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ENVIRONMENTAL PROTECTION
NATURAL AND HISTORIC RESOURCES
HISTORIC PRESERVATION OFFICE

The New Jersey Register of Historic Places Rules

Adopted Rules: N.J.A.C. 7:4

Adopted Amendments: N.J.A.C. 7:4-1.3, 2.2, 4.1, 5.3, 7.1, 7.2, 7.4

Adopted New Rules: N.J.A.C. 7:4-8.4 through 8.9

Proposed: March 17, 2008 at 40 N.J.R. 1428(a)

Adopted: August 1, 2008 by Lisa P. Jackson, Commissioner,
Department of Environmental Protection

Filed: August 5, 2008 as R. 2008 d. 261 with substantive and
technical change not requiring additional public notice and
comment (see N.J.A.C. 1:30-6.3)

Authority: N.J.S.A. 13:1B-15.108 et seq. and
13:1B-15.128 et seq.

DEP Docket Number: 02-08-02/650

Effective Date: August 5, 2008, Readoption;
September 2, 2008, Amendments and new rules.

Expiration Date: August 5, 2013

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The Department of Environmental Protection (Department) is readopting with amendments and new rules The New Jersey Register of Historic Places Act Rules, N.J.A.C. 7:4. The proposal was published on March 17, 2008. The comment period closed on May 16, 2008.

Summary of Hearing Officer's Recommendation and Agency Response

The Department held a public hearing on the proposal on April 14, 2008 at 5:00 P.M. at the DEP Public Hearing Room in Trenton, New Jersey. Katherine Marcopul was the hearing officer. No one attended or gave testimony. The hearing officer recommended that the proposal be adopted as proposed with the changes described below in the Summary of Public Comments and Agency Responses and the Summary of Agency Initiated Changes. The Department accepts the recommendation.

The hearing record is available for inspection in accordance with applicable law by contacting:

Office of Legal Affairs

Attn: DEP Docket No. 02-08-02/650

Department of Environmental Protection

401 East State Street, Floor 4

P.O. Box 402

Trenton, New Jersey 08625-0402

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Summary of Public Comments and Agency Responses:

The Department accepted comments on the proposal through May 16, 2008. Ten commenters provided timely individual written comments. The following individuals provided comments:

1. Thomas W. Bailey; Maser Consulting, P.A.
2. Stephen Dilts; New Jersey Department of Transportation
3. Russell J. Furnari; PSE&G Services Corporation
4. Elizabeth George-Cheniara; New Jersey Builders Association
5. Richard Grubb; Richard Grubb & Associates
6. Robert J. Jubic, Jr.; Atlantic City Electric
7. John Masten; Institute for Advanced Studies
8. Tim Touhey; New Jersey Builders Association
9. Sharon D. White; Maser Consulting, P.A.
10. Larry Liggett, The Pinelands Commission

The timely submitted comments and the Department's responses are summarized below.

The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

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General

1. COMMENT: The New Jersey Department of Environmental Protection should extend the comment period for the New Jersey Register of Historic Places rule proposal beyond the current deadline of May 16, 2008. The proposed rules not only affect the historic preservation program, but also entail important changes to all DEP permitted programs. As such, this proposal requires a closer examination and discussion to fully appreciate its impact on the regulated community. More time is particularly necessary for public comment given that this rule proposal comes at a time when there are seven other environmental rule proposals pending adoption. Furthermore, the commenter indicates that its membership includes those who specialize in historic and cultural resources. Their input would be valuable to the Department, especially from a practical, implementation perspective. (4)

RESPONSE: The Department evaluated the request for the extension of the public comment period in accordance with the Administrative Procedure Act and the standards established at N.J.A.C. 7:1D-5.1. In this instance, the Department provided a sixty-day comment period on the proposed readoption with amendments and new rules. Opportunities were provided during this comment period for both written and verbal comments. As indicated in the proposal, the proposed additions to Subchapter 8 codify both existing survey and reporting guidelines and guidelines for preparing alternatives analyses. The proposed additions also establish electronic submission standards,

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mapping standards, and photographic standards. The archaeological survey and reporting guidelines have been in use by the professional archaeological consulting community since 1994 for all projects requiring archaeological survey. These guidelines were developed, peer reviewed, and approved by a committee of archaeological professionals including archaeologists employed by State agencies and representatives of several small, medium, and large archaeological consulting firms. Over the past thirteen years, the Department has continued to clarify appropriate and necessary elements of the archaeological survey and reporting guidelines.

Similarly, the architectural reporting guidelines have been in use by the professional architectural history and history consulting community since 1999 for all projects requiring architectural survey. These guidelines were developed, peer reviewed, and approved by a committee of architectural history and history professionals including architectural historians and historians employed by State agencies and representatives of several small, medium, and large architectural history and history consulting firms. Over the past nine years, the Department has continued to clarify appropriate and necessary elements of the architectural reporting guidelines.

The Department proposed to add the requirements for Phase I archaeological surveys at N.J.A.C. 7:4-8.4. Phase I archaeological surveys are routinely requested as part of other Department regulatory review processes, including reviews under the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, the Coastal Zone Management Rules, N.J.A.C. 7:7E, and under the historic and archaeological resources

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provisions of the Highlands Water Protection and Planning Act Rules at N.J.A.C. 7:38-3.10.

Based upon the type of amendments and new rules proposed and the history cited in the proposal, summarized above, the Department determined that the proposal did not involve complex issues or significant amendments to the regulatory program. Further, the Department determined that an extension of the comment period would not be likely to raise issues or provide new information, data or findings that were not previously raised or provided during the development of the proposed readoption with amendments and new rules or during the comment period. The Department believes that adequate opportunity for comment was provided to all commenters on this readoption with amendments and new rules without the necessity of an extension of the comment period.

2. COMMENT: The proposed New Jersey Register of Historic Places rules should be withdrawn, a formalized stakeholder process convened, and the rules re-proposed. The decision to deny the commenter's request for an extension of the comment period was unfortunate because the proposed rules will have a severe impact on both the regulated community (applicants) and on the professional consultants who must comply with new rules pertaining to survey, research, format and reporting requirements. Professional consultants would be spending their time ensuring that they comply with administrative rules pertaining to citation format and font type, not in utilizing their valuable skill sets to achieve the goal of "preservation of the State's historic, architectural, archaeological, engineering, and cultural heritage." This unnecessarily burdens survey, research,

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reporting and format requirements. Will the Department similarly adhere to a specific style in all of its correspondence, reports and guidelines? We strongly encourage the Department to reconsider these types of regulations and adopt those that are fair, consistent, and necessary to the statutory mandates of the New Jersey Register of Historic Places Act.

Furthermore, public vetting and discussions prior to this rulemaking would have been extremely beneficial, because, contrary to the background statement, the proposed rules do not simply codify existing guidelines, but in fact contain many new requirements that are inconsistent with and more stringent than Federal requirements. Neither the basis document nor the proposal states that the Department is Federally mandated to undertake this rulemaking and the proposed regulations at this time. (8)

RESPONSE: The Department is not instituting significant changes that will dramatically affect how professionals in the field of historic preservation operate. As summarized in the response to comment 1, the Department is continuing, in effect, the existing program by codifying both existing survey and reporting guidelines and guidelines for preparing alternatives analyses that have been in use by the preservation community for a minimum of nine years. The preservation community is particularly familiar with the standards being added to the chapter as part of this rulemaking because the majority of the requirements were developed in consultation with representatives of that community. In addition, the previous consultation that led to the development of standards for

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alternatives analysis involved various interest groups including representatives of the commenter. Furthermore, the inclusion of formatting requirements such as font type in the rule is necessary to achieve consistency in reporting. This consistency in reporting facilitates both the expedient review of the document by the Department and the future use of the document in research, both of which achieve the goal of preservation of the State's historic, architectural, archaeological, engineering, and cultural heritage.

The Department disagrees with the commenter's assertion that the additions to the rule are inconsistent with and more stringent than Federal requirements. As stated in the Federal Standards Analysis on pages 1435-1436 of the rule proposal, the archaeological survey and reporting standards, the architectural reporting standards, and the alternatives analysis standards clarify the requirements of the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44176) set forth by the National Park Service, and are not more stringent.

Based upon the type of amendments and new rules proposed and the history cited in the proposal summarized in the response to comment 1, the Department determined that the proposal did not involve complex issues or significant amendments to the regulatory program. The Department believes that adequate opportunity for comment was provided to all commenters on this readoption with amendments and new rules.

3. COMMENT: The commenter generally supports the proposed readoption of the New Jersey Register of Historic Places Rules with amendments and new rules. (10)

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RESPONSE: The Department acknowledges this comment in support of the rule.

4. COMMENT: Applications to the NJDEP Division of Land Use Regulation (DLUR) require that an applicant submit information in regards to historic resources in a project area. To meet this requirement, DLUR applicants make a written request to SHPO, SHPO staff research their files and the applicant then received a review letter back from SHPO within a timely period. However, the SHPO research process changed within the last two years to now require applicants to complete their own initial research at SHPO's Trenton Offices. The commenter's experience has been that the SHPO staff is excellent, very quick and thorough in finding information in their files, and they understand their resources better than any expert could. The previous process should be reinstated as the current process is ineffective and subject to error. (3)

RESPONSE: The practice of applicants conducting their own research at the Historic Preservation Office (HPO) in support of applications submitted to the Division of Land Use Regulation has been in effect for the past 10 years. Prior to its initiation, the HPO received hundreds of requests monthly requesting that staff conduct research to support various submissions to the Department and elsewhere. Each of these requests had particular timeframes by which the information was requested. However, because of the large and increasing volume of requests, the HPO was unable to respond to all of the requests within the requested timeframes and the amount of time devoted to responding to these requests took resources away from assuring project applications could be

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reviewed in as efficient a manner as possible. As a result, in 1998 the HPO made its reference collection available for use by appointment, upon completion of an orientation in the use of the HPO reference collection. The orientation session is provided by the HPO free of charge on a monthly basis. If an individual or company requiring information from the HPO reference collection is not confident in having their employees conduct the necessary research at the HPO in the above-referenced manner, there are a number of historic preservation consulting firms who are familiar with the HPO reference collection, and can be retained to conduct the necessary research.

5. COMMENT: Proposed N.J.A.C. 7:4-8.4 through N.J.A.C. 8.9 apply to Department permitting programs that require submissions for Historic Preservation Office (“HPO”) consultation and review. However, it is unclear regarding how such submissions made in conformance with current regulations will be treated if the proposed new rules and amendments become effective prior to issuance of a permit. If pending submissions will have to conform to rules that were not effective at the time that the submission/application was made, affected applicants will be adversely affected. The new requirements listed above, as well as any others included within the proposal, should not and cannot be imposed on submissions made in conformance with current regulations. Imposing new requirements adopted after a submission is made will unduly prejudice these applicants by needlessly delaying the already lengthy application and approval process that they have undertaken.

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In light of the foregoing, the proposed amendments and new rules must include a provision providing that review of submissions prior to the effective date of the proposed amendments and new rules will be conducted pursuant to the regulations in effect as of the date of that submission. Adoption of such a provision will allow for fair and expeditious review of the submissions currently under review and which will be under review as of the date that the proposed amendments and new rules are adopted, and will avoid the need for laborious, expensive and time-intensive revision, re-submission and re-review. (7)

6. COMMENT: The proposal fails to address grandfathering of projects that are currently being conducted with ongoing research efforts. The Department should recognize the extensive work, time commitment and financial expenditures that are currently required for cultural resource studies and provide adequate protection to these projects. All reports should be grandfathered if the scope of work has been approved by DEP prior to the effective date of the amendments and new rules, evidence is provided demonstrating that work has commenced by a qualified cultural resources consultant, or a submission has been made to the Department prior to the effective date of these rules. (5, 7, 8)

RESPONSE TO COMMENTS 5 AND 6: As indicated in the response to comment 1 above, most of the amendments and new rules adopted at this time codify practices followed by the preservation community for many years. Accordingly, it is not

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anticipated that significant application changes will be required for those applications that do need to comply with the amendments and new rules adopted at this time.

Impact Analyses

7. COMMENT: The Economic Impact analysis focuses only on the costs associated with the nomination of a site and not the impacts to the overall development process, including the loss of revenue from time delays that will occur from the anticipated prolonged review process. The Department also does not address, but should, how this rule proposal will affect an already struggling economy in New Jersey. (8)

RESPONSE: The Economic Impact statement for this proposal included analysis both of the impacts of the rules proposed for readoption with amendments to applicants seeking to nominate property for listing in the New Jersey Register of Historic Places, as well as the impact to State, county and municipal governments, and their agencies and instrumentalities, which will continue to incur costs to obtain project authorization for an undertaking that constitutes an encroachment upon or that will damage or destroy a property listed in the New Jersey Register of Historic Places.

The Economic Impact statement provides an estimate of the costs associated with both the nomination of a historic property to the New Jersey and National Registers of Historic Places and the cost of producing the various survey reports required pursuant to N.J.A.C. 7:4- 8.4 through N.J.A.C. 7:4-8.8. While the Department did provide specific

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numbers associated with the costs to prepare New Jersey and National Register nominations, the Department was not able to provide specific numbers associated with the cost of producing the reports required by N.J.A.C. 7:4- 8.4 through N.J.A.C. 7:4- 8.8 because those costs will depend on the scale of the proposed undertaking, the size of the area of the proposed undertaking's impact, and the types of historic properties present within the area of the proposed undertaking's impact. In the Economic Impact Statement, the Department also noted that the rules are codifying guidelines that have been in use since at least 1999 by historic preservation consultants conducting surveys, on behalf of project developers, and when requested to do so under the Freshwater Wetlands Protection Act rules, N.J.A.C. 7:7A, the Coastal Zone Management Rules, N.J.A.C. 7:7E, or the Highlands Water Protection and Planning Act rules, N.J.A.C. 7:38. Accordingly, the Department determined that a majority of the new provisions will have little or no economic impact for most applicants for permits for approval of a project that may have an impact on a historic or archaeological resource.

8. COMMENT: The Department claims that the cost for a professional consultant to prepare a National Register nomination for a single resource would range from \$3150 to \$8400 "depending on the complexity of the resource." The Department claims further that the cost for a professional consultant to prepare a nomination for a historic district would range from \$15,750 to \$19,425 "depending on the complexity of the application." Establishing a cost structure for preparing National Register nominations is unrealistic and ill-advised. Considering that the amended Rules, if adopted, would be in effect for

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five (5) years, it is a reasonably foreseeable outcome that the claimed costs to prepare a National Register nomination would soon become exceedingly low, irrelevant, and erroneous during the period the Rules are in effect. Furthermore, the cost to prepare a nomination for a historic district appears to be arbitrary and capricious. Historic districts can encompass a single property with multiple resources, a dispersed rural agricultural district with dozens of resources, or a large neighborhood comprised of hundreds of resources. The claimed costs to prepare a nomination for a single resource and a historic district also do not reflect the widespread deviation in an individual preparer's knowledge, experience and technical ability to conduct unassailable historical research, provide professional architectural and engineering descriptions, and complete the type of thorough and well-documented nomination that has heretofore been expected by the SHPO. The costs claimed by the Department do not adequately reflect the effects of variables like the nature of the district and the number of resources contained within it, or the total level of effort involved and thus the final cost.

If the concern of the SHPO is the cost of nominations, then perhaps applicants should be advised to obtain competitive bids from several firms. The New Jersey SHPO is one of the only SHPO's in the country that does not maintain a qualified consultant list for distribution to applicants. A qualified consultant list could include not only consultants capable of preparing National Register nominations but also compliance-related archaeological and architectural surveys, historic tax credit applications, and other work requiring specific training and knowledge in the fields of archaeology and history. The commenter strongly urges that the cost of preparing National Register nominations be left

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out of the amended rules, and that the Department allows the market and the historical attributes of each project to determine the price of documentation. The commenter fears that the suggested financial limits on preparing National Register nominations and Applications could diminish the overall quality of each document and make it very difficult, if not impossible, for consultants to fulfill the SHPO's stringent requirements and meet high expectations. (5)

RESPONSE: Pursuant to the Rules for Agency Rulemaking at N.J.A.C. 1:30-5.1, any agency proposing a rule is required to include in each proposed rule an economic impact statement describing the expected costs, revenues, and other impacts upon governmental bodies of the State and on segments of the public proposed to be regulated. In the Economic Impact statement accompanying the rules, the Department is required to provide to the public as much detail as possible regarding the costs associated with the rules proposed for amendment or, in this case, readoption with amendment and new rules. In the past, when the Department estimated costs associated with the preparation of National Register nominations, it obtained informal cost estimates from consultants performing these tasks. In the Economic Impact Statement, the Department used the cost estimates previously obtained for the previous rule readoption, and applied a multiplier to estimate the increase in costs that have occurred over time.

However, the Department acknowledges that there may be significant variation in these costs depending upon the factors noted by the commenter: the number of properties

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being nominated to the National Register, the nature of a historic district, and the individual preparer's knowledge, experience, and technical capabilities.

The Economic Impact statement is informational and does not require that actual National Register nomination preparation costs stay within the identified ranges. Further, the estimates contained in the Economic Impact statement do not become part of the amended rules and are meant to represent an estimate of the impact of the proposed rules and amendments at the time of proposal. Accordingly, while it is true that costs may increase (or decrease) over time, the proposal does not attempt to establish cost estimates that are limiting over time. Accordingly, there is no concern that the estimates would soon become exceedingly low, irrelevant, and erroneous during the period the Rules are in effect. With reference to the level of effort necessary for a particular project, the Department believes that consultants should rely upon their professional expertise, with any desired input from the HPO, in determining the level of research necessary for the property in question and does not intend to suggest that, depending upon the particular circumstances of an application, it may be possible for the actual cost for application preparation to vary.

The New Jersey Historic Preservation Office does maintain informational lists of historic preservation consultants for distribution to applicants upon request. Specifically, there are separate lists of consultants specializing in archaeology, historic property registration and planning, historic architecture, and conservation, and they have been available from the HPO upon request since the early 1980s. The Historic Preservation Office (HPO) provides lists of preservation consultants for informational purposes only.

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The lists do not imply recommendation or certification of the consultants included on the list. Many of the consultants appearing on these lists have worked on projects involving the HPO, and all have resumes and work samples on file at the Historic Preservation Office. Before selecting a consultant, the HPO encourages the review of previous work and verification of the consultant's qualifications. Project applicants and sponsors are free to engage other qualified professional archaeologists.

9. COMMENT: In addition to the costs associated with National Register nominations, the proposed Rules suggest costs associated with preparation of an Application for Project Authorization (application). The Department claims the cost to complete an application with no attachments would range from \$250 to \$1000 and from \$750 to \$2500 for an application with attachments.

The Department suggests that an application for "a small and simple undertaking that constitutes an encroachment upon a property listed in the New Jersey Register of Historic Places is not complicated to complete." This statement is misleading, as equating "a small and simple undertaking" with an encroachment on a New Jersey Register-listed property appears disingenuous at best. Perhaps a project that will have no encroachment can be classified as "small and simple," but previous experience suggests that the SHPO considers encroachments a serious matter, and the cost to prepare sufficient documentation so that an application is deemed "technically and professionally complete" by the SHPO exceeds the cost claimed in this section.

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Furthermore, the Department's costs for preparation of an application completely disregard the proposed Rules changes, which include a new section requiring an alternatives analysis for projects that will have an "adverse impact to an architectural resource(s)" (N.J.A.C: 7:4-8.8). Section D of the Application is titled "Alternatives/Mitigation." Thus, to prepare a "technically and professionally complete" application, the applicant, it is presumed, must meet the requirements for the alternatives analysis described in N.J.A.C: 7:4-8.8. The requirements for the alternatives analysis are quite extensive and rigorous, and the costs to prepare such a document for inclusion in an application far exceed the costs claimed by the Department. The cost of preparing applications for project authorization should be left out of the amended rules, and the Department should allow the market and the historical attributes of each project to determine the price of documentation. The suggested financial limits on preparing National Register nominations and applications could diminish the overall quality of each document and make it very difficult, if not impossible, for consultants to fulfill the SHPO's stringent requirements and meet high expectations. (5)

RESPONSE: As stated in the response to Comment 8 above, the Economic Impact statement is informational and does not require that actual application preparation costs, whether it be for nomination of a property to the New Jersey Register of Historic Places or an Application for Project Authorization, stay within the identified ranges. Instead, these estimates are intended to provide an analysis of the range of impacts that may be anticipated. Should it be necessary due to the complexity of a particular application for a

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consultant to charge more for preparation, the Economic Impact statement would not preclude that consultant from charging appropriate fees in accordance with whatever agreement it may have with its client. The estimates contained in the Economic Impact statement do not become part of the amended rules.

As indicated in the response to Comment 8, in the past when the Department estimated costs associated with the historic preservation provisions of this chapter, it obtained informal cost estimates from consultants performing these tasks. However, the Department acknowledges that there may be significant variation in these costs depending upon the nature of the project. Furthermore, the requirement for an alternatives analysis is not new. This document is required to comply with the existing rule at N.J.A.C. 7:4-7.2(e)6iii. The Department believes that the estimates contained in the Economic Impact statement provide a fair analysis of the types of costs that might normally be anticipated to be encountered as a result of the readoption with amendments and new rules.

10. COMMENT: The Jobs Impact section states the rules will enhance "long term job possibilities for those in the construction trade." However, the Department provides no analysis of the number of jobs that will be lost due to the high costs associated with restoration that will discourage development. (8)

RESPONSE: As indicated in the Jobs Impact statement, the Department believes that the rules, as amended, will foster efficient rehabilitation and restoration, encouraging the

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protection of the State's heritage. Because architectural rehabilitation and restoration projects can be labor-intensive, it is the Department's further belief that the trades identified in the Jobs Impact statement, including construction jobs and for consultants in areas specializing in historic restoration, will benefit in the long-term as a result of the anticipated positive impact on rehabilitation and restoration projects as these specialties will be instrumental in providing the services necessary to comply with the Rules' requirements, including those codified at N.J.A.C. 7:4-7. However, long-term jobs are influenced by many factors, including the general economic climate, making assignment of a precise number of jobs that could result from the readoption with amendments and new rules impossible. With reference to the suggested analysis of negative job impacts anticipated by the commenter due to a perception that restoration costs will discourage development, the rules do not require restoration or rehabilitation as a defined course of action for any given undertaking.

