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ENVIRONMENTAL PROTECTION

WATERSHED AND LAND MANAGEMENT

Coastal Zone Management Rules

Freshwater Wetlands Protection Act Rules

Flood Hazard Area Control Act Rules

Proposed Repeal: N.J.A.C. 7:7A-11.10

Proposed Amendments: N.J.A.C. 7:7-17.11 and 17.14; 7:7A-11.1, 11.2, 11.6, 11.9, 11.13, 11.16, 11.22, 11.25, and 11.26; and 7:13-13.9

Authorized By: Shawn M. LaTourette, Commissioner, Department of Environmental Protection.

Authority:

As to N.J.A.C. 7:7: N.J.S.A. 12:3-1 et seq., 12:5-3, 13:1D-1 et seq., 13:1D-9 et seq., 13:1D-29 et seq., 13:9A-1 et seq., 13:19-1 et seq., 23:2A-1 et seq., and 58:10A-1 et seq.;

As to N.J.A.C. 7:7A: N.J.S.A. 13:9B-1 et seq., 23:2A-1 et seq., and 58:10A-1 et seq.;

As to N.J.A.C. 7:13: N.J.S.A. 13:1D-1 et seq., 13:1D-29 et seq., 13:20-1 et seq., 23:2A-1 et seq., 58:1A-1 et seq., 58:10A et seq., 58:11A-1 et seq., and 58:16A-50 et seq.

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

DEP Docket Number: 01-25-02.

Proposal Number: PRN 2025-027.

A public hearing concerning this notice of proposal will be held virtually on April 16, 2025, at 10:00 A.M.

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A link to the virtual public hearing and more information about the live hearing will be provided on the Department of Environmental Protection's (Department) website at www.nj.gov/dep/wlm/proposals.

Submit comments by close of business on May 16, 2025, electronically at www.nj.gov/dep/rules/comments. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

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

Attn: Chris Segal, Esq.
DEP Docket No. 01-25-02
Office of Legal Affairs
New Jersey Department of Environmental Protection
401 East State Street, 7th Floor
Mail Code 401-04L
PO Box 402
Trenton, NJ 08625-0402

If you are interested in providing oral testimony or submitting written comments at a public hearing, please email the Department at DEPWLMProgramDevelopment@dep.nj.gov no later than 5:00 P.M., April 14, 2025, with your contact information (name, organization, telephone number, and email address). You must provide a valid email address so the Department can send you an email confirming receipt of your interest to testify orally at the hearing and provide you with a separate option for a telephone call-in line if you do not have access to a computer that can

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connect to Microsoft Teams. It is requested (but not required) that anyone providing oral testimony at the public hearing provide a copy of any prepared text to the Department at the hearing. Please note the Department will take oral testimony at the hearing in chronological order based upon when you registered for the event. Further, the hearing will be recorded. This notice of proposal may be viewed or downloaded from the Department's website at www.nj.gov/dep/rules.

The agency proposal follows:

Summary

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

This rulemaking proposes amendments and a repeal to the Coastal Zone Management (CZM) rules, N.J.A.C. 7:7, Freshwater Wetlands Protection Act (FWPA) rules, N.J.A.C. 7:7A, and Flood Hazard Area Control Act (FHACA) rules, N.J.A.C. 7:13, all relating to mitigation. Mitigation is a tool used to replace environmental resources when the determination is made that a proposed activity meets the standards and conditions to be granted a permit that will result in the loss of coastal or freshwater wetlands, intertidal/subtidal shallows, or riparian zones. It should be noted that various minor amendments are proposed to update codifications and cross-references due to changes proposed in this rulemaking. These, along with minor technical and grammatical changes that do not change the meaning of the text, will not be discussed further.

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Coastal Zone Management Rules N.J.A.C. 7:7

N.J.A.C. 7:7-17.11 Requirements for Intertidal and Subtidal Shallows and Tidal Water

Mitigation

Within the Coastal Zone Management (CZM) rules (N.J.A.C. 7:7), N.J.A.C. 7:7-17.11 sets forth the requirements for intertidal and subtidal shallows (ISS) and tidal water mitigation. The hierarchy for ISS mitigation is bifurcated between applicants with single-family/duplex (SFD) projects that are not part of a larger development at N.J.A.C. 7:7-17.11(c)1, and all other applicants at N.J.A.C. 7:7-17.11(c)2. SFD applicants are required to contribute to the Freshwater Wetlands Mitigation Council (Council) fund if they cannot provide onsite mitigation, while all other applicants may opt to use a mitigation bank. For SFD applicants, the rules require the contribution amount be based on “the amount of the value of the land filled and the cost of creation of intertidal and subtidal shallows of equal ecological value to those which are being lost.”

For the following reasons, the Department is proposing to delete N.J.A.C. 7:7-17.11(c)1 and 2 to allow all applicants required to mitigate for ISS the option of using a mitigation bank.

In the existing rules, mitigation for ISS must be in the form of a monetary contribution to the Council. The Council was established pursuant to the Freshwater Wetlands Protection Act (FWPA) at N.J.S.A. 13:9B-14 and 15 and oversees the Mitigation Fund, also established pursuant to statute, for the deposit of money for mitigation by applicants who have exhausted all other mitigation options. In 2015, when the Department established its In-Lieu Fee (ILF) Program to oversee the Mitigation Fund, as required pursuant to Federal mitigation rules, 33

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CFR 332.8 (2008) and 40 CFR 230.98 (2008), the ILF Program identified the Council as the ILF manager with the authority to accept funds for tidal and freshwater wetland impacts.

The CZM rules do not set forth guidance on how to determine either the value of the land or the cost of creating ISS. The FWPA rules at N.J.A.C. 7:7A-11.16 do provide such guidance. The FWPA rules require an applicant proposing a monetary contribution to develop a proposal for submittal to the Council prior to, and far enough in advance of, a Council meeting to allow the staff to Council to review the proposal and prepare recommendations (usually at least 30 days in advance). Applicants are then invited to the meeting to present that proposal to the Council. As the FWPA rules are the only rules with guidance on making a monetary contribution, they are used to assist applicants mitigating for ISS.

The Division of Land Resource Protection (Division) oversees the implementation of the ISS rules, and frequently receives applications where small amounts of ISS have been impacted at SFD properties. Generally, SFD applicants do not possess the expertise to develop mitigation monetary proposals and must hire a consultant to assist them, which adds additional time and expense to the monetary contribution obligation.

To address this issue when first identified in 2019, until such time that the rules could be amended, the Department requested, and the Council approved, a simplified process to determine the “amount of the value of the land filled and the cost of creation of intertidal and subtidal shallows of equal ecological value to those which are being lost.” The Division has been using the tax-assessed value of the land to calculate the “value of the land filled” by using a simple formula:

$$\frac{\text{Assessed Value of Land (\$)}}{\text{Total Site Area (ft}^2\text{)}} \times \text{ISS Mitigation Area (ft}^2\text{)} = \text{Value of Land Filled}$$

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As ISS is defined to include all permanently or temporarily submerged areas from the spring high water line to a depth of four feet below mean low water, ISS mitigation typically involves excavating uplands to convert them to tidally flowed open water with no planting requirements. Thus, to approximate the “cost of creation of intertidal and subtidal shallows of equal ecological value,” the Division accepts a contractor’s site-specific estimate for the cost of excavating the required area of upland to create ISS. The final contribution is the sum of the two amounts. Similar to the current process for making a contribution for a general permit, at N.J.A.C. 7:7-11.16(e), applicants that follow the prescribed calculations make their contribution directly to the Department and the Mitigation Fund without having to bring their mitigation contribution to the Council for approval.

While this has proved satisfactory to expeditiously provide mitigation, contribution amounts have varied significantly from one applicant to another because each calculation is heavily influenced by the specific property’s assessed value.

