

includes the purchase and preservation of 2 offsite properties, including a 21.1 acre parcel and an 89.29 acre parcel. The 21.1 acre parcel (Block 75.01, Lot 3 in Manchester Township) was purchased from Manchester Township. The 89.29 acre parcel (Block 77, Lots 2, 4, 5, & 6) is currently under contract for purchase.

The proposed project is shown on plans (29 sheets) entitled "PRELIMINARY AND FINAL SITE PLAN & MINOR SUBDIVISION FOR WAL-MART REAL ESTATE BUSINESS TRUST, PROPOSED WAL-MART STORE (#1844-05), NEW JERSEY STATE HIGHWAY ROUTE #37 & NORTHAMPTON BOULEVARD, BLOCK 44, LOTS 2, 3, 5 AND PART OF LOT 4, MANCHESTER TOWNSHIP, TAX MAP SHEETS 7.02, 8 & 9 (DATED APRIL, 1973); BLOCK 505, LOTS 14 & 15, TOMS RIVER TOWNSHIP, TAX MAP SHEET 54 (DATED SEPTEMBER, 1996), OCEAN COUNTY, NEW JERSEY", prepared by Bohler Engineering, dated June 26, 2009, unrevised.

ADMINISTRATIVE HISTORY

On November 8, 2004, file number 1500-04-0001.1 (CAF040001) was received by the Division for the construction of a 208,433 SF retail store, a 19,554 SF garden center, and parking for 1,198 vehicles on this site. The application was denied on June 1, 2006 for non-compliance with the following rules: Endangered or Threatened Wildlife or Plant Species Habitats (7:7E-3.38), Critical Wildlife Habitats (7:7E-3.39), Basic Location Rule (7:7E-6.2), Water Quality (7:7E-8.4), Groundwater Use (7:7E-8.6), Traffic (7:7E-8.14), and Section 10 (N.J.S.A. 13:19-10). The applicant appealed this decision and that appeal is currently pending.

During the appeal, the applicant entered into settlement discussions with the Department. As a result of those settlement discussions, the applicant felt they could prepare a new design that would meet the Rules on Coastal Zone Management, and would therefore be issued a permit.

The current application, file number 1500-04-0001.2 (CAF090001), was submitted on October 22, 2009 and was declared complete for public comment on November 30, 2009. The public comment period ran from December 16, 2009 through January 15, 2010. The jurisdictional decision deadline is March 16, 2010.

ANALYSIS

The Division reviewed the application and found the project to be in compliance with the following rules:

- Wetlands (7:7E-3.27)
- Wetland Buffers (7:7E-3.28)
- Historic & Archaeological Resources (7:7E-3.36)
- Critical Wildlife Habitats (7:7E-3.39)
- Public Open Space (7:7E-3.40)
- Special Urban Areas ((7:7E-3.43)
- Commercial Facility Use Rules (7:7E-7.10(b))

- Stormwater Management (7:7E-8.7)
- Vegetation (7:7E-8.8)
- Public Trust Rights (7:7E-8.11)
- Scenic Resources & Design (7:7E-8.12)
- Buffers & Capability of Uses (7:7E-8.13)
- Traffic (7:7E-8.14)

The applicant failed to meet the following regulations. The following analysis is based on New Jersey's Rules on Coastal Zone Management (N.J.A.C. 7:7E-1.1 *et seq.*), as amended to January 20, 2009 and the Coastal Permit Program Rules (7:7-1.1 *et seq.*), as amended to April 7, 2008. Rule text is denoted in italics.

7:7E-3.38 Endangered or threatened wildlife or plant species habitats

- (a) *Endangered or threatened wildlife or plant species habitats are areas known to be inhabited on a seasonal or permanent basis by or to be critical at any stage in the life cycle of any wildlife or plant identified as "endangered" or "threatened" species on official Federal or State lists of endangered or threatened species, or under active consideration for State or Federal listing. The definition of endangered or threatened wildlife or plant species habitats include a sufficient buffer area to ensure continued survival of the population of the species. Absence of such a buffer area does not preclude an area from being endangered or threatened wildlife or plant species habitat.*
1. *Areas mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife (known hereafter as Landscape Maps) are subject to the requirements of this section unless excluded in accordance with (c)2 below. Buffer areas, which are part of the endangered or threatened wildlife species habitat, may extend beyond the mapped areas. The Department's Landscape Maps, with a listing of the endangered and threatened species within a specific area, are available from the Department's Division of Fish and Wildlife, Endangered and Nongame Species Program at the Division's web address, www.state.nj.us/dep/fgw/ensphome.*
 2. *Information on the areas mapped as endangered or threatened plant species habitat on the Department's Landscape Maps and the occurrence of endangered or threatened plant species habitat is available from the Department's Office of Natural Lands Management, Natural Heritage Database at PO Box 404, Trenton, New Jersey 08625-0404.*
 3. *The required endangered or threatened wildlife or plant species habitat buffer area shall be based upon the home range and habitat requirements of the species and the development's anticipated impacts on the species habitat.*
- (b) *Development of endangered or threatened wildlife or plant species habitat is prohibited unless it can be demonstrated, through an Endangered or Threatened Wildlife or Plant Species Impact Assessment as described at N.J.A.C. 7:7E-3C.2, that endangered or*

threatened wildlife or plant species habitat would not directly or through secondary impacts on the relevant site or in the surrounding area be adversely affected.

