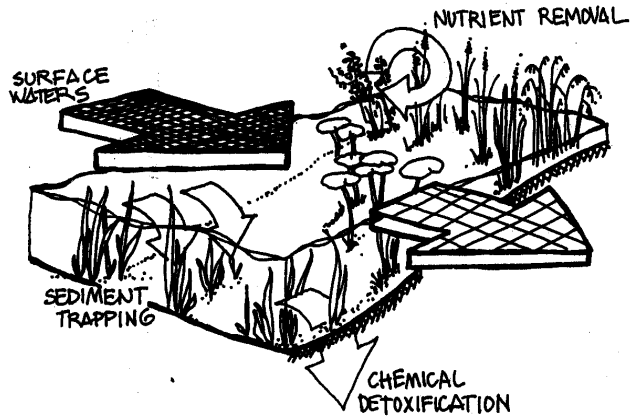


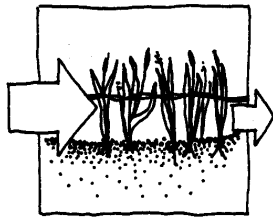
# FRESHWATER WETLANDS PROTECTION IN NEW JERSEY

## Tools for Municipal Action

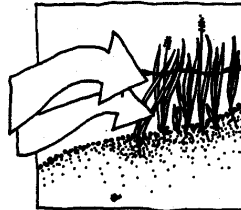
WETLAND VALUES AND FUNCTION:  
• WATER QUALITY PROTECTION



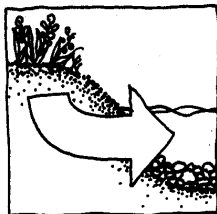
• FLOOD PROTECTION



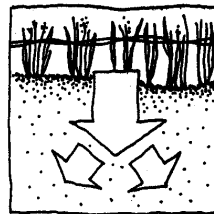
• SHORELINE STABILIZATION



• STREAMFLOW MAINTENANCE



• GROUNDWATER RECHARGE





# The Freshwater Wetlands Protection Act

## INTENT OF FRESHWATER WETLANDS LAW

The New Jersey legislature passed the Freshwater Wetlands Protection Act on July 1, 1987 to "preserve the purity and integrity of freshwater wetlands from unnecessary and undesirable disturbance." The New Jersey legislature found that the public interest in protecting freshwater wetlands required "vigorous action" because freshwater wetlands protect and preserve drinking water supplies; provide a natural means of flood and storm damage protection that prevents loss of life and property; provide essential habitat for a major portion of the State's fish and wildlife; and, maintain critical base flows to surface waters during droughts.

## BACKGROUND

Careful study of the existing wetlands protection programs at the local, state and federal levels of government established that New Jersey needed a more comprehensive wetlands protection strategy. The federal wetlands program to protect wetlands, established under Section 404 of the Clean Water Act in 1977, is administered by the U.S. Army Corps of Engineers (COE) whose primary responsibility is to protect the navigable waters of the country. Because the federal program focuses on navigable waters, it does not provide comprehensive freshwater wetlands protection. It also limits the authority of the COE to regulation of discharge of dredged or fill material and does not authorize the COE to regulate such activities as draining wetlands or destroying vegetation in wetlands. The federal program also limits the COE's jurisdiction so that no protection is afforded wetlands in headwater areas where substantial acreage of valuable freshwater wetlands occur.

## OVERVIEW OF MAJOR PROVISIONS

The Act directs the Department of Environmental Protection (the Department) to provide comprehensive protection for freshwater wetlands (no matter what their size), their adjacent transition areas, and state open waters through regulation of actions which may impact these areas. Individuals, companies, as well as all levels of government must obtain permits.

### *REGULATED NATURAL RESOURCES*

**Freshwater wetlands** are wet areas including bogs, swamps, and marshes. The Act authorizes the Department to regulate virtually all activities in freshwater wetlands including dredging, filling, soil removal and construction. These activities all have a significant potential for causing substantial harm to and loss of freshwater wetlands.

