

November 7, 2024

Melissa Abatemarco, Esq.
Attention: DEP Docket No 05-24-05
Office of Legal Affairs
New Jersey Department of Environmental Protection
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Trenton, NJ 08625-0402

RE: Resilient Environments and Landscapes Rule Proposal
DEP Docket Number: 05-24-05
Proposal Number: PRN-2024-073

Dear Ms. Abatemarco:

Please accept the following comments on the above referenced rules. These comments are submitted on behalf of the following organizations: The Watershed Institute, Raritan Headwaters, NY/NJ Baykeeper, Hackensack Riverkeeper, Great Egg Harbor Watershed Association, Lower Raritan Watershed Partnership, New Jersey Highlands Coalition, Association of New Jersey Environmental Commissions, Pinelands Preservation Alliance, New Jersey Environmental Education Fund, New Jersey Environmental Lobby, Cooper River Watershed Association, Trout Unlimited New Jersey, The Passaic River Coalition, Deal Lake Watershed Alliance, American Littoral Society, , New Jersey Sierra Club, New Jersey Conservation Foundation, Clean Ocean Action, New Jersey League of Conservation Voters, and Environment New Jersey.

Overall, we are supportive of the Department's proposal and urge the Department to adopt these rules as quickly as possible. As noted below there are instances where we do not support the proposal. We urge the Department to adopt these rules in totality and very quickly propose amendments to address the concerns outlined below.

General Comments:

The basis of most of New Jersey's regulations and statutes is found in the policy statement of the Clean Water Act. The Act sets the main objective of "restore and maintain the chemical and physical, and biological integrity of the Nation's waters." To achieve that objective the act sets out goals:

- elimination of discharges into navigable waters by 1985.
- to achieve an interim goal of water quality that provides for protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water by 1983.
- prohibit the discharge of toxic pollutants¹

New Jersey's Water Pollution Control Act incorporates these goals into New Jersey law where it declared "[I]t is the policy of this State to restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial and other uses of water."² This requirement is echoed in several additional statutes or regulations. The Freshwater Wetlands Protection Act asserts that wetlands "purify surface water and groundwater resources..."³ It is through these lens that our comments on the REAL rules are based.

In addition to the "environmental" requirements of these statutes, there is a public health and safety requirement. The Flood Hazard Area Control Act requires the Department to adopt rules "to minimize the threat to the public safety, health and general welfare."⁴ The FWPA notes wetlands function in providing natural means of

¹ 33 U.S.C. 1251(a).

² N.J.S.A. 58:10A-2.

³ N.J.S.A. 13:9B-2.

⁴ N.J.S.A. 58:16A-55(a).

flood absorption and storage of water during high runoff periods and the reduction of flood crests.”⁵ Thus the FWPA also looks to public health and safety.

We support the Department’s decisions on the science of climate change. We recognize that the Department chose to use a moderate emissions scenario when calculating the impacts of sea level rise as opposed to a more protective approach of using high emissions scenarios. While we would have preferred the high emission scenario as that provides even more protection to the residents and communities of New Jersey we understand the Department was balancing competing concerns. The Department is empowered to determine those areas of the state which are subject to flooding and which “the improper development and use of which would constitute a threat to the safety, health and general welfare.”⁶

We believe a higher emission scenario would provide more protection and given recent trends a higher emission scenario may be more likely. In addition to the projected trends, we are currently experiencing more significant impacts from climate change than were anticipated.⁷ Not only are the impacts more significant but the likelihood of reaching 1.5° C or 2.0° C is questionable. The scientific community is extremely skeptical that we will be able to meet the goals of keeping global warming below the 2° C by 2100.⁸ In fact recent studies question whether we can keep global warming below 3° C by 2100.⁹ Therefore it is highly likely we will reach if not exceed the moderate emissions scenario. Therefore, it would be irresponsible to plan using lower emissions scenarios that are extremely unlikely we will be able to achieve.

⁵ Supra Footnote 3.

⁶ N.J.S.A. 58:16A-52(a).

⁷ 10 Big Findings from the 2023 IPCC Report on Climate Change, Boehm and Schumer, <https://www.wri.org/insights/2023-ipcc-ar6-synthesis-report-climate-change-findings>, last visited Oct. 28, 2024.

⁸ Wynes, S., Davis, S.J., Dickau, M et al, “Perceptions of carbon dioxide emissions reductions and future warming among climate experts”, , 5 Commun Earth Environ 498 (2002) <https://www.nature.com/articles/s43247-024-01661-8>

⁹ Hanson, James, et al., “Global Warming in the Pipeline” Oxford Open Climate Change, 2023 Vol 3. No. 1 and Ripple, Jame J. et al., “World Scientists’ Warning of a Climate Emergency 2022”, BioScience Vol 72 No. 12, 1149 (Dec. 2022).

Likewise, we strongly support the Department's use of the 83% chance of experiencing versus the 50% chance as advocated by some. The Department's position greatly increases the chances that the proposed rules will be protective of life and communities, while the 50% chance is a mere toss up placing billions in investment and thousands of lives at risk for damage from storms. Again, rolling the dice and hoping is irresponsible.

While New Jersey is leading the nation in addressing the implications of climate change, it is not alone. Other jurisdictions are referencing and utilizing over 5 feet of sea level rise. New York City's Mayor's Office of Climate & Environmental Justice provides on their website: "[s]ince 1900, sea level in New York City has risen by about 12 inches and is projected to continue to increase as much as 5.4 feet by 2100, leading to increased frequency and intensity of coastal flooding."¹⁰ That position was derived from New York City Panel on Climate Change.¹¹ In that report the authors noted "[t]he collapse of Thwaites Glacier, which holds the equivalent of more than half a meter of global sea level rise potential, could also destabilize neighboring glaciers that hold another 3 m of sea level rise potential."¹² Importantly the report stated that "[g]laciers and ice sheets combined are now the dominant contributors to global mean sea level rise with very high confidence."¹³

The 2022 National Oceanic and Atmospheric Administration's "Global and Regional Sea Level Rise Scenarios for the United State," also references five feet of sea level rise. NOAA indicates in an intermediate high emission scenario that sea level rise along the contiguous United States is 1.7 meters or 5 feet 6.9 inches.¹⁴ This projection does not include ice-sheet melting which could add a significant amount of additional warming.¹⁵ Given that we may see more warming than we have

¹⁰ "Coastal Surge Flooding." NYC Mayor's Office of Climate Change and Environmental Justice, 13 Feb. 2024, <https://climate.cityofnewyork.us/challenges/coastal/-surge-flooding/> last visited on October 25, 2024.

