



## **NEW JERSEY HIGHLANDS COALITION**

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Mr. James Humphries, P.P., AICP  
New Jersey Highlands Water Protection & Planning Council  
100 North Road  
Chester, NJ 07930  
*Email: james.humphries@highlands.nj.gov*

### **Re: Proposed Highlands Open Space Partnership Funding Program and Highlands Development Credit Purchase Program Rules**

Dear Mr. Humphries:

The New Jersey Highlands Coalition appreciates the opportunity to submit comments on the proposed Highlands Open Space Partnership Funding Program and Highlands Development Credit Purchase Program rules (the "Rules") published in the New Jersey Register on August 17, 2015. In general, we support these Rules and the Council's initiative to address this issue through the rulemaking process. However, we would like to address the following points, with contributions from the Raritan Headwaters Association and the New Jersey Conservation Foundation:

1. Generally, the proposal needs substantial revision and editing. There are a number of places where the Rule is inconsistent with itself or existing statutes and regulations; where precise terms are used inaccurately; and where the language of the Rule is either unclear, misleading, or in error. We recommend that the Highlands Water Protection and Planning Council (the Highlands Council) withdraw the proposal, take sufficient time to have it revised and edited by someone with considerable experience drafting regulations, and then republish the proposal for public comment.
2. The definitions in section N.J.A.C. 7:70-2.1 ought to be clarified in order to distinguish between a grant for the acquisition of property interest in fee simple, the acquisition of a conservation easement or the acquisition of an agricultural easement. These terms need to be defined to provide clarity for the remainder of the Rule document.
3. Section N.J.A.C. 7:70-3.3(b) that addresses review of applications needs to include explicit criteria for fee simple, conservation easements and agricultural easements. Criteria N.J.A.C. 7:70-3.3(b)5 is unclear, undefined and lacks specificity. We suggest that any requirement that confers a benefit must be explicitly set forth in the

regulation in order for the public to have an opportunity to comment on the proposed criteria.

4. We noticed numerous irregularities and inconsistencies within the individual 'Impact Analyses' sections, including the following:
  - a. The Federal Standards Statement says "There are two Federal Acts that are related to the national Highlands Region...the Food, Agriculture, Conservation and Trade Act of 1990, **also known as the Federal Farm Bill**, and the 2004 Highlands Conservation Act. These two Federal acts provide the basis for the Highlands Act, do not set any standards or requirements for the **New Jersey Highlands Water Protection and Planning Act**, but do not set any standards or requirements related to the subject matter covered by the proposed new rules. *However, the federal Farm Act that provides funding for the federal farmland preservation program (Agricultural Conservation Easements) does in fact require limits on impervious cover on a sliding scale, should the Highlands Council wish to avail itself of this funding opportunity to preserve farmland.*

The Federal Standards Statement correctly notes the 1990 Act, which authorized the "New York-New Jersey Highlands Regional Study," was issued in 1992, and was a valuable source of information and data on the New Jersey Highlands Region. However, it was not until the **2002 Update** of the Regional Study, prepared by an entirely different set of "compilers," – Marcus G. Phelps and Martina C. Hoppe – that the "effort to protect the critical natural resources of the region" was "**reignited.**" The 2002 Update confirmed the conclusions of the 1992 report.

Both the 2004 New Jersey Highlands Water Protection and Planning Act (signed August 10, 2004) and the 2004 federal Highlands Conservation Act (signed in November, 2004) succeeded partly as a result of the 2002 Update, as well as years of advocacy by NJ citizens and organizations fighting to preserve the New Jersey Highlands.

The Highlands Conservation Act has provided nearly \$5 million to help preserve over 11,000 acres in the New Jersey Highlands. Both the HCA and the federal Forest Legacy Program are funded by the federal Land and Water Conservation Fund, which has recently expired, but legislation has been filed (H.R. 1814 and S. 338 – S.890) to continue the program. The federal Forest Legacy Program has provided over \$20 million to protect environmentally important forest lands in the New Jersey Highlands. The HCA and the Forest Legacy Program both stand to be refunded when the Land and Water Conservation Fund is renewed by Congress, something that the Highlands Council should be advocating.

- b. Jobs Impact: While we agree that the program to facilitate the preservation of environmentally sensitive lands is not expected to cause the loss of any jobs, we suggest that the program may in fact lead to the generation of jobs

in natural lands and resources management, stewardship, research, ecotourism, wildlife tourism, agritourism and outdoor recreation. This section should be updated to reflect such possibilities.

