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Gary J. Bower, Esq.

July 31, 2015

NJ Dept. of Environmental Protection

Office of Legal Affairs

401 East State St, 7th Fl

Trenton, NJ 08625-0402

by email: rulemakingcomments@dep.nj.gov

Re: DEP Docket 05-15-04

Proposed recodification, repeals, amendments and new rules:

**Flood Hazard Area Control Act Rules; Coastal Zone Management Rules; and
Stormwater Management Rules**

Dear Mr. Bower-

On behalf of the seventy-nine member organizations and the over eight hundred individual members whose interest in the protection of the natural and cultural resources of the New Jersey Highlands our Coalition represents, below are our comments on the above referenced agency rule proposals that if adopted will cause unacceptable losses to the public trust resources that the Department has a fundamental and solemn responsibility to protect, and a retreat from a program of developing flood resiliency when we look to the State for leadership.

Our comments will focus on subjects that pertain to fluvial waters, areas, and resources, which are characteristic of the Highlands. That our comments do not respond to proposed changes in areas impacted by acid producing soils or regulations specific to coastal zones, should not be taken as an endorsement of those aspects of the rule proposals.

We are sympathetic to the demands placed on the Department's resources. Staffing levels and its budget are at all-time lows. Regulated areas can come under the jurisdiction of more than one program unit, each with differing standards and rules. Reasonable requests with de minimus impacts and well-intentioned conservation projects can be overwhelmed by regulatory complexity. The need for a more streamlined, more efficient approach is well

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justified. And although it is precisely the reasoning given for the rule changes proposed on this docket, the Department goes much further.

With the deletion of the SWRPA buffers under the proposed Stormwater rule amendment (NJAC 7:8-4.2 and 5.5), significant source water protections will be dropped along with wetlands buffer standards designed to protect ecological values that promote groundwater recharge. The Highlands are the gathering grounds of headwaters that further downstream grow into the defined streams and rivers that comprise some of the State's most important drinking water resources. The uppermost origins of these riverine systems are the swales and intermittent streams that under the proposed deletion, would no longer be regulated. In the western Highlands where limestone is the predominant bedrock, important tributaries to Category-1 waterbodies are easily misidentified because only a small segment of a waterbody may actually rise to the surface—and when miscategorized as an isolated wetland feature, it lose the protection the SWRPA Rule currently enforces.

The Department justifies the proposed deletion of SWRPA buffers due to confusion between the list of regulated waters under FHACA and the regulated waters under the Department's Surface Water Quality standards (NJAC 7:9B) as shown on the USGS Quadrangle Maps or in the County Soil Surveys. These are buffer regulations promulgated to protect different kinds of resources and for different reasons---FHA riparian buffer standards were developed primarily to protect life and property during flood events, whereas buffers under SWRPA were developed primarily to protect water quality. Having parallel sets of regulations for functionally different riparian buffers is a rather simple concept. Any confusion this causes is either self-inflicted or overstated, and certainly not justification for the deletion of SWRPA buffers. More streamlined regulatory language and better cross-referencing would clear up any lingering confusion by the persistently challenged.

The new Table 11.2 (NJAC 7:13-11.2) proposes to increase the maximum area of disturbances allowed to vegetated buffers before mitigation is required and adds to the types of disturbances allowed. This proposes a wholesale increase in disturbances to riparian zones across the State. Instead of prohibiting development in the most valuable riparian zones and flood hazard areas, more disturbances will be encouraged resulting in a net loss of the functional values currently provided by riparian buffers, with adverse impacts to water quality and flood control.

A complex system of mitigation and mitigation banking (NJAC 7:13-13) sets up a system that allows new disturbances in naturally occurring, high value riparian buffers by attempting to offset the loss of ecological values by enhancing or restoring vegetated buffers along existing waterbodies anywhere within the same or an adjacent Watershed Management

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Area. Such a trading program can only result in a net loss of ecological values. Although the enhancement or restoration of previously disturbed areas should always be encouraged, they can never fully mitigate against the damage caused when a naturally occurring riparian buffer is disturbed, even when the mitigation ratio is greater than one-to-one. The administration of such a system, with the required oversight, reporting and monitoring, is complex and detailed. That much of the stated reasoning behind this far ranging rule proposal is to reduce the administrative burdens of an over worked, under staffed Department and to reduce the regulatory complexity facing the regulated community, and then to propose a sophisticated program that will carry with it the responsibility of alleviating the full measure of ecological damage that the Department now intends to allow and to fully offset the associated new risks to water quality and flooding, requires a leap of faith that the Department is in no position to ask.

The Department proposes to allow mitigation projects on public lands 7:13-13.4(c)2 if approved by the Green Acres Program (7:13-13.4(c)2). It is wrong to provide land preserved with public funds for mitigation projects unless it is at a ratio many times greater than the disturbance. Mitigation on private land requires the recording of a conservation easement, which has a certain value. Public lands are already protected, and any additional deed limitations to protect a mitigation project is only of marginal value. We object to the use of our public lands to facilitate the loss of riparian buffers in the service of private interests.

