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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT

DIVISION OF LAND USE REGULATION

Freshwater Wetlands Protection Act rules

Proposed Amendments: N.J.A.C. 7:7A-1.7, 3.6, 10.1, 10.3, and 11.1

Proposed New Rule: N.J.A.C. 7:7A-3.7

Authorized By: Mark N. Mauriello, Acting Commissioner,

Department of Environmental Protection

Authority: N.J.S.A. 13:9B-1 et seq.

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

DEP Docket Number:

Proposal Number: PRN 2009-

A public hearing concerning the proposal will be held on Tuesday, May 12, 2009, at 2:00 p.m. at:

NJ Department of Environmental Protection
Public Hearing Room
401 East State Street
Trenton, New Jersey

Submit written comments on this proposal by (60 days after publication), to:

Janis Hoagland, Esq.
Attn.: DEP Docket No.
Office of Legal Affairs
Department of Environmental Protection
401 East State Street, 4th floor
P.O. Box 402
Trenton, New Jersey 08625-0402

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The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper in order to facilitate incorporation of submitted comments into its comment-response document. For this purpose, the comments on disk or CD should not be access-restricted (locked or read-only). The Department prefers Microsoft Word 6.0 or above. MacIntosh formats should not be used. Submission of a disk or CD is not a requirement. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

A copy of the proposal is available on paper or on disk by calling the Department at (609) 633-7021. The rule proposal can also be found at the Department's website (www.nj.gov/dep). The agency proposal follows:

Summary

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

The Freshwater Wetlands Protection Act (FWPA) (N.J.S.A. 13:9B-1 et seq.) protects wetlands from development but authorizes disturbances under certain circumstances. The Freshwater Wetlands Protection Act rules at N.J.A.C. 7:7A establish the procedures by which the Department reviews applications for permits to conduct regulated activities in wetlands and/or their associated transition areas (a transition area is a "buffer" area of up to 150 feet wide adjacent to a freshwater wetland). The FWPA and the FWPA rules (see N.J.A.C. 7:7A-3) also provide that a person proposing to engage in a regulated activity in a freshwater wetland or transition area may request from the Department a letter of interpretation (LOI). An LOI is the Department's official determination of whether there are any freshwater wetlands, transition areas, and/or State open waters present on a site or portion of a site; where the boundaries of freshwater wetlands, transition areas and/or State open waters are located on a site; and what the resource value classification (as determined in accordance with N.J.A.C. 7:7A-2.4) is of any freshwater wetlands on a site. The resource value classification identified in the LOI

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establishes the width of the transition area adjacent to a wetland and also affects the type of activities that may be permitted in the wetland and transition area.

The FWPA, and the rules at N.J.A.C. 7:7A-3.6, provide that a person who is issued an LOI is entitled to rely on the Department's determination of the presence or absence of wetlands, or the extent of wetlands, on a site for a period of five years. N.J.A.C. 7:7A-3.6(a) further states that the Department may void and issue a revised LOI to reflect actual conditions on a site when new information is discovered. For example, the revised LOI may identify additional wetland areas, or new areas of threatened or endangered species habitat disclosed or discovered after the issuance of the initial LOI.

Each year, the Department receives approximately 1,660 applications for new LOIs, and an additional 150 applications to extend the five-year terms of LOIs. In addition, based upon newly discovered information, the Department revises between 5 and 10 LOIs annually. Most of the revised LOIs concern the discovery of new or expanded threatened and/or endangered species habitat after the initial LOI was issued, resulting in a change in resource value classification of a wetland from intermediate to exceptional resource value. An exceptional resource value classification requires an applicant to establish a 150 foot transition area adjacent to the wetland instead of the 50 foot transition area required adjacent to an intermediate resource value wetland. In some instances, when the Department reviews a request for extension of an LOI, it discovers additional wetlands on the site and the LOI is revised accordingly, or a wetland that was previously described as a swale is found to be part of a larger wetland complex, resulting in a change in resource value classification from ordinary, which requires no transition area, to intermediate resource value, which requires a 50 foot transition area.

The Department receives about five requests each year from persons to whom a revised LOI has been issued who assert that they substantially relied on the wetlands determination in the initial LOI. The Department responds on a case by case basis to these requests for a determination as to whether the applicant is entitled to rely on the initial LOI.

On July 8, 2008, the Department received a petition for rulemaking from Neil Yoskin, Esq., requesting that the Department amend the rules at N.J.A.C. 7:7A-3.6 to codify the process that the Department uses to make determinations that an applicant has

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substantially relied on an LOI. The Department published notice of receipt of the petition in the New Jersey Register on August 4, 2008 (see 40 N.J.R. 4628(a)), and on October 6, 2008, the Department published a notice to refer the petition for further deliberation not to exceed 90 days (see 40 N.J.R. 5847(a)). The Department held a public information meeting in Trenton on October 21, 2008, to solicit comments on the petition (see public notice at 40 N.J.R. 5847(b)). Six people, all representing environmental interest groups, attended the meeting and provided comments. In addition, 20 environmental groups signed a joint letter opposing the promulgation of rules regarding reliance determinations.

