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Gary J. Bower, Esq.

December 28, 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 10-15-09

Water Quality Management Planning

Proposed repeal and new rules, NJAC 78:15

Proposed amendments, NJAC 7:14A-4.3 and NJAC 7:38-1.1

Dear Mr. Bower-

The New Jersey Highlands Coalition represents the interests of its eighty-six member organizations in its advocacy for the protection of the natural and cultural resources of the New Jersey Highlands. With respect to these interests, we provide the following comments on the above-referenced proposed repeal and new rules and proposed amended rules. Sadly, the proposal indicates the Department's intention to abandon comprehensive capacity-based planning as an effective means to balance the State's goals of economic growth with the protection of our natural capital and public trust natural resources. In combination with the significant rollbacks in the recent Flood Hazard Area Control Act rule proposal at NJAC 7:13, the Department's intention, as communicated to us, to increase the septic density standards set forth in the Highlands Water Protection and Planning Act Rules at NJAC 7:38, and the Department's failure in responding to the statutory requirement of releasing the long overdue Water Supply Master Plan, and other actions, signal an alarming pattern of a diminished will to protect New Jersey's environment and its public trust natural resources in favor of the protection of private development interests. We are deeply concerned by the Department's shift in priorities because New Jersey's long-term economic viability will be greatly diminished. Specific concerns are as follows:

7:15-4.5 Wastewater Capacity Analysis

An environmental build out analysis that is consistent with the Department's key water resource regulations and State-wide planning goals (i.e. Water Supply Master Plan, Stormwater Management, riparian zone protection, groundwater recharge) will no longer be the basis for the capacity analysis used to determine

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.2

deficiencies between existing and future wastewater capacity. Significantly, the WMP agency will no longer be required to demonstrate that deficiencies between existing and future capacity, identified in the wastewater capacity analysis, have been resolved before the WMP can be adopted. This will allow the expansion of sewer service areas even if the wastewater treatment capacity is not assured.

If new or expanded wastewater treatment capacity is shown to be needed within a five-year planning horizon, the WMP agency is required to begin coordinating with the Department and a hierarchy of approaches are required in order to avoid any increases in pollutant loading in new discharges to surface water. In a disturbing departure from the existing rules, when it cannot be demonstrated that the hierarchy of approaches are satisfied, the Department will no longer require the size of the sewer service area to be reduced accordingly.

The Department claims that the deletion of the capacity assurance and capacity gap requirements is a recognition that conditions change over time, planned future wastewater flows may never materialize and that “requiring build-out solutions too far in advance of the actual need ***could result in over-planning.***” (emphasis added). A continuing planning process, as contemplated by Federal statute in Sec. 303 of the Water Pollution Control Act, and to which New Jersey’s WQMP Rules intend to be responsive, is by its nature, fluid. Predicting future needs and responsive planning incorporates both science and art, and although accuracy is important, being exact is neither required nor expected. New Jersey, has more people per square mile than any other state sharing in its limited supply of natural resources. Over-planning may be inconvenient, whereas under-planning can be very costly, and if it is the intention, inexcusable. WQMPs are necessarily broad and comprehensive, because our water resources are so vital to the State’s economic stability. Failing to adequately plan will have consequences, which should be borne by the errant WMP agency, otherwise we all suffer the preventable consequences of poor planning.

7:15-4.5(c)1 i.-vii. Nitrate Dilution Analysis

Consistent with Department’s antidegradation policy for groundwater, in areas served by individual subsurface sewage disposal systems, the WMP agency is required to conduct a nitrate dilution analysis to determine the density of development that would not exceed the statewide nitrate loading standard of 2 mg/L. The existing rule requires that municipal zoning is appropriately adjusted so that the total number of units served by septic systems must not exceed a density that would surpass the 2 mg/L standard, allowing the distribution and lot sizes of the units to be at the discretion of the municipality but within the same HUC 11. The proposed rule proposes to delete the zoning requirement to meet the 2 mg/L standard and instead directs the municipality to work with the Department to evaluate

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.3

options to address the gap, referencing a link to a Continuing Planning Process document that “identifies potential strategies to address this capacity deficiency.”

Whatever strategies the Department intend to offer and the extent that meaningful compliance can be achieved, it is impossible to know. The section of the CPP document that the proposed rule references, “Appendix F: Strategies for Meeting Nitrate Dilution Analysis Target” is currently blank, with the advisory, “Under Development”.