¹¹ New York City Panel on Climate Change 4th Assessment Climate Risk and Equity: Advancing Knowledge Toward a Sustainable Future – Introduction, 2024.

¹² *Id.*

¹³ *Id.* at 27.

¹⁴ "Global and Regional Sea Level Rise scenarios for the United States", National Oceanic and Atmospheric Administration, Feb. 2022, at 20. It should be noted this projected does not provide a level of certainty on either achieving the SLV or exceeding it.

¹⁵ *Id.* at 21

targeted, closer to 3°C instead of 2°C or 1.5°C, it is prudent to plan for higher sea level rise.

In this case the Department has correctly used its discretion to develop policies that provide protection for the environment and the public. Some have argued that the Department should use a less protective standard and that some of the science used by it is suspect. There has been an argument that there is low confidence in the sea level rise numbers and therefore should be disregarded. They are misusing “low confidence” to mean the science is demonstrating the outcome or prediction is unlikely. That is inaccurate. We also would note that Dr. Kopp’s subsequent work does not repudiate the 2019 Climate Change report.¹⁶

The Department is entitled to deference in its use of science. “It is well within the DEP’s discretion to determine what scientific data it will rely upon to support its decision-making.”¹⁷ That deference is not defeated or overcome merely by contrary expert opinions.¹⁸

We will also note that some have expressed concern that complying with 5.1 feet of sea level rise will be too costly and create additional zoning and construction concerns. They advocate for using 3.3 of sea level rise instead. The cost of complying with 5.1 versus 3.3 is incremental and de minimis to modest at best. Costs for new construction will be less than the cost of attempting retrofit structures. It also should be noted that only certain structures, critical infrastructure, will need to meet this standard, not all structures. Protection critical infrastructure is vital to the safety of the public but to the economic wellbeing on the State. NJ has the th. highest number of critical infrastructures at risk of flooding at least twice a year by 2100.¹⁹

¹⁶ Kopp, Robert; Oppenheimer, Michael, et al. “Communication Future Sea-Level Rise Uncertainty and ambiguity to assessment users.”, *Nature Climate Change* vol. 13, July 2023 Pages 648-660.

¹⁷ *In re Amendments to N.J.A.C. 7:9b*, 2022 N.J. Super Unpub. LEXIS 1309, *83 (App Div. 2022) (citing *Mercer County Deer Alliance v. State Dept. of Environmental Protection*, 349 N.J. Super 440, 449 (App. Div. 2002)).

¹⁸ *Animal Prot. League vs. State Dept. of Environmental Protection*, 423 N.J. Super 549, 562 (App. Div. 2011) See also *In re Amendments to N.J.A.C. 7:9b*, 2022 N.J. Super Unpub. LEXIS 1309, *7 (App. Div. 2022).

¹⁹ “Looming Deadlines for Coastal Resilience: Rising Seas, Disruptive Tides, and Risks to Coastal Infrastructure”, *Union of Concerned Scientists*, June 2024.

Further, the cost of compliance will not be uniform as the coast is not uniform in elevation. The grade elevation is very different throughout the coast where some buildings may already be several feet above current sea level rise, therefore, will not be required to elevate as significantly as a property that is at current sea level.

While some have argued that the cost of compliance is too extreme, we suggest that not only will it be incremental, but that the investment in resiliency is a wise investment. According to a recent study commissioned by U.S. Chamber of Commerce, Allstate, and the U.S. Chamber of Commerce Foundation, that every dollar invested in resiliency returns \$13 in benefits from reduction in economic costs, damage and cleanup costs.²⁰ Another report demonstrated that adopting the latest building codes has resulted in a \$11 savings for every \$1 invested. More importantly the report explains these costs only added 1% to the construction costs compared to the standards in place in 1990.²¹ The report continued and found \$4 in additional benefits by exceeding the latest building codes. As New Jersey is third in dollars paid by FEMA for repetitive loss²², it is good policy to reduce the risks and recoup the investment. It would be bad economic policy not to adopt these regulations.

We the reasons set forth above, we support the Department's judgment on sea level rise and level of risk.

Below are specific comments regarding the various amendments to the rule.

Overall, we are supportive of the proposed changes. Where we have concerns, we outline those concerns and urge the Department to begin additional rulemaking to address these issues. We strongly urge the Department to adopt these regulations as soon as possible.

²⁰ "The Preparedness Payoff: The Economic Benefits of Investing in Climate Resilience", U.S. Chamber of Commerce, Allstate, and the U.S. Chamber of Commerce Foundation, 2024

²¹ "Mitigation Saves: Mitigation Saves up to \$13 per \$1 Invested", National Institute of Building Sciences, 2020. While this report was not necessarily limited to elevation of structures, the report did discuss it. For example, "In most coastal locations subject to hurricane surge, it can be cost effective to build the first floor up to 10 feet above base flood elevation, in some places saving more than \$12 per \$1 of added costs."

²² <https://rebuildbydesign.org/atlas-of-disaster-new-jersey/> last visited Nov. 7, 2024.

Stormwater Management N.J.A.C. 7:8-1 Et. seq.

Overall, we are supportive of the proposed amendments to the stormwater management rules. We do have several concerns over the proposal and suggestions for future amendments.

N.J.A.C. 7:8-1.2- Definitions- Amendments to “Disturbance”. Generally, we agree with the additional exemptions the Department is proposing, with a nuanced exception. In instances where repair or replacement of sidewalks, curbing etc. provides an opportunity to create new stormwater management that opportunity should be explored. For example, the reconstruction of curbing and sidewalks along a street may create an opportunity to create a bump out and redirect some unmanaged stormwater into a bioretention basin for treatment. In these instances, it would not make sense to exempt these activities. As the Department notes further on in the proposal, many of our urban areas are overburdened communities that “have long since been developed with motor vehicles surfaces and burdened with degraded water quality that results from allowing runoff from those surfaces to enter watercourses unmanaged.”²³ Therefore, when the repair or replacement of curbing and sidewalks occur in segments of roads that do not have managed stormwater; the agency should explore the opportunity to add small scale stormwater management and implement it. If it is technically practicable and not exorbitant in cost compared to the benefits, these “retrofits” should be implemented.

