

STATE OF NEW JERSEY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

(See Issuing Division below)

PERMIT\*



The New Jersey Department of Environmental Protection grants this permit in accordance with your application, attachments accompanying same application, and applicable laws and regulations. This permit is also subject to the further conditions and stipulations enumerated in the supporting documents which are agreed to by the permittee upon acceptance of the permit.

Permit No. 1500-04-0001.1 APL080001, FWW090001	Application No. 1500-04-0001.1 APL080001, FWW090001
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Issuance Date <b>APR 18 2012</b>	Effective Date <b>APR 18 2012</b>	Expiration Date <b>APR 17 2017</b>
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Name and Address of Applicant Jaylin Holdings, LLC Dover Esplanade, Building 1 1027 Hooper Avenue Toms River, NJ 08753	Name and Address of Owner Applicant	Name and Address of Operator Applicant
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Location of Activity/Facility (Street Address) Route 37 & Northampton Boulevard Toms River Township, Ocean County Lots: 14 & 15 Block: 505 Manchester Township, Ocean County Lots: 2, 3, 4(part) & 5 Block: 44	Issuing Division Land Use Regulation	Statute(s) NJSA 13:19-1 NJSA 13:9B-1
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Type of Permit: CAFRA, Freshwater Wetlands GP #6	Maximum Approved Capacity, if applicable
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This permit authorizes the construction of a 189,797 square foot (SF) Walmart retail store with a water tower, a 5,703 square foot (SF) seasonal garden center, parking for 833 vehicles, retaining walls, 5 above ground and 2 underground stormwater basins, and access from Route 37 and Northampton Boulevard (the "Project") within an approximate 22.4 acre development area. This permit also authorizes the filling of 0.47 acres of an isolated wetland. The Project is shown on the approved plans referenced on page 3 of this permit.

This permit is authorized under and in compliance with applicable Rules on Coastal Zone Management (N.J.A.C. 7:27E-1.1 et seq.) and the Freshwater Wetlands Protection Act Rules (N.J.A.C. 7:27A-1.1 et seq.) provided the conditions listed are met. The Division of Land Use Regulation ("DLUR") hereby determines that the applicable findings as required by Sections 10 & 11 of the CAFRA statute (N.J.S.A. 13:19-1 et seq.) and the Rules on Coastal Zone Management and Freshwater Wetlands have been met. The issuance of this permit is contingent upon compliance with the listed conditions and failure to comply with any or all conditions may result in appropriate enforcement action and revocation of this permit.

Revised Date	Approved by the Department of Environmental Protection Name (Print or Type) _____ DRAFT _____ Title _____ Signature _____ DRAFT _____ Date _____
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\*The word permit means "approval, certification, registration, etc." (General Conditions are on Page Two)

### STANDARD PERMIT CONDITIONS

1. This permit is revocable, or subject to modification or change at any time, pursuant to the applicable regulations, when in the judgement of the Department of Environmental Protection of the State of New Jersey such revocation, modification or change shall be necessary.
2. The issuance of the permit shall not be deemed to affect in any way action by the Department of Environmental Protection of the State of New Jersey on any future application.
3. The works, facilities, and/or activities shown by plans and/or other engineering data, which are this day approved, subject to the conditions herewith established, shall be constructed and/or executed in conformity with such plans and/or engineering data and the said conditions.
4. No change in plans or specifications shall be made except with the prior written permission of the Department of Environmental Protection of the State of New Jersey.
5. The granting of this permit shall not be construed to in any way affect the title or ownership of property, and shall not make the Department of Environmental Protection or the State a party in any suit or question of ownership.
6. This permit does not waive the obtaining of Federal or other State or local government consent when necessary. This permit is not valid and no work shall be undertaken until such time as all other required approvals and permits have been obtained.
7. A copy of this permit shall be kept at the work site, and shall be exhibited upon request of any person.
8. In cases of conflict, the conditions of this permit shall supersede the plans and/or engineering data.
9. The permittee shall allow an authorized representative of the Department of Environmental Protection the right to inspect construction pursuant to N.J.A.C. 7:7-1.5(b)4.
10. 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, PO Box 402, Trenton, NJ 08625-0402. This request must include a completed copy of the Administrative Hearing Request Checklist. If a person submits the hearing request after this time, the Department shall deny the request. The DEP bulletin and checklist are available through the Department's website at [www.state.nj.us/dep](http://www.state.nj.us/dep).

