PINELANDS PRESERVATION ALLIANCE

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Via Email
May 6, 2011

Gary J. Brower, Esq.
Office of Legal Affairs
Attn: DEP Docket Number 03-11-02
New Jersey Department of Environmental Protection
401 East State Street, Floor 4
P.O. Box 402
Trenton, NJ 08625-0402

Re: Comments on Rule Proposal Titled Waiver of Department Rules, Docket Number 03-11-02

Dear Mr. Brower:

I am submitting these comments on behalf of the Pinelands Preservation Alliance (PPA) regarding the proposed rule titled "Waiver of Department Rules," N.J.A.C. 7:1B.

PPA objects in the strongest terms to the proposed rule because it is both unlawful and very bad public policy. The proposed rule is unlawful because it violates existing environmental statutes and is unconstitutionally vague, arbitrary and subjective. It is bad public policy because it will promote the case-by-case sacrifice of environmental resources and public welfare behind a screen of speculative and unenforceable mitigation projects. It will invite corruption of the public trust, as politically influential applicants are given relief from environmental protections because of who they are and the financial resources they bring to support their ambitions. Who gets permits and on what conditions will depend on who is in charge, not the letter of the law. Settled expectations and predictable outcomes will become a thing of the past. By creating such an arbitrary and easily manipulated mechanism for providing *ad hoc* accommodations to polluters and developers, the rule proposal erode or destroy public confidence in the Department of Environmental Protection as a guardian of our environment and health.

The Department (DEP) should not adopt the proposed rule because:

- There is no statutory authority for this waiver rule.
- The rule would conflict with existing environmental statutes, each of which either allows no waivers or provides more limited waivers for specific standards.
- The waiver rule is unconstitutionally vague and discretionary.

- The rule improperly, and without statutory authority, subordinates environmental laws to other laws.
- The waiver rule proposal does not provide for adequate public input.
- Mitigation is bad policy when used to justify destruction or degradation of natural resources, and it lacks any generally accepted or rigorous scientific basis.

Each of these objections to the proposed rule is detailed in the comments on specific sections which follow.

Authority

The rule proposal lists more than one hundred statutes as its "Authority," but fails to cite any specific statutory provision in any one of these statutes as authorizing a generic waiver provision, either within each listed statute or for all environmental standards. This inability to cite an actual authority for a generic waiver provision is not surprising: there is no such statutory authority. The dizzying list of laws, nearly all carefully expanded with an "et seq." to cover entire statutes, seems aimed at overwhelming the reader rather than providing any genuine guidance at finding and analyzing the claimed authority. For example, what is the reader to do with general citations to the entirety of the Freshwater Wetlands Protection Act (identified as 13:9B-1 et seq. in the rule proposal)? Mistakes like listing "50:1-5" and "50:1-5 et seq.," of which there are several, further illustrate the fact that this list is not a serious attempt to identify an actual legal authority.

The proposed rule, moreover, actually conflicts with the listed statutes, because each of these statutes either provides for specific waivers or does not provide for any waivers. The many separate choices to include a waiver provision for a given requirement, or not to do so, reflect decisions made by the legislature in the framing and passage of each statute.

For example, the Freshwater Wetlands Protection Act, provides for "transition area waivers" under specified conditions, and the statute details the types of waivers, the circumstances justifying waivers, and the application requirements. See N.J.S.A. 13:9B-12, -17 & -18. The Flood Area Hazard Control Act allows for waiver of its provisions, but only to address hardship – not for "undue burden," to achieve a "net environmental benefit," or to avoid "conflicting rules." See N.J.S.A. 16A:58-55(b). The Coastal Area Facility Review Act (CAFRA) also provides for waiver of certain requirements under specified conditions, but not others. Specifically, CAFRA allows waivers, under differing conditions, for grading or excavating a dune and for environmental impact statements, but not for any of its other myriad requirements. The CAFRA statute does not authorize the alteration of these requirements in exchange for mitigation. See N.J.S.A. 13:19-6, especially sections 5.3 and 6. The Water Pollution Control Act does not provide for the waiver of any of its permitting requirements. See N.J.S.A. 58-10A-1 et seq.

N.J.A.C. 7:1B-1.2 Definitions and 7:1B-2.1(a)1-3 Basis for a waiver

The authorization of waivers for "conflicting rules," "unduly burdensome" compliance, or "net environmental benefit" conflicts with the statutes to which the waiver provision is

intended to apply, as explained above under "Authority." In addition, these waiver standards are so vague, ill-defined, and subjective as to violate due process requirements that regulations create reasonably predictable and objective legal rights for applicants and the public.