N.J.A.C. 7:8-5-3 & 5- this definition/regulation should not be interpreted to limit the inquiry to the right of way immediately alongside of the proposed project. Rights of way adjacent or up and down gradient from the project should be examined for opportunities to implement stormwater management practices especially in instances where the segment is not managed or is draining into an impaired or TMDL listed waterway.

²³ 55 N.J.R. supra at 1338.

N.J.A.C. 7:8-1.6(d) & 5.3(k). It is understood that there are instances where the design or implementation of a project has reached a milestone which makes compliance with new rules difficult or more expensive. We disagree that the State agencies should not be held to a higher standard. Given the significant impacts of climate change on the state, state entities should strive to lead by example and demonstrate the State's commitment to reduce the "disastrous consequences for public health and safety."²⁴ It would be appropriate to require compliance with these rules from the date of the executive order. The Green Infrastructure Rule was adopted in 2020. Allowing projects to avoid compliance with those rules and these rules is bad public policy. It will cause some number of projects in New Jersey to implement practices that were abandoned by the State as outdated and to avoid the benefits of green infrastructure. When the Department proposed the Green Infrastructure rule it did so because, "Green infrastructure is widely recognized to be a cost-effective and resilient approach to managing stormwater while simultaneously providing environmental, social, and economic co-benefits"²⁵

Courts have approved of the state's ability to provide retroactive applicability to statutes and rules in instances where the rules provide for the protection of public health and safety. For example, in OFP v. DEP, the Court upheld the retroactive application of the Highlands Water Protection and Planning Act.²⁶ The Court found the justification to protect forested lands and wetlands from a rush of development rational and supported. Even more relevant the Courts have upheld retroactive application of affordable housing lawsuits to agency review because "loss of expected profits is discordant, under these circumstances, with the connotations of 'manifest injustice.'"²⁷ Retroactive application of a regulation is appropriate when the regulation is ameliorative or curative.²⁸ Given the strong language in the Executive Order, the recognized benefits of green infrastructure over how stormwater was managed in the past, allowing for the use of outdated standards and rules is counter to the Department's obligations under the law. It will result in

²⁴ Executive Order 100, Jan. 27, 2020.

²⁵ 50 N.J.R. 2375(a), 2377 (Dec. 3, 2008).

²⁶ OFP v. Department of Env't Prot., 395 N.J. Super 571, 592-594 (App. Div. 200?), *aff'd* 197 N.J. 418 (2009).

²⁷ Hills Development Company v. Bernards Township, 103 N.J. 1, 54-55 (1986)

²⁸ Matter of Appeal by Progressive Cas. Ins. Co., 307 N.J. Super 93, 94 (App. Div. 1997) citing Twiss v. State, Dept. of Treasury, 124 N.J. 461, 467 (1991).

projects that do not meet the maximum extent practicable standard under the CWA and will place people and property at risk. The recognition in these rules that climate change is currently have impacts in this State and those impacts will continue to increase retroactive application of these rules is manifest necessity. State agencies were clearly put on notice of the content and requirements of these rules in May. Delaying the requirements of these rules to the future will result in many projects complying with regulations that are inadequate resulting in the compounding of threats to public health and safety.

While we recognize that yes, the planning and design of public roadways take resources of the state to implement, the extra resources to comply with these rules will likely result in reduced costs in the future in the repair and replacement of damaged infrastructure due to storms, reduced threat to life, etc. As noted elsewhere in these comments the investment of \$1 in resiliency will result in up to \$13 in benefits from that resiliency investment.²⁹ We would argue not requiring these projects to comply with the instant rules is contrary to the public interest. We will be spending money on projects that are subject to damage and destruction from climate change which will require rebuilding. Therefore, the extra expense invested in redesigning projects to comply with the increased safety requirements of these rules will potentially result in a thirteen-fold benefit to the state and its communities.

Given the Governor's Executive Order 100 and that these rules have been in process for years, it is not unreasonable for the State of New Jersey to hold itself to a higher standard. At the latest, the cutoff should be from the release of these rules as a courtesy copy, i.e. May 17, 2024. Once these rules were released the public and the regulated community were put on notice of the issues and regulatory requirements. State agencies were even more so, as it is presumed that there were significant interagency discussions regarding these rules during their development. Therefore, we respectfully requested that the State of New Jersey and their agencies are required to meet these standards if they did not meet the listed milestones by May 17, 2024, as opposed to the adoption of these regulations.

²⁹ Supra at Footnote 20.

N.J.A.C. 7:8-4.2- we strongly support this provision. We can no longer ignore that conditions that have existed in the past or that currently exist will not be impacted by climate change over the years. By requiring municipalities to consider how its stormwater management program will be impacted by increased rainfall, more extreme storms, sea level rise, etc. it can plan future infrastructure to avoid or accommodate those impacts. It will hopefully also examine existing infrastructure, practices, etc. and plan for ways to adapt those structures for the future. This provision compliments the requirements of the municipal land use law amendments.³⁰

N.J.A.C. 7:8-5.3- There are areas of this section that we can support and others where we have concerns. First, the public transportation entity should be required to demonstrate that it is technically impracticable to utilize the BMPs in Tables 5.1 & 5.2. This proposal does not set out the standard utilized to determine that this alternative is necessary. Assuming the demonstration of technically impractical is made, we support the requirement to look at adjacent *disturbed* lands to meet those requirements. We also support the explicit exclusion of undisturbed wooded areas from consideration. We cautiously support the examination of recreation and conservation lands as areas to address the stormwater requirements. Any such examination and implementation should be done so that those recreational or conservation lands are enhanced by the addition of stormwater BMPs and not merely as a location for BMPs to be installed. The use of these lands should not be implemented in such a way to allow for poor planning of infrastructure or as a cost reduction. Further it should not be done to accommodate new or expanded road infrastructure and this allowance should only be to implement stormwater management for existing roadways that currently are unmanaged or do not meet current standards. This would be consistent with the new section at N.J.A.C. 7:8-5.2(e). Further there should be a demonstration that it is not technically practical to retrofit existing stormwater BMPs to meet current standards thus requiring the use of open space to manage stormwater runoff.