**Transition areas**, or buffer areas, adjacent to wetlands are an integral part of the wetlands ecosystem. The Act authorizes the Department to regulate many activities in transition areas including soil removal, dumping or filling, erection of permanent structures, and destruction of plant life which would alter the existing pattern of vegetation.

The Act requires regulation of transition areas of 150 feet around exceptional resource value wetlands and 50 feet around intermediate resource value wetlands. (Please see Chapter II for a full discussion of wetlands value classifications.)

**State open waters** are inland waters including ponds, lakes, streams, and rivers. The New Jersey law provides for state assumption of the federal wetlands or 404 program which regulates both wetlands and waters of the nation. (See discussion on next page.) The regulation of state open waters is limited to the discharge of dredged or fill material to protect water quality, aquatic habitat, and navigability.



# Municipal Land Use Law and the Freshwater Wetlands Act

## SUMMARY DISCUSSION

Municipal officials can use their land use control powers as defined by the 1975 Municipal Land Use Law (NJ.S.A. 40:50D-1 et. seq.) in conjunction with land use and zoning regulations to provide wetlands protection.

The following pages outline ways municipalities can use the local land use planning and development review process to protect wetlands including ordinance checklists and other local regulatory options. They also offer suggestions for coordinating the local and state review process.

## LAND USE IN NEW JERSEY

Since New Jersey municipalities control land use, they have many opportunities to take actions that will complement the state's Freshwater Wetlands Act.

The 1975 Municipal Land Use Law (MLUL) delegates control of land use in New Jersey to municipal government. The provisions of the MLUL are intended to promote appropriate use or development of all lands in the state in a manner that will protect the public health, safety, and welfare.

Although the state wetlands law preempts municipalities from regulating wetlands, it does not supersede the provisions of the MLUL requiring municipalities to designate appropriate uses and densities for land.

### *WETLANDS, THE MUNICIPAL MASTER PLAN AND ZONING*

The master plan is intended to provide a sound basis for zoning and the zoning ordinance. The MLUL charges planning boards with the job of preparing, adopting, and/or amending master plans to determine appropriate uses for lands in the municipality.

A master plan's land use element identifies the physical character of the municipality - soils, geology, topography, forests, rivers, wetlands. Natural Resource or Environmental Resource Inventories can be the source document or can be adopted as part of the land use element. Taking these physical characteristics into

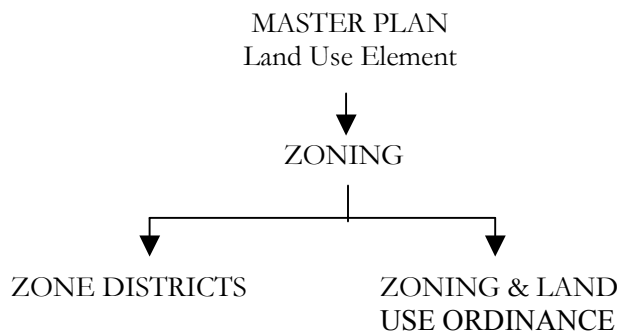
account, the master plan establishes appropriate uses for all lands.

Using available information -- the National Wetlands Inventory, hydric and poorly drained soils shown on the County Soil Survey maps, or state freshwater wetlands maps when completed -- the master plan can use maps to show generally where wetlands are located and designate uses for them consistent with their environmental sensitivity. They can also be identified as parts of conservation, greenways, stream corridors, or open space plans.

Once the planning board has adopted a master plan land use element, the MLUL gives governing bodies the



power to designate uses for different zones in the municipality and to enact or amend a zoning ordinance that provides regulations for each zone district. The zoning ordinance must be consistent with the master plan (NJ.S.A. 40:55D - 62a). It describes legally permitted land uses and densities for different districts and provides the planning board and the board of adjustment with rules for development review in those zones. Zoning designations for wetlands areas, based on the master plan land use element, can provide for low intensity use, e.g., large lot zoning or cluster provisions to avoid wetland areas.