### ADMINISTRATIVE PERMIT CONDITIONS

1. This permit shall be RECORDED in the office of the Ocean County Clerk within ten (10) days after receipt of the permit by the applicant and the Applicant shall immediately send documentation of its recordation to the DLUR.
2. Acceptance of permit: If you begin any Project activity approved by this permit, you thereby accept this document in its entirety, and the responsibility to comply with the terms and conditions. If you do not accept or agree with this document in its entirety, do not begin any site disturbance, pre-construction earth movement or construction of or for the Project.
3. Additional development or other related construction unauthorized by this permit shall require either a modification to CAFRA and/or Freshwater Wetlands Permit #1500-04-0001.2 APL080001, FWV090001, or most likely a new CAFRA and/or Freshwater Wetlands permit depending on the size and scope of the proposed development as well as the activity status of the existing CAFRA and/or Freshwater Wetlands permit.

4. The following approved plans were prepared by Bohler Engineering and are hereafter referred to as the "Revised Plans":
- "PRELIMINARY AND FINAL SITE PLAN & MINOR SUBDIVISION FOR WAL-MART REAL ESTATE BUSINESS TRUST, PROPOSED WALMART 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", all sheets (1-29) are dated June 26, 2009, unrevised, except for sheet #5, which was last revised on June 3, 2010.
  - "DEVELOPMENT / CONSERVATION AREA PLAN" originally dated October 7, 2009, revised/redated October 6, 2011.
  - "WETLANDS MITIGATION PLAN" originally dated June 26, 2009, revised through November 2, 2011.
  - "OVERALL SITE PLAN", sheet 5 of 29, depicting wire exclusion fencing revised through November 9, 2011. This plan is approved for the installation of the exclusion fence during the construction phase only.

#### PROJECT SPECIFIC PERMIT CONDITIONS

1. Within (30) days of permit issuance, and prior to the start of any site disturbance, pre-construction earth movement or construction for the Project, and as more fully set forth in the December 20, 2011 Settlement Agreement which is incorporated herein and made a part hereof ("Settlement Agreement"), the owner of the property shall grant to the Department a conservation restriction approved in advance in writing by the DLUR. The lands subjected to the conservation restriction shall be free of all buildings, dwellings, tenants, billboards and easements, including access easements, covenants, mortgages, liens, encumbrances, judgements, tax liens, outstanding taxes and any other instruments except for a cable easement granted to AT&T recorded May 21, 2009 in Deed Book 14300, page 1267 and following, and utility easements granted to Jersey Central Power and Light Company recorded in Book 2676, page 343; Book 2898, page 152; and Book 1277, page 305; and all of said lands shall be insurable at regular rates by a licensed and reputable New Jersey title company on the Department's Green Acres list. The lands subjected to the conservation restrictions shall include:
- a. Block 77, Lot 27 (approximately 11.3 acres); Block 73, Lots 31 & 32 (approximately 42.9 acres); Block 73, Lot 21 (approximately 15.8 acres); and Block 73, Lot 3 & 4 (approximately 11.6 acres), located in the Township of Manchester, Ocean County.
  - b. Block 77, Lots 2, 4, 5 and 6 (approximately 89.29 acres) located in the Township of Manchester, Ocean County.
  - c. Block 75.01, Lot 3 (approximately 21 acres) located in the Township of Manchester, Ocean County.
    - \* Hereafter, subparagraphs 1a-c shall be referred to as the "Protected Lands".
  - d. Those portions of lots 14 and 15 of block 505 of the official 2011 Toms River tax map and lots 2, 3, 4 (part) and 5 of block 44 of the official Manchester Township tax map where no development is proposed, as depicted in the Development/Conservation Area Plan revised through October 6, 2011 which total approximately 20.9 acres shall be maintained as a permanent conservation restriction pine snake corridor area (hereafter, the Paragraph 1d Lots).