Additionally, providing funds to the Council places the burden for conducting mitigation on the Council. The Council must collect funding for a project, conduct a request for proposals, select an acceptable mitigation project and purveyor, and enter into a grant agreement before any mitigation can begin. This delay in conducting mitigation is one reason why other types of mitigation, including the use of a mitigation bank, are preferred options in the mitigation hierarchy and why contributions to the Council are the last option after all other mitigation options have been exhausted.

By comparison, mitigation banks are constructed in advance of mitigation impacts and most mitigation bank credits cannot be sold until the Department confirms that the mitigation

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project has already been constructed on the ground and is successful or nearing success. Thus, there is little, if any, delay between when impacts occur and when mitigation is provided. Additionally, a mitigation banker assesses the costs for establishing a mitigation bank one time based on the price of the property where the bank is located and the costs for conducting the required mitigation activities. These costs are considered when the mitigation credit price is established, and then the same credit price applies to all applicants using the bank. Thus, the use of a mitigation bank ensures that costs are being equally assessed for all applicants. Based on these factors, using a mitigation bank more quickly replaces lost resources, and may also be more cost-effective than the current rules for those mitigating for ISS. Therefore, the Department is proposing to allow the use of a mitigation bank for impacts to ISS.

N.J.A.C. 7:7-17.14 Wetlands Mitigation Hierarchy

N.J.A.C. 7:7-17.14 sets forth the wetlands mitigation hierarchy or the preferred order for choosing a mitigation option. As mitigation is most advantageous when performed as close as possible to the impact affecting the wetland resource, mitigating onsite is always the first and most preferred option, followed by mitigating offsite in the same watershed management area, as required at N.J.A.C. 7:7-17.14(b). The rules also allow the use of a mitigation bank serving the area where the wetland impact occurred. A wetland mitigation bank is a wetland project (creation, enhancement, restoration) constructed in advance of wetland impacts to serve applicants needing mitigation in the respective service area.

Existing rules at N.J.A.C. 7:7-17.14(c) state that if mitigation cannot be performed onsite or offsite or through the purchase of credits, then mitigation in the form of a monetary contribution to the Mitigation Fund, upland preservation, or an in-lieu fee payment may be pursued. The

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Department is proposing to add a new mitigation option to the mitigation list at N.J.A.C. 7:7-17.14(c)1 to allow wetlands preservation as a mitigation option. The existing rules do not provide this option because preserving wetlands, when losing wetlands elsewhere, does not result in a net gain in wetland area.

New Jersey has a unique status among states in terms of land use. First, New Jersey may soon become the first state in the nation to reach a point of being “built out,” meaning every available piece of land in the State is either developed, preserved, or protected in some way (for example, preserved farmland or protected parkland). While the Coastal Zone Management program and the FWPA rules establish strict standards for the regulation of development in wetlands, these regulatory programs are not designed to prevent encroachment entirely. Thus, being able to preserve wetlands, as a mitigation option, affords an added level of protection against potential development pressure.

Second, New Jersey is presently experiencing the effects of climate change more intensely than many other states. On June 30, 2020, in accordance with Governor Murphy’s Executive Order No. 89 (EO No. 89), the Department released New Jersey’s Scientific Report on Climate Change (NJ Climate Science Report). This report synthesized the latest and most reliable scientific information on the current and predicted future impacts of climate change to New Jersey’s natural and built environments. The NJ Climate Science Report explains that New Jersey has already experienced impacts from the observed increase in greenhouse gas concentrations since the end of the 1890s, including a 3.5 degree Fahrenheit (1.9 degrees Celsius) increase in the State’s average temperature, a 7.9 percent increase in the State’s average precipitation, more frequent and intense precipitation, and 0.16 inches per year of sea-level rise over the past century (Department of

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Environmental Protection, 2020. Scientific Report on Climate.). Thus, wetland areas in the coastal zone may become areas of ecological retreat for plants and animals as the sea level rises and storms intensify. Additionally, wetlands often contain important or unique resources like threatened or endangered species. Finally, wetlands can provide a protective buffer between a waterway and inland areas. Therefore, while preserving wetlands does not provide a new wetland area to add to the State's wetland inventory, wetlands provide many important values and functions. For these reasons, the preservation of wetlands is ecologically beneficial and should be a mitigation option if other mitigation options are not available.

To ensure the wetlands merit preservation, the Department is proposing new N.J.A.C. 7:7-17.14(c)1, setting forth several criteria for a wetland parcel to qualify for preservation. Proposed N.J.A.C. 7:7-17.14(c)1i requires that the parcel in question cannot be adversely impacted by solid or hazardous waste and water or soil pollution. This is a universal provision that applies to land for all mitigation projects, including preservation. In addition, at new N.J.A.C. 7:7-17.14(c)1ii, the Department is proposing 11 criteria that individually or cumulatively would make a property desirable for preservation. First, at N.J.A.C. 7:7-17.14(c)1ii(1), the property should be at least five acres in size. The Department may consider preserving a wetland that is smaller than five acres if it also contains one or more of the other desirable criteria. For example, if it also meets N.J.A.C. 7:7-17.14(c)1ii(2) and is immediately adjacent to public lands, such as a Federal wildlife refuge, a State wildlife management area, a State park or forest, or a State, county, or local preservation area, or preservation areas held by a charitable conservancy, a smaller property may be valuable for preservation as an add-on to these areas. Wetlands also merit preservation when the wetlands are exceptional resource value

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as proposed at N.J.A.C. 7:7-17.14(c)1ii(3). Exceptional resource value wetlands, defined at N.J.A.C. 7:7A-3.2(b), are wetlands that discharge into FW-1 or FW-2 trout production waters or their tributaries; are present habitats for threatened or endangered species; or are documented habitats for threatened or endangered species, and remain suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat. Wetlands that contain critical habitats for flora or fauna, as proposed at N.J.A.C. 7:7-17.14(c)1ii(4), merit preservation because critical wildlife habitats are areas known to serve an essential role in maintaining wildlife, particularly in wintering, breeding, and migrating. Wetlands that drain to FW1 or category one waters, as defined at N.J.A.C. 7:9B-1.4, or into public drinking water sources, as proposed at N.J.A.C. 7:7-17.14(c)1ii(5), are important for preservation because they protect water quality. Forested wetlands, or those with unique aspects or characteristics that make them unusual or regionally rare, as proposed at N.J.A.C. 7:7-17.14(c)1ii(6), are also important. Forested wetlands provide water quality and quantity protections, while unique wetland types contribute to biological diversity. Wetlands are also valuable when they are within or part of the riparian zone since the riparian zone is also important for protecting water quality and fisheries, as proposed at N.J.A.C. 7:7-17.14(c)1ii(7). Wetlands may be valuable for preservation if they provide an important or unique community resource, such as being the last remaining piece of undeveloped land in a developed neighborhood, as proposed at N.J.A.C. 7:7-17.14(c)1ii(8); or if they provide an ecological inland retreat for endangered or threatened plants or animals, as proposed at N.J.A.C. 7:7-17.14(c)1ii(9). Wetlands also merit preservation when they provide flood attenuation, as proposed at N.J.A.C. 7:7-17.14(c)1ii(10). Wetland vegetation helps slow the speed of flood water. In addition, the holding capacity of wetlands aids in

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decreasing the severity of flooding, whether the flooding is caused by a watercourse overtopping its banks or by an excess of runoff flowing over impervious areas. Finally, at N.J.A.C. 7:7-17.14(c)1ii(11), the Department is proposing that wetlands may also be valuable if they provide an area identified as a "core" or "corridor" for wildlife, as described and mapped in the Department's Connecting Habitat Across New Jersey (CHANJ) project. The CHANJ project maps important areas for habitat connectivity which are necessary for wildlife to move across the landscape as they seek food, suitable habitats, and mates. CHANJ maps include large intact "core" habitats and the best available "corridors" that connect them. The CHANJ mapping also identifies road segments that bisect habitats and are likely to pose problems for animal movement. Together, these cores, corridors, and road segments represent the most advantageous places to preserve and restore wildlife connectivity in New Jersey. CHANJ-mapped parcels can be viewed online at <https://dep.nj.gov/njfw/conservation/tools-of-chanj/>.