³⁰ N.J.S.A. 40:55D-28, P.L. 2021 c.6. 2021.

N.J.A.C. 7:8-5.3(k)- We oppose this provision for the reasons set forth above in N.J.A.C. 7:8-1.6(d).

N.J.S.A. 7:8-5.5- We support this provision. A significant percentage of NJ was developed prior to the statewide requirements for stormwater management not alone “modern” stormwater management required since 2004. By 1984, the year after enactment of New Jersey’s Stormwater Management Act, over 1.2 million acres of land had been developed.³¹ Between 1986 and 2002 an additional 243,950 acres of urban development occurred under pre-2004 rules.³² One of the byproducts of this development is water pollution. The series of Integrated Water Quality Assessment Reports demonstrate that a majority of monitored waters do not meet standards so that the waters are not complying with designated uses.³³ That trend has been consistent since at least the 2010 Integrated Report to present. In 2016, the Department attributed impairments to urban development.³⁴ This would be consistent with findings from the Environmental Protection Agency on a national level.³⁵

We will not reverse the trends of water quality impairment unless we address the impervious surfaces that are not receiving treatment or not receiving adequate treatment. Given that there is a significant amount of development in NJ that predates modern stormwater regulations, it only makes sense to take advantage of the opportunity of private development investment to require the installation of stormwater management during the redevelopment process. That will slowly start to address the source of pollution from older development.

While we support the requirement that water quality treatment requirements for redevelopment that is only part of the equation. Sites that are redeveloped should

³¹ Infra at Footnote 43.

³² Changing Landscapes in the Garden State: Land Use change in New Jersey 1986 through 2015, Richard G. Lathrop and John E. Hasse, Rutgers University (July 2020) page 5. The true amount of development under legacy pre-2004 rules is likely more than that as in 2007 1,534,612 acres were urbanized for an additional 82,109 acres. So somewhere between 243,950 and 326,059 acres were developed under old standards.

³³ 2022 NJ Water Quality Assessment Report.

³⁴ 2016 New Jersey Integrated Water Quality Assessment Report, page X & XI.

³⁵ National Water Quality Inventory Report to Congress (U.S. EPA).

require not only water quality treatment, but peak rate reductions and recharge requirements as set out in N.J.A.C. 7:8-5.4 and 5.6 as if the site is a greenfield without pre-existing impervious surfaces.

We know that some of the sedimentation and pollution occurring in our streams is from erosion within the stream bank/bed itself. As erosion is caused by increased volumes and velocities of stormwater piped into the streams. While the water quality and volumetric reduction requirements will help, we can no longer afford incremental steps addressing the problem. We strongly urge the Department to propose additional amendments to the stormwater rules requiring peak rate reductions as well as recharge requirements for redevelopment sites as if the site is a “greenfield” with forested land cover in good condition.

Additionally, the water quality treatment requirements only apply to Total Suspended Solids and nutrients to the maximum extent practicable. The rules do not address any other pollutant. For example, petrochemical substances, 6PPD-Quinone and other substances are found on our motor vehicle traveled surfaces and are having impacts to water quality.³⁶ The Department had started to examine dissolved solids during the Phase II stakeholder process, but that effort was discontinued. Therefore, we request that the Department begin a stakeholder process to investigate these pollutants and to develop requirements for treatment through stormwater management systems.

N.J.A.C. 7:8-5.5(j)- We strongly support this proposed provision. We agree with the Department’s analysis that under the Clean Water Act and New Jersey’s Water Quality Planning Act, the waste load reductions in an approved Total Maximum Daily Load must be implemented and addressed by municipalities and major developments. The Department’s New Jersey Discharge Elimination System

³⁶ Product-Chemical Profile for Motor Vehicle Tires Containing N-(1,3-Dimethylbutyl)-N'-phenyl-p-phenylenediamine (GPPD), March 2022. See also, Tian, Zhenyu, et al., “A ubiquitous tire rubber-derived chemical induces acute mortality in coho salmon” *Science* Vol 371, Issue 6525, 185-189 (Dec. 3, 2020).

regulations required the implementation of TMDLs through the stormwater program.³⁷

We are concerned though that the proposed language limits this obligation only to those additional measures specified in an approved TMDL. It is unclear how many of NJ's approved TMDLs include additional measures that municipalities can readily implement. We suggest that this language be modified to require municipalities to develop programs and stormwater control ordinances to implement the WLA set out in the TMDL independent of whether an additional measure exists within the TMDL. Permits or approvals cannot be issued that would violate the WLAs in approved TMDLs.³⁸ The Department should also commit to a review and modification of all TMDLs to add appropriate additional measures that can be implemented through the State's stormwater program. Otherwise, the requirement may not be as impactful as it would appear and achieving water quality standards will be less likely.

N.J.A.C. 7:8-5.6(d)- We strongly support this proposed provision. Implementing the volumetric reduction standard requirement for both new development and redevelopment sites will certainly reduce downstream flooding. We know that adding impervious cover increases the runoff from a site. This results in increased volume downstream which may result in or exacerbate flooding. The peak rate reductions in the current rules are not sufficient to address flooding.

Further we support the ability of sites to provide alternative means to address the volumetric reduction standard. Removing impervious cover is a technique used on other jurisdictions to address volume issues.³⁹ We do suggest that the removal of impervious surfaces follow a hierarchical list of preferred surfaces: (1) unmanaged motor vehicle surfaces (2) unmanaged nonmotor vehicle surfaces near environmental resources (state open waters or wetlands) (3) unmanaged nonmotor vehicle surfaces and lastly (4) impervious surfaces managed under standards that pre-date the 2004 stormwater management rules. Utilizing a hierarchical approach will maximize the reduction of runoff volumes and improve water quality. This hierarchical list can be developed as part of Stormwater Management BMP manual.

³⁷ N.J.A.C. 7:14A-25.6.