- e. All lands with conservation restrictions shall include a reverter clause which provides for reversion of such conservation restriction to the Permittee or record owner (If not Permittee), if the issuance of the permit by the Department is overturned on appeal or if the Department otherwise precludes development of the Project pursuant to Paragraph 7 of the Stipulation of Settlement. However, if any person has commenced any site disturbance, pre-construction earth movement or any construction for the Project, or if any of the Protected Lands have been disturbed, except for the removal of waste, pollutants and contaminants or for habitat enhancement, all such reverter clauses shall lapse and expire.
  - f. Within (30) days of issuance of the Permit, the Owner or Permittee shall provide proof to DLUR of recordation of the conservation restrictions for the Protected Lands and the Paragraph 1d Lots, respectively. Within (10) days of its receipt, the Owner or Permittee shall deliver to the DLUR complete copies of the recorded conservation restrictions.
- 2. The Permittee shall remove all waste, pollutants and contaminant materials identified by Whitestone Associates and the Department on, above, below and throughout the Protected Lands and the Paragraph 1d Lots to be conveyed to the Department and conserved for pine snake protection and/or enhancement, respectively. Upon the Department's review and approval that all waste, pollutants and contaminants have been satisfactorily removed, the Department shall issue to the Permittee a letter to said effect.
  - a. The Permittee shall ensure that all soils shall be at or below the numeric concentrations needed to meet Residential Cleanup standards, N.J.A.C. 7:26E-1 et seq., that is Remediation Standards, N.J.A.C. 7:26D-1 et seq., including, but not limited to, Residential Cleanup Standards for waste, contaminants and pollutants throughout the Protected Lands and the Paragraph 1d Lots, respectively. Further, all groundwater shall be at or below the numeric concentrations for all applicable standards for waste, pollutant and contaminant requirements as defined in N.J.A.C. 7:26E-1.8 and the Groundwater Quality Standards, N.J.A.C. 7:9C-1 et seq.
  - b. Adequate removal of waste, pollutants and contaminant materials identified on, above, below and throughout the Protected Lands and the Paragraph 1d Lots shall be completed, so that once the pine snake habitat enhancement is completed, there is no need to subsequently disturb the pine snake habitat enhancements.
  - c. In addition, prior to commencing the construction of the Project as defined in paragraph 4 below, Permittee shall either complete the required remediation or establish and maintain a remediation funding source in an amount acceptable to the Department through the use of one of the instruments defined in N.J.A.C. 7:26C-5.2(f)1, 2, 3 or 4.
- 3. Any and all clearing of trees and vegetation shall only occur from August 1<sup>st</sup> through March 31<sup>st</sup>, except for clearing associated with the pine snake enhancements.
- 4. Prior to site disturbance, pre-construction earth movement or construction, and in accordance with the Settlement Agreement, the Permittee shall undertake and complete all pine snake habitat enhancement as follows:
  - a. Permittee shall first complete all pine snake enhancements for the Protected Lands, except for the planting of saplings which shall be undertaken and completed in the next spring planting season;
  - b. Upon completion of the pine snake enhancements for the Protected Lands, Permittee shall then complete all pine snake enhancements on the Paragraph 1d Lots;

- c. Pursuant to the deadlines set forth in the Settlement Agreement, the Permittee shall seek notice from the Endangered and Nongame Species Program (ENSP) and DLUR whether the pine snake enhancements have been satisfactorily completed.
5. Subject to the timing restriction referenced in Project Specific Condition #3 above, Permittee shall next install and complete the Herpetofauna Fence (as defined in the Settlement Agreement) on the Paragraph 1d Lots and then install and complete the linear barrier wall as shown on the Revised Plans, including the Development/Conservation Area Plan, dated October 6, 2011:
- a. The clearance width for the Herpetofauna Fence shall be no more than twenty feet, that is, no more than ten feet on either side of the center line of the fence.
  - b. Upon the start of the installation of the Herpetofauna Fence, Permittee shall retain a qualified herpetologist who shall conduct daily site inspections of the Herpetofauna Fence, linear barrier wall and stormwater basin and their associated clearing on the construction side and monitor, protect and remove to the habitat side all reptiles found on the construction side of the Herpetofauna Fence and on both sides of the linear barrier wall.
  - c. Upon completion of the linear barrier wall, but no later than the issuance of a temporary certificate of occupancy for the Project, the Permittee shall remove the Herpetofauna Fence.
  - d. The Permittee's herpetologist shall continue to conduct the daily site inspections until clearing has been completed on the construction side of the linear barrier wall.
  - e. No more than ten days before clearing, preconstruction earth movement, site disturbance or construction of the Project, a qualified herpetologist shall conduct a thorough survey of the entire Development Area on the construction side of the linear barrier wall and shall remove all reptiles to the habitat side of the linear barrier wall.