Freshwater Wetlands Protection Act Rules N.J.A.C. 7:7A

N.J.A.C. 7:7A-11 Mitigation

The Department is proposing several changes to the freshwater wetlands rules as they relate to mitigation. In general, the proposed amendments are intended to expand mitigation options.

For a summary of proposed changes at N.J.A.C. 7:7A-11.1, 11.2, and 11.6, please see the discussion at N.J.A.C. 7:7A-11.13 below.

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N.J.A.C. 7:7A-11.9 Mitigation Hierarchy for a Smaller Disturbance

The rules at N.J.A.C. 7:7A-11.9 currently address mitigation for a smaller disturbance, while the rules at N.J.A.C. 7:7A-11.10 address mitigation for a larger disturbance. This distinction was made because the rules for a smaller disturbance prioritize the use of a mitigation bank as the first option, while the rules for a larger disturbance prioritize onsite mitigation as the first option. The Department is proposing to amend the mitigation hierarchy to remove this disparity and to prioritize the purchase of mitigation credits from a mitigation bank serving the site of the disturbance as the first mitigation option, regardless of the disturbance size. By mirroring the small disturbance hierarchy, there is no longer a need for two separate sections. Thus, the Department is proposing to repeal N.J.A.C. 7:7A-11.10.

The proposed amendment will make the Department's rules consistent with the Federal mitigation rules, 33 CFR 332.8 (2008) and 40 CFR 230.98 (2008). As the Federal mitigation rules were adopted in 2008, the Department's rules have been inconsistent with the Federal rules. The Federal rules prioritize the use of a bank as the first mitigation option for all wetland impacts, regardless of size. As the State has assumed the Federal permitting authority from the Army Corps of Engineers, the Department's rules are required to be as stringent as the Federal rules. As a result of the State rules' inconsistency with the Federal rules, the Department must justify each mitigation project for a larger impact for which a mitigation bank was not the chosen mitigation option as part of the State's annual report to EPA regarding its assumed wetlands (404) program. This analysis would no longer be required if the mitigation hierarchy is amended as proposed.

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This change is appropriate because since the time these rules were originally adopted, banks have been established in almost all watersheds Statewide. Therefore, most applicants have the option and often choose to use a mitigation bank to satisfy mitigation requirements because it generally is quicker and easier than having to identify and obtain property suitable for mitigation, construct a mitigation project, and monitor the project for at least five years. The proposed amendment will not preclude an applicant from providing onsite or offsite mitigation. Rather, if an onsite or offsite mitigation project is chosen instead of a bank, the amendment will require the applicant to justify why a bank was not chosen.

The following amendments are proposed at N.J.A.C. 7:7A-11.9 to address all disturbances.

N.J.A.C. 7:7A-11.9(a) is being amended to delete the reference to a “smaller” disturbance, making it apply to all disturbances. N.J.A.C. 7:7A-11.9(b) is proposed for deletion since there is no need to define a “smaller” disturbance. Recodified N.J.A.C. 7:7A-11.9(b) is proposed to be amended to delete the first sentence and subsequent references to a “smaller” disturbance so that the section will apply to all disturbances, regardless of size. This change results in prioritizing the use of a mitigation bank for all disturbances regardless of size, making onsite or offsite mitigation the second and third options, respectively. Recodified N.J.A.C. 7:7A-11.9(c)2 is proposed for amendment to include the ability to preserve wetlands, in addition to preserving uplands as a mitigation option. This proposed new option will be discussed in greater detail pursuant to recodified N.J.A.C. 7:7A-11.12 below.

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N.J.A.C. 7:7A-11.10, which currently addresses the mitigation hierarchy for a larger disturbance, is proposed to be repealed since there will no longer be a distinction between mitigation for a larger versus a smaller disturbance.

N.J.A.C. 7:7A-11.13 Requirements for Upland Preservation

Recodified N.J.A.C. 7:7A-11.12 provides criteria by which the Department allows the preservation of uplands when onsite and offsite mitigation and mitigation banking are not available. The Department is proposing to amend this provision to include the ability to preserve wetlands, when appropriate. As previously discussed in reference to proposed changes to the CZM rules at N.J.A.C. 7:7-17.14(c), the existing rules do not provide this option because preserving wetlands does not provide a new wetland area. However, the preservation of wetlands is ecologically beneficial and should be a mitigation option if other mitigation options are not available.

As also noted, while the Coastal Zone Management program and the FWPA rules establish strict standards for the regulation of development in wetlands, these regulatory programs are not designed to entirely prevent encroachment into wetlands. Thus, being able to preserve them as a mitigation option affords wetlands an added level of protection against potential development pressure. Additionally, wetlands sometimes contain important or unique resources like threatened or endangered species. Therefore, while preserving wetlands does not provide a net gain in the area of the wetland resource, it ensures that these areas will not be lost to development and, thus, continue to provide their important values and functions. For these reasons, preservation of these

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areas is ecologically beneficial and should be permitted when other mitigation options are not available.

As there are different factors to be considered when preserving uplands versus preserving wetlands, the Department is proposed to divide recodified N.J.A.C. 7:7A-11.12 into two parts. N.J.A.C. 7:7A-11.12(a) will be amended to incorporate the provisions currently codified at subsections (a) and (b) and will apply specifically to preserved uplands. Proposed new N.J.A.C. 7:7A-11.12(b) will apply specifically to the preservation of wetlands.

In addition, the introductory sentence that states that the Department “shall approve mitigation through preservation of uplands” is proposed to be amended to “may approve” because there are additional criteria to be considered before accepting upland preservation that are set forth at N.J.A.C. 7:7A-11.12(c). To ensure that the wetlands merit preservation, the Department is proposing new N.J.A.C. 7:7A-11.12(b)1 that requires that the parcel in question is clear of solid or hazardous waste and water or soil pollution. This provision applies to all land being used for mitigation. In addition, at N.J.A.C. 7:7A-11.12(b)2, the Department is proposing 10 criteria that individually or cumulatively would make a property desirable for preservation. These are the same as the 11 criteria previously discussed in reference to proposed changes to the CZM rules at N.J.A.C. 7:7-17.14(c)1ii, except that they do not include the criteria that the parcel should be at least five acres in size because that provision is already included at N.J.A.C. 7:7A-11.12(c)1. In addition, N.J.A.C. 7:7A-11.12(c)1 is proposed for amendment to clarify that the requirement that the parcel should be at least five acres may be waived for lands that meet other criteria at N.J.A.C. 7:7A-11.12. Finally, the Department is proposing to amend N.J.A.C. 7:7A-11.12(d) to provide that preservation may be achieved through transfer of the property to a

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charitable conservancy or through the execution of legal instruments to prevent development, such as a conservation restriction. Currently, the rules require that land be placed in a conservation restriction and transferred to a charitable conservancy or a government agency.

While this is ideal, there is not always a government agency or conservancy interested in owning a parcel of environmentally sensitive land, but that does not negate the importance of preserving the land and protecting it with a conservation restriction.

At N.J.A.C. 7:7A-11.1, Definitions, the definition of “upland preservation” is proposed to be amended to include wetlands and to state that preservation may be achieved through transfer to a charitable conservancy or government agency, or through conservation restrictions.

