



PINELANDS PRESERVATION ALLIANCE

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February 15, 2013

Elizabeth Semple
Manager
Division of Coastal and Law Use Planning
Department of Environmental Protection
401 East State Street
PO Box 420, Mail Code 401-07C
Trenton, NJ 08625

Re: Public Comment on Proposed Cape May County Future Wastewater Service Area Map

Dear Ms. Semple,

Pinelands Preservation Alliance (PPA) submits the following comments on the proposed Future Wastewater Service Area (FWSA) map for Cape May County, in accordance with the public notice published by the Department of Environmental Protection (DEP).

As detailed below, DEP should not adopt the proposed Cape May County FWSA map as proposed because it wrongfully includes all Pinelands Villages, regardless of circumstances, planning considerations or municipal consent, in expanded sewer service areas; and because it incorporates land into sewer service areas that is environmentally sensitive under the standards of the Water Quality Management Planning Rules at NJAC 7:15-5.24.

The issue of Pinelands Villages arises because the great majority of Villages in Cape May County have never before been included in sewer service areas. The proposed FWSA would include *all* Villages in expanded sewer service areas without any basis in applicable Pinelands, Water Quality Management Planning (WQMP) or other land use regulations or municipal planning decisions and objectives.

1. There Is No Legal Requirement that Pinelands Villages Be Included in Sewer Service Areas

Neither the WQMP Rules nor the Pinelands Comprehensive Management Plan (CMP) require that Pinelands Villages be added to expanded sewer service areas in the current round of updated County Plans. The Pinelands CMP permits but does not require Villages to be sewer. NJAC 7:50-5.27. In fact most have never been in sewer services areas throughout the Pinelands' 32 years of existence. The WQMP Rules do not require that *any* area not previously within a sewer service area be added in the current revisions; instead, the Rules provide minimum standards any sewer service areas, including expansions, must meet in order to be approved.

With respect to the Pinelands CMP, detailed land use planning and zoning for Pinelands Villages is left to the discretion of the municipalities consistent with the broad standards of the CMP. Among those standards are that “the character and magnitude” of any proposed use “is compatible with existing structures and uses in the Village” NJAC 7:50-5.27. By adopting a sweeping inclusion of all Pinelands Villages in sewer service areas, without regard to their individual character or any individualized planning process for each Village, DEP would violate both the spirit and the letter of the CMP.

2. The Memorandum of Understanding Between the Pinelands Commission and DEP Does Not Provide a Lawful Basis To Add Pinelands Villages to Sewer Service Areas

Both DEP staff and the Pinelands Commission have informed the Pinelands Counties that they must include all Pinelands Villages in the sewer service areas as part of their Water Quality Management Plans, citing the Memorandum of Understanding between the Pinelands Commission and DEP dated April 9, 2012. *See, e.g.*, Email from Paul Tyshchenko, Pinelands Commission, to Robert C. Brewer, Cumberland County, dated October 3, 2012 (attached); DEP public notice re Proposed Amendment to the Lower Delaware Water Quality Management Plan, dated November 5, 2012 (attached). Consistent with this position, the public notice for the Cape May County’s proposed FWSA states that some areas have been added to sewer service areas in the proposed map “based on ... the requirements of the Pinelands Comprehensive Management Plan.” (Public Notice, p. 2, attached). Counties, such as Ocean County, which did not put all Villages in sewer service areas in their initial submissions to DEP have been required to do so. In sum, both the Pinelands Commission and DEP read the Memorandum of Understanding as requiring DEP to add all Pinelands Villages to sewer service areas, and on this basis DEP in turn told the Counties they must include all Villages in the revised sewer service areas.

This position, however, has no basis in the WQMP Rules or in the Pinelands CMP – nor even in sound planning. In a letter dated August 27, 2012, Nancy Wittenberg, the Executive Director of the Pinelands Commission, agrees that the November 2012 Memorandum of Understanding did not change the law or rules governing Pinelands Villages in any way. As explained above, before the MOU, neither the Comprehensive Management Plan (CMP) nor DEP’s Water Quality Management Planning (WQMP) Rules law *require* that Villages be included in sewer service areas. That remains the case after the Memorandum of Understanding.

The fact that Wastewater Management Plans must be coordinated with the Pinelands Protection Act and CMP, NJAC 7:15-3.7, cannot justify an across-the-board expansion of sewer service areas to all Pinelands Villages because neither the Act nor the CMP require sewerage of Villages or give the Commission authority to require sewerage of Villages. Indeed, it is the express policy of the Pinelands program to allocate the decision whether or not to permit sewerage of Villages to municipal government, consistent with the CMP’s minimum standards and permitted uses for Villages (such as maintaining the character and magnitude of existing uses).

Consequently, DEP should not approve WQMPs that include Villages which were previously not in sewer service areas and inform the Counties that they may apply to include specific Villages in expanded sewer service areas under the normal standards governing such expansions, including obtaining municipal consent. Indeed, since the inclusion of Villages in expanded sewer service areas in this case is based entirely on DEP’s application of the

Memorandum of Understanding, but that document cannot lawfully require the expanded sewer service areas, it would be unlawful for DEP to adopt the proposed FWSA.

3. Sewer Service Area Designation Conflicts with Lawful, Certified Municipal Zoning for Many Pinelands Villages

All Pinelands Villages at issue have municipal zoning, which the Pinelands Commission has previously certified as complying with the Pinelands Comprehensive Management Plan (CMP). Many of these Villages have zoning that is inconsistent with installation of sewers.