11. COMMENT: The Regulatory Flexibility impact analysis should discuss in greater detail the impact on small businesses, particularly as this section seemingly contradicts the Economic Impact analysis. Furthermore, the DEP states that it "has balanced the need to protect and preserve historic properties against the economic impact on small businesses." 40 N.J.R. 1436. If the Department were "to minimize the impact of the rules" it "would endanger the protection and preservation of historic properties." 40 N.J.R. 1436. This "balance" is apparent justification for there being "no exemption from coverage for small businesses." 40 N.J.R. 1436. Contrary to the Department's belief that

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it has created a "balance", the rules contain no provisions to ensure such a balance but should be revised to do so. (8)

RESPONSE: The Regulatory Flexibility Analysis statement addresses those portions of the rules most likely to impact small business, namely the preparation and submission of nominations to the New Jersey Register of Historic Places. As this is a voluntary program, only small businesses that choose to participate will be subject to any requirements. This is not inconsistent with the Economic Impact analysis, which recognizes that there will be costs associated with professionally prepared nominations. However, professional services, while strongly recommended, are not a requirement of the nomination process under the rules. Additionally, the New Jersey Register of Historic Places nomination portions of these rules are designed to dovetail with the Federal process for nomination to the National Register of Historic Places. Accordingly, relaxation of those rules would create inconsistency between the State and Federal nomination processes. N.J.A.C. 7:4-7 applies to projects proposed by State, county, or municipal governments (or their agents thereof) that may affect historic properties listed on the National Register of Historic Places. As such, the Department does not anticipate that this part of the rule will affect small businesses. In addition, in situations where consideration of historic and archaeological properties is required in the provisions of rules administered through other Departmental programs and non-Federal agencies, N.J.A.C. 7:4- 8, and the new rules at N.J.A.C. 7:4-8.4 through N.J.A.C. 7:4- 8.8, are the standards used in consultation between the Historic Preservation Office and other

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Departmental programs and non-Federal agencies. The standards at N.J.A.C. 7:4- 8.4 through N.J.A.C. 7:4- 8.8 were based upon guidelines that have been in use by the historic preservation community since 1994 for archaeology and 1999 for architecture. Therefore, the Department does not anticipate that the proposed amendments and new rules in other subsections of the rule will have an impact on small businesses.

The commenter misinterprets the Regulatory Flexibility analysis as an attempt to create an equal balance between preservation and exemptions. As indicated in the Regulatory Flexibility analysis, the Department balanced the need to protect and preserve historic properties against the economic impact of the rules on small businesses. In light of the limited impacts on small businesses identified in the proposal and the countervailing strong need to protect and preserve the State's remaining historic resources, the result of that analysis was a determination that an exemption of small businesses from the requirements of the rule would be inappropriate. The Department stands by that analysis.

12. COMMENT: The New Jersey State Development and Redevelopment Plan ("State Plan") recognizes the importance of redevelopment to the State's future and encourages the redevelopment and revitalization of urban areas. However, despite the Department's contention in the Smart Growth impact analysis section that it encourages "the redevelopment, repair, and rehabilitation of existing facilities", the proposed rules will make it more difficult to redevelop these sites. 40 N.J.R. 1436. This is evident, for example, in the Wildwood area where the cost associated with the redevelopment of a

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site has made it economically unfeasible. The proposed rules should be revised to be consistent with the State Plan by ensuring onerous and unnecessary requirements are removed that would only discourage redevelopment. (8)

RESPONSE: Encouragement of redevelopment, repair and rehabilitation of existing facilities and the preservation of natural, environmental, coastal, historic and cultural resources are goals of both smart growth and the State Plan. Statewide policy 9 of the State Plan provides that it is a statewide policy to “protect, enhance, and, where appropriate, rehabilitate historic, cultural and scenic resources by identifying, evaluating and registering significant historic, cultural and scenic landscapes, districts, structures, buildings, objects and sites and ensuring that new growth and development is compatible with historic, cultural and scenic values.” Statewide goal 7 similarly calls for preservation and enhancement of areas with historic, cultural, scenic, open space and recreational value. Further, the State Plan recognizes the value of historic resources as part of the statewide policy 5 (economic development) as part of travel and tourism.

As indicated in the proposal, historic preservation is consistent with the law and policy of New Jersey to promote smart growth and to reduce the negative effects of sprawl and dis-investment in older communities. In fact, historic preservation has often been the catalyst for economic revitalization in cities and older communities across the nation. Numerous examples exist of historic neighborhoods attracting families back to urban communities because of the diverse architectural styles, especially when historic district designation is combined with other types of financial incentives, such as property

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tax abatement programs or low interest loans to finance rehabilitation. Reinvestment in historic neighborhoods helps to protect existing open space, reduce automobile dependency, provide affordable housing opportunities and stabilize property taxes. Income producing properties can qualify for a 20 percent Federal investment tax credit when rehabilitation is done in accordance with appropriate standards. Through the program established by the rules, the Historic Preservation Office offers technical assistance and guidance to local governments when they desire to implement historic preservation programs on the local level.

Rather than discourage redevelopment, the rules seek to protect the resources recognized as significant by the State Plan, while establishing a system that provides for the greatest possible efficiency in processing of nominations for New Jersey Register of Historic Places status and of applications for project authorization. The Department believes that the process established by the Rules encourages both protection of historic resources and redevelopment, and is consistent with smart growth and implementation of the State Plan.

Subchapter 1. General Provisions

N.J.A.C. 7:4-1.3 Definitions

13. COMMENT: The proposed definition for "Location map" is vague and would lead to subjective interpretation. The Department should provide specific parameters for depicting "the resource in its entirety and enough surrounding area to locate the resource

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on other map sources" as a frame of reference that would allow the applicant to implement this instruction. (8, 9)

RESPONSE: The appropriate map scale for a location map is dependent on a number of factors, including the total area of the individual resource being depicted, the density of development of the surrounding area, and the proximity of named streets or other named features. For example, where a historic resource is at a remote location distant from the nearest identifying named streets, it will be necessary for the map to be produced at a smaller scale in order to include on the map named roads and other information that will allow the property to be located on other mapping resources. In contrast, where the resource is a single structure located at the intersection of two named roads, a larger scale would be appropriate. Because of the wide range of resources covered by these rules, it is not possible to provide specific scale factors that will be applicable to all cases.

Accordingly, the definition clearly indicates that the map must identify the location of the resource referenced in the application in relation to named local streets. As indicated in the summary of amendments to N.J.A.C. 7:4-2.2 and 5.3, which incorporate the location map requirement (as referenced in the summary of the definition of "location map"), receipt of a location map will enable the Historic Preservation Office to place the subject property within its appropriate spatial context thereby facilitating comparison with existing historic property information to enable more efficient review of a preliminary application.

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The Department believes that the definition provides the necessary flexibility to assure the map is appropriate for the specific nature of the resource depicted while clearly guiding preparers in the use of professional judgment in choosing the appropriate map scale. However, specific formats for the location map are provided in certain applications, such as on the architectural survey forms presented as Appendix 2.

14. COMMENT: The Department proposes to amend "preliminary questionnaire" to "preliminary application" at N.J.A.C.7:4-5.3. The Department should define "preliminary application" at N.J.A.C. 7:4-1.3. and establish guidelines for its completion. (8)

RESPONSE: The preliminary application is intended as an informal mechanism through which the Historic Preservation Office may evaluate, at an applicant's request, the eligibility of properties for listing in the New Jersey Register of Historic Places, to ensure that the historic resource merits the preparation of a Register nomination. A complete preliminary application will include whatever elements are needed to foster a fair and accurate evaluation of a property's eligibility. Ordinarily, that will include: a) the preliminary application questionnaire form, b) survey forms to help the applicant organize descriptive information, c) both exterior and interior photographs of a property, d) information about the property's history that is readily obtainable without extensive searching, and e) a map showing the property's location. The basic requirements for completing a preliminary application are contained in N.J.A.C. 7:4-2.2(c)2. The Department disagrees that formal guidelines for completing the preliminary application

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should be established because of the myriad of property types that can be nominated to the State and National Registers. The intent of the rule is to leave sufficient latitude for capturing different areas of significance for diverse resources. However, upon receipt of the form from the Department, the Department would encourage any applicant who is uncertain as to what to provide for their particular application to contact the Department for assistance.

Subchapter 2 Registration Procedures and Criteria

N.J.A.C. 7:4-2.2 Procedure for the nomination of properties for inclusion in the New Jersey and National Registers

15. COMMENT: The new provision at N.J.A.C. 7:4-2.2(c)2iii requires the submission of a location map as part of an application for the nomination of a property for inclusion in the New Jersey and National Registers or certification of eligibility for listing in the New Jersey Register, respectively. However, although a definition of the term "location map" is proposed to be included at N.J.A.C. 7:4-1.3, it is unclear whether this map must meet the mapping standards set forth at N.J.A.C. 7:4-8.9(a)l. The Department should consider amending these provisions on adoption to provide a specific format for these location maps or to reference the mapping standards set forth at N.J.A.C. 7:5-8.9A(a)l. (10)

RESPONSE: The mapping standards referenced by the commenter at N.J.A.C. 7:4-8.9(a)l refer to electronic map data, while the location map is a hard copy map output.

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While it would be preferable for the location map to be based on the electronic map data, it is not essential in light of the intended uses of the location map. As indicated in response to comment 13, the appropriate map scale for a location map is dependent on a number of factors, including the total area of the individual resource being depicted, the density of the development of the surrounding area, and the proximity of named streets or other named features. Because of the wide range of resources covered by these rules, it is not possible to provide specific scale factors that will be applicable to all cases.

However, specific formats for the location map are provided in certain applications, such as on the architectural survey forms presented as Appendix 2. The Department believes that the definition provides the necessary flexibility to assure the map is appropriate for the specific nature of the resource depicted while clearly guiding preparers in the use of professional judgment in choosing the appropriate map scale and does not believe amendment of these provisions is necessary.

16. COMMENT: The application requirements for the nomination of a property for inclusion in the New Jersey and National Registers are set forth at N.J.A.C. 7:4-2.2. N.J.A.C. 7:4-2.2(c)4ii requires submission of a map that meets the standards set forth at N.J.A.C. 7:4-8.3(h)l. This rule reference, however, appears to be an error as the mapping standards are set forth at N.J.A.C. 7:4-8.9(a)l. (10)

RESPONSE: The Department acknowledges this typographical error and has corrected it in the adoption to reflect the correct cross-reference at N.J.A.C. 7:4-8.9(a)l.

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Subchapter 5 Certification of Eligibility for Listing in the New Jersey Register

N.J.A.C. 7:4-5.3 Application for certification of eligibility

17. COMMENT: The new provision at N.J.A.C. 7:4-5.3(a)iii requires the submission of a location map as part of the applications for the nomination of a property for inclusion in the New Jersey and National Registers or certification of eligibility for listing in the New Jersey Register, respectively. However, although a definition of the "location map" is proposed to be included at N.J.A.C. 7:4-1.3, it is unclear whether this map must meet the mapping standards set forth at N.J.A.C. 7:4-8.9(a)l. The Department should consider amending these provisions on adoption to provide a specific format for these location maps or to reference the mapping standards set forth at N.J.A.C. 7:5-8.9A(a)l. (10)

RESPONSE: As stated in the response to comment 15, the mapping standards referenced by the commenter at N.J.A.C. 7:4-8.9(a)l refer to electronic map data, while the location map is a hard copy map output. While it would be preferable for the location map to be based on the electronic map data, it is not essential to intended uses of the location map. Further, specific formats for the location map are provided in certain applications, such as on the architectural survey forms presented as Appendix 2.

Subchapter 7. Review Procedures for Projects Encroaching upon New Jersey properties

N.J.A.C. 7:4-7.1 Application procedure for encroachment authorizations

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18. COMMENT: The rule proposal at N.J.A.C. 7:4-7.1 fails to set timelines in which the Historic Preservation Office must complete an encroachment authorization. The Department should establish and enforce timeframes to require responses from the Historic Preservation Office staff and for scheduling consultations with the HPO staff. Similar to the expectation that the regulated community is to follow HPO rules, the Department should establish a process to file grievances when the HPO staff does not adhere to its regulations and rules. Without set timeframes by when HPO must request any additional information, unnecessary delays occur and costs increase in the preparation of applications. This unlimited review time could deter various projects that have stringent regulatory and financial timeline restrictions from requesting an encroachment review at the conceptual stage. (1, 3, 8)

RESPONSE: Pursuant to N.J.S.A. 13:1B-15.131, the Department has 120 days to review an application for project authorization. The failure of the Commissioner to authorize, consent, or deny the application within 120 days of receipt of a technically and professionally complete and sufficient application constitutes an approval of the application. This review period is reflected at N.J.A.C. 7:4-7.2. In addition, N.J.A.C. 7:4-7.2 establishes shorter timeframes within the 120-day review period by which different steps in the review of an application for project authorization must be completed. For example, N.J.A.C. 7:4-7.2(a) specifies that the Department review the application for technical and professional completeness and sufficiency within 30 days of

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the receipt of an application for project authorization. N.J.A.C. 7:4-7.2(b) specifies that the Department has 120 days to review an application for project authorization. The 120-day clock begins on the day that the Department receives a technically and professionally complete and sufficient application. N.J.A.C. 7:4-7.2(c)2 states that the Department must notify the applicant whether or not the undertaking constitutes an encroachment within 45 days after the Department notifies the applicant that the application is technically and professionally complete and sufficient. These timeframes were not included in the rule proposal because the sections in which these timeframes appear were not proposed for amendment.

While failure of the Department to meet these interim timeframes will not result in the project being deemed to be approved, these interim timeframes represent the Department's estimation of the timing of steps that must be met in order to assure that an informed decision on the application for project authorization can be made within the 120 days allowed. Accordingly, the Department strives to assure that these interim timeframes are met.

19. COMMENT: Proposed N.J.A.C. 7:4-7.1(d) identifies the required elements of the application. In relation to subsection (d), subsection (a) should further require that the HPO staff identify all necessary and sufficient materials and attachments during the required consultation meeting. (1, 8, 9)

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RESPONSE: There is no required consultation meeting in N.J.A.C. 7:4-7.1. The consultation with the Department contemplated by this section of the rule can be in writing, over the phone, or in a meeting. The material necessary for a complete application is listed at 7:4-7.1 (d). During consultation, the HPO will attempt to identify all necessary components of the application and provide guidance as to the level of detail needed to address each issue. However, depending upon the detail of the information discussed/supplied during consultation, it may not be possible for the Department to fully identify all information that may be necessary until a completed application has been received and reviewed. The Department will advise the applicant of any further information necessary to analyze a particular application as soon as the need is identified. The Department will, of course, have to review information supplied in response to each of the particular issues that may be applicable to a particular project to determine if the information/analysis provides sufficient detail to provide a good picture of potential impacts.

20. COMMENT: The proposed amendments to N.J.A.C. 7:4-7.1(e) that will allow for a two staged review process for projects that will result in "substantial encroachment or demolition" of a protected resource are supported. The initial review at the conceptual level offers an opportunity to gain approval by the Council on a project's purpose and need as well as the sufficiency of the alternative analyses conducted prior to advancing a project to final design. Early coordination with the Historic Sites Council at the conceptual phase can accomplish these objectives prior to the applicant expending

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substantial time and revenues that could be at risk. It also gives an opportunity for the Council to identify key issues that need to be addressed in the final design efforts and can lead to an expedited stage 2 review. (2)

RESPONSE: The Department acknowledges this comment in support of the rule.

21. COMMENT: Some flexibility should be allowed in the determination of a "technically complete application" for the conceptual review specified in N.J.A.C. 7:4-7.1(e). Information required for a "technically complete" application includes several items which are not routinely prepared until later in the design process. The requirements discussed in the amendment appear to contradict the theory of gaining conceptual approval prior to substantial expenditures of time and funding by the applicant. Consistent with the Context Sensitive Solutions process, early consultation with the Historic Sites Council (HSC) and other stakeholders should take place as soon as a project need (and before design alternatives are developed) is developed to identify all of the competing issues that must be addressed. Accordingly, the commenter requests that flexibility be inserted into the proposed process such that the first stage of the process is essentially a technical assistance phase that can either result in guidance for future project development activities (documented in meeting minutes or a memo to record) or a project authorization at the discretion of the applicant. These points should be clarified in any implementing procedures associated with these amendments. The commenter is willing to work with the appropriate staff to accomplish this objective. (2)

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RESPONSE: The concept review is intended to facilitate the review of projects that involve both Federal and State historic preservation regulations. In order for an application for conceptual review as specified under N.J.A.C. 7:4-7.1(e) to be considered technically and professionally complete, the project must have been developed to the point of having an initially preferred alternative. In the specific terms of the New Jersey Department of Transportation (NJDOT) Project development process, the Department intended the conceptual review process to be used for Federally funded projects that are not in conformance with the Secretary of the Interior's Standards for the Treatment of Historic Properties and would require the execution of a Memorandum of Agreement to complete the Section 106 review process and complete the categorical exclusion document for National Environmental Policy Act of 1969. The conceptual review application is anticipated to be submitted at the end of the scoping phase, prior to graduation to final design. The conceptual review was not designed to be technical assistance, but rather result in a binding Departmental decision to provide the agency with a firm basis to move forward with project development.

N.J.A.C. 7:4-7.2 Review of an application for project authorization

22. COMMENT: The proposed rules at N.J.A.C. 7:4-7.2 do not include any timeframes, which will only continue the current unacceptable practices of the Historic Preservation Office that cause significant delays and costs for applicants and consultants. There is a

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need to establish a strict review and authorization process to which HPO staff must adhere. The Department should set forth standardized procedures as enforced in other departmental regulatory programs. Specifically, deadlines are necessary for HPO staff to: (1) inform an applicant of the sufficiency and completeness, or lack thereof, of a submitted application; (2) complete administrative review of an application for project authorization; and (3) issue a determination to the applicant. (1, 8, 9)

RESPONSE: As more fully detailed in response to comment 18, the rules do contain interim deadlines for actions to be taken by the Department/HPO and also reflect the statutory 120-day period from receipt of a technically and professionally complete and sufficient application for the Department to act on an application for project authorization. These timeframes were not included in the rule proposal because the sections in which these timeframes appear were not proposed for amendment.

23. COMMENT: Proposed N.J.A.C. 7:4-7.2(e)1 requires the submission of 12 original copies of the application for project authorization, which will then be sent to the Historic Sites Council. 40 N.J.R 1439. This provision should specify the acceptable media for production and also allow for alternatives to paper submissions, such as CD-R. In the absence of any alternatives, the proposed rule will significantly increase material and labor costs associated with application preparation. (1, 8, 9)

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RESPONSE: N.J.A.C. 7:4-7.2(e)1 requires the submission of 12 original copies of the application in the case of a project evaluated by HPO to be an encroachment that will be heard by the New Jersey Historic Sites Council. The Council reviews fewer than 20 projects a year; approximately half of the applicants in the last two years have submitted 12 copies of the application as they felt it was in their interest for each Council member to have an original copy of the application. The Department welcomes media that provide alternatives to paper. However, in this case, as the material is reviewed by Historic Sites Council members at home, and used as reference during the public meeting, electronic media are not a viable alternate at this time.

24. COMMENT: N.J.A.C. 7:4-7.2(e)3 continues the practice of granting project authorizations, conducting special meetings, if necessary, and making written decisions by the Historic Sites Council within 120 days after encroachment authorization. The timeframe for review of encroachment authorization and project authorization should run concurrently, particularly for critical utility projects. The commenter's projects are often required to meet service dates set by the Federal Energy Regulatory Commission, and these extensive timelines for encroachment authorizations and project authorizations could cause the commenter to miss deadlines. In addition, this extensive review time could prevent various projects from requesting an encroachment review at the conceptual stage. (3)

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RESPONSE: It is not clear what the commenter means by “encroachment authorization.” The 120-day review timeline for applications for Project Authorization reflected in N.J.A.C. 7:4- 7.2(b) and 7.2(e)3 is the 120-day period established by N.J.S.A. 13:1B-15.131. The 120-day timeline begins on the day of receipt of a technically and professionally complete and sufficient application. The 120-day timeline is the same if a project is judged to be in conformance with the Standards for the Treatment of Historic Properties and approved administratively, or if a project constitutes an encroachment and is presented to the Historic Sites Council.

25. COMMENT: The five-year expiration date for project authorizations that appears in N.J.A.C. 7:4-7.2(e)10 should not apply to electric and gas utility projects. Large, and critical, electric and gas linear projects in New Jersey can take years of development, planning and permitting. The five year timeline could deter companies from coming to the Historic Sites Council for preliminary reviews, as timelines could lapse and reapplications could be required, preventing key project personnel from learning about locations to avoid in project planning. Further, once authorization is granted, there does not appear to be a policy purpose for the project authorization to expire; the requirements in the authorization would still have to be met whether the project is undertaken in five years, or beyond that time period. Unlike programs regulating land use, such as wetlands, where environmental conditions may change over time requiring re-examination of facts underlying an approval, such conditions do not exist for historic preservation reviews and recommendations. (3)

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RESPONSE: Gas and electric utility projects are not routinely subject to the provisions of the New Jersey Register of Historic Places Act because they are usually sponsored by private companies, and, as such, not subject to the provisions of the New Jersey Register of Historic Places Act. A review of over 2000 applications for project authorization received since 2002 reveals only 2 projects related to electric and gas utilities. Both of these projects occurred within the boundaries of the New Jersey Register listed and State owned and operated Delaware and Raritan Canal State Park. Therefore, the action was subject to the provisions of the rule because the Division of Parks and Forestry was the property owner required to give permission to the utility companies to access the New Jersey Register listed resource. In those cases, the Division of Parks and Forestry was the applicant of record and has qualified staff to facilitate the review process.

In those rare instances where a utility project would be subject to the provisions of the New Jersey Register of Historic Places Act, as noted above, electric and other large-scale utility projects can be submitted as phased projects. Combining the five year approval period of the stage 1 review with the five year term of the stage 2 application provides up to a 10 year period of approval. The stage 1 approval is intended to provide certainty about what historic properties will be affected, and how adverse effects will be handled. The stage 2 approval, which builds on the agreed treatment of historic properties from the stage one approval, provides for an additional five years for project design.

Contrary to the commenter's assertion, conditions in historic preservation reviews and recommendations do change over time, thereby requiring a re-examination of facts

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underlying an approval. Changes to setting, level of deterioration and available technology can greatly influence decisions and recommendations for treatment of historic properties. It is the Department's experience that the condition of historic properties do change over time, requiring re-examination of the facts underlying an approval. For example, a proposed roadway widening project is reviewed and authorized under the New Jersey Register of Historic Places Act. Subsequent to that approval, a historic house is restored in accordance with Secretary of the Interior's Standards for the Treatment of Historic Properties including the replication of appropriate perimeter fencing.

Meanwhile, the aforementioned roadway widening project has stalled, and the project authorization has expired. This fencing, now an important element of the historic property's setting, could be subsequently adversely affected by the proposed roadway widening project. The provision for a five-year expiration date on authorizations would allow consideration of this resource during review of a new Application for Project Authorization. In addition, it is also the Department's experience that some projects change, particularly over longer timeframes, subsequent to receiving authorization under the New Jersey Register of Historic Places Act and that some applicants do not reapply for approval of changes to approved projects. The addition of the five-year expiration provision in the rule would also ensure that impacts to historic and archaeological resources by changes occurring during the life of the project would be considered.