At N.J.A.C. 7:7A-11.2, General mitigation requirements, subsection (o) provides a listing with references for each type of mitigation project. N.J.A.C. 7:7A-11.2(o)3 will be amended to change the reference from upland to upland and wetland preservation. Similarly, N.J.A.C. 7:7A-11.6 provides the basic requirements for mitigation proposals. N.J.A.C. 7:7A-11.6(e) lists the information required in a mitigation proposal and will be amended to change the reference from uplands to uplands and/or wetland preservation.

7:7A-11.16 Requirements for a monetary contribution to the Department’s in-lieu fee program

In accordance with recodified N.J.A.C. 7:7A-11.15, the Council is charged with determining whether to accept a monetary contribution to the Department’s Mitigation Fund (Fund) in lieu of providing any other type of mitigation. In accordance with the mitigation hierarchy at amended N.J.A.C. 7:7A-11.9, applicants wishing to contribute to the Fund must exhaust all other mitigation options before a contribution may be considered. Applicants work through the mitigation hierarchy and when the Department agrees with the applicant that there

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are no other options, the applicant may submit a proposal to the Council for consideration. The Council may accept or reject the contribution. To administer the funds, the Council pools the contributions by water region and then, through a request for proposal, provides grants to non-profit and government agencies to provide on-the-ground mitigation.

The FWPA and the Department's rules provide the criteria to determine the required contribution amount. The FWPA states:

The contribution shall be equivalent to the lesser of the following costs: (1) purchasing, and enhancing or restoring, existing degraded freshwater wetlands, resulting in preservation of freshwater wetlands of equal ecological value to those which are being lost; or (2) purchase of property and the cost of creation of freshwater wetlands of equal ecological value to those which are being lost.

See N.J.S.A. 13:9B-13(c).

In the early 1990s, the Council deviated from the statutory language to develop a "single-family contribution." Even though a monetary contribution is intended to provide sufficient funding to create, enhance, or restore freshwater wetlands of equal ecological value to those being lost to approved permits, the Council determined it was appropriate to make the single-family contribution a fee of \$28,000 per acre, significantly less than the cost to replace lost wetlands, in consideration of the fact that, at that time, many of those needing mitigation for wetland impacts had owned their property prior to the Act's passage in 1987 and may, therefore, be affected by the requirement to obtain a permit. See N.J.S.A. 13:9B-22. The single-family contribution amount was approximately 10 percent of the actual costs of mitigation. Over the years, the \$28,000 per-acre contribution was adjusted using the consumer price index to the

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current per-acre contribution of \$47,600. In 2009, when mitigation became a requirement of most general permits, the single-family contribution option was assigned to those obtaining general permits. It is important to note that the rules also set forth a non-single-family general permit contribution amount that is currently \$377,000 per acre (or percentage thereof), an amount that more accurately reflects actual mitigation costs. Regardless, applicants obtaining individual permits (as opposed to general permits) are required to determine their contributions on a case-by-case basis using the requirements for a monetary contribution at recodified N.J.A.C. 7:7A-11.15(c), which language also reflects the statutory requirement.

Applicants to the Council frequently ignore the distinction in the rules and request to use the single-family contribution calculation regardless of whether they obtain an individual or general permit. In addition, due to the passage of time, there are few applicants coming to the Council who have owned their property since before 1987. The Council routinely receives requests to use the single-family contribution from those who have recently purchased property containing wetlands and who receive individual permits to fill wetlands to develop the property. Additionally, a single applicant can have more than one single-family property and request to use the single-family contribution for each parcel. Based on this experience, the Council has concluded that since it has been more than 30 years since passage of the FWPA, the applicants who are coming to the Council requesting the use of the single-family contribution are recent property purchasers and are knowingly purchasing property containing wetlands, often at a reduced rate. Thus, the original purpose for a separate, lower-cost, single-family contribution is no longer applicable. Additionally, accepting a single-family contribution that is knowingly far less than the actual costs for conducting mitigation denies the Mitigation Fund adequate

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resources to perform on-the-ground mitigation. For these reasons, the Council seeks to amend the rules at recodified N.J.A.C. 7:7A-11.15(e) to delete the single-family contribution.

Flood Hazard Area Control Act Rules N.J.A.C. 7:13

N.J.A.C. 7:13-13.9 sets forth the riparian zone mitigation hierarchy. A riparian zone is the land and vegetation within and adjacent to a regulated water. Riparian zones exist along both sides of every regulated water and include the regulated water itself. For all applications pursuant to N.J.A.C. 7:13-13.9(a), the hierarchy at N.J.A.C. 7:13-13.9(b) prioritizes performing mitigation onsite, to ensure that the mitigation activities will provide similar ecological benefits to the waterway itself as those lost to permitted activities. For example, if trees must be removed in one part of the riparian zone, replacing those trees by replanting trees elsewhere onsite in the riparian zone is ecologically beneficial for the adjacent waterway.

N.J.A.C. 7:13-13.9(b) further addresses impacts that cannot be mitigated onsite and divides these impacts into two types. First, N.J.A.C. 7:13-13.9(b)1 addresses those impacts associated with a Category 1 (C-1) waterway that also constitute a “major development” as defined in the Department’s Stormwater Management rules at N.J.A.C. 7:8-1.2, and second, N.J.A.C. 7:13-13.9(b)2 addresses all other impacts.

N.J.A.C. 7:13-13.9(b)1 requires that mitigation for an impact associated with a C-1 waterway, that also constitutes a “major development,” be provided along either the same regulated water as the disturbance or an upstream tributary to that regulated water. When applicants are unable to locate a suitable mitigation site along either the same regulated water as

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the disturbance or an upstream tributary to that regulated water, there are currently no other mitigation options provided.

C-1 waterways contain the highest water quality of all waters in the State. Water quality is often linked to limited development in the vicinity of the waterway and throughout a watershed. Therefore, riparian zones adjacent to C-1 waterways and upstream tributaries are heavily forested, since the presence of forest helps to keep water clean. Since these rules were first adopted, the Department has found that applicants seeking mitigation along the same C-1 water or an upstream tributary cannot find areas suitable for mitigation. The areas they are required to explore are already forested and, therefore, would not benefit, and in fact would be potentially damaged from typical mitigation activities, for example, restoration or enhancement. Therefore, the Department is proposing to amend the rules to continue to require that applicants first look at mitigating onsite and offsite along the same C-1 water or an upstream tributary, but adds new N.J.A.C. 7:13-13.9(b)1i that will allow those applicants who cannot find a feasible onsite or offsite location for mitigating in these areas to be able to use the full range of mitigation options set forth at N.J.A.C. 7:13-13.9(b)2.

N.J.A.C. 7:13-13.9(b)2 allows applicants the option of either mitigating offsite in the same watershed management area as the impact or purchasing mitigation bank credits from a mitigation bank with a service area that includes the area of impacts. The mitigation bank service area is the area where impacts may occur that can be mitigated at a particular bank. Mitigation bank service areas are mostly limited to the watershed management area in which the bank is physically located. This is appropriate because, as previously noted, water quality is affected by

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activities that occur not just onsite but within a watershed. Thus, mitigating at a site within the same watershed as the C-1 impact will have a positive effect on water quality.

In addition, several mitigation banks have been established in watersheds that contain C-1 waterways, and in fact, several mitigation banks contain C-1 streams. Therefore, purchasing credits from one of these banks will provide appropriate mitigation for C-1 impacts in the same watershed.

Social Impact

While the State of New Jersey is often in the forefront of protecting environmental resources like wetlands and flood hazard areas, State laws create a critical balance. The balance enables the construction of housing, roads, and other societal needs while protecting environmental resources like clean and abundant water that support New Jersey residents.