*LOCAL PLANNING/ZONING  
AND OTHER STATE PROGRAMS*

The state mandate for local control of land use planning and zoning gives municipal government opportunities for wetlands protection not available to the state. At the same time, local planning and zoning are the basis for many state programs and can promote protection of freshwater wetlands.

For example, state water quality planning and associated wastewater management planning prohibit providing sewer service to wetlands and other environmentally critical areas. Local planning and zoning should reflect these constraints.

Local master plans and zoning are an important focus of the State Development and Redevelopment Plan. Its goal is to manage the state's growth largely through coordination of state agency and local land use planning.

The State Plan sets several statewide goals and policies and recommends areas for growth and limited growth in an attempt to balance future development with protection of natural resources, including freshwater wetlands. The Plan's Planning area system divides the state into five regions, each with different development characteristics. The Plan's regional design system creates objectives for development within these regions.

Planning Area Five consists of undeveloped areas where growth must be carefully managed to protect environmentally sensitive features. The Plan encourages local government to map these features and establishes strategies for their protection. Since Planning Area Five criteria designate freshwater wetlands systems as one of the areas for protection, local governments should identify them for the State Planning Commission if the State Plan Map did not.

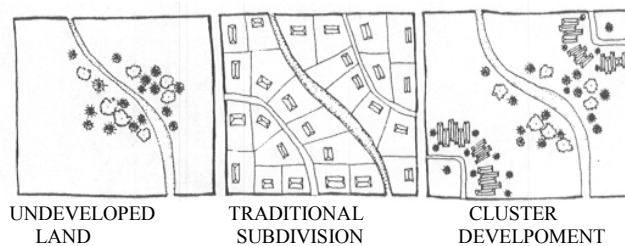
**LAND USE AND ZONING REGULATIONS**

The zoning ordinance establishes regulations by which municipal boards regulate development in different zoning districts. It is used in conjunction with land use regulations that spell out in detail requirements and standards for subdivision and site plan review. Both ordinances can promote wetlands protection.

The Freshwater Wetlands Protection Act does not preempt ordinances with a general purpose that incidentally protects wetlands. The following ordinances and standards can be especially helpful in wetlands protection:

**Critical areas ordinances** regulate and provide design standards for environmentally sensitive areas. It is important that such ordinances state these purposes clearly, and define the critical areas, e.g., steep slopes, floodplains, high water table soils, poorly drained soils, shallow depth to bedrock, streams, aquifer recharge areas, and set up specific techniques to protect them: large lot zoning, useable land calculations, buffers, or performance standards.

**Open space/cluster ordinances or zoning standards** enable municipalities to require that a certain percentage of a site be preserved as open space to provide desirable aesthetics and protect natural resources such as wetlands. The concept behind clustering is straightforward -- in exchange for dedicated open space, development is allowed on smaller lots than provided under conventional zoning. The number of units on the site remains the same as could be obtained under the standard zoning. The MLUL requires that an ordinance for residential cluster development shall provide that the open space shall be owned either by an owners' association or by the municipality. Preservation of the open space in perpetuity can be assured by including such a provision in a deed restriction.



Both the municipality and the developer benefit from cluster developments. A municipality's natural resources are protected and future residents are assured of their own open areas. Allowing a developer added intensity for clustering is unnecessary, since benefits are built in. The developer has lower costs for roads, infrastructure and for state permits. By eliminating state regulatory requirements for wetlands and stream encroachments, the developer also saves time and consultant expenses.

Disadvantages of clustering include public perception that open space will be used even though the open space can be preserved in perpetuity. Another possible disadvantage is the potential difficulty of providing proper sewage disposal, depending on required minimum lot sizes, soil conditions, or the availability of public wastewater tie-ins.