26. COMMENT: N.J.A.C. 7:4-7.2(e)(10) should be rewritten to include flexibility based on a project's reasonably anticipated schedule and to be clear on what action must be

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initiated by the deadline. As written, it is unclear whether the deadline relates to the authorization of funding for construction, the actual initiation of construction activities, or some other project milestone. The relationship between the five year deadline and the new two-stage review process also needs to be clarified since it would not be unusual for five years to elapse prior to construction authorization in the staged process. (2)

RESPONSE: For projects authorized under the normal review process as outlined in N.J.A.C. 7:4-7.2, a construction contract must be fully executed within 5 years of the date of authorization to prevent expiration of the authorization. The construction contract was chosen as the reference point to maintain consistency with N.J.A.C. 7:4- 7.1(a)3, which specifies that review under the New Jersey Register of Historic Places shall not be required for public projects or actions for which acquisition or construction contracts have been let prior to listing on the New Jersey Register. For projects authorized under the phased review process as outlined under N.J.A.C. 7:4- 7.1(e), the stage 1 approval provides a “go-ahead” on the basic concept of a project. The applicant then has the duration of 5 years from the date of the stage 1 approval to develop the design for the project, and submit an Application for Project Authorization for the stage 2 review. The stage 2 application must be submitted with construction (or near construction ready plans). The stage 2 or construction approval is then good for 5 years within which the project has to be under contract for the approval not to expire.

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N.J.A.C. 7:4-7.4 Criteria for determining whether an undertaking constitutes an encroachment or will damage or destroy the historic property

27. COMMENT: If the requirement for a Phase I archaeological survey is not required, but is a discretionary process, then N.J.A.C. 7:4-7.4(b)(1) should be amended to reflect that the Phase I archaeological surveys are one of many processes that can be used to satisfy the review of an impact on registered properties. As a result, we suggest that the phrase “but not limited to” be added after the word “including” at N.J.A.C. 7:4-7.4(b)(1).
(3)

RESPONSE: The Department believes the commenter misunderstands this subsection of the rule. N.J.A.C. 7:4- 7.4(a) defines the types of project activities that constitute an encroachment to a historic property, and therefore, must be reviewed by the Historic Sites Council. The definition of an encroachment under N.J.A.C. 7:4-7.4(a)1 is “physical destruction, damage, or alteration of all or part of a registered property.” Under this definition, all undertakings occurring on New Jersey Register listed archaeological sites would constitute an encroachment, and therefore, require review by the Historic Sites Council. However, the next subsection of the rule, at N.J.A.C. 7:4-7.4(b)(1), provides that undertakings affecting New Jersey Register listed archaeological sites can be considered non-encroachments, and therefore, not require Historic Sites Council review, when the registered property is important only for its potential contribution to research, provided that value can be preserved through the conduct of appropriate research. In

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other words, an undertaking that will destroy a listed archaeological site that is important only for its potential contribution to archaeological research can be determined by the Department to be a non-encroachment when archaeological research meeting the cited standards is conducted. In these situations, a Phase I (identification level) archaeological survey would not be appropriate because the site boundaries and significance have already been identified. Rather, as stated in the rule, archaeological data recovery meeting professional standards and guidelines, including the Secretary of the Interior's *Standards for Archeology and Historic Preservation*, would be appropriate. As such, it is not appropriate to change the rule as suggested by the commenter.

Subchapter 8 Consultation with other Department programs and other non-Federal governmental agencies

28. COMMENT: The actions described in Subchapter 8 are unrelated to the other sections of the New Jersey Register of Historic Places Act, which focus on the listing of properties on the New Jersey Register of Historic Places and the protection of those properties. We believe that the rules in Subchapter 8 should be promulgated as separate guidelines. If they are retained in this rule, it is suggested that the clarity of purpose described in the regulatory summary for Subchapter 8 be inserted into the text. This would make it clear to the user that the work described in this Subchapter is required only in the context of certain NJDEP regulatory processes, and not in the context of the encroachment reviews. (2)

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RESPONSE: Subchapter 8 was added in the previous rule readoption with amendments in response to requests from other agencies to make the consultation that takes place between the Historic Preservation Office and other Department programs and non-Federal governmental agencies under separate regulatory processes more transparent. This subchapter is used in instances where rules implementing permitting programs administered by other programs within the Department include a requirement that historic preservation consideration be analyzed. These other program areas routinely consult with the HPO in the delineation of a project's area of potential effects and the identification, evaluation, and treatment of historic properties. Therefore, the standards at N.J.A.C. 7:4-8.4 through N.J.A.C. 7:4- 8.9 will be retained in Subchapter 8.

It would not be appropriate to add a regulatory summary to Subchapter 8 that specifies that the Subchapter is required only in the context of certain NJDEP processes, and not in the context of encroachment reviews, for several reasons. First, it is not possible to explain all of the regulatory process to which Subchapter 8 could apply, since it is possible that future rules could incorporate this subchapter by reference. Second, the survey and reporting standards specified in Subchapter 8 would apply to encroachment reviews because they represent what the Department considers to be the minimum information required for historic property survey and reporting and the exploration of project alternatives. The guidelines upon which the rule at Subchapter 8 is based encouraged other agencies and organizations to adopt them and reference them in their standards of practice to ensure that all submissions provide sufficient information for

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regulatory consultation and decision making. Given this, it is possible that Departmental and non-departmental agencies may choose to reference these standards in developing scopes of work to ensure acceptable survey and work products and to avoid delays in project implementation that could result from the production of substandard documentation.

29. COMMENT: Subchapter 8 should be recodified as guidelines to be used by qualified professionals (according to the federal professional qualifications standards referenced elsewhere in the proposed rules) rather than as standards. The regulatory analysis states the standards proposed in Subchapter 8 have been in use as guidelines for a number of years: (since 1994 for archaeology and 1999 for historic architecture). The difference between "guidelines" and specific "standards" is significant in the context of conducting archeological investigations. There is no "one size fits all" approach to that type of work. Field methodologies vary with environmental setting and reporting is commensurate with the field investigations. (2)

RESPONSE: As noted in the comment, the standards are based on guidelines that have been in use by the historic preservation and archaeological communities since 1994, for archaeology and since 1999, for historic architecture. This has provided adequate opportunity to evaluate their usefulness and success for the breadth of site and project types. Furthermore, the standards provide for adequate latitude for the use of professional judgment in survey and reporting that may be necessitated by special

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circumstances. Specifically, N.J.A.C. 7:4-8.4(c)3x provides for consultation with the Historic Preservation Office staff in cases where it is necessary to deviate from the testing strategy outlined in the rules. Finally, by publishing the guidelines as standards they are more easily referenced and enforced. Accordingly, the Department believes that it is important and appropriate to adopt what was previously guidelines as regulatory standards.

30. COMMENT: The proposed new rules at N.J.A.C. 7:4-8.5, N.J.A.C. 7:4-8.6, and N.J.A.C. 7:4- 8.7 set forth the requirements relevant to submission of sufficient archeological, architectural or combined survey reports, respectively. The regulations are very precise in terms of the content, format, structure, citation style, etc. required for a report to be considered sufficient. The rules, however, fail to specify what will happen if a report does not satisfy all of the delineated requirements. The rules appear to be so specific that they may not afford the Department any flexibility in rendering a determination as to the sufficiency of such reports. (10)

RESPONSE: The rules represent what the Department considers to be the minimum information required to identify and evaluate historic properties within the area of the undertaking's potential impact. In instances where historic preservation consideration is included in rules that are administered by other programs within and outside of the Department, other program areas routinely consult with the HPO in the delineation of a project's area of potential effects and the identification, evaluation, and treatment of

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historic properties. These areas where the Historic Preservation Office may provide consultation with other Department programs and other non-Federal governmental agencies are specified in Subchapter 8. The HPO provides recommendations to those other programs regarding the definition of an area of potential effects and the identification, evaluation, and treatment of historic properties based upon the review of documentation submitted to the HPO. N.J.A.C. 7:4-8.4 through N.J.A.C. 7:4- 8.9 provide the standards for preparing adequate documentation for submission to the HPO. If a report does not satisfy all of the delineated requirements, the Historic Preservation Office will not be able to provide recommendations to those other Department programs or non-Federal governmental agencies regarding the appropriate treatment of historic properties.

N.J.A.C. 7:4-8.4 Requirements for Phase I archaeological survey

31. COMMENT: Proposed N.J.A.C. 7:4-8.4 includes requirements for a Phase I archaeological survey and provides very strict definitions of the elements of the various phases of work, documentation and curation. The text refers to other phases of work, but does not define how such work differs from Phase I. In addition, at least some of the work described as Phase I work is often undertaken as Phase II research. In the past, the commenter, in the context of Section 106 compliance, has avoided references to such phases of investigations because there is no universally accepted definition for each of the phases. Instead, reference is made to identification and evaluation, and data collected

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must be sufficient to satisfy those processes according to the guidance contained in the Federal regulations at 36 C.F.R. Part 800, the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44716), etc. This is the same guidance used by HPO staff to evaluate archaeological sites and research— much of which is incorporated by reference in Subchapter 8. It is suggested that the proposed rules adopt the same approach or be amended to define the various phases and provide guidance for what has traditionally been considered Phase II work. (2)

RESPONSE: The standards for the conduct of Phase I archaeological survey at N.J.A.C. 7:4- 8.4 are based upon the Phase I archaeological survey guidelines that were developed by the Department in consultation with a committee of archaeological professionals including archaeologists employed by State agencies and representatives of several small, medium, and large archaeological consulting firms. The Department has not developed specific guidelines for Phase II or Phase III archaeological surveys, and therefore has not codified them as standards in the proposed rule. There are a variety of field methods that may be appropriate for the conduct of archaeological survey at the Phase II and/or Phase III level. The use of field methods appropriate to Phase II and/or Phase III archaeological investigations vary based on a number of factors, including the specific type of archaeological resource being investigated, the physical setting of the archaeological resource (including topography), the state of preservation of the archaeological resource, and the nature and complexity of the project. For Phase II and Phase III archaeological investigations, the Department relies on the *Secretary of the Interior's Standards for*

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Archeology and Historic Preservation, promulgated by the Federal government, to guide the implementation and documentation of Phase II and Phase III archaeological work. The Secretary of the Interior's standards allow for sufficient flexibility for the use of professional judgment in the selection of methods appropriate within the context of project circumstances.

32. COMMENT: With regard to the scope of the proposed regulations, the Department's authority to impose an archaeological survey requirement must be consistent with the limits of its authority under statutes such as the Coastal Zone Management Act, Freshwater Wetlands Protection Act and the Highlands Water Protection and Planning Act. Historic preservation interests are not advanced by extending the archaeological survey requirement to activities which do not have any realistic potential to impact or harm historic or archaeological interests. (6)

RESPONSE: The new rule does not extend the archaeological survey requirement to activities which do not have any realistic potential to impact or harm historic or archaeological interests. The rule merely specifies what is required when the Department asks for an archaeological survey pursuant to rules where consideration of historic and archaeological resources is necessary prior to permit issuance.

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33. COMMENT: The proposed regulations at N.J.A.C. 7:4-8.4 do not appear to establish a threshold below which the Phase I archaeological survey requirement would not apply.

(6)

RESPONSE: In instances where historic preservation consideration is included in rules that are administered by other programs within and outside of the Department, other program areas screen applications and make an initial determination regarding whether the project site has the potential to affect historic and archaeological resources. If that program determines that a project has the potential to affect historic and archaeological resources, they forward the application to the Historic Preservation Office for review. The HPO reviews the project application and provides recommendations to those other programs regarding the definition of an area of potential effects and the identification, evaluation, and treatment of historic and archaeological resources. For example, for projects requiring freshwater wetlands permits, the Land Use Regulation program screens all permits it receives based upon the checklist at N.J.A.C. 7:7A- 12.2(l). N.J.A.C. 7:7A-12.2(l)1 - 5 set the criteria for determining when an archaeological survey will be required as part of a freshwater wetlands permit application. The permit application, including the cultural resources survey, is then forwarded to the HPO for review. Accordingly, it would not be appropriate for these rules to include a threshold for provision of a Phase I survey.

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34. COMMENT: Latitude needs to be introduced into Subchapter 8 that allows for field investigations and reporting commensurate with the scale of the project and the amount of information which is known about a project area. This would be consistent with Federal guidance found at 36 CFR 800.4 (b). As written, the requirements for testing and reporting are excessive for many of the types of projects that the commenter routinely undertakes. Subchapter 8 prescribes a single testing method, specific testing intervals, deep stratigraphic testing in certain settings when the magnitude of impacts may not require it, and extensive reporting requirements. The only apparent deviation from prescribed testing strategies is for linear road-widening or utility line projects, and the latitude still does not address many of the commenter's projects. And the standards require archeologists to test outside of a project area (beyond the limits of their legal authority to conduct work), if they are unable to excavate or an area has been disturbed. The standards also preclude the commenter from using abbreviated reporting formats for small scale investigations that were developed in consultation with Historic Preservation Office staff to streamline work. (2)

RESPONSE: As stated in the response to comment 33, the standards are based on guidelines that have been in use by the historic preservation and archaeological communities since 1994, for archaeology and since 1999, for historic architecture. This experience has provided adequate opportunity to evaluate the standards' usefulness and success for the breadth of site and project types. Furthermore, the standards recognize that there may be special circumstances applicable to a particular project and provide for

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adequate latitude for the use of professional judgment in survey and reporting that may be necessitated by such special circumstances. Specifically, N.J.A.C. 7:4-8.4(c)3x provides for consultation with Historic Preservation Office staff in cases where it is necessary to deviate from the testing strategy outlined in the rules. The Department believes that the information specified in these rules provides the minimum amount of information necessary to review and comment on the potential for projects to affect historic properties. The Department is willing to assist other agencies in assuring that application materials are sufficient to facilitate Department review.

35. COMMENT: The new rules and standards appear to apply to projects being reviewed under the New Jersey Register of Historic Places Act as well as all cultural resource investigations reviewed by HPO except those under Federal jurisdiction. Clarification is needed as to whether this is an accurate statement and also whether Section 106 projects would be subject to the new survey and reporting rules. (8)

RESPONSE: The rule applies when the Department requires archaeological survey in response to the review of documentation submitted under the New Jersey Register of Historic Places Act, the Coastal Area Facilities Review Act, the Waterfront Development Act, the Freshwater Wetlands Protection Act, and the Highlands Water Protection and Planning Act. The Department has used the guidelines upon which the rules are based to determine whether archaeological survey and reporting and architectural survey reporting are sufficient. These rules represent the minimum level of effort necessary to identify

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and evaluate historic properties in accordance with the Secretary of the Interior's

Standards for Archeology and Historic Preservation.

36. COMMENT: As stated in the summary section for N.J.A.C. 7:4-8.4, the Department suggests that Phase I archaeological surveys are required pursuant to requests under other statutes such as Coastal Zone Management Act, Freshwater Wetlands Protection Act and the Highlands Water Protection and Planning Act. The requirement to complete a Phase I archaeological survey is frequently also triggered by Section 106 of the National Historic Preservation Act of 1966, and its implementing regulations at 36 C.F.R. Part 800. In these circumstances, it is the Federal agency official who determines whether the proposed action is an undertaking and "whether it is a type of activity that has the potential to cause effects on historic properties." *Id.* at 800.3(a). To the extent the preceding interpretation is at odds with the Department's views, this rulemaking process would benefit from clarification by the Department regarding the statutory basis for its authority to require Phase I archaeological surveys. (6)

RESPONSE: Archaeological survey is indeed required under Section 106 of the National Historic Preservation Act and the rules implementing the Coastal Area Facilities Review Act, the Freshwater Wetlands Protection Act, and the Highlands Water Protection and Planning Act. Each of these legal mechanisms is separate and distinct from one another, and multiple regulatory review processes may apply to a given project. It is correct that under Section 106 of the National Historic Preservation Act, and its implementing

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regulations, 36 C.F.R. Part 800, it is the Federal agency official who determines whether the proposed action is an undertaking and “whether it is a type of activity that has the potential to cause effects on historic properties.” This is not, as suggested by the commenter, at odds with the Department’s views because Section 106 of the National Historic Preservation Act and its implementing regulations at 36 C.F.R. Part 800 is separate and distinct from the State Coastal Area Facilities Review Act, the Freshwater Wetlands Protection Act, and the Highlands Water Protection and Planning Act. When multiple regulatory processes apply to a project, the Department attempts to coordinate these reviews and their requirements to the maximum extent possible. In fact, the Freshwater Wetlands Protection Act Rules, at N.J.A.C. 7:7A-12.2(m), recognize that projects requiring freshwater wetlands permits may have already undergone review under Section 106 of the National Historic Preservation Act, and require that documentation to that effect be provided as part of the permit application submitted to the Department.

37. COMMENT: There would be considerable practical benefit if the Department would provide guidance in N.J.A.C. 7:4-8.4 to inform Federal agency decision making with respect to what constitutes an “undertaking.” Such guidance should enumerate the types of projects and activities that the Department considers sufficient to trigger, and, conversely, too insubstantial to require, a Phase I archaeological survey. In addition, the Department should specify the types of projects that are categorically exempt from the Phase I archaeological survey requirement due to limited (or non-existent) bases to cause adverse effects. Routine utility line maintenance activities such as vegetation clearance

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rarely (if ever) generate ground disturbance that rises to the level of an impact for which a Phase I archaeological survey is warranted. Furthermore, in constructing aboveground utility lines, the typical separation distance between utility poles is substantial and, as a result, subsurface ground disturbance is very limited. This is in stark contrast to the disturbance caused by roads and other types of more intensive construction activity. An exemption for aboveground utility line projects should be provided due to limited (if any) potential to cause adverse impact. (6)

RESPONSE: The New Jersey Historic Preservation Office does not have the statutory authority under the National Historic Preservation Act to promulgate regulations that implement Section 106. Rather, at 16 U.S.C. 470s, the National Historic Preservation Act (the Act) gives the Federal Advisory Council on Historic Preservation the statutory authority to promulgate regulations to implement Section 106 of the Act.

Recognizing the variability of impact that can occur for the same type of project, the Department determines whether a Phase I survey is required based upon factors including the nature, scope, and location of the proposed project; the presence of recorded historic and archaeological resources within the area of the undertaking's potential impact, and the likelihood for the presence of unrecorded historic and archaeological resources within the area of the undertaking's potential impact, and the project's potential to affect historic and archaeological resources. Accordingly, it would be inappropriate to create a blanket exemption.

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The Department is confident that application of the criteria described above will result in Phase I surveys being required only in cases where the information provided by such a survey is necessary based upon the circumstances of that case.

38. COMMENT: The proposed Phase I archaeological survey at N.J.A.C. 7:4-8.4 does not take into account the use of methodologies that can and have been employed to limit the adverse impact to a project's area of potential effect. The Department should not preclude them from consideration. For example, matting, that is, placement of wooden boards, plastic panels or other protective materials is often used to avoid tearing up the soil surface in areas where no subsurface ground disturbance is necessary for project construction. This practice also prevents disturbance to buried archaeological resources. In short, the minimal footprint associated with aboveground utility line projects, coupled with a wide array of alternative protective measures, substantially nullifies the basis for requiring Phase I archaeological surveys in connection with utility line projects. (6)

RESPONSE: The rule does not preclude from consideration the use of methodologies to limit the adverse impact to a project's area of potential effect. The use of these methodologies is taken into consideration when the Department evaluates the need for archaeological survey. As stated in the response to comment 37 above, the Department determines whether a Phase I survey is required based upon factors including the nature, scope, and location of the proposed project; the presence of recorded historic and archaeological resources within the area of the undertaking's potential impact, and the

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likelihood for the presence of unrecorded historic and archaeological resources within the area of the undertaking's potential impact, and the project's potential to affect historic and archaeological resources, which includes the use of methodologies that limit an adverse effect upon historic properties within the area of the undertaking's potential impact.

39. COMMENT: While it appears that the proposal mainly applies to commercial and residential real estate development, the commenter is concerned that the Department's proposals will have significant adverse impacts on the public service infrastructure that electric utilities have a mandate to provide under New Jersey law. Specifically, the proposed regulations could hinder development (and maintenance) of much needed electric transmission infrastructure by significantly increasing the regulatory obstacles an electric utility must navigate to site such public service infrastructure. That additional regulatory burden will translate into a significant increase in cost to electric consumers.

(6)

RESPONSE: Generally, the proposed amendments to the rules codify existing guidance that has been in use by the historic preservation and archaeological communities since 1994 for archaeology and since 1999 for architecture, and do not incorporate substantial changes. Over the extended period that the standards were used as guidelines, there was no observed impact on the development of utility infrastructure or consumer costs for

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electricity and the Department does not anticipate that codifying these standards will change that.

40. COMMENT: If consultation with HPO is required under the provisions of Subchapter 8, then there should be provisions for timely response by the HPO to consultation requests from consultants. The HPO should be held accountable for delays to publicly mandated projects imposed by their unresponsiveness to consultation requests.

Moreover, a reasonable time frame for the scheduling of consultation meetings should be specified in these rules along with provision for filing of grievances with an independent ombudsman when HPO violates its own rules with regard to consultation time frames.

(1, 9)

RESPONSE: The timeframes for Historic Preservation Office response is set through other regulatory authorities using these standards to request a survey. For example, the timetable for Departmental decisions regarding permit applications submitted under the Coastal Area Facilities Review Act are governed by the timetable for review set forth at N.J.A.C. 7:7-4.7(a). The timetable for Departmental decisions regarding permit applications submitted under the Waterfront Development Act are governed by the timetable for review set forth at N.J.A.C. 7:7-4.7(b).

41. COMMENT: The new requirement at proposed N.J.A.C. 7:4-8.4(c)liii. requires an assessment report prepared by a "geomorphologist, pedologist or other soils specialist."

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(40 N.J.R. 1440) should be expunged from the proposed rules. This provision essentially excludes other professionals who have acquired a soils specialty from the anthropological or archaeological discipline from conducting geomorphological analysis in archaeological studies. Clarification should be provided regarding the qualifying specializations to complete assessment reports. In addition, if a post-graduate degree in an earth-science field is required to qualify as a geomorphologist, the Department should ensure that only equivalently qualified Historic Preservation Office staff members review the geomorphological analysis. (1, 8, 9)

RESPONSE: The preparation of assessment reports by a geomorphologist, pedologist or other soils specialist has been a practice in use by the archaeological community since 1994 for identifying archaeological sites. Discipline-specific specialists, such as geomorphologists, pedologists or other soils specialists who possess academic credentials and demonstrated expertise, are appropriate for the interpretation of natural landform evolution within specific geographical settings (as outlined in N.J.A.C. 7:4-8.4(c)1iii) to inform archaeological excavations consistent with existing practices. This rule is not intended to exclude individuals with multi-disciplinary training from geomorphological analysis in archaeological survey. Instead, as expressed in the rule, it is intended to assure that a geomorphological assessment is prepared by individuals possessing the required expertise in soils, whether it be a geomorphologist, a pedologist, or someone else with specialized knowledge of soils. While it is not required that the analysis be limited to one performed by a geomorphologist or pedologist, it is necessary that the

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individual performing the analysis demonstrate that they are qualified to provide appropriate and professional conclusions to inform archaeological investigations.