- c. Smart Growth Development: It should be acknowledged that the Highlands Regional Master Plan supersedes the 2001 New Jersey State Development and Redevelopment Plan, which identified the Highlands as a Special Resource Area “of statewide importance” to “establish a receptive environment for regional planning efforts... Such recognition is an indication of the need for coordinated planning with regional vision (page 171).” The planning and implementation strategies identified in the State Plan have been formalized and expanded and are being implemented in the Highlands RMP; therefore up-to-date regional planning guidance for the Highlands Region is found in the 2008 Highlands Regional Master Plan, not in the 2001 State Development and Redevelopment Plan. Therefore it is against the RMP itself that the Smart Growth Development Impact Analysis evaluation should occur. The Impact Analysis should evaluate growth in relationship to the RMP Protection, Conservation, and Existing Community Zones, and the environmentally sensitive subzones, as well as RMP goals, policies and objectives. The effects related to State Plan Planning Areas may be noted as of historical interest only.
5. We request clarification for use of the term “greenway” in Subchapter 3 at N.J.A.C. 7:70-3.3(b)1(i) and (b)2(i). We were unable to locate an official definition, both within the Rules and with other State entities. If the Council intends to use ‘greenways’ as a way to prioritize acquisitions, then we strongly urge the Council to define ‘greenway’ or to collaborate with other State entities and projects (e.g. the Connecting Habitats Across NJ project) to develop a definition. Though we suggest it would be less burdensome for the Council to refer to their existing guidelines for agriculture and conservation priority areas in the 2008 RMP (Chapter 5, Figures 5.1 and 5.3).
6. The guidelines (N.J.A.C. 7:70-3.4(a)1) for a 1-year grant timeline with two 6-month extensions is not long enough to complete a complex transaction with several funding partners that have timelines for process and approval that are not in sync. We recommend a two year grant, retaining the contract requirement provision and two 6-month extensions, for a total of three years.
7. The Rules do not include any guidelines for acquiring historic, cultural and archeological resources, despite the 2008 Regional Master Plan’s (Chapter 3, Part 4, Sub-part A) acknowledgement of the importance of these resources to “the character of the Highlands Region and...its cultural heritage.” Further, the Council has an existing inventory of important historic, cultural, and archeologic sites and should be encouraging, through this partnership program and in conjunction with the Historic Preservation Trust, the protection and preservation of such.
8. The statement in N.J.A.C. 7:70-3.3(b)5 addressing criteria for property acquisitions would be strengthened if it included an opportunity for public comment and review:

“Any specific criteria that has been approved by the Highlands Council, in a Highlands Council resolution after an **opportunity for public review and comment** on any project review where funding is received as part of mitigation for the project.” (Changed language in **bold** and underlined).

9. In section N.J.A.C. 7:70-3.3, the Rules grant important oversight to the Landowner Equity and Land Preservation Committee. Currently, these Committee meetings are not open to the public. Because the recommendations of this Committee will be considered as to how public funds will be allocated, we *strongly* urge the Council to allow the public an opportunity to attend these committee meetings.
10. The statement in N.J.A.C. 7:70-3.3(f) would provide stronger resource protections if it included a requirement based on the Forest Stewardship Council’s certification guidelines: “the applicant must provide a **Forest Stewardship Plan using Forest Stewardship Council certification standards** for forested lots ~~summary of a plan~~ for the long-term stewardship of the property, including enforcement, monitoring, ownership, access, and any maintenance or proposed restoration.” (Changed language in **bold** and underlined). We also request that Forest Steward Plans be filed with the Highlands Council and made available to the public.
11. We suggest edits to the following sections (Changed language in **bold** and underlined):
  - a. *N.J.A.C. 7:70-1.1(a)3 Subchapter 1 – General Provisions:*
    1. “To establish the procedures by which the Highlands Council will provide funding in partnership with the State of New Jersey, local government units, [and] charitable conservancies **and federal government programs such as the Forest Legacy Program and the Highlands Conservation Act,** to acquire lands that further the goals of the Highlands Act and the RMP;”
    2. N.J.A.C. 7:70-1.1(a)5 “To establish the procedures by which the Council...permanently remain in use for passive recreation, [and/or] **conservation [and/or] or agricultural/farmland preservation** purposes.”
  - b. *N.J.A.C. 7:70-4.2 Application review process:*
    1. (a)1.i.(6) “Location in the preservation area or planning area; **location in the Regional Master Plan Protection Zone, Conservation Zone, Environmentally Sensitive Existing Community Zone, Environmentally Sensitive Conservation Zone, or Lake Management Zone;**
    2. N.J.A.C. (a)1.i.(7) “Location adjacent to scenic, **historic or archaeological** resources identified in the RMP **or through the Highlands Council “Procedure for Nomination, Evaluation and Inventory of Highlands Regionally significant Scenic Resources, Oct. 2008” or by municipal historic boards or commissions or other knowledgeable entities;**
12. Summary, Subchapter 1. General Provisions says, “The Open Space Partnership Funding Program will provide funding matches of up to 50 percent of the total purchase price of properties for the acquisition of development rights.” Similar language appears in Subchapter 3 at N.J.A.C. 7:70-3.3(e)1. This language raises two issues:

- a. Does the Highlands Council intend to limit the use of these funds to purchasing development rights only and to exclude the use of these funds for the acquisition of rights in fee? Please clarify the intent of the Highlands Council with regard to these two provisions.
- b. We recommend you redraft N.J.A.C. 7:70-3.3(e)1 to read, “The Highlands Council **may** provide a maximum award of up to 50 percent of the total purchase price of the property, **towards** the acquisition of the development rights.” (changed language in **bold** and underlined.) Often, the majority of the value of an undeveloped property lies in the development rights. As presently drafted, this provision suggests that the Highlands Council might receive the vast majority of the value of the transaction by taking ownership of all of the development rights, while providing only half of the funding.