The definition of net environmental benefit, and the authorization of waivers based on net environmental benefit are:

(a) too broad to enforce rationally and consistently, because there is no scientifically accepted basis on which to reliably evaluate and implement the measures an applicant might propose as mitigation;

(b) too vague in failing to provide any criteria or scientific requirements for evaluating elements such as "other related environmental good" or "adequate geographic and resource nexus" (for example, can off-site mitigate be separated by a highway from the site where wildlife resources are being degraded or destroyed?); and

(c) bad policy, because it will promote the sacrifice of existing healthy habitats, ecosystems, and resources in the speculative hope that mitigation actions will bring future benefits to other habitats, ecosystems, and habitats.

The reliance of the proposed rule on mitigation is especially troubling, because we have no confidence at all in the scientific validity, efficacy, or enforceability of mitigation plans to off-set destruction or degradation of existing resources. The lack of sound scientific footing for the use of mitigation to provide equivalent environmental benefits is described more fully in the memo by Dr. Amy Karpati, attached as appendix A and incorporated here by reference. Moreover, neither DEP nor any other state or regional agency has shown it is structure and dedicated to ensuring mitigation projects are successfully completed, and once a development is complete, it is practically-speaking impossible to undo the permit if the mitigation does not work as promised.

The definition of "unduly burdensome," and the authorization of waivers based on undue burden, are similarly too broad, too vague, and bad policy. What makes a hardship "exceptional"? Is "exceptional" anything greater than the *average* cost of compliance, or the *top quartile* of cost of compliance, or some other definition? What is the universe of applicants or applications against which a given application is to be compared in determining what is "exceptional" – is it all applications, or only those deemed similar in nature, magnitude or applicant? DEP has neither the data nor the time to apply any rigorous definition of exceptionality even if the rule provided or required one.

Moreover, it is unclear what the rule means by "excessive cost." The language might be read to mean a financial cost is excessive any time the applicant argues to DEP's satisfaction that non-compliance plus mitigation would be less expensive than compliance. This reading would simply read a mitigation mechanism into every DEP permitting program and standard, which, as we have noted, has no statutory authority, conflicts with existing statutes, and is bad policy. But if not this kind of broad cost/benefit option for all permits, what could "excessive cost" mean in the rule as written? Again, even if the rule resolved this ambiguity, DEP has neither the capacity nor the expertise to conduct such financial analyses in a rigorous, reliable fashion.

We also object to the provision of waivers where environmental regulations are deemed to "conflict" with other legal requirements, because (a) the proposed rule would waive, and thus

subordinate, DEP requirements in favor of other, non-environmental, statutes and regulations, without any legal authority for doing so; and (b) the proposed rule provides no indication of how DEP would determine a conflict exists in a particular case, ensure that such a conflict is genuinely irreconcilable (so that an applicant literally cannot meet both legal requirements), and fashion a waiver tailored to avoid the asserted conflict. As with the "unduly burdensome," and "net environmental benefit" options, this avenue to waiver is unconstitutionally and unwisely vague, subjective and prone to arbitrary application.

N.J.A.C. 7:1B-2.1(b)1

We believe this provision, if read according to its plain language, should negate the proposed waiver rule, since the proposed rule is designed precisely to permit the waiving of duties imposed by State statutes, via the regulations that are adopted to implement those duties. The proposed rule seems to use the word "specific" to modify duty in order to capture some narrow range of requirements, presumably far less than the whole universe of statutory requirements. But it is impossible to know what DEP believes, or will in application assert, these "specific," as opposed to all the other, non-specific, duties are.

N.J.A.C. 7:1B-2.1(b)2 & 3

We object to these provisions on the grounds that it is impossible for the public or applicants to know which rules, in which situations, are covered by these exceptions. The fact that DEP cannot even set out the exceptions in the rule proposal shows that the rule is unlawfully, and unwisely, vague and arbitrary. DEP must believe the exceptions do not exclude all environmental rules that are connected with any federal statute or program, since that reading would essentially negate the proposed waiver rule. But if not that, then how is one to know where the exceptions apply?

N.J.A.C. 7:1B-2.1(b)6

We object to this provision because it is not clear which standards DEP considers "protective of human health" as opposed to those it considers <u>not</u> "protective of human health." While we have not been able to review every statute listed in the rule proposal, we have found that all of the following major environmental statutes reference the protection of human health as among the goals served by the statute: the Water Pollution Control Act, the Freshwater Wetlands Protection Act, the State Flood Control Facilities Act, the Coastal Area Facilities Review Act, the Wetlands Act of 1970, the Brownfield and Contaminated Site Remediation Act, the Air Pollution Control Act, and the Solid Waste Management Act. Perhaps there is an environmental program that does not aim to protect human health, but we have not found it yet.

A plain reading of the proposed rule would mean that all regulations implementing these statutes are non-waivable. DEP obviously does not intend to exempt all these regulations. So, once again, we find the proposed rule is unlawfully, and unwisely, vague and arbitrary.