The commenters expressed the following concerns: (1) that the public should be able to participate in the process for assessing reliance; (2) by providing rules for assessing reliance, those preparing applications to the Department will have an incentive to attempt to suppress information or mislead the Department about the resources on a site, since, once issued, the applicant will be able to claim reliance on the Department's LOI; (3) if the Department allows an applicant to rely on an incorrect or obsolete wetland delineation or classification, and then approves a permit based upon the obsolete information, it could result in a violation of the Freshwater Wetlands Protection Act. Site conditions change over time and the Department should be acting on the most current information; and (4) LOIs are often done speculatively. Therefore, finances should not be a consideration when assessing reliance upon an LOI.

The proposed rules will provide for participation in the process for determining reliance by requiring that applicants requesting a determination of substantial reliance submit all of the basic information for applications at N.J.A.C. 7:7A-10.2. N.J.A.C. 7:7A-10.2 includes the requirement to provide documentation that public notice of the application was provided in accordance with N.J.A.C. 7:7A-10.8. In addition, in accordance with N.J.A.C. 7:7A-12.3, the Department publishes notices of applications in the DEP Bulletin, and accepts comments for a period of 30 days following publication. The final decision on the application is published in the Bulletin as well, in accordance with N.J.A.C. 7:7A-12.5. To forestall LOI applicants' withholding information or submitting misleading information, the proposed rules at N.J.A.C. 7:7A-3.7(a)3 provide that the Department will not consider a request for a determination of substantial reliance if the LOI for which the determination of reliance is being requested was the result of the

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failure to provide complete and accurate information of which the applicant, its consultants, engineers, surveyors, or agents are, or reasonably should have been aware.

Regarding the concern that reliance on an LOI could result in a violation of the FWPA if permits are issued based upon the initial LOI, the proposed rules at N.J.A.C. 7:7A-3.7(d)2 provide that a determination of substantial reliance does not relieve the applicant from the obligation to obtain and meet the standards for approval under any other State or Federal statute, rule or permit necessary to complete construction of the project or activity for which the Department issued the determination of substantial reliance.

As to the concern that LOIs are speculative and that financial considerations should therefore be excluded as part of the determination of substantial reliance, the Department notes that LOIs are a planning tool often used to aid in good environmental design of a project. Project design and obtaining development approvals are costly. If an LOI were obtained for purely speculative reasons, there would be little basis upon which the applicant could claim reliance because he or she would not be able to demonstrate time and money were expended based on the initial LOI. However, if an applicant can demonstrate that significant expenditures were made in project design and development approvals based on an LOI, then it is appropriate for the Department to consider and balance the costs spent in reliance on an LOI against the potential environmental impacts.

Applicants have the legal right under the FWPA and the rules to claim reliance on an LOI. The Department is obligated to consider these claims. The Department believes that establishing criteria for making determinations of substantial reliance in the rules will make these determinations more consistent and transparent.

A description of the proposed amendments and new rules follows.

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SUBCHAPTER 1 GENERAL INFORMATION

N.J.A.C. 7:7A-1.7 Hearings and appeals

The Department is proposing to amend N.J.A.C. 7:7A-1.7(a)2 to include determinations of substantial reliance on an LOI among the decisions on which a person may request an administrative hearing.

SUBCHAPTER 3 LETTERS OF INTERPRETATION

N.J.A.C. 7:7A-3.6 Effect, duration, and extension of a letter of interpretation

As noted previously, the rules at N.J.A.C. 7:7A-3.6(a) provide that a person who receives an LOI is entitled to rely on the Department's determination. The rule further states that the Department may void a letter of interpretation and issue a revised letter to reflect actual conditions on a site. The Department is proposing new N.J.A.C. 7:7A-3.6(a)1 to provide that if the person to whom the revised LOI is issued objects to the revision and asserts that he or she has substantially relied upon the initial LOI, the person may request that the Department make a determination of substantial reliance on the LOI in accordance with the procedures at N.J.A.C. 7:7A-3.7.

The Department is also proposing new N.J.A.C. 7:7A-3.6(d) to establish the duration of a determination of substantial reliance on an LOI. A determination of substantial reliance on an LOI shall be valid for no more than 10 years from issuance of the initial LOI upon which the applicant is determined to have substantially relied. For example, an LOI is issued on October 31, 2005, extended for another term as of October 31, 2010, but voided and issued as revised in January 2011. If the applicant, in 2011, obtains a determination of substantial reliance on the initial LOI, that determination of substantial reliance will be valid until October 31, 2015, that is, 10 years from issuance of the initial LOI.

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N.J.A.C. 7:7A-3.7 Substantial reliance on a letter of interpretation

Proposed new N.J.A.C. 7:7A-3.7 establishes the process and standards for making a determination of substantial reliance on an LOI.