The HPO staff review report findings to assure that they are supported by appropriate documentation and submitted by individuals meeting professional qualifications standards for their field of expertise. The relatively small number of projects requiring geomorphological assessment does not demand the HPO have a professionally qualified geomorphologist, pedologist, or other soils scientist on staff. However, in instances where geomorphological or pedological assessments are included in project documentation, the HPO routinely consults with appropriately qualified individuals employed by the New Jersey Geological Survey within the Department.

42. COMMENT: An assessment report to assess the potential for deeply buried artifact deposits within the area of the undertaking's potential impact required in N.J.A.C. 7:4-8.4(c)1.iii. is only appropriate for projects where disturbance of these potentially deeply buried deposits is proposed. In circumstances where project impacts will be limited to surface and near surface deposits, but not to subsoil and other deeply buried deposits, disturbance of deeply buried strata is unwarranted, costly, and excessive. Deeply buried deposits that will be preserved in place as an outcome of the proposed undertaking should remain undisturbed as a conservation measure. This rule should specify the conditions where this rule is waived due to inapplicability. (1, 9)

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RESPONSE: The assessment report prepared by those with the requisite expertise utilizing appropriate testing strategies is a necessary component of the overall survey and project planning. The assessment report will identify historic properties within the undertaking's area of potential impact and may modify the project design to avoid and/or minimize project impacts. With reference to deeply buried archaeological deposits, such an assessment is necessary even if deep disturbance is not planned because construction of a project over such deposits would preclude reasonable future access to such deposits and would, thus, be considered an impact rather than preservation in place. The Department believes that it is more appropriate to identify the conditions under which the assessment report will be necessary, as is done in N.J.A.C. 7:4-8.4(c)1iii, rather than attempt to identify all possible sets of conditions where such a report will not be necessary.

43. COMMENT: As part of a Phase I archaeological survey, proposed N.J.A.C. 7:4-8.4(c)1iv would require "a complete deed search for the area of the undertaking's potential impact prior to conducting archaeological testing." It is unnecessary and extremely costly to newly require that complete deed research be conducted at the Phase I level for identification of potential archaeological sites and historic properties. The Phase I level should be limited to historic map research and field survey. Applicants will unnecessarily incur substantial costs to satisfy this requirement at the Phase I level. However, deed research is an appropriate tool to evaluate significance at the Phase II

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level of investigation. The Department should maintain the current distinctions between Phase I and II levels, which are not maintained in this proposal. (1, 5, 8, 9)

RESPONSE: The standards adopted at this time, including those that appear at N.J.A.C. 7:4-8.4(c)1iv, codify existing guidance that has been in use by the archaeological community since 1994 for identifying historic properties pursuant to both Federal and State law. This extended period of time has provided adequate opportunity to evaluate the standards' usefulness and success for the breadth of site and project types. Deed research has been part of the background research section of the Phase I archaeological survey guidelines on which the standards are based since their development in 1994. In the 14 years that the Department has had to evaluate the effectiveness of the survey guidelines, it became clear that certain site types, for example 17th – and 18th – century sites, have often been missed altogether during Phase I archaeological survey. The conduct of deed research during the background research phase of the Phase I archaeological survey would more frequently result in the identification of these often missed resources. In addition to identifying the greatest range of potential resource types within a project site, deed research also provides guidance to focus subsequent archaeological research designs and field survey strategies. For these reasons, the Department determined that it is appropriate to place greater emphasis on deed research in the Phase I archaeological survey standards.

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44. COMMENT: As part of a Phase I archaeological survey, proposed N.J.A.C. 7:4-8.4(c)1iv would require “a complete deed search for the area of the undertaking’s potential impact prior to conducting archaeological testing.” Although the commenter would not dispute the requirement for such deed searches for projects at a fixed location, linear development projects for electric utilities present a vastly different situation. That reflects the fact, among other things, that high voltage transmission lines – as well as power distribution lines – can often traverse many miles. In that regard, it is not hyperbole to suggest that, under the terms of proposed N.J.A.C. 7:4-8.4(c)1iv, thousands of deeds and other land record documents would require research in the case of such extensive linear development projects. Aside from prohibitive cost, a search of that magnitude could easily take a large team of researchers several years to complete and would delay critical electric infrastructure improvement projects that are sorely needed in New Jersey.

But aside from the impossibility of undertaking a “complete” deed search in cases involving lengthy public utility infrastructure facilities, it is at least equally important to emphasize that there are other readily available means to obtain the information to which the deed search would be directed. In that regard, historical records of land development activity in New Jersey are extensive and widely available. These records fully describe “historic and modern land use to facilitate predictions of the types of archaeological sites that may be present,” which is the purpose of proposed N.J.A.C. 7:4-8.4(c). Put another way, the objective of the deed search can be accomplished through other means.

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(6)

RESPONSE : The Department agrees with the commenter that deed research on long, narrow linear corridor projects may be cost prohibitive. Therefore, the Department has amended this provision to exempt linear corridor projects 100-feet or less in width from the need to do deed research prior to survey pursuant to N.J.A.C. 7:4-8.4(c)3x. The rule has been amended to read: “For non-linear projects, and for linear projects longer than one-mile in length and greater than 100 feet in width of ground disturbance, a complete deed search for the area of the undertaking’s potential impact prior to conducting archaeological testing to provide information regarding historic period land use, date by which buildings were present, ethnicity of occupants, number of households or uses through time, and in some instances detailed information regarding owners’ occupations, buildings, and land use, thereby providing valuable information to guide field survey;” The Department chose the 100-foot width referenced in the above amendment based upon its experience in reviewing linear projects. In the Department’s experience, the common width for utility corridor and roadway widenings and minor new roadways is 100 feet. Specifically, utility projects commonly have a 50-foot width of ground disturbance with a 25-foot vegetative buffer on each side. Further, within this 100 foot wide area, ground disturbance resulting from most utility corridor projects is limited to either small, noncontiguous areas, such as utility pole installation footprints, or narrow trenches within which utility lines or pipelines will be installed. Therefore, these types of projects have more limited potential to affect archaeological resources.

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This exemption will allow small utility corridor projects with a low potential to affect archaeological resources to proceed without conduct of complete deed research. In these instances, however, if resources are discovered during project implementation, there are provisions in the rules of other Departmental programs for consideration of those resources. For example, under the Freshwater Wetlands Protection Act Rules, if resources are discovered during project implementation, N.J.A.C. 7:7A-4.3(b) requires the permittee to notify the Department immediately and proceed as directed. The exemption, however, will not apply to larger roadway or utility corridor projects that have a much greater potential to affect archaeological resources.

45. COMMENT: Proposed N.J.A.C. 7:4-8.4(c)2 states that a Phase I archaeological survey shall include "the development of an archaeological site predictive model based upon the results of the background and deed research and field inspection." 40 N.J.R. 1441. Proposed N.J.A.C. 7:4-8.4(c)3i also references the "archaeological site predictive model." 40 N.J.R. 1441. Predictive models cannot be generated with validity from small scale landscape sampling. The Department should specify what would be acceptable predictive models and provide a bibliography of such models. A preferable methodology would state probability as high, medium, or low with corresponding field strategies as appropriate for the likelihood of site discovery. Clarification should be provided on the applicability of predictive models for small-scale landscape sampling sites. (1, 8)

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RESPONSE: These standards do not require the formulation of a new predictive model for each project site. Instead, the intent of this requirement is for the applicant to apply developed information into an existing regionally-appropriate model, developing modeled results for the project site. The information developed by application of the chosen model identifies the area(s) of low, medium, and high archaeological potential within a project site. In addition to existing regional predictive models available within the professional archaeological community through journals, list-serves, and conferences, the Department provides guidance for predictive models both within the Historic Preservation Office's *Guidelines for Phase I Archaeological Investigations* and *Guidelines for Preparing Cultural Resources Archaeological Management Reports* (<http://www.nj.gov/dep/hpo/1identify/survarkeo.htm#ac>) and through Historic Preservation Office publications available from the Historic Preservation Office upon request.

46. COMMENT: The new provision at N.J.A.C. 7:4-8.4(c)3i would require a systematic archaeological field investigation of all portions of the area of an undertaking's potential impact defined as having potential to hold archeological sites by the predictive model required pursuant to N.J.A.C. 7:4-8.4(c)2. The provision as drafted is unclear as to the size of the area that would need to be field investigated. For example, for a large parcel of which only a portion has the potential to hold archeological sites, it is unclear whether the area to be surveyed pursuant to the new rule must include the whole parcel or just the portion with potential archeological sites. The Department should consider clarifying this

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rule on adoption to more clearly define the area that must be field surveyed and to limit the area to be surveyed to the precise area of potential impact, not an entire parcel a portion of which may be potentially impacted. (10)

RESPONSE: The regulatory jurisdictions of a permitted project can vary between the various rules under which archaeological survey may be required, including the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, the Coastal Zone Management Rules, N.J.A.C. 7:7E, and the historic and archaeological resources provisions of the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38-3.10. Therefore, the authority for the scope of the survey is dependent upon the rules that trigger the need for the archaeological survey. For example, if an archaeological survey is required under a freshwater wetlands permit application, the area that needs to be surveyed is the entire project site, as delineated on the project plans submitted to the Department. However, if an archaeological survey is required under a Waterfront Development permit application, the area that needs to be surveyed is the area within 500-feet of the mean high water line, consistent with the jurisdiction of the permit.

47. COMMENT: The proposed new requirements for Phase I archaeological surveys are extensive, overly burdensome, impractical, and could substantially impede the maintenance of safe, adequate and proper electric and gas transmission and distribution service in New Jersey. In particular, several of the requirements involving archaeological investigation require shovel testing every 50 linear feet (N.J.A.C. 7:4-8.4(c)3iii. and iv.)

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are burdensome and impractical for a major utility transmission project that can span many miles. The commenter recommends that this section not apply to new gas and electric transmission projects that are required pursuant to a Federal or State requirement, including an order or rule from the Federal Energy Regulatory Commission or New Jersey Board of Public Utilities. (3)

RESPONSE: The guidance upon which these standards are based has been in use in conducting archaeological survey since 1994, including for utility projects. It has been the Department's experience that they have not imposed a hardship for utility projects nor impacted safe and timely electric, gas or other utility transmission and distribution. Many utility projects do not result in large areas of ground disturbance, and consequently, the potential for impacts to archaeological properties is limited. When there is not a high likelihood of impacts to historic properties, the Department has not requested archaeological survey. The Department's codification of the 1994 guidelines does not reflect a change in frequency of requests for survey, and therefore, will not constitute a greater impact on utility company projects and their schedules. Therefore, the Department does not agree that an exemption for utility projects is appropriate.

48. COMMENT: No interval based sampling strategy can "ensure" site discovery as stated in N.J.A.C. 7:4-8.4(c)3iii. since the area of landscape sampled is a fraction of the whole. A small interval in a low probability landscape does not increase the likelihood of site presence, which is the force driving site discovery. The investment of additional

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expense in these areas is excessive in light of prevailing regional predictive models which indicate that archaeological sites in low probability areas, when they are discovered, typically lack the size and integrity to warrant additional investigations. The HPO should provide a scaled approach to survey methodologies in step with their directive to stratify landscapes into areas of high, medium and low potential for site discovery. (1, 9)

RESPONSE: The Department requests archaeological survey when there is a high likelihood of impacts to historic properties which will result from ground disturbance associated with a project under review. The Department agrees that no fraction of a whole can assure discovery of every site. However, the background research, initial field inspection, and knowledge of standard sampling strategies for archaeological survey allow professional archaeologists to stratify the project impact area for testing in a manner that will be most effective in identifying historic properties. Stratification and use of an appropriate statistically quantifiable sampling strategy (based on specifics of the project, project site and the background research) increase the likelihood that generalizations about the whole made on the basis of the sample will be valid. The rationale for the selected field testing based on these factors may then be provided in reporting of the archaeological survey work. N.J.A.C. 7:4-8.4 does not preclude the use of a scaled approach to survey methodologies consistent with stratifying landscapes into areas of high, medium, and low potential for site discovery provided that the average testing density across the project site is 17 shovel tests per acre, as stated in N.J.A.C. 7:4-8.4(c)3iii. The Department does provide more detailed guidance on subsurface testing

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strategies on the Historic Preservation Office website at

www.state.nj.us/dep/hpo1identify/culreso.pdf.

49. COMMENT: Contrary to what is specified in N.J.A.C. 7:4-8.4(c)3iv, density calculations for linear project corridors must take into account areas, not just points, of restricted access (such as impervious cover and safety issues) or obstruction where subsurface testing is not possible even with offsets. This rule should make provision for densities of less than 17 tests per acre in situations where the area of potential impacts includes such areas where testing is not feasible. (1, 9)

RESPONSE: The Department assumes the comment is actually referring to N.J.A.C.7:4-8.4(c)3v. N.J.A.C.7:4-8.4(c)3v allows offsets and professional judgment to accomplish the necessary testing density. This has been accomplished successfully for areas as well as points for at least three decades, for example, for sewer line and roadway projects. In the event of seriously restricted access to the area of the undertaking's potential impact, N.J.A.C. 7:4-8.4(c)3x provides for consultation with Historic Preservation Office staff to discuss deviation from the testing strategy as outlined in the standards.

50. COMMENT: Proposed N.J.A.C. § 7:4-8.4(c)3 outlines requirements for the actual work of archaeological field investigations. One portion of the regulation, N.J.A.C. 7:4-8.4(c)3viii, addresses the role for geomorphologists, pedologists and other soils specialists. The commenter does not interpret N.J.A.C. 7:4-8.4(c)3viii as requiring a

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geomorphologist or pedologist to be present in the field during investigative work, but rather to assist in developing the testing strategy that the field work implements. (6)

RESPONSE: The interpretation in this comment is correct. The geomorphologist and other soils specialists do not need to be present throughout the duration of the field investigation. However, the contributions of these individuals are critical initially in development of testing strategies capable of sampling all potentially culture bearing soils. The standard for sufficiency of testing will be met when the archaeological survey provides identification of historic and prehistoric sites within the area of the undertaking's potential impact, including within deeply buried contexts. Therefore, the analysis of a geomorphologist is necessary to identify when deeply buried deposits may exist so that the archaeological testing strategy may be designed to sample these deposits. However, the geomorphologist does not need to be present during this field investigation.

51. COMMENT: N.J.A.C. 7:4-8.4(c)3viii requires an assessment of the potential for deeply buried artifact deposits within the area of the undertaking's potential impact. However, this is only appropriate for projects where disturbance of these potentially deeply buried deposits is proposed. In circumstances where project impacts will be limited to surface and near surface deposits, disturbance of deeply buried strata is unwarranted, costly, and excessive. Deeply buried deposits that will be preserved in place as an outcome of the proposed undertaking should remain undisturbed as a

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conservation measure. This rule should specify the conditions where this rule is waived due to inapplicability. (1, 9)

RESPONSE: As stated in the response to comment 42, the assessment is a necessary component of the overall survey and project planning. Proper assessment includes utilization of experts and the appropriate testing strategies to identify historic properties within the undertaking's area of potential impact. The results assessment may modify the project design to avoid and/or minimize project impacts. With reference to deeply buried archaeological deposits, such an assessment is necessary even if deep disturbance is not planned because construction of a project over such deposits would preclude reasonable future access to such deposits and would, thus, be considered an impact rather than preservation in place. The Department believes that it is more appropriate to identify the conditions under which the assessment report will be necessary, as is done in N.J.A.C. 7:4-8.4(c)1iii, rather than attempt to identify all possible sets of conditions where such a report will not be necessary.

52. COMMENT: The regulation at N.J.A.C. 7:4-8.4(c)3ix indicates that soils from machine assisted testing methods (i.e. backhoe trenches) shall be treated in the same manner as shovel test pits or excavation units. However, screening all soils derived from machine testing is not feasible or cost effective. It is reasonable to screen a sample of soils excavated from backhoe trenches, but only from contexts that have the potential to contain significant archaeological resources. As indicated in page 15 of the current, 1996,

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guidelines: "When heavy equipment such as a backhoe is employed for subsurface exploration, the total volume of excavated earth is usually too great to screen in entirety and sampling is necessary." The commenter concurs with the latter statement and requests that it be included in the regulations. (5)

53. COMMENT: Proposed N.J.A.C. 7:4-8.4(c)3ix requires soil matrices to be screened for artifacts. Clarification is requested regarding whether all mechanically excavated soil must be passed through screens. If that is the Department's intent, this requirement is impractical and would prohibit most commonly used mechanically aided archaeological techniques, such as mechanical topsoil stripping to expose features in subsoil. A requirement to screen everything is particularly inappropriate on urban or fill sites. Screening for artifacts is more of an exception than the norm when soil is mechanically excavated. (8)

RESPONSE TO COMMENTS 52 AND 53: The Department did not intend to require screening of all soils excavated from backhoe trenches. As noted by the commenter in comment 52, the guidelines upon which the Phase I archaeological survey standards were based clearly state that it is necessary to use sampling when screening soil matrices from backhoe-assisted excavations. Complete screening of soil matrices from backhoe excavated trenches has not previously been standard in New Jersey archaeological site investigations. Therefore, the Department has amended N.J.A.C. 7:4-8.4(c)3ix. to clarify

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that a sample of the soil matrices from backhoe excavations must be screened for artifacts.

54. COMMENT: Proposed N.J.A.C. 7:4-8.4(c)3.x states that “[d]eviation from the testing density specified in this paragraph (i.e., N.J.A.C. 7:4-8.4(c)3.iii and iv) shall be approved by the Historic Preservation Office in advance of the field survey,” and “[u]nless necessitated by specific circumstances related to the area to be surveyed, such as fill depths greater than six feet or a test area under a building or highway, deviations will not be approved.” With all due respect to the Department, one of the realities of field investigations of this type is the need for flexibility. For that reason, it is not reasonable to prohibit essentially any departure from testing density criteria. Moreover, contrary to the Department’s statement, it is rarely feasible to know “in advance” when the need for such departures is going to arise. (6)

RESPONSE: N.J.A.C. 7:4-8.4(c)3v and N.J.A.C. 7:4-8.4(c)3vi, respectively, provide latitude for offsets from grid points and augmentation of testing through use of judgmentally placed tests, when necessary. Further, the rules do not mandate a specific sampling strategy, but rather a required overall density of testing. By their nature, probability sampling methods allow generalizations about the whole to be derived from a sample. In all but extreme circumstances, an area inaccessible for testing will not preclude excavation of the necessary overall testing density, but rather will require deployment of those tests elsewhere within the project study area. In these rare

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circumstances, N.J.A.C. 7:4-8.4(c)3x provides the opportunity for consultation with the Historic Preservation Office. Therefore, the Department does not agree that it is unreasonable to prohibit departure from testing density criteria. The rules provide adequate flexibility for minor adjustments during field survey. In cases where accessibility is extremely limited, background research and other activities undertaken to scope the survey and plan for testing as specified in N.J.A.C. 7:4-8.4(c) including the initial field visit will allow identification of the special circumstances prior to field survey.

55. COMMENT: Proposed N.J.A.C. 7:4-8.4 sets forth very specific requirements regarding the procedures to be utilized for field testing. Although N.J.A.C. 7:4-8.4(c)3x permits deviation from the testing density specified in these rules, such deviations are only permitted if necessitated by the specific circumstances related to the area to be surveyed. It is unclear whether this provision provides adequate flexibility to address unanticipated issues that may come up in the development of a systematic archaeological field investigation. (10)

RESPONSE: N.J.A.C. 7:4-8.4(c)3v and N.J.A.C. 7:4-8.4(c)3vi, respectively, provide latitude for offsets from grid points and augmentation of testing through use of judgmentally placed tests, when necessary. Further, the rules do not mandate a specific sampling strategy, but rather a required overall density of testing. By their nature, probability/statistically quantifiable sampling methods allow generalizations about the

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whole to be derived from a sample. In all but extreme circumstances, an area inaccessible for testing will not preclude excavation of the necessary overall testing density, but rather will require deployment of those tests elsewhere within the project study area. In these rare circumstances, N.J.A.C. 7:4-8.4(c)3x provides the opportunity for consultation with the Historic Preservation Office. Therefore, the Department believes that the rules provide adequate flexibility for minor adjustments during field survey. In cases where accessibility is extremely limited, background research and other activities undertaken to scope the survey and plan for testing as specified in N.J.A.C. 7:4-8.4(c) including the initial field visit will allow identification of the special circumstances prior to field survey.

56. COMMENT: N.J.A.C. 7:4-8.4(c)3x contradicts other subparagraphs of the proposed rules. N.J.A.C. 7:4-8.4(c)3x states that deviation from the testing density specified in the rule has to be approved by the Historic Preservation Office in advance of the field survey. However, other sections of the proposed rule, N.J.A.C. 7:4-8.4(c)3vi, N.J.A.C. 7:4-8.5(a)12iv., N.J.A.C. 7:4-8.5(a)13 and N.J.A.C. 7:4-8.5(a)14ii, clearly contemplate that project developers, through their archaeological and architectural historian consultants, will have the flexibility to modify investigations in response to conditions in the fieldnotes that “[s]ystematic shovel testing as described in (c)3iii [sic]. . . shall be augmented by judgmentally placed subsurface tests excavated at the discretion of the Principal Investigator.” In short, in its present form, proposed section 7:4-8.4(c)3.x is out of keeping with the rest of the regulation and should be modified accordingly. Indeed,

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proposed N.J.A.C. 7:4-8.4(c)3vi contemplates only augmentation of subsurface testing units and should be modified to include the possibility of decreasing the number of subsurface testing units, consistent with the intent suggested by the Department's approach in later portions of the proposed rules. (6)

RESPONSE: N.J.A.C. 7:4-8.4(c)3i through N.J.A.C. 7:4-8.4(c)3ix. outlines field requirements that will be appropriate for most field situations, including latitude for professional judgment during survey to augment (as discussed in N.J.A.C. 7:4-8.4(c)3vi) or relocate a limited number of tests in response to field conditions and discoveries.

These changes in testing and/or other field strategy are then discussed in the survey report as provided for in N.J.A.C. 7:4-8.5(a)12iv and N.J.A.C. 7:4-8.5(a)13iv. N.J.A.C. 7:4-8.5(a)14ii requires that the number of shovel tests excavated per acre be included.

N.J.A.C. 7:4-8.4(c)3x anticipates a field situation identified during development of the plan for survey and testing as specified in N.J.A.C. 7:4-8.4(c) in which the ability to undertake more traditional Phase I survey as specified in N.J.A.C. 7:4-8.4(c)3i through N.J.A.C. 7:4-8.4(c)3ix is hampered by extreme inaccessibility or other circumstances that disallow the more usual field protocols. In this event, N.J.A.C. 7:4-8.4(c)3x provides the opportunity for consultation with the Historic Preservation Office. Therefore, N.J.A.C. 7:4-8.4(c)3x is consistent with other sections of the regulations, and changes to this section of the rule are not appropriate.

