the applicant demonstrates in accordance with (b)1 below that enhancement at a ratio of less than 3:1 will provide equal ecological functions and values.**

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1. A mitigator may enhance riparian zones, or land adjacent to riparian zones in accordance with (d) below, at a ratio of less than 3:1 if the mitigator demonstrates through the use of studies that enhancing a smaller area of riparian zone will result in replacement riparian zones 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 the conditions on the site of disturbance and on the proposed mitigation area and provide written documentation regarding the existing and proposed type and density of vegetation, the sediment and pollution removal ability of the existing and proposed riparian zone vegetation, all proposed bank stability and erosion protection, and any anticipated wildlife habitat conditions. The documentation shall also detail how the mitigation proposal will replace the ecological values of the riparian zone lost or disturbed.

(d) The Department shall approve a riparian zone restoration or enhancement plan only if the land intended for restoration or enhancement is:

1. Restored to a natural condition, free from any gravel, impervious surface, or other structures and manmade materials, except for soil bioengineering or other structures necessary to support the proposed plan;
2. Planted with native, non-invasive vegetation of equivalent or superior density and ecological functions and values as the disturbed area for which mitigation is being provided;

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3. Located within 100 feet from any top of bank along a regulated water possessing a 50-foot riparian zone;
4. Located within 300 feet from any top of bank along a regulated water possessing a 150-foot riparian zone;
5. Located within 300 feet from any top of bank along a regulated water possessing a 300-foot riparian zone; and
6. Not separated from the regulated water along which the mitigation is proposed by a roadway, railroad or other intervening structure.

(e) The Department shall approve a riparian zone restoration plan that consists of restoring to a natural condition a regulated water that has been previously straightened, channelized, or lined with revetments, retaining walls, or other armoring, only if:

1. All structures lining the regulated water are removed;
2. The regulated water is restored to a natural condition and configuration, including channel geometry, sinuosity, and benthic characteristics to the maximum extent practical; and
3. The channel is stabilized with native, non-invasive vegetation.

#### **7:13-13.11 Monitoring and reporting for riparian zone creation, restoration, and enhancement**

(a) This section sets forth monitoring and reporting for approved plans for riparian zone creation, restoration, and enhancement.

(b) Within 60 calendar days after the construction of a creation, restoration, or

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enhancement project is completed, the mitigator shall submit a construction completion report to the Department. The Department may establish a different timeframe for the submittal of the construction completion report if it determines doing so would 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 the species and densities of plantings, and any grading necessary to accomplish the approved mitigation proposal;
2. Photographs of the completed mitigation; and
3. An explanation for any deviation from the approved mitigation proposal.

(c) In addition to the construction completion report required under (b) above, the mitigator shall submit a post-construction monitoring report to the Department each year for five years after completion of any creation, restoration, or enhancement project, unless a different timeframe for submittal is specified in the approved mitigation proposal. The Department may modify the frequency and/or duration of required reporting if it determines that such 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.

(d) The post-construction monitoring report required under (c) above shall be submitted to the Department by December 31 of each year and shall include:

1. An executive summary;
2. The requirements and goals set forth in the approved mitigation proposal;

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- 3. A detailed explanation of the ways in which the mitigation has or has not achieved progress toward those goals. If mitigation has not achieved progress, the report shall also include a list of corrective actions to be implemented as determined pursuant to (e) below and a timeline for completion;**
- 4. Information required by the riparian zone mitigation monitoring checklist available from the Department at the address set forth at N.J.A.C. 7:13-1.3. For a riparian zone 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; and**
  - iii. An assessment of the planted vegetation and the species that are naturally colonizing the site including relevant data, photographs, and field observation notes collected throughout the monitoring period.**

**(e) The standards by which the mitigation project shall be determined to be successful are set forth at (e) 1 through 4 below. The mitigator shall submit a post-construction monitoring report as required at (d) above demonstrating that these standards have been met. The standards are:**

- 1. The goals of the approved riparian zone mitigation proposal have been achieved;**
- 2. The percent coverage of the planted vegetation as detailed in the approved mitigation plan has been achieved;**
- 3. The mitigation provided meets all applicable requirements of this subchapter; and**

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4. **The permittee has executed and recorded (or caused to be executed and recorded if the mitigation has occurred on public property) the conservation restriction for the mitigation area, which meets the requirements of N.J.A.C. 7:13-14.**

**(f) The Department shall determine, after consultation with the mitigator, the appropriate corrective action(s) that the mitigator must implement so that the standards at (e) above are met. Corrective actions 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.**

#### **7:13-13.12 Riparian zone preservation**

- (a) This section sets forth specific requirements for riparian zone preservation plans.**
- (b) An applicant proposing to provide riparian zone mitigation under a preservation plan shall preserve undeveloped land such that future development is precluded within the preserved area.**
- (c) If preservation is the mitigation alternative, the area preserved shall be sufficient to ensure that the functions and values resulting from the preservation area will fully compensate for the loss of functions and values caused by the disturbance. At a minimum, the area preserved shall be:**
  - 1. Valuable for the protection of a riparian zone ecosystem;**
  - 2. Free of solid or hazardous waste, and water and soil pollution; and**
  - 3. Significantly larger than the area that would be required for any other mitigation alternative.**

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**(d) Other factors the Department shall consider in determining whether an area is valuable for the protection of a riparian zone ecosystem include, but are not limited to:**

- 1. The diversity of the ecological communities of the land to be preserved;**
- 2. The relationship of the land to be preserved to existing and planned development;**  
**and**
- 3. Whether the land to be preserved is adjacent to a riverine system that:**
  - i. Includes headwaters;**
  - ii. Is adjacent to public lands containing preserved lands, such as Federal wildlife refuges, State wildlife management areas, State parks or forests, or State, county, or local preservation areas; and**
  - iii. Has unique aspects or characteristics that contribute to its ecological value, such as an unusual or regionally rare type of ecosystem.**

**(e) The Department shall determine mitigation through preservation successful upon:**

- 1. Demonstration that any required conservation restriction has been recorded in accordance with N.J.A.C. 7:13-14; and**
- 2. Documentation that the property has been transferred in fee simple to a government agency or a Department approved charitable conservancy and that the transfer has been recorded with each county in which the preserved land is located.**

#### **7:13-13.13 Requirements for credit purchase from an approved mitigation bank**

**(a) If the Department determines that a proposal to provide mitigation through the**

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**purchase of credits from a mitigation bank is an appropriate mitigation alternative, the Department shall evaluate the values and functions lost as a result of the disturbance and determine the number of credits required to ensure that the mitigation results in a riparian zone 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 required. Documentation shall include a written certification from the mitigation bank operator, indicating the number of credits purchased and the Department permit number.**

#### **7:13-13.14 Financial assurance for mitigation projects; general provisions**

**(a) Financial assurance in accordance with this section is required for mitigation projects involving creation, or restoration activities as mitigation for disturbance to riparian zones.**

**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 riparian zone mitigation project or riparian zone bank; or**

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2. Where mitigation is required as part of the remedy for a violation, the person designated to provide mitigation in the enforcement document.

(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 site 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 below is available from the Department at the address set forth at N.J.A.C. 7:13-1.3.

1. A fully funded trust fund, in accordance with N.J.A.C. 7:13-13.15;
2. A line of credit, in accordance with N.J.A.C. 7:13-13.16;
3. A letter of credit, in accordance with N.J.A.C. 7:13-13.17;
4. A surety bond, in accordance with N.J.A.C. 7:13-13.18; 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.

(f) The amount of financial assurance shall be based on an itemized estimate provided by an independent contractor and approved by the Department and shall include the

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**following:**

- 1. Construction costs, equal to 115 percent of the estimated cost of completing the creation, or restoration; and**
- 2. Maintenance costs, equal to 115 percent of the estimated cost of monitoring and maintaining the site, including the cost to replant the mitigation area.**

**(g) The Department shall review the financial assurance annually and adjust the amount as necessary to reflect any changes in the estimated construction or maintenance costs.**

**(h) The Department shall require additional financial assurance, in accordance with (f) above, if additional construction and/or monitoring is required to ensure success of the mitigation project.**

**(i) The portion of financial assurance required under (f)1 above shall be released upon the Department's determination that construction (including grading and planting) of the mitigation project or bank has been successfully completed in accordance with the approved mitigation proposal.**

**(j) The portion of financial assurance required under (f)2 above shall be released when the Department determines that the mitigation project or bank is successful pursuant to N.J.A.C. 7:13-13.11(e) (for a riparian zone project), or N.J.A.C. 7:13-13.19(j) (for a mitigation bank), 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 mitigation project or bank as required by a permit, mitigation banking instrument, enforcement document, or settlement agreement, the Department shall:**

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- 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.**

#### **7:13-13.15 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, block, 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;**
- 4. Specify that the trustee may only disburse funds with the Department's written approval;**

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5. **Specify that funds shall be utilized solely for the purposes of conducting the mitigation project 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. 7:13-13.14(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.**

**7:13-13.16 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, block, 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. 7:13-13.14(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.**

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**7:13-13.17 Financial assurance; letter of credit requirements**

**(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, block, 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. 7:13-13.14(l).**

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#### **7:13-13.18 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 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, block, 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. 7:13-13.14(l).**

#### **7:13-13.19 Mitigation banks**

**(a) A mitigation bank requires approval by the Department prior to the sale or utilization of any mitigation credits. “Approval” for the purposes of this section means approval in**

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accordance with N.J.A.C. 7:13-13.20.

**(b) If the establishment of a mitigation bank involves regulated activities, as described at N.J.A.C. 7:13-2.4, the bank operator shall obtain all necessary approvals from the Department 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, even if the credits are not anticipated to be immediately sold or the mitigation bank is formed with the intent that credits will be used solely by the mitigation bank operator.**

**(d) The Department shall determine how many mitigation credits each mitigation bank operator may receive or sell, based on the increase in 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 aquatic and non-aquatic resources. The Department shall evaluate each mitigation bank to determine its functions and values considering the following:**

- 1. The functions and values provided by the bank site at the time the mitigation bank proposal is submitted, such as existing soil, vegetation, water quality functions, flood storage capacity, soil erosion and sediment control functions, and wildlife habitat functions;**
- 2. Whether the proposed mitigation activities will result in an increase in functions and values over the existing value of the mitigation bank site;**
- 3. The likelihood of long-term success of the proposed mitigation activities in creating functions and values similar to undisturbed riparian zones;**

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4. **The total area of the riparian zone located on the proposed bank site;**
5. **The potential for the completed mitigation site to be a valuable component of the stream ecosystem;**
6. **The area and type of mitigation proposed to be performed;**
7. **The types of resource losses that have occurred in the area;**
8. **The similarity or dissimilarity of the bank to other existing resources in the area;**
9. **Available scientific literature regarding credit ratios; and**
10. **The Department's and other government agencies' experience with mitigation and mitigation banks.**

**(e) The Department shall include in the banking instrument approving a mitigation bank, a schedule, as set forth in (e)1 through 7 below, under which a bank operator may sell credits. The Department shall adjust the amount of credits that can be released under (e)2 through 7 below to reflect the degree of progress the bank has shown toward meeting the goals and performance standards in the approved mitigation proposal:**

1. **Ten percent of the credits shall be released upon completion of both of the following:**
  - i. **Signing of the banking instrument approving the bank; and**
  - ii. **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 in accordance with N.J.A.C. 7:13-13.14 for a mitigation bank involving creation or restoration mitigation, and filing of the conservation restriction;**

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2. Up to 15 percent of the credits shall be released upon completion of planting as required in the banking instrument approving the bank;
3. 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 an entire one-year period;
4. 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 a two-year period;
5. 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 three consecutive years;
6. 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
7. 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.