The vast body of academic, scientific and professional literature recognizes the “mitigative hierarchy” that should be followed when considering environmental impacts: *avoidance of impacts, minimizing impacts, and only lastly, compensation, or mitigation, of impacts*. The Department, with this rule proposal, intends to allow more disturbances in riparian buffers (NJAC 7:13-11.2). Only when the higher threshold of disturbance is exceeded will mitigation be required (NJAC 7:13-13). This not only reverses the traditional mitigative hierarchy model, but places “*disturbance*” as the very first step in the sequence.

Very little scientific basis is provided to justify the types of mitigation allowed, the specific ecological values that are to be replaced, or the locations that mitigation may take place. In a departure from the Department’s existing requirement that riparian buffer replacement mitigation occur in within the same waterway, mitigation under the proposed rule may occur anywhere within the same Watershed Management Area, or in an adjacent Watershed Management Area. The State is divided into twenty Watershed Management Areas, they are similar to counties in size. This is too large an area. As in the Stormwater and Freshwater Wetlands rules, mitigation should occur, if not in the same waterbody, in the same HUC 14 subwatershed. No basis is provided to support the value or merit of mitigation that has neither a hydrological nor ecological connection with the area disturbed other than to serve the convenience of the applicant. This is alarmingly consistent with many aspects of

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the proposed new Riparian Zone Protection Standards, including the expanded grandfathering provisions and exception areas, the new Permits-by-Rule and Permits-by-Certification, the repeal of SWRPAs, the repeal of prohibitions on stormwater discharges within the 150 and 300 foot riparian zone and on stormwater discharges directly into surface waters. The Department provides no basis or background documentation or scientific grounds that can show that by adopting sweeping, more lenient provisions that the Department is acting in the interest of the State or is responsive to the scope and purpose as stated in NJAC 7:13-1-1. In fact, the interests to which the Department responds throughout the rule proposal are solely those of the regulated community.

Mitigation, if it is to be successful—an outcome that by no means is guaranteed—has rules and standards and it must be undertaken by experienced professionals. The USEPA, the USF&WS, the Army Corps of Engineers, national conservation organizations, many state agencies and universities have published standards, guidelines and best management practices pertaining to riparian area mitigation and mitigation banking. Mitigation to the extent proposed in this Rule must reference a set of acceptable standards to which participants and mitigation projects must adhere and held as the benchmark to determine the success or failure of a project.

Many disturbances that currently require a demonstration that strict compliance with riparian zone limitations would create an undue hardship are proposed to be allowed with mitigation. The conditions to qualify for a hardship exemption for the few disturbances that will continue to be prohibited are relaxed (NJAC 7:13-15.1). Hardship waivers are intended to provide those who, in rare situations and because of unique circumstances, should be relieved from strict compliance to necessary regulations. If, as the Department claims, too many applicants are applying for hardship exemptions and as a result, they experience uncertainty in having to apply for a waiver, the proper response of a responsible agency would be to promptly deny the requests from those who do not qualify, not relax the rules to ease the workload of the Department and for those who are abusing the program.

Many of the bridges and dams that may be subject to regulations under this rule potentially have historical resource values. Historical resources are significant assets of the public trust and should be recognized. In the least, if there is the potential of historical value associated with any structure or natural feature as a result of a regulated activity, a provision should be added that the State Historic Preservation Office be notified so that the resource may be documented and recorded. This provision is not intended to prevent an approved regulated activity from taking place.

The Department recognizes climate change as a factor contributing to increased flooding

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(Added flexibility for flood control projects, Rule Narrative, p. 198) but the proposed rule fails to factor the projected influences climate change will have on precipitation and flood events in New Jersey. In determining flood mapping, flood elevations, and other features of floodway design standards, the Department proposes the 100-year flood as the standard. However, FEMA and many States have adopted the 500-year flood in response to the conservatively projected influences of climate change on the mid-Atlantic region. This is a gross omission that the Department must rectify. Providing flexibility for the regulated community—it is mentioned more than fifty times in the narrative section—should not be the priority of the Department, especially where public health, safety, and property is at risk.

This rule proposal has been under development for at least four years. The public has been allowed only 60 days to review and comment on a 936 page document. In the press release the Department issued with the publication of the rule proposal our organization was listed as a stakeholder in the development of the rule. We were never consulted nor did we participate in any stakeholder meetings. If we had been consulted we would have been as stridently opposed to the aspects of the rule as we are in our comments letter.

The Department's first responsibility and primary charge is to protect public property, health and safety, and the public trust resources of the State. If the Department truly wishes to make the application process less burdensome and more predictable for the regulated community, it can do so by saying "no" promptly, more clearly and by having less confusing regulations. What it is proposing in this rule, allowing more disturbances in riparian buffers and in the flood hazard area, proposing an unproven and administratively complex mitigation program, will cause the loss of the resources the Department is supposed to protect and will result in more flooding, more flood damage, and put our health and safety at further risk.

Sincerely,


Elliott Ruga, Policy Director
New Jersey Highlands Coalition.