

http://www.nj.gov/dep/rules/adoption/adopt_071105a.pdf

RESPONSE: The terms "municipal building or construction permit" appeared in the proposed rule at N.J.A.C. 7:13-2.1(c)3, and were intended to describe a type of municipal approval that would grandfather a project from regulation under the adopted new rules, as described in the proposal summary at 38 N.J.R. 3964-5. As discussed in detail in the response to comments 241 through 251, N.J.A.C. 7:13-2.1(c) has been modified on adoption to clarify the types of approvals that would qualify a project to be grandfathered from the adopted new rules

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241. COMMENT: The proposed grandfathering provision at N.J.A.C. 7:13-2.1(c) fails to recognize the millions of dollars that are invested in developing plans for local approvals, many of which are designed specifically to avoid requirements for stream encroachment permits under existing the Department rules. Such projects should be exempt from the new rules or, at a minimum, be entitled to a hardship waiver based upon reliance upon the prior rules. (65)

[clip comments 242-251]

RESPONSE TO COMMENTS 241 THROUGH 251: As noted in the summary of the proposal, 38 N.J.R. 4001-2, flooding has been a chronic problem in New Jersey which has, in recent years, markedly increased in intensity and damage to property and the environment. This problem is due, in large part, to development within flood hazard areas throughout the State. New Jersey's Fiscal Year 2004 Map Modernization Business Plan estimates that flood hazard areas encompass almost 35 percent of the State (http://www.floods.org/pdf/sbp_nj_04.pdf) and FEMA has declared flooding New Jersey's number one natural hazard (FEMA news release 1530-012, August 4, 2004). These facts, combined with New Jersey's dense population and its long history of development within flood hazard areas, has led the Department to conclude that it is necessary to adopt more stringent Flood Hazard rules and apply them to all projects except those described in N.J.A.C. 7:13-2.1(c). The Department believes that the new rules fairly balance the public interest in minimizing flood damage and protecting against surface water degradation with the interest of individual property owners' in completing projects that have, prior to adoption of these rules, progressed in planning and organization to the verge of construction or which have obtaining a site specific review for impact on flood hazard areas and surface waters as described below. If a project is not grandfathered under N.J.A.C. 7:13-2.1(c) and the applicant feels that strict compliance with the requirements of the adopted new rules would create an undue hardship, N.J.A.C. 7:13-9.8 sets forth a procedure by which an applicant can petition the Department for an exception from strict compliance with one or more requirements of this chapter. This procedure addresses commenters' concerns that inflexible application of the new rules might infringe upon investment-backed expectations and provides an administrative remedy for such claims to be examined on a case-by-case basis. Because stream encroachment, CAFRA, and Waterfront Development permits include a site-specific review of a project's potential adverse impact on flood hazard areas and surface waters, the Department believes that it appropriate to grandfather projects that have received these approvals under certain circumstances. While the Department stated its intention in the proposal summary to grandfather projects that had undergone a Department flood hazard area review prior to adoption of the new rules, some commenters expressed confusion over which portions of a development would be grandfathered.

N.J.A.C. 7:13-2.1(c), as modified on adoption, provides that, for the purpose of this subsection, each distinct construction activity in a project, such as each building, road or utility crossing, is considered a distinct regulated activity. This clarification is necessary since the grandfathering of a project, or any distinct portion of a project, as described below, is predicated on whether all necessary approvals have been obtained under the various rules or jurisdictions that have authority over a site prior to the effective date of these new rules; November 5, 2007. N.J.A.C. 7:13-2.1(c)1, as modified on adoption, grandfathers in its entirety a project for which, prior to the effective date of these new rules, a permit issued pursuant to the repealed Flood Hazard Area Control rules was obtained or timely applied for, provided the permit covered all aspects of the project that required approval under the repealed rules. Projects for which a permit issued pursuant to the repealed rules was not obtained or timely applied for, or which permit did not cover all aspects of the project requiring a permit under the repealed rules, are grandfathered only as to the portions approved under a permit issued pursuant to a timely received application. Thus, assume that a ten-house development proposed under the repealed rules had only seven houses under Department jurisdiction under the repealed rules because those seven houses were located within the 50-foot buffer of a stream. With the adoption of these new rules, assume that the other three houses are now under Department jurisdiction because they are located within the new 150-foot riparian zone along the stream. If the applicant submitted a permit application under the repealed rules for all prior regulated portions of the project (the seven homes), which was complete for review prior to the adoption of these new rules, and the application is subsequently approved, then all ten houses are grandfathered from the new rules for as long as the Flood Hazard Area Control rules permit is valid. The three houses that did not lie within the Department's jurisdiction prior to November 5, 2007 (the effective date of the new rules) are grandfathered. In order for a project to be grandfathered, a complete application for the permit must have been received by the Department prior to (the effective date of these new rules). If the Department receives an application for a stream encroachment permit prior to (effective date of these new rules), and the application is complete for review before this date, the Department will review the application according to the Flood Hazard Area Control Act rules that were in effect on the date of application submittal. The Department can make its completeness determination after (effective date of these new rules). The application need only arrive at the Department offices prior to (effective date of these new rules). All applications received on or after (effective date of these new rules) will be reviewed under the new rules. If an application is received prior to (effective date of these new rules) and is subsequently rejected as incomplete, or is denied or withdrawn, a revised application will be reviewed under the new rules if it is received by the Department on or after (effective date of these new rules).