(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 shall meet the requirements for protecting mitigation sites from future disturbance, set forth at

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**N.J.A.C. 7:13-14.**

**(h) The mitigation bank operator shall monitor the mitigation bank site 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 governmental agency or 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 frequently if required by the banking instrument approving the bank.**

**(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 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 corrective action, in order to reflect the change in values and functions that will result from the changes to the bank.**

**(j) Upon completion of all requirements in the banking instrument approving the bank, the Department shall determine the mitigation bank is successful, provided the mitigation bank operator:**

- 1. Demonstrates that the bank is successful, 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. Except for banks based solely upon preservation mitigation provides the government agency or charitable conservancy to which the mitigation bank site is**

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**transferred with a maintenance fund. The maintenance fund shall support maintenance activities such as trash removal, maintenance of natural features, monitoring of the site to ensure proper upkeep, maintenance of water control structures, fences, or safety features, and any other activities necessary to ensure that the site complies with this chapter and all applicable law. 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 (g) above, are recorded with the county or other appropriate agency.**

**(k) If the Department determines that the mitigation bank operator is in default of any provision of the mitigation banking instrument and the default results in a termination of the 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 less than the number of credits already sold, the Department shall assert its rights to the financial assurance provided under N.J.A.C 7:13-13.14(k) and (l).**

#### **7:13-13.20 Application for a mitigation bank**

**(a) A prospective mitigation bank operator may obtain conceptual review of a proposed mitigation bank before buying land or preparing a detailed mitigation bank proposal. In a conceptual review, Department staff will discuss the apparent strengths and weaknesses of the proposed mitigation bank. 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 conceptual review does not grant any property or other rights 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. Information on the location, size, and environmental characteristics of the proposed mitigation bank site;**
- 2. Information on previous uses of the site, including possible contamination;**
- 3. The proposed mitigation alternatives being considered, such as creation, restoration, and/or enhancement;**
- 4. Whether the credits generated by the bank will be used solely by the mitigation bank operator, or will be available for use by others;**
- 5. Maps, photographs, diagrams, delineations, and/or other visual materials necessary for the Department to generally evaluate the proposed mitigation bank;**
- 6. The names and addresses of all current owners of the mitigation bank site, and any prospective owners, as of the date the request for conceptual review is submitted; and**
- 7. 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 inspect the site.**

**(c) To obtain Department approval of a proposed mitigation bank, an applicant shall**

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**submit the information required by the riparian mitigation bank proposal checklist, available from the Department at the address set forth at N.J.A.C. 7:13-1.3. The checklist shall require the following:**

- 1. A functional assessment of the bank site prior to construction and proposed site conditions after construction;**
- 2. The goals and objectives of the bank;**
- 3. The ownership of the bank site including disclosure of any leases, easements or other encumbrances;**
- 4. The size of the bank site, as well as type and amount of the riparian zone resources for which credits from the bank could serve as suitable compensation;**
- 5. A description of baseline conditions on the bank site, including all relevant natural features and parameters, as well as pollutants, contamination, and other factors which could affect the bank's ability to provide mitigation credits;**
- 6. A description of the mitigation bank 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 as the bank site;**
- 7. The method for determining credits and debits;**
- 8. Accounting procedures;**
- 9. Performance standards to enable the Department to determine when credits may be released under N.J.A.C. 7:13-13.19(e);**

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- 10. Performance standards to enable the Department to determine if and when the mitigation bank is successful;**
  - 11. Reporting protocols and a monitoring plan;**
  - 12. Contingency and corrective actions that will be taken by the mitigation bank operator in case the bank fails;**
  - 13. Financial assurance meeting the requirements of N.J.A.C. 7:13-13.14;**
  - 14. Provisions for long-term management and maintenance of the mitigation bank site;**
  - 15. Site plans, cost estimates, and schedules for construction, completion, and transfer of the mitigation bank;**
  - 16. Draft legal instruments necessary to meet the requirements of this chapter, including a conservation restriction, financial assurance, property transfer, and/or agreement with a charitable conservancy to maintain the site;**
  - 17. Identification of the persons who will construct, operate and maintain the mitigation bank and mitigation bank site; and**
  - 18. Documentation that public notice of the proposed mitigation bank was provided in accordance with N.J.A.C. 7:13-19.**
- (d) The Department's approval of a mitigation bank shall incorporate conditions necessary to ensure that the requirements of this subchapter are met.**

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## **SUBCHAPTER 14. CONSERVATION RESTRICTIONS**

### **7:13-14.1 Conservation restriction form and recording requirements**

**(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 the land owner and successors in interest to any interest in the land or any part of the land covered by the mitigation area;**
- 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. 7:13-1.3.**

**(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; and**

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**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. 7:13-13.2(c)2.**

**(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 calendar days of the issuance 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 (that is, the mitigation area) shall:**

- 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.**

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**(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.**

#### **7:13-14.2 Reservation of rights**

**(a) 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 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.**

**(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.**

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## **SUBCHAPTER 15. HARDSHIP EXCEPTION FOR AN INDIVIDUAL PERMIT**

7:13-[9.8]**15.1** Hardship exception for an individual permit

(a) The Department shall issue an individual permit for [an] **a project or regulated activity** that does not comply with one or more of the requirements at N.J.A.C. 7:13-[10 and ]11 **and 12** only if [all of the requirements of (b) below are satisfied and, additionally, one or more of the following requirements are satisfied]:

- 1. One or more of the requirements at (b) below are satisfied; and**
- 2. All of the requirements at (c) below are satisfied.**

**(b) A project or regulated activity is eligible for a hardship exception under this section only if one or more of the following apply:**

1. The Department determines that there is no feasible and prudent alternative to the proposed project **or regulated activity**, including not pursuing the project **or regulated activity**, which would avoid or substantially reduce the anticipated adverse effects of the project **or regulated activity**, and that granting the hardship exception would not compromise the reasonable requirements of public health, safety, and welfare, or the environment;
2. The Department determines that the cost of compliance with the requirements of this chapter is unreasonably high in relation to the environmental benefits that would be achieved by compliance; [and/or] **or**

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3. The Department and applicant agree to one or more alternative requirements that, in the judgment of the Department, provide equal or better protection to public health, safety, and welfare and the environment.

[(b) To obtain an individual permit based on a hardship exception, the applicant shall demonstrate to the Department that the following requirements are satisfied:]

**(c) In addition to meeting at least one of the requirements in (b) above, a project or regulated activity is eligible for a hardship exception under this section only if the applicant demonstrates that:**

1. Due to an extraordinary situation of the applicant or site condition, compliance with this chapter would result in an exceptional and/or undue hardship for the applicant **and/or would adversely impact public health, safety, and welfare;**
2. The proposed **project or regulated** activities will not adversely affect the use of contiguous or nearby property; **and**
3. The proposed **project or regulated** activities will not pose a threat to the environment, or to public health, safety, and welfare[; and].

[4. The hardship was not created by any action or inaction of the applicant or its agents.]

**(d) In determining whether to approve a hardship exception for an application satisfying the requirements of (b) and (c) above, the Department shall consider the extent to which the applicant, prior or current property owner(s), and/or their agents may have directly caused or contributed to the hardship.**

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[(c)] (e) To obtain an individual permit based on a hardship exception, the applicant shall submit an application **for an individual permit** pursuant to N.J.A.C. 7:13-[9.2]**18** and shall include the following additional information as applicable:

**1. A detailed narrative that:**

- i. Explains how the project or regulated activity for which the applicant is seeking a hardship exception meets at least one of the requirements at (b) above as well as all of the requirements of (c) above; and**
- ii. Demonstrates that the applicant has pursued alternate designs and/or locations for the project or regulated activity, as applicable, which have proven to be not feasible;**

[1.] **2.** A description of any potential impacts of the proposed project **or regulated activity** upon the environment;

**3. If the hardship exception request relates to the requirements for buildings at N.J.A.C. 7:13-12.5, all necessary structural, socio-economic, flood-proofing, and/or other information relevant to support the request;**

[2.] **4.** If the hardship exception request relates to the access requirements of N.J.A.C. 7:13-[11.6]**12.6**, proposed access routes to and from the property during a flood;

Recodify existing 3. and 4. as **5. and 6.** (No change in text.)

[5.] **7.** A description of the existing development in the area and any potential impacts of the proposed **project or** regulated activities on that development; and

[6.] **8.** (No change in text.)

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[(d)] (f) The Department shall review an application for an individual permit based on a hardship exception in accordance with the procedures for an individual permit at N.J.A.C. 7:13-9.3]21. [The denial of an individual permit based on a hardship exception shall be without prejudice. However, any future reapplication for an individual permit based on a hardship exception that has been denied or withdrawn shall be accompanied by a new application fee.]

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

## **SUBCHAPTER 16. EMERGENCY AUTHORIZATIONS**

### **7:13-16.1 Standard 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 general permit or an individual permit for the preventive or ameliorative activity.**

### **7:13-16.2 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:**

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- 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;**
- 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, block, 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 flood hazard areas and riparian zones; and**
- 10. Any other information necessary for the Department to ensure compliance with the requirements of this chapter.**

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**(b) A person requesting an emergency authorization need not comply with the public notice requirements at N.J.A.C. 7:13-19 or submit an application fee. However, public notice and an application fee are required for the application for the general permit authorization or the individual permit, as applicable, that, as required at N.J.A.C. 7:13-16.3(e), must be submitted for the activities conducted under the emergency authorization.**

### **7:13-16.3 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. 7:13-16.2. 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) Within 20 calendar days after the verbal decision to issue an emergency authorization, the Department shall publish notice of the emergency authorization in the DEP Bulletin.**

**(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;**
- 2. The timeframes within which the regulated activities authorized under the emergency authorization must be commenced and conducted as set forth in (d) below;**
- 3. A requirement that the person conducting the regulated activities authorized**

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**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 riparian zones in accordance with N.J.A.C. 7:13-13, as appropriate.**

**(d) 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 (f) below. If the emergency activities are not commenced within 30 calendar days or by the date established under (f) 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 (f) below, as applicable; and**
- 2. Activities authorized under the emergency authorization, including any required 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 (f) 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 (f) below, as applicable, the regulated activities shall cease until either a general permit**

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**authorization or an individual permit is obtained, or another emergency**

**authorization is obtained.**

**(e) The person to whom the emergency authorization is provided shall submit a complete application in accordance with N.J.A.C. 7:13-18 for an authorization under a general permit or for an individual 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 (f) below, as applicable.**

**(f) The Department shall establish a timeframe different from those set forth at (d) or (e) above where the applicant demonstrates that the timeframe set forth at (d) or (e) 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.**

**(g) 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.**

**(h) The general permit authorization or individual permit application submitted under (e) above shall, in addition to meeting the application requirements for the specific general permit authorization or individual 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,**

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**as appropriate, showing the regulated activities that were or are being conducted under the emergency authorization.**

**(i) Upon review of the application submitted under (e) 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.**

**(j) 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.**

**(k) If the person to whom the emergency authorization was provided conducts any regulated activity not authorized under the emergency authorization and/or the general permit or individual 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. 7:13-24.**

## **SUBCHAPTER 17. PRE-APPLICATION CONFERENCES**

### **7:13-17.1 Purpose and scope**

**(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.**

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**(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.**

**7:13-17.2 Request for a pre-application conference; scheduling; information required**

**(a) Except as provided at (b) below, a request for a pre-application conference shall be directed by electronic mail to LURTechSupport@dep.state.nj.us, or by writing to the address set forth at N.J.A.C. 7:13-1.3 to the attention of "Supervisor, (county in which the proposed project is located)."**

**(b) A request for a pre-application conference for a dredging or dredged material management project shall be directed to Supervisor, Office of Dredging and Sediment Technology, Site Remediation Program, NJ Department of Environmental Protection, P.O. Box 420, Mail Code 401-06C, 401 East State Street, 6th Floor, Trenton, NJ 08625 (Telephone: (609) 633-6801).**

**(c) A request for a pre-application conference for any project shall include the following:**

- 1. A written description of the site and the proposed development including the**

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**dimensions, number, and uses of proposed structures;**

- 2. Site plans or conceptual designs depicting the proposed development, if available;**
- 3. The street address, lot, block, municipality, and county of the property upon which the regulated activity is proposed; and**
- 4. A copy of any letter of interpretation pursuant to the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A, or any flood hazard area verification pursuant to N.J.A.C. 7:13-5, that the Department has issued for the site. If neither a letter of interpretation nor a flood hazard area verification has been issued, the prospective applicant shall provide the general location of freshwater wetlands, freshwater wetland transition areas, State open waters, flood hazard areas, and/or riparian zones.**

**(d) Within 10 calendar days of receipt of the material submitted in accordance with (c) 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 (c) above.**

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## **SUBCHAPTER 18. APPLICATION REQUIREMENTS**

### **7:13-18.1 Purpose and scope**

**(a) This subchapter sets forth the application requirements for:**

- 1. A verification;**
- 2. An authorization under a general permit-by-certification;**
- 3. An authorization under a general permit, except for general permit 1 (see N.J.A.C. 7:13-9.1); and**
- 4. An individual permit.**

**(b) The application requirements for the following are set forth elsewhere in this chapter:**

- 1. For an applicability determination, see N.J.A.C. 7:13-2.5;**
- 2. For an application for a revision of a Department delineation, see N.J.A.C. 7:13-3.7;**
- 3. For an application for authorization under general permit 1, see N.J.A.C. 7:13-9.1;**
- 4. For approval of a mitigation proposal, see N.J.A.C. 7:13-13;**
- 5. For an emergency authorization, see N.J.A.C. 7:13-16; and**
- 6. For an extension, transfer, or modification of an approval, see N.J.A.C. 7:13-22.3, 22.4, or 22.5, respectively.**

### **7:13-18.2 General application requirements**

**(a) The Department provides a checklist for each type of application submitted under this subchapter. The checklist identifies all of the submissions required under the rules to be**

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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](http://www.nj.gov/dep/landuse) or obtained by contacting the Department at the address set forth at N.J.A.C. 7:13-1.3.