Proposed N.J.A.C. 7:7A-3.7(a) establishes the requirements that must be met in order for the Department to consider a request for a determination of substantial reliance. Proposed N.J.A.C. 7:7A-3.7(a)1 requires an applicant to apply for a determination of substantial reliance by providing the items set forth at N.J.A.C. 7:7A-10.2, basic content requirements for all applications, and at proposed new N.J.A.C. 7:7A-10.3(e), which establishes the additional information to be submitted for a determination of substantial reliance on an LOI. Proposed N.J.A.C. 7:7A-3.7(a)2 states that the LOI for which a request for determination of substantial reliance is submitted must not have expired. As noted previously, an LOI is issued for a five-year term, which can be extended once for up to an additional five years. Consequently, an applicant cannot seek to rely on an LOI after it has expired. Proposed N.J.A.C. 7:7A-3.7(a)3 provides that the findings in the LOI for which a request for determination of substantial reliance is submitted cannot result from the failure of the applicant to provide complete and accurate information of which the applicant for the LOI, its consultants, engineers, surveyors or agents are, or reasonably should have been, aware. This prohibition is consistent with the application requirements at N.J.A.C. 7:7A-10, including the certification that every applicant must sign when submitting an application.

Proposed N.J.A.C. 7:7A-3.7(b) sets forth the factors the Department will consider in making a determination of substantial reliance. At N.J.A.C. 7:7A-3.7(b)1, the Department proposes to consider the nature and degree of the LOI revision and the effect on a potential project or activity. Specifically, the Department will consider whether the revised LOI will enable the applicant to conduct the same project or activity but with a revised layout; or whether the revised LOI will result in a project or activity that is reduced in scope from the project or activity that was anticipated based upon the initial LOI; or whether the revised LOI will eliminate the applicant's ability to conduct any project or activity on the site.

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Under proposed N.J.A.C. 7:7A-3.7(b)2, the Department will consider the type of project or activity proposed within the wetlands and/or transition areas and whether the proposed project or activity would include certain elements that are of particular concern because of the potential for degradation of the wetlands that they present. These elements are the installation of a septic system; the placement of hazardous substances or pollutants; the placement of an outfall that will discharge unfiltered or untreated stormwater; or the placement of an aboveground or underground storage tank for any substance other than water. Each of these elements presents the potential for environmental degradation if placed in or adjacent to a wetland. Therefore, the Department will require conformance to the revised LOI to ensure maximum protection for the wetland and transition area.

Proposed N.J.A.C. 7:7A-3.7(b)3 considers the impact and effect that the proposed project or activity would have on the wetlands and/or transition areas identified in the revised LOI if the Department were to allow the applicant to rely on the initial LOI. The Department would not allow the applicant to proceed based on an initial LOI if a proposed project or activity would destroy, jeopardize or adversely modify a present or documented habitat of a threatened or endangered species; or jeopardize the continued existence of a local population of a threatened or endangered species. The FWPA and rules prohibit approval of a project or activity if it would destroy, jeopardize or adversely modify a present or documented habitat of a threatened or endangered species; or if it would jeopardize the continued existence of a local population of a threatened or endangered species (see N.J.S.A. 13:9B-9b; N.J.A.C. 7:7A-4.3, Conditions that apply to all general permit authorizations; and N.J.A.C. 7:7A-7.2, Standard requirements for all individual permits).

The Department also would not allow the applicant to proceed based on an initial LOI if a proposed project or activity would cause or contribute to a violation of any applicable State water quality standard, or applicable toxic effluent standard or prohibition imposed pursuant to the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.). These restrictions are imposed by the FWPA and the FWPA rules (see N.J.S.A. 13:9B-9b; N.J.A.C. 7:7A-4.3, Conditions that apply to all general permit authorizations; and N.J.A.C. 7:7A-7.2, Standard requirements for all individual permits).

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Proposed N.J.A.C. 7:7A-3.7(b)4 provides that the reasonableness of costs incurred by the applicant will be evaluated by the Department when assessing substantial reliance. The Department proposes to evaluate costs incurred by the applicant in the period between issuance of the initial LOI and the revised LOI. These costs include (1) those costs actually incurred in pursuit of development of a project or activity including the amount, nature, and date of any investments made to acquire the property or develop the project or activity; (2) those costs incurred in furtherance of a lawful action related to the proposed project or activity, but not, for example, costs related to defending an enforcement action for a violation on the site; (3) those costs relating to the specific property that is the subject of the initial and revised LOI; (4) those costs incurred in obtaining State, county, and local approvals relating to the proposed project or activity since the initial LOI was issued; and (5) any other cost affecting the property or the applicant, that affects the reasonableness of the applicant's investments, the expectations, and/or the proposed use of the property based on the initial LOI.

Proposed N.J.A.C. 7:7A-3.7(c) provides that the determination of substantial reliance will either (1) approve the request to rely on the initial LOI and authorize the applicant to proceed based on the initial LOI; or (2) revise the initial LOI in such a way as to minimize any detrimental effect the revision might have on the applicant who has been determined to have substantially relied on the initial LOI, and protect the wetlands and/or transition areas on the site; or (3) deny the request to rely on the initial LOI and require compliance with the revised LOI.