Understanding the nature of open space in clustered developments is important. Open space in clustered developments falls into two categories:

1. active open space to provide for recreation and other amenities; and
2. passive open space that:
  - protects sensitive natural resources like wetlands;
  - provides open space connections for wildlife corridors and helps sustain biological diversity;
  - provides stormwater facilities;
  - includes existing easements;
  - includes roads.

**Lot size averaging ordinance provisions** (MLUL 40:55D-40(b)) enable municipalities to provide design flexibility for subdivision layout to promote resource protection. The concept allows the planning board to approve some lots in a subdivision to be less than the standard minimum lot size, provided that other lots are larger than the minimum and conform to the overall intent of the zoning. Lot size averaging facilitates protection of environmentally sensitive areas such as stream corridors, wetlands, steep slopes, and agricultural lands. Ordinance requirements should include:

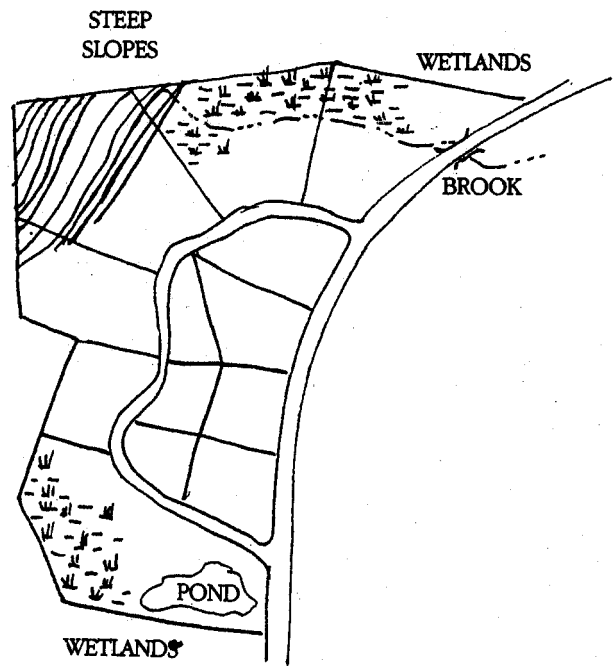
- establishing the minimum parcel size that qualifies;
- designating the zones where allowed;
- limiting dwelling unit numbers to those allowed under the conventional zoning (numbers are determined by a concept plan for conventional zoning);
- requiring the applicant to demonstrate that the lot size averaging plan is preferable to the conventional plan in achieving the goals and purposes of the ordinance and the Master Plan;
- designating the minimum lot area as well as the required average lot area throughout the subdivision;
- offering an acceptable lot area range;
- requiring deed restrictions to prohibit further subdivision and development of lots larger than that allowed under conventional zoning;

- requiring that new lots can be developed according to town ordinances.

The benefits of lot size averaging for the municipality and the developer are very similar to those enjoyed by open space/cluster ordinances except that the open space protected remains in private ownership.

## LOT SIZE AVERAGING

Table D



**Overlay zoning** enables municipalities to protect natural, cultural or other resources in more than one zone by establishing protection standards for specific resources that apply in more than one zone. For example, an overlay stream corridor protection zone establishes buffer requirements that could include setbacks of 100 feet no matter what zone district the stream flows through. Other resources that overlay zoning can protect include steep slopes, flood hazard areas, historic districts.

**Usable yard area ordinance provisions** insure that residents on newly created lots have yard areas where the use and enjoyment of their property is not limited. The ordinances define yards, lot areas and minimum area requirements and require contiguous areas outside of floodways, wetlands, wetland buffer areas, storm water detention basins, water courses and slopes 15% or greater.

**Soil erosion and sediment control** requirements can be critical to wetlands protection. Important erosion control requirements include:

- having controls in place before construction starts and insuring that such controls if in wetlands or transition areas are subject to the Freshwater Wetlands Protection Act;
- insuring that stockpiled soil is protected;
- insuring that as little of the site is disturbed at one time as possible;
- requiring full-time on-site inspector for large projects.