³⁸ N.J.A.C. 7:9B-1.5(d)

³⁹ 55 N.J.R. supra at 1339.

Additionally, we suggest when an applicant cannot meet the requirements on site, they engage in the same process as we propose below for N.J.A.C. 7:8-5.6(d)2(ii).

N.J.A.C. 7:8-5.6(d)2(ii) We do not support a provision that allows public transportation entities to jump from the HUC14 to the Watershed Management Area. This is a significant jump in scale of watershed and may provide little to no benefits of flood reduction downstream from the proposed project. As an example, a road project in West Amwell, which is in the upper portion of the Stony Brook watershed, where the volumetric reduction standard cannot be met will provide increase flood volumes downstream within the Stony Brook Watershed. Providing for a project of volumetric reductions in Cranbury will not benefit the municipalities of Hopewell, Pennington, Lawrence and Princeton. Those downstream communities will be subjected to increased flood volumes. Therefore, again the Department should require the off-site location to be as close to the project as technically practicable. The hierarchal list of preferences should be upstream HUC14s within the same waterbody; (2) the HUC14 immediately downstream of the project; (3) the HUC12 encompassing the project site; (4) the HUC10 encompassing the project site; and then the WMA. The proposed language “and as close as practicable to the major development,” may suggest this approach, but we believe it is better to make this assumption explicit. Requiring “mitigation” as close to the site is utilized by other jurisdictions. For example, Connecticut requires that the off-site retention which looks to the same “CT DEEP Subregional Basin or USGS HUC12 watershed (and preferably the same municipality)⁴⁰

N.J.A.C. 7:8-5.6(b)2i- We do not support the elimination of the requirement to perform an analysis of downstream flooding impacts. Given the increasing severity of flooding events, the removal of this analysis is counterproductive. The proposal creates an exception to this exception, which is when the “review agency determines that there will be increased flooding impacts downstream of the site.” If there is no analysis it is difficult to understand how the review agency will determine there is downstream flooding impacts.

⁴⁰ Connecticut Stormwater Quality Manual, Chapter 4.2 Page 43.

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

General Comment:

For permits whether there are permits by registration, permits by certification, general permits or individual permits, we urge the Department to adopt the concepts found in the Army Corp of Engineer's 404(b) guidance. This guidance under the CWA sets out a hierarchical requirement to avoid, then minimize and then mitigate impacts to the waters and wetlands of United States. While the 404(b) guidance applies to the placement of dredge and fill directly into waterways the concepts are equally important to the riparian zones. As stated elsewhere in these comments, the larger and more intact a riparian zone is the more protection is afforded to the waterways.⁴¹ Avoiding unnecessary impacts to the riparian zone can result in halting the degradation of our waterways from development. The 404(b) guidelines analysis should be required for all forms of approvals: permit by registrations, permits by certification, general permits and individual permits. If the activity can occur onsite outside of regulated areas that should be required unless there is a clear demonstration that the proposed activity will not have a negative impact on the waterway.⁴² By not requiring an avoid, minimize and mitigate approach, impacts to our waterways are occurring unnecessarily.

N.J.A.C. 7:13-1.1. We urge the Department to include in subsection c the restoration of waters of the state as a purpose. This would be consistent with authorizing statute's goals and requirements.

N.J.A.C. 7:13-1.3- Definitions.

"Climate Adjusted Flood Elevation" we strongly support the inclusion of this new definition and its implementation throughout these rules. As noted above in the "Science" section of these comments, it is clear that climate change, sea level rise, subsidence, etc. are having and will continue to dramatic impact on our coastal areas. The failure to require new development to address these dramatic impacts places the property owners' lives and property at risk. It also places the lives of first

⁴¹ See footnotes 46-48 supra. See also Wenger, Seth, "A Review of the Scientific Literature on Riparian Buffer Width, Extent and Vegetation", Office of Public Service & Outreach Institute of Ecology, University of Georgia, March 5, 1999.

⁴² Clean Water Act Section 404(b)(1) Guidelines.

responders at risk in that they will be required to rescue those that reside in buildings that have not incorporated climate resiliency into the design and construction of the buildings. Further, it is clear that what is built today will continue to exist and be utilized for decades. NJ is replete with buildings that are over a hundred years old. Much of our development in the state pre-dates the 1980s.⁴³ Much of those structures are still standing decades later. Given this trend, it is prudent to look to 2100 and instill standards that will be protective of those future conditions now. What is built today will likely exist in 2100.

“Compelling Public Need” – we support the addition of this definition and the resulting requirements. This will help reduce the potential for impacts to the very generous allowances in Table 11.2.

“Inundation Risk Zone”- We support adding this definition and the resulting requirements to the rule.

“Substantial damage” and “Substantial improvement- we support these definitions.

N.J.A.C. 7:13-2.1(c). We do not support creating a legacy provision for projects that applied for permits prior to the adoption of this rule. As noted above regarding N.J.A.C. 7:8-5.3(k), there is precedent for retroactive implementation of regulations. As many of the amendments to the Flood Hazard Area Control Act regulations are public health and safety related it is easily justified. As the Department notes in its discussion of N.J.A.C. 7:13-2.1(c)(3), projects under older exemptions/regulations “possibly adversely impacting public health, safety and welfare, and the environment if constructed as designed.”⁴⁴ Similarly, it is reasonable for projects submitted after the release of the rules in May to be required to comply with those requirements “to prevent a rush to obtain development approvals while the [regulation] proceeded through the [regulatory] process.”⁴⁵ At the very latest, the rules should be effective from the date of their proposal, i.e. August 5, 2024. This

⁴³ New Jersey Land Cover Analysis Project 1972-1984-1995, Center for Remote Sensing & Spatial Analysis, Rutgers University, Richard G. Lathrop Oct. 2020. NJ had approximately 1,204,920 acres of land developed by 1984.

⁴⁴ 55 N.J.R. supra at 1343.

⁴⁵ OFP, LLC. supra at 593.

will reduce the number of projects that are legacied resulting in increased resilience, reduced damage, reduced threats to life, less economic loss, et.