How the Department intends to comply with the antidegradation policies of the federal Clean Water Act for nitrates in groundwater, including the antibacksliding provisions, for non-sewer service areas in New Jersey, is not specified in this proposal, yet it is one of the key integrated elements of water quality management planning. The municipal zoning requirements of the current rule meet these standards. That the Department intends to replace this requirement with other strategies might be appropriate, but they might not be. The lack of clarity and intention in this section of the rule precludes our ability to have a meaningful and complete review and an understanding of the rule as a whole, as well as the ability to submit meaningful and informed comments. **We request that the Department withhold adoption until we are provided with the opportunity to review and comment on the complete rule proposal.**

A justification provided by the Department for dropping the zoning adjustment requirement includes the specious claim of having a “*potential effect on the speculative value of land relative to development, which in turn affects the ability of agricultural producers to leverage their land value to secure loans for production.*” Here, the Department outlines a conflict between the speculative value of land and the protection of groundwater quality. That the Department chooses to protect the speculative land value over protecting groundwater quality is one of the more revealing and troubling statements to date of the Department’s shift in priorities. Never mind the falseness of the argument—banks that make agricultural production loans rely on the farm’s production value and business plan to determine credit worthiness, not a speculative development potential of a land use conversion.¹

1. The fallacy that land value is a primary factor that banks consider in approving agricultural production loans is a falsehood that continues to plague implementation of the Highlands Act because of impacts on speculative land values. The Department should not perpetuate this provocative myth. The following is quoted from the official Minutes of the April 21, 2005 Highlands Council meeting, at which Richard Nieuwenhuis, President of the New Jersey Farm Bureau discussed the matter:

“Mr. Spinelli asked... for farmers that choose to go into the Farmland Preservation Program, if there is protection for pre-Act equity so that farmers can borrow funds. **Mr. Nieuwenhuis said that First Pioneer Farm Credit, based throughout the State, makes loans to agricultural entities and that the basis for approval of a loan is on cash flow and ability to repay. As an example, he stated that a farmer may own land worth a million dollars, however could have difficulty paying a thousand dollar monthly mortgage. Mr. Nieuwenhuis noted that farm loans are not primarily based on land value but on the capability to make payments.**” (emphasis added)

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.4

Capacity constraints based on established land use policies and regulations have a large influence on market values of land. In the development of a Wastewater Management Plan those constraints are revealed. Municipalities must revise local zoning to reflect actual land use capabilities. Failing to do so for the purpose of protecting speculative land values, as the Department proposes, creates a false bubble in the market that approaches fraud. The Department should reconsider encouraging such misrepresentation at the scale of statewide policy.

Deletion of Nonpoint Source Pollution and other Environmental Standard

As comprehensive planning tools, it is appropriate, and it offers meaningful guidance to ensure consistency with the Department's other programs that naturally intersect with water quality management planning. Consistency with environmental standards for water supply, stormwater, riparian zone protection and steep slope protection, when met early on, in the development of a WMP, provides a great deal of predictability to all interests, including the regulated community. Piecemeal compliance under permitting programs, rather than through the comprehensive planning potential of WMP development, is the antithesis of planning, it makes the permitting process more tedious for both the Department and the permittee, and provides far less predictability.

Requiring a demonstration that water supply needs associated with the environmental build-out can be met is a matter of good planning and should be retained as a required component of WMP development. It is disingenuous to claim that the Department's current water supply program ensures adequate planning and permitting of water supply infrastructure while the most recently adopted Water Supply Master Plan is rendered ineffective by its being 20 years out of date.

Steep slope protection is not a requirement outside of the Coastal Zone Management Rules, the Highlands Preservation Area and the voluntarily conformed Highlands Planning Area. It is a non-controversial and important environmental and land use standard that should remain as a requirement.

7:15-4.4(3) Riparian Buffers under SWM Rules at 7:8

The Department has proposed amending the Stormwater Management Rule at NJAC 7:08 coincident with the proposed repeal and new Flood Hazard Area Control Act Rule at NJAC 7:13, for the stated purpose of having consistency within each rule for regulated riparian areas. As we have noted in our submitted comments on the FHACA Rule, features that characterize headwaters will lose protection under the proposed changes to the SWM and FHACA rules, and by reference, it will apply to this rule as well.