(c) Applicants for development of sites that contain or abut areas mapped as endangered or threatened wildlife species habitat on the Landscape Maps shall either:

1. Demonstrate compliance with this Rule by conducting an Endangered or Threatened Wildlife Species Impact Assessment in accordance with N.J.A.C. 7:7E-3C.2; or

2. Demonstrate that the proposed site is not endangered or threatened wildlife species habitat and this Rule does not apply by conducting an Endangered or Threatened Wildlife Species Habitat Evaluation in accordance with N.J.A.C. 7:7E-3C.3.

(d) If the Department becomes aware of an occurrence of an endangered or threatened wildlife species on a site that is not mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps, and the Department determines that the habitat may be suitable for that species, the Department shall notify the applicant and the applicant shall demonstrate compliance with or inapplicability of this Rule in accordance with (c) above.

(e) N/A

(f) The Department is responsible for the promulgation of the official Endangered and Threatened Wildlife lists pursuant to the Endangered and Non-Game Species Conservation Act, N.J.S.A. 23:2A et seq. These lists include wildlife species that are endangered and threatened in New Jersey as well as wildlife species officially listed as endangered or threatened pursuant to the Endangered Species Act of 1973, 16 U.S.C.1531 et seq. Because the lists are periodically revised by the Department in accordance with N.J.S.A. 23:2A-1 et seq., the lists are not published as part of this Rule. The lists are found at N.J.A.C. 7:25-4.13 and 7:25-4.17, the Rules adopted pursuant to the Endangered and Non-Game Species Conservation Act. To obtain a copy of the most current Endangered and Threatened Wildlife lists, please contact the Department, Division of Fish and Wildlife, Endangered and Nongame Species Program at the Division's web address, www.state.nj.us/dep/fgw/ensphome, or by writing to the Division at PO Box 400, Trenton, New Jersey 08625-0400.

(g) – (i) N/A

ANALYSIS

A review of the Department's Landscape Project revealed that the site is mapped Conservation Rank 3 for northern pine snake habitat. It should also be noted that a 2005 field study by EcolSciences, Inc., confirmed the presence of pine snake habitat and documented 2 adult pine snakes and 1 pine snake winter hibernaculum on the site. As part of the application, the applicant submitted an Endangered or Threatened Wildlife or Plant Species Impact Assessment (Assessment). The Division of Land Use Regulation (DLUR) solicited comments

on the submitted application from the New Jersey Division of Fish & Wildlife, Endangered and Nongame Species Program (ENSP). The ENSP has reviewed the submitted Assessment and has submitted formal review findings to the DLUR via a memorandum dated March 10, 2010. The ENSP has made the finding that the proposed project would have direct adverse impacts upon threatened species habitat on site, due to the direct loss of approximately 21.4 acres of northern pine snake habitat. Additionally, the ENSP has found that the proposed project would result in a number of secondary impacts, and that these impacts would be adverse to the remaining northern pine snake habitat found on the subject site. Significantly, ENSP's findings indicate that secondary impacts are likely to include the abandonment of the existing, on-site northern pine snake hibernaculum, due to the failure to adequately buffer this den from the proposed development. These comments assisted the DLUR in assessing compliance with the Rules on Coastal Zone Management.

As was originally established, the relevant rule concerning endangered and threatened species habitats generally prohibits development of threatened or endangered wildlife species habitats. The proposed project includes 14.9 acres of new impervious cover, plus an additional 6.5 +/- acres of clearing and grading for associated development such as detention basins and road shoulders within northern pine snake habitat. As a result, the proposed development will result in the direct elimination of approximately 21.4 acres of suitable northern pine snake habitat. That habitat is currently available for snake movement, including critical seasonal movements to and from the existing hibernaculum. This project would result in the direct loss of approximately 50% of the on site threatened species habitat, which is prohibited by this rule. Further, the applicant has failed to demonstrate that the proposed 21.4 acre development would not harm the populations or habitat of threatened species that resulted in the identification of the site as threatened species habitat.

Additionally, the DLUR concurs with the ENSP's finding that secondary impacts will adversely affect the remaining on site northern pine snake habitat, including the existing active hibernaculum. Off site habitat in the immediate vicinity of the proposed development will also be harmed by secondary impacts. These adverse impacts will occur as a result of the failure of the proposed 21.4 acre development to provide an adequate buffer to the remaining threatened species habitat, as is specifically required by the Rule at N.J.A.C. 7:7E-3.38(a)3. Measures proposed to enhance or preserve the remaining 20.91 acres of on site habitat, or adjacent off-site habitats, fail to buffer or eliminate the adverse secondary impacts which the 21.4 acre development will have on the remaining pine snake habitat.

The applicant has not demonstrated that the threatened or endangered wildlife habitat would not be adversely affected. Therefore, the proposed development is prohibited by this rule.

