

## **Freshwater Wetland Rules and Agriculture**

NJDEP Freshwater Wetlands Rules N.J.A.C. 7:7A Effective 10/20/03

Normally, the NJDEP Freshwater Wetlands Rules (**NJAC 7:7A-2.2**) regulate any activities in and around freshwater wetlands that involves the placement of fill, construction of structures, or disturbance of soils, vegetation, or drainage. In general, active farming operations are exempted from many of the requirements of the NJDEP Freshwater Wetlands Rules (**NJAC 7:7A**) if they meet the following criteria:

NJAC 7:7A-1.4: "Established, ongoing farming, ranching or silviculture operation" means activities on areas subject to a farming, ranching, or silviculture use as of June 30, 1988, which use has been pursued continuously since June 30, 1988. Activities on areas lying fallow as part of a conventional rotational cycle that does not exceed five years are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle for so long that modifications to the hydrological regime are necessary to resume operations, or for more than five years, whichever is shorter."

Section 7:7A-2.8 describes activities that are exempted from wetland permit and/or waivers. These exemptions are reproduced in Appendix I for reference. It is important to emphasize that these exemptions are only effective for ongoing operations and do not apply to changes in use that impair or further disrupt wetlands or State open waters. Subject to these conditions, the rules exempt **“Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or soil and water conservation practices.”**

Under this exemption, minor drainage is defined to include maintenance of existing drainage (drainage tiles or ditches) and connection of wetland areas to upland areas in order to remove soil moisture from upland crop areas. It also includes ditching and ponding to grow wetland crops such as cranberries or rice. Removal of blockages in existing drainageways is allowed as long as the depth and cross-section of the drainageway is not increased. Any drainage done in wetland areas must be part of ongoing farming or silviculture operations and cannot be used to gradually convert a wetland to an upland. Similarly, plowing cannot be used to redistribute fill into wetland areas in order to convert them to uplands (**NJAC 7:7A-1.4**). The official NJDEP definition of plowing, as well as other agriculture-related definitions, is reproduced in Appendix II below.

Other agricultural activities that are specifically allowed are the construction of farm or stock ponds for watering animals or crops and the construction and maintenance of irrigation ditches. Construction of farm or forest roads is also allowed but roads must be constructed in accordance with Best Management Practices (BMPs) as described in the NJDEP Technical Manual for Stream Encroachment and Federal Regulations (33 C.F.R. 330.6, 40 C.F.R. 233.35(a)6). Clear cutting of forested wetland areas is not allowed unless it is part of a forestry management plan approved by the State Forester. Removal

of forest products from wetland areas under an approved plan is allowed under the silviculture exemption but the removal of stumps is not as it would cause discharge of dredged or fill material and a possible change in water flow characteristics.

NJDEP defines wetlands boundaries by three criteria according to the 1989 Interagency Manual (FMIDJW, 1989): 1) hydrophytic vegetation; 2) hydric soils; and 3) wetland hydrology. These three technical characteristics are mandatory and, except in disturbed areas, must be present for an area to be identified as wetlands. Hydrophytic vegetation is defined as macrophytic plant life growing in water, soil, or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content (FMIDJW, 1989). Hydric soils are defined as soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part (USDA, Soil Conservation Service, 1987). In general, hydric soils are flooded, ponded, or saturated for usually one week or more during the period when soil temperatures are above biological zero (41oF). Wetland hydrology (permanent/periodic inundation or soil saturation to the surface) is the driving force behind wetland formation. The presence of water for a week or more during the growing season creates anaerobic conditions in the soil, which affects the types of plants that can emerge and the types of soils that develop.

In addition to the wetlands themselves, NJDEP regulates the wetland transition areas, commonly called “wetland buffers.” The width of the transition area is determined by the “resource value” of the wetland (NJAC 7:7A-2.4):

Resource Value	Transition Area
Exceptional	150 ft
Intermediate	50 ft
Ordinary	No transition area assigned

Exceptional resource value wetlands drain to trout production waters or provide habitat for threatened or endangered species. Ordinary resource value wetlands include small (<5000 ft<sup>2</sup>) isolated wetlands more than 50% surrounded by lawns or impervious surfaces, drainage ditches and swales, as well as man-made detention basins constructed in uplands. Intermediate resource level wetlands are all wetlands that are neither exceptional nor ordinary. Appendix IV contains more detail on these definitions.