For example, Dennis Township's zoning and land use ordinances governing its Pinelands Village of Eldora is inconsistent with inclusion in sewer service area. The permitted densities could not support sewer treatment, as the zoning mandates minimum lot areas of 3.2 acres (PV District). *See* Dennis Township's Ordinance Section 185-21.

4. WQMP Rules Require Municipal Agreement To Expand a Sewer Service Area into a Pinelands Village, and Several Municipalities Have Not Given Such Consent

The WQMP Rules require that municipalities consent to the expansion of sewer service areas within their jurisdiction. As noted above, one fundamental requirement the Rules place on DEP is that it "Coordinate and integrate WQM plans with related ... local comprehensive land use, functional and other relevant planning activities, programs and policies." NJAC 7:15-2.1(a)3. One way the Rules ensure this coordination is to require municipal consent to expansion of sewer service areas. Thus, the WQMP Rules require that wastewater management planning agencies provide DEP with "written statements of consent for wastewater management plans" from "the governing bodies" of each municipality affected. NJAC 7:15-5.22(b).

It may be argued that DEP or a County may expand a sewer service area without the municipality's consent in a case where the area in question is failing to meet state or Pinelands water quality standards due to excessive or concentrated septic effluent, as conversion to a sewer treatment system would solve a water quality violation. In the present case, however, no agency has made such a determination for all – or even, so far as know, for any – of the Pinelands Villages in question – much less justified inclusion of entire Villages in expanded sewer service areas based on such a rationale.

5. The Map Under Consideration Provides Insufficient Information To Evaluate or Justify Approval

While the WQMP Rules require that Wastewater Management Plans (WMPs), including sewer service area maps, provide substantial information to justify each plan, DEP proposes to approve revised sewer service areas in isolation from any such information – at least, no such information has been provided to the public. This lack of information makes it impossible for the public to evaluate the maps, or for DEP to approve the maps as meeting regulatory requirements or the sound planning objectives, which these requirements are designed to achieve. Since sewer service area maps are a part of the whole WMP, such maps cannot be justified in isolation from the WMP. The lack of information also makes it impossible to know what information is in the record of decision on which DEP will base its approval decision, and therefore what information one needs to address in comments.

The WQMP Rules require, for example, that WMPs include sewer service area mapping that will “provide adequate wastewater service for ... [l]and uses allowed in zoning ordinances that have been adopted and are in effect under SNJSA 40:55-D-62” or must “identify relevant zoning ordinances on which the wastewater management plan is based specifying the type, density, and intensity of land use allowed in each district.” NJAC 7:15-5.18(b). The Rules also state that DEP will only adopt a wastewater management plan, plan update or plan amendment “if the applicant demonstrates compliance with the requirements in this section for existing and future wastewater treatment needs, *water supply demands*, and *nonpoint sources of pollution*.” NJAC 7:15-5.25(a) (emphases added). No such information is provided to the public in the Cape May County submission subject to the current public comment and approval process.

With respect to water supply, for example, the Rules require that DEP “will only adopt a WMP, WMP update or WMP amendment if water supply needs associated with the environmental build-out are demonstrated to be met with existing, new or expanded water supplies that do not conflict with the most current New Jersey State Water Supply Plan, regional water supply plans, or TMDLs adopted as WQM plan amendments” NJAC 7:15-5.25(f). The Rules provide specific information requirements to make such demonstrations. Again, no such information is provided in support of the proposed Cape May County FWSA.

In Public Law 2011, C. 203, the Legislature overrode certain provisions of the WQMP Rules. The Legislature, however, did not permit DEP to approve any expansion of sewer service areas in isolation from all the information and planning requirements set forth in the Rules, or to adopt any new sewer service area maps that violate the environmental standards of the Rules. The Legislature did give DEP the authority to keep land in sewer service areas “notwithstanding that existing treatment works may not currently have the assured capacity to treat wastewater from such land without infrastructure improvements or permit modifications.” Section 5. The Act, however, did not require DEP to do so, and it did not even *permit* DEP to take such action without regard to water supply demands or nonpoint sources of pollution. Yet the Cape May County map is presented for approval without any of the information or justification this Rule requires for DEP approval. Public Law 2011, C. 203 cannot be used as an excuse for this failure.

6. DEP Has No Authority To Adopt Maps that Include Environmentally Sensitive Areas in Sewer Service Areas

DEP has declared that, contrary to the express requirements of the WQMP Rules, it will not remove land from sewer service areas that meets the Rules’ standards as environmentally sensitive “in recognition of the nature and scope of the New Jersey Pinelands Commission’s (Commission) regulation and oversight of land use and development within the Pinelands Area” This vague reference to the Commission’s “regulations and oversight” provides no lawful basis to violate the express requirements of the duly adopted WQMP Rules.

Moreover, the WQMP Rules are, in this respect, fully consistent with the provisions of the Pinelands CMP, because nothing in the provisions or objectives of the CMP mandates the sewerage of land that meets the WQMP Rule criteria as environmentally sensitive. There is no conflict in the regulations of the two agencies, so, again, DEP has no basis for ignoring the requirements of the WQMP Rules in this case.

In the case of Cape May County, the proposed FWSA map includes areas that are indisputably environmentally sensitive under NJAC 7:15-5.24(b). Such areas include not only numerous wetlands, but also areas with Landscape Map ranks of 3 and above. For example, the area on the west side of Paper Mill Road in Eldora, Dennis Township has a Landscape ranking of 4, State Endangered.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Carleton Montgomery". The signature is fluid and cursive, with a large, stylized "C" at the beginning and a long, sweeping tail.

Carleton Montgomery
Executive Director

Cc: Leslie Gimeno, Cape May County Planning