N.J.A.C. 7:1B-2.2 Waiver evaluation criteria

The waiver evaluation criteria listed here seem relevant to the forging of environmental policies. The rule, however, purports to make them the basis for individualized decision-making in the granting or waiving of permits and other requirements. We object to this provision because:

(a) These standards are highly generalized and too subjective to be applied as the basis for individual permit and compliance decisions, lacking any measurable thresholds;

(b) There is no requirement that DEP actually find each of these considerations is satisfied, as the rule only requires DEP to "consider the extent to which" each criterion "support[s]" granting a waiver; and

(c) There is no way to know how each consideration would be weighed in comparison with the other listed considerations in each case.

N.J.A.C. 7:1B-2.3 Notice of the waiver

We object to this provision because it does not ensure adequate public notice of waiver applications or an opportunity for the public to provide information or comment on the application prior DEP's decision. The proposed rule states that "The Department shall publish, in the DEP Bulletin, notice of: (1) Its determination to consider a waiver; and (2) Its decision on each waiver," but does not specify the timing of this publication or ensure the public has the necessary information to identify important waiver requests, research the facts, and comment on the request prior to the DEP determination.

N.J.A.C. 7:1B-2.4(b)(7) Rule waiver and limitations

This provision, which states that waivers "may be used to resolve contested cases or other disputes" is extremely disturbing. It will invite any applicant with the financial resources and the desire to avoid environmental requirements to file suit in order to promote its chances of getting a coveted waiver. The alleged fear of "litigation risk" will become the screen behind which deals are made for the politically influential applicant.

As the court held in the Dragon case, New Jersey law forbids the use of litigation settlements to grant relief from environmental permit requirements. Dragon v. New Jersey Dept. of Environmental Protection, 405 N.J. Super. 478, 488, 496 (2009), cert. denied, 199 N.J. 517 (2009). The policy reasons for this holding are sound. The proposed rule provision, tucked away in the middle of the last sentence of the rule, appears aimed at reversing this judicial limitation. Doing so would be a bad policy choice for New Jersey, because it would lead to the expansion of litigation (applicants would be encouraged to file lawsuits simply as a venue and cover for negotiating inappropriate waivers), the loss of natural resources, harm to public health, and cumulative damage to the state's economy as sustainable growth is sacrificed to short-term deals in favor of privileged developers and polluters.

Thank you for considering these comments.

Sincerely,

Carleton Montgomery

Executive Director

Appendix A

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M E M O R A N D U M

May 6, 2011

TO: Gary J. Brower, Esq., Office of Legal Affairs, Department of Environmental Protection

FROM: Amy Karpati, Ph.D., Director for Conservation Science

RE: Use of Mitigation as Basis for Approval of Development

I have conducted a review of scientific literature on the efficacy of mitigation as a method of off-setting the loss or degradation of natural resources through clearing of land and other forms of development. This memo summarizes my conclusions based on my review of the relevant literature, which Pinelands Preservation Alliance submits in connection with its comments on the proposed rule titled Waiver of Department Rules, DEP Docket No. 02-11-02.

Mitigation, compensatory habitat creation, habitat trading, and other forms of habitat and biodiversity offsets are increasingly proposed as a technique to compensate for habitat loss due to land clearing and development. Land clearing has negative impacts on ecosystems, including (1) eliminating biota and decreasing habitat; (2) fragmenting plant and animal populations; (3) destabilizing natural ecological processes such as water quality control and carbon sequestration; and (4) reducing the resilience of biological systems to disturbances (Gibbons and Lindenmayer 2007).

When presented as a justification for land clearing and development, such habitat mitigation assumes that the resulting negative impacts will be off-set by protecting, enhancing, restoring, or creating habitat elsewhere (Gibbons and Lindenmayer 2007). In order to compensate for losses involved in habitat destruction, such offsets must result in at least equivalent habitat gains. However, the valuation of habitat loss and subsequent mitigation gains is rarely accurate or reliable, undermining the premise that mitigation projects provide no net loss of habitat or biodiversity. There are a variety of reasons to doubt the integrity of mitigation to achieve equal habitat or habitat value (Gibbons and Lindenmayer 2007, Bekessy et al. 2010).

Limitations of habitat mitigation

Major limitations of habitat offsetting involve the following:

1. The amount of gain that can be achieved compared to the loss from habitat destruction.

Often, habitat loss is permitted in exchange for protecting areas of existing habitat. The newly protected sites are not guaranteed to have equivalent habitat quality, capacity for improvement, or to have been under any existing threat of decline or degradation (Gibbons and Lindenmayer 2007). This kind of simple trade results in the net loss of native vegetation and habitat equal to the area cleared. Policies that allow permanent habitat destruction to be offset by the protection of existing habitat will result in further loss of biodiversity (Bekessy et al. 2010).