(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 environmentally sensitive areas, and its potential for impacts to the environment and flooding. The Department shall, upon request, provide an 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 an activity is proposed or conducted, or which is the subject of the verification;
2. An agent designated by the owner(s) of a site to obtain or operate under a verification, an authorization under a general permit or general permit-by-

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**certification, or an individual permit on behalf of the owner(s); or**

- 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.**

**(d) An application for shall be certified as set forth in (l) 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 through 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:**
  - i. The individual who has overall responsibility to obtain the verification and/or operate, construct or complete the activity, such as a contractor, construction site supervisor, or other individual of equivalent responsibility; or**

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**ii. A position of responsibility equivalent to that of the individual 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 verification 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 site plan submitted as part of an application shall be signed and sealed by an engineer, land surveyor, or architect, as appropriate, unless both (h)1 and 2 below apply, in which case the applicant may elect to prepare his or her own site plan:**

- 1. The applicant proposes the construction of a single-family home or duplex or an accessory structure, such as a patio, garage, or shed on his or her own property for his or her own use; and**
- 2. 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.**

**(i) Any professional report, survey, calculation, environmental impact statement, or other**

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**document prepared by a consultant, engineer, land surveyor, architect, attorney, scientist, or other professional and 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, or the individual permit under N.J.A.C. 7:13-22.8, and may subject the applicant or its agents to enforcement action under N.J.A.C. 7:13-24.**

**(l) When a proposed regulated activity or project requires more than one approval under this subchapter, or requires, in addition, an approval under the Coastal Permit Program Rules at N.J.A.C. 7:7 and Coastal Zone Management Rules at N.J.A.C. 7:7E, and/or the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A, 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**

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each such approval included.

**7:13-18.3 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](http://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, lot, and block;
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 riparian zone vegetation under general permit-by-certification 2 (see N.J.A.C. 7:13-8.2);
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 set forth in N.J.A.C. 7:13-18.2(j), as to each of the following:

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- 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. 7:13-19;
    - 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 6 must certify that the proposed building being reconstructed is not located within a floodway;
  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. 7:13-20.
- (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](http://www.nj.gov.dep/online).

**7:13-18.4 Additional application requirements for a verification, for an authorization**

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**under a general permit, or for an individual permit**

**(a) In addition to meeting the requirements at N.J.A.C. 7:13-18.2, an application for a verification, for an authorization under a general permit, or for an individual permit 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. 7:13-1.3. This form requires basic information regarding the proposed delineation, regulated activity, or project, including the name and address of the applicant and any designated agent(s), the specific location of the delineation, regulated activity, or project, the types of approvals being sought, a brief description of the proposed delineation, activity, or project, 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. 7:13-19;**
- 3. The appropriate application fee as set forth at N.J.A.C. 7:13-20;**
- 4. Site plans, certified in accordance with N.J.A.C. 7:13-18.2(i), that include the following, both on and adjacent to the site:**
  - i. Existing features, such as lot lines, structures, land coverage, and vegetation, which are necessary to demonstrate that the proposed delineation, regulated activity, or project meets the requirements of this chapter;**
  - ii. All proposed regulated activities, such as changes in lot lines; the size, location,**

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- and details of any proposed structures, roads, or utilities; details of any clearing, grading, filling, and excavation; the location and area of any riparian zone vegetation that will be disturbed; cross-sections of regulated waters or water control structures being analyzed; and the anticipated limits of disturbance;**
- iii. Existing and proposed topography where necessary to demonstrate that the proposed delineation, 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;**
  - v. The location of any riparian zone onsite and well as details of any proposed mitigation;**
  - vi. A metes and bounds description of any existing and proposed flood hazard area and floodway limits onsite, as well as an indication of which method in N.J.A.C. 7:13-3 was used to determine these limits, unless the applicant is seeking a verification of only the riparian zone;**
  - vii. If the entire site lies within a flood hazard area and/or floodway, the site plans shall indicate this, as well as the elevation(s) of the flood hazard area design flood throughout the site; and**
  - viii. If construction is proposed in a regulated water, the site plans shall include a thorough description of proposed construction methods, a timetable for construction, and details of any trenching, diversionary channels, temporary**

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**pipng, and other disturbances to the regulated water;**

- 5. State plane coordinates for a point at the approximate center of the site, except for a delineation or 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 delineation of a flood hazard area or riparian zone, or 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 delineation or 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 entire length of the delineation or linear activity or project; and**
    - (2) For a delineation or 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 delineation or linear activity or project.**
- 6. In addition to the site plan specified at (a)4 above, other visual representations, such as photographs, graphs, and tables, that illustrate existing site conditions and the proposed delineation, activity or project;**
- 7. Calculations, analyses, data, and supporting materials necessary to demonstrate that the proposed delineation, activity, or project meets the requirements of this**

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**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. Any information necessary to ensure compliance with State and/or Federal law, and/or to determine whether an application for a verification, for an authorization under a general permit or for an individual permit meets State and/or Federal standards; and**
- 10. 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) An application for an individual permit for a regulated activity or project in an area under the jurisdiction of the Pinelands Commission shall also include a Certificate of Filing, a Notice of Filing, a Certificate of Completeness, or a resolution approving an application for public development, issued by the Pinelands Commission.**

**(c) If a proposed activity or project for which an authorization under a general permit or an individual permit is sought requires mitigation in accordance with this chapter, the applicant may submit a mitigation proposal as part of the application for the authorization or permit. 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**

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**activities authorized by the permit, in accordance with N.J.A.C. 7:13-13.**

**7:13-18.5 Engineering report requirement for an application for a verification based on Methods 4, 5, or 6 or for an individual permit**

**(a) In addition to the requirements at N.J.A.C. 7:13-18.2 and 18.4, an application for a verification based on Methods 4, 5, or 6, pursuant to N.J.A.C. 7:13-3.4(f), 3.5, and 3.6, respectively, or for an individual permit shall include an engineering report. The engineering report shall include:**

- 1. The signature and seal of an engineer;**
- 2. The name, address, and telephone number of the engineer, as well as any other person designated by the engineer to answer questions about the report;**
- 3. All supporting hydrologic, hydraulic, flood storage volume, stormwater and structural calculations, which are necessary to demonstrate that the application meets the requirements of this chapter;**
- 4. A narrative that explains the submitted calculations and describes why each particular calculation or methodology was used;**
- 5. All maps, references, and other supporting materials that were used to prepare the submitted calculations;**
- 6. For an application for a verification, all flood maps, drainage area maps, and other material used to determine the flood hazard area and/or floodway limits;**
- 7. For an application for an individual permit, the total area of impervious surface proposed and the total land area that will be disturbed;**

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8. For an application for an individual permit for which the Department is reviewing a stormwater management plan pursuant to N.J.A.C. 7:13-12.2, the following information where applicable:
  - i. An explanation of how nonstructural stormwater management strategies have been maximized on site, as required at N.J.A.C. 7:8-5.3;
  - ii. A demonstration of how the regulated activity and/or project meets the groundwater recharge standards at N.J.A.C. 7:8-5.4(a)2;
  - iii. A table which compares existing and proposed stormwater discharges for the two-year, 10-year, and 100-year storm in order to demonstrate compliance with the runoff quantity standards at N.J.A.C. 7:8-5.4(a)3; and
  - iv. An explanation of how the regulated activity and/or project meets the water quality standards at N.J.A.C. 7:8-5.5; and
9. For an application for an individual permit for a project located in the Central Passaic Basin that relies on fill credits, as described at N.J.A.C. 7:13-11.4(s) and (t), documentation that the fill credits have been purchased by the applicant prior to the submittal of the application.

**7:13-18.6 Environmental report requirement for an application for an individual permit**

(a) In addition to meeting the requirements at N.J.A.C. 7:13-18.2, 18.4, and 18.5, an application for an individual permit shall include an environmental report. The environmental report shall include:

1. A narrative that describes the proposed design and the construction techniques that will be used;

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2. **Maps (such as freshwater wetlands maps and USDA soil surveys) that provide an environmental inventory of the site; and**
3. **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 regulated waters, channels, riparian zones, fishery resources, and threatened or endangered species and their habitat. The analysis shall include:**
  - i. **A justification for the proposed regulated activity or project, including an explanation of why any proposed regulated activity or project and its location is the most appropriate for the site, and how the proposed location and design minimizes adverse environmental impact(s) to the resources identified in (a)3 above;**
  - ii. **An analysis of alternatives to the proposed regulated activity or project, including a no-build alternative;**
  - iii. **A description of all measures to be taken to reduce any potential adverse environmental impact(s) to the resources listed at (a)3 above; and**
  - iv. **A plan to mitigate the effects of all adverse environmental impacts.**

**(b) Where a survey for threatened or endangered species and their habitat under N.J.A.C. 7:13-11.6(e) is required, the survey shall be performed by a person with education and experience in wildlife biology, zoology, and/or botany, as appropriate, and shall include:**

1. **The name, address, and qualifications of all persons participating in the survey;**
2. **The acreage of the surveyed area;**
3. **A USGS quad map with the surveyed area for each threatened or endangered**

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**species and their habitat outlined;**

- 4. A description of each habitat and cover type onsite including vegetation, hydrology, soils, and natural communities. These habitats shall be assessed for suitability and compatibility to the life history of the threatened or endangered species being investigated. If no threatened or endangered species are observed, a discussion of the site's suitability for such species shall be provided;**
- 5. The date and time of the investigation (including total number of hours spent by each observer for species observation);**
- 6. The number of observers present on the site at any one time, including their location on the site relative to one another;**
- 7. Site conditions during the survey, such as precipitation, temperature, wind speed and direction, artificial or natural noise, and nearest onsite or offsite human activity or development; and**
- 8. If the survey reveals the presence or evidence of a threatened or endangered species, detailed information regarding each sighting, including:**
  - i. Whether the subject was sighted directly or identified by call, track, scat, remains, or other indirect evidence of presence;**
  - ii. The date(s) and time(s) of each such sighting or discovery of evidence;**
  - iii. The relative age and condition of any indirect evidence observed and its location on the property;**
  - iv. A description of the techniques and methodologies employed by the observer during the site investigation;**

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- v. **If a wildlife species is observed directly, the number of each species observed, likely age, observed activity, gender, location on or near the site, and proximity to the observer at each sighting; and**
- vi. **If a plant species is observed directly, the number of each species observed and its location on or near the site.**

## **SUBCHAPTER 19. REQUIREMENTS FOR AN APPLICANT TO PROVIDE PUBLIC NOTICE OF AN APPLICATION**

### **7:13-19.1 Purpose and scope**

**(a) An applicant shall provide public notice in accordance with this subchapter for the following:**

- 1. An application for a verification, pursuant to N.J.A.C. 7:13-5, which is based on Methods 4, 5, or 6, pursuant to N.J.A.C. 7:13-3.4(f), 3.5, and 3.6, respectively;**
- 2. An application for an authorization under a general permit-by-certification pursuant to N.J.A.C. 7:13-6 and 8;**
- 3. An application for an authorization under a general permit pursuant to N.J.A.C. 7:13-6 and 9, except for general permit 1 for channel cleaning under the Stream Cleaning Act at N.J.A.C. 7:13-9.1;**
- 4. An application for an individual permit pursuant to N.J.A.C. 7:13-10, 11, and 12;**
- 5. A mitigation proposal pursuant to N.J.A.C. 7:13-13, which is not submitted as part of an application for an individual permit; and**
- 6. An application for a major technical modification pursuant to N.J.A.C. 7:13-**

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**22.5(d)3.**

**(b) An applicant is not required to provide public notice for the following:**

- 1. A request for an applicability determination pursuant to N.J.A.C. 7:13-2.5;**
- 2. An application for a revision of a Department delineation pursuant to N.J.A.C. 7:13-3.7;**
- 3. An application for a verification that is based on Methods 1, 2, or 3, pursuant to N.J.A.C. 7:13-3.3, 3.4(d), or (e), respectively;**
- 4. Conducting an activity under a permit-by-rule pursuant to N.J.A.C. 7:13-6 and 7;**
- 5. An application for authorization under general permit 1 pursuant to N.J.A.C. 7:13-9.1;**
- 6. An application for an emergency authorization pursuant to N.J.A.C. 7:13-16;**
- 7. An application for an extension of the term of a verification, authorization under a general permit, or individual permit pursuant to N.J.A.C. 7:13-22.3;**
- 8. The transfer of a verification, authorization under a general permit, or individual permit pursuant to N.J.A.C. 7:13-22.4; and**
- 9. An application for an administrative or minor technical modification pursuant to N.J.A.C. 7:13-22.5(c) or (d), respectively.**

**(c) When a proposed regulated activity or project requires more than one approval under this chapter, or requires, in addition, an approval under the Coastal Permit Program Rules at N.J.A.C. 7:7, and/or the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A, 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.**

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**(d) 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. 7:13-21.5.**

#### **7:13-19.2 Timing of public notice of an application**

**For any of the applications listed in N.J.A.C. 7:13-19.1(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.**

#### **7:13-19.3 Contents and recipients of public notice of an application**

**(a) For any of the applications listed in N.J.A.C. 7:13-19.1(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. 7:13-19.1(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. 7:13-19.2. The notice shall include the information specified at (d) 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;**

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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 property boundary of the site in the manner set forth in the Municipal Land Use Law at N.J.S.A. 40:55D-12.b, unless the delineation, regulated activity, or project is one of those listed at (c)1 through 5 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) If the application is for a delineation, regulated activity or project listed at (c)1 through 5 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. **A delineation of one-half mile or longer of a regulated water;**
2. **A mosquito control activity subject to general permit 2 at N.J.A.C. 7:13-9.2;**
3. **A linear project of one-half mile or longer;**
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.**

**(d) 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 proposed delineation, regulated activity, or project;**
- ii. A site plan, showing the location and boundaries of the site and depicting the proposed delineation, 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 delineation, 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 as set forth at N.J.A.C. 7:13-1.3. The form notice letter explains that: an application will be submitted to the Department for the specific delineation, 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 proposed delineation, regulated activity, or project and site may be submitted to the Department at the address set forth at N.J.A.C. 7:13-1.3 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**

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it electronically.