Proposed N.J.A.C. 7:7A-3.7(d) contains three caveats regarding a determination of substantial reliance on an LOI. First, the determination of substantial reliance does not change the resource classification of the wetland as determined in the revised LOI. The wetland resource classification is established only in accordance with the criteria in N.J.A.C. 7:7A-2.4. Second, the determination of substantial reliance does not relieve an applicant from the obligation to obtain and meet the standards for approval under any State or Federal statute, rule or permit necessary to complete construction of the project or activity for which the Department issued the determination of substantial reliance. If a wetland permit or waiver is required for the project, the applicant must apply for the permit or waiver and demonstrate compliance with all standards for approval. As an

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example, if the resource value classification of a wetland in a revised LOI is modified from intermediate resource value (requiring a 50-foot transition area) to exceptional resource value (requiring a 150-foot transition area), and the determination of substantial reliance allows the applicant to rely on the initial LOI, the Department will not approve a project or activity that would encroach within 50 feet of the exceptional resource value wetland under a transition area waiver unless the transition area waiver was also approved by the Department before the LOI was revised and the applicant applies for a determination of substantial reliance. The FWPA and rules preclude applicants from conducting activities within a minimum of 75 feet of an exceptional resource value wetland. Therefore, if the initial LOI established a 50 foot buffer, and the Department subsequently approved a transition area waiver or permit before issuing the revised LOI, the Department may issue a determination of substantial reliance on the initial LOI that allows the project or activities to proceed. However, if no transition area waivers were approved before the issuance of the revised LOI, the Department will not approve a transition area waiver to authorize a project or activities within 50 feet of an exceptional resource value wetland regardless of whether the applicant obtains a determination of substantial reliance on the initial LOI.

As a second example, if the resource classification of a wetland in a revised LOI has been modified from intermediate to exceptional resource value, regardless of whether the determination of substantial reliance allows the applicant to rely on the initial LOI, if the applicant needs a permit for the construction of a project or activity, authorization under general permits 6 and 7 will not be available. General permits 6 and 7 are based upon the FWPA at N.J.S.A. 13:9B-23b, which states that the Department cannot issue such permits in exceptional resource value wetlands.

Last, a determination of substantial reliance on an LOI does not apply to any project or activity proposed on the site except for the project or activity for which the Department has issued the determination of substantial reliance. A determination of substantial reliance applies only to the project or activities that were anticipated, planned, and designed before an applicant was aware of the revised classification of the wetland.

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SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURES

N.J.A.C. 7:7A-10.1 Basic application information

At N.J.A.C. 7:7A-10.1(b)1, the Department is adding a determination of substantial reliance to the list of applications to which the subchapter applies.

N.J.A.C. 7:7A-10.3 Additional application requirements for an LOI

The Department is proposing to amend N.J.A.C. 7:7A-10.3, additional application requirements for an LOI, to add new subsection (e) containing the additional requirements for a request for a determination of substantial reliance upon an LOI, and is modifying the section title accordingly. The submittal requirements at N.J.A.C. 7:7A-10.3(e) are in addition to those for all applications at N.J.A.C. 7:7A-10.2. The applicant must provide a copy of the LOI for which the determination of substantial reliance is sought. Although the Department maintains file copies of all LOIs, this submittal is necessary to ensure that the applicant and the Department are reviewing the same LOI. Documents that show the amount, nature, and date of costs incurred and any investments made to develop the project or activity after the initial LOI was issued must be submitted. Such documents may include, but are not limited to, receipts, invoices, or payment vouchers. This information is necessary to evaluate the reasonableness of costs under N.J.A.C. 7:7A-3.7(b)4. The applicant must submit a development plan that depicts the wetland and transition area locations identified in the initial LOI, the wetland and transition area locations identified in the revised LOI, the project or activity that is proposed, and the effect of the revised LOI on the project or activity. The applicant must also submit a development plan that shows alternative design(s) for the proposed project or activity that would minimize impacts to the wetlands and transition areas identified in the revised LOI. Finally, the applicant must submit copies of other State, County and local approvals obtained for the proposed project or activity, so that the Department may assess the reasonableness of these costs for purposes of N.J.A.C. 7:7A-3.7(b)4.

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SUBCHAPTER 11 FEES

N.J.A.C. 7:7A-11.1 General fee provisions

At N.J.A.C. 7:7A-11.1(g) the Department is proposing a fee of \$2,400.00 for a request for a determination of substantial reliance on an LOI. Unlike the review of an LOI application, which focuses entirely upon the location and classification of the wetlands, the review of a request for a determination of substantial reliance requires the review of the location of the wetlands and transition areas, the evaluation of the proposed project or activity, and the consideration of potential alternative layouts or designs for a site that both minimize detrimental effects to the applicant and minimize impacts to the wetland and transition area. The review of a request for determination of substantial reliance therefore requires a level of effort similar to that needed to review an application for an individual permit. Consequently, the proposed fee for a reliance determination is the same as the base fee for an individual permit. However, the Department is not proposing an additional per acre fee for a reliance determination, as is charged for individual permit reviews, because by the time an applicant claims substantial reliance on a letter of interpretation, all field work will have already been completed, so the size of the entire property will not be a factor in the level of effort required for the review.

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Social Impact

When the Department revises an LOI and the applicant objects based upon a claim of substantial reliance on the initial LOI, the incorporation into the rules of the process and standards for determining whether an applicant has substantially relied upon an LOI will have a positive social impact. It will provide a consistent process for reviewing such claims, and allow applicants and the public to know the factors the Department considers when making such determinations. It is a mechanism to balance the rights of applicants who are affected by the Freshwater Wetland Protection Act rules with the public benefit of protecting freshwater wetlands.