7:7E-3.39 Critical wildlife habitats

- (a) *Critical wildlife habitats are specific areas known to serve an essential role in maintaining wildlife, particularly in wintering, breeding, and migrating.*

1. *Rookeries for colonial nesting birds, such as herons, egrets, ibis, terns, gulls, and skimmers; stopovers for migratory birds, such as the Cape May Point region; and natural corridors for wildlife movement merit a special management approach through designation as a Special Area.*
 2. *Ecotones, or edges between two types of habitats, are a particularly valuable critical wildlife habitat. Many critical wildlife habitats, such as salt marsh water fowl wintering areas, and muskrat habitats, are singled out as water or water's edge areas.*
 3. *Definitions and maps of critical wildlife habitats are currently available only for colonial waterbird habitat in the 1979 Aerial Colony Nesting Waterbird Survey for New Jersey (NJDEP, Division of Fish and Wildlife). Until additional maps are available, sites will be considered on a case-by-case basis by the Division of Fish Wildlife.*
- (b) *Development that would directly or through secondary impacts on the relevant site or in the surrounding region adversely affect critical wildlife habitats is discouraged, unless:*
1. *Minimal feasible interference with the habitat can be demonstrated;*
 2. *There is no prudent or feasible alternative location for the development; and*
 3. *The proposal includes appropriate mitigation measures.*
- (c) *The Department will review proposals on a case-by-case basis.*
- (d) *N/A*

ANALYSIS

The referenced site contains approximately 39 acres of forest habitat which the Department considers to be "critical wildlife habitat" due to its functioning as migratory songbird stopover habitat. Additionally, this forest area contains a small isolated wetland which functions as a vernal habitat, providing critical breeding or foraging habitat for a local population of amphibians, as well as related on-site wildlife. Approximately 21.4 acres of forest are proposed to be developed, and this disturbance would eliminate 0.47 acres of vernal habitat.

The applicant proposes to mitigate for this disturbance via the preservation of approximately 20.91 acres of remaining on-site forest, as well as two off-site mitigation parcels. One of the parcels (Manchester Twp. Tax Parcel block 75.01, lot 3) is 21± acres in size, is forested and is located immediately adjacent to the site. The Department has determined that permanent preservation of approximately 42± acres of forested critical wildlife habitat for use as migratory bird stopover habitat represents an adequate mitigative measure for these species. Additionally, the applicant has proposed to compensate for the impact to the vernal habitat via a concept plan submitted which would create a 1 acre vernal habitat on the subject site. The applicant notes that "upon approval of the concept plan, a detailed "Vernal

Habitat Mitigation Report” including target species and their ecology, project goals, design information, and maintenance plans will be provided to the Department for final approval.” While the specific details of this concept plan have not been approved, including its acceptable location in relation to other Special Areas such as endangered and threatened species habitats, the applicant’s proposal to mitigate for this vernal habitat impact would, upon final approval of the Department, appropriately mitigate for impacts to this specific area of critical wildlife habitat.

Upon final Department approval of the proposed off-site parcel(s) preservation *and* of the vernal habitat mitigation concept plan, the applicant would comply with this rule.

7:7E-5B.4 Impervious cover limits for a site in the CAFRA area

(a) The impervious cover limit for a site in the CAFRA Area shall be determined as follows:

- 1. If a site is located in a CAFRA center, CAFRA core, or CAFRA node, the impervious cover limit is determined under (c) below. Note that the impervious cover limit for such a site is calculated based on the acreage of the total land area on the site, as opposed to the acreage of the net land area on the site;*
- 2. If a site is not located in a CAFRA center, CAFRA core, or CAFRA node but is located in the Coastal Metropolitan Planning Area or in a coastal center, the impervious cover limit is determined under (d) below;*
- 3. If a site is not located in a CAFRA center, CAFRA core, or CAFRA node, and is not located in the Coastal Metropolitan Planning Area or in a coastal center, the impervious cover limit is determined under (e) below; and*
- 4. If a site is located on a military installation, the impervious cover limit is determined under (f) below.*

(b) To determine the location of a site for the purposes of determining the applicable impervious cover limit:

- 1. Determine if the site is located in a CAFRA center, CAFRA core, or CAFRA node by referring to the CAFRA Planning Map;*
- 2. If the site is not located in a CAFRA center, CAFRA core, or CAFRA node, determine if the site is located in a coastal center by referring to Appendix 2 and 3;*
- 3. If the site is not located in a CAFRA center, CAFRA core, or CAFRA node, and is not located in a coastal center, determine the Coastal Planning Area in which the site is located by referring to the CAFRA Planning Map; and*
- 4. If the site is located on a military installation, see (f) below.*

(c) *If a site is located in a CAFRA center, CAFRA core, or CAFRA node, the impervious cover limit is the limit at (c)1, 2 or 3 below, whichever is higher:*

1. *The acreage of the total land area on the site as determined under N.J.A.C. 7:7E-5.3(d)1, multiplied by the impervious cover percentage in Table H below for the type of CAFRA center, CAFRA core, or CAFRA node in which the site is located;*
2. *For a site located in the Coastal Metropolitan Planning Area, the acreage of the net land area on the site as determined under N.J.A.C. 7:7E-5.3(d), multiplied by the impervious cover percentage in Table H below for the Coastal Metropolitan Planning Area; or*
3. *The amount of legal, existing impervious cover located on the site, as determined under (g) below.*

(d) *Subject to the limitations regarding mainland coastal centers at N.J.A.C. 7:7E-5B.6(g), if a site is located in the Coastal Metropolitan Planning Area or in a coastal center, the impervious cover limit is the limit at (d)1 or 2 below, whichever is higher:*

1. *The acreage of the net land area on the site as determined under N.J.A.C. 7:7E-5.3(d), multiplied by the impervious cover percentage in Table H below for the type of coastal center in which the site is located; or*
2. *The amount of legal, existing impervious cover located on the site, as determined under (g) below.*