**(e) In addition to the information required at (d) above, the public notice for an application for an individual permit based on a hardship exception pursuant to N.J.A.C. 7:13-15.1 shall also include:**

- 1. A description of the nature of the hardship; and**
- 2. The citation and subject matter of each requirement in this chapter for which the hardship exception is being requested.**

**(f) An applicant for a verification, authorization under a general permit, individual permit, or major technical modification for a delineation, regulated activity, or project in the Pinelands Preservation Area or the Pinelands Protection Area shall provide a copy of the entire application, as submitted to the Department, to the New Jersey Pinelands Commission.**

#### **7:13-19.4 Content and format of newspaper notice**

**(a) The newspaper notice pursuant to N.J.A.C. 7:13-19.3(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. 7:13-19.3(c) shall include all of the following:**

- 1. The mailing address and telephone number of the Department set forth at N.J.A.C. 7:13-1.3;**
- 2. The name and mailing address of the applicant;**

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- 3. The type of approval being sought;**
- 4. A description of the proposed delineation, regulated activity, or project;**
- 5. The street address of the site;**
- 6. A list of each lot, block, municipality, and county within which the proposed delineation, regulated activity, or project will occur;**
- 7. For an application for an individual permit based on a hardship exception pursuant to N.J.A.C. 7:13-15.1:
  - i. A description of the nature of the hardship; and**
  - ii. The citation and subject matter of each requirement in this chapter for which the hardship exception is being requested; and****
- 8. The standard language of the form notice letter available from the Department website as set forth at N.J.A.C. 7:13-1.3.
  - i. The form notice letter explains that: an application will be submitted to the Department for the specific delineation, regulated activity, or project as identified pursuant to (b)4 through 7 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 proposed delineation, regulated activity, or project and site may be submitted to the Department at the address set forth at N.J.A.C. 7:13-1.3 within 15 calendar days of the date of the notice.****

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**7:13-19.5 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; and**
  - 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, lot, and block) 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**
- 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 [17.] 20. APPLICATION FEES**

**7:13-[17.1]20.1 Application fees**

**(a) This subchapter establishes the application fees for:**

- 1. A revision of a Department delineation, pursuant to N.J.A.C. 7:13-3.7;**
- [1.] 2. A verification, pursuant to N.J.A.C. 7:13-[6]5;**

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**3. An authorization under a general permit-by-certification, pursuant to N.J.A.C.**

**7:13-6 and 8, except as provided in (b)3 below;**

[2.] **4.** An authorization under a general permit pursuant to N.J.A.C. 7:13-[8]**6 and 9,**  
except [for:] **as provided in (b)4 below;**

[i. General permit 1 for channel cleaning under the Stream Cleaning Act, N.J.A.C.

7:13-8.3; and

ii. General permit 6 for the reconstruction of a damaged or destroyed residence,

N.J.A.C. 7:13-8.8;]

[3.] **5.** An individual permit pursuant to N.J.A.C. 7:13-[9, 10, and 11]**10, 11, and 12;** [and]

**6. An extension of a verification, authorization under a general permit, or individual permit, pursuant to N.J.A.C. 7:13-22.3; and**

[4.] **7.** A [revision] **modification** of a verification, authorization under a general permit,  
**or individual permit, [or Department delineation] pursuant to N.J.A.C. 7:13-[13]22.5.**

(b) There is no application fee for:

1. An applicability determination pursuant to N.J.A.C. 7:13-[5.1]**2.5;**

2. A permit-by-rule pursuant to N.J.A.C. 7:13-**6 and 7;**

**3. An authorization under the following general permits-by-certification:**

**i. General permit-by-certification 4 for enhancement of a riparian zone through the planting of native, non-invasive plant species, N.J.A.C. 7:13-8.4; and**

**ii. General permit-by-certification 5 for reconstruction, relocation, expansion, and/or elevation of a building outside a floodway, N.J.A.C. 7:13-8.5;**

[3.] **4.** An authorization under the following general permits:

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i. General permit 1 for channel cleaning under the Stream Cleaning Act, N.J.A.C.

7:13-[8.3]9.1; [and]

ii. **General permit 4 for creation, restoration, and enhancement of habitat and water quality values and functions, N.J.A.C. 7:13-9.4; and**

[ii.] iii. General permit [6] 5 for the reconstruction [of a damaged or destroyed

residence] **and/or elevation of a building in a floodway, N.J.A.C. 7:13-[8.8]9.5;**

4. An emergency [permit] **authorization**, pursuant to N.J.A.C. 7:13-[12]16; and

5. A transfer of [an approval] **a verification, authorization under a general permit, or individual permit**, pursuant to N.J.A.C. 7:13-[14.1]22.4.

(c) – (d) (No change.)

(e) The fees for applications under this chapter are set forth in Table [F] 20.1 below:

Table [F] 20.1  
APPLICATION FEES

Verification pursuant to N.J.A.C. 7:13-[6]5

	Fee
Method 1 (Department delineation method; see N.J.A.C. 7:13-3.3)	\$1,000 <sup>1</sup>
Method 2 (FEMA tidal method; see N.J.A.C. 7:13-3.4(d))	\$1,000 <sup>1</sup>
Method 3 (FEMA fluvial method; see N.J.A.C. 7:13-3.4(e))	\$1,000 <sup>1</sup>
Method 4 (FEMA hydraulic method; see N.J.A.C. 7:13-3.4(f))	\$4,000 plus \$400.00 per each 100 linear feet of regulated water (or fraction thereof) <sup>2</sup>
Method 5 (approximation method; see N.J.A.C. 7:13-3.5)	\$1,000 <sup>1</sup>
Method 6 (calculation method; see N.J.A.C. 7:13-3.6)	\$4,000 plus \$400.00 per each 100 linear feet of regulated water (or fraction thereof) <sup>2</sup>
<b>Delineation of riparian zone only</b>	<b>\$1,000</b>

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**Authorization under a general permit-by-certification pursuant to N.J.A.C. 7:13-6 and 8**

Type of General Permit-by-Certification	Fee
General permits-by-certification 4 and 5	No fee
Any other general permit-by-certification	\$1,000

Authorization under a general permit pursuant to N.J.A.C. 7:13-[8]6 and 9

	Fee
General permits 1, 4, and [6] 5	No fee
Any other general permit	\$1,000

Individual permit pursuant to N.J.A.C. 7:13-[9 through 11]10, 11, and 12

		Fee
Individual permit for the construction of one [private residence] <b>single-family home or duplex</b> , which is not being constructed as part of a residential subdivision or multi-unit development, or for the construction of an addition or other <b>accessory</b> structure [appurtenant] to a [private residence] <b>single-family home or duplex</b>		\$2,000
Base fee for any other individual permit		\$3,000
Additional review fee per project element <sup>1</sup>		
Bank or channel stabilization, reestablishment, protection, or modification project	Review of hydrologic, hydraulic, and/or flood storage displacement (net-fill) calculations required	\$4,000 plus \$400.00 per each 100 linear feet of regulated water (or fraction thereof) <sup>2</sup>
	No review of calculations required	\$1,000 per project
Bridge, culvert, footbridge, low dam, or other water control structure	Review of hydrologic, hydraulic, and/or flood storage displacement (net-fill) calculations required	\$4,000 per structure
	No review of calculations required	\$1,000 per structure

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Review of flood storage displacement (net-fill) calculations for any project not listed above	\$4,000
Review of a hardship exception request	\$4,000
Utility line	\$1,000 per crossing of a regulated water

**Extension of a Verification, Authorization under a General Permit, or Individual Permit (N.J.A.C. 7:13-22.3)**

Type of Extension	Fee
Extension of a verification based on Method 1, 2, 3, or 5	\$240.00
Extension of a verification based on Method 4 or 6	Twenty-five percent of original application fee
Extension of a verification of the riparian zone alone	\$240.00
Extension of an authorization under a general permit	\$240.00
Extension of an individual permit	Twenty-five percent of original application fee

[Revision] **Modification** of a verification, **authorization under a** general permit [authorization], or individual permit pursuant to N.J.A.C. 7:13-[13.1 through 13.3]**22.5**

	Fee
<b>Administrative modification</b>	<b>\$500.00 per approval modified</b>
<b>Minor technical modification</b>	<b>\$500.00 per project element modified</b>
[Each major revision] <b>Major technical modification</b>	[30] <b>Thirty</b> percent of the original permit application fee or \$500.00, whichever is greater
[Each minor revision]	[\$500.00]

Revision of a Department delineation pursuant to N.J.A.C. 7:13-[13.4]**3.7**

	Fee
Each major revision	\$4,000 plus \$400.00 per each 100-foot segment of regulated water (or fraction thereof) to be re-delineated <sup>2</sup>

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Each minor revision	\$500.00
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Additional application fee stormwater review if a project is a “major development” pursuant to Stormwater Management Rules (see N.J.A.C. 7:8-1.2)

	Fee
Base fee for any major development	\$3,000
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)
[Additional fee if project disturbs vegetation within a Special Water Resource Protection Area (see N.J.A.C. 7:8-5.5)]	[\$2,000]

<sup>1</sup> This fee does not apply for any application associated with the construction of one [private residence] **single-family home or duplex**, which is not being constructed as part of a residential subdivision or multi-unit development, or for the construction of an addition or [other] **accessory** structure [appurtenant] to a [private residence] **single-family home or duplex**.

<sup>2</sup> The length of the regulated water shall be measured along its centerline. The length of a regulated water in which no channel is discernible shall be determined by measuring along the approximate centerline of the regulated water.

7:13-[17.2]**20.2** (No change in text.)

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## **SUBCHAPTER 21. APPLICATION REVIEW**

### **7:13-21.1 General application review provisions**

(a) **This subchapter sets forth the review procedures for applications for a verification, applications for authorization under a general permit, and applications for an individual permit.**

(b) **The review procedures for the following are set forth elsewhere in this chapter:**

- 1. For a request for an applicability determination, see N.J.A.C. 7:13-2.5;**
- 2. For an application for a revision of a Department delineation, see N.J.A.C. 7:13-3.7;**
- 3. For a mitigation proposal, see N.J.A.C. 7:13-13;**
- 4. For a request for an emergency authorization, see N.J.A.C. 7:13-16; and**
- 5. For a request to extend, transfer, or modify an approval, see N.J.A.C. 7:13-22.3, 22.4, or 22.5, respectively.**

(c) **Any application for an authorization under a general permit or for an individual permit reviewed in accordance with this subchapter, other than those identified at (d)1 and 2 below, is subject to the application review requirements of the Construction Permits Law, N.J.S.A. 13:1D-29 et seq. This subchapter incorporates those requirements and is consistent with N.J.S.A. 13:1D-29 et seq.**

- 1. An application for authorization under a general permit or an individual permit for an electric generating facility or for a petroleum processing or storage facility, including a liquefied natural gas facility, with a storage capacity of over 50,000 barrels is subject to all of the requirements of this subchapter except for the**

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**timeframes established for completeness review at N.J.A.C. 7:13-21.2 and for Department decision on an application that is complete for review at N.J.A.C. 7:13-21.3.**

- 2. An application for authorization under general permit 1 for channel cleaning under the Stream Cleaning Act at N.J.A.C. 7:13-9.1 is subject only to the review requirements at N.J.A.C. 7:13-21.4.**

**(d) An applicant may submit a revised application at any time during the application review process. 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. 7:13-19.3(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. 7:13-19.5 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. 7:13-21.3, 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. 7:13-21.3(b).**

**(e) 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.**

**(f) Notwithstanding any other provision of this subchapter, an application for an authorization under a general permit or for an individual permit shall not be declared complete for review unless the applicant has obtained all tidelands instruments required**

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for occupation of State-owned tidelands or has submitted a complete application for a tidelands instrument, available from the Department's website at

<http://www.nj.gov/dep/landuse/tideland.html> or from the Bureau of Tidelands

Management at P.O. Box 420, Mail Code 501-02B, Trenton, NJ 08625-0420. An

application for a tidelands instrument requires the name and address of the applicant/title holder and any agent, site location and description, a property survey, and title or deed information.

(g) The Department shall publish notice in the DEP Bulletin of the receipt of each new 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 verification, applications for authorization under a general permit, or applications for an individual permit. Actual notice of the Department's decision to approve or deny an application will be provided, in accordance with N.J.A.C. 7:13-21.3, to the applicant and to persons who specifically request such notice.