Mitigation is a tool used to replace environmental resources when the determination is made that a proposed activity meets the standards and conditions to be granted a freshwater wetlands, flood hazard area, or coastal zone management permit, although the activity will result in the loss of these resources. The proposed amendments will have a positive social impact by expanding the options available to applicants who are required to provide mitigation. For example, allowing applicants who fill intertidal subtidal waters, have “larger disturbances” (as currently defined in the rules at N.J.A.C. 7:7A-11.10) upon freshwater wetlands, or impact riparian zones adjacent to Category 1 waters to use a mitigation bank ensures that applicants have a wide range of mitigation options. Mitigation banking is a method by which several mitigation projects are amassed to form one consolidated mitigation project that is divided into

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credits. The mitigation bank credits are then ready and available for those receiving permits, ensuring that mitigation occurs in a timely and ecologically beneficial manner. Facilitating mitigation helps to balance the deleterious environmental impacts of development and, therefore, these proposed amendments will have an overall positive impact on the social well-being of the State. Allowing the preservation of tidal or freshwater wetlands will also have a positive impact because it expands the applicant's mitigation options for completing their mitigation obligations.

Preserving wetlands, in addition to uplands, provides positive social benefits by providing undeveloped green spaces, which are beneficial to the plants and animals inhabiting the wetlands and are good for human health (Barton, Jo, and Mike Rogerson. 2017. The Importance of Greenspace for Mental Health. *BJPSYCH International* Volume 14, Number 4, November 2017). Finally, the proposed elimination of the single-family contribution to the Wetlands Mitigation Council may have a neutral or negative social impact. There will be no impact to most people because the impact is limited to those who obtain property and fill wetlands using general permits to develop a single-family house and for whom no other mitigation option exists. However, it may have a negative impact on prospective property speculators and may cause them to reconsider or avoid purchasing such properties when there is no longer a "discount" for the cost of mitigation associated with wetland filling and development.

Economic Impact

The Department anticipates that the proposed rulemaking will have neutral or positive economic impacts because the proposed amendments are anticipated to provide more options and

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not new requirements for applicants required to provide mitigation for permitted activities. Specifically, the Department anticipates the proposed amendment to allow applicants who are required to use a mitigation bank for intertidal/subtidal shallows may have a positive economic impact. As previously stated, the existing rules require that a monetary contribution be given to the Mitigation Council that equals the “amount of the value of the land filled and the cost of creation of intertidal and subtidal shallows of equal ecological value to those which are being lost.” The Division has been utilizing the land’s tax-assessed value to calculate the “value of the land filled,” together with a contractor’s site-specific cost proposal to excavate the required ISS area, to satisfy the mitigation contribution. Due to the use of the tax-assessed value for individual properties, the contribution amounts vary greatly among applicants.

By comparison, a mitigation banker assesses the costs for creating mitigation one time based on the price of the property where the bank is located and the costs for conducting the required mitigation activities. These costs are considered when the mitigation price per credit is established, and then the same credit price applies to all applicants using the bank. Thus, the use of a mitigation bank ensures that costs are equally assessed across all applicants. Based on these factors, using a mitigation bank may cost less, thereby having a positive economic impact for most applicants.

Allowing the use of wetland preservation as a mitigation option will have a neutral or slightly positive economic impact. The addition of wetland preservation to the existing list of mitigation options will have no negative impact since it simply provides an additional option for satisfying an existing mitigation requirement. However, if a property owner needing mitigation owns a site with wetlands on it, when all other mitigation options have been exhausted, allowing

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the owner to preserve the wetlands to satisfy the mitigation requirement would provide a positive economic impact for that owner because they will not have to search for property upon which to conduct mitigation.

Amending the freshwater wetland mitigation hierarchy so that all impacts, no matter the size, use a mitigation bank as the first option, will have a neutral economic impact. Currently, applicants with larger wetland impacts have the option of using a mitigation bank if mitigation on and off site is not feasible. Elevating the use of a mitigation bank as the first option in the hierarchy does not preclude the use of onsite or offsite mitigation if it is ecologically justifiable.

Amending the rules to allow the use of all mitigation options, including the use of a mitigation bank for applicants required to provide riparian zone mitigation adjacent to a Category 1 waterway for a project that constitutes a major development when there is no feasible onsite or upstream option, would also have a neutral or positive economic impact. To the extent that this amendment also provides an additional option to an already-existing mitigation requirement, there is no negative economic impact. However, in the case where it becomes difficult, if not impossible, to locate an acceptable mitigation option pursuant to the existing rules, applicants and/or their consultants frequently spend a lot of time and effort, with the Department's assistance, attempting to locate and identify a viable mitigation option. This may result in project construction delays since no project can commence construction until after the Department receives and approves a mitigation proposal. Thus, providing additional mitigation options, including allowing the use of a mitigation bank under these circumstances, will eliminate the need to search for a project and the associated costs, time, effort, and delays resulting in a positive economic impact.

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Finally, deleting the single-family contribution from the mitigation options for satisfying the general mitigation permit requirements will have a perceived negative economic impact. The discounted mitigation contribution is limited to single-family applicants obtaining general permits for whom there is no other mitigation option. Despite this, many applicants erroneously believe that the policy applies (or should apply) to them regardless of whether they have obtained an individual or general permit. This leads applicants for individual permits to hire consultants to spend time and effort preparing a monetary contribution that is subsequently rejected by the Council. With this option eliminated, applicants will prepare contribution proposals that are more likely to be approved, rather than preparing a proposal that is rejected by the Council and that necessitates additional consulting assistance to prepare a new or revised proposal, thereby saving time and money. However, for those limited number of single-family applicants that are obtaining general permits, the proposed change will have a negative economic impact because the amount of the contribution will be higher, although it will more accurately reflect the actual costs of mitigation. History indicates there is perhaps one applicant per year that would be affected by the proposed change.

Environmental Impact

The Department anticipates that the proposed rulemaking will also have neutral or positive environmental impacts. By providing applicants with more mitigation options, it ensures that resources lost to permitting can be replaced more efficiently and, in some cases, more quickly. Specifically, the Department anticipates that the proposed amendment to allow the use of a mitigation bank for those needing to mitigate for intertidal/subtidal shallows will have a

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positive environmental impact. While contributing to the Mitigation Fund and purchasing credits from a mitigation bank both result in mitigation, credits are not released for sale at a mitigation bank unless the bank is at most one year from being constructed. When money is deposited in the Mitigation Fund, however, it may take significantly longer for that contribution to become on-the-ground mitigation. Therefore, the proposed change will result in mitigation occurring more quickly, which will have a positive environmental impact.

Allowing the use of wetland preservation as a mitigation option will also have a neutral or positive environmental impact. While this mitigation option is near the end of the mitigation hierarchy and, therefore, should not be used frequently, the proposed amendment to allow preservation of wetlands provides an additional mitigation option. Facilitating mitigation has a positive environmental impact because it means replacing a wetland lost to permitting. While preserving wetlands does not add new, enhanced, or restored wetlands to the State's wetlands inventory, it does ensure that specific valuable wetlands will remain protected in perpetuity from future impacts.

Amending the mitigation hierarchy so that all impacts to freshwater wetlands, no matter the size, use a mitigation bank as the first option will have a neutral environmental impact. Currently, applicants with larger environmental impacts have the option of using a mitigation bank if mitigation on and off site is not feasible. Elevating the use of a mitigation bank as the first option in the hierarchy does not preclude the use of onsite or offsite mitigation if it is ecologically justifiable.

Eliminating the option to make a single-family homeowner contribution to the Mitigation Council for impacts associated with general permits will have a positive environmental impact

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because it will ensure that all mitigation contributions will be sufficient to cover the costs associated with conducting mitigation.

Amending the rules to allow the use of a mitigation bank for applicants required to provide riparian zone mitigation adjacent to a Category 1 waterway for a project that constitutes a major development when there is no feasible onsite or upstream option would also have a neutral or positive environmental impact. To the extent that this amendment provides an additional option to an already-existing mitigation requirement, there is a positive environmental impact, for the reasons previously stated. Additionally, for the reasons previously discussed, allowing the use of a mitigation bank serving the area of the proposed riparian zone impact, when there are no options available closer to the impact, will have a neutral or somewhat positive environmental impact since mitigation bank service areas are established as the same watershed as the proposed impacts. Eliminating the need to search for a project and allowing the use of a bank under these circumstances will ensure timely and ecologically beneficial mitigation.