The regulation of activities within the transition area is not quite as strict as within the wetland itself. While disturbance of the soils, vegetation or hydrology are still regulated activities, “normal property maintenance” of lawfully existing (prior to July 1, 1989) natural and artificial features, landscaping and gardens is allowed. This includes mowing of existing lawns, pruning of trees and shrubs, replacement of non-native plants with natives, cultivation of existing gardens, development of new gardens no larger than a quarter acre, and maintenance of existing structures as long as the footprint is not increased. Activities that causes substantial alteration of the character of the area (e.g., expanding lawns or clear-cutting, application of herbicides, etc.) are not considered normal property maintenance. It is important to recognize that even if you have no wetlands on your property, you are subject to transition area restrictions for wetlands on adjacent properties up to 150 ft from your property boundary. Appendix IV reproduces the language from the NJAC 7:7A 2-6 on regulated activities within the transition area.

## **Appendix I (NJAC 7:7A-2.8)**

### **7:7A-2.8 Activities exempted from permit and/or waiver requirement**

(a) This section sets forth certain activities that are exempt from certain permit requirements in this chapter. However, even if an activity is exempt under this chapter, it may still require a permit from the Army Corps of Engineers under the Federal wetlands program, and/or a water quality certificate issued by the Department.

(b) The farming, ranching, and silviculture exemptions in (c) and (d) below are subject to the following limits:

1. The exemptions shall not apply to any discharge of dredged or fill material into freshwater wetlands or State open water incidental to any activity which involves bringing an area of freshwater wetlands or State open waters into a use to which it was not previously subject, where the flow or circulation patterns of the freshwater wetlands or waters may be impaired, or the extent or values and functions of freshwater wetlands or State open waters is reduced;
2. The exemptions apply only as long as the area is used for the exempted activity. Therefore, if the area stops being used for farming, ranching, or silviculture, the exemption no longer applies;
3. The exemptions apply only to the portion of the property which meets all requirements for the exemption. For example, if half of a 20 acre property has been actively farmed and half has not, the half that has not been actively farmed would not be considered to be part of an established, ongoing farming operation and would therefore not be eligible for the farming exemption;
4. Clear cutting of a non-cultivated, wooded wetland area is not covered by the exemptions unless it is part of the normal harvesting of forest products performed in accordance with a written approval from the State Forester; and
5. If an area with hydric soils has been drained for farming purposes through the use of drainage structures such as tiles or ditches, the Department shall presume that the area has wetlands hydrology for the purpose of identifying a freshwater wetland under N.J.A.C. 7:7A-2.3. To rebut this presumption of wetlands hydrology, all drainage structures shall be removed or completely disabled and the area shall be left undisturbed for at least one normal rainfall year, after which the presence or absence of wetlands hydrology shall be determined through use of technical criteria, field indicators, and other information, in accordance with the 1989 Federal manual.

(c) Subject to the limitations of this section, the following activities, when part of an established, ongoing farming, ranching or silviculture operation, on properties which have received or are eligible for a farmland assessment under the New Jersey Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq., are exempt from the requirement of a freshwater wetlands or open water fill permit, or transition area waiver:

1. Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food and fiber, or soil and water conservation practices. For the purposes of this paragraph, "minor drainage" means:
  - i. The discharge of material incidental to connecting upland drainage facilities to adjacent wetlands, adequate to effect the removal of excess soil moisture from upland croplands;