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.5

NJAC 7:15-4.7 Habitat Impact Assessment

The Department is proposing to include endangered or threatened wildlife habitat in a sewer service area if: *“conservation measures that will minimize to the maximum extent practicable all adverse modification of suitable habitat, and will mitigate for any adverse modification of habitat so that there is no net loss of habitat value for the local population of endangered or threatened wildlife species documented on-site, or their suitable habitat.”*

The concept of "No Net Loss of Habitat Value" is an unscientific and invalid surrogate for protection of actual existing habitat. This concept allows the destruction of critical habitat, and mitigation proposed for the loss of habitat is solely the manipulation of other habitats to (hypothetically) increase species density (value of habitat). Assume for just a moment that one could actually be successful in manipulating habitat and eventually, in measuring an increase in rare species density. If successful, results would only be short term, as such physical manipulations would not persist—habitats change through ecological succession—and eventually, "value" benefits will be lost.

However, the greatest flaw in a scheme of transferring habitat “value” is that it is entirely speculative. There are no requirements for the collection of baseline data, no requirement for a procedure based on verified research or peer-reviewed habitat enhancement procedures, and no obligation to monitor or measure future success. If a full and accurate calculation of the lost value is untenable, how is it possible to restore the lost value elsewhere?

The example of No Net Loss of Habitat Value cited in the rule summary (*Pinelands Preservation Alliance v. Jaylin Holdings, LLC*) was a proposal based on speculation—not developed with any research, data, monitoring, verification, or success criteria. It was not even known if Pine Snakes occurred in the habitat patch that was proposed to be manipulated for habitat value enhancement. The project was executed without consultation with the NJDEP Endangered and Non-Game Species Advisory Committee. The community of northern Pine Snake experts and field research scientists working on the species in the NJ Pine Barrens, however, evaluated the project and determined it to be useless and guaranteed to fail .

There is no scientific basis for mitigating the loss of habitat acreage with habitat “value” projects unless and until such a project is undertaken decades in advance, its results can be measured, and its success proven. The mitigation scheme as proposed in this section will result only in lost habitat values.

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.6

Relationship with the Highlands Council

The Department proposes to undercut the Highlands Water Protection and Planning Act, which was put in place in order to protect the water supply and water quality relied upon by two-thirds of New Jersey's population. The proposed rule does so by failing to fully incorporate the detailed Regional Master Plan for the protection of water and the lands that provide and protect this water. Instead, the proposed rules only minimally incorporate the RMP goals, policies, objectives and the detailed and accurate mapping that provides the empirical basis for RMP policies:

7:15-4.5(c)3 removes the RMP wastewater planning standards (and build-out analysis) for all non-conforming Highlands municipalities, thereby contravening the legislative intent of the Highlands Act to protect water supply and water quality for the entire Highlands region.

In addition, while the current rule requires that the Department obtain a determination of consistency with the Highlands Regional Master Plan from the Highlands Council, the proposed rule does not, but merely calls for "coordination," which appears to violate a Memorandum of Understanding between the Highlands Council and the NJDEP.

The proposed rules lower or eliminate protective goals, policies, objectives and standards that protect Highlands water – all at the expense of the public and the critical water and other natural resources upon which we all depend. The proposed rules put New Jersey's future and quality of life in jeopardy and lay out multiple opportunities to circumvent goals protective of water and wildlife. The proposed rule does not uphold the State's somber obligation to protect our public trust resources, including both wildlife and a clean and abundant water supply.

The Highlands Act mandated that the Highlands Council determine the carrying capacity of the Highlands Region (**C.13:20-11.a Contents of regional master plan**):

*"The regional master plan shall include...: (1) A resource assessment which: (a) determines the amount and type of human development and activity which the ecosystem of the Highlands Region can sustain while still maintaining the overall ecological values thereof, **with special reference to surface and ground water quality and supply**; contiguous forests and woodlands; endangered and threatened animals, plants, and biotic communities; ecological factors relating to the protection and enhancement of agricultural or horticultural production or activity; air quality; and other appropriate considerations affecting the ecological integrity of the Highlands Region; and (b) includes an assessment of scenic, aesthetic, cultural, historic, open space, farmland, and*

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.7

outdoor recreation resources of the region, together with a determination of overall policies required to maintain and enhance such resources;" (emphasis added)

As part of the preparation of the Highlands Regional Master Plan, the Council performed the build-out analysis, as described above, for the entire region, and then refined it at the municipal level. *Development permitted in the Highlands Region should be capped at the RMP build-out level.*

The proposed rule severely undercuts protections for natural resources that the Highlands RMP has identified, mapped, and seeks to protect with its Goals, Policies and Objectives.