N.J.A.C. 7:13-2.2(a)(3)iii- We support the removal of exemptions for isolated waters. We are supportive of the Department's protection of waters within the karst geological areas. This provides protection to these waters. Unfortunately, this proposal does not go far enough to protect our waterways. The 50-acre drainage area threshold holds no basis in science. The opposite is true. Research demonstrates that these smaller streams are strongly influenced by upland disturbances; therefore, protecting these waters as regulated and providing a riparian zones will help preserve the integrity of the streams.⁴⁶ Scientific literature is replete with support that headwater, smaller tributary streams are significant to water quality on the larger streams.⁴⁷ In its review of the science in developing the 2015 Waters of the United States rule, EPA did an extensive study. One of the conclusions was "[t]he scientific literature unequivocally demonstrates that streams, *regardless of their size or frequency of flow*, are connected to downstream waters and *strongly influence their function*."⁴⁸ We therefore urge the Department to proposal supplemental regulations to regulate headwaters and implement riparian zones for all waters regardless of drainage areas or whether the stream has a defined bed and bank. Not doing so seems to be inconsistent with the amendments the Department is proposing at N.J.A.C. 7:13-2.3(c).

N.J.A.C. 7:13-2.3(c)- We are supportive of this provision. First, the addition of the language "regardless of the drainage areas" is important. Riparian zones are very important for the protection of water quality, protection of the streams physiology as well as providing a buffer from flood waters.⁴⁹ We are supportive of the re-

⁴⁶ "The Significance of Small Streams," Ellen Wohl, *Font. Earth Sci.* 2017 Vol 11, 447-456, (2017). See also, <http://www.delcodd.org/wp-content/uploads/2016/01/The-Science-Behind-the-Need-for-Riparian-Buffer-Protection.pdf>.

⁴⁷ *Id.* at 3. "Another study indicated that basic water chemistry parameters ... in downstream reaches of a river network in eastern Kansas correlated most closely with riparian land cover adjacent to first-order streams."

⁴⁸ "Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence", U.S. EPA January 2015.

⁴⁹ *Id.*

establishment of riparian zones along the bayside of barrier islands for the reasons set forth above.

N.J.A.C. 7:13-2.3(c)vi- We support the inclusion of riparian zones along all waters for the reason set forth above. We are also supportive of the Department's deletion of this provision. It recognizes that some of these human created features function as a state open water; therefore, it should receive the same protections.

N.J.A.C. 7:13-2.5(a)1- While we are supportive of this provision we urge the Department to consider adding additional guardrails. As we understand it this proposed exemption would allow the maintenance of stormwater management structures and related conveyances. We support this concept, except to the extent that maintenance includes the removal of "nuisance vegetation." Our concern is related to the recognition of riparian zones along stormwater conveyances found in proposed N.J.A.C. 7:13-2.3(c)vi. Abuse of this exemption may be utilized to circumvent the protections of riparian zones. The exemption should be revised that it is clear the removal of nuisance vegetation shall only be from within the structure itself and not the riparian zone protected in section 2.3 above.

N.J.A.C. 7:13-3.2- We support this provision for the reason set forth above at N.J.A.C. 7:13-1.3. We support the inclusion of flexibility to account for updates of mapping over time but still provides a default of the use of protective standards. This provision provides additional methods of compliance but sets the bar at a minimum of compliance with NFIP standards. As noted in the proposal we are not allowed to enact standards that are less protective than the minimum standards set by FEMA.⁵⁰

N.J.A.C. 7:13-3.4- We support this provision for the reasons set forth above.

N.J.A.C. 7:13-4.1- We support this provision. The recognition that threatened and endangered species are reliant upon healthy riparian zones is important. By providing healthy riparian zones for species that rely on healthy water and

⁵⁰ 44 C.F.R. 60.3.

terrestrial habitat these regulations further the requirements under New Jersey's Endangered and Nongame Species Conservation Act to "assist in the protection of species."⁵¹ Further, one of the designated uses of New Jersey's waters are aquatic life. We know wider more intact riparian zones protect against water pollution thus supporting the designated uses.

N.J.A.C. 7:13-6.1- We support the creation of permits by registration to take the place of permit by rule. We support and agree with the Department's desire to tract the application and actual development under permit by rule. This will provide the Department with a better understanding of the impacts to a waterway and its watershed. We may not agree that all of the proposed permit-by-registrations should exist, but we do support the overall provision of tracking what is going on. The Department should utilize this data annually or biannually to re-evaluate the various non-individual permits and revise or delete them as appropriate. While we assume the Department intends to do this, we wish to make it explicit.

As noted by the Department this tracking "enables the Department to address waters appearing on the ... 303(d) list" or waters that have an applicable TMDL.⁵² We would assert that once a water is listed on the 303(d) list or is included in a TMDL the use of any permit by registration, permit by certification or general permit is foreclosed. According to the Surface Water Quality Standards the Department "shall not approve any activity which, alone or in combination with any other activities, might cause changes, other than toward natural water quality, in the existing water quality characteristics."⁵³ Minimal impacts is not no impacts. We suggest that even minimal negative impacts are impacts which may cause changes to existing water quality characteristics. According to these regulations, the permit by registration, formerly permit by rule "the regulated activity will only cause minimal adverse impacts."⁵⁴ Unless the various non-individual permits can be demonstrated to have zero negative impact on water quality, the regulations would

⁵¹ N.J.S.A. 223:2A-2.

⁵² 55 N.J.R. supra at 1356.

⁵³ N.J.A.C. 7:9b-1.6(d)2ii.

⁵⁴ N.J.A.C. 7:13-6.2(b)1.

prohibit the issuance or usage of the permits. Therefore, the Department should begin a new rulemaking process to provide consideration of water quality impacts from permits by registration, permits by certification, general permits and individual permits.

N.J.A.C. 7:13-6.4- We support the clarification that all the various non-individual permits have a maximum cumulative impact that cannot be exceeded by piling on the various permits.

N.J.A.C. 7:13-6.5- We support the timelines and other requirements for permits-by-registration. This will ensure that the proposed projects are using the most current delineations and information.

N.J.A.C. 7:13-6.5(e)- We support this provision. By confirming completion of a project, the Department has additional data to analysis the impacts of projects on water quality for the reasons noted above in N.J.A.C. 7:13-6.