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57. Proposed N.J.A.C. 7:4-8.4(c)3vi appears to make deviations an option only for non-linear development projects described in N.J.A.C. § 7:4-8.4(c)3iii, and not for linear development projects under N.J.A.C. § 7:4-8.4(c)3iv (i.e., the 50 linear feet interval in that portion of the proposed regulation may at times be excessive). The commenter believes the Department's intent is to allow deviations in the case of both types of projects. (6)

RESPONSE: The commenter is correct in the interpretation that N.J.A.C. 7:4-8.4(c)3vi which is applicable to all projects. While not mandating any specific number of additional tests, N.J.A.C. 7:4-8.4(c)3vi recognizes the usefulness of limited additional testing to be performed at the discretion of the principal investigator when this testing may provide benefit to the survey and survey recommendations (including, for example, obviating the need for additional survey phases). N.J.A.C. 7:4-8.4(c)3iii provides explanation of the necessary density of shovel testing for all projects, while N.J.A.C. 7:4-8.4(c)3iv provides an explanation of the manner in which these test density requirements should be interpreted for acceptability of coverage for linear projects.

58. COMMENT: Where it is demonstrated that all Holocene sediments are contained within a plow zone, proposed N.J.A.C. 7:4-8.4(c)4 would allow project developers to use surface inspection supplemented by broad interval subsurface testing as an alternative to 17 shovel tests per acre. It is not clear whether this alternative is available only to non-linear development projects described in N.J.A.C. 7:4-8.4(c)3.iii or if it also applies to

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linear development projects under N.J.A.C. 7:4-8.4(c)3.iv. The section should be clarified or, if need be, modified expressly to include linear projects. (6)

RESPONSE: N.J.A.C. 7:4-8.4(c)4 applies to all linear and non-linear projects.

59. COMMENT: Proposed N.J.A.C. 7:4-8.4(c)4 indicates that "surface inspection supplemented by broad interval subsurface testing may be substituted for 17 tests per acre to identify archaeological sites ..." 40 N.J.R. 1441. The Department should define and quantify "broad interval subsurface testing" and also specify acceptable supplemental testing patterns. (8, 9)

RESPONSE: The rule allows for professional judgment and flexibility in developing a testing strategy that meets the test for sufficiency at N.J.A.C. 7:4-8.4(a). The Department believes that it is important to provide latitude for professionally trained archaeologists to exercise their professional judgment when developing a testing strategy tailored to a specific project site. Factors that will impact what is considered to be sufficient "broad interval subsurface testing" for a particular site include the nature and types of sites that are likely to be present within the project site as indicated by background research, the topography of and likelihood of soil deflation and erosion across the project site, and the size of the cultivated area. Furthermore, areas subject to subsurface testing within a project site will be based upon locations within the project site likely to contain deeper buried deposits, for example, along the bases of knolls, hedgerows, or tree lines.

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Therefore, it would not be appropriate to quantify broad interval subsurface testing or specify acceptable supplemental testing patterns.

60. COMMENT: N.J.A.C. 7:4-8.4(c)4 sets forth an alternative method of field investigation, i.e. surface inspection supplemented by broad interval subsurface testing, for areas of potential impact where it can be demonstrated that all Holocene sediments are contained within a plow zone. The new rules, however, do not appear to permit the use of other alternative ways to assess the presence of sub-surface resources such as ground penetrating radar, metal detectors, etc. The Department should consider amending N.J.A.C. 7:4-8.4 on adoption to permit other alternative investigatory methods if approved by the Historic Preservation Office in advance of implementation of a field survey. (10)

RESPONSE: The Department disagrees that N.J.A.C. 7:4-8.4(c)4 provides no alternative methods to plowing to assess the presence of subsurface archaeological resources.

N.J.A.C. 7:4-8.4(c)3x provides latitude for flexibility and the use of professional judgment in the development of alternate specialized testing strategies (such as ground penetrating radar, metal detectors, etc.) through consultation with Historic Preservation Office staff. The provisions of N.J.A.C. 7:4-8.4(c)4 outline one acceptable alternative to the prescribed testing strategy in N.J.A.C. 7:4- 8.4(c)3 when it can be demonstrated that the entirety of Holocene deposits are contained within the plowzone. However, this does not preclude the use of alternate specialized testing strategies such as ground penetrating

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radar or metal detecting when determined to be appropriate through consultation with Historic Preservation Office staff.

61. COMMENT: Proposed N.J.A.C. 7:4-8.4(c)6 states that the Phase I archaeological survey project design must also include a provision for permanent curation of the artifact collection and records at a repository that meets the National Park Service's curation standards. Curation should only be required after the presence of a site has been identified and the need for a repository is determined. The Department should amend the rule to require provision for permanent curation of artifact collections and records at the Phase II level of investigation, because estimates of the collection size and requirements for special storage needs cannot be discussed with the designated repository prior to the assessment of the extent and character of a site. In addition, prior to the Phase II investigation, the consultant cannot determine whether the site and its associated collection will meet the designated repository's criteria for accessioning.

In addition to the above, the proposed requirement would be difficult to meet as there are no other known qualified repositories other than the New Jersey State Museum ("State Museum"). Applicants/consultants would incur a great financial burden where the Museum's fees are set at \$250.00 per storage box. The Historic Preservation Office should provide a list of pre-qualified repositories for artifact curation in New Jersey to satisfy this requirement. (8, 9)

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RESPONSE: The Department does not agree that this section of the standards requires amendment. This section requires contacting the potential receiving institution in advance of work in order to make provision for ensuring that the project will meet the Secretary of the Interior's Standards, including the Standards for Curation. This does not imply or require gifting a collection of artifacts in advance of its discovery. Rather, it contributes to professional planning for appropriate treatment of artifacts that may be discovered during survey by determining in advance the standards and requirements of a potential receiving institution. This planning in the early stages of projects also has a direct bearing on the project budgets which, in most cases, will need to factor in the cost of storage and archivally stable storage materials. If, after a Phase II or subsequent survey there is a need to change the proposed curatorial facility identified after Phase I survey or to select an additional curatorial facility, the new or additional facility should be identified in the survey report(s) for the subsequent phases of survey. Many New Jersey and other repositories meet the Secretary of the Interior's Standards for Curation. Alternate curation facilities may include universities and larger historical societies. However, because economic and other considerations change regarding the appropriateness of other curation facilities, the Department reviews potential alternate repositories on a case by case basis rather than providing a pre-qualified list.

62. COMMENT: Proposed N.J.A.C. 7:4-8.4(c)6 creates an inconsistency between the State Museum's policies and those of the HPO. The State Museum does not accept all collections and does not accept metal artifacts among other types of artifacts at all. As a

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result, there will be instances where the State Museum will decline accession to an artifact assemblage while the HPO will decline to grant permission to discard it.

Ultimately, the consultant may then be required to retain the artifacts in perpetuity. The Department should re-evaluate the proposed rule in light of the foregoing conceivable circumstance. Discussion is also necessary with the State Museum as to its current culling standards for assemblage as a great deal of material (i.e. nails, brick) must be discarded before the State Museum would accept the artifact. (8)

RESPONSE: It is unclear why the commenter thinks that the New Jersey State Museum does not accept metal or brick artifacts. According to the New Jersey State Museum Registrar for the Bureau of Archaeology and Ethnology (July 18, 2008), representative samples of brick and brick important for research and identification purposes are accepted by the New Jersey State Museum. In addition, metals that have been adequately stabilized and/or conserved are also accepted by the New Jersey State Museum.

Therefore, N.J.A.C. 7:4-8.4(c)6 is consistent with the policies of the New Jersey State Museum. This comment underscores the need to contact potential receiving institutions or potential curatorial facilities in advance of survey to determine their requirements for treatment of the collections.

There is nothing in the rule mandating a consultant to retain all cultural material discovered during archaeological survey. The rule makes provisions for the discard of artifacts as long as the rationale for discard is explained in the documentation. In fact, N.J.A.C. 7:4- 8.4(c)5v. allows for discard of limited categories of artifacts such as

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modern objects and bulk items such as concrete, asphalt, and coal. Furthermore, the rule does not mandate that the artifact collection will be transmitted to the repository at the end of Phase I survey. Rather, N.J.A.C. 7:4- 8.4(c)6 requires the archaeologist to make provisions for the permanent curation of the artifact collection and records which includes contacting the receiving institution to ascertain its requirements for artifact preparation. The Department anticipates that the transmission of the artifact collection to the artifact repository would occur after all phases of archaeological survey are completed. The rule allows for the discard of artifacts not associated with a potentially eligible or National Register eligible archaeological site at the conclusion of all phases of archaeological survey in consultation with the Historic Preservation Office, and other reviewing agencies including the repository for the artifact collection. If there is a situation where the selected repository will not accept certain categories of artifacts contained within the artifact collection, the applicant should consult with the Department and the artifact repository to resolve the discrepancy as referenced in N.J.A.C. 7:4- 8.4(c)6.

63. COMMENT: The requirement at N.J.A.C. 7:4-8.4(c)6 creates an inconsistency. The site collection recovered on privately owned land would only require curation in the event that it is gifted to the institution designated as the repository. Realistically, private landowners cannot gift a collection to a designated repository before said collection exists. (9)

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RESPONSE: Contacting the potential receiving institution in advance of work in order to make provisions for ensuring that the project will meet the Secretary of the Interior's Standards including the Standards for Curation does not imply or require gifting a collection of artifacts in advance of its discovery. It does contribute to professional planning for appropriate treatment of artifacts that may be discovered during survey by determining in advance the standards and requirements of a potential receiving institution, and allowing the location where the collection will be housed at the conclusion of phased survey and agency review to be identified in the survey reports. Identification of the location of the artifact collection at the conclusion of Phase I survey will assist individuals with an interest in conducting research on that artifact collection in accessing it.

64. COMMENT: There is an inconsistency in regulatory provisions at N.J.A.C. 7:4-8.4(c)6 and what DEP intends by these proposed rules with respect to National Register-eligible versus non-eligible sites. There is little scientific value in newly requiring consultants to retain artifact collections from non-eligible sites, as these by definition, lack the potential to contribute important information to the study of history or prehistory. Consequently, we believe there is no reason to retain artifacts from non-eligible sites. If the Department requires that artifacts from non-eligible sites be retained, then the Department should provide the rationale for doing so. The Department should also establish standards for discarding artifacts so that determinations are not made on a case-by-case basis. (8)

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RESPONSE: N.J.A.C. 7:4- 8.4(c)6 allows for the discard of artifacts not associated with National Register/National Register eligible sites, but only after the conclusion of all phases of archaeological survey and agency review. This is necessary because it is not always possible to determine in advance what categories of artifacts may be important for the analysis and interpretation of the site. Categories of artifacts necessary for analysis and interpretation of the site can vary based upon the state of knowledge about a particular type of archaeological site and the research questions developed to fill critical gaps in knowledge about those site types. Therefore, it is not appropriate for the Department to establish standards for discarding artifacts to prevent determinations being made on a case-by-case basis. Only in very limited circumstances, as defined in N.J.A.C. 7:4-8.4(c)5, would it be appropriate to discard artifacts before the completion of all phases of archaeological survey. It has been professionally standard for modern artifacts to be discarded during Phase I survey.

65. COMMENT: The Department should address the legal issue concerning ownership of artifacts. Specifically, if the project sponsor/landowner owns the artifacts but the HPO has the authority to dictate their disposition, would this constitute a legal "taking"? (8)

RESPONSE: It has been the Department's experience that most applicants required to do archaeological survey as part of a permit application willingly donate the artifact collection recovered from survey to the New Jersey State Museum. However, in those

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cases where a property owner/applicant wishes to retain the artifact collection recovered from the archaeological survey, the Department requires complete documentation of that artifact collection in order to obtain the most information about the collection to advance future archaeological research that may involve the collection. There have also been circumstances where property owners donate the artifact collection to the New Jersey State Museum, and then the State Museum provides the collection to the property owner on long-term loan. This results in the property owner having long-term possession of the artifact collection while ensuring that the collection has a permanent curation location should the property owner ever decide to dispose of the collection. Further, State historic preservation-related laws and their respective sets of implementing rules such as N.J.A.C.7:38-3.10(c), N.J.A.C.7:7E-3.36(d), N.J.A.C.7:7A-4.3(b)(5), and N.J.A.C. 7:4-8.3(b) require: that projects be conducted in accordance with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation which includes the Standards for Curation of artifact collections and accompanying survey reports and records and/or that project proponents and/or the agencies permitting or approving the work demonstrate that the activity avoids, minimizes or mitigates impacts to National Register eligible historic properties to the maximum extent practicable. This would include appropriate curation of the eligible archaeological site collection, since most if not all site areas left unexcavated will be destroyed by project implementation, and the analysis and reporting of the site excavation and data recovery do not recover all information from the collection that causes the site to be National Register eligible.

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N.J.A.C. 7:4-8.5 Standards for Archaeological Reporting

66. COMMENT: The proposed requirements for archaeological survey reports at N.J.A.C. 7:4-8.5 fail to recognize the existing distinction between Phase I and II levels of investigation. As a result, Phase I would include what is currently done at Phase II, and will dramatically increase costs to applicants. Furthermore, the Economic Impact statement does not provide a range of anticipated added costs for compliance with the proposed combination of Phase I and II reports. The proposed rules will also clearly increase the burden on DEP's regulatory staff and will lead to delays in the review of the reports. Yet, the Department does not indicate that staffing will be increased to implement the proposed rules. The Department should amend the rules to maintain the distinction of what is currently done at each Phase and increase Historic Preservation Office staffing. (8)

RESPONSE: The requirements at N.J.A.C. 7:4-8.5 are consistent with the archaeological reporting guidelines that have been in use since 1994, and so will not increase the burden on applicants or on the Department's regulatory staff. The archaeological reporting standards at N.J.A.C. 7:4- 8.5 does not propose the combination of Phase I and II reports, as suggested by the commenter. Rather, the standards specify general content and formatting requirements for all archaeological survey reports, regardless of the phase of archaeological survey being reported. While the Department appreciates the

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recommendation for an increase in Historic Preservation Office staffing, however, given the realities of the current budget situation, it is unlikely that increases in staff will occur.

67. COMMENT: Different agencies (Federal and State) implement and follow their own reporting protocols for archeological and architectural reports. This practice frequently results in the need for project applicants to prepare multiple reports for the same project in order to conform to each agency's requirements. It appears that the Department is encouraging uniformity in its proposed reporting requirements at N.J.A.C. 7:4-8.5. We strongly support such uniformity and urge the Department to conform its regulations to the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation. (6)

RESPONSE: The Department acknowledges this comment in support of the rule.

68. COMMENT: N.J.A.C. 7:4-8.5(a)li., ii., and vi. provide requirements for the materials on which an archaeological survey report is submitted. The term hard-covered binder should be defined and acceptable materials listed. Similarly, the term bond paper should be defined and acceptable weights and fiber contents listed. The term "adequately durable" is vague and subjective terminology. Standards for "durable materials" should be specified by product types. (9)

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RESPONSE: The Department believes that the language specified in the provisions cited by the commenter, which is intended to be given its commonly understood meaning, is sufficiently clear and does not require further definition. The intent of these provisions is to assure that reports are bound in a hard cover durable enough to be self-supporting and the binder and paper materials used in the report are adequately sturdy to withstand regular use in Historic Preservation Office's report collection. For instance, comb-bound reports with flexible plastic or vinyl covers are not sufficiently durable to meet this requirement.

69. COMMENT: The Department should clarify N.J.A.C. 7:4-8.5(a)6v. to specify that excavation unit and trench photographs should be included within the report only in circumstances where these excavations (1) produce positive evidence of cultural materials or cultural features, (2) demonstrate representative stratigraphic soil profiles for a site, or (3) depict evidence of previous site disturbance. Inclusion of photographs from all excavated units and trenches, regardless of their information content, is excessive, costly, and unnecessary. (9)

RESPONSE: Inclusion of photographs of all excavated units and trenches in the body of the archaeological survey report in survey reports is not excessive, costly, or unnecessary. Inclusion of photographs from all excavated units and trenches in the body of the archaeological survey report is necessary to allow for independent review, assessment, and concurrence with project findings as well as more complete recordation of survey

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findings and the sites themselves. The Historic Preservation Office allows for submission of prints of digital images within the report with an accompanying CD as well as original photographs, allowing for expeditious and inexpensive photographic recording of excavation units and trenches.

70. COMMENT: The proposed N.J.A.C. 7:4-8.5(a)6vii states that “[a]ll photographs used in the [archaeological survey] report shall be . . . [t]aken of the area of the undertaking’s potential impact and archaeological site overview.” The purpose of this instruction is not clear inasmuch as it seems unlikely that a project developer would want to use photographs from outside the area of the project’s potential impact (and we assume the Department did not intend to require photo-documentation of 100% of the project undertaking’s footprint). In any event, clarification and guidance should be provided regarding the Department’s objectives with respect to this aspect of the regulation. (6)

RESPONSE: The objective of this part of the rule is to obtain photographs of the physical area of the undertaking’s potential impact that are both representative of the project site and its environmental and cultural setting, including architectural ruins, features, and buildings that are 50 years of age or older. The Department is not requiring submission of photographs of 100% of the project’s footprint. However, it is expected that the photographs taken will be adequate for the Historic Preservation Office staff to place the survey methodology and results within its appropriate physical context.

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71. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)6vii. should be clarified to indicate whether only overview photographs of the area of the undertaking's potential impact and archaeological site must be keyed to a project map or all photographs included within the report should be keyed to a project map. (9)

RESPONSE: The objective of the part of the rule referenced by the commenter was to require that only the photographs of the area of the undertaking's potential impact and archaeological site overview must be keyed to a map.

72. COMMENT: A county soil survey map, as required in N.J.A.C. 7:4-8.5(a)9vii, is more appropriately included within the Background Research section as part of the discussion of soils under Environmental Setting N.J.A.C. 7:4-8.5(a)10ii(1). (9)

RESPONSE: The inclusion of the soils map in the introduction section helps to orient the reader to both the project and the survey effort. If desired by the archaeological consultant, either a second copy of the county soil survey map or a reference to the earlier figure may be included in the discussion of the soils.

73. COMMENT: N.J.A.C. 7:4-8.5 (9)ix requires the name and location of a potential curatorial facility be specified in the report. This information could be provided if, in a later Phase of investigation, a site is found to be National/State register eligible or contributing to the significance of a historic district. However, if a site is potentially

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eligible, it may be too early to determine if curation at a 36 C.F.R. 79 facility is necessary. (5)

RESPONSE: It is not too early at the Phase I level to plan for the disposition of possible discoveries. By contacting the potential receiving institution in advance of work, provision can be made to ensure that this aspect of the project will meet the Secretary of the Interior's Standards for Curation. This requirement contributes to professional planning for appropriate treatment of artifacts that may be discovered during survey by determining in advance the standards and requirements of a potential receiving institution, and also allows the location where the collection will be housed at the conclusion of phased survey and agency review to be identified in the survey reports. Identification of the location of the artifact collection at the conclusion of Phase I survey will assist individuals with an interest in conducting research on that artifact collection in accessing it.

74. COMMENT: Copies of correspondence as required in N.J.A.C. 7:4-8.5(a)10i. are not appropriate to include within the body of a report designed to summarize a data collection and information analysis effort. Inclusion of a correspondence file with project records and a listing of these sources in the References section provides sufficient documentation for a Phase I level of investigation. (9)

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RESPONSE: The Department acknowledges that copies of correspondence are not appropriate to include within the body of a report designed to summarize a data collection and information analysis effort. The Department did not intend to require that copies of correspondence be included in the body of a report. Actual copies of correspondence may appear in the reference section of the survey report, as provided for in N.J.A.C. 7:4-8.5 (a)28iv. and v. Discussion of sources consulted as part of the background research and the opinions and/or information provided by these sources should be included in the background research section of the report, as discussed in N.J.A.C. 7:4-8.5(a)10i.

75. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)10i(1)-(10) should be clarified. This section mandates use of standard repositories for the purpose of conducting the background research that is a required element of an archaeological survey report. Most of the sources identified in the regulation would be recognized as “standard” sources that the project developer could be expected to consult, with the exception of N.J.A.C. 7:4-8.5(a)10i(7), which refers in somewhat vague terms to “[o]ther individuals, agencies, and groups possessing knowledge of the history and prehistory of the area under investigation.” It is unclear why the regulation places such “other individuals” on the same level as widely recognized sources like the Archaeological Society of New Jersey. Consultation with such “other individuals,” etc., should be required, if at all, only in situations where the information obtained from the other standard repositories and sources identified in N.J.A.C. 7:4-8.5(a)10i (specifically, N.J.A.C. 7:4-8.5(a)10i(1)-(6)) is not sufficient. (6)

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RESPONSE: N.J.A.C. 7:4-8.5(a)10i(7) acknowledges the potential contribution of local experts to provide valuable information for areas under investigation not always available through other sources. It is necessary to contact local experts, regardless of their title or organizational affiliation, to assure that they do not have information not in the possession of the other standard repositories. Consulting with the repositories defined in N.J.A.C. 7:4-8.5(a)10i(1)-(10) provides a reasonable degree of assurance that the full spectrum of potential information sources on cultural sources within a project site are consulted and incorporated into project planning and documentation.

It is often possible to contact local experts quickly and efficiently through the use of listserves that provide access to people with expertise pertinent to the project and the resources that may exist within that project site. In addition, the Department is frequently contacted by citizens and groups within areas where development will occur. These individuals and/or groups have requested to be provided an opportunity to comment on the potential for the project to affect historic and archaeological resources. In these instances, the Department provides this contact information to potential permittees.

76. COMMENT: Under proposed N.J.A.C. 7:4-8.5(a)10i(8) project developers would be required to consult with Native American informants both within and outside of New Jersey. The regulation limits that obligation to situations where doing so would be “appropriate,” and refers to Native American sites as an example. The term “Native American informants” is not defined nor is its meaning otherwise readily apparent.

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Nevertheless, the Department's use of the term "informant" would seem to refer to information that is brought to the project developer's attention at the initiative of the "informant." Without that qualifier, the regulation would impose an extremely burdensome and open-ended obligation on the project developer to solicit information from unknown persons. The regulation should not be interpreted to require such solicitation by the project developer. (6)

RESPONSE: N.J.A.C. 7:4-8.5(a)10i(8) acknowledges the potential contribution of Native American informants to provide valuable information for areas under investigation not always available through other sources. It is entirely necessary and appropriate for an applicant, or their archaeological consultant, to seek out information from Native American informants in situations where there is a potential impact to resources related to our Native American culture. The appropriateness of consulting with Native American informants for a particular project is dependent upon a number of factors including the nature of the project site; the nature of archaeological sites identified and/or anticipated based on the survey, background research, and regional, predictive models; and the specific regulations under which survey work is being conducted. For this reason, the Department used the phrase "as appropriate" in the rule, rather than specifying all of the potential circumstances in which it would be appropriate to consult with Native American informants. Consultation with Native American informants both within and outside of the State of New Jersey was part of the guidance, which has been used since 1994, upon which the standards are based.

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There are a limited number of standard groups and organizations within and outside New Jersey representing New Jersey's current and former Native American population. A list of these groups and organizations is regularly updated and is available from the Historic Preservation Office. This list can be requested from the Historic Preservation Office by mail at P.O. Box 404, Trenton, NJ 08625 or via e-mail at NJHPO@dep.state.nj.us.