The Department reserves the right to immediately revoke or suspend all regulated activities onsite should the Department determine that the Permittee has not taken proper precautions to ensure continuous compliance with this condition.

6. Subject to the timing restriction referenced in Project Specific Condition #3 above, upon the completion of all pine snake enhancements throughout the Protected Lands and the Paragraph 1d Lots except for the planting of saplings, the completion of the Herpetofauna Fence and linear barrier wall, and subject to the Settlement Agreement's requirements regarding notice of satisfactory completion thereof, the Permittee may then start pre-construction earth movement, site disturbance, and construction of the Project, in the development area, as authorized by this permit.
7. Upon completion of the Herpetofauna Fence and subject to the timing restriction referenced at Project Specific Condition #3 above, the Permittee is authorized to: construct the 1-acre freshwater wetlands mitigation area; create the stormwater basin #1 on the construction side of the Herpetofauna Fence; and place excavated material from stormwater basin #1 or the wetlands mitigation area in the Development Area adjacent to the proposed location of the linear barrier wall.
- a. Prior to any site disturbance, pre-construction earth movement, or filling of the isolated freshwater wetlands and associated transition areas in the Development Area, the Permittee shall construct and vegetate the vernal pool as shown on the "WETLANDS MITIGATION PLAN" revised through November 2, 2011.
  - b. The Permittee may only start site disturbance, pre-construction earth movement, or construction of the vernal pool after the Permittee has submitted and the Department has approved all of the documentation and plans required pursuant to the issuance of this permit.

8. In accordance with the Settlement Agreement, if ENSP or DLUR identifies deficiencies in the pine snake habitat enhancements, linear barrier wall, herpetofauna fence, or vernal pond mitigation and the Permittee either does not dispute the deficiencies or disputes the deficiencies and a determination is made by the Commissioner, and the Permittee fails either to correct any undisputed deficiency or to start to physically comply with any determination of the Commissioner concerning a disputed deficiency within ten (10) business days of receipt of the Commissioner's determination, then said failure to correct or to start to comply shall be considered a material breach and shall void this permit.
9. Prior to site disturbance, pre-construction earth movement, or construction of the Project, the Permittee shall deposit in an escrow account the full sum of \$70,911 which shall be used by the Department to ensure successful project completion and ongoing monitoring and maintenance of the enhanced pine snake habitat, and in a second escrow account, a refundable sum of \$15,344 for the completion of the sapling planting costs, respectively.
10. Upon the commencement of site disturbance, pre-construction earth movement and construction of the Project, the Owner shall simultaneously convey to the Department via affidavits of title with the appropriate corporate or partnership authorizing resolutions and via Bargain and Sale Deeds with Covenants Against Grantor's Acts for any or all of the Protected Lands, which the Department in its sole discretion, may determine to acquire. The Department may defer conveyance of any portion of the Protected Lands, if it determines that adequate site remediation and clean-up has not been concluded for that portion of the Protected Lands. Upon the Department's issuance of a notice to the Owner of the Protected Lands requesting fee simple conveyance, said Owner shall convey said lands within thirty (30) days if said lands were not conveyed at the commencement of site disturbance, pre-construction earth movement or construction of the Project.
11. In accordance with the Settlement Agreement and prior to site disturbance, pre-construction earth movement, or construction of the Project, the Wetland Mitigation Plan, for the vernal pool, last revised on November 2, 2011, must be constructed. No filling of any wetlands is permitted until such time that the mitigation project has satisfactorily been constructed in its entirety and the Department has issued its letter pursuant to the procedures and deadlines set forth in the Settlement Agreement that the pond has been satisfactorily constructed pursuant to the November 2, 2011 Wetlands Mitigation Plan.
  - a. At least ten (10) business days in advance of the start of construction of the approved wetland mitigation project, the Permittee shall notify the DLUR, in writing, to request an on-site pre-construction meeting between the Permittee, the contractor, the consultant and the DLUR;
  - b. Following the final grading of the mitigation project, the Permittee shall notify the DLUR for a post-grading construction meeting between the Permittee, contractor, consultant and the DLUR. The Permittee must give the DLUR at least ten (10) business days notice prior to the date of this meeting;
  - c. The Permittee shall assume all liability for accomplishing corrective work should the DLUR determine that the constructed mitigation project was not constructed in accordance with the approved November 2, 2011 Wetlands Mitigation Plan. Remedial work may include re-grading, replanting and/or alteration of hydrology of the mitigation site. Pursuant to the procedures and deadlines set forth in the Settlement Agreement, the Permittee shall seek approval from the Department that the vernal pond has been constructed in accordance with the approved plans.