Economic Impact

The proposed rules, which provide a process for applicants to claim substantial reliance on an LOI, including the proposed application fee, are expected to have both positive and negative economic impacts. In order for an applicant to obtain a determination of substantial reliance, the applicant will have to make application to the Department and pay an application fee. However, applicants generally claim substantial reliance on an LOI when they have used the LOI determination to obtain other required approvals and permits, which may involve substantial costs that far exceed the application fee for a determination of substantial reliance. Establishing in the rules the process and standards by which the Department considers the costs spent in reliance on an LOI before requiring compliance with the provisions of a revised LOI will provide a positive economic impact to those applicants for whom the determination results in their ability to pursue a proposed project based on the initial LOI. In addition, establishing in the rules the specific application requirements for a reliance determination might reduce costs for applicants who are able to develop their request without professional assistance.

For those applicants whose request for a determination of substantial reliance results in a denial of their request to rely on the initial LOI, the economic impact may be negative. However, these applicants may appeal the Department's decision, in accordance with N.J.A.C. 7:7A-1.7, seek an individual permit in accordance with N.J.A.C. 7:7A-7, or pursue their rights under N.J.A.C. 7:7A-17.

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Environmental Impact

Wetlands protect and preserve drinking water supplies, purify surface and groundwater resources, provide a natural means of flood and storm damage protection, reduce flooding, and provide essential breeding, spawning, nesting and wintering habitats for fish and wildlife, including migratory birds, endangered and threatened species, and commercially and recreationally important species.

Although the proposed rules for determining whether an applicant has substantially relied upon an LOI that is the subject of a revision will codify and make more consistent specific claims of reliance under the FWPA, there is the potential for a slightly negative environmental impact. In the rare cases when the Department revises an LOI, it does so based upon new or revised scientific information. The transition area widths established under the FWPA are deemed necessary for the protection of the adjacent wetland. In those cases where, in order to balance the rights of applicants who are affected by the Freshwater Wetland Protection Act rules with the public benefits from protecting freshwater wetlands, the Department allows an applicant to rely on a previous LOI under which the level of protection to the adjacent wetland is less than under the revised LOI, there will be a slightly negative environmental impact. However, based on the Department's experience, the number of reclassifications each year amounts to no more than between 5 and 10 letters of interpretation revised out of a total of 1,180 new and extended LOIs issued annually. Further, the proposed rules include standards that will minimize any potential negative impact. The Department will ensure that impacts to the wetlands will be minimized by evaluating the type of project to be placed within the wetland or transition area, and precluding an applicant from relying on a previous LOI if such reliance would result in threatened or endangered species destruction, jeopardy or adverse habitat modification, violation of water quality standards, or an excessive encroachment into a transition area adjacent to an exceptional resource value wetland.

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Federal Standards Analysis

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. Such a comparison is appropriate in the case of the freshwater wetlands program rules, because the Department is also obligated under Federal law to ensure that its program is at least as stringent as the Federal 404 program.

Satisfying New Jersey's FWPA program also satisfies the Federal Clean Water Act Section 404 program (33 U.S.C. 1344) throughout most of the State. Consequently, the State's implementing rules replace the Army Corps of Engineers (ACOE) regulations for implementation of the Section 404 program. The basic structure of the Department's freshwater wetlands permitting program, and much of its substance, are similar to the Federal 404 program. Both provide for individual and general permits. Both use similar key concepts and definitions, and apply similar standards in approving both general and individual permits.

However, the letter of interpretation process is unique to New Jersey's program. The LOI is important to New Jersey citizens especially because the State's FWPA classifies wetlands and regulates adjacent uplands to intermediate and exceptional resource value wetlands. Although the Army Corps of Engineers has a process for making jurisdictional determinations which include verifying the location and extent of wetlands, there is no Federal wetland resource classification system and no designation or protection for wetland transition areas.

To date, most claims of substantial reliance on an LOI, have resulted from the discovery of threatened or endangered species habitat after the LOI was issued, with an accompanying change in resource value classification from intermediate to exceptional resource value, and the imposition of a 150-foot instead of a 50-foot transition area adjacent to the wetlands. Although the State's freshwater wetlands program overall is more stringent than the Federal program because of the protection for transition areas, the establishment of a process for those claiming substantial reliance upon an LOI has no Federal counterpart. Therefore no further analysis is required.

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Jobs Impact

The proposed rules for determining whether an applicant has substantially relied upon an LOI that is the subject of a revision will have a slightly positive jobs impact. By allowing applicants to rely upon a previous LOI, this process would potentially preserve construction jobs that may otherwise be lost in the few cases where requiring an applicant to comply with a new LOI would entirely preclude development on a site. In cases where the Department determines that an applicant has substantially relied on an LOI and the result is some, or no, redesign of a project or activity on a site, there will be no gain or loss of jobs.