#### **7:13-21.2 Completeness review**

(a) Within 20 working days after receiving an application for a verification, an application for authorization under a general permit, or an application for an individual permit, 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:

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- 1. Determine the application is both administratively and 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 application;**
- 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.**

**(b) Within 15 calendar days after receiving the additional information submitted pursuant to (a)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; 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 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.**

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**(c) The applicant shall send the additional information submitted to the Department pursuant to (a)2 and (b)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. 7:13-19.3(b) whom the Department determines would likely be affected by the additional information. The applicant shall provide documentation in accordance with N.J.A.C. 7:13-19.5 that the additional information and notice were provided.**

**(d) An applicant shall submit all additional information pursuant to (a)2 or (b)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. 7:13-21.5, 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.**

**(e) If the Department does not take one of the actions in (a) 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, and the Department shall make a decision to approve or deny the application by the applicable deadline set forth at N.J.A.C. 7:13-21.3.**

**(f) If the Department does not take one of the actions in (b) above within 15 calendar days after receiving additional information submitted for a technically incomplete application, the application shall be declared complete for review, effective as of the date the additional**

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information was received by the Department, and the Department shall make a decision to approve or deny the application by the applicable deadline set forth at N.J.A.C. 7:13-21.3.

(g) The Department shall hold a fact-finding meeting on an application for a verification or an application for an individual permit if 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.

(h) Once an application for a verification, an application for authorization under a general permit, or an application for an individual permit is complete for review, the Department shall make a decision to approve or deny the application by the applicable deadline established under N.J.A.C. 7:13-21.3.

#### **7:13-21.3 Department decision on an application that is complete for review**

(a) Within 90 calendar days after an application for a verification, application for an authorization under a general permit, or application for an individual permit is declared complete for review in accordance with N.J.A.C. 7:13-21.2, the Department shall:

- 1. Determine that the application meets the requirements of this chapter and issue a verification, authorization, or individual permit approving the application in writing. The verification, authorization, or individual permit shall include any conditions necessary to ensure compliance with this chapter; or**

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**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.**

**(b) The 90-calendar-day deadline set forth in (a) 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 extended by less than or greater than 30 calendar days.**

**(c) If the Department does not make a decision to approve or deny an application for a verification, application for authorization under a general permit or application for an individual permit by the applicable deadline set forth in (a) or (b) above, the application shall be deemed to have been approved as of that deadline. Regulated activities shall not commence unless and until all required tidelands instrument(s) to use and occupy State-owned tidelands are obtained.**

**1. An authorization or individual permit issued under this subsection shall include the standard conditions set forth in N.J.A.C. 7:13-22.2.**

**2. A verification, authorization, or individual permit issued under this subsection shall not prevent the Department from taking enforcement action pursuant to N.J.A.C. 7:13-24 for any activity undertaken in violation of this chapter.**

**(d) The Department shall provide notice of the decision on an application for a verification, application for authorization under a general permit, or application for an individual permit in the DEP Bulletin and to any person who specifically requested notice of the decision on a particular application.**

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**(e) The Department shall not waive the timeframes established in this subchapter for review and decision on an application.**

**7:13-21.4 Department review and decision on an application for an authorization under general permit 1 for channel cleaning under the Stream Cleaning Act**

**(a) Within 15 calendar days after receiving an administratively and technically complete application for authorization under a general permit 1 for activities that do not include the removal of sediment, or within 60 calendar days after receiving an administratively and technically 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 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**
- 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.**

**(b) If the Department does not make a decision to approve or deny an application for a authorization under a general permit 1 by the applicable deadline set forth in (a) above, the applicant is authorized to commence stream cleaning activities in accordance with the**

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**Stream Cleaning Act provisions of the Flood Hazard Area Control Act at N.J.S.A. 58:16A-67.**

- 1. An authorization issued under this subsection shall include the standard conditions set forth in N.J.A.C. 7:13-22.2.**
  - 2. An authorization issued under this subsection shall not prevent the Department from taking enforcement action pursuant to N.J.A.C. 7:13-24 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 1 in the DEP Bulletin and to any person who specifically requested notice of the decision on a particular application.**

#### **7:13-21.5 Cancellation of an application**

- (a) The Department shall cancel an application for any of the following reasons:**
- 1. An applicant does not submit additional information within the timeframe 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. 7:13-20, 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. 7:13-19.**
- (b) To cancel an application, the Department shall:**

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- 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.**

#### **7:13-21.6 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 withdrawal in writing.**

#### **7:13-21.7 Re-submittal of an application after denial, cancellation, or withdrawal**

**If an application for a verification, an application for an authorization under a general permit, or an application for an individual permit 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. 7:13-18. The Department shall treat a re-submitted application as a new application and shall review it in accordance with N.J.A.C. 7:13-21.**

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**7:13-21.8 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.**

**(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. 7:13-21.5, 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.**

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**SUBCHAPTER 22. PERMIT CONDITIONS; EXTENSION, MODIFICATION, TRANSFER, SUSPENSION, AND TERMINATION OF VERIFICATIONS, AUTHORIZATIONS, AND PERMITS**

**7:13-22.1 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 verification, the duration of which is governed by N.J.A.C. 7:13-5.2(a); an authorization under a general permit, the duration of which is governed by N.J.A.C. 7:13-6.6; or an individual permit, the duration of which is governed by N.J.A.C. 7:13-10.2(a);
2. Transferring a verification, an authorization under a general permit, or an individual permit to a new owner of the site where the delineation, regulated activity, or project authorized under the authorization or permit is taking place;
3. Modifying a verification, an authorization under a general permit, or an individual permit;
4. Suspending a verification, an authorization under a general permit, or an individual permit; and
5. Terminating a verification, an authorization under a general permit, an individual permit, or emergency authorization.

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**7:13-22.2 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, and the additional conditions that apply to all permits except permits-by-rule are set forth in (d) 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.**

**(c) The following conditions apply to all permits:**

- 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 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;**

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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. 7:13-22.7;**
7. **The permittee shall immediately inform the Department by telephone at (877) 927-6337 (Warn DEP Hotline) of any noncompliance that may endanger the 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 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**



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**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. 7:13-24; and**

**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.**

**(d) In addition to the conditions at (c) above, the following conditions apply to all permits except permits-by-rule:**

- 1. The permittee and its contractors and subcontractors shall comply with all conditions, site plans, and supporting documents approved by the permit;**
- 2. 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. 7:13-22.5;**
- 3. Except for an authorization under general permit 1 for channel cleaning under the Stream Cleaning Act at N.J.A.C. 7:13-9.1, the permittee shall record the permit, including all conditions listed therein, with the Office of the County Clerk (the**

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- 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. 7:13-1.3;**
- 4. The permittee shall perform any mitigation required under the permit prior to or concurrently with regulated activities in accordance with N.J.A.C. 7:13-13;**
  - 5. 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;**
  - 6. 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;**
  - 7. 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;**
  - 8. The permittee shall provide monitoring results to the Department at the intervals specified in the permit;**
  - 9. A permit shall be transferred to another person only in accordance with N.J.A.C. 7:13-22.4;**
  - 10. A permit can be suspended or terminated by the Department for cause;**

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11. 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;
12. 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
13. The permittee shall submit written notification to the Bureau of Coastal and Land Use Compliance and Enforcement, 401 East State Street, 4th Floor, P.O. Box 420, Mail Code 401-04C, Trenton, NJ 08625, at least three working days prior to the commencement of regulated activities.

**7:13-22.3 Extension of a verification, an authorization under a general permit, and an individual permit**

(a) A person may request one five-year extension of a verification, the duration of which is governed by N.J.A.C. 7:13-5.2(a); an authorization under a general permit, the duration of which is governed by N.J.A.C. 7:13-6.6; and an individual permit, the duration of which is governed by N.J.A.C. 7:13-10.2(a).

(b) The Department shall issue an extension only if:

1. A person submits a request for extension that meets the requirements of (c) below and that is received by the Department prior to the expiration of the verification, authorization, or individual permit. The Department shall not accept a request for

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**extension received more than one year prior to the expiration of an authorization or individual permit;**

- 2. The person requesting the extension demonstrates that there has been no significant change in the overall condition of the site, including regulated waters, flood hazard areas, and riparian zones;**
- 3. The person requesting the extension demonstrates that regulated activities approved under any authorization 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 or individual permit under N.J.A.C. 7:13-22.5; and**
- 4. For an individual permit, the person requesting the extension demonstrates that the rules in this chapter governing the 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.**

**(c) A request for an extension of a verification, an authorization under a general permit, or an individual permit shall include:**

- 1. A completed application form as described at N.J.A.C. 7:13-18.4(a)1 and available from the Department at the address set forth at N.J.A.C. 7:13-1.3;**
- 2. The appropriate application fee as set forth at N.J.A.C. 7:13-20; 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**

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**verification or individual permit, the Department shall take one of the actions identified below. During the Department's review of the extension request, regulated activities subject to the authorization or individual permit may continue.**

- 1. Determine the request meets the requirements of this section and issue an extension in accordance with (g) below; or**
  - 2. Determine the request meets the criteria for denial at (e) below and deny the extension request.**
- (e) The Department shall deny a request for an extension for any of the following reasons:**
- 1. The verification, 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 verification, authorization, or individual permit for which the extension is sought;**
  - 3. The Department receives the request after the expiration date of the verification, authorization, or individual permit for which the extension is sought;**
  - 4. The term of the verification, 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**

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- 7. The verification, authorization, or individual permit for which the extension is sought has been terminated in accordance with N.J.A.C. 7:13-22.8.**
- (f) If the Department denies a request for an extension under (e) above:**
- 1. The verification, 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. 7:13-22.8; and**
  - 2. All regulated activities authorized under any authorization under a general permit or individual permit shall cease on the expiration date of the authorization or individual permit specified in (f)1 above, and shall not commence again unless and until a new authorization or individual permit is obtained in accordance with N.J.A.C. 7:13-18.**
- (g) If the Department determines that the requirements of this section have been met, the Department shall issue an extension of the verification, authorization under a general permit, or individual permit for one five-year period, beginning on the original expiration date of the verification, 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.**

**7:13-22.4 Transfer of an emergency authorization, verification, authorization under a general permit, or an individual permit**

- (a) If the site for which the Department has issued a verification, or on which regulated activities are authorized under an emergency authorization, an authorization under a**

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**general permit, or an individual permit, is transferred to a new owner, the verification, authorization, or individual permit, including all conditions, shall be automatically transferred to the new owner, provided the verification, authorization, or individual permit is valid on the date that the site is transferred to the new owner.**

**(b) The verification, authorization, 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**
- 2. Documentation that the transfer will not alter any condition on which the original verification, authorization, or individual permit was based and will not otherwise circumvent any requirement of this chapter.**

**7:13-22.5 Modification of a verification, an authorization under a general permit, or an individual permit**

**(a) A verification that is valid as described in the provisions regarding duration of verifications at N.J.A.C. 7:13-5.3, an authorization under a general permit that is valid as described in the provisions regarding duration of authorizations under general permits at N.J.A.C. 7:13-6.6, or an individual permit that is valid as described in the provisions regarding duration of individual permits at N.J.A.C. 7:13-10.2, 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.**

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**(b) The term of a verification, an authorization under a general permit, or an individual permit shall not be extended by a modification.**

**(c) An administrative modification of a verification, 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 verification, 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 flood hazard area design flood elevation, floodway limits, or riparian zone width. An administrative modification may include:**

- 1. Correcting a drafting or typographical error on a site plan or report;**
- 2. Improving topographical or other data in order to make the verification, 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 verification, an authorization under a general permit, or an individual permit applies to a change in the design or layout of a project or the flood hazard area design flood elevation, floodway limits, or riparian zone width, including any associated change to an approved site plan or other document, that, without hydrologic, hydraulic, flood storage, stability, or stormwater calculations, the applicant demonstrates does not result in new or additional impacts to the flood hazard area or riparian zone. The Department therefore will not review such calculations in the context of a minor technical modification in order to determine if the modified regulated activity,**

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**project, or delineation continues to comply with the requirements of this chapter. 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 flood hazard area design flood elevation or floodway limits to comply with:**
    - i. A Department delineation amended pursuant to N.J.A.C. 7:13-3.7 or 3.8, or otherwise amended or adopted by rulemaking; or**
    - ii. FEMA flood mapping that is amended by FEMA;**
  - 4. A change in the riparian zone width due to data obtained by the Department after a verification is issued; and**
  - 5. A change in the size, shape, or location of the regulated activities or project, provided the total area covered by impervious surface does not increase.**
- (e) A major technical modification of a verification, an authorization under a general permit, or an individual permit applies to any change in a delineation or regulated activities or project authorized pursuant to the verification, authorization, or individual permit, including any associated change to an approved site plan or other document, that is not addressed under (c) or (d) above and that does not require a new permit in accordance with (f) below.**

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**(f) Notwithstanding any other provision in this section, the Department shall not issue a modification of a verification, an authorization under a general permit, or an individual permit if the Department determines that the person requesting the modification proposes changes to the delineation that constitute a substantial redelineation of flood hazard area design flood elevations or floodway limits or a substantial redesign of the regulated activities or project, or will significantly increase the environmental impact of the regulated activities or project, or will exacerbate flooding. In such a case, the applicant shall submit a new application for a verification, an authorization, or an individual permit in accordance with N.J.A.C. 7:13-18 and the Department shall review the application in accordance with N.J.A.C. 7:13-21. Changes for which a new application shall be submitted include:**

- 1. In the case of a verification:**
  - i. A redelineation of a verified flood hazard area and/or floodway limit, which is based on new hydrologic and hydraulic calculations; or**
  - ii. Addition of any previously unverified sections of a regulated water; and**
- 2. In the case of an authorization under a general permit or an individual permit:**
  - i. 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;**
  - ii. 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. 7:13-19;**

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- iii. A substantial redesign of the regulated activity or project or its stormwater management system such that the Department determines a new engineering analysis of the site and/or regulated activity or project is necessary;
- iv. A significant change in the size or scale of the regulated activity or project, including the addition of structures;
- v. A significant change in the impact of the regulated activity or project on any flood hazard area or riparian zone; or
- vi. A change that would result in impacts to a site not owned or controlled by the permittee.