12. Within 30 days following the post-grading construction meeting, the Permittee shall submit a "Mitigation Plan Construction Completion Report" to the DLUR detailing as-built conditions (see below) and any changes to the approved mitigation plan that were made during construction. The report shall contain, at a minimum, the following information:
  - a. A completed "Wetland Mitigation Project Completion of Construction Form" (located at <http://www.nj.gov/dep/landuse/forms/index.html>) to certify that the mitigation project has been constructed as designed and that the proposed vernal habitat has been successfully constructed;
  - b. A copy of the approved plan if the mitigation project was built in strict accordance with said plan, or an as-built plan(s) if revisions or alterations were required or occurred, which in either case depicts final grade elevations at one foot contours, includes a table of the species and quantities of vegetation that were planted including any grasses that may have been used for soil stabilization purposes, and depicts the locations of structural components intended to serve critical life functions of the target species of herpetofauna;
  - c. Photos of the constructed wetland mitigation project with a photo location map as well as the GPS waypoints in NJ state plane coordinates NAD 1983.
  - d. Pursuant to the deadlines set forth in the Settlement Agreement, the Permittee may seek notice from DLUR that the vernal pond construction has been satisfactorily constructed in accordance with the approved plans.
13. Subject to complete construction of the vernal pond and pursuant to the Settlement Agreement, the Permittee may start site disturbance, pre-construction earth movement and construction of the Project. However, the Permittee shall monitor the wetland mitigation project for 5 full growing seasons beginning the year after the mitigation project has been completed. The Permittee shall submit monitoring reports to the Director of the DLUR no later than December 31st of each full monitoring year.

All monitoring reports must include the standard items identified in the checklists entitled Mitigation Project Monitoring Reports: Checklist for Completeness, located at <http://www.nj.gov/dep/landuse/forms/index.html>.
14. Once the required monitoring period for the mitigation project has expired and the Permittee has submitted the final monitoring report, the DLUR shall determine whether the mitigation project is either a success or a failure. This mitigation project will be considered successful if the Permittee demonstrates all of the following:
  - a. That the goals of the wetland mitigation project, including creation of desired hydroperiod, demonstrated use and evidence of reproductive activity by target species of herpetofauna, required acreage of wetlands, transition areas, and critical terrestrial habitat, as stated in the approved wetland mitigation proposal and the permit, have been satisfied;
  - b. The site has an 85 percent survival and 85 percent area coverage of the mitigation plantings or hydrophytes which are species native to the area and similar to ones identified on the mitigation planting plan;