Agriculture Industry Impact

Pursuant to N.J.S.A. 52:14B-4, the Department evaluated this rulemaking to determine the nature and extent of the impacts of the proposed amendments on the agriculture industry. Subject to certain limitations, ongoing farming, ranching and silviculture are exempt from the FWPA and rules. The exemption also permits certain discharges necessary to continue ongoing farming, for example, the discharge of material for the purpose of installing ditching incidental to planting, protecting or harvesting wetland crop species, and the construction or maintenance of farm or stock ponds, or farm roads. The exemptions, and their implementation, are similar to ongoing farming exemptions contained in the Federal Clean Water Act that have been in effect since 1977. Consequently, so long as exempt agricultural activities are undertaken, there is no need to obtain a letter of interpretation that could subsequently be revised and result in a claim or substantial reliance.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that some of the builders and property owners that may be affected by the proposed amendments are "small businesses" as defined by

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the Regulatory Flexibility Act. Because the FWPA rules apply to any person owning property containing freshwater wetlands, State open waters and/or transition areas, who intends to engage in a regulated activity, it is impossible for the Department to estimate the number of small businesses that own property that will be affected by the proposed amendments. It would be necessary for the Department to know the number of small businesses that own land containing wetlands, State open waters or transition areas, and the number that have or will obtain letters of interpretation. To the extent that a small business proposes new construction that may affect areas regulated under this chapter, it may obtain a letter of interpretation, like all other individuals proposing similar projects on similar properties, thus also making it eligible for a determination of substantial reliance if the LOI is revised.

The proposed amendments would not impose additional reporting or recordkeeping requirements on small businesses. The reporting, recordkeeping, and other compliance requirements include the requirement to provide information to the Department and the public in the form of applications, reports, and public notices in the case where application for an LOI is being made, and the requirement to provide additional information in those cases where an LOI is revised and the applicant seeks a determination of substantial reliance.

The costs accrued to small business, as a result of the proposed rules, will be the same as those for other applicants, as described in the Economic Impact. Those costs include making an application to the Department and paying an application fee. However, also like other applicants, small businesses would only claim substantial reliance on an LOI when they have used the LOI determination to obtain other required approvals and permits, which may involve substantial costs that far exceed the application fee for a determination of substantial reliance. Establishing in the rules the process and standards by which the Department considers the costs spent in reliance on an LOI, before requiring compliance with the provisions of a revised LOI, may benefit small businesses by allowing them to pursue a proposed project based on the initial LOI and might reduce costs for small businesses that can follow the provisions in the proposed rules, to develop their request for a determination of substantial reliance, without professional assistance.

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The rules regulate based on environmental impacts and will generally have the same impact on a small business as on any other person. Because the values and functions of freshwater wetlands are important to all of the State's citizens, and the proposed amendments are necessary to provide continuing protection for this resource, no lesser requirements for small businesses are provided.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies that adopt, amend or repeal State regulations to include in the rulemaking document a Smart Growth Impact Statement that describes the impact of the proposed rule on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the proposed amendments' impact on smart growth and the implementation of the State Plan.

The State Plan policy identifies the protection and enhancement of water resources through coordinated planning efforts aimed at reducing sources of pollution and other adverse effects of development, encouraging designs in hazard-free areas that will protect the natural function of stream and wetland systems, and optimizing sustainable resource use. A letter of interpretation provides an individual with information regarding the location of wetlands and wetland transition areas on a site. It enables better planning by allowing an individual to design a project that is outside these environmentally sensitive areas. The proposed amendments which provide a process for assessing whether or not an applicant has substantially relied upon the LOI, in those cases where an LOI is revised, enable the Department to work with an applicant to ensure that projects or activities are located in an environmentally sensitive manner while also considering the cost and effect that revision of LOI may have on the viability of the project. This balancing consistent with the goals of protecting the quality of the environment, encouraging growth in areas suitable for growth, and promoting reinvestment in older communities where such features are not present.

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Therefore, the proposed rules comport with the goals of smart growth and implementation of the State Plan as required in Executive Order No. 4.

Housing Affordability Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments and new rules at N.J.A.C. 7:7A for purposes of determining their impact, if any, on the affordability of housing. The Department has determined that the proposed rules would not impose a significant impact on the average costs associated with housing. The proposed rules establish a process for assessing whether or not an applicant has substantially relied on an initial LOI in those cases where the LOI has been revised. The rules are intended to ensure that projects or activities are located in an environmentally sensitive manner while also considering the cost and effect that revising the LOI may have on the project or activity. Therefore, the proposed rules will not increase the average costs associated with housing.

Smart Growth Development Impact

In accordance with N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed amendments and new rules at N.J.A.C. 7:7A-16 for purposes of determining their impact, if any, on smart growth development. The Department has determined that the proposed rules will impose an insignificant impact because there is an extreme unlikelihood that the rules will evoke a change in housing production within Planning areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. An LOI is a planning tool to identify the location and extent of wetlands and wetland transition areas on a site. It assists planners or developers in designing a project or activity to avoid or minimize impacts to these environmentally sensitive areas. In addition, planning areas 1 and 2, and designated centers tend to be more developed and disturbed than other areas. Consequently, there are fewer wetlands in such areas. Further, the proposed amendments provide a process for assessing whether or not an applicant has substantially relied upon

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an LOI, in those cases where an LOI is revised, thereby providing the possibility that the Department will not require compliance with a revised LOI. Therefore, the Department believes there is an extreme unlikelihood that the proposed rules would evoke a change in housing production within Planning areas 1 or 2 or within Designated Centers.