In the Highlands Planning Area, for municipalities *that do not conform to the Highlands RMP*, the only "environmentally sensitive areas" that will be excluded from a sewer service area are "any contiguous area of 25 acres or larger consisting of any of the following features alone or in combination:

1. Areas mapped as endangered or threatened wildlife species habitat as identified on the DEP Landscape Maps Priority Rank 3, 4 and 5;
2. Areas mapped as Natural Heritage Priority Sites;
3. Category One waters,... and their corresponding 300 foot riparian zone based upon the Flood Hazard Area Control Act Rules – (which are currently being challenged by the Legislature as not conforming to legislative intent); and
4. Wetlands mapped by the DEP..." ... (e)1.,2.,3., and 4.

The extremely limited list of "environmentally sensitive areas" in the proposed rule severely undercuts the goals, policies and objectives developed by the Highlands Regional Master Plan for the identified and mapped environmentally sensitive features of the Highlands, and thereby undermines the legislative intent of the Highlands Act.

In conforming Highlands municipalities, the Highlands RMP planning is not incorporated. For example, the proposed WQMP rule identifies Highlands areas eligible for sewer service (**7:15-4.4** Delineation of sewer service areas).

In the Highlands Planning Area, *in conforming municipalities only*, sewers are limited to the Existing Community Zone, the Lake Community Sub-Zone, or a designated Highlands redevelopment area or Highlands center. *The Environmentally Constrained Existing Community Zone is NOT excluded from a potential SSA and should be excluded.*

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.8

NJAC 7:38-1.1 HWPPA Rules

The Department proposes to delete the current requirement of approving an amendment to an areawide WQMP for the Highlands Preservation or Planning Area only after receiving from the Highlands Council a determination of consistency with the Highlands Regional Master Plan. This is a clear contradiction of legislative intent. The Legislature enacted the 2004 Highlands Water Protection and Planning Act as an extraordinary intervention:

*“...that sprawl and the pace of development in the region has dramatically increased, with the rate of loss of forested lands and wetlands more than doubling since 1995; that the New Jersey Highlands, because of its proximity to rapidly expanding suburban areas, is at serious risk of being fragmented and consumed by unplanned development; **and that the existing land use and environmental regulation** system cannot protect the water and natural resources of the New Jersey Highlands against the environmental impacts of sprawl development.”*

The Legislature called for the formation of the Highlands Council *“to recommend the Commissioner of Environmental Protection water and water quality standards, and other environmental protection standards pertaining to the lands and natural resources of the Highlands Region, as the council deems appropriate... To identify and designate in the regional master plan special areas in the preservation area within which development shall not occur in order to protect water resources and environmentally sensitive lands.”*

While the Highlands Act required the Department to adopt stringent standards governing development in the Preservation Area, it specified that the Highlands Council was to be *“independent of any supervision or control by the department or by the commissioner...”*

Without execution of a memorandum of understanding between the Highlands Council and the Department, or by specific resolution of the Legislature, the Department cannot unilaterally drop the important and well-established deference to the Highlands Council for approval of amendments to areawide WQMPs in the Highlands. Removing this provision is detrimental to the Highlands Council’s ability to effectively lead State-level planning initiative in the Highlands region, as the Legislature clearly intended.

Consistency with Federal statutes

The federal Clean Water Act (CWA) requires New Jersey to prepare Water Quality Management Plans. Both federal and state law require the Department to have a “continuing planning process” (CPP) for water quality management. The CPP is the

management approach used by the Department for carrying out the water quality

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.9

management requirements of the CWA, the federal Water Quality Planning and Management Regulations, the New Jersey Water Quality Planning Act, the New Jersey Water Pollution Control Act, the County Environmental Health Act, and the Department of Environmental Protection Act of 1970. In other words, the WQMP process is an integral and essential part of New Jersey's ability to meet its obligations under the CWA and several other federal and state mandates.