Further, because the survey reports are prepared by professional archaeologists, these individuals are generally knowledgeable about the groups and organizations within and outside New Jersey representing New Jersey's current and former Native American population and their contact information.

77. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)10ii(6) requires archaeological survey reports to include "a discussion of information provided by artifact collectors and Archaeological Society of New Jersey local chapter members." This requirement is potentially very broad and burdensome. While it may be possible to identify the local chapter members of the Archaeological Society of New Jersey, to require the project applicant to contact such individuals will be quite burdensome. The same point applies to individual artifact collectors and is compounded by the fact that the latter are obviously numerous and not readily identifiable. While it is not unreasonable to require archaeological survey reports to discuss information that is brought to the attention of a project developer at the initiative of artifact collectors and/or Archaeological Society of New Jersey local chapter members, the commenter does not interpret N.J.A.C. 7:4-

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8.5(a)10ii(6) as requiring the project developer to solicit information from these sources.

(6)

RESPONSE: N.J.A.C. 7:4-8.5(a)10i(6) acknowledges the potential contribution of members of the Archaeological Society of New Jersey and artifact collectors to provide valuable information for areas under investigation not always available through other sources. It is entirely necessary and appropriate for an applicant, or their archaeological consultant, to seek out information from Archaeological Society of New Jersey members and artifact collectors as part of archaeological survey efforts. Consultation with Archaeological Society of New Jersey members and artifact collectors was part of the guidance, which has been used since 1994, upon which the standards are based.

Because individuals often possess information not formally recorded about the area of an undertaking's potential impact, this aspect of the standards acknowledges the potential for substantive contributions by local experts to provide valuable information not available elsewhere. Further, because the survey reports are prepared by professional archaeologists, these individuals are generally knowledgeable about the groups, organizations, and individuals that may provide useful information in support of this standard. Most professional archaeologists have access to relevant list serves, including that of the Archaeological Society of New Jersey, and many frequently query these list serves to solicit information about specific project locations. Therefore, it is fully appropriate for archaeologists, in conducting background research for undertakings and in planning the field portion of a survey to solicit information from these sources.

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78. COMMENT: Rationalization of standard archaeological methods, strategies and procedures as required in N.J.A.C. 7:4-8.5(a)12 is excessively pedantic and unnecessary, particularly when many of the methods and strategies are prescribed by the review agency itself. Archaeological survey reports are written for professional audiences and not as academic or educational exercises. (1, 9)

RESPONSE: Inclusion of rationalization of standard archaeological methods, strategies and procedures within prepared technical archaeological reports is necessary. The rationale for defining survey methods pursuant to N.J.A.C. 7:4- 8.5(a)12 is to provide both Historic Preservation Office staff and the third parties with independent verification that the appropriate survey methodology was employed to identify the full spectrum of potential historic properties within a project site. The rule provides for a range of professional responses to specific field conditions and resource types. For example, pursuant to N.J.A.C. 7:4- 8.4(c)3x allows for deviation from the prescribed testing strategy in consultation with the Historic Preservation Office. The rationale for the use of an alternate testing strategy developed under this provision of the rule should be included in the survey report. Similarly, as was discussed in the response to comment 31, testing strategies employed for Phase II and Phase III level surveys can vary based upon factors including the nature of the resource, the physical setting of the project site, the state of preservation of the archaeological resources, and the nature and complexity of the project. As such, N.J.A.C. 7:4- 8.5(a)12 requires the Principal Investigator(s) the

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opportunity to provide explanations regarding the appropriateness of the selected methods and strategies.

79. COMMENT: The definition of an archaeological site, as required in N.J.A.C. 7:4-8.5(a)12v, should be consistent with those for Pre-Contact Period Sites and Historic Sites provided by the New Jersey State Museum in a September 2005 document entitled: "Site Identification Criteria, New Jersey Archaeological Site Survey Files". All consultants should use the same criteria for archaeological site definition. (5)

RESPONSE: N.J.A.C. 7:4- 8.5(a)12v recognizes the lack of consensus among members of the professional archaeological community about the definition for an archaeological site. Particularly, the definition of archaeological site can vary based upon the cultural period being studied and the particular theoretical context of the archaeologist conducting the research. In order to create a complete and understandable document for the "cold reader", this definition must be included in the survey report as identified in N.J.A.C. 7:4-8.5(a)12v. However, as suggested by the commenter, the New Jersey State Museum has criteria for defining both prehistoric and historic period archaeological sites for the purposes of registering sites with the State Museum. N.J.A.C. 7:4- 8.5(a)29iv requires the inclusion of New Jersey State Museum registration forms for all sites recorded by the survey as well as site form updates for revisited sites. By registering all archaeological sites at the New Jersey State Museum, as required by the rule, this consistency in site definition can be achieved.

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80. COMMENT: N.J.A.C. 7:4-8.5(a)19iv. specifies elements to be included in the artifact analysis section. The meaning of this section should be clarified. It is not clear if the intent of this section is to require that the analysis section provides the name and location of the repository for the artifact collection and for copies of all survey records and files, or the required copies of survey records and files should be appended to the report rather than incorporated within the artifact analysis section. Copies of survey files and records are not appropriate to include within the body of a report designed to summarize a data collection and information analysis effort. In addition, the "draft deed of gift form" should be appended at the back of the report, since it is only indirectly associated with the analysis of an artifact collection. (9)

RESPONSE: The intent of this provision of the rule is to require a discussion of the name and location of the repository for both the artifact collection and the copies of all survey records and files as well as a discussion of the draft deed of gift form if one was used. The draft deed of gift form itself should be included as an appendix to the report. The Department is clarifying this provision on adoption to reflect this intention. Particularly, N.J.A.C. 7:4-8.5(a)19iv has been changed require that the artifact analysis section include: "The name and location of the repository for the artifact collection and copies of all survey records and files, and reference to the draft deed of gift form, if applicable (with the draft deed of gift form appended)".

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81. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)19vi requires archaeological survey reports to include an artifact analysis section that discusses how the "proposed curation facility meets the Secretary of the Interior's Standards for Curation" when the facility is not the New Jersey State Museum.

Designation of a curatorial facility is inappropriate during Phase I research, where the artifact collection is more of an abstraction. This information should be required at the Phase II planning process when collections could be better estimated and described to a potential repository. Further, justifying the use of a different facility than the State Museum as a repository is a new requirement. The Historic Preservation Office should provide a list of pre-qualified facilities for artifact curation within the state. (8, 9)

RESPONSE: The Department believes that a curatorial facility should be contacted in planning for Phase I survey in order to identify the requirements, costs, and other considerations associated with curation in that institution. Contacting the potential receiving institution in advance of work will ensure that this aspect of the project will meet the Secretary of the Interior's Standards for Curation. Meeting the Secretary of the Interior's Standards, including the Standards for Curation, has always been required for all State and Federally regulated projects reviewed by the Historic Preservation Office. As such, justifying the use of an alternate repository to the State Museum is not a new requirement. In addition to contributing to professional planning for appropriate treatment of artifacts that may be discovered during survey by determining in advance the standards and requirements of a potential receiving institution, this allows the location

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where the collection will be housed at the conclusion of phased survey and agency review to be identified in the survey reports, as required for reporting in N.J.A.C. 7:4-8.5 (a)

19.iv. Inclusion of information about the location of the artifact collection in the Phase I report allows individual researchers needing access to the artifact collection to determine the location of that collection and obtain access. The rule does not mandate that the artifact collection will be transmitted to the repository at the end of Phase I survey.

Rather, N.J.A.C. 7:4- 8.4(c)6 requires the archaeologist to make provisions for the permanent curation of the artifact collection and records which includes contacting the receiving institution to ascertain its requirements for artifact preparation. The

Department anticipates that the transmission of the artifact collection to the artifact repository would occur after all phases of archaeological survey are completed.

Justifying the use of a different artifact repository other than the New Jersey State Museum is not a new requirement. When a repository other than the New Jersey State Museum is chosen to house the artifact collection, it is necessary to demonstrate that it meets the Secretary of the Interior's Standards for Curation, 36 C.F.R. Part 79 in order to satisfy the requirements of the rules under which a permit is being sought. For example, N.J.A.C. 7:7E-3.36(d) requires professional procedures and reports of architectural and archaeological survey meet the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, which include satisfying the requirements of 36 C.F.R. Part 79. If a CAFRA permit is being sought, it is necessary for applicant to demonstrate that the artifacts are being curated in accordance with these standards.

Because economic and other considerations change regarding the appropriateness of

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other curation facilities, the Department reviews potential alternate repositories on a case by case basis rather than providing a pre-qualified list.

82. COMMENT: N.J.A.C. 7:4-8.5(19)vi requires a discussion of how the proposed curation facility meets the standards specified at 36 C.F.R. Part 79. Are there any curation facilities in New Jersey other than the New Jersey State Museum that meet the requirements of 36 C.F.R. 79? (5)

RESPONSE: Many New Jersey and other repositories meet the Secretary of the Interior's Standards for Curation. Alternate curation facilities may include universities and larger historical societies. It is necessary to contact respective repositories in order to determine the policies of each for accepting and accessioning collections, since their varying missions, policies, locations within the State, and other factors will affect curatorial facility decisions regarding acceptance of collections.

83. COMMENT: N.J.A.C. 7:4-8.5(a)20ii requires the inclusion of a section on the interpretation of the results of a survey. Archaeological survey reports are written for professional audiences and not as academic or educational exercises. Discussion of the reliability or appropriateness of survey methods is unnecessary, particularly when many of the methods and strategies are prescribed by the review agency itself. (9)

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RESPONSE: For the reasons expressed in the response to comment 77 above, the Department believes this requirement is both necessary and appropriate.

84. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)21 requires "an evaluation of National Register eligibility of all sites identified during the survey." This information should be defined as a requirement for Phase II reports as eligibility is now conducted during the Phase II level of archaeological investigation. This sentence should be revised to state: "Phase II archaeological survey reports shall include an evaluation of the National Register eligibility of identified properties." (1, 5, 8, 9)

85. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)22 requires that "Phase I reports shall address potential National Register eligibility." This is an inappropriate requirement for Phase I reports and should be deleted. As Phase I archaeological investigations focus on site discovery and investigation, sufficient data would be lacking to make determinations on site type and character. (1, 8, 9)

RESPONSE TO COMMENTS 84 AND 85: Evaluations of National Register eligibility for all sites identified during the survey was part of the guidance, which has been used since 1994, upon which the standards are based. While National Register eligibility is most commonly assessed during Phase II archaeological survey, it is sometimes possible to evaluate archaeological sites for their National Register eligibility at the conclusion of a Phase I survey. For example, if an artifact is found in one shovel test, and adequate

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additional radial testing does not result in the discovery of additional archaeological material, it would be possible to argue that the artifact represents an isolated find, and does not constitute a National Register eligible site. Moreover, if an artifact is discovered in a shovel test, and additional testing demonstrates the presence of modern disturbance at deeper levels than the original find across the project site, it would be possible to argue that the archaeological deposits on the project site are not eligible for National Register inclusion because of a lack of integrity. As a result, N.J.A.C. 7:4- 8.5(a)22 provides for the evaluation of identified archaeological resources for inclusion on the New Jersey and National Register at the conclusion of a Phase I survey, when possible, supported by report findings and conclusions. When National Register eligibility determination is not possible at the conclusion of a Phase I survey, it is appropriate to make that determination during the Phase II level of survey.

86. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)23 requires documentation that is "sufficient to allow independent evaluations of New Jersey Register and National Register eligibility ..." The Department should further clarify the types of documentation that would be acceptable for eligibility evaluation. As proposed, the provision is vague and subjective- The Department should clarify that eligibility analysis should be done during Phase II investigation. (8, 9)

RESPONSE: N.J.A.C.7:4-8.5(a)23 requires "sufficient documentation to evaluate significance using all appropriate National Register Criteria and Criteria Considerations."

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Guidance for determining National Register eligibility is provided by the National Park Service's comprehensive bulletin series and other guidance available on the internet at:

<http://www.nps.gov/history/nr/publications/bulletins.htm> and by mail from: National Register

of Historic Places, National Park Service, 1849 C St. NW, #2280, Washington, D.C.

20240. These sources provide detailed guidance on how to document, evaluate, and nominate a wide range of historically significant site types to the National Register.

Guidance relevant to archaeology includes, but is not limited to, the following Bulletins and Forms:

[How to Apply the National Register Criteria for Evaluation \(#15\)](#)

[How to Complete the National Register Registration Form \(#16A\)](#)

[How to Complete the National Register Multiple Property Documentation Form \(#16B\)](#)

[How to Prepare National Historic Landmark Nominations](#)

[Researching a Historic Property \(#39\)](#)

[Archeological Properties](#)

[America's Historic Battlefields \(#40\)](#)

[Cemeteries and Burial Places \(#41\)](#)

[Mining Sites \(#42\)](#)

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Properties That Have Achieved Significance Within the Last Fifty Years (#22)

Properties Associated with Significant Persons (#32)

Vessels and Shipwrecks (#20)

Defining Boundaries for National Register Properties (with Appendix, Definition of National Register Boundaries for Archeological Properties) (#12 and #21)

How to Improve the Quality of Photographs for National Register Nominations (#23)

National Register Registration Form (NPS Form 10-900)

National Register Continuation Sheet (NPS Form 10-900a)

National Register Multiple Property Documentation Form (NPS Form 10-900b)

As stated in the response to comments 83 and 84 above, while National Register eligibility is most commonly assessed during Phase II archaeological survey, it is sometimes possible to evaluate archaeological sites for their National Register eligibility at the conclusion of a Phase I survey for the reasons elaborated above.

When National Register eligibility determination is not possible at the conclusion of a Phase I survey, it is appropriate to make that determination during the Phase II level of survey.

87. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)24 requires that "Reports shall contain complete information and evaluations on both horizontal and vertical extent of evaluated

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sites, if applicable.” The required evaluation is now conducted during Phase II level of archaeological investigations and thus should be included in Phase II reports. We request that this paragraph be amended to specify that this information be included in Phase II reports. (8, 9)

RESPONSE: Information regarding the known horizontal and vertical extents of evaluated sites will be different depending upon the phase of survey being reported. Because all archaeological analyses will necessarily include horizontal and vertical components, the reference to “if applicable” in this provision recognizes that the completeness of the information will vary according to the particular phase of the survey being conducted. Accordingly, the extent of the information to be supplied will depend upon the extent of information applicable to the particular phase of the survey.

88. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)25 requires National Register eligibility determinations and documentation. However, such eligibility determinations are currently done at the Phase II level of investigation and therefore, the provision should be amended to specify that this information be included in Phase II reports. (8, 9)

RESPONSE: The Department believes that it is appropriate to require that this information be supplied at any phase of the analysis if the archaeologist is asserting that the site is not National Register eligible. If that assertion is made in Phase II, the information would be supplied at that time. However, if the assertion that the site is not

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National Register eligible is made in Phase I, the information that is alleged to support the assertion must be provided to the Department at that time to allow the Department to determine if the assertion is justified.

89. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)26 requires archaeological survey reports to "identify and describe both direct and indirect impacts of the undertaking on each site identified, including depictions of identified sites on project maps." The Department should delete this requirement from Phase I reports. Discussion of direct and indirect project impacts is appropriate at the Phase II level of archaeological investigation and thus should be included with Phase II reports as it is now. (8, 9)

RESPONSE: The Department believes it is appropriate for reports for all phases of survey to include a discussion of direct and indirect impacts of the project on each site identified and include depictions of identified sites on project maps. The Department understands that information available for this part of the analysis, and thus the level of detail included, will vary depending upon the depth of analysis that has been performed at each stage, with a more thorough analysis being possible at Phase II than at Phase I and at Phase III than at Phase II. However, the Department believes that it is appropriate to include whatever information is available at the particular stage of the analysis, including Phase I, because it allows subsequent project planning to avoid or minimize impacts to archaeological resources. The guidance that has been in use since 1994, and upon which

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this standard is based, has always included the provision for such discussion of direct and indirect impacts.

90. COMMENT: Proposed N.J.A.C. 7:4-8.5(a)27 requires archaeological survey reports to include "appropriate recommendations for each site, including ... no further work, additional investigations, data recovery, avoidance, and mitigation as well as specific tools, methods, and analyses recommended for achieving these goals." The Department should amend this provision to recognize the recommendations that can be made at Phase I versus Phase II. Phase I reports should include recommendations for no further work and additional investigations. However, only Phase II reports would contain recommendations for data recovery, avoidance, and mitigation as they do now. (8, 9)

RESPONSE: This provision is applicable to all phases of archaeological survey reporting. Accordingly, the examples provided of the types of recommendations that may be made include examples of recommendations that may be appropriate at some phases, but not others. As these are simply examples of possible recommendations and several of the recommendations may be made a more than one phase, the Department does not believe it is necessary to attempt to identify which type of recommendation may be made at each phase.

N.J.A.C. 7:4-8.6 Standards for architectural survey reports

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91. COMMENT: Proposed N.J.A.C. 7:4-8.6 focuses primarily on formatting, structure and general content for architectural survey reports. The Department also should include in N.J.A.C. 7:4-8.6 guidelines on how to conduct architectural surveys and the substance of what is required as such information would better inform how determinations will be made. (8)

RESPONSE: Appendix 2 contains guidance on the completion of survey documentation. The Department believes that this guidance will provide a framework for those preparing architectural survey reports which, in conjunction with professional judgment, will allow preparers, in consultation with Historic Preservation Office staff, to tailor the requirements to the many circumstances and varying situations that can be applicable to a particular analysis. Additional guidance on how to conduct architectural surveys is provided by the Department in the *Guidelines for Architectural Survey* on the Historic Preservation Office website at <http://www.state.nj.us/dep/hpo/1identify/survarcht.htm>.

92. COMMENT: N.J.A.C. 7:4-8.6(a) li., iii., and viii. provide requirements for the materials on which an architectural survey report is submitted. The term hard-covered binder should be defined and acceptable materials listed. Similarly, the term bond paper should be defined and acceptable weights and fiber contents listed. The term "adequately durable" is vague and subjective terminology. Standards for "durable materials" should be specified by product types. (9)

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RESPONSE: As more fully detailed in the response to comment 67, the intention of this provision is to assure that reports are durable enough to withstand regular use in the Historic Preservation Office's report collection. The Department does not believe further definition of these commonly used terms is necessary.

93. COMMENT: At proposed N.J.A.C. 7:5-8.6(a)l, the Department requires citation and writing styles different from those proposed at N.J.A.C. 7:4-8.5. Specifically, architectural survey reports are proposed to require citations based on the "Chicago Manual of Style" whereas archaeological survey reports must contain "a sources/references cited section" based on the "SAA Journal Style Guide." Further, in proposed N.J.A.C. 7:4-8.6(a)liv, the Department proposes that citations should adhere to the format of the "Chicago Manual of Style, and should be included as "footnotes" rather than "endnotes or parenthetical references." The proposed formal requirements for citations (i.e. use of footnotes instead of endnotes or parenthetical references) are commonly used in professional journals and are not widely used in cultural resource management reports in other states. Very few reports are published in professional journals. The proposed formal distinctions for archaeological survey reports from architectural survey reports are confounding and serve no apparent purpose from a regulatory perspective. However, consulting professionals would expend significant effort and time to comply with such differing format requirements. This would increase the costs for report preparation, which then would be passed on to applicants. The

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Department should adopt the SAA Journal Style Guide that is now commonly used for the citation and writing style format for all of its required reports. (8)

RESPONSE: The proposed rule represents a codification of the requirements outlined in the *Guidelines for Architectural Survey* and the *Guidelines for Preparing Cultural Resource Management Archaeological Reports submitted to the Historic Preservation Office* which have been in use since 1999 and 1994 respectively. Because these standards have co-existed for the past nine years, and the regulated community has in general been in compliance with their requirements, no additional cost implications are anticipated. The *Guidelines for Architectural Survey* were developed, peer reviewed, and approved by a committee of individuals representing the New Jersey Department of Transportation, the Pinelands Commission, the New Jersey Coastal Heritage Trail, the Somerset County Planning Board, NJ Transit, Preservation New Jersey, Union County, the United States Army Corps of Engineers, as well as several private consulting firms of varying size. The choice to use the *Chicago Manual of Style* was based on common academic practice in the historic preservation field. It would be inappropriate to adopt the Society for American Archaeology Style Guide for the citation and writing style format for architectural survey reports because there is a disciplinary distinction in the use of background context information to evaluate archaeological versus architectural properties. The chief difference is that application of National Register Criterion D to archaeological sites requires that the standard of new significant information is yielded or has been yielded by an archaeological site, requiring all professionals to have in-depth

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knowledge of a standard body of academic literature, hence, the truncated citation format.

Whereas, in the application of National Register criteria dealing with broad patterns of our nation's history, the significance of individuals at both state and local levels, and the complete history of American architecture, both high style and vernacular, and encompasses a breadth of resources that no one could maintain an in-depth knowledge of, requiring the fuller citation format.

94. COMMENT: Proposed N.J.A.C. 7:4-8.6(a)7ii and iii respectively require descriptions of the "surrounding natural environment" and "surrounding built environment." In order to maintain consistency in submissions, the Department should quantify these environments in terms of range or area from a proposed undertaking. (8, 9)

RESPONSE: The descriptions required at N.J.A.C. 7:4-8.6(a)7 are specifically tied to the "area of the undertaking's potential impact" which is defined at N.J.A.C. 7:4-1.3. It is not appropriate to quantify these environments in terms of a range or area since the area of the undertaking's potential impact is project specific. The rule has to be general enough to accommodate a range of project types. For example, in either a heavily urbanized area with tall 8-story or larger buildings, or in a ravine, the area of the undertaking's potential impact would be confined due to shortened sight lines narrowing the area that could be adversely impacted by visual effects resulting from the proposed project. Whereas, the same type of project conducted in a flat, open marshland would

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have a much broader area that could be adversely impacted by visual effects resulting from the proposed project.

95. COMMENT: There is a conflict between section N.J.A.C. 7:4-8.6(a)9 and N.J.A.C. 7:4-8.6(a)13. Proposed N.J.A.C. 7:4-8.6(a)9 indicates that a complete set of Architectural Survey Forms should be included-with the report as an Appendix. However, proposed N.J.A.C. 7:4-8.6(a)13 does not include the Architectural Survey Forms among the listed appendices. The Department should make these subsections consistent. (8, 9)

RESPONSE: The appendix referred to in N.J.A.C. 7:4-8.6(a)9 is Appendix 2 of the proposed rule, not a required appendix to a submitted survey report. The Department agrees that the architectural survey forms should be included as an appendix to the report. Therefore, the Department is amending this rule at N.J.A.C. 7:4-8.6(a)13v to clarify this.

96. COMMENT: Proposed N.J.A.C. 7:4-8.6(a)13i requires as an appendix the "request for proposal (RFP) or scope of work statement for the undertaking." This is normally done for government agencies but not in the context of private projects. The Department should specify that this requirement is not applicable for private projects. (8)

RESPONSE: The requirement for including a request for proposal or scope of work statement in the survey report was in the original guidance document upon which these

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rule are based. It has always been applicable to all submissions regardless of sponsor, and provides readers of the report with a clear understanding of the context in which the report was prepared. Therefore, it is not appropriate to amend the requirement, as suggested by the comment.