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 that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law.

The Department's authority for regulating development within freshwater wetlands and State open waters is derived from Federal and State law. The Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., requires rules to be promulgated to govern the removal, excavation,

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disturbance, or dredging of soil, sand, gravel, or aggregate material of any kind; drainage or disturbance of the water level or water table; dumping, discharging, or filling with any materials; driving of pilings; and placing of obstructions in a freshwater wetland; and the destruction of vegetation that would alter the character of a freshwater wetland. The FWPA rules, N.J.A.C. 7:7A, fulfill this purpose and regulate the discharge of dredged and fill material in State open waters, as well as govern activities in transition areas. New Jersey's freshwater wetlands program operates in place of the Federal 404 program (Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.). The Department has assumed the Federal permitting authority pursuant to Section 404(g). The United States Environmental Protection Agency (EPA) oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and the EPA. The Federal Clean Water Act requires any state assuming Federal permitting authority to implement regulatory standards at least equally stringent as those currently in place for the Federal 404 program for the protection of waters of the United States, including wetlands.

The Federal program also sets forth mitigation rules. See 33 CFR 325 and 332 (2008); 40 CFR 230 (2008). The proposed FWPA rule amendments add the ability to preserve wetlands as a mitigation option and eliminate the disparity between mitigating for "smaller" versus "larger" impacts. Preservation is a mitigation option pursuant to the Federal rules and the Federal rules do not differentiate between large and small impacts when providing a hierarchy of mitigation options. Additionally, the Federal rules address the establishment of in-lieu fee programs and the EPA has approved the State's Mitigation Council to act in that capacity. The Federal rules allow the in-lieu fee sponsor (the Council) to establish "credit costs," or in the Council's case, the

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contribution amount. Therefore, each of the proposed amendments is consistent with and retains the appropriate level of stringency to ensure compliance with Federal law.

The Department's authority for regulating development within flood hazard areas and riparian zones is derived from State statute, specifically N.J.S.A. 58:16A-50 et seq., 58:10A-1 et seq., 58:11A-1 et seq., and 13:1D-1 et seq. The FHACA rules are not promulgated pursuant to the authority of, or in order to implement, comply with, or participate in any program established pursuant to Federal law or a State statute that incorporates or refers to Federal laws, standards, or requirements. Therefore, the proposed amendments relating to options for riparian zone mitigation for major developments proposed adjacent to C-1 waterways do not derive authority from any Federal law or pursuant to any State statute that incorporates or refers to Federal laws, standards, or requirements.

The Federal Coastal Zone Management Act (P.L. 92-583) was signed into law on October 27, 1972. The Federal Coastal Zone Management Act does not set specific regulatory standards for development in the coastal zone; rather it provides broad guidelines for states developing coastal management programs. These guidelines pursuant to 15 CFR 923 do not specifically address the review standards that should be applied to new coastal development to preserve and protect coastal resources or the mitigation that may be required. The guidelines provide a planning and management process without establishing development standards for development in the coastal area. Tidal wetland regulation, like freshwater wetlands, comes within the purview of the Federal 404 program. As previously stated, the ability to preserve wetlands is consistent with, and does not exceed any Federal standards or requirements of, the Federal Coastal Zone Management Act or the Federal Clean Water Act. Finally, the ability to purchase credits from a mitigation bank

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to mitigate for ISS is within the purview of Federal protection for waters of the United States and is also consistent with, but does not exceed, Federal law.

Therefore, the Department has determined the proposed rulemaking does not include any standards or requirements that exceed the standards or requirements imposed by Federal law. Accordingly, Executive Order No. 27(1994), or N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65), do not require any further analysis.

Jobs Impact

Mitigation is an existing requirement across the Coastal Zone Management, Freshwater Wetlands, and Flood Hazard Area rules. The proposed amendments, in most cases, increase the mitigation options available to applicants. Allowing the use of a mitigation bank for intertidal subtidal shallows (ISS) may have a minor negative jobs impact because it may be quicker and easier for an applicant, consultant, or engineer to identify an existing mitigation bank than to calculate the cost of an ISS contribution.

Allowing the use of a mitigation bank for riparian zone impacts associated with major development may also have a neutral or negative jobs impact. The requirement to mitigate onsite or offsite and upstream of the impact must still be investigated. However, if there is no feasible mitigation site in these locations, it is quicker and easier to identify and use a mitigation bank than to search for, locate a site, plan, and execute a riparian zone mitigation project.

Allowing preservation as a mitigation option will have a neutral jobs impact. As applicants already have the option to preserve uplands under certain conditions, preserving wetlands will not add to, or subtract from, the time or work effort to identify land for preservation.

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Finally, eliminating the single-family contribution will have a neutral impact on jobs. This option is lowest within the mitigation hierarchy and not frequently used. The proposed amendment will not change this. Rather, when applicants obtaining a general permit reach this option, the calculation for the contribution amount will change. Again, the work effort associated with the amendment will not change when compared with the existing rules.

Therefore, overall, the Department does not believe the proposed rulemaking will result in a significant impact on jobs.

Agriculture Industry Impact

Pursuant to N.J.S.A. 52:14B-4(a)2, the Department has evaluated this rulemaking to determine the nature and extent of its impact on the agricultural industry. The proposed rulemaking will have no impact on agriculture because the proposed rulemaking does not add mitigation requirements, but instead, amends existing mitigation options.

Regulatory Flexibility Statement

As required pursuant to the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has evaluated the reporting, recordkeeping, and other compliance requirements that the proposed rulemaking would impose upon small businesses. The Regulatory Flexibility Act defines the term “small business” as “any business which is a resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full-time employees.” The Department has determined the proposed rulemaking will

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not impose any additional reporting, recordkeeping, or other compliance requirements beyond what the existing rules require.

Housing Affordability Impact Analysis

In accordance with N.J.S.A. 52:14B-4.1, the Department has evaluated the proposed rulemaking to determine its impact, if any, on housing affordability. The Department anticipates there will be no impact on the affordability of housing and the average housing cost in the State because the proposed rulemaking is anticipated to provide more options and not new requirements for applicants required to provide mitigation for permitted activities.

Smart Growth Development Impact Analysis

In accordance with N.J.S.A. 52:14B-4, the Department has evaluated the proposed rulemaking to determine its impact, if any, on housing production in Planning Areas 1 or 2, or within designated centers, pursuant to the State Development and Redevelopment Plan. The Department has determined the rulemaking is unlikely to evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, pursuant to the State Development and Redevelopment Plan.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

In accordance with N.J.S.A. 52:14B-4(a)(2) and 2C:48B-2, the Department has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing,

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probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the rule proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 7:7A-11.10.

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

CHAPTER 7

COASTAL ZONE MANAGEMENT RULES

SUBCHAPTER 17. MITIGATION

7:7-17.11 Requirements for intertidal and subtidal shallows and tidal water mitigation

(a)-(b) (No change.)

(c) If the onsite mitigation for the filling of intertidal and subtidal shallows described at (b) above is not feasible, mitigation shall be performed [as follows:

1. At a single-family home or duplex property that is not part of a larger development, mitigation for the filling of intertidal and subtidal shallows shall be in the form of a monetary contribution to the Wetlands Mitigation Fund. The monetary contribution shall be in the amount of the value of the land filled and the cost of creation of intertidal and subtidal shallows of equal ecological value to those which are being lost; or

2. At a property other than a single-family home or duplex, mitigation for the filling of intertidal and subtidal shallows shall be performed] in accordance with the hierarchy at (d) through (g) below.