- ii. The discharge of material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters which are in established use for such agricultural and silvicultural wetlands crop production;
  - iii. The discharge of material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing
    - i. impoundments which have been constructed in accordance with applicable requirements of the Federal Act and which are in established use for the production of rice, cranberries, or other wetland crop species;
  - iv. The discharge of material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not properly removed, would result in damage to or loss of existing crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of formation of such blockages in order to be eligible for exemption under this paragraph; and
  - v. Minor drainage in wetlands is limited to drainage within areas that are part of an established farming or silvicultural operation. It includes maintenance of existing drainage tile or other drainage structures. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (for example, wetlands species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any new canal, ditch, dike or other waterway or structure. Any discharge of dredged or fill material into the wetlands or State open waters incidental to the construction of any such structure or waterway requires a freshwater wetlands or State open water permit, and will not be considered minor drainage;
2. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, provided that such facilities are for farming, ranching or silvicultural purposes and do not constitute a change in use. Any dredged material from pond construction or maintenance must be placed outside the freshwater wetlands unless it is needed for the structural or environmental integrity of the pond; and
  3. Construction or maintenance of farm roads or forest roads constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of freshwater wetlands and State open waters are not impaired and that any adverse effect on the aquatic environment will be minimized. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. Roads constructed for forestry and silviculture purposes shall be constructed using temporary mats whenever practicable. All roads employing the

placement of fill shall be removed once the land use changes from forestry to another use.

(d) Normal harvesting of forest products in accordance with a forest management plan approved by the State Forester is exempt from the requirement of a freshwater wetlands permit, transition area waiver, or open water fill permit, subject to the limitations of this section. However, the removal of stumps results in a discharge of dredged or fill material, and a change in use and an impairment of flow or circulation. Therefore, under (b)1 above, the removal of stumps is not exempt.

## **Appendix II (Agriculture-related Definitions)**

Excerpted from 7:7A-1.4 Definitions

"Abandoned" means, with respect to an agricultural field, including a blueberry field or a cranberry bog, that the field was used for agriculture, but has not been used to produce a crop or product for five years or more. If an agricultural field has been abandoned for 40 or more years, it shall no longer be considered an abandoned agricultural field.

"Best Management Practices" or "BMPs" means methods, measures, designs, performance standards, maintenance procedures, and other management practices which prevent or reduce adverse impacts upon or pollution of freshwater wetlands, State open waters, and adjacent aquatic habitats, which facilitate compliance with the Federal Section 404(b)(1) guidelines(40 C.F.R. Part 230), New Jersey Department of Environmental Protection Flood Hazard Area Control rules, N.J.A.C. 7:13; the Department's Storm Water Management Regulations, N.J.A.C. 7:8; the Standards for Soil Erosion and Sediment Control in New Jersey, promulgated by the New Jersey State Soil Conservation Committee at N.J.A.C. 2:90; and effluent limitations or prohibitions under Section 307(a) of the Federal Act and the Department's Surface Water Quality Standards, N.J.A.C. 7:9B. Examples include practices found at 33 C.F.R. 330.6, 40 C.F.R. 233.35(a)6, the Department's Technical Manual for Stream Encroachment, and "A Manual of Freshwater Wetland Management Practices for Mosquito Control in New Jersey". The manuals included in this definition are only a partial listing, and interested persons should contact the Department for the most up to date list.

"Cultivating" means physical methods of soil treatment, employed upon planted farm, ranch or forest crops to aid and improve the growth, quality or yield of the crops.

"Ditch" means a linear topographic depression with bed and banks of human construction, which conveys water to or from a site, which is surrounded by uplands and which is not located within a wetland. This does not include channelized or redirected natural water courses.

"Drainage" means active or passive methods for changing the hydrologic conditions of wetlands or State open water, such as lowering groundwater or surface water levels through pumping, ditching, or otherwise altering water flow patterns.

"Established, ongoing farming, ranching or silviculture operation" means activities on areas subject to a farming, ranching, or silviculture use as of June 30, 1988, which use has been pursued continuously since June 30, 1988. Activities on areas lying fallow as part of a conventional rotational cycle that does not exceed five years are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another

use or has lain idle for so long that modifications to the hydrological regime are necessary to resume operations, or for more than five years, whichever is shorter.

"Farmed wetland" means a freshwater wetland, as defined in this section, which was both manipulated and cropped before December 23, 1985, and has been in active agricultural use continuously since then. This term also includes a wetland that was manipulated and used for pasture or hayland before December 23, 1985, which has been in active use for pasture or hayland continuously since then. An area that lies fallow as part of a conventional rotational cycle that does not exceed five years is considered to be in active agricultural use.