N.J.A.C. 7:4-8.7 Standards for combined archaeological and architectural survey reports

97. COMMENT: The combined archaeological and architectural survey report outline described in N.J.A.C. 7:4- 8.7(a) does not appear sufficient and complete for the majority of Phase I investigations that combine both the archaeological and architectural survey. Several sections pertinent to archaeological investigations as outlined in N.J.A.C. 7:4-8.5(a) are abbreviated in N.J.A.C. 7:4-8.7(a) without explanation as to why the information is not required in the combined report. Notably, the prehistoric cultural history, land use history, and the research objectives and theoretical context sections are not required in the combined format. Overall, this product seems geared toward the investigation of a single historic property that is associated with an archaeological deposit. The majority of combined investigations survey broad areas where multiple architectural and archaeological resources may be identified. This paragraph should be clarified to define under what circumstances the combined report with its abbreviated archaeological investigations reporting is acceptable. (1, 9)

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RESPONSE: The combined architectural and archaeological reporting standards were developed in response to requests from consultants for guidance regarding the formatting and structure of reports produced for surveys identifying both architectural and archaeological resources. Within each discipline, there are different standards that are used for the formatting and structure of publications. The intent of these standards is to facilitate the reporting of surveys identifying both archaeological and architectural resources by creating a uniform standard for reporting. As such, many of the sections specifically noted in the archaeological reporting standards at N.J.A.C. 7:4-8.5 have been subsumed under other sections of the combined reporting standards at N.J.A.C. 8.7. For example, prehistoric cultural history, land use history, and theoretical context sections are part of the requirement for a narrative history specific to the historic of the area of the undertaking's potential impact and the properties it contains specified at N.J.A.C. 7:4-8.7(a)9ii. Likewise, research objectives are part of the requirement specified at N.J.A.C. 7:4-8.7(a)7i. These requirements are not abbreviated. Reports must still meet the standards for sufficiency specified under N.J.A.C. 7:4-8.7(a). It is expected that, in order to meet this standard, topics such as prehistoric cultural history, land use history, research objectives, and theoretical context will be included in an acceptable report document.

98. COMMENT: N.J.A.C. 7:4-8.7(a)li., iii., and ix. provide requirements for the materials on which an archaeological survey report is submitted. The term hard-covered binder should be defined and acceptable materials listed. Similarly, the term bond paper should be defined and acceptable weights and fiber contents listed. The term "adequately

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durable" is vague and subjective terminology. Standards for "durable materials" should be specified by product types. (9)

RESPONSE: As more fully detailed in the response to comment 67, the intention of this provision is to assure that reports are durable enough to withstand regular use in the Historic Preservation Office's report collection. The Department does not believe further definition of these commonly used terms is necessary.

99. COMMENT: At proposed N.J.A.C. 7:4-8.7(a)iv, the Department states that citations in combined archaeological and architectural survey reports should adhere to the format of the *Chicago Manual of Style*. More surveys involve combined architectural and archaeological studies than archaeology alone. As a result, most survey reports would be required to use the Chicago Manual format in footnote style that HPO favors for architectural studies. Very few reports are published in professional journals. Converting to this style would entail a great deal of time and effort and would increase costs, especially in light of the fact that many cultural resource consultants use the Society of American Archaeology ("SAA") format for all reports. The Department should not adopt the Chicago Manual of Style format. (8)

RESPONSE: It is not true that more surveys involve combined architectural and archaeological studies than archaeology alone. In fact, review of accessioned reports on file at the Historic Preservation Office indicates that 55% of the total collection is

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comprised of reports addressing solely archaeology, compared to 8% that address both architecture and archaeology. Further, use of the *Chicago Manual of Style* will not substantially increase the time and effort needed to prepare reports because there is a requirement that these reports be authored by someone who meets the Secretary of the Interior's Professional Qualifications Standards in the disciplines of history and/or architectural history. Furthermore, for the reasons specified in the response to comment 92, these authors should have proficiency in the use of the *Chicago Manual of Style* acquired through their academic training.

100. COMMENT: N.J.A.C. 7:4- 8.6 and N.J.A.C. 7:4- 8.7 require that sources and references for archaeological survey reports use American Antiquity as published in the "SAA Journal Guide," while sources and references for architectural survey reports and combined archaeological and architectural survey reports should use the *Chicago Manual of Style*. As evidenced by the lengthy report outline for various reports that is proposed to be codified in the Rules, it appears that it is the intent of the SHPO to establish consistency in reporting standards. This same consistency should be applied to sources and references used in all reports to be submitted to the SHPO. Either American Antiquity or the *Chicago Manual of Style* should be selected as the required style guide for *all* reports, not both.

Since it is current practice to follow American Antiquity for both archaeological and architectural survey reports, a grandfather clause should be included in the Rules if the *Chicago Manual of Style* is chosen as the required style guide for all reports. The

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grandfather clause should include a provision that the preparer of a cultural resources report (archaeology, architecture, or both) can submit the report in American Antiquity format if the project for which the report is to be prepared or was prepared had been awarded to the preparer of the report prior to the date of the formal adoption of the Rules. However, the archaeology reports should always be prepared in American Antiquity format. (5)

RESPONSE: As stated in the response to comment 92, there is a justified disciplinary reason for making the distinction in the citation format in the reporting standards. The Department chose to require one citation format for combined reports to avoid confusion that would be caused by the use to two different citation formats within one report. The *Chicago Manual of Style* citation format was chosen for combined reports because, of the two reporting formats, it provide the most detailed information necessary to understand the work that has been done to evaluate historic properties in their appropriate historic context. As required by N.J.A.C. 7:4- 8.5, archaeological survey reports will require the use of American Antiquity format, as suggested by the commenter. Because cultural resource consulting firms preparing combined architectural and archaeological survey reports have qualified architectural historians and historians on staff who should be familiar with the requirements of the *Chicago Manual of Style* format, the Department does not anticipate that these firms will have great difficulty changing the citation format for reports that have not been submitted to the Department prior to the effective date of

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these rules. Therefore, the Department does not believe it is necessary to include a grandfather clause as suggested by the commenter.

101. COMMENT: Proposed N.J.A.C. 7:4-8.7(a)lv states that citations should be included as "footnotes" rather than "endnotes or parenthetical references." In addition, proposed N.J.A.C. 7:4-8.7(a)5i states that all graphic titles should follow the "Chicago Manual of Style." The proposed report format requirements (i.e. citations, use of footnotes in place of endnotes or parenthetical references') are inappropriate and excessive in the current regulatory context. The Department should adopt the SAA format for all of its required reports. (8)

RESPONSE: As stated in the response to comment 92, there is a disciplinary rationale for requiring different citation formats for archaeological reports and architectural reports. As such, it is not appropriate to adopt the Society for American Archaeological Style Guide for all reports.

102. COMMENT: Proposed N.J.A.C. 7:4-8.7(a)2ii requires a two-page "Management Summary" as part of combined archaeological and architectural survey reports. Requiring Management Summaries for larger projects is acceptable, but this is unnecessary for smaller projects and should not be universally imposed on all projects. In addition, limiting the Management Summary to only two pages would be insufficient particularly for large projects. (8)

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RESPONSE: The information provided in the required management summary is equally important for both large and small projects. The management summary has both immediate regulatory benefit and long-term research benefit. In a regulatory context, it provides the report reviewer with a guide to the report content and findings which facilitates the review process. In the long-term, the management summary can be an effective tool for researchers, helping them to focus their time and efforts on resources germane to their research problem. Two pages is sufficient to include the necessary elements of a management summary, as specified at N.J.A.C. 7:4- 8.6(a)2ii, and achieve the goals for which it was intended, regardless of project size and complexity.

103. COMMENT: Proposed N.J.A.C. 7:4-8.7(a)8iii requires a description of the "surrounding built environment." The Department should quantify the built environment in terms of range or area from a proposed undertaking. (8, 9)

RESPONSE: As more fully detailed in the response to comment 93, the Department believes that defining the area of the built environment in terms of geographic range would be inappropriate as the area of the built environment can vary widely depending upon project specific factors including the nature of the project, the topography of the project site and the setting of the project site.

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104. COMMENT: There is an inconsistency between N.J.A.C. 7:4-8.7(a)10i and N.J.A.C. 7:4-8.7(a)16. Proposed N.J.A.C. 7:4-8.7(a)10i indicates that a complete set of Architectural Survey Forms should be included with the report as an Appendix. However, proposed N.J.A.C. 7:4-8.7(a)16 does not include the Architectural Survey Forms among the listed appendices. The Department should make these provisions consistent. (8, 9)

RESPONSE: The appendix referred to in N.J.A.C. 7:4-8.7(a)10i is Appendix 2 of the proposed rule, not a required appendix to a submitted survey report. The Department agrees that the architectural survey forms should be included as an appendix. Therefore, the Department is amending the rule at N.J.A.C. 7:4-8.7(a)10i and N.J.A.C. 7:4-8.7(a)16v to clarify this.

105. COMMENT: Proposed N.J.A.C. 7:4-8.7(a)11 requires an "archaeological artifact analysis" that includes, among other things, the "draft deed of gift form" and "copies of all project records and files." The meaning of this section should be clarified. It is not clear if the intent of this section is to require that the analysis section provides the name and location of the artifact repository and for copies of all survey records and files be appended to the report rather than being incorporated into the body of the report. These required documents should be included as an appendix rather than within the main body of the artifact analysis section. Copies of survey files and records are not appropriate to

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include within the body of a report designed to summarize a data collection and information analysis effort. (8, 9)

RESPONSE: The intent of this provision of the rule is to require a discussion of the name and location of the repository for both the artifact collection and the copies of all survey records and files as well as a discussion of the draft deed of gift form if one was used. The draft deed of gift form itself should be included as an appendix to the report. The Department is clarifying this provision on adoption to reflect this intention. Particularly, N.J.A.C. 7:4-8.7(a)11v has been corrected to state that the Archaeological Artifact Analysis shall include: “(t)he name and location of the repository for the artifact collection and copies of all survey records and files, and reference to the draft deed of gift form (with the draft deed of gift form appended);”.

106. COMMENT: Proposed N.J.A.C. 7:4-8.7(a)11v requires the combined archaeological and architectural survey reports to include "how the proposed curation facility meets the Secretary of the Interior's Standards for Curation ..." The proposed discussion on curatorial facilities should occur at the planning process of Phase II as is done now, rather than the research design planning of Phase I that is applicable at this provision. During the Phase I stage, the size and character of an artifact collection are not yet defined and thus this discussion would not contribute to meaningful determinations of the adequacy of curation facilities. Assessment of the adequacy of alternative

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repositories cannot be accurately determined during Phase I research design planning. (8, 9)

RESPONSE: It is not too early at the Phase I level to plan for the disposition of possible discoveries. By contacting the potential receiving institution in advance of work, provision can be made to ensure that this aspect of the project will meet the Secretary of the Interior's Standards for Curation. Contacting potential receiving institutions in advance of work contributes to professional planning for appropriate treatment of artifacts that may be discovered during survey by determining in advance the standards and requirements of a potential receiving institution, and also allows the location where the collection will be housed at the conclusion of phased survey and agency review to be identified in the survey reports, as stated in N.J.A.C. 7:4-8.5 (a) 19.iv. Identification of the location of the artifact collection allows individual researchers needing access to the artifact collection to determine the location of that collection and obtain access. If, after Phase II or subsequent survey there is a need to change the proposed curatorial facility identified after Phase I survey or to select an additional curatorial facility, the new or additional facility should be identified in the survey report(s) for the subsequent phases of survey.

107. COMMENT: Proposed N.J.A.C. 7:4-8.7(a)12 requires "an evaluation of the New Jersey and National Register eligibility of all archeological sites identified during the survey." The Department should recognize the distinction of work completed during the

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different phases of an archaeological investigation- The specified evaluation is normally conducted during the Phase II level of an archaeological investigation. Therefore, the subsection should be revised to clarify that this evaluation should be included with Phase II reports. (8, 9)

RESPONSE: As more fully detailed in the response to comments 83 and 84, there are circumstances where it is possible to evaluate archaeological sites for their National Register eligibility at the conclusion of Phase I survey. When National Register eligibility determination is not possible at the conclusion of a Phase I survey, it is appropriate to make that determination during the Phase II level of survey.

N.J.A.C. 7:4-8.8 Standards for an alternatives analysis for buildings meeting National Register of Historic Places criteria

108. COMMENT: The new provision at N.J.A.C. 7:4-8.8 sets forth the procedures for conducting an alternatives analysis to determine whether an alternative to a proposed undertaking is available which will result in lesser impacts to architectural resources. Proposed N.J.A.C. 7:4-8.8(a) requires that the alternatives analysis submitted be sufficient to enable an identification and evaluation of all alternatives to a proposed project that will avoid or minimize the encroachment to a subject building(s) in the area of the undertaking's potential impact. Although the term "architectural resources" is not defined in either the existing rules or the proposal, the existing regulations at N.J.A.C.

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7:4-1.3 define the term "building" as "a structure created to shelter any form of human activity." The term "architectural resources", however, would seem to be broader than the term "building" and include other structures, i.e. bridges, not just those structure created to shelter human activity. The Department should clarify on adoption whether the term "architectural resources" is intended to be synonymous with the term "building." If it is not, the Department should amend the rules on adoption to make clear that the requirements of the alternatives analysis set forth at N.J.A.C. 7:4-8.8 applies to all architectural resources. Moreover, to the extent that the Department is authorized to do so, it should consider expanding the scope of these new provisions to include an alternatives analysis for impacts to all cultural/archeological resources, not just architectural resources. (10)

RESPONSE: As indicated by the title of the subchapter and the use of the term building in subsections N.J.A.C. 7:4-8.8(a)1 through N.J.A.C. 7:4-8.8(a)6, the Department did intend that the use of the term "architectural resource" to be synonymous with the term "building." In order to clarify this point, the Department has changed the term architectural resource to building in N.J.A.C. 7:4-8.8. The Department will consider expanding the use of the alternatives analysis in the next re-adoption process.

109. COMMENT: In the sections providing background about the proposed N.J.A.C. 7:4-8.8 alternatives analysis report, the Department states that these requirements "were developed, peer reviewed, and approved by a committee of individuals representing ...

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the New Jersey Builder's Association ..." We are surprised to team of our involvement as this is the first time we are learning that formalized discussions were held on alternatives analysis reporting. We do not recall having a designated representative participate in these discussions. However, those who attended the *one meeting* find that the above statement grossly overstates the extent of the discussion, particularly in implying that consensus was reached on an acceptable report. (8)

RESPONSE: A representative of the New Jersey Builder's Association attended the alternatives analysis meeting on January 27, 2006. The representative was given a draft copy of the Alternatives Analysis prior to the meeting date for discussion among members of the Association. At the January 27, 2006 meeting, there was open dialogue between all attendees. The Historic Preservation Office received numerous comments from participants in the meeting through December 19, 2007. The New Jersey Builder's Association did not choose to participate further in the development of the Alternatives Analysis.

110. COMMENT: Proposed N.J.A.C 7:4-8.8 requires an alternatives analysis where a proposed undertaking would adversely impact an architectural resource. The regulation suggests that the Department would request such alternatives analyses pursuant to its authority under the Coastal Zone Management Rules (N.J.A.C. 7:7E), Freshwater Wetlands Protection Rules (N.J.A.C. 7:7A), the New Jersey Register of Historic Places Rules (N.J.A.C. 7:4-7.2), or the Highlands Water Protection and Planning Act Rules

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(N.J.A.C. 7:38). Although the Department's reference to those four programs presumably means that an alternatives analysis under proposed N.J.A.C 7:4-8.8 would be required where a permit from the Department is necessary under one (or more) of the programs, it would be helpful for the Department to clarify this point. In that regard, the Department may not impose a generic requirement for such alternatives analysis with respect to architectural resources unless the statutes on which the Department relies authorize such a requirement. In fact, the Department's guidelines, "Alternatives Analysis Outline for Protecting Buildings," which provide the basis for proposed N.J.A.C. 7:4-8.8, state that "documentation of [alternatives analysis] in accordance with this outline is only necessary when requested by the Historic Preservation Office as part of a specific regulatory process." It is also noted that in many situations proposed N.J.A.C. 7:4-8.8 would be unnecessary and redundant given that the statutes which underlie the regulation's alternatives analysis requirement already contemplate consideration of alternatives. (6)

RESPONSE: The alternatives analysis provides applicants with a clear understanding of how to meet the requirements of the specified sets of rules when alternatives analyses are required by those rules. The rules for the New Jersey Register of Historic Places Act specifically require analysis of alternatives, pursuant to N.J.A.C. 7:4-7.2(e)4i.

The Highlands Water Protection and Planning Act Rules, at N.J.A.C. 7:38-3:10 h. states that the Department shall not issue a Highlands Preservation Area Approval unless

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the applicant demonstrates that the proposed regulated activity would result in minimal practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes at the site and within the surrounding region. The alternatives analysis is the tool that demonstrates that the project meets the threshold of resulting in minimal practicable degradation of historical or archaeological areas, and therefore qualifies for a Highlands Preservation Area Approval.

The Coastal Area Facilities Review Act, at N.J.S.A. 13:19-10g. states that a permit may be issued pursuant to that act only upon a finding that the proposed development would result in minimal practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes at the site and within the surrounding region. Again, the alternatives analysis is the tool that demonstrates that a project would meet the threshold of resulting in minimal practicable degradation of historical or archaeological areas, and therefore qualify for a CAFRA permit.

The Freshwater Wetlands Protection Rules, at N.J.A.C. 7:7A-4.3(b)5, require that the activity shall not adversely affect properties which are listed or are eligible for listing on the New Jersey or National Register of Historic Places unless the applicant demonstrates to the Department that the proposed activity avoids or minimizes impacts to the maximum extent practicable or the Department determines that any impact to the affected property would not impact the property's ability to continue to meet the criteria

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for listing at N.J.A.C. 7:4-2.3 or otherwise negatively impact the integrity of the property or the characteristics of the property that led to the determination of listing or eligibility.

The alternatives analysis is the tool that demonstrates that a project meets the threshold of avoiding or minimizing impacts to properties listed or eligible for listing on the New Jersey or National Registers of Historic Places to the maximum extent practicable.

111. COMMENT: Proposed N.J.A.C. 7:4-8.8(a) states that "where a proposed undertaking will have an adverse impact to an architectural resource(s), an alternatives analysis will be requested by the Department." The proposed requirements for an alternatives analysis are very extensive, onerous and confusing and should be simplified for clarity. The proposed rules also do not provide any standards or criteria for evaluation of alternatives analyses. (8)

RESPONSE: N.J.A.C. 7:4-8.8 was developed to outline the necessary aspects of an acceptable alternatives analysis for a broad range of projects and buildings. This rule reflects the Department's recognition that alternative analyses must vary in scope and detail depending on the size and complexity of the project, and on the type and severity of impact a project has on a historic property. More specific guidance is available on the Historic Preservation Office's website at http://www.state.nj.us/dep/hpo/4sustain/protect_buildings.pdf. The information required by N.J.A.C. 7:4- 8.8 allows for both quantitative and qualitative evaluation of the alternatives analysis by Historic Preservation Office staff. The Department did not intend

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for the alternatives analysis to examine the universe of alternatives to a project that has an adverse effect. Rather, the focus of the analysis should be on the comparative viability of those alternatives that preserve the resource or reduce the impact on the resource.

112. COMMENT: Although federal projects require such analyses, this requirement has not been the Department's standard practice. The Department should explain how the proposed requirement differs from current policy and the basis for requiring this for buildings meeting National Register of Historic Places criteria. (8)

RESPONSE: The Department does, as standard practice, receive alternatives analyses. The proposed alternatives analysis codifies existing practice, and clearly establishes the required elements of an alternatives analysis. The legal bases for the requirement to develop an alternatives analysis are addressed in the response to comment 109 above.

113. COMMENT: Clarification should be provided as to which impacts would constitute an "adverse impact", as referenced in N.J.A.C. 7:4-8.8(a), including whether this refers to any degree or type of impact. For example, would a finding of an adverse visual effect trigger an alternatives analysis? (8)

RESPONSE: The criteria for evaluating the potential for effects and impacts to historic properties are referenced in N.J.A.C. 7:4-8.3(b). The Historic Preservation Office reviews projects for conformance with both the *Secretary of the Interior's Standards and*

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Guidelines for Archeology and Historic Preservation and the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (both available from the Historic Preservation Office by mail at P.O. Box 404, Trenton, NJ 08625 or on the website at www.state.nj.us/dep/hpo). As the agency responsible for administering the Federal historic preservation program in New Jersey, and to maintain consistency between the regulatory processes in which the office has a role, the Historic Preservation Office uses the criteria of adverse effect found at 36 CFR §800.5(a)1 of the regulations implementing Section 106 of the National Historic Preservation Act to determine whether a project will have an adverse impact on a historic property. The criteria for adverse effect at 36 CFR §800.5(a)1 states, "An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association...Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative."

Many visual adverse effects would not trigger the need for full alternatives analysis but rather, efforts to avoid, minimize, or mitigate visual impacts through such as activities as screen plantings. Visual adverse effects that threaten or severely compromise the setting of a historic property, however, would require an alternatives analysis. At the point in one of the State review processes where alternatives analysis would be requested, the project will already be under review by the Historic Preservation

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Office, and as stated in the rule, guidance regarding the need to undertake an alternatives analysis will be provided by the Department.

114. COMMENT: Proposed N.J.A.C. 7:4-8.8(a)3iii requires "an existing conditions assessment prepared by a historic architect" where a complete demolition is proposed. The existing conditions assessment does not require such analysis or specific knowledge that would necessitate the involvement of a historic architect. The Department should permit the existing conditions assessment to be completed by other qualifying professionals. (8)

RESPONSE: The requirements for Architects and Engineers who are qualified to evaluate the safety and usability of buildings are already specified under N.J.A.C. 7:4-7.1(d). N.J.A.C. 7:4-8.8(a)3iii add the training and/or experience requirements necessary to evaluate historic structures. The rule recognizes that historic construction methods differ dramatically from more modern construction methods. As a result, the additional training and specialized experience required in the rule is necessary to ensure that the professional performing the existing conditions assessment contemplated by this section of the rule can understand and evaluate methods of construction which are no longer in common use.