The CWA expressly prohibits backsliding from effluent limitations contained in previously issued permits. Under the CWA, the Department is to be barred from allowing permit holders to "backslide" or from weakening limits contained in discharge permits except under very limited circumstances. Thus, permits issued with these types of limitations may not be reissued, renewed, or modified to contain less stringent effluent limitations than the previous permit *unless* the proposed new limitations comply with the CWA's antidegradation rule, or the permit falls into one of the statutory exceptions to this ban on backsliding.

Nevertheless, backsliding from permits originally based on Best Professional Judgment (BPJ) is restricted to permit limits that are not less stringent than the effluent limitation guidelines in effect at the time of the relaxation. Furthermore, when attempting to backslide from Water Quality Based Effluent Limits under either the antidegradation rule or an exception to the antibacksliding rule, *relaxed permit limits must not result in a violation of the applicable water quality standard*. This final provision is probably the most important part of the antibacksliding rule.

The Department acknowledges in the summary of the rule proposal that it has been unable to meet federal water quality standards under the CWA. However, with this rule proposal the Department proposes to rollback protections for C-1 streams and steep slopes, and loosen controls on nonpoint source pollution. Moreover, this rule proposal abandons planning, which is an abandonment of the Department's obligation under the CWA to engage in continuous planning.

New Jersey is not meeting its obligations under the CWA. Rolling back existing regulations will result in backsliding—in violation of the CWA—and will ensure that New Jersey continues to fail to meet its obligations under the CWA.

NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.10

Reliance on Permit Decisions

The proposed rule shifts several types of decisions to the permitting process, eliminating planning analysis from WMPs. The rule proposal assumes that a collection of permit decisions will result in reasonable results at the watershed or aquifer scale. In the absence of planning at the area-wide scale, permit-by-permit decisions do not achieve acceptable regional results.

The WQMP rules need provisions whereby sewer service area decisions include at least a “fatal flaw” analysis of other issues such as water quality, water supply, and water infrastructure capacity. Climate change will alter limits on environmental capacity as well. A “fatal flaw” analysis would be sufficient, but is critical, at the WMP stage.

Conclusion

The Department proposes a repeal of the entirety of the WQMP rules and replacement with a new rule. The Department claims that the purpose of the repeal and replacement is to restructure the rule. This rule proposal does just that but it does so in a manner that is inconsistent with state and federal law and promises not the protection but the degradation of New Jersey’s water resources.

A major overarching issue with the rule proposal is that all negative consequences of a failure to submit WMPs and WMP components have been removed from the rules. The current rules call for loss of future sewer service areas (which the Legislature placed in abeyance through two different laws) and controls on developments with total septic system flows of 2,000 gpd or greater. The only remaining consequence is that the Department “may” move on its own authority to develop and adopt a WMP, which is an authority it always had but has never used. We should not expect The Department to take this action. The lack of consequences will lead to a lack of compliance, with sewer service area delineations (nearly complete) getting attention and all other issues relegated to the background except for municipalities that want to use the WQMP rules as justification for acting on septic system area zoning or other approaches.

We have described in these comments the many steps that the Department is proposing to undertake that will reduce the relevancy of water quality management planning as an effective mechanism to plan our infrastructure wisely and with coordination so that our limited, shared, public trust natural resources can continue to sustain us with a stable

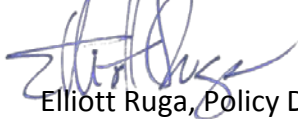
NEW JERSEY HIGHLANDS COALITION

Comments, DEP Docket 10-15-09 p.11

economy and appropriate growth, for today and for the next and subsequent generations.

We urge the Department to withdraw the rule proposal and instead propose rules that will achieve the required planning and protection outcomes mandated by law. We repeat our request that the Department clarify and complete this rule proposal by issuing for public comment "Strategies for Meeting Nitrate Dilution Analysis Target", which will be a vital component of the adopted rule. A failure to do so runs afoul of the New Jersey Administrative Procedures Act because it denies the public an opportunity to meaningfully comment on this proposal.

Respectfully,



Elliott Ruga, Policy Director

NJ Highlands Coalition member organizations that contributed expert analysis and guidance in the development of these comments:

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