(g) The modified verification, modified authorization under a general permit, or modified individual permit, including all conditions listed therein, shall be 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 verification, modified authorization under a general permit, or modified individual permit is located within two or more counties, the modified verification, 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. 7:13-1.3.

#### **7:13-22.6 Application for a modification**

(a) This section sets forth requirements for an application to modify a verification, an

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**authorization under a general permit, or an individual permit. The general application requirements at N.J.A.C. 7:13-18.2 apply to applications for modifications in addition to the application requirements in this section.**

**(b) To apply for an administrative modification to a verification, an authorization under a general permit, or an individual permit under N.J.A.C. 7:13-22.5(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 verification, authorization, or individual permit was based;**
- 2. The site plans approved as part of the verification, authorization, or individual permit with revisions illustrating the proposed change;**
- 3. A copy of the verification, 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 verification, an authorization under a general permit, or an individual permit under N.J.A.C. 7:13-22.5(d), the person requesting the modification shall submit:**

- 1. A completed application form as described at N.J.A.C. 7:13-18.4(a)1 and available from the Department at the address set forth at N.J.A.C. 7:13-1.3;**
- 2. The appropriate application fee set forth at N.J.A.C. 7:13-20;**
- 3. A description of the scope and purpose of the proposed change to the verified delineation or the regulated activity or project authorized under the authorization or individual permit;**

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4. **The site plans approved as part of the verification, authorization, or individual permit with revisions illustrating the proposed change in the regulated activity or project;**
5. **A copy of the verification, 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 delineation and/or 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**
8. **Any information necessary to ensure compliance with State and/or Federal law.**

**(d) To apply for a major technical modification of a verification, an authorization under a general permit, or an individual permit under N.J.A.C. 7:13-22.5(e), the person requesting the modification shall submit:**

1. **A completed application form as described at N.J.A.C. 7:13-18.4(a)1 and available from the Department at the address set forth at N.J.A.C. 7:13-1.3;**
2. **Documentation that public notice of the application for the major technical modification was provided in accordance with N.J.A.C. 7:13-19;**
3. **The appropriate application fee set forth at N.J.A.C. 7:13-20;**

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- 4. A description of the scope and purpose of the proposed change to the verified delineation and/or the regulated activity or project authorized under the authorization or individual permit;**
- 5. The site plans approved as part of the verification, authorization, or individual permit with revisions illustrating the proposed change;**
- 6. A copy of the verification, 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 delineation and/or regulated activity or project, as applicable;**
- 8. 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 this chapter, and the requirements of the Department's Stormwater Management rules at N.J.A.C. 7:8, if applicable;**
- 9. For a modification of a verification based on Methods 4, 5, or 6, pursuant to N.J.A.C. 7:13-3.4(f), 3.5, and 3.6, respectively, or an individual permit, a revised engineering report addressing the aspects of the delineation and/or regulated activity or project that are proposed to be changed and a demonstration that the delineation and/or regulated activity or project for which the modification is requested continues to comply with all requirements of this chapter;**
- 10. 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**

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**changed 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**

**11. Any information necessary to ensure compliance with State and/or Federal law.**

**7:13-22.7 Suspension of a verification, an authorization under a general permit, an individual permit, or an emergency authorization**

**(a) The Department shall suspend a verification, an authorization under a general permit, an individual permit, or an emergency authorization for good cause, including, but not limited to, the following:**

- 1. The verification, authorization under a general permit, individual permit, or emergency authorization was based on false or inaccurate information;**
- 2. The permittee or person to whom the verification was issued has not complied with a condition of the verification, authorization under a general permit, individual permit, or emergency authorization;**
- 3. The permittee has undertaken activities onsite that violate this chapter;**
- 4. The permittee or person to whom the verification was issued has misrepresented or failed to fully disclose all relevant facts pertaining to the verification, authorization under a general permit, individual permit, or emergency authorization;**

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5. **The permittee has failed to fully and correctly identify impacts of the regulated activity or project in the application for the authorization under a general permit, individual permit, or emergency authorization;**
  6. **The regulated activities conducted pursuant to the authorization under a general permit, individual permit, or emergency authorization have caused unanticipated environmental impacts;**
  7. **The permittee or person to whom the verification was issued has made a change in the delineation and/or project that, under N.J.A.C. 7:13-22.5, would require a modification to the verification, authorization under a general permit, or individual permit but the person to whom the verification was issued or permittee did not first obtain the required modification; or**
  8. **The Department determines that suspension of the verification, authorization under a general permit, individual permit, or emergency authorization is necessary for emergency reasons or to protect public health, safety, and welfare of the environment.**
- (b) The Department shall provide written notice of a suspension by certified mail to the permittee or person to whom the verification was issued in accordance with (c) below, except if the verification, authorization under a general permit, individual permit, or emergency authorization is suspended for emergency reasons, in which case the Department shall contact the permittee or person to whom the verification was issued by telephone or by any practical method, and will follow up with written notice.**
- (c) A notice of suspension shall:**

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1. **State that the verification, authorization under a general permit, individual permit, or emergency authorization is suspended upon the receipt of the notice by the permittee or person to whom the verification was issued;**
2. **Include the reasons for the suspension;**
3. **State that all regulated activities authorized under the suspended authorization under a general permit, individual permit, or emergency authorization shall cease immediately upon receipt of the notice by the permittee or person to whom the verification was issued; and**
4. **Notify the permittee or person to whom the verification was issued of the right to, within 10 calendar days after the permittee or person to whom the verification was issued receives the notice, request:**
  - i. **A meeting with the Department to discuss the suspension; and/or**
  - ii. **An adjudicatory hearing in accordance with N.J.A.C. 7:13-28.**

**(d) Within 30 calendar days after receiving a notice of suspension under (b) above, the permittee or person to whom the verification was issued 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.**

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**(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 verification, authorization under a general permit, individual permit, or emergency authorization, and require the permittee or person to whom the verification was issued 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 or person to whom the verification was issued of its intent to terminate the verification, authorization under a general permit, individual permit, or emergency authorization pursuant to N.J.A.C. 7:13-22.8.**

**(f) Noncompliance with any of the requirements of this section shall constitute cause for the Department to terminate the verification, authorization under a general permit, individual permit, or emergency authorization under N.J.A.C. 7:13-22.8.**

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**7:13-22.8 Termination of a verification, an authorization under a general permit, an individual permit, or an emergency authorization**

(a) The Department shall terminate for good cause a verification, an authorization under a general permit, an individual permit, or an emergency authorization that has been suspended pursuant to N.J.A.C. 7:13-22.7. 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. 7:13-22.7(c)3;
2. The permittee or person to whom the verification was issued has not complied with the requirement at N.J.A.C. 7:13-22.7(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) The Department shall provide written notice of its intent to terminate a verification, an authorization under a general permit, individual permit, or emergency authorization by certified mail to the permittee or person to whom the verification was issued.

(c) The permittee or person to whom the verification was issued may request an adjudicatory hearing on the notice of intent to terminate in accordance with N.J.A.C. 7:13-23. The hearing request shall be submitted within 10 calendar days after receipt of the notice of intent to terminate.

(d) If the permittee or person to whom the verification was issued does not request an adjudicatory hearing under (c) above, or if the adjudicatory hearing request is denied, the

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verification, authorization under a general permit, individual permit, or emergency authorization shall automatically terminate, effective 10 calendar days after the permittee or person to whom the verification was issued received the notice of intent to terminate under (b) above.

(e) If the Department terminates a verification, an authorization under a general permit, individual permit, or emergency authorization, the permittee or person to whom the verification was issued shall take all of the actions at (e)1 through 3 below. Failure to do so shall constitute a violation of this chapter and shall subject the permittee or person to whom the verification was issued to enforcement action pursuant to N.J.A.C. 7:13-25:

1. Remedy any changes to the site made in violation of this chapter;
2. Remedy any adverse impacts to flooding 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 authorization under a general permit, individual permit, or emergency authorization.

## **SUBCHAPTER 23. REQUESTS FOR ADJUDICATORY HEARINGS**

### **7:13-23.1 Procedure to request an adjudicatory hearing; decision on the request**

(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

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**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. 7:13-24.**

**(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 person requesting an adjudicatory hearing shall provide the following information on an adjudicatory hearing request form, available from the Department at the address set forth at N.J.A.C. 7:13-1.3:**

- 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; and**
- 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**

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**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**

**Mail Code 401-04L, P.O. 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. 7:13-1.3.**

**(e) Nothing in this subchapter shall be construed to provide a right to an adjudicatory hearing in contravention of the Administrative Procedure Act, at N.J.S.A. 52:14B-3.1 through 3.3.**

**(f) The Department shall notify the requester that the request for hearing 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 the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.**

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**(g) A final decision issued by the Commissioner after the hearing in the Office of Administrative Law shall be considered final agency action for purposes of the Administrative Procedure Act, and shall be subject to judicial review in the Appellate Division of the Superior Court, as provided in the Rules of Court.**

#### **7:13-23.2 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 that the matter is suitable for mediation, the Department shall also notify the requester of the procedures and schedule for mediation.**

#### **7:13-23.3 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**

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**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.**

#### **7:13-23.4 Notice of settlement agreement**

**(a) If the Department and the person requesting an adjudicatory hearing agree to a settlement that may result in the issuance of a flood hazard area permit 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. 7:13-1.3, to the following:**
  - i. Each person who was provided specific notice of the application which 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.**

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SUBCHAPTER [19.] **24. ENFORCEMENT**

**7:13-24.1 General provisions**

**(a) Whenever the Department finds that a person has violated any provision of N.J.S.A. 58:16A-50 et seq. or any regulation, rule, permit, or order 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. 7:13-24.11, 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 order requiring the person found to be in violation to comply in accordance with N.J.A.C. 7:13-24.2;**
- 2. Levy a civil administrative penalty in accordance with N.J.A.C. 7:13-24.5 or 24.6;**
- 3. Bring an action for a civil penalty in accordance with N.J.A.C. 7:13-24.7;**
- 4. Bring a civil action for injunctive and other relief in accordance with N.J.A.C. 7:13-24.8; and/or**
- 5. Petition the Attorney General to bring a criminal action in accordance with N.J.A.C. 7:13-24.9.**

**(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. 58:16A-50 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 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 N.J.S.A. 58:16A-50 et seq.**

#### **7:13-24.2 Issuance of an administrative order**

**Whenever the Department finds that a person has violated any provision of N.J.S.A. 58:16A-50 et seq., or any regulation, rule, permit, or order adopted or issued by the Department pursuant thereto, the Department may issue an order specifying the provision or provisions of the act, regulation, rule, permit, or order of which the person is in violation citing the action which constituted the violation, ordering compliance and restoration 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. 7:13-24.4. After the hearing and upon 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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**7:13-24.3 Assessment, settlement, and payment of a civil administrative penalty**

**(a) To assess a civil administrative penalty under N.J.S.A. 58:16A-50 et seq., the**

**Department shall notify the violator by certified mail (return receipt requested) or by**

**personal service. This Notice of Civil Administrative Penalty Assessment (NOCAPA) shall:**

- 1. Identify the section of the statute, rule, administrative order, or permit violated;**
- 2. Concisely state the alleged facts which constitute the violation;**
- 3. State the basis for the amount of the civil administrative penalty 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 pursuant to the procedures in N.J.A.C. 7:13-24.4.**

**(b) Payment of the civil administrative penalty is due when a notice of civil administrative penalty assessment becomes a final order, as follows:**

- 1. If no hearing is requested pursuant to N.J.A.C. 7:13-24.4, a notice of civil administrative penalty assessment becomes a final order on the 36th calendar day following receipt of the notice of civil administrative penalty assessment by the violator;**
- 2. If the Department denies an untimely submitted hearing request pursuant to N.J.A.C. 7:13-24.4(a), a notice of civil administrative penalty assessment becomes a final order on the 36th calendar day following receipt of the notice of civil administrative penalty assessment by the violator;**

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3. **If the Department denies a hearing request pursuant to N.J.A.C. 7:13-24.4(d) 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**
4. **If the Department grants the hearing request, a notice of civil administrative penalty assessment becomes a final order upon receipt by the violator of a final order in a contested case.**