- c. The final monitoring report must include documentation demonstrating the site is less than 5 percent occupied by invasive or noxious species such as but not limited to (Source: Snyder, David and Sylvan R. Kaufman. 2004. An overview of nonindigenous plant species in New Jersey. New Jersey Department of Environmental Protection, Division of Parks and Forestry, Office of Natural Lands Management, Natural Heritage Program, Trenton, New Jersey. 107 pages.): *Acer platanoides* (Norway Maple), *Ailanthus altissima*, (Tree of Heaven), *Allaria petiole* (Garlic mustard), *Ampelopsis brevipedunculata* (Porecelain berry), *Artemisia biennis* (Biennial wormwood), *Artemisia vulgaris* (Mugwort or Common wormwood), *Berberis thunbergii* (Japanese barberry), *Berberis vulgaris* (Common barberry), *Carex kobomugi* (Japanese sedge), *Celastrus orbiculatus* (Asian Bittersweet), *Centaurea biebersteinii* *maculosa* (Spotted knapweed), *Cirsium arvense* (Canadian thistle), *Dipsacus fillonum* (Wild teasel), *Dipsacus laciniatus* (Cut-leaf teasel), *Elaeagnus angustifolia* (Russian olive), *Elaeagnus umbellata* (Autumn olive), *Euonymus alata* (Winged spindletree), *Lespedeza cuneata* (Chinese bush-clover), *Ligustrum obtusifolium* (Japanese privet), *Ligustrum vulgare* (Common privet), *Lonicera japonica* (Japanese honeysuckle), *Lonicera morrowii* (Morrow's bush honeysuckle), *Lonicera tartarica* (Tartarian honeysuckle), *Lythrum salicaria* (Purple loosestrife), *Melilotus officinalis* (Yellow sweetclover), *Microstegium vimineum* (Japanese stiltgrass), *Myriophyllum spicatum* (Eurasian water-milfoil), *Phalaris arundinacea* (Reed canary grass), *Phragmites australis* (Common reed grass), *Polygonum cuspidatum* (Japanese knotweed), *Polygonum perfoliatum* (Mile-a-minute), *Potamogeton crispus* (Curly leaf pondweed), *Pueraria montana* (Kudzu), *Ranunculus ficaria* (Lesser celandine), *Rhamnus cathartica* (Common buckthorn), *Robinia pseudoacacia* (Black locust), *Rosa multiflora* (Multiflora rose), *Rubus phoenicolasius* (Wineberry), *Typha latifolia* (Broad-leaved cattail), *Typha angustifolia* (Narrowed leaved cattail);
- d. The Permittee's mitigation requirement shall not be deemed to have been satisfied unless or until the DLUR confirms in writing via a Mitigation Completion Letter that the vernal habitat creation project satisfied the permit's vernal habitat mitigation requirement;
- e. If the mitigation project is considered a failure, the Permittee is required to submit a revised mitigation plan. That plan will describe the steps that will be taken to rectify the failed aspects of the Project. The revised mitigation plan shall be submitted within 30 days of receipt of the letter from the DLUR indicating the wetland mitigation project was a failure.
15. No additional impervious coverage shall be added to the Project without a written modification to this permit.
16. The Department reserves the right to review and approve or to disapprove all future modifications or revisions required as the result of review by any local, county, State or Federal entity to ensure compliance with this permit and the applicable regulations.
17. Prior to site disturbance, pre-construction earth movement or construction of the Project, the Permittee shall obtain all other necessary local, County, State and Federal construction approval, including but not limited to Treatment Works Approval, Ocean County Soil Conservation District, Ocean County Planning Board, and Air Pollution Control permits.

  
David B. Fanz  
Manager  
Bureau of Coastal Regulation

  
Date



**DIVISION OF LAND USE REGULATION  
BUREAU OF COASTAL REGULATION  
ENVIRONMENTAL REPORT**

**April 2012**

CAFRA & Freshwater Wetland General Permit No. 6

#1500-04-0001.1, APL080001, FW090001

#1500-04-0001.1, CAF040001 – Original Denial – currently under appeal

#1500-04-0001.2, CAF090001 – Second Denial – currently under appeal

**Applicant:** Jaylin Holdings, LLC

**Location:** Block(s): 505 Lot(s): 14, 15  
Township of Toms River, Ocean County

Block(s): 44 Lot(s): 2, 3, 4 (part), and 5  
Township of Manchester, Ocean County

**Administrative History:**

On November 8, 2004, application file number 1500-04-0001.1, CAF040001 was received by the Division of Land Use Regulation ("DLUR" or the "Division") of the Department of Environmental Protection (the "Department") for the construction of a 208,433 square foot (SF) retail store, a 19,554 SF garden center, 3 stormwater basins, parking for 1,198 vehicles, 2 outparcels reserved for future use, and access roads off Route 37 and Northampton Boulevard. 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 Rule (7:7E-8.4), Groundwater Use Rule (7:7E-8.6), Traffic (7:7E-8.14), and Section 10 (N.J.S.A. 13:19-10). The applicant, Jaylin Holdings, LLC ("Applicant") appealed this decision and that appeal is still pending.