**Stormwater management requirements** attempt to maintain the volume and quality of stormwater runoff to pre-development levels. Effective stormwater management protects wetlands from pollutants and excessive flooding as long as stormwater flows are not concentrated at the wetland line.

Many New Jersey municipalities require control of peak rates of runoff, water quality, and total volume by encouraging maximum use of non-structural runoff controls like:

- preservation of existing vegetation;
- natural recharge and infiltration;
- dispersal of run-off, rather than concentration into structures;
- grassed swales;
- porous paving or grassed paving blocks;
- flush curbing to allow sheet flow of runoff.

ANJEC has a number of “no-net” stormwater management ordinances on file that require infiltration wherever possible. The Department also has a stormwater web page at: [www.njstormwater.org](http://www.njstormwater.org).

**Stream corridor protection ordinances** most commonly require buffer areas along streams and can be especially effective when combined with a stream corridor plan as part of a municipal master plan. A required buffer area along streams will protect any freshwater wetland that lies in the buffer area as well as the stream.

Ordinance provisions should spell out the purposes intended to be accomplished, provide definitions, and specific methods for protection. The following is excerpted from Mendham Township's land use ordinance and provides good protection for both perennial and intermittent streams:

*"Where a subdivision or site plan development is traversed or bordered by a watercourse, drainage-way, channel or stream, there shall be provided a stormwater easement or drainage right-of-way and a conservation easement dedicated to the township conforming substantially with the lines of such watercourse, and such further width or*

*construction, or both, as will be adequate for the purpose. For major or scenic streams, and where applicable, the conservation easement shall be one hundred fifty (150) feet in width on either side of the stream centerline. The minimum width for a conservation easement for a watercourse of **intermittent nature** shall be twenty-five (25) feet on either side of the center line, where applicable. For **flowing streams of minor nature**, and where applicable, the conservation easement shall be at least fifty(50) feet in width on either side of the stream center line. "*

\* Emphasized words are defined elsewhere in the ordinance.

**Tree protection ordinances** establish regulations protecting trees and vegetation. They generally set limits to the amount of vegetation that can be removed from a site and provide protection to shade trees over a certain size. Since trees and vegetation provide a major means of filtering runoff and holding soil, these ordinances can be very important for wetlands protection.

#### INNOVATIVE PLANNING AND REGULATION OPTIONS

Some areas in New Jersey are applying innovative techniques to protect critical natural resources.

**Transfer of Development Rights.** Transfer of development rights (TDR) or transfer of development credits (TDC) are techniques that use the cluster concept on more than one piece of property. The right to develop a particular resource (agricultural land or environmentally constrained land) can be sold to a government entity or on the open market. The buyer can hold the right or credit and use it in areas designated to receive the development.

Use of the TDR concept requires local government to designate:

- "Sending areas" - areas where development rights can be purchased (areas designated for protection);
- "Receiving Areas" - areas where development rights can be used.

The net result for a municipality or region using the TDR concept is the same overall amount of development, distributed in a way that protects agricultural or environmentally constrained land.

The TDR or TDC option benefits property owners of constrained land since they receive compensation for leaving the land undeveloped. It helps government protect areas important to the public welfare. A TDC program has been in effect in the Pinelands Management Area since 1981. In 1989 the MLUL was amended to provide for TDR in Burlington county as a demonstration pilot before allowing it statewide. TDR is one of the legislative initiatives important to the State Development and Redevelopment Plan's implementation.