**(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:**

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 pursuant to N.J.A.C. 7:13-24.5 or 24.6 according to the following factors:**

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- 1. Mitigating or extenuating circumstances not previously considered in the assessment of penalties;**
- 2. The timely implementation by the violator of measures leading to compliance 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 full payment by the violator of a specified part of the civil administrative penalty assessed if made within a time period established by the Department in an administrative order and provided that the violator waives the right to request an adjudicatory hearing on the civil administrative penalty; or**
- 4. Any other terms or conditions acceptable to the Department.**

**7:13-24.4 Procedures to request and conduct an adjudicatory hearing to contest an administrative order and/or a notice of civil administrative penalty assessment**

**(a) To request an adjudicatory hearing to contest an administrative order and/or a notice of civil administrative penalty assessment issued pursuant to N.J.S.A. 58:16A-50 et seq., the violator shall submit a hearing request in writing within 35 calendar days after receipt by the violator of the administrative order and/or the 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.**

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**(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 set forth at N.J.A.C. 7:13-1.3:**

- 1. The name, address, daytime telephone number, fax number, and e-mail address of the violator requesting the hearing and the violator's authorized representative;**
- 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;**
- 4. A specific admission or denial of each of the facts appearing in the Department's administrative order and/or notice of civil administrative penalty 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 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 of 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**

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**purposes of engaging in settlement negotiations as provided by the Uniform Administrative Procedure Rules at N.J.A.C. 1:1-8.1(b);**

**i. 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 that the matter is suitable for mediation, the Department shall also notify the requester of the procedures and schedule for mediation. More information about the Office of Dispute Resolution is available from the Department’s website at [www.nj.gov/dep/odr](http://www.nj.gov/dep/odr);**

**6. Information supporting the request and specific reference to or copies of other written documents relied upon to support the request;**

**7. An estimate of the time required for the hearing (in days and/or hours); and**

**8. A request, if necessary, for a barrier-free hearing location for physically disabled persons.**

**(c) 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**

**Mail Code 401-04L, P.O. Box 402**

**401 East State Street, 7th Floor**

**Trenton, NJ 08625-0402; and**

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**2. Submit a copy of the hearing request to:**

**New Jersey Department of Environmental Protection**

**Bureau of Coastal and Land Use Compliance and Enforcement**

**P.O. Box 420**

**Mail Code 401-04C**

**401 East State Street, 4th Floor**

**Trenton, NJ 08625-0420**

**(d) If the violator fails to include all the information required by (b) above, the Department may deny the hearing request.**

**(e) 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., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.**

**7:13-24.5 Civil administrative penalties for failure to obtain a permit prior to conducting regulated activities**

**(a) For the failure to obtain a permit prior to conducting regulated activities, the Department may assess a civil administrative penalty pursuant to this section of not more than \$25,000 for each violation of N.J.A.C. 7:13-2.1.**

**(b) Each violation of N.J.A.C. 7:13-2.1 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.**

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**(d) To assess a civil administrative penalty pursuant to this section, the Department shall identify the civil administrative base penalty within Table 24.5A in (f) below by determining the number of points pursuant to (e) below. The civil administrative penalty shall be the amount within Table 24.5A in (f) below, unless adjusted pursuant to (g) and/or (h) below.**

**(e) The Department shall use the two factors described in (e)1 and 2 below to determine the number of points assigned to each violation.**

- 1. The conduct factor of the violation shall be classified as major, moderate, or minor and assigned points as follows:**
  - i. Major shall include any intentional, deliberate, purposeful, knowing, or willful act or omission by the violator and is assigned five points;**
  - ii. Moderate shall include any unintentional but foreseeable act or omission by the violator and is assigned two points; and**
  - iii. Minor shall include any other conduct not included in (e)1i or ii above and is assigned one point.**
  
- 2. The seriousness factor of the violation is assigned points as provided below and shall be based on the type, size, and location of the violation as provided at (e)2i through iv below, whether the activity also constitutes a Tidelands violation as provided at (e)2v below, and whether the activity impacted a resource of concern as provided at (e)2vi below:**
  - i. An impact to a channel, such as a physical alteration including excavation, grading, channelization, channel widening, dredging, and channel relocation,**

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**or a change in the channel equilibrium, channel bank stability, or water quality, is assigned points as provided at (e)2i(1) through (3) below and shall be based on the length of the channel impacted. A violation that disturbed:**

- (1) Greater than 300 linear feet of channel is assigned five points;**
- (2) Greater than 75 linear feet up to and including 300 linear feet of channel is assigned three points; and**
- (3) Up to and including 75 linear feet of channel is assigned one point.**

**ii. An impact to a floodway, such as the construction or placement of structures, fill, or obstruction within the floodway, is assigned points as provided at (e)2ii(1) through (3) below and shall be based on the type and volume of fill or obstruction constructed or placed within the floodway, whether the fill constitutes a habitable building, and the area of the footprint of the structure:**

- (1) A violation comprised of the placement of fill or obstruction within the floodway:**
  - (A) Greater than 100 cubic yards is assigned five points;**
  - (B) Greater than 25 cubic yards and up to and including 100 cubic yards is assigned three points; and**
  - (C) Up to and including 25 cubic yards is assigned one point;**
- (2) A violation comprised of the unauthorized construction of a habitable building or addition within the floodway is assigned five points; and**

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**(3) A violation comprised of the unauthorized construction of any other structure having a footprint of greater than 150 square feet is assigned three points.**

**iii. An impact to a flood fringe, such as the construction or placement of structures, fill, or obstruction within the flood fringe, is assigned points as provided at (e)2iii(1) through (3) below and shall be based on the volume of fill or obstruction constructed or placed within the flood fringe, whether the structure complies with this chapter notwithstanding that a flood hazard area permit was not obtained, and, in the case of a building, the elevation of the lowest floor in relation to the minimum elevation required for the type of building:**

**(1) A violation comprised of the placement of fill or obstruction within the flood fringe:**

**(A) Greater than 200 cubic yards is assigned five points;**

**(B) Greater than 50 cubic yards up to and including 200 cubic yards is assigned three points; and**

**(C) Greater than five cubic yards up to and including 50 cubic yards is assigned one point;**

**(2) A violation comprised of the unauthorized construction of a habitable building where the “as-built” lowest floor elevation is:**

**(A) Below the minimum elevation required for the type of building is assigned five points; and**

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**(B) At or above the minimum elevation required for the type of building is assigned two points; and**

**(3) A violation comprised of the unauthorized construction of any other structure, where the structure that was constructed without a flood hazard area permit:**

**(A) Does not comply with this chapter is assigned three points; and**

**(B) Does comply with this chapter is assigned one point;**

**iv. An impact to a riparian zone, such as the clearing, cutting, and/or removal of vegetation, the construction, reconstruction, relocation, or enlargement of the footprint of any structure, and all site preparation such as excavation, filling, and grading of any kind within the riparian zone, is assigned points as provided at (e)2iv(1) through (4) below and shall be based on the area disturbed and the type of vegetation that was disturbed:**

**(1) A violation that disturbed:**

**(A) Greater than 15,000 square feet is assigned three points;**

**(B) Greater than 7,000 square feet up to and including 15,000 square feet is assigned two points; and**

**(C) Greater than 400 square feet up to and including 7,000 square feet is assigned one point;**

**(2) A violation comprised of activities in which the riparian zone has been clear-cut of existing woody vegetation (trees and shrubs) and stumped,**



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**(6) The portion of the riparian zone within 25 feet of the top of bank of a regulated water.**

**(f) The Department shall sum the total points assigned according to the two factors in (e) above, and shall determine the base penalty amount per day using the following table:**

**Table 24.5A**

**Base Penalty Points Table**

<b><u>Points</u></b>	<b><u>Base Penalty</u></b>
<b>1-3</b>	<b>\$500</b>
<b>4-6</b>	<b>\$1,000</b>
<b>7-8</b>	<b>\$2,000</b>
<b>9-10</b>	<b>\$3,000</b>
<b>11-12</b>	<b>\$6,000</b>
<b>13-14</b>	<b>\$8,000</b>
<b>15-16</b>	<b>\$10,000</b>
<b>17-19</b>	<b>\$15,000</b>
<b>20-22</b>	<b>\$20,000</b>
<b>23 or more</b>	<b>\$25,000</b>

**(g) The Department shall adjust the amount of the base penalty assessed pursuant to (f) above based upon the mitigating penalty component as calculated in Table 24.5B below, if applicable.**

- 1. The Department shall multiply the base penalty dollar amount by the multiplier for either of the applicable mitigating factors in Table 24.5B below to obtain the mitigating penalty component. Where neither mitigating factor in Table 24.5B**

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applies, the civil administrative penalty shall be the civil administrative base penalty determined pursuant to (f) above, unless adjusted pursuant to (h) below.

**Table 24.5B**

**Mitigating Penalty Component**

<u>Mitigating Factor</u>	<u>Multiplier</u>
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 of receipt of the notice of the violation from the Department and a permit is subsequently obtained for the unauthorized regulated activities without the need to modify the regulated activities, provide riparian zone mitigation, or restore disturbed regulated areas	0.50

2. To obtain the civil administrative penalty, the Department shall subtract the mitigating penalty component calculated pursuant to (g)1 above, where applicable, from the base penalty.

(h) The Department may, in its discretion, adjust the amount of a penalty assessed pursuant to (f) and, where applicable, (g) above based upon any or all of the factors listed in (h)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

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**4. Any other mitigating, extenuating, or aggravating circumstances.**

**(i) The total civil administrative penalty shall be the daily civil administrative penalty determined under (d) through (h) above, multiplied by the number of calendar days during which each violation continued or remained in place without the required permit.**

**(j) 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, or by delaying compliance with, an applicable law and/or condition.**

**7:13-24.6 Civil administrative penalties for violations other than failure to obtain a permit prior to conducting regulated activities**

**(a) For violations other than failure to obtain a permit prior to conducting regulated activities, the Department may, in its discretion, assess a civil administrative penalty pursuant to this section of not more than \$25,000 for each violation of N.J.S.A. 58:16A-50 et seq., or any regulation, rule, permit, condition, or order adopted or issued by the Department pursuant thereto. The Department shall assess penalties under this section rather than under N.J.A.C. 7:13-24.5 when N.J.A.C. 7:13-24.5 is not applicable to the violation.**

**(b) Each violation of N.J.S.A. 58:16A-50 et seq., or any regulation, rule, permit, condition, or order adopted or issued by the Department pursuant thereto, shall constitute an additional, separate, and distinct violation.**

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(c) Where any requirement of N.J.S.A. 58:16A-50 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.

(d) To assess a civil administrative penalty pursuant to this section, the Department shall use the two factors described at (e) and (f) below, seriousness and conduct, to determine the amount of the base daily civil administrative penalty. The applicable daily penalty amount is determined using the base daily penalty matrix in the table below, based on the seriousness of the violation determined pursuant to (e) below and the conduct of the violator determined pursuant to (f) below.

**Table 24.6**

**Base 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

(e) The seriousness of the violation shall be determined as major, moderate, or minor as follows:

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- 1. Major seriousness shall apply to any violation which has caused or has the potential to cause serious harm to human health or safety, property, the environment, or the flood hazard area regulatory program, or seriously deviates from the applicable law and/or condition. “Serious deviations” include, but are not limited to, those violations which are in complete contravention of the law, requirement, and/or condition, and/or which severely impair or undermine the protection, operation, or intent of the law, requirement, or condition. Violations of “major” seriousness include, but are not limited to:**
  - i. Conducting any activity that adversely impacts flooding, flood potential, the flood hazard area habitat for threatened or endangered wildlife or plant species, the pattern of riparian zone vegetation, or water quality;**
  - ii. Placing fill, excavating, and/or grading within the flood hazard area;**
  - iii. Clearing, cutting, and/or removal of vegetation within the riparian zone;**
  - iv. Placing fill, excavating, and grading within the flood hazard area and/or clearing, cutting, and/or removal of vegetation within the riparian zone in excess of that which is authorized by a permit or plan;**
  - v. Conducting regulated activities during a restricted time period identified in Table 11.5, Restricted Time Periods for Regulated Waters with Fishery Resources, at N.J.A.C. 7:13-11.5;**
  - vi. Failure of a permittee to timely record a conservation restriction or other required instrument, and the property has been sold or transferred; and**

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**vii. Failure of an applicant, permittee, or violator to provide information upon request to determine compliance with any applicable law and/or condition.**

**2. Moderate seriousness shall apply to any violation which has caused or has the potential to cause substantial harm to human health, safety, property, or the environment, the flood hazard area regulatory program, or is a substantial deviation from the applicable law and/or condition. “Substantial deviation” includes, but is not limited to, violations which are in substantial contravention of the law, requirement, and/or condition, and/or which substantially impair or undermine the protection, operation, or intent of N.J.S.A. 58:16A-50 et seq. or any regulation, rule, or permit condition issued by the Department pursuant thereto.**

**Violations of “moderate” seriousness include, but are not limited to:**

- i. Failure to record a conservation restriction or other required instrument, and the property has not been sold or transferred; and**
- ii. Failure to properly remediate and restore impacts caused under a terminated permit or approval; and**