(e) *If the site is not located in a CAFRA center, CAFRA core, or CAFRA node, is not located in the Coastal Metropolitan Planning Area, and is not located in a coastal center, the impervious cover limit is the limit at (e)1, 2, or 3 below, whichever is higher:*

1. *The acreage of the net land area on the site as determined under N.J.A.C. 7:7E-5.3(d), multiplied by the impervious cover percentage in Table H below for the Coastal Planning Area in which the site is located; or*
2. *The acreage covered by buildings and/or asphalt or concrete pavement legally existing on the site at the time the application is submitted to the Department, excluding any buildings, asphalt and/or concrete paving placed on a site in accordance with (e)3 below; or*
3. *For a marina support facility at a legally existing and operating commercial marina including a marina operated by a public agency, commission or authority, the limit at (e)1 or 2 above or the amount of legal existing impervious cover located on the site, as determined under (g) below, provided the marina support facility is placed on existing legal impervious cover, whichever is higher. For the purposes of this subsection, marina support facilities are boat rack systems, facilities for sewage treatment and marina support buildings. Marina support buildings, include but are not limited to,*

showrooms, sheds, restrooms, and buildings for marine supplies, bait and tackle, boat sales, dock masters office(s), and boat repair, maintenance and manufacturing.

(f) If a site is located on a military installation, the impervious cover limit is the limit at (f)1 or 2 below, whichever is higher:

- 1. The acreage of the net land area on the site as determined under N.J.A.C. 7:7E-5.3(d), multiplied by the impervious cover percentage in Table H below for a military installation; or*
- 2. The amount of legal, existing impervious cover located on the site, as determined under (g) below.*

(g) For the purposes of determining impervious cover limits under (c)3, (d)2, (e)3, and (f)2 above, the amount of existing impervious cover is the highest of the following, provided the impervious cover was legally placed on the site:

- 1. The amount of impervious cover located on the site at the time the application is submitted to the Department;*
- 2. The amount of impervious cover that appears on the applicable 95-97 imagery; or*
- 3. The amount of impervious cover that was placed under the authority of a coastal permit and after the date the photography was performed for the imagery in (g)2 above.*

TABLE H
Percentages For Calculating Impervious Cover
Limits Under N.J.A.C. 7:7E-5B.4

<i>Site Location</i>	<i>Impervious Cover Percentage</i>
<i>CAFRA Urban Center</i>	<i>90 percent</i>
<i>CAFRA Regional Center</i> <i>Coastal Regional Center</i> <i>CAFRA Core</i> <i>CAFRA Node</i>	<i>80 percent</i>
<i>CAFRA Town</i> <i>Coastal Town</i> <i>Military Installation</i>	<i>70 percent</i>
<i>CAFRA Village</i> <i>Coastal Village</i>	<i>60 percent</i>
<i>CAFRA Hamlet</i> <i>Coastal Hamlet</i>	<i>50 percent</i>
<i>Coastal Metropolitan Planning Area</i>	<i>80 percent</i>
<i>Coastal Suburban Planning Area, within a sewer service area*</i>	<i>30 percent</i>
<i>Coastal Suburban Planning Area, outside a sewer service area*</i>	<i>5 percent</i>
<i>Coastal Fringe Planning Area</i>	<i>5 percent</i>
<i>Coastal Rural Planning Area</i>	<i>3 percent</i>
<i>Coastal Environmentally Sensitive Planning Area</i>	<i>3 percent</i>

* "Sewer service area," for the purpose of this section, means the "sewer service area" as described at N.J.A.C. 7:15-5.16(a) and 5.18(c)4 and (c)5, and identified in a wastewater management plan in accordance with the Water quality Management Planning rules at N.J.A.C. 7:15-5 and/or in an areawide water quality management plan in accordance with N.J.A.C. 7:15-3. Wastewater management plans and areawide water quality management plans may be reviewed at the Department's Division of Watershed Management, 401 East State Street, Trenton, New Jersey; 609-984-0058.

ANALYSIS

The proposed project straddles the municipal boundary between Toms River Township and Manchester Township. The underlying planning area across the entire project site is classified as a Coastal Suburban Planning Area. The portion of the project site located in Toms River Township is within the boundaries of the Toms River Coastal Regional Center, and the portion of the project site in Manchester Township lies beyond the limits of the Toms River Coastal Regional Center. For reasons described below, under 7:7E-5B.6 Mainland coastal centers, the impervious cover limit for this entire site is 30%.

The applicant has stated in the compliance statement that the total acreage of the site is 43.341 acres. After taking out any special water areas, as per N.J.A.C. 7:7E-5.3(d), the net land area of the site is calculated to be 36.666 acres. 30% of 36.666 acres equals 10.99 acres allowable impervious cover. The applicant is proposing 14.85 acres, which is 40.5%. This rule is not met.