Similarly, habitat offsets often involve claimed enhancement or improved management of existing habitat in exchange for habitat destruction elsewhere. The assumption here is that such improvements might lead to future increases in biodiversity value or avoid future biodiversity losses (Bekessy et al. 2010). However, there is no certainty that this will be the case; there *is* certainty in the immediate destruction of the biological integrity of the land to be cleared, and experience suggests such projects have not been shown to succeed (see further discussion below). Such offsetting schemes result in net losses of biodiversity (Bekessy et al. 2010).

2. Inadequate biological assessment currencies and equivalency of habitat losses and gains.

Biodiversity is extremely difficult to quantify. It is a complex hierarchical system that involves the diversity of genes all the way up to the diversity of ecosystems – all levels of which are embedded with elements that vary in time and space and interactions within and between these levels (Walker et al. 2009). Such complexity means that measuring biodiversity losses and gains is difficult, and mitigation gains are rarely equivalent to habitat losses (Gibbons and Lindenmayer 2007).

Aside from arbitrary valuation of biodiversity, the contributions of different biodiversity components are non-interchangeable (Walker et al. 2009). For example, endangered orchid habitat is not equivalent to nor exchangeable for endangered bird habitat, an area of contiguous habitat is not equivalent to an equal area of fragmented habitat patches, and early successional habitats are not exchangeable for late successional habitats. Using simplified indices of biodiversity prohibits strict adherence to the exchange of "like-for-like" (Gibbons and Lindenmayer 2007).

3. Lag time between habitat loss and offset gain.

Policies that permit exchanging immediate loss of existing habitat for the creation or mitigation of promised future habitat elsewhere, even if such future habitat is of equivalent value, result in time lags between the loss of the existing habitat and its ecological functions and the establishment of the offset habitat. This break in resource continuity could result in major consequences for some biota (Gibbons and Lindenmayer 2007), including increased extirpation or extinction risk (Bekessy et al. 2010).

4. Poor enforcement and inadequate compliance.

Even if habitat offset schemes are theoretically ecologically viable, they are often undermined by a poor track record of compliance in following through with the agreed-upon mitigation conditions (Gibbons and Lindenmayer 2007) and lack of enforcement to ensure that the conditions are implemented (Walker et al. 2009).

Mitigation and habitat restoration failure

Race (1985) asserts that the institutionalization of habitat mitigation as a strategy to offset habitat loss has happened prematurely, with little evidence to suggest it actually fulfills expectations of ecosystem function. Race and Fonseca (1996) cite multiple studies which found high rates of permit noncompliance and mitigation project failure.

Most research examining habitat mitigation success focuses specifically on wetland mitigation. Sudol and Ambrose (2002), looking at wetland mitigation projects in Southern California, measured project success based both on compliance with permit stipulations and the resulting habitat conditions. Thirty out of 55 projects (55%) were considered successful in permit compliance and only nine of these 55 projects (16%) were successful based on habitat outcome goals.

While specific research on terrestrial habitat mitigation is more difficult to come by, Morris et al. (2006) contends that the prospect of success in compensatory terrestrial habitat creation is even less certain than that of wetland habitats. Created woodlands, for example, may need to be hundreds of years old before they achieve a level of habitat quality equal to that which has been lost (Morris et al. 2006). Additionally, mitigation and habitat restoration success suffers from our limited knowledge of the abiotic requirements for some habitats (Morris et al. 2006).

Gibbons and Lindenmayer (2007) reference studies which show that planted vegetation does not perform the same role as native vegetation and is often inferior habitat for the native biota. Even if areas of existing native vegetation are to be enhanced or improved to provide habitat equivalent to that which has been lost, there is considerable uncertainty that these systems can be forced into such a predetermined restoration trajectory (Gibbons and Lindenmayer 2007). Re-creation of lost habitat that takes into account all component species and ecosystem functions has been shown to be either prohibitively expensive or impossible (Bekessy et al. 2010).

Because of these uncertainties, habitat offsets cannot be relied upon to compensate for habitat loss, nor be viewed as an effective strategy in the pursuit of sustainable development (Morris et al. 2006). These shortcomings in habitat restoration and mitigation require that critical habitats are not destroyed in the first place (Bekessy et al. 2010). If compensatory habitat creation is to be at all effective, the value of the offset habitat must be pre-established (it must have already reached demonstrable ecological equivalence) before habitat loss elsewhere may proceed (Bekessy et al. 2010).

Conclusions

The difficulties inherent in accurately assessing ecological value and re-creating ecologically functional habitats means that, with the current state of scientific knowledge and regulatory structures, compensatory habitat policy cannot be viewed as a viable alternative to habitat conservation. Moreover, the mitigation approach to environmental policy obscures measures of biodiversity loss and weakens the incentives for effective conservation planning (Walker et al. 2009).

References

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