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(d) If mitigation for the filling of intertidal and subtidal shallows as described at (b) above [at a property other than a single-family home or duplex] is not feasible onsite, or if mitigation for the filling of tidal waters as described at (b) above is not feasible onsite, then mitigation shall be performed offsite through the creation, at a creation to loss ratio of 1:1, of intertidal and subtidal shallows or tidal waters within the same estuary as the site of the filling or through the purchase of in-kind credits from a mitigation bank with a service area that includes the site of the filling.

(e)-(l) (No change.)

7:7-17.14 Wetlands mitigation hierarchy

(a)-(b) (No change.)

(c) If mitigation, as described at (b) above, is not feasible, then mitigation shall be required in the form of one or more of the following, as determined in consultation with the Department:

1. Preservation of wetlands in the same watershed management area, provided the land to be preserved meets the following:

i. The parcel shall not be adversely affected by solid waste, hazardous waste, water pollution, or soil pollution; and

ii. The parcel shall meet at least one, and preferably several, of the following criteria:

(1) Is at least five acres in size;

(2) Is immediately adjacent to public lands, such as a Federal wildlife refuge, a State wildlife management area, a State park or forest, or a State, county, or local preservation area, or preservation areas held by a charitable conservancy;

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- (3) Contains exceptional resource value wetlands;**
- (4) Contains critical habitat for flora or fauna;**
- (5) Contains wetlands or waters draining to FW1 or category one waters, as defined at N.J.A.C. 7:9B-1.4, or into public drinking water sources;**
- (6) Is forested or has unique aspects or characteristics that contribute to its ecological value, such as an unusual or regionally rare type of wetland;**
- (7) Is within, or a part of, the riparian zone;**
- (8) Provides an important or unique resource for a community, such as being the last remaining piece of undeveloped wetland in a developed neighborhood;**
- (9) Provides an ecological inland retreat for endangered or threatened plants or animals;**
- (10) Provides flood attenuation; or**
- (11) Occurs in an area identified as a “core” or “corridor” in NJ DEP Connecting Habitat Across New Jersey (CHANJ) habitat mapping.**

[1.] **2.** Monetary contribution in accordance with the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-[11.16]**11.15;**

[2.] **3.** Upland preservation in accordance with the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-[11.13]**11.12;** or

[3.] **4.** In-lieu fee payment in accordance with N.J.A.C. 7:7-17.16.

(d)-(e) (No change.)

CHAPTER 7A

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FRESHWATER WETLANDS PROTECTION ACT RULES

SUBCHAPTER 11. MITIGATION

7:7A-11.1 Definitions

In addition to the terms defined at N.J.A.C. 7:7A-1.3, the following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

...

“Upland **and/or wetland** preservation” means the permanent protection of **wetlands**, transition areas, or other [uplands] **lands** from disturbance or development, through transfer of the property to a **government agency or Department-approved** charitable conservancy [and] **or** the execution of legal instruments to prevent development, such as a conservation restriction.

...

7:7A-11.2 General mitigation requirements

(a)-(n) (No change.)

(o) Specific requirements for each type of mitigation project are located as follows:

1.-2. (No change.)

3. Requirements for upland **and wetlands** preservation at N.J.A.C. 7:7A-[11.13]**11.12**;

4. Requirements for credit purchase from an approved mitigation bank at N.J.A.C. 7:7A-[11.14]**11.13**;

5. Requirements for land donation at N.J.A.C. 7:7A-[11.15]**11.14**;

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6. Requirements for a monetary contribution to the ILF Program at N.J.A.C. 7:7A-[11.16]**11.15**; and

7. Requirements for mitigation for transition area impacts (N.J.A.C. 7:7A-8.3(g)) at N.J.A.C. 7:7A-[11.11]**11.10**.

7:7A-11.6 Basic requirements for mitigation proposals

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

(e) The information required to be submitted in a mitigation proposal for restoration, creation, and/or enhancement, upland[s] **and/or wetlands** preservation, and land donation is set forth in the appropriate mitigation proposal checklist, available from the Department's website at the address set forth at N.J.A.C. 7:7A-1.4 and described at (h) and (i) below.

(f)-(i) (No change.)

7:7A-11.9 Mitigation hierarchy [for a smaller disturbance]

(a) This section governs[, for a smaller disturbance,] the mitigation alternative required and the location of mitigation in relation to the disturbance. However, if a [smaller] disturbance is a temporary disturbance, it is governed by N.J.A.C. 7:7A-11.8.

[(b) A smaller disturbance is:

1. A disturbance of 1.5 acres or less of freshwater wetlands or State open water; or
2. A disturbance affecting only ordinary resource value wetlands.]

[(c)] **(b)** [The Department presumes that onsite mitigation for a smaller disturbance is not feasible. Therefore, mitigation for a smaller disturbance] **Mitigation** shall be performed through

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the purchase of in-kind credits from a mitigation bank with a service area that includes the site of the disturbance in accordance with N.J.A.C. 7:7A-[11.14]**11.13**, or, if that is not feasible, then either through onsite restoration, creation, or enhancement or offsite restoration, creation, [or] enhancement within the same watershed management area as the disturbance. In determining the feasibility of onsite or offsite mitigation, [for a smaller disturbance] the Department shall consider the following factors regarding the proposed mitigation area:

1.-4. (No change.)

5. Availability of parcels for offsite mitigation that meet the requirements [of (f)] **at (e)** below.

[(d)] **(c)** If mitigation as described at [(c)] **(b)** above is not feasible, mitigation shall be in the form of one or more of the following, as determined in consultation with the Department:

1. Monetary contribution to the ILF Program in accordance with N.J.A.C. 7:7A-[11.16]**11.15**; and/or

2. Upland **and/or wetlands** preservation in accordance with N.J.A.C. 7:7A-[11.13]**11.12**. [(e)] **(d)** If mitigation as described at [(d)] **(c)** above is not feasible, mitigation shall be in the form of a land donation in accordance with N.J.A.C. 7:7A-[11.15]**11.14**.

[(f)] **(e)** In order to demonstrate that offsite mitigation [under (c)] **pursuant to (b)** above is not feasible, an applicant shall provide to the Department a list of at least six sites within the same watershed management area to accommodate the required mitigation. With respect to each site on the list, the applicant shall explain why:

1.-4. (No change.)

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Recodify existing N.J.A.C. 7:7A-11.11 and 11.12 **as 7:7A-11.10 and 11.11** (No change in text.)

7:7A-[11.13]**11.12** Requirements for upland **and wetlands** preservation

(a) The Department [shall] **may** approve mitigation through preservation of uplands only if the uplands [meet the requirements in this section.

(b) Preserved uplands shall be] **are** valuable for the protection of a freshwater wetlands ecosystem. Factors the Department shall consider in evaluating an area for upland preservation include, but are not limited to:

1. -7. (No change.)

(b) The Department may approve the preservation of wetlands in the same watershed management area as the disturbance, provided the wetlands to be preserved meets the following:

1. The parcel shall not be adversely affected by solid waste, hazardous waste or water, or soil pollution; and

2. The parcel shall meet at least one, and preferably several, of the following criteria:

i. Is immediately adjacent to public lands such as a Federal wildlife refuge; a State wildlife management area, State park, or State forest; or a State, county, or local preservation area; or a preservation area held by a charitable conservancy;

ii. Contains exceptional resource value wetlands;

iii. Contains critical habitat for flora or fauna;

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iv. Contains wetlands or waters draining to FW1 or category one waters, as defined at N.J.A.C. 7:9B-1.4, or into public drinking water sources;

v. Is forested or has unique aspects or characteristics that contribute to its ecological value, such as an unusual or regionally rare type of wetlands;

vi. Is within or part of the riparian zone;

vii. Provides an important or unique resource for a community, such as being the last remaining piece of undeveloped land in a developed neighborhood;

viii. Provides an ecological inland retreat for endangered or threatened plants or animals;

ix. Provides flood attenuation; or

x. Occurs in an area identified as a “core” or “corridor” in Connecting Habitat Across New Jersey (CHANJ) habitat mapping.