"Hydric soil" means a soil that in its undrained condition is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation. These soils may be described in several places, including New Jersey's Official List of Hydric Soils, developed by the Natural Resources Conservation Service; the National Wetlands Inventory, entitled "The Wetlands of New Jersey", published in 1985 by the United States Fish and Wildlife Service; or in the 1989 Federal manual. Alluvial land, as mapped on soil surveys, or other soils exhibiting hydric characteristics identified through field investigation as described in Part III of the 1989 Federal manual may also be considered a hydric soil for the purposes of wetland classification. Also, wet phases of somewhat poorly drained soils not on New Jersey's Official List of Hydric Soils may be associated with a wetland and therefore for the purposes of this chapter shall be considered a hydric soil.

"Seeding" means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

"Silviculture" means the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis. The normal harvesting of forest products is a part of some silviculture operations.

"Soil Conservation District" means a local subdivision of the New Jersey Department of Agriculture (NJDA), established pursuant to N.J.S.A. 4:24-1 et seq. Generally, each Soil Conservation District administers NJDA programs for a single county, although some administer programs for more than one county. The Soil Conservation Districts are overseen by the New Jersey State Soil Conservation Committee in the NJDA, which promulgates the Standards for Soil Erosion and Sediment Control in New Jersey, N.J.A.C. 2:90.

"State open waters" means all waters of the State as defined in this section, including waters of the United States as defined in this section, but excluding ground water as defined at N.J.A.C. 7:14A, and excluding freshwater wetlands as defined in this section. The following waters will generally not be considered State open waters for the purposes of this chapter. However, the Department shall determine, on a case-by-case basis, if a particular watercourse or water body listed below is a State open water:

1. Non-tidal drainage and irrigation ditches excavated on dry land;
2. Artificially irrigated areas which would revert to upland if the irrigation ceased;

3. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
4. Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons;
5. Water-filled depressions created in dry land incidental to construction or remediation activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of "waters of the United States";
6. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Federal act (other than cooling ponds);
7. Erosional channels less than two feet wide and six inches deep in upland areas resulting from poor soil management practices; and
8. Stormwater management facilities created in uplands.

#### **Appendix IV (NJAC 7:7A-2.4 and -2.6)**

##### 7:7A-2.4 Classification of freshwater wetlands by resource value

(a) Freshwater wetlands shall be divided into three classifications based on resource value. The Department shall consider the resource value classification of a wetland in, among other things, evaluating alternatives to the proposed regulated activity, in determining the size of the transition area, and in determining the amount and/or type of mitigation required.

(b) A freshwater wetland of exceptional resource value, or exceptional resource value wetland, is a freshwater wetland which:

1. Discharges into FW1 or FW2 trout production waters or their tributaries;
2. Is a present habitat for threatened or endangered species; or
3. Is a documented habitat for threatened or endangered species, and which remains suitable for breeding, resting, or feeding by these species during the normal period these species would use the habitat.

(c) The Department identifies present or documented habitat for threatened or endangered species for purposes of (b) above using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened or endangered wildlife species. The details of this method are described in the Land Use Regulation Program's freshwater wetlands technical manual, available from the Department's Office of Maps and Publications at the address in N.J.A.C. 7:7A-1.3. An applicant may request that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value. Such a request shall include a demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity. Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.

(d) A freshwater wetland of ordinary resource value, or an ordinary resource value wetland, is a freshwater wetland which does not exhibit any of the characteristics in (b) above, and which is:

1. An isolated wetland, as defined at N.J.A.C. 7:7A-1.4, which:
  - i. Is smaller than 5,000 square feet; and
  - ii. Has the uses listed below covering more than 50 percent of the area within 50 feet of the wetland boundary. In calculating the area covered by

a use, the Department will only consider a use that was legally existing in that location prior to July 1, 1988, or was permitted under this chapter since that date:

- (1) Lawns;
- (2) Maintained landscaping;
- (3) Impervious surfaces;
- (4) Active railroad rights-of-way; and
- (5) Graveled or stoned parking/storage areas and roads;

2. A drainage ditch;
3. A swale; or
4. A detention facility created by humans in an area that was upland at the time the facility was created.

(e) A freshwater wetland of intermediate resource value, or intermediate resource value wetland, is any freshwater wetland not defined as exceptional or ordinary.

(f) The classification system established under this section shall not restrict the Department's authority to require the creation or restoration of freshwater wetlands under N.J.A.C. 7:7A-15.