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Full text of the proposed amendments and new rules follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

SUBCHAPTER 1 GENERAL INFORMATION

N. J.A.C. 7:7A-1.7 Hearings and appeals

(a) Subject to the limits on third party hearings at (k) below, a person may request an administrative hearing to contest a decision under this chapter on any of the following actions:

1. (No change.)

2. An application for a letter of interpretation, including an application for a determination of substantial reliance on an LOI;

3.-7. (No change.)

(b)-(k) (No change.)

SUBCHAPTER 3 LETTERS OF INTERPRETATION

N.J.A.C. 7:7A-3.6 Effect, duration, and extension of a letter of interpretation

(a) A person who is issued a letter of interpretation pursuant to this subchapter shall be entitled to rely on the determination of the Department, concerning the presence or absence, or the extent of freshwater wetlands and/or State open waters, for a period of five years from its issuance, unless the letter of interpretation is determined to have been based on inaccurate or incomplete information, in which case the Department may void the original letter of interpretation and issue a new letter of interpretation reflecting the actual conditions on the site. For example, the LOI may be revised to reflect additional

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wetland areas identified after LOI issuance; or if a threatened or endangered species habitat is disclosed or discovered after the LOI was issued, the Department may correct the resource value classification.

1. If the person to whom a revised LOI is issued objects to the revised LOI and asserts that he or she has substantially relied on the initial LOI, the person may request that the Department make a determination of substantial reliance on the LOI in accordance with the procedures at N.J.A.C. 7:7A-3.7.

(b)-(c) (No change.)

(d) A determination of substantial reliance issued in accordance with N.J.A.C. 7:7A-3.7, shall be valid for no more than 10 years from the date of issuance of the initial LOI to which the determination of substantial reliance applies.

N.J.A.C. 7:7A-3.7 Determination of substantial reliance on a letter of interpretation

(a) The Department shall consider a request for a determination of substantial reliance on a letter of interpretation only when:

1. A request for a determination of substantial reliance is submitted in accordance with the requirements at N.J.A.C. 7:7A-10.2 and N.J.A.C. 7:7A-10.3(e);

2. The LOI for which the determination of substantial reliance is requested has not expired; and

3. The findings in the LOI for which the determination of substantial reliance is requested did not result from the failure to provide complete and accurate information required under this chapter of which the applicant for the LOI, its consultants, engineers, surveyors or agents are, or reasonably should have been, aware.

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(b) In making a determination of substantial reliance on an LOI under this section, the Department shall consider the following factors:

1. The nature and degree of the LOI revision and the effect on a potential project or activity, that is, as a result of the LOI revision, whether the applicant will be able to pursue:

i. The same project or activity but with a revised layout;

ii. A project or activity that is reduced in scope from the project or activity that was anticipated based on the initial LOI; or

iii. No project or activity;

2. The type of project or activity proposed to be conducted within the wetlands and/or transition areas identified in the revised LOI, specifically whether the proposed project or activity would include any of the following within the wetlands and/or transition areas identified in the revised LOI:

i. Installation of a septic system;

ii. Placement of any hazardous substance, as defined in the Department's rules governing hazardous substances at N.J.A.C. 7:1E, Appendix A; or pollutant, as defined in the New Jersey Pollutant Discharge Elimination System rules at N.J.A.C. 7:14A;

iii. Placement of an outfall structure that would discharge unfiltered or untreated stormwater; or

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iv. Placement of an aboveground or underground storage tank for storing any substance other than water;

3. The impact and effect that the proposed project or activity would have on the wetlands and/or transition areas identified in the revised LOI if reliance on the initial LOI were to be allowed. The proposed project or activity shall not:

i. Destroy, jeopardize or adversely modify a present or documented habitat of a threatened or endangered species;

ii. Jeopardize the continued existence of a local population of a threatened or endangered species; or

iii. Cause or contribute to a violation of any applicable State water quality standard or applicable toxic effluent standard or prohibition imposed pursuant to the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.);

4. The costs incurred by the applicant after the initial LOI was issued but before the revised LOI was issued, and whether the costs were reasonable, as follows:

i. Costs actually incurred in acquisition of the property or pursuit of development of the proposed project or activity, including the amount, nature, and date of any investments made to develop the proposed project or activity;

ii. Costs incurred in furtherance of a lawful action related to the proposed project or activity. However, if the property owner began the project without the necessary permits, the cost of defending against an enforcement action for a violation shall not be considered a reasonable cost;

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iii. Costs relating only to the specific property that is the subject of the initial and revised LOI, excluding costs related to other properties;

iv. Costs incurred to obtain any State, county, and local approvals related to the proposed project or activity; and

v. Any other cost affecting the property or the applicant that affects the reasonableness of the applicant's investments, expectations, and/or use of the property based on the initial LOI.