7:7E-5B.5 Vegetative cover percentages for a site in the CAFRA area

(a) The area (in acres) on a site in the CAFRA area in which trees and/or herb/shrub vegetation shall be planted or preserved is calculated as follows:

- 1. To determine the area (in acres) of tree preservation and/or tree planting on the site:
 - i. Determine the location of the site for purposes of determining applicable vegetative cover percentages using the method described at N.J.A.C. 7:7E-5B.5(b);*
 - ii. Identify the forested or unforested portions of the site, as determined under N.J.A.C. 7:7E-5.5; and*
 - iii. For each forested site or portion identified at (a)1ii above, multiply the acreage of the net land area on the forested site or forested portion as determined under N.J.A.C. 7:7E-5.3(d), by the tree preservation percentage in Table I below for the site location that applies to the site or portion, as determined under (a)1i above; and*
 - iv. For each unforested site or portion identified at (a)1ii above, multiply the acreage of the net land area on the site or portion, as determined under N.J.A.C. 7:7E-5.3(d), by the tree planting percentage in Table I below for the site location that applies to the site or portion, as determined under (a)1i above; and**
- 2. To determine the area (in acres) of herb/shrub vegetation preservation or planting on the site, subtract both the acreage of the impervious cover allowed under N.J.A.C. 7:7E-5B.4 and the acreage of tree planting and/or preservation required under (a)1 above from the acreage of the net land area on the site.*

- (b) If the sum of the acreage of tree planting required under (a)1 above plus the acreage of either the existing impervious cover on the site as determined under N.J.A.C. 7:7E-5B.4(c), (d), (e)3 or (f) or the acreage covered by buildings and/or asphalt or concrete pavement as determined under N.J.A.C. 7:7E-5B.4(e)2, exceeds the net land area on the site, as determined under N.J.A.C. 7:7E-5.3(d), then trees shall be planted in area (in acres) remaining after the acreage of impervious cover or acreage covered by buildings and/or asphalt or concrete pavement is subtracted from the acreage of the net land area on the site.*
- (c) The preservation or planting of trees and/or herb/shrub vegetation areas shall comply with the vegetative cover requirements at N.J.A.C. 7:7E-5.4.*
- 1. The requirement for tree planting at (a)1 above, can be satisfied by preserving equivalent forested areas in addition to that required under (a)1 above.*
 - 2. The requirement for planting of herb/shrub vegetation at (a)2 above, can be satisfied by preserving equivalent wooded areas or planting an equivalent area of trees in addition to that required under (a)1 above.*

TABLE I
Tree Preservation and Planting Percentages
For Forested and Unforested Sites

<i>Site Location</i>	<i>Tree preservation percentage for forested portion of site</i>	<i>Tree preservation and/or planting percentage for unforested portion of site</i>
<i>CAFRA Urban Center CAFRA Regional Center Coastal Regional Center CAFRA Core CAFRA Node Military Installation</i>	<i>10 percent</i>	<i>0 percent</i>
<i>CAFRA Town Coastal Town</i>	<i>25 percent</i>	<i>5 percent</i>
<i>CAFRA Village Coastal Village</i>	<i>30 percent</i>	<i>5 percent</i>
<i>CAFRA Hamlet Coastal Hamlet</i>	<i>40 percent</i>	<i>5 percent</i>
<i>Coastal Metropolitan Planning Area</i>	<i>10 percent</i>	<i>0 percent</i>
<i>Coastal Suburban Planning Area, within a sewer service area*</i>	<i>35 percent</i>	<i>5 percent</i>
<i>Coastal Suburban Planning Area, outside a sewer service area* Coastal Fringe Planning Area Coastal Rural Planning Area Coastal Environmentally Sensitive Planning Area</i>	<i>70 percent</i>	<i>5 percent</i>

**"Sewer service area," for the purpose of this section, means the "sewer service area" as described at N.J.A.C. 7:15-5.16(a) and 5.18(c)4 and 5, and identified in a wastewater management plan in accordance with the Water Quality Management Planning rules at N.J.A.C. 7:15-5 and/or in an areawide water quality management plan in accordance with N.J.A.C. 7:15-3. Wastewater management plans and areawide water quality management plans may be reviewed at the Department's Division of Watershed Management, 401 East State Street, Trenton, New Jersey; 609-984-0058.*

ANALYSIS

As noted above, the proposed project straddles the municipal boundary between Toms River Township and Manchester Township. The underlying planning area across the entire project site is classified as a Coastal Suburban Planning Area, however, the portion of the project located in Toms River Township is within the boundaries of the Toms River Coastal Regional Center. For reasons described below, under 7:7E-5B.6 Mainland coastal centers, the applicant is required to preserve 35% of the forested area, and plant/preserve 5% of the unforested portion.

According to the applicant's compliance statement, 26.945 acres of the net land area is considered to be forested. Therefore, the required 35% preservation is 9.43 acres. The applicant is also required to plant/preserve 5% of the unforested area. The unforested area is 9.721 acres. The required 5% planting/preservation equals 0.49 acres. The applicant is proposing to preserve 8.708 acres. This rule is not met.

N.J.A.C. 7:7E-5B.6 Mainland coastal centers

- (a) *On February 7, 2005, the boundaries delineated by the Department for coastal centers not located on barrier islands, oceanfront spits, or peninsulas in the CAFRA area expired. The expired boundaries for such coastal centers are re-established as the boundaries for mainland coastal centers once all conditions set forth at (b)1 or (b)2 below are met. The boundaries of mainland coastal centers are described in Appendix 2 of this chapter. The boundaries for coastal centers that expired on February 7, 2005 that do not meet the conditions set forth at (b) below are described in Appendix 4 of this chapter.*
- (b) *A mainland coastal center is established under this section if, as explained at (a) above, the boundaries of the coastal center expired on February 7, 2005 and the coastal center is:*
1. *Located in a municipality that, prior to July 5, 2006 held a pre-petition meeting with the Office of Smart Growth in accordance with N.J.A.C. 5:85-7.3; or*
 2. *Located in a municipality that:*
 - i. *By August 4, 2005, submits to the Office of Smart Growth a resolution of the municipal governing body requesting a pre-petition meeting in accordance with N.J.A.C. 5:85-7.3. The resolution shall identify the expired coastal centers described in Appendix 4 that the municipality seeks to re-establish. Only the expired coastal centers identified in the resolution shall be re-established;*
 - ii. *Prior to October 15, 2005, holds a pre-petition meeting with the Office of Smart Growth in accordance with N.J.A.C. 5:85-7.3; and*

iii. *Prior to March 15, 2006 obtains a determination from the Executive Director of the Office of Smart Growth, in accordance with N.J.A.C. 5:85-7.5, that its initial petition for plan endorsement is complete.*