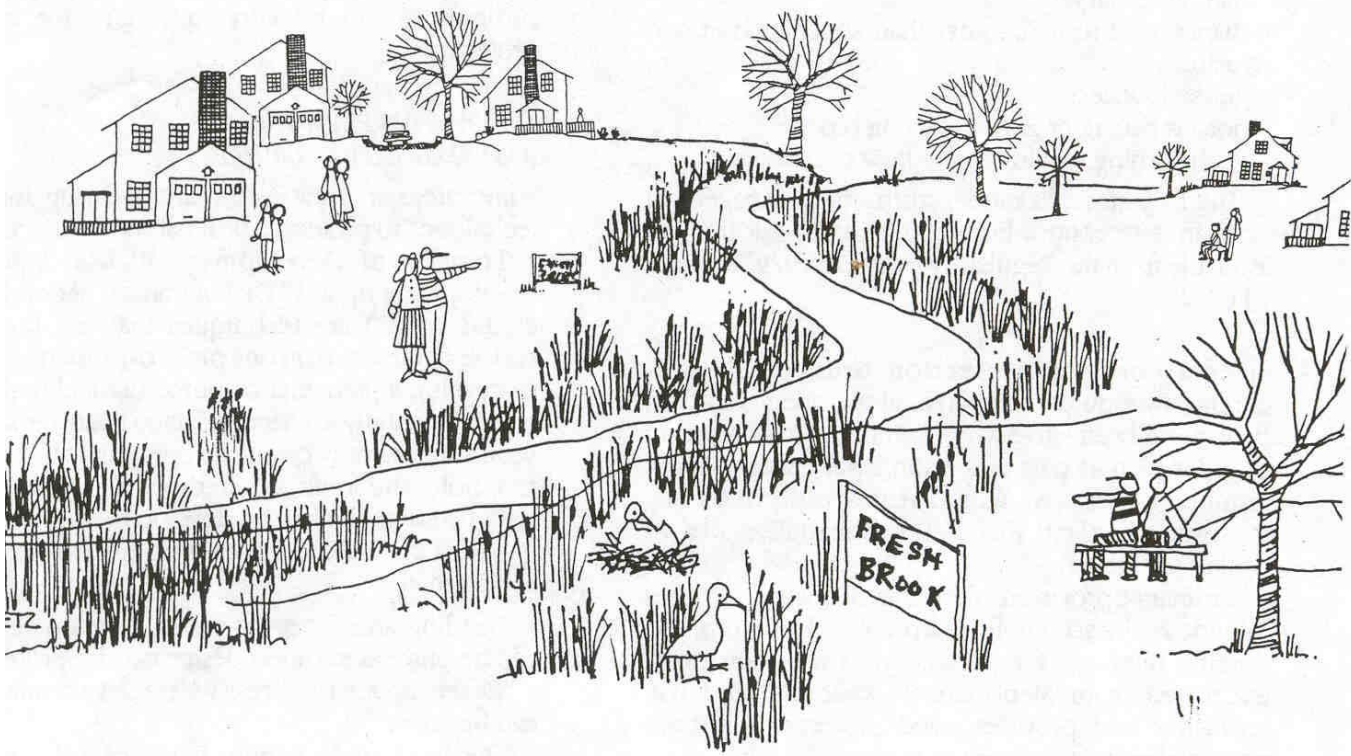
**Non Contiguous Cluster** – The Municipal Land Use Law (MLUL) has a provision that would allow an ordinance to require that part of the minimum area required for a cluster development does NOT have to be adjacent or contiguous with the developed parcel.

The MLUL definition of “Planned Unit Development” provides for an area with a specified minimum contiguous or noncontiguous acreage of 10 acres or more that can be developed as a single entity with a plan that contains one or more residential clusters and one or more public,

quasi-public, commercial or industrial areas in such ratio of nonresidential use to residential use specified in the zoning ordinance.

“Planned unit residential development” means an area with a specified minimum contiguous or noncontiguous acreage of 5 acres or more to be developed as a single parcel according to a plan containing one or more residential clusters.