**3. Minor seriousness shall apply to any violation not included in (e)1 or 2 above.**

**(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. There is a rebuttable presumption that any violation of a Department permit, applicability determination, and/or Tidelands instrument or the conditions thereof to be knowing violations;**

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**2. Moderate conduct shall include any unintentional but foreseeable act or omission by the violator; and**

**3. Minor conduct shall include any other conduct not included in (f)1 or 2 above.**

**(g) The total civil administrative penalty shall be the daily civil administrative penalty determined under (d) through (f) above, multiplied by the number of calendar days during which each violation continued or remained in place prior to removal or restoration.**

**(h) 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, or by delaying compliance with, an applicable law and/or condition.**

#### **7:13-24.7 Civil penalties**

**(a) Any person who violates the provisions of N.J.S.A. 58:16A-50 et seq., any regulation, rule, permit, order, or court order issued pursuant to thereto, or who fails to pay a civil administrative penalty in full pursuant to N.J.A.C. 7:13-24.3, 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.**

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**(b) Any penalty established pursuant to this section may be imposed and collected with costs in a summary proceeding pursuant to the Penalty Enforcement Law of 1999, N.J.S.A. 2A:58-10 et seq. The Superior Court shall have jurisdiction to enforce the provisions of the Penalty Enforcement Law of 1999 in connection with N.J.S.A. 58:16A-50 et seq.**

#### **7:13-24.8 Civil actions**

**(a) The Department may institute an action or proceeding in the Superior Court for injunctive and other relief, including the appointment of a receiver, for any violation of N.J.S.A. 58:16A-50 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. A temporary or permanent injunction;**
- 2. Recovery of reasonable costs of any investigation, inspection, or monitoring survey that led to the discovery of the violation, and for the reasonable costs of preparing and bringing a civil action commenced under this subsection;**
- 3. Recovery of reasonable costs incurred by the State in removing, correcting, or terminating the adverse effects resulting from any violation for which a civil action has been commenced and brought under this subsection;**
- 4. Recovery of compensatory damages for any loss or destruction of natural resources, including, but not limited to, wildlife, fish, aquatic life, habitat, plants,**

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**and for any other actual damages caused by any violation for which a civil action has been commenced and brought under this subsection; and/or**

- 5. An order requiring the violator to restore the site of the violation to the maximum extent practicable 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 as approved by the Department.**

**(b) Recovery of damages and costs under (a) above shall be paid to the State Treasurer.**

#### **7:13-24.9 Criminal actions**

**(a) The Department, upon petition to the Attorney General, may bring a criminal action in court for certain violations of N.J.S.A. 58:16A-50 et seq. or any regulation, rule, permit, or order adopted or issued by the Department pursuant thereto.**

**(b) A person who knowingly, purposely, or recklessly violates N.J.S.A. 58:16A-50 et seq., or any regulation, rule, permit, 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 and not more than \$50,000 per day of violation, or imprisonment, or both.**

**(c) 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**

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**maintained under N.J.S.A. 58:16A-50 et seq., or 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 N.J.S.A. 58:16A-50 et seq., or any regulation, rule, permit, or order adopted or issued by the Department pursuant thereto.**

**7:13-24.10 Recording a notice concerning violation with deed for the property**

**(a) On order of the Commissioner, the clerk or registrar of deeds and mortgages of the county where the property on which the violation occurred is located shall record a notice concerning the violation of the N.J.S.A. 58:16A-50 et seq. with the deed for the property. 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 concerning the violation shall remain attached to the property deed until the violation has been remedied and the Commissioner has ordered the clerk to remove the notice 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.**

**7:13-[19.2]24.11 Grace period applicability; procedures**

**(a) Each violation, identified in Table [G] 24.11 at (f) below by an "M" in the Type of Violation**

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column[,] for which the conditions of (d)1 through 6 below are satisfied, **and each violation determined under (c) below as a minor for which the conditions of (d)1 through 9 below are satisfied**, is a minor violation and is subject to a 30-**calendar**-day grace period as described at (e) below.

(b) Each violation identified in Table [G] **24.11** 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 [G] **24.11** 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 [G] **24.11** at (f) below but is comparable to a violation designated as "M" in Table [G] **24.11** and the violation meets all of the criteria of (d)1 through 6 below, then the violation is minor. The minor violation shall be subject to a grace period of 30 calendar days as described at (e) below.
2. If the violation is not listed in Table [G] **24.11** at (f) below and is not comparable to a violation listed in Table [G] **24.11** but the violation meets all of the criteria at (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 [G] **24.11** at (f) below but is comparable to a violation designated as "NM" in Table [G] **24.11**, 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 [G] **24.11** at (f) below and is not comparable to a violation listed in Table [G] **24.11**, 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 a grace period.

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5. Comparability of a violation to a violation in Table [G] **24.11** at (f) below is based on the nature of the violation(s) (for example recordkeeping, accuracy of information provided to the Department, amount and type of impacts to the protected resources). A violation shall not be considered comparable to any violation designated as "M" in Table [G] **24.11** 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 under this section, provided the following conditions are met:

1. -4. (No change.)
5. In the case of a violation of the [Flood Hazard Area Control Act,] N.J.S.A. 58:16A-50 et seq. or any rule or regulation promulgated thereunder, or permit issued pursuant 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) (No change.)

(f) The designations of violations [of the Flood Hazard Area Control Act] **relating to N.J.S.A. 58:16A-50 et seq.** and this chapter as minor (M) and non-minor (NM) are set forth in Table [G] **24.11** below. The violation descriptions are provided for informational purposes only. In the event that there is a conflict between a violation description in Table [G] **24.11** and the rule to which the violation description corresponds, the rule shall govern.

Table [G]**24.11**

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[MINOR AND NON-MINOR VIOLATIONS]

<u>Rule Citation</u>	<u>Violation Description</u>	<u>Type of Violation</u>
[N.J.A.C. 7:13-1.3(d)]	[Failure of an applicant, or any consultant, engineer, surveyor or agent employed by an applicant, to provide all necessary information to the Department which is relevant to an application. Submittal of false information by the applicant, its consultants and/or agents.]	[NM]
N.J.A.C. 7:13-1.4(a)2ii	Failure of a delegated county governing body to uphold the requirements of this chapter	NM
N.J.A.C. 7:13-1.4(c)	Failure of a delegated county governing body to permanently retain a copy of all required documents that document that it has discharged its delegated duties	NM
N.J.A.C. 7:13-2.1(a)	[Initiating a regulated activity in a regulated area not in conformance with a permit-by-rule, general permit authorization, individual permit, emergency permit or appropriate CAFRA or waterfront development permit] <b>Conducting regulated activities without prior Department approval</b>	NM
N.J.A.C. 7:13-[6.1(g)] <b>5.6</b>	Failure [of an applicant] to record the metes and bounds description of a verified flood hazard area and/or floodway limit on the property deed within 90 calendar days of issuance of the verification	NM
N.J.A.C. 7:13-[6.1(g)] <b>5.6</b>	Failure [of an applicant] to submit proof to the Department of recording of the metes and bounds description of the verified flood hazard area and/or floodway limit on the property deed within 90 calendar days of issuance of the verification	M
N.J.A.C. 7:13-[8.2] <b>6.7, 7, 8, and 9</b>	Failure to comply with all conditions of a <b>permit-by-rule, general permit-by-certification, or</b> general permit, except as indicated directly below	NM
N.J.A.C. 7:13-8 <b>and 9</b>	Failure to submit to the Department any documentation required by a <b>general permit-by-certification or</b> general permit	M
N.J.A.C. 7:13-[9.5] <b>10.3</b>	Failure to comply with all conditions of an individual permit except as indicated directly below	NM

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N.J.A.C. 7:13-[9]10, 11, and 12	Failure to submit to the Department any documentation required by an individual permit	M
N.J.A.C. 7:13-13	<b>Failure to conduct mitigation as required by a Department approval or administrative order</b>	NM
N.J.A.C. 7:13-13	<b>Failure to comply with all conditions of a mitigation plan</b>	NM
N.J.A.C. 7:13-14.1	<b>Failure to place land intended for mitigation within a conservation restriction</b>	NM
N.J.A.C. 7:13-14.1	<b>Failure to submit proof that a conservation restriction has been recorded</b>	M
N.J.A.C. 7:13-16.3	<b>Failure to comply with the terms of an emergency authorization, except as specified below</b>	M
N.J.A.C. 7:13-[12.2]16.3(e) and (h)	[Commencement of activities authorized under an emergency permit later than 30 calendar days after verbal approval; failure to complete commenced activities within 60 calendar days after verbal approval; failure to file a complete permit application and “as built” drawings for completed activities within 90 calendar days after verbal approval; and failure to modify the activities to comply with the requirements of this chapter where directed to do so by the Department.] <b>Failure to file a complete permit application and “as-built” site plans for completed activities authorized under an emergency authorization within 90 calendar days after verbal approval</b>	NM
N.J.A.C. 7:13-16.3	<b>Undertaking emergency activities not authorized under N.J.A.C. 7:13-16.3; undertaking emergency activities that do not meet the design and construction standards of this chapter</b>	NM
N.J.A.C. 7:13-18	<b>Submittal of false information by the applicant, its consultants and/or agents</b>	NM
N.J.A.C. 7:13-18.2(k)	<b>Failure to provide complete and accurate information of which an applicant or its agents are aware, or reasonably should have been aware</b>	NM
N.J.A.C. 7:13-19	<b>Failure to provide timely public notice of an application</b>	M
N.J.A.C. 7:13-[13]22.5(g)	Failure [of an applicant] to record a [revised] <b>modified verification, authorization under a general permit, or individual permit</b>	NM

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N.J.A.C. 7:13- [13]22.5(g)	Failure [of an applicant] to provide proof that a [revised] <b>modified</b> verification, <b>authorization under a general permit, or individual permit</b> has been properly recorded	M
N.J.A.C. 7:13-22.6	<b>Failure to submit to the Department an application for modification of a general permit authorization or individual permit, should a permittee propose a change in the development</b>	NM
N.J.A.C. 7:13-22.7 and 22.8	<b>Failure to comply with the terms of a suspension or termination notice</b>	NM
N.J.A.C. 7:13-22.8(e)	<b>Failure to properly remediate and restore impacts caused under a terminated permit or approval</b>	NM
[N.J.A.C. 7:13-16.1(c)]	[Failure of an applicant to comply with notice requirements]	[NM]

#### APPENDIX 1

##### APPROXIMATING THE FLOOD HAZARD AREA DESIGN FLOOD ELEVATION

As described in detail at N.J.A.C. 7:13-3, the Department and FEMA have adopted flood mapping along many of the State's waters. In absence of a Department delineation<sup>1</sup>, or [a] FEMA flood [insurance study] **mapping** that meets the requirements of N.J.A.C. 7:13-3.4(b), an applicant may use the approximation method described at N.J.A.C. 7:13-3.5 in conjunction with this appendix.

Note that this method approximates only the flood hazard area design flood elevation. This method does not approximate the floodway limit. Many activities are restricted within floodways and some calculations cannot be performed if the floodway limit is unknown. Therefore, the Department shall issue [a] **an** individual permit for a regulated activity within an approximated flood hazard area only if the regulated activity meets the requirements at N.J.A.C. 7:13-

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[9.7]3.5(f).

...

## APPENDIX 2

### LIST OF DEPARTMENT DELINEATED WATERS

The following table lists the waters for which the Department has promulgated a delineation of the flood hazard area. This list is organized by county and municipality. In most cases the delineation includes both the flood hazard area design flood elevation and the floodway limit. To determine which mapping is available for a particular water, or to obtain copies of maps or other information regarding the use or revision of these studies, contact the Department as described at N.J.A.C. 7:13-3.3. An asterisk indicates that the Department delineation for that studied water was promulgated on or after January 24, 2013.

...		
Mercer County		
<u>Municipality</u>	<u>Name of Studied Water</u>	<u>Section Studied</u>
...		
[Princeton Borough]	[None]	
Princeton [Township]	Cherry Run	Downstream of Cherry Hill Road
	Harrys Brook	Downstream of a point located 50 feet upstream of Snowden Lane
	Harrys Brook Branch 1	Downstream of a point located 100 feet upstream of Bertrand Drive
	Harrys Brook Branch 2	Downstream of Harrison Street
	Harrys Brook Branch 2-1	Downstream of Van Dyke Road
	Harrys Brook Branch 2-2	Downstream of a point located 850 feet upstream of Grover Avenue
	Millstone River	Entire reach

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	Mountain Brook	Downstream of a point located 1,000 feet upstream of Stuart Road
	Mountain Brook Branch 2	Downstream of a point located 80 feet downstream of Red Hill Road
	Stony Brook	Entire reach
	Van Horn Brook	Downstream of a point located 240 feet downstream of Arreton Road
	Van Horn Brook Tributary	Downstream of Herrontown Road
...		
Warren County		
<u>Municipality</u>	<u>Name of Studied Water</u>	<u>Section Studied</u>
...		
[Pahaquarry Township]	[None]	[N/A]
...		