(c) *The boundaries of the mainland coastal centers established in accordance with (b) above and described in Appendix 2 shall expire in accordance with (c)1 or 2 below, as applicable. On and after the expiration of the mainland coastal centers, the impervious cover limits and vegetative cover percentages for all sites in the CAFRA area, except for sites in the non-mainland coastal centers in Appendix 3 of this chapter, shall be determined in accordance with N.J.A.C. 7:7E-5B.4(c), (e) or (f).*

1. *On March 15, 2006, if the municipality in which the mainland coastal center is located has not obtained a determination from the Executive Director of the Office of Smart Growth, in accordance with N.J.A.C. 5:85-7.5, that its initial petition for plan endorsement is complete; or*

2. *On March 15, 2007.*

(d) *N/A*

(e) *The areas identified at (e)1 through 6 below shall not be considered part of a mainland coastal center, except for purposes of (f) below:*

1. *Areas mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps of Habitat for Endangered, Threatened or Other Priority Species. The data are available as a download at the CAFRA Planning Map layers webpage: www.nj.gov/dep/gis/CAFRAlayers.htm;*
2. *Areas mapped as Natural Heritage Program priority sites, excluding those lands within the boundaries of these sites mapped in the URBAN lands layer extracted from the most recent NJDEP Land Use/Land Cover GIS data set. Both the Natural Heritage Program priority site data and the URBAN lands data are available as a download at the CAFRA Planning Map layers webpage: www.nj.gov/dep/gis/CAFRAlayers.htm;*
3. *Land that is owned by Federal, State, county or municipal agencies or conservation organizations and dedicated to recreation, conservation of natural resources, wildlife protection, or wildlife management;*
4. *Special water resource protection areas along a Category One water established under the Stormwater Management rules, N.J.A.C. 7:8. Surface waters that are designated Category One are listed in the Surface Water Quality Standards at N.J.A.C. 7:9B;*
5. *Wetlands as defined at N.J.A.C. 7:7E-3.27; and*
6. *Areas identified as Coastal Critical Environmental Sites. The data are available as a download at the CAFRA Planning Map layers webpage: www.nj.gov/dep/gis/CAFRAlayers.htm. (f) For purposes of any CAFRA permit*

application that was received by the Department prior to February 7, 2005, assigned an agency project number pursuant to N.J.A.C. 7:7-4.4(a) i or ii, and proposes a development in a mainland coastal center established in accordance with (b) above that has not expired pursuant to (c) above, the impervious cover limits and vegetative cover percentages shall be determined in accordance with N.J.A.C. 7:7E-5B.4(d) and N.J.A.C. 7:7E-5B.5, respectively, provided the CAFRA permit application is complete for final review pursuant to N.J.A.C. 7:7-4.6 prior to March 15, 2006.

(f) For purposes of any CAFRA permit application that was received by the Department prior to February 7, 2005, assigned an agency project number pursuant to N.J.A.C. 7:7-4.4(a) i or ii, and proposes a development in a mainland coastal center established in accordance with (b) above that has not expired pursuant to (c) above, the impervious cover limits and vegetative cover percentages shall be determined in accordance with N.J.A.C. 7:7E-5B.4(d) and N.J.A.C. 7:7E-5B.5, respectively, provided the CAFRA permit application is complete for final review pursuant to N.J.A.C. 7:7-4.6 prior to March 15, 2006.

(g) For purposes of any CAFRA permit application that was received by the Department after February 6, 2005 and proposes a development in a mainland coastal center established in accordance with (b) that has not expired pursuant to (c) above:

- 1. The impervious cover limits and vegetative cover percentages for those portions of the site located within the mainland coastal center shall be determined in accordance with N.J.A.C. 7:7E-5B.4(d) and N.J.A.C. 7:7E-5B.5, respectively, provided no portion of the proposed development, as defined at N.J.A.C. 7:7E-1.8, is located outside the boundaries of the mainland coastal center, or in one of the areas identified at (e)1 through 6 above.*
- 2. If any portion of the proposed development, as defined at N.J.A.C. 7:7E-1.8, is located outside of the mainland coastal center boundaries, or in one of the areas identified at (e)1 through 6 above, then the impervious cover limits and vegetative cover percentages for the entire development shall be determined in accordance with N.J.A.C. 7:7E-5B.4(e) and 7:7E-5B.5, respectively, for the appropriate Coastal Planning Area.*

(h)-(i) N/A

ANALYSIS

The Toms River Coastal Regional Center was established by amendments to the CAFRA implementing rules at 7:7E in February 2000 and provided for an impervious cover limit of not more than 80% for conforming development with the Coastal Regional Center. Portions of the project site that lie in Toms River (then Dover) were included within the boundary of the Toms River Coastal Regional Center at that time. All of the mainland Coastal Centers that were established in 2000 expired on February 7, 2005. However, some, including the Toms River Regional Coastal Center, were re-established by rule amendment on February 6, 2006.