N.J.A.C. 7:13-6.7. As part of a supplemental proposal, the Department should require applicants for non-individual permits to avoid impacts to the riparian zone or flood hazard areas where there is available non-regulated areas on site to accomplish the project unless the applicant can demonstrate the proposed project will not have any negative impacts on the resource and waters. This would be consistent with the avoidance requirements in the 404(b) guidance and as implicitly reference in the regulations. The regulations require an applicant to “take all reasonable steps to prevent, minimize, or correct adverse impact on the environment”⁵⁵ While the regulations arguable already require this analysis as it is the section applicable to all permits, placing it in the permits by registration section clarifies this requirement.

⁵⁵ N.J.A.C. 7:13-22(c)5.

N.J.A.C. 7:13-7.2- We support the reinstatement of the riparian zone along bulkheaded waters. We have long argued that riparian zones even along bulkheaded, etc. waters still provide water quality, volume reduction benefit. Therefore, we strongly support the Department in the restoration of the protections.

N.J.A.C. 7:13-7.28- We appreciate the reduction in size for allowable manure management structures within a riparian zone. We question whether manure management structures should be allowed in riparian zones in the first place. We know that healthy riparian zones need to be at least 15 to 100 meter to remove 90% of nutrients depending on conditions.⁵⁶ Given the recognized impacts to water pollution that manure can have it would be prudent to avoid as much as possible the potential for these facilities to contribute material to state waters.

N.J.A.C. 7:13-8.1 & 8.2- While we support the removal of duplicative and/or contradictory provisions we object to the selection of 750 square feet of allowable expansion during the reconstruction, relocation and/or elevation of a structure (8.1) or initial construction of a building (8.2). Only that which is absolutely necessary to accomplish the goal should be allowed and not to exceed 400 square feet as provided by existing N.J.A.C. 7:12-7.11. Further, the concepts of avoid, minimize and mitigate should require the avoidance of the impacts in the first place. The expansion of a structure should occur in non-regulated areas as a preference then in the regulated areas if absolutely necessary. This provision does not require minimization or avoidance of the impacts.

N.J.A.C. 7:13-9.1- We support the addition of restriction to the removal of trees from the riparian zone during stream cleaning activities. Allowing removal of trees during stream cleaning activities would increase impacts to streams, water quality and downstream flooding.

⁵⁶ "Riparian Buffer Width, Vegetative Cover, and Nitrogen Removal Effectiveness: A Review of Current Science and Regulations" US EPA Oct. 2005

N.J.A.C. 7:13-9.12- We strongly support the deletion of permit by rule 36 and requiring a general permit or individual permit for horizontal directional drilling or jacking. Over the years it has become clear that these techniques are not without risks and very real impacts to our waterways. HDD has a 50% plus failure rate resulting in impacts to waters and groundwater.⁵⁷

N.J.A.C. 7:13-10 & 11- Individual Permits- We strongly urge the Department in a subsequent rulemaking incorporate the 404(b) guidelines as outlined above. Further, as noted above, the Department should institute additional rulemaking to explicitly set out the review process for water quality impacts from a proposed project. Currently, review and approval of applications does not consider the existing water pollution conditions of the receiving water body. The current regulations require the Department to issue a permit “**only** if it determines that the regulated activity is not likely to cause significant and adverse effects on the following: (1) water quality; (2) aquatic biota; ... (4) flooding; ... (threatened and endangered species or their current or documented historic habitats.”⁵⁸The Surface Water Quality Standards prohibits the issuance of a permit to an impaired water.⁵⁹ The current process also ignores waters with a Load Allocation from a TMDL. These load allocations address non-MS4 stormwater contributions and/or agricultural contributions to impairment. By not considering the Load Allocations (LA); this process ignores approved WMP. The Department should not be issuing permits that conflict with water quality management plans.

N.J.A.C. 7:13-11.2(b)- We support the addition of requirements to remove impervious cover within 25 feet of the top of bank. As noted above in the wetlands portion, 25 feet is not sufficient to protect water quality and provide other environmental benefits. The Department should enlarge this width to a minimum

⁵⁷ Skonberg, Eric R., Carl E. Tammi, et al., 2008 Inadvertent Slurry Returns during Horizontal Directional Drilling: Understanding the Frequency and Causes. Environmental Concerns in Rights-of-Way Management 8th International Symposium, 12-16 Sept. 2004 Saratoga Springs, NY. See also, “Final Report on Horizontal Directional Drilling,” NJDEP Science Advisory Board, Oct. 2021.

⁵⁸ N.J.A.C. 7:13-12(1)(b). emphasis added.

⁵⁹ Supra at 53.

of 30 feet. In reality the removal of impervious cover should be to the requirements for the appropriate water classification (50/150/300) as we know wider more intact riparian zones are necessary to remove pollutants, etc.

N.J.A.C. 7:13-11.2(b)2 – As noted above the requirement to avoid and minimize is important especially in New Jersey. We support the provision to limit development to actively disturbed areas or areas wherein the benefits and functions of a riparian zone are deteriorated. We would prefer that applicants take all opportunities to avoid any development in the riparian zone and require restoration of disturbed areas. As noted by the Department in the explanation of the amendments to the stormwater regulations, we are not going to see significant improvements in water quality and reductions in flooding until we start to repair the damage from past approvals/decisions. In regard to this provision and its allowance for additional riparian zone impacts where reuse of disturbed areas is not practicable, we urge the Department to clearly explain that compliance with local zoning setbacks or other zoning requirements is not justification for development in riparian zones. Applicants should be required to seek a variance from the appropriate land use board before seeking to demonstrate they have minimized the impacts to the “maximum extent practicable.”

N.J.A.C. 7:13-11.2(b)(6)(ii)- We support requiring mitigation for all impacts to the Riparian Zone. We do not support the allowance of 2,000 square feet of impacts within the 150-foot riparian zone without mitigation. Not only does this run counter to the proposed avoid, minimize, mitigate proposal above, it also ignores any inquiring as to the water quality/water pollution impacts to impaired waters or TMDL listed water. Mitigation should be required for all impacts to a riparian zone whether in a 50-foot, 150-foot, 300-foot riparian zone. As noted above, it has been demonstrated that wider more intact buffers function better resulting in more effective pollutant removal, temperature regulation, absorption of runoff and the reduction in velocity of runoff. The Department recognizes this importance of riparian zones with “a riparian zone and its attendant water quality protections would be in place around these waters.”⁶⁰ Allowing impacts to the riparian zone

⁶⁰ 55 N.J.R. supra at 1345.

compromises the effectiveness of the riparian zone. As noted elsewhere intact riparian zones are important for water quality.