## STREAM CORRIDOR PROTECTION



## MUNICIPAL REVIEW OF DEVELOPMENT APPLICATIONS

When wetlands considerations are part of the municipal master plan and zoning ordinance, freshwater wetlands protection is integrated into the local development review process. Municipal boards and/or the construction official can routinely trigger the state permit process when they receive applications involving wetlands.

For example, if the master plan or Environmental Resources Inventory indicates a proposal may include wetlands, staff for municipal boards can check applications with these documents as they are submitted and advise the applicant of the advisability of checking with the Department about permit needs.

It is in the applicant's and the town's interest to know if and/or where wetlands are located on a site since wetlands considerations may be an important factor in subdivision and/or site plan design. A Letter of Exemption or a Letter of Interpretation from the State will clarify the wetlands issues for a particular application.

## SUGGESTIONS FOR MUNICIPAL ACTION

*(Planning Boards, Boards of Adjustment,  
Boards of Health, Environmental Commissions)*

Municipalities can take a number of steps to protect freshwater wetlands through the local development review process;

1. Establish procedures for applications involving wetlands.
  - a. Staff for municipals boards or the construction officials should check all applications with New Jersey Wetlands Maps, National Wetlands inventory maps and hydric soils and poorly drained soils delineated on County Soil Survey maps for presence or proximity to wetlands. If the presence of wetlands or a transition area is in question, the applicant can be requested to:
    - obtain a Letter of Interpretation from DEP that will:
      - supply site specific documentation of the presence or absence of wetlands;
      - a state-approved wetlands delineation and appropriate transition area; and/or,
      - identify the classification of the freshwater wetland.
    - obtain a Letter of Exemption from DEP;
    - consider scheduling a pre-application conference with the Department if an applicant needs an individual wetlands permit.
  - b. Each board should designate a person to respond to public notice for Letters of Exemption, Letters of Interpretation, Statewide General Permits, and Individual Permits to allow timely comment by municipal agencies to the Department. Local comments can be helpful to the Department since knowledge of a particular area can include more information. Limited time is allowed for response.
  - c. The municipality should establish a process for the town clerk to notify immediately the designated person of each board of receipt of notice of applications for Letters of Interpretation, Statewide General Permits, Individual Permits, and Transition Area Waivers.
  - d. Each board should insure that applicants obtain permits from other levels of government by withholding signature on plans until these permits are obtained.
  - e. Boards can include conditions in site plan and subdivision approvals to insure protection of wetlands through: conservation easements, official approval of

each construction phase (sequence of construction) and agreements for future maintenance activities.

2. Amend master plan and zoning to reflect location of wetlands.
3. Amend development application checklist to include:
  - a. copy of Letter of Exemption from the DEP's- Land Use Section and documents sent with application for Letter from the Department, when appropriate.
  - b. copy of a Letter of Interpretation from the Department and documents sent with application, when appropriate.
4. Amend final site plan and/or subdivision application requirements to include submission of a map showing a state-approved wetlands delineation and transition area boundaries at the same scale as the municipal tax map, when wetlands exist on the subject or adjacent tract.
5. Insure that your municipality obtains a freshwater wetlands permit for municipal projects that will affect wetlands. The wetlands regulations require local government compliance; permit fees are waived.
6. Report violations of the Freshwater Wetlands Protection Act to the Department's Enforcement Office at 609-292-2402.

## MUNICIPAL OPTIONS FOR ENFORCEMENT

Municipalities should encourage staff, board members, and the public to notify the Department, usually by working with the local Construction Official, of possible violations:

- filling or alteration of wetlands without a permit;
- violating permit conditions.

Wetlands permits must be prominently displayed on the construction site. If none is visible, there is a violation because:

- no permit exists; or,
- the display requirement has not been met.

All violation reports must include:

- the address, block and lot number;
- the nature of the violation.

**Source: FRESHWATER WETLANDS PROTECTION IN NEW JERSEY, A Manual for Local Officials**, Second Edition, 1992, The Association of New Jersey Environmental Commissions, PO Box 157, Mendham, NJ 07945