At that time, the Toms River Coastal Regional Center designation was provisionally recognized as extended by the Department due to the Township's on-going participation within the State Planning Commission's Plan Endorsement Program. Although the Toms River Coastal Regional Center, which includes the subject site, was extended in 2006, and that extension was continued by the Permit Extension Act of 2008, N.J.A.C. 7:7E-5B.6(e) specifically excludes areas as part of a mainland coastal center. The site includes both wetlands and threatened and endangered species habitat. Therefore, pursuant to N.J.A.C. 7:7E-5B.6(e)1 & (e)5, the area is not part of the Toms River Coastal Regional Center.

The pending application was submitted with the assumption that the project would be subject to the impervious coverage limits of the Toms River Coastal Regional Center. However, due to the fact that there are both wetlands and threatened and endangered species habitat on site, the impervious coverage shall be determined by N.J.A.C. 7:7E-5B.4(e).

Pursuant to N.J.A.C. 7:7E-5B.6(g), for purposes of any CAFRA permit application that was received by the Department after February 6, 2005 and proposes a development in a mainland coastal center established in accordance with (b) that has not expired pursuant to (c) above: 1. The impervious cover limits and vegetative cover limits for those portions of the site located within the mainland coastal center shall be determined in accordance with NJAC 7:7E-5B.4(d) and NJAC 7:7E-5B.5, respectively, provided no portion of the proposed development is located outside the boundaries of the mainland coastal center, or in one of the areas identified at (e) above. If any portion of the proposed development is located outside of the center boundaries, or in one of the areas identified at (e), then the impervious cover limits and vegetative cover limits shall be determined in accordance with NJAC 7:7E-5B.4(e) and NJAC 7:7E-5B.5, respectively, for the appropriate Coastal Planning Area.

Since development (in the form of parking, access roads, stormwater basins and retaining walls) is proposed within Manchester Township, outside of the boundaries of the Toms River Coastal Regional Center, involving disturbance to endangered and/or threatened species habitat and wetlands, the impervious cover and vegetative cover limits are determined under N.J.A.C. 7:7E-5B.4(e) and N.J.A.C. 7:7E-5B.5, respectively. In this case, the underlying planning area is a Coastal Suburban Planning Area. The Coastal Suburban Planning Area limits impervious cover to 30%, and requires the preservation of 35% of the forested area and planting/preservation of 5% of the unforested areas on site. For reasons discussed above, this rule is not met.

7:7E-6.2 Basic location rule

- (a) *A location may be acceptable for development under N.J.A.C. 7:7E-3, 4, 5, 5A, 5B, and 6, but the Department may reject or conditionally approve the proposed development of the location as reasonably necessary to:*
1. *Promote the public health, safety, and welfare;*
 2. *Protect public and private property, wildlife and marine fisheries; and*

3. *Preserve, protect and enhance the natural environment.*

ANALYSIS

The proposed project does not comply with the above Rule since the development would have an adverse impact on wildlife, specifically northern pine snake, and would not preserve and protect the northern pine snake's natural environment.

7:7E-8.4 Water Quality

- (a) *As required by Section 307(f) of the Federal Coastal Zone Management Act (P.L. 92-583), Federal, State and local water quality requirements established under the Clean Water Act (33 U.S.C. 1251) shall be the water resource standards of the coastal management program. These requirements include not only the minimum requirements imposed under the Clean Water Act but also the additional requirements adopted by states, localities, and interstate agencies pursuant to Section 510 of the Clean Water Act and such statutes as the New Jersey Water Pollution Control Act. In the Delaware River Basin, the requirements include the prevailing "Basin Regulations-Water Quality" adopted by the Delaware River Basin Commission as part of its Comprehensive Plan. In the waters under the jurisdiction of the Interstate Sanitation Commission in the New Jersey-New York metropolitan area, the requirements include the Interstate Sanitation Commission's Water Quality Regulations. Department Rules related to water pollution control and applicable throughout the entire coastal zone include, for example, the Surface Water Quality Standards (N.J.A.C. 7:9-4), the Rules concerning Wastewater Discharge Requirements (N.J.A.C. 7:9-5), the Ground-Water Quality Standards (N.J.A.C. 7:9-6), and the Regulations Concerning the New Jersey Pollutant Discharge Elimination System (N.J.A.C. 7:14A).*
- (b) *Coastal development which would violate the Federal Clean Water Act, or State laws, Rules and regulations enacted or promulgated pursuant thereto, is prohibited. In accordance with N.J.A.C. 7:15 concerning the Water Quality Management Planning and Implementation process, coastal development that is inconsistent with an approved Water Quality Management (208) Plan under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., is prohibited.*

ANALYSIS

Dhruv Patel, DLUR Engineer, has reviewed this project with regard to water quality and stormwater management. Mr. Patel's report indicated that the proposed infiltration/detention basins satisfactorily provide water quality through retention and infiltration of the entire water quality design storm volume. More than two feet of separation is provided between the basins' bottoms and seasonal high water tables under the basins. The lowest outlets from the basins are set at elevations above the elevations of stormwater runoff volumes within the basins. Dewatering calculations show that the proposed basins dewater the entire design storm within 72 hours. The proposed basins have been designed as per the

guidelines given in the BMP manual and receive credit for 80% TSS removal. An offline Jelly Fish Unit is provided on the upstream side of the basin to meet the water quality requirement for the stormwater runoff drains. Mr. Patel reported that the project meets the water quality requirement.