Freshwater Wetlands Protection Act N.J.A.C. 7:7A-1 et seq.

Wetlands are an important system in New Jersey to filter pollutants, absorb and slow down stormwater runoff, provides base flow to streams, and provide habitat to various species of plants and animals. As climate change continues threats will continue to challenge wetlands and their functioning. As the Department notes, protecting wetlands is a resiliency strategy. The Freshwater Wetlands Protection Act regulations require the Department to determine before issuing any permit that the activity will “not cause or contribute to a violation of any applicable State water quality standard; ... will not cause or contribute to a significant degradation, as defined at 40 C.F.R. 230.10(c) to ground or surface water.”⁶¹

New Jersey has lost a significant amount of its wetlands. According to the United States Geological Survey, New Jersey lost thirty-nine percent of our wetlands between 1780’s and the 1980’s.⁶² The Freshwater Wetlands Protection Act was enacted effective in 1988 Since then loss continues. According to Lathrop and Hasse’s study between 1986 and 2012 New Jersey lost an additional 56,703 acres of wetlands.⁶³ That trend continued between 2012-2015.⁶⁴ That means more than forty-five percent of New Jersey’s wetlands have been lost to development. As the data is only current through 2015, there are over 9 additional years of potential wetlands loss. This loss also does not account for the changes or conversions of wetlands from a more productive type to another less productive type. Another trend that was noted in the 2020 report.⁶⁵

⁶¹ N.J.A.C. 7:7A-10.2(b)5 & 8.

⁶² USGS Water Supply Paper 2425.

⁶³ Hasse, J & Lathrop, R.G. (2012) Changing Landscapes in the Garden State: Land Use Change in NJ 1986 thru 2012. Center for Remote Sensing & Spatial Analysis, Rutgers University, New Brunswick, NJ, Page 2 Table 2.1.

⁶⁴ Hasse, J, supra at Footnote 32.

⁶⁵ Id.

We also know that wetlands are valuable to addressing water quality, flood control, etc. Scientific studies repeatedly demonstrate the value and service of wetlands to New Jersey. The Department reconfirmed these values in its “Scientific Report on Climate Change.” Freshwater wetlands provide the following services:

- Flood Control
- Groundwater replenishment
- Sediment and nutrient retention and export
- Water purification
- Reservoirs of biodiversity
- Recreation and tourism
- Climate change mitigation and adaptation including carbon sequestration.⁶⁶

Those provisions of the rule that provide opportunities to fill wetlands, impact transition areas without the requirement to determine water quality impacts is counter to the CWA. Further applicants should be required to engage in a robust avoid, minimize then mitigation process people the issuance of a permit. The EPA notes that “water quality standards for wetlands are necessary to ensure the provisions of the Clean Water Act (CWA) applied to other surface waters are also applied to wetlands.”⁶⁷

N.J.A.C. 7:1-3- The Department should in a future rulemaking revise the definition of “Part of a surface water tributary system.” The definition should be revised to delete the prohibition against the connection between waters consisting solely of groundwater flow. Wetlands provide baseflow to waterways through groundwater connections. By requiring a surface water connection for wetlands, it ignores the subsurface connections.

⁶⁶ Scientific Report on Climate Change, page 95. (2020). See also, National Guidance Water Quality Standards for Wetlands, U.S. EPA <https://www.epa.gov/cwa-404/national-guidance-water-quality-standards-wetlands>.

⁶⁷ Id.

N.J.A.C. 7:7A-5- As noted above in the Flood Hazard Area Control Act discussion regarding non-individual permits, there needs to be a 404(b) like process for impacts to the wetlands and transition areas. Further, an analysis of the water quality impacts to the receiving water bodies as wetlands are integral to surface water bodies, should be included in the decision on the availability of and issuance of the approvals.

N.J.A.C. 7:7A-5.4- We support the requirement of mitigation for impacts to wetlands, state open waters and transition areas for the use of general permits. We urge the Department to require mitigation for all impacts and not just impacts over 0.1 acres. As noted above, NJ water quality is severely impacted by development. Allowing continued impacts without mitigation will not achieve the goal of reducing flooding, improving water quality and increasing NJ's resiliency to climate change.

N.J.A.C. 7:7A-5.7- We support the addition of avoidance criteria in 404(b) by requiring a demonstration that there "is not other practicable onsite configuration for the project." We would encourage the Department to include a reduction in the size or scope of the project as another required demonstration. We also support the addition of mitigation requirements for temporary impacts.

N.J.A.C. 7:7A-7.2 We support the requirement of a general permit for HDD installation of utility lines for the reason set forth in comments to N.J.A.C. 7:13-9.12.

N.J.A.C. 7:7A-7.20 We support the revisions to the Bank Stabilization GP. We note that it is important not only to stabilize banks but to understand the reasoning why the project is needed and that the proposed project will likely result in improvements to the waterway. If there is not an understanding of the causes of the instability than projects may be designed in ways that do not ultimately succeed.

N.J.A.C. 7:7A-8.1(b)(5)- We support the requirement to remove impervious cover within 25 feet of a freshwater wetland. For the same reasons that a riparian zone is important to the health of a stream and its water quality, transition areas provide the same benefits. Requiring the restoration of the transition area as we redevelop is an important tool reducing flooding, improving water quality and providing other benefits. Just as our comments in N.J.A.C. 7:13-2(b) we urge the Department to look at expanding beyond the 25 feet.

Again, we appreciate the Department's engagement and proactive approach in these rules. There was significant stakeholdering over the years to reach the proposal stage. While we believe these rules could be stronger, we support the Department's adoption of these rules in total. We urge the Department to adopt these rules as quickly as possible. Also as noted throughout these comments there are opportunities to address missed opportunities or to clarify provisions. We urge the department to start the stakeholder process on these topics as soon as possible as well.

Respectfully submitted,

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