(c) The Department shall provide the applicant with a written determination of substantial reliance that:

1. Approves the request to rely on the initial LOI and authorizes the applicant to proceed based on the initial LOI;

2. Revises the initial LOI, in order to minimize the detrimental effect to the applicant who has been determined to have substantially relied on the initial LOI and to protect the wetlands and/or transition areas on the site; or

3. Denies the request to rely on the initial LOI and requires compliance with the revised LOI.

(d) A determination of substantial reliance upon an LOI shall not:

1. Change the resource value classification of the wetland as determined under the revised LOI. The wetland resource value classification is determined only in accordance with the criteria at N.J.A.C. 7:7A-2.4;

2. Relieve the applicant from the obligation to obtain and meet the standards for approval under any State or Federal statute, rule or permit necessary to complete

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construction of the project or activity for which the Department has issued the determination of substantial reliance. For example, if the resource value classification of a wetland in a revised LOI is modified from intermediate resource value (to which a 50-foot transition area applies) to exceptional resource value (to which a 150-foot transition area applies), and the determination of substantial reliance allows the applicant to proceed based on the initial LOI, the Department shall not approve a project or activity that would encroach within 50 feet of the wetland now classified as exceptional resource value under a transition area waiver, unless the transition area waiver was also approved by the Department before the LOI was revised and the applicant applies for a determination of substantial reliance. As a second example, if the resource value classification of a wetland in a revised LOI has been modified from intermediate resource value to exceptional resource value, regardless of whether the determination of substantial reliance on the initial LOI allows the applicant to proceed based on the initial LOI, if the applicant needs a permit for the construction of a project or activity, authorization under general permits 6 and 7 is not available, because these permits are do not apply to disturbances in exceptional resource value wetlands; and

3. Apply to any project or activity proposed on the site except for the project or activity for which the Department has issued the determination of substantial reliance.

SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURE

N.J.A.C. 7:7A-10.1 Basic application information

- (a) (No change.)
- (b) This subchapter applies to an application for all of the following:

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1. A letter of interpretation, including an extension or modification of a letter of interpretation, or a determination of substantial reliance on a letter of interpretation;

2.-6. (No change.)

(c)-(q) (No change.)

N.J.A.C. 7:7A-10.3 Additional application requirements for an LOI and for a request for a determination of substantial reliance on an LOI

(a)-(d) (No change.)

(e) In addition to the basic information required for all applications under N.J.A.C. 7:7A-10.2, the application checklist for a request for a determination of substantial reliance on an LOI under N.J.A.C. 7:7A-3.7 shall include:

1. A copy of the Department-approved initial LOI for which the determination of substantial reliance is requested;
2. Document(s), including but not limited to, receipts, invoices, or payment vouchers showing the amount, nature, and date of any costs incurred or investments made to develop a proposed project or activity after the initial LOI was issued;
3. A development plan showing the wetland and/or transition area boundaries identified in the initial LOI, the wetland and/or transition area boundaries identified in the revised LOI, the proposed project or activity, and the effect of the revised LOI on the proposed project;

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4. A development plan showing alternative design(s) for the proposed project or activity that will minimize impacts to the wetlands and/or transition areas identified in the revised LOI; and

5. A copy of any other State, county or local approval obtained for the proposed project or activity.

SUBCHAPTER 11 FEES

N.J.A.C. 7:7A-11.1 General fee provisions

(a)-(f) (No change.)

(g) In some cases, an applicant's act or omission makes it necessary for Department staff to perform more than one site visit during the review of an application. In such a case, the Department shall assess an additional fee of up to \$ 1,000 for each additional site visit. No permit, waiver, or letter of interpretation shall be issued until this fee has been paid.

FEE TABLES

Application fees for LOIs (N.J.A.C. 7:7A-3):

| <u>Type of LOI</u> | <u>Fee</u> |
|---|------------|
| Presence/absence LOI--whole site | \$ 240.00 |
| Presence/absence LOI under N.J.A.C. 7:7A-3.2--portion of a site or footprint of disturbance | \$ 480.00 |

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| Line delineation LOI under N.J.A.C. 7:7A-3.3--site smaller than one acre | \$ 600.00 |
| Line verification LOI under N.J.A.C. 7:7A-3.4--site smaller than one acre | \$ 600.00 |
| Line verification LOI under N.J.A.C. 7:7A-3.4--site one acre or larger | \$ 600.00 plus \$ 84.00 per acre ⁿ¹ , up to \$ 60,000 |
| LOI extension under N.J.A.C. 7:7A-3.6 | \$ 240.00, or 25 percent of original fee, whichever is greater |
| LOI (any type) and a transition area waiver, (any type) if The site is one acre or smaller. | \$ 840.00 Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application. |
| LOI (any type) and a transition area waiver, (any type) if The site is larger than one acre. | \$ 1,080.00 plus \$ 96.00 per acre ⁿ¹ Note: this application fee is for a combined transition area waiver and |
| LOI (any type) and a transition area waiver, (any type) if | \$ 1,080.00 plus \$ 96.00 per acre ⁿ¹ Note: this application fee is for a combined transition area waiver and LOI, since the wetlands must be delineated before the review of the transition area waiver application. |
| LOI (any type) and a general permit | Sum of applicable LOI and general |

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| | |
|--|----------------------------------|
| authorization | permit authorization fees |
| LOI (any type) and an individual permit | Applicable individual permit fee |
| <u>Request for determination of substantial reliance on an LOI</u> | <u>\$2,400.00</u> |

...

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

Date

MARK N. MAURIELLO
Acting Commissioner