However, since commitment letters from United Water Toms River (water supply) and the Ocean County Utilities Authority (sewer), stating that there is adequate capacity to serve the proposed development, have not been received by the Department, this rule is not met.

7:7E-8.6 Groundwater use

- (a) *Groundwater is all water within the soil and subsurface strata that is not at the surface of the land. It includes water that is within the earth that supplies wells and springs.*
- (b) *Coastal development shall demonstrate, to the maximum extent practicable, that the anticipated groundwater withdrawal demand of the development, alone and in conjunction with other groundwater diversions proposed or existing in the region, will not cause salinity intrusions into the groundwaters of the zone, will not degrade groundwater quality, will not significantly lower the water table or piezometric surface, or significantly decrease the base flow of adjacent water sources. Groundwater withdrawals shall not exceed the aquifer's safe yield.*
 1. *Coastal development shall conform with all applicable Department and, in the Delaware River Basin, Delaware River Basin Commission requirements for groundwater withdrawal and water diversion rights.*

ANALYSIS

A well permit (No. 3300045604) has been obtained for the Manchester Township. However, since the proposed Wal-Mart building is located entirely within Toms River Township, the applicant does not expect to continue with the installation. Therefore, no groundwater withdrawals or installed wells are proposed as part of this project.

According to the applicant's compliance statement, water supply is to be provided by a connection to the United Water Toms River (UWTR) main located along Northampton Blvd. The applicant has requested a commitment letter from UWTR, but it has not been submitted to the DLUR as of the date of this letter. Therefore, the proposed project is not in compliance with this Rule.

CAFRA Section 10 Review (N.J.S.A. 13:19-10)

The commissioner shall review filed applications, including any environmental impact statement and all information presented at public hearings or during the comment period, or submitted during the application review period. The Department shall issue a permit pursuant to the Coastal Area Facility Review Act (CAFRA) only upon a finding as required by N.J.S.A. 13:19-10 that the development:

- a. *Conforms with all applicable air, water and radiation emission and effluent standards and all applicable water quality criteria and air quality standards.*
- b. *Prevents air emissions and water effluents in excess of the existing dilution, assimilative, and recovery capacities of the air and water environments at the site and within the surrounding region.*
- c. *Provides for the collection and disposal of litter, recyclable material and solid waste in such a manner as to minimize adverse environmental effects and the threat to the public health, safety, and welfare.*
- d. *Would result in minimal feasible impairment of the regenerative capacity of water aquifers or other ground or surface water supplies.*
- e. *Would cause minimal feasible interference with the natural functioning of plant, animal, fish, and human life processes at the site and within the surrounding region.*
- f. *Is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety, and welfare.*
- g. *Would result in minimal practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes at the site and within the surrounding region.*

DISCUSSION

The proposed development does not comply with criterion a, b, d, e, & g above, as there are records of northern pine snakes utilizing the site and surrounding area, there is not sufficient water and sewer commitment by the respective Townships, and the development would result in the degradation of irreplaceable land types (pine snake habitat). Therefore, the Division can not make a positive finding under Section 10 of the Act.

CONCLUSION

The proposed construction is prohibited pursuant to the Rules on Coastal Zone Management, specifically, Endangered or threatened wildlife or plant species habitats (7:7E-3.38), Impervious cover limits for a site in the CAFRA area (7:7E-5B.4), Vegetative cover percentages for a site in the CAFRA area (7:7E-5B.5), Mainland coastal centers (7:7E-5B.6), Basic location rule (7:7E-6.2), Water quality (7:7E-8.4), Groundwater use (7:7E-8.6), and Section 10 (N.J.S.A. 13:19-10).

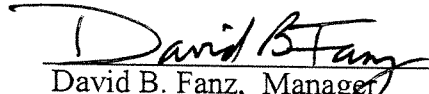
Therefore, based on the noncompliance status of the proposed development with the Rules listed above, and negative findings under Section 10, the CAFRA permit is hereby denied.

In accordance with N.J.A.C. 7:7A-1.7, any person who is aggrieved by this decision may request a hearing within 30 days after notice of the decision is published in the DEP Bulletin by writing to: New Jersey Department of Environmental Protection, Office of Legal Affairs, Attention: Adjudicatory Hearing Requests, 401 East State Street, P.O. Box 402, Trenton, NJ 08625-0402. This request must include a completed copy of the Administrative Hearing Request Checklist, which can be found at <http://www.state.nj.us/dep/landuse/forms/lurpaahr.pdf>. If a person submits the hearing request after this time, the Department shall deny the request. The DEP bulletin is available through the Department's website at www.state.nj.us/dep.

I am sharing a copy of the denial with the appropriate local and federal agencies to promote inter-governmental cooperation in managing natural resources.

If you have any questions on this decision, please contact Eric M. Virostek of my staff in writing at the above address or by telephone at (609) 633-2289.

Sincerely,



David B. Fanz, Manager
Bureau of Coastal Regulation

3/15/10

Date

c: Bureau of Coastal and Land Use Compliance and Enforcement, Toms River
Municipal Clerk
Planning Board