This would be inequitable to the Highlands Council’s partner, which would also provide half of the funding but receive substantially less than half the value of the transaction. For example, assume the development rights account for 75% of the value of a particular property and the residual rights 25% of the value. If the Highlands Council and a partner preserve the property under this program, the Highlands Council would provide 50% of the purchase price and receive 75% of the value. The partner would likewise provide 50% of the purchase price, but receive only 25% of the value. Redrafting the provision as suggested eliminates this potential inequity. Also, replacing “shall” with “may” makes the provision permissive rather than mandatory. We assume it was not the intent of the drafter to require the Highlands Council to provide funding for every proposed preservation project, regardless of merit or available funding. We recommend *Subchapter 1 - General Provisions* are redrafted so that it is consistent with this provision.

13. Subchapter 3. Highlands Open Space Partnership Funding Program provides at N.J.A.C. 7:70-3.3(d), “In accordance with N.J.S.A. 13:8C-26j(1) or 38.j(1), the property owner shall obtain appraisals containing values detailing the pre- and post-Highlands Act values.” This provision is inconsistent with the statute cited and raises five issues:

- a. The statute does not recognize “pre- and post-Highlands Act values...” Given the many public misconceptions about what the Highlands Act does and does not say, it is incumbent upon the Highlands Council not to add to public misunderstanding. The statute provides that appraisals be made
 

*“using (a) the land use zoning of the lands, and any State environmental laws or Department of Environmental Protection rules and regulations that may affect the value of the lands, subject to the appraisal and in effect at the time of the acquisition, and (b) the land use zoning of the lands, and any State environmental laws or Department of Environmental Protection rules and regulations that may affect the value of the lands, subject to the appraisal and in effect on January 1, 2004.” (N.J.S.A. 13:8C-26j(1)).*

In other words, the appraisals are based on the property’s current market value with all zoning and environmental rules currently in effect, and on the current market value if those protections were not in place. If one insisted on using a short-hand, it would be more accurate to refer to values “with” and “without” the Highlands Act,

not “pre-“and “post-“. However, please note that there are non-Highlands Act environmental rules that have been implemented since January 1, 2004 that are used in formulating the second appraisal. Using the terms “pre-“and “post-highlands Act” may be convenient, but it is legally inaccurate. Those terms must be removed from this rule proposal and should not be used by Highlands Council members or staff.

- b. The Rule provision, as drafted, places the onus to obtain the appraisals on the property owner. In contrast, the statute provides that “the department [NJDEP], a local government unit, or a qualifying tax exempt nonprofit organization...shall conduct or cause to be conducted an appraisal or appraisals of the value of the lands...” (N.J.S.A. 13:8C-26j(1)). The statute puts the requirement on the buyers; the proposed Rule puts the requirement on the seller. We recommend that you redraft the proposed Rule to make it consistent with the statute by placing the requirement to obtain appraisals on the buyers.
- c. The requirement in the proposed Rule provision is mandatory: “[T]he property owner **shall** obtain appraisals...” The same requirements in the statute are permissive and are left to the landowner’s discretion: “A landowner may waive any of the requirements of this paragraph...” (N.J.S.A. 13:8C-26j(1)). We recommend that you redraft the proposed Rule to make it consistent with the statute by adding a sentence allowing the seller to waive any of the requirements of this provision.
- d. The statute contains a provision that bars prospective sellers from speculating by buying land at depressed values and selling it at inflated dual-appraisal values. “The provisions of this paragraph shall be applicable only to lands the owner of which at the time of proposed acquisition is the same person who owned the lands on the date of enactment of P.L.2004, c.120 (C.13:20- et al.) and who has owned the lands continuously since that enactment date...” (N.J.S.A. 13:8C-26j(1)). The proposed Rule does not contain a provision to bar speculation. We recommend that you redraft the proposed Rule to make it consistent with the statute by limiting this program to sellers who owned the land prior to the enactment of the Highlands Act.
- e. Finally, the statute uses the term “qualifying tax exempt nonprofit organization.” The proposed Rule uses the term charitable conservancy.” We recommend the Rule be redrafted throughout to be consistent with, and use the same terminology as, the statute.

Thank you in advance for addressing our comments. Please do not hesitate to contact the Coalition with any questions.

Sincerely,



Julia Somers  
Executive Director