(c) The amount of uplands **and/or wetlands to be** preserved shall be sufficient to ensure that the functions and values resulting from [the] preservation [of the uplands] will fully compensate for the loss of functions and values caused by the disturbance. In determining if an upland **and/or wetlands** preservation proposal will fully compensate for a disturbance, the Department shall consult the sources, and consider the conditions, referenced [in] **at** N.J.A.C. 7:7A-11.2(a). At a minimum, the uplands **and/or wetlands to be** preserved shall be:

1. At least five acres in size, and significantly larger than the area that would be required for any other mitigation alternative, to compensate for the fact that [uplands] preservation, unlike other mitigation alternatives, does not directly replace the wetland values and functions destroyed by a disturbance. **If land proposed to be preserved comprises less than five acres, it**

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may be considered valuable for preservation if it possesses one or more of the ecological criteria enumerated at (a) above for uplands and/or (b)2 above for wetlands; and

2. (No change.)

(d) The Department shall declare mitigation through [upland] preservation successful upon:

1. (No change.)

2. [Documentation] **If a government agency or Department-approved charitable conservancy is willing to accept the parcel identified, documentation** that the property has been transferred in fee simple to a government agency or [Department approved] **Department-approved** charitable conservancy; and

3. Documentation that a maintenance fund for maintenance and supervision of the mitigation area has been transferred to the governmental agency or charitable conservancy **identified at (d)2 above.** The amount of the maintenance fund shall be determined by agreement between the mitigator and the agency or conservancy.

Recodify existing N.J.A.C. 7:7A-11.14 and 11.15 as **7:7A-11.13 and 11.14** (No change in text.)

7:7A-[11.16]**11.15** Requirements for a monetary contribution to the Department's in-lieu fee program

(a) This subchapter includes the requirements for a monetary contribution to the Department's ILF Program, described at N.J.A.C. 7:7A-[11.23]**11.22**, to compensate for wetland impacts, in accordance with the State of New Jersey In-Lieu Fee Mitigation Program Instrument (ILF

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Instrument), made and entered into by and among the Department, the USEPA, and the Wetlands Mitigation Council.

(b)-(d) (No change.)

(e) [The following analysis shall be used to determine the amount of a monetary contribution when mitigating] **To calculate the amount of monetary contribution** for general permit impacts at N.J.A.C. 7:7A-7[:

1. For single family] **for single-family** property owners, the acreage of wetlands/State open water impacts multiplied by \$47,600, adjusted in accordance with (f) below, using the Consumer Price Index for Urban Consumers, as published by the United States Department of Labor; or

2. For] **for** all [other] property owners, the acreage of wetlands/State open water impacts **shall be** multiplied by \$377,000, adjusted in accordance with (f) below, using the Consumer Price Index for Urban Consumers, as published by the United States Department of Labor.

(f) -(g) (No change.)

Recodify existing N.J.A.C. 7:7A-11.17 through 11.21 **as 7:7A-11.16 through 11.20** (No change in text.)

7:7A-[11.22]**11.21** Wetlands Mitigation Council

(a) The Wetlands Mitigation Council's duties and functions include:

1.-2. (No change.)

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3. Managing the Department's ILF Program in accordance with the ILF Instrument and N.J.A.C. 7:7A-[11.23 and 11.24]**11.22 and 11.23**. As the ILF Program Administrator, the Council is responsible for:

i. through v. (No change.)

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

(d) ILF grant funding procedures, including how to apply for a grant, are found at N.J.A.C. 7:7A-[11.24]**11.23**.

(e) (No change.)

Recodify existing N.J.A.C. 7:7A-11.23 and 11.24 as **7:7A-11.22 and 11.23** (No change in text.)

7:7A-[11.25]**11.24** Mitigation banks

(a) A mitigation bank requires approval by the Department prior to the sale of any mitigation credits. "Approval" for the purposes of this section means approval in accordance with N.J.A.C. 7:7A-[11.26]**11.25**.

(b)-(d) (No change.)

(e) The Department shall include in the banking instrument approving a mitigation bank, a schedule, as set forth at (e)1 through 8 below, [under] **pursuant to** which a bank operator may sell credits. The Department shall adjust the amount of credits that can be released [under] **pursuant to** (e)2 through 8 below to reflect the degree of progress the bank has shown toward meeting the goals and performance standards in the approved mitigation proposal:

1. Ten percent of the credits shall be released upon completion of both of the following:

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i. (No change.)

ii. Compliance with all pre-release credit sale conditions in the banking instrument approving the bank, including securing all construction permits, posting adequate and effective financial assurance, in accordance with N.J.A.C. 7:7A-[11.17]**11.16**, and filing of the conservation restriction;

2.- 8. (No change.)

(f)-(j) (No change.)

(k) If the Department determines that the mitigation bank operator is in default of any provision of the mitigation banking instrument, the Department shall determine whether the amount of mitigation completed at the bank site is commensurate with the number of credits already sold. If the Department determines that the amount of mitigation completed is less than the number of credits already sold, the Department may assert its rights to the financial assurance provided [under] **pursuant to** N.J.A.C. 7:7A-[11.17(k)]**11.16(k)** and (l).

7:7A-[11.26]**11.25** Application for a mitigation bank

(a)-(b) (No change.)

(c) To obtain Department approval of a proposed mitigation bank, an applicant shall submit the information required by the wetlands mitigation bank proposal checklist, available from the Department at the address set forth at N.J.A.C. 7:7A-1.4. The checklist shall require a draft mitigation banking instrument that includes the following:

1.-10. (No change.)

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11. Performance standards to enable the Department to determine when credits may be released [under] **pursuant to** N.J.A.C. 7:7A-[11.25(e)]**11.24(e)**;

12. -14. (No change.)

15. Financial assurances meeting the requirements [of] **at** N.J.A.C. 7:7A-[11.17]**11.16**;

16.-20. (No change.)

(d) (No change.)

CHAPTER 13

FLOOD HAZARD AREA CONTROL ACT RULES

SUBCHAPTER 13. RIPARIAN ZONE MITIGATION

7:13-13.9 Riparian zone mitigation hierarchy

(a) (No change.)

(b) Mitigation for a riparian zone vegetation disturbance shall be performed through **the** creation, enhancement, restoration, or preservation of riparian zones onsite. If onsite mitigation is not feasible, then mitigation shall be provided offsite in accordance with the following:

1. For disturbance to vegetation within a 300-foot riparian zone that is associated with a “major development,” as defined in the Department’s Stormwater Management rules at N.J.A.C. 7:8-1.2, mitigation shall be provided along either the same regulated water as the disturbance or an upstream tributary to that regulated water[; and].

i. If offsite mitigation along either the same regulated water as the disturbance or an upstream tributary to that regulated water is not feasible, then mitigation shall be provided in accordance with (b)2 below.

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2. For all other disturbance to riparian zone vegetation, mitigation shall be provided offsite in the same watershed management area as the impacts or through the purchase of credits from a mitigation bank with a service area that includes the area of impacts.

3. In determining the feasibility of onsite or offsite mitigation [or credit purchase], the [Department shall consider the] following factors **shall be considered** regarding the proposed mitigation area:

i.-iv. (No change.)

(c) If offsite mitigation for riparian zone vegetation disturbance within the same watershed management area at [(b)2] **(b)** above is not feasible, mitigation may occur in another watershed management area, provided the mitigation is as close as possible to the watershed management area where the disturbance is to occur, as approved by the Department, and provided the mitigation fully compensates for the disturbance, in accordance with N.J.A.C. 7:13-13.2.