(g) To obtain a Department determination of the resource value classification for a particular wetland, an applicant may obtain a letter of interpretation from the Department under N.J.A.C. 7:7A-3.

#### 7:7A-2.6 Regulated activities in transition areas

(a) Except as provided in (b) and (c) below, the following are regulated activities when they occur in transition areas:

1. Removal, excavation, or disturbance of the soil;
2. Dumping or filling with any materials;
3. Erection of structures;
4. Placement of pavements;
5. Destruction of plant life which would alter the existing pattern of vegetation; and
6. Placement of any portion of a residential development project, as defined at N.J.A.C. 7:7A-1.4.

(b) Notwithstanding (a) above, the following activities are not regulated in transition areas and do not require Department approval under this chapter, provided that the activities are performed in a manner that minimizes adverse effects to the transition area and adjacent freshwater wetlands:

1. Normal property maintenance;
  - i. For the purposes of this paragraph, "normal property maintenance" means activities required to maintain lawfully existing artificial and natural features, landscaping and gardening. These activities include:
    - (1) Mowing of existing fields or lawns;
    - (2) Pruning of trees and shrubs;
    - (3) Selective cutting of trees;
    - (4) Replacement of existing non-native plants with either native or nonnative species;
    - (5) Limited supplemental planting of non-native plant species that will not significantly change the character of the existing vegetational community of the transition area. The creation of a lawn is not considered supplemental planting;



(6) Planting of native species, that is, plants naturally occurring in transition areas in the local region, (the county agricultural agent may be consulted to obtain information regarding these species);

(7) Continued cultivation of existing gardens and the development of new gardens no larger than one quarter acre in size; and

(8) Maintenance of artificial features including the repair, rehabilitation, replacement, maintenance or reconstruction of any previously authorized, currently serviceable structure, lawfully existing prior to July 1, 1989, or permitted under this chapter, provided such activities do not result in additional disturbance of the transition area upon completion of the activity. Minor deviations from the existing structure due to changes in materials or construction techniques and which are necessary to make repairs, rehabilitation or replacements are allowed provided such changes do not result in disturbance of additional transition area upon completion of the activity.

ii. Any activity which involves or causes the substantial alteration or change of the existing characteristics of a transition area shall not be considered normal property maintenance. Activities which involve or cause substantial alteration or change of the transition area include, but are not limited to, extensive removal or destruction of vegetation by clear cutting, cutting, mowing (except as described in (b)1i above), burning or application of herbicides, planting of ornamental plants or lawns for landscaping purposes (except as described in (b)1i above), regrading or significant changes in the existing surface contours and the placement of fill, pavement or other impervious surfaces.

2. Minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area, provided the activities do not result in adverse environmental effects on the transition area or on the adjacent freshwater wetlands, and do not continue for more than six months. For the purposes of this paragraph, minor and temporary disturbances include, but are not limited to, the placement of scaffolds or ladders, the removal of human-made debris by non-mechanized means which does not destroy woody vegetation, the placement of temporary construction supports, and the placement of utility lines over or under a previously authorized, currently serviceable paved roadway surface;

3. The erection of one or more temporary structures covering a combined total of 150 square feet or less of the transition area. For the purposes of this paragraph, a "temporary structure" means a shed or fence without a foundation, or a structure that remains in the transition area for no more than six months.

(c) Certain regulated activities are exempt from transition area requirements under N.J.A.C. 7:7A-2.8(f). In addition, an activity that is exempt from freshwater wetlands permit requirements under N.J.A.C. 7:7A-2.8(c) for farming activities, or N.J.A.C. 7:7A-2.8(d) for forestry activities, is also exempt from transition area requirements, subject to the limits on freshwater wetlands exemptions at N.J.A.C. 7:7A-2.8. A person may request an exemption letter confirming the exemption status of an activity by using the procedures at N.J.A.C. 7:7A-2.10.

## **References**

FMIDJW, 1989. Federal Manual for Identifying and Delineating Jurisdictional Wetlands -January 1989. An Interagency Cooperative Publication of USFWS, USEPA, DOA, SCS. Washington, DC.

USDA Soil Conservation Service, 1987. Hydric Soils of the United States Washington,  
DC.