115. COMMENT: Proposed N.J.A.C. 7:4-8.8(a)5i requires "a reasonable number of prudent and feasible alternatives commensurate with the effect of the foreseeable

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impacts" to be developed. The Department should specify what would be considered to be "a reasonable number" or "prudent and feasible." Further, the Department should delineate the standards that would be applied to determine which of the presented alternatives would be deemed reasonable. (8)

RESPONSE: The Department considers four alternatives to be a reasonable number based upon previously developed standards for developing alternatives analyses at N.J.A.C. 7:38-3.10(h). One of the four alternatives must include preservation or rehabilitation of the existing building, either through adaptive use or by sensitive incorporation of the historic building into the proposed site development. Alternatives must have the potential to be reasonably implemented, and be substantially different from each other to provide genuine alternatives for analysis. The rule includes references to the Standards for Rehabilitation 36 CFR 68.3(b), the Standards and Guidelines for Archaeology and Historic Preservation (Federal Register, Volume 48, No. 190), incorporated by reference at N.J.A.C. 7:4- 8.3(b), and the Rehabilitation Subcode, N.J.A.C. 5:23-6, incorporated by reference at N.J.A.C. 7:4- 8.8(a)4i. N.J.A.C. 7:4- 8.8(a)1v, N.J.A.C. 7:4- 8.8(a)3ii, N.J.A.C. 7:4- 8.8(a)3iii, and N.J.A.C. 7:4- 8.8(a)5i, and N.J.A.C. 7:4- 8.8(a)6i recognize that project circumstances may vary and that an alternatives analysis must be tailored to a specific project and project impact. As such, the rule allows latitude for the use of professional judgment in the development of project alternatives. In addition, N.J.A.C. 7:4-8.8(a)1v and N.J.A.C. 7:4- 8.8(a)6 of the rule

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differentiate between the standard of what is reasonable for a public project and a private project.

116. COMMENT: Proposed N.J.A.C. 7:4-8.8(a)6 requires the analysis to be "detailed and rigorous" in order "to permit independent comparative evaluation of the benefits, costs, and environmental risks..." The proposed rules further require an "understanding of the economic parameters that would prohibit the owner from realizing a return on investment" for private projects. The Department should identify which office within the Department (or HPO) would be making this determination concerning the economic feasibility of projects and their qualifications to do so. Where there is a dispute concerning economic feasibility, the Department should outline the approach for reaching an agreed upon determination. Further, where it is demonstrated that a "reasonable rate of return" would not be obtained for adaptively reusing the building, the Department should state whether the building would then be permitted to be demolished. (8)

RESPONSE: The consideration of costs, benefits, and environmental consequences is always part of the Department's review of a project when consideration of impacts to historic and archaeological resources is required. Economic parameters are in the rules to ensure the Department receives adequate data upon which to make a decision. In the past, the Department has not received sufficient analyses of economic parameters of a project to inform decision making. Given that, analysis of economic parameters is only one component of the analysis of the appropriateness of the preferred alternative. It must

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be balanced against historic, architectural, engineering, cultural, and social values. It must also be made in consideration of issues including code and public safety. Outlining an approach for reaching consensus regarding economic feasibility is beyond the scope of the rule. Lastly, it is inappropriate for the Department to specify whether a building would be permitted to be demolished if it is demonstrated that a "reasonable rate of economic return" would not be obtained for adaptively reusing the building. Making this suggested specification in the rule incorrectly assumes that demolition is an objective of every proposed project.

117. COMMENT: Proposed N.J.A.C. 7:4-8.8(a)6ii refers to "investment tax credits" as a "financial benefit." The inclusion of tax credits in the analysis is inappropriate as such opportunities are so rare to be non-existent. We request that the Department delete the reference to "investment tax credits" from proposed N.J.A.C. 7:4-8.8(a)6ii. (8)

RESPONSE: The opportunities for Historic Rehabilitation Tax Credits, also known as Investment Tax Credits are neither rare nor non-existent. In 2007, New Jersey was ranked the eighth state in the nation with \$115,767,336 spent on certified expenses for the rehabilitation of income producing historic buildings. Within the last five years, 118 projects were completed and \$368,816,934 of certified expenses were spent utilizing this tax credit. It is appropriate for this financial tool to be considered in an alternatives analysis. Therefore, it is inappropriate for the reference for this program to be deleted from the rule.

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N.J.A.C. 7:4- 8.9 Standards for electronic submissions

118. COMMENT: Proposed N.J.A.C. 7:4-8.9 sets forth the standards for the submission of certain types of information electronically. Although the rules indicate that the Department will accept the electronic submission of information, they do not require it. One of the goals of this provision, as stated in the Summary, is to provide for consistency in the submission of electronic information in order to facilitate the population of the Historic Preservation Office's growing digital library, which the HPO intends to make accessible to the general public in the future. The Commission commends the Department on its efforts to accommodate and encourage the use of recent developments in computer, mapping and photographic technologies. The Commission suggests, however, that the Department consider mandating the submission of digital mapping, if feasible, in order to better achieve its goal of populating its digital library and to ensure consistency and archival stability, which are additional goals that the Department hopes to achieve through this rule proposal. (10)

RESPONSE: The Department acknowledges the comment in support of using of new technologies. Electronic submissions are called for as applicable in the preceding subchapters, where they are in fact required when referenced. The electronic submission standards outlined at N.J.A.C. 7:4-8.9 are simply intended to provide the minimum sufficiency for electronic submissions in support of those requirements.

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119. COMMENT: The requirements at proposed N.J.A.C. 7:4- 8.9(a)2 should be clarified as to the items and formats to be submitted. Specific clarification is required as to whether both a CD-R with an exact duplicate of the hard copy (including photo plate images) and a second CD-R with digital photo plate images are required. (8)

RESPONSE: When required, both the PDF version of the report and discrete digital images are to be provided as separate digital files. All electronic submissions are to be made on CD-R media. The number of CD-R required will be dictated by the size of all of the digital files that make up the required electronic submission. Combining all digital files onto one CD-R is acceptable provided all of the data will fit, otherwise, multiple CD-R, formatted and labeled as indicated at N.J.A.C. 7:4- 8.9 will be required.

Appendix 1: Documentary and Informant Sources:

120. COMMENT: In our opinion, background research can certainly provide cost savings, but only if the archaeological field survey can target specific areas demonstrated through such research to have a high potential for resources. Background research and consultation with interested parties occur after a project is awarded thus the costs in most circumstances have already been determined and are estimated in accordance with the requirement of 17 tests per acre. (5)

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RESPONSE: The Department disagrees with the assumption archaeological testing at 17 tests per acre will identify the full range of historic properties within a project site. The Phase I testing strategy is informed and structured by appropriate background research. Therefore, minimal or subjective consultation of select sources may not identify the full range of potential historic properties within a project site. The inclusion of Appendix 1 in the rule outlines the breadth of resources that may be appropriate to consult prior to survey to identify the full range of historic properties across a project site and inform the excavation field strategy.

Agency Initiated Changes

N.J.A.C. 7:4- 8.7(a)18ii incorrectly makes reference to N.J.A.C. 7:4-8.3(d)5 when referencing the standards for digital images. The correct reference for the section addressing the standards for digital images is N.J.A.C. 7:4- 8.9(a)3. The rule has been corrected upon adoption.

N.J.A.C. 7:4- 8.5(a)9vi, N.J.A.C. 7:4-8.5(a)15, N.J.A.C. 7:4- 8.6(a)4vii, N.J.A.C. 7:4- 8.7(a)4vii, N.J.A.C. 7:4- 8.7(a)6vii, and N.J.A.C. 7:4- 8.7(a)10xii include a typographic error. These sections require the use of a 7.5-foot USGS Topographic Quadrangle. Rather, these sections should require the use of a 7.5-minute USGS Topographic Quadrangle. The rule has been corrected upon adoption.

Federal Standards Statement

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Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995 c. 65), require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards analysis.

The National Historic Preservation Act, 16 U.S.C. 470, established the National Register of Historic Places. The implementing Federal regulations for the National Register are codified at 36 CFR 600. As is the case with the New Jersey Register of Historic Places, which was established pursuant to N.J.S.A. 13:1B-15.128, the National Register functions as a permanent record of properties which are determined to have significant historical, architectural, archaeological, engineering or cultural value.

The procedures for registration of properties in the New Jersey Register are integrated with the National Register of Historic Places Program. The New Jersey and National Registers both use the same nomination criteria, nomination forms, state administrative agency (Historic Preservation Office), and State Review Board. Moreover, requirements for the submission of application information and accompanying documentation for both the New Jersey and the National Registers are essentially parallel. This integrated process is designed to avoid duplication of steps since the two programs parallel and complement each other. While the National Register regulations allow properties to be listed in the National Register if a public owner objects, they will not allow listing of a property if a private owner objects to the listing. Under New Jersey's regulations, owner objection is not a basis for rejecting a nomination for listing on the New Jersey Register of Historic Places, and therefore, may be considered more

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stringent than its Federal counterpart. However, as with the Federal Regulations, the Department's encroachment regulations do not apply to private undertakings.

The adopted amendments to the definitions in N.J.A.C. 7:4-1.3 clarify terminology used by both the Department and the Federal government. In general, the proposed amendments to N.J.A.C. 7:4-2.2, N.J.A.C. 7:4-4.1, and N.J.A.C. 7:4-5.3 reflect current practice, and are consistent with Federal regulations. However, the adopted amendments to N.J.A.C. 7:4-2.2(c)4ii. add a requirement that digital map data be included in a National Register nomination submitted to the Historic Preservation Office. This requirement is more stringent than that of the Federal regulations. This enhanced information requirement for the listing of a property on the New Jersey Register of Historic Places is necessary because it both forms the basis for the encroachment reviews performed by the Department under Subchapter 7 and is consistent with the Department's broader goal of developing comprehensive digital Geographic Information Systems data.

The Economic Impact Statement included a discussion of the anticipated costs associated with the requirement to provide digital map data using Geographic Information Systems (GIS) technology for cultural resources nominated to the New Jersey and National Registers of Historic Places. Map production is one component of the production of a National Register nomination whose cost is based on the time required to prepare the maps. While it is impossible to provide an exact cost for the creation of digital map data because the costs will vary depending upon the nature of the nominated resource, the Department does not anticipate that the addition of a requirement to provide digital map data will significantly alter the costs of producing a historic

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property nomination. The time required to produce digital map data should be roughly equivalent to the time currently required to prepare maps for a nomination. For individual properties, the National Park Service only requires mapping on an original USGS 7.5-minute topographic quadrangle, however, it is standard practice to provide a larger scale map depicting property boundaries. For any multi-component resource (including historic districts or historic complexes), the National Park Service requires a detailed map. Standard practice is to provide such maps on paper tax parcel maps. In both of these cases, the requirement for a digital map can replace this paper based detail map resulting in a negligible cost impact.

The addition of this requirement will provide a number of benefits for the preparer, the Historic Preservation Office (HPO) and HPO's constituents. First, GIS delineation of the resource will be more accurate and cost effective if completed by the preparer. The preparer of the nomination has the most relevant and timely knowledge of the spatial extent of the resource in question, and is responsible for accurately and clearly communicating that understanding in the nomination. Delineation by the HPO later in time, as is currently done for newly listed properties, increases the chance for error and misinterpretation of the boundary, and takes significantly longer. GIS based delineation will also allow the preparer to make changes to the boundary more effectively, as necessary, during the nomination process.

Second, GIS delineation during the nomination process helps ensure consistency between the narrative and graphical components of the nomination. This is particularly critical for large complex resources such as historic districts, where the inventory of

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district features and accompanying maps can be more easily cross-checked when based on GIS data, rather than on text and hard copy maps. The GIS delineation of historic property boundaries during the nomination process avoids later revisions and delay in the nomination process that result from the need to correct inconsistencies between the inventory of district features and accompanying maps.

Third, GIS delineation will enable a faster turnaround for disseminating an awareness of the resource and its extent. HPO will be able to provide access to its cultural resources inventory through NJDEP's interactive mapping applications. This is particularly relevant because inclusion in the New Jersey Register of Historic Places invokes the New Jersey Register Review process (N.J.A.C. 7:4-7) for undertakings of State, county, local government, or any instrumentality thereof, that might impact listed resources. Accurate and current data will enable better project planning and compliance with these provisions.

Fourth, in addition to the detail map referenced above, the National Register requires mapping on an original USGS 7.5-minute topographic quadrangles, which does not provide sufficient accuracy at large scales to understand the exact placement of resource boundaries relative to surrounding properties and activities. Cultural resources GIS data prepared based on the 2002 digital ortho-photos, and other GIS data ensures that cultural resources are located as accurately as possible, and enables a more precise understanding of the listing status of a given location. Further, the digital data can be represented at multiple scales for easier comparison with other map sources, while the hard-copy USGS map is fixed, and requires much manipulation to achieve a similar

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comparison. Therefore, the Department has determined that exceedance of the Federal standard is necessary in order to protect the State's historic and archaeological resources.

In comparison to Section 106 of the National Historic Preservation Act, as implemented in 36 CFR 800, the readoption with amendments is less stringent than its Federal regulatory counterpart in that the New Jersey Register of Historic Places Act only requires public agencies which are seeking to take action that may impact a historic resource to obtain Department authorization if the potentially affected resource is actually listed on the New Jersey Register of Historic Places. In contrast, the Federal act includes review of undertakings that potentially impact both listed properties and those eligible for listing. An undertaking is broadly defined as any project that could affect a historic property. Criteria employed to determine when an undertaking will have an adverse effect (i.e. will be considered an encroachment) upon a historic property are drawn from the Federal standards set forth in 36 CFR 800 et seq.

Additionally, to assess a project's impact upon cultural resources, it is incumbent upon the Federal agency, or its delegee, to identify those properties that are potentially eligible for listing in the National Register of Historic Places. Architectural or archaeological surveys may be required under the Federal requirements in order to determine whether a property is eligible for inclusion. Therefore, Federal regulatory review, by including properties that are potentially eligible for listing in the National Register of Historic Places, encompasses a larger universe of historic resources than does State review.

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With reference to review of requests for Department authorization of an undertaking that may impact a historic resource, N.J.S.A. 13:1B-15.131 requires that the Department take action on such a request (either authorize, consent or deny the request) within 120 days of receipt of the application. If action is not taken in that timeframe, the failure to act is deemed to be consent to the undertaking. In contrast, the Federal process is consultative in nature and the review period is open ended. Both State and Federal processes allow opportunity for public comment and input into the decision making.

The adopted additions to Subchapter 8 codify both existing archaeological survey and reporting guidelines, architectural reporting guidelines, and guidelines for preparing alternatives analyses. They clarify the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44716) set forth by the National Park Service, and are not more stringent than the Federal requirements.

The Department has determined that the readoption with amendments does not contain any standards or requirements that exceed the standards or requirements imposed by Federal law, except as mentioned above. With reference to those standards or requirements that do exceed those imposed by Federal law, for the reasons specified above, the Department has determined that variation from the standard is appropriate.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:4.

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Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks

[thus]):

SUBCHAPTER 2. REGISTRATION PROCEDURES AND CRITERIA

7:4-2.2 Procedure for the nomination of properties for inclusion in the New Jersey and National Registers

(a) – (b) (No change)

(c) The procedure for the nomination of property for inclusion in the New Jersey and National Registers is as follows:

1.-3. (No change from proposal)

(1) (No change.)

4. The applicant shall, as part of an adequately documented and technically and professionally correct and sufficient National Register Nomination Form, submit the following to the Department:

i. (No change from proposal.)

ii. A map that meets the standards specified in N.J.A.C. 7:4- ~~*[8.3(h)1]*~~ *8.9(a)1*

SUBCHAPTER 8. CONSULTATION WITH OTHER DEPARTMENT PROGRAMS AND OTHER NON-FEDERAL GOVERNMENTAL AGENCIES

7:4-8.4. Requirements for Phase I Archaeological Survey

(a)–(b) (No change from proposal.)

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(c) A Phase I archaeological survey shall include:

1. Background research consisting of:

i.-iii. (No change from proposal.)

iv. *For non-linear projects, and for linear projects longer than one-mile in length and greater than 100 feet in width of ground disturbance,*[A]* *a* complete deed search for the area of the undertaking's potential impact prior to conducting archaeological testing to provide information regarding historic period land use, date by which buildings were present, ethnicity of occupants, number of households or uses through time, and in some instances detailed information regarding owners' occupations, buildings, and land use, thereby providing valuable information to guide field survey;

3. A systematic archaeological field investigation, including all field methods designed so that:

i.- viii. (No change from proposal.)

ix. Machine or mechanical-assisted excavation of soil shall be treated in the same manner as manually excavated soil matrices. For example, soil cores shall be recorded stratigraphically, to the extent possible, and the soil matrices screened for artifacts. *For backhoe excavations, a sample of the soil matrices may be screened for artifacts.*

7:4-8.5 Requirements for Archaeological Survey Reports – Standards for Report Sufficiency

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(a) All archaeological survey reports submitted to the Department shall be sufficient to enable the identification, evaluation, and treatment of historic properties in the area of the undertaking's potential impact. The standard for report sufficiency will be met when the report addresses all of the items listed below.

1.-8. (No change from proposal.)

9. Archaeological survey reports shall include an introduction that contains the following:

i.-v. (No change from proposal.)

vi. The surveyed area accurately delineated on a U.S.G.S. 7.5-*[foot]* *minute* topographic map;

vii. – ix. (No change from proposal.)

10.-14. (No change from proposal.)

15. The locations of all archaeological sites identified during the survey shall be marked on U.S.G.S. 7.5-*[foot]* *minute* topographic survey map(s)

16.-18. (No change from proposal.)

19. Archaeological survey reports shall include a section on artifact analysis that provides descriptions of artifacts identified during the survey, the results of analysis of those artifacts, and the definitions of artifact classes and attributes referenced in the analysis. The artifact analysis section shall also include:

i.-iii. (No change from proposal.)

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iv. The name and location of the repository for the artifact collection *[, a draft deed of gift form, if applicable]*, and copies of all survey records and files, *and reference to the draft deed of gift form, if applicable (with the draft deed of gift form appended)*;

7:4-8.6 Standards for Architectural Survey Reports

(a) All architectural survey reports submitted to the Department shall be sufficient to enable the identification, evaluation, and treatment of historic properties in the area of a proposed undertaking's potential impacts. The standard for report sufficiency will be met when the report addresses all of the items listed below.

1.-3. (No change from proposal.)

4. Architectural survey reports shall include a Management Summary of not more than two pages in length that includes:

i.-vi. (No change from proposal.)

vii. The title(s) of the 7.5-^[foot] *minute* USGS Topographic Quadrangles(s) that corresponds to the location of the area of the undertakings potential impacts;

viii.-xiv. (No change from proposal.)

5.- 8. (No change from proposal.)

9. Architectural survey reports shall include a discussion of Field Results and *relevant* *[a completed set of]* Architectural Survey Forms *[, incorporated herein by reference as chapter Appendix 2,]* with all applicable fields completed. *The architectural survey forms are incorporated herein by reference as chapter Appendix 2.*

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10–12. (No change from proposal.)

13. Architectural survey reports shall include as Appendices:

i.-ii. (No change from proposal.)

iii. The Author(s) vitae/resume; *[and]*

iv. Information on local designation ordinances and authority *[,]* and*

v. All relevant completed architectural survey forms.

14.-15. (No change from proposal.)

7:4-8.7 Standards for Combined Archaeological and Architectural Survey Reports

(a) Where a proposed undertaking potentially impacts archaeological and architectural resources, a combined archaeological and architectural survey may be prepared. All combined archaeological and architectural survey reports submitted to the Department shall be sufficient to enable the identification, evaluation, and appropriate treatment of historic properties in the area of the potential impacts of a proposed undertaking. The standard for report sufficiency shall be met when the report addresses all of the items listed below.

1.-3. (No change from proposal.)

4. Combined archaeological and architectural survey reports shall include a management summary of not more than two pages in length that includes:

i.-vi. (No change from proposal.)

vii. The title(s) of the 7.5-*[foot]* minute USGS Topographic Quadrangle(s) that corresponds to the location of the area of the undertaking's potential impacts;

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viii.-xi. (No change from proposal.)

5. (No change from proposal.)

6. Combined archaeological and architectural survey reports shall include an

Introduction that contains the following:

i.-vi. (No change from proposal.)

vii. A section of the 7.5-^[foot] minute USGS Topographic Quadrangle(s) reproduced to scale on which the project is located with archaeological survey area delineated identifying the titles of the quadrangles on which the project site is located.

7.-9. (No change from proposal.)

10. Combined archaeological and architectural survey reports shall include a discussion of Field Results including:

i. Relevant [A completed set of] architectural survey forms [, incorporated herein by reference as chapter Appendix 2,] with all applicable fields completed. The architectural survey forms are incorporated herein by reference as chapter Appendix 2.

ii.-xi. (No change from proposal.)

xii. Locations of all archaeological sites delineated on a section of the U.S.G.S. 7.5-^[foot] minute Topographic Quadrangle(s) reproduced to scale;

xiii.-xiv. (No change from proposal.)

11. Combined archaeological and architectural survey reports shall include an Archaeological Artifact Analysis that provides descriptions of artifacts identified during

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the survey, the results of analysis of those artifacts, and the definitions of artifact classes and attributes referenced in the analysis, and shall also include:

i.-iii. (No change from proposal.)

iv. The name and location of the repository for artifact collection *[, along with a draft deed of gift form, if applicable]* , and copies of all project records and files*, and reference to the draft deed of gift form, if applicable (with the draft deed of gift form appended)*:

v. (No change from proposal.)

12.-15. (No change from proposal.)

16. Combined archaeological and architectural reports shall include the following as appendices, as applicable:

i.-vi. (No change from proposal.)

vii. Specialized analyses and deed research that were conducted as part of the survey and reporting, if applicable; *[and]*

viii. New Jersey State Museum archaeological site registration forms for all recorded archaeological sites, and New Jersey State Museum archaeological site registration form updates for all revisited archaeological sites. The New Jersey State Museum registration forms are available from the New Jersey State Museum at 205 West State Street, Trenton, NJ 08625-0530 or on the Historic Preservation Office's website at

http://www.state.nj.us/dep/hpo/1identify/njasm_siteform.pdf or at

http://www.state.nj.us/dep/hpo/1identify/njasm_siteform.doc *[,] * ; and*

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vii. All relevant completed architectural survey forms.

17. (No change from proposal.)

18. All plates included in the combined archaeological and architectural survey report shall be:

i. (No change from proposal.)

ii. Photographic prints generated from 35 mm film, or, if submitted in digital form, shall conform to the standards for digital images specified at N.J.A.C. 7:4-[8.3(h)1]
8.9(a)3;

iii.-iv. (No change from proposal.)

19. (No change from proposal.)

7:4-8.8. Standards for an Alternatives Analyses for Buildings Meeting National Register of Historic Places Criteria

(a) Where a proposed undertaking will have an adverse impact to a *[n architectural resource]* *building(s)*, an alternatives analysis will be requested by the Department pursuant to the Coastal Zone Management Rules, N.J.A.C. 7:7A, Freshwater Wetlands Protection Rules, N.J.A.C. 7:7E, The New Jersey Register of Historic Places Rules, N.J.A.C. 7:4-7.2, or the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7.38 to analyze whether an alternative to the proposed undertaking is available which would result in lesser impacts to * [architectural resources]* *buildings*. Alternatives analyses submitted to the Department shall be sufficient to enable the identification and evaluation of all alternatives to a proposed project that will avoid or minimize the

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encroachment to the subject building(s) in the area of undertaking's potential impact. The standard for analyses sufficiency will be met when the analysis addresses the items listed below.

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

Date

Lisa P. Jackson, Commissioner
Department of Environmental Protection