In addition, the regulated activity must either be specifically approved under the permit or not have required a stream encroachment permit under the repealed rules and be part of a project that did require a stream encroachment permit. If an applicant applied for and obtains a stream encroachment permit for a project under the repealed rules, and that permit encompasses and approves the entirety of activities that were regulated under the jurisdiction of N.J.A.C. 7:13 at the time of application, then all regulated activities that are part of the project would be grandfathered. If, however, an applicant segments a development and applies to the Department for a permit for only some of the activities that would have been regulated under the repealed rules, only that portion of the project for which a permit was issued would be grandfathered. Any portions of the project that were subject to the repealed rules but which were not approved by the Department under the repealed rules, would require a permit under the newly adopted rules. The Department does not agree with some commenters' proposals to grandfather projects that obtained a freshwater wetlands permit from the Department prior to the effective date of these rules. Such projects are not eligible for grandfathering under this chapter because neither the Freshwater Wetlands Act, N.J.S.A. 13:9B-1 et seq., nor its implementing rules at N.J.A.C. 7:7A require site-specific review of the project's potential adverse impact on flooding and surface waters.

N.J.A.C. 7:13-2.1(c)2 grandfathers projects for which all necessary CAFRA or Waterfront Development Permits have been issued by (the effective date of these rules), or for which an administratively complete application for a CAFRA or Waterfront Development Permit has been received prior to (the effective date of these rules). Note that these coastal programs do not perform a site-specific review of potential flood hazard area impacts until the application has been declared by the Department as complete for final review. Thus, to be grandfathered under N.J.A.C. 7:13-2.1(c)2, the Department must have declared an application for a CAFRA or Waterfront Development Permit complete for final review prior to (effective date of these rules). If a CAFRA or Waterfront Development Permit application is received by the Department prior to (effective date of these new rules) but the Department has not declared the application complete for final review prior to (effective date of these new rules), the application will be reviewed under the newly amended Coastal Zone Management rules.

N.J.A.C. 7:13-2.1(c)3 further clarifies the Department's intention to grandfather from these new rules only those coastal projects that were not eligible to receive a stream encroachment permit because of repealed N.J.A.C. 7:13-1.3(d), which exempted projects from stream encroachment permitting if they were located "within tidally influenced flood plains" (i.e., tidal flood hazard areas) regulated pursuant to the Waterfront Development Law or the Coastal Area Facilities Review Act (CAFRA). Under the repealed rules, a stream encroachment permit was not needed for projects in tidal flood hazard areas if a coastal permit was required. However, because projects located in non-tidal flood hazard areas were not exempt under repealed N.J.A.C. 7:13-1.3(d) they would have required a stream encroachment permit even if they did need a coastal permit as well. Since a project located in a non-tidal flood hazard area needed a

stream encroachment permit the grandfathering provision of N.J.A.C. 7:13-2.1(c)1 would apply because that paragraph addresses projects that received a prior stream encroachment permit. Such a project would not be considered under N.J.A.C. 7:13-2.1(c)2 because that provision addresses projects in tidal flood hazard areas that received a prior coastal permit. Projects that did not require any of the permits described above are grandfathered under N.J.A.C. 7:13-2.1(c)3 if the project required and now has a currently valid zoning certificate from the New Jersey Meadowlands Commission that was issued for the project prior to (the effective date of these rules). Grandfathering such projects is appropriate since the Meadowlands Commission conducts a site-specific review that includes potential adverse impacts to flood hazard areas and surface waters, just as the State does for stream encroachment, CAFRA and Waterfront Development Permit applications. N.J.A.C. 7:13-2.1(c)4 contains text originally proposed as part of N.J.A.C. 7:13-2.1(c)3, with certain clarifications. As proposed, N.J.A.C. 7:13-2.1(c)3i intended to grandfather regulated activities that were not subject to this chapter prior to (effective date of these new rules) but that, prior to this date, have received a local approval allowing a regulated activity (such as lot clearing, installation of utilities or foundations) to commence. To express this intention, N.J.A.C. 7:13-2.1(c)3i as proposed required a regulated activity to be authorized by a "valid final building or construction permit" in order to be grandfathered. Some commenters questioned whether it was the Department's intention to exempt projects with site plan or subdivision approvals under the Municipal Land Use Law. However, such approvals can remain dormant or incomplete for years without work having to commence. It is the Department's understanding that only a local construction permit or its equivalent allows regulated activities such as lot clearing and foundation work to commence. It is this lot-specific, local construction permit or equivalent approval authorizing a regulated activity that the Department requires in order to grandfather activities that would otherwise be regulated under the new rules. Thus, projects that did not require a stream encroachment permit, CAFRA permit or waterfront development permit are grandfathered pursuant to N.J.A.C. 7:13-2.1(c)4i only if a valid municipal approval enabling commencement of construction on a specific lot and/or easement was issued for the project prior to (the effective date of the rules). Where no such municipal approval is required to commence construction, such projects are grandfathered pursuant to N.J.A.C. 7:13-2.1(c)4ii (proposed as N.J.A.C. 7:13-2.1(c)3ii), if certain activities have commenced on-site.

Applying these new rules to pre-construction-phase projects not previously reviewed for flood and water degradation impacts affords the public the full protective benefit of the new rules. Furthermore, developers had more than one year's notice to apply for and/or receive construction approval that would meet the Department's proposed grandfathering rule after the proposal was first announced by Governor Corzine on August 22, 2006, and the Department posted a draft of the proposed rules on its website.