As a result of settlement discussions, the project design was modified and a second CAFRA permit application was submitted on October 22, 2009 (1500-04-0001.2, CAF090001). That permit application was also for a Walmart Superstore and proposed the construction of a 187,793 SF retail store, a 5,703 SF seasonal garden center, parking for 833 vehicles, retaining walls, 5 above ground and 2 underground stormwater basins, and access roads off Route 37 and Northampton Boulevard (the "Project"). The southern portion of Lot 4 would be incorporated into the Project through subdivision, whereas the northern portion (containing a former gas station) was excluded. A 0.342 acre portion of Lot 15 was proposed for dedication to NJDOT for roadway improvements.

In addition to the Project activities, the Applicant's proposal included the purchase and preservation of 2 offsite properties, including an adjoining 21.1 acre parcel and an 89.29 acre lot to mitigate for the disturbance of pine snake habitat on the project site. The 21.1 acre lot (Block 75.01, Lot 3 in Manchester Township) was purchased from Manchester Township and adjoins the Project area. The 89.29 acre parcel (Block 77, Lots 2, 4, 5, & 6) was under contract for purchase and is part of the regional pine snake habitat in contiguous Toms River and Manchester Townships.

The second CAFRA application (1500-04-0001.2, CAF090001) was denied on March 15, 2010 due to non-compliance with the Endangered or Threatened Wildlife or Plant Species Habitats Rule (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 Rule (7:7E-8.4), Groundwater Use Rule (7:7E-8.6), and Section 10 (N.J.S.A. 13:19-10). The Applicant appealed this decision and that appeal is also currently pending.

### **Project Description:**

The subject property is identified as Block 505, Lots 14 & 15, in the Township of Toms River, Ocean County, and adjoining Block 44, Lots 2, 3, 4(part) & 5, in the Township of Manchester, Ocean County. The site fronts New Jersey State Highway Route 37 and Northampton Boulevard. A Conrail railroad right-of-way forms the site's southwestern boundary. The 43 acre +/- site is currently forested and undeveloped (the "Property").

On December 1, 2010, the Applicant submitted revised and updated information in accordance with N.J.A.C. 7:7-5.4, Settlement in Response to a Hearing Request. That submission was made as a result of ongoing settlement discussions between the Applicant and the Department and is intended to demonstrate compliance with those items referenced in the March 15, 2010 denial. Those items are discussed at length later in this report.

The proposed work under the December 1, 2010 submittal includes a 189,797 square foot (SF) Walmart retail store with a water tower, a 5,703 SF seasonal garden center, parking for 833 vehicles, retaining walls, 5 above ground and 2 underground stormwater basins, and access roads off Route 37 and Northampton Boulevard (the "Project") within an approximate 22.4 acre development area. This project also includes the filling of 0.47 acres of an isolated wetland. The Project is shown on the approved plans referenced below.

### **Approved Plans:**

The approved plans were prepared by Bohler Engineering and are referred to as:

- "PRELIMINARY AND FINAL SITE PLAN & MINOR SUBDIVISION FOR WALMART REAL ESTATE BUSINESS TRUST, PROPOSED WALMART 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", all sheets (1-29) are dated June 26, 2009, unrevised, except for sheet #5, which was last revised on June 3, 2010.
- "DEVELOPMENT / CONSERVATION AREA PLAN" originally dated October 7, 2009, revised through October 6, 2011.
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- "OVERALL SITE PLAN", sheet 5 of 29, depicting wire exclusion fencing revised through November 9, 2011. This plan is approved for the installation of the exclusion fence during the construction phase only.

### **Compliance with Applicable Coastal Zone Management (CZM) Rules:**

The following discussion addresses only those sections of the Coastal Zone Management Rules at N.J.A.C. 7:7E-1.1 et. seq., as amended, which apply to the proposed project. For further clarification, the italicized writing indicates the applicable regulation and the un-italicized writing indicates how the project complies the applicable regulation. The complete rule text may be found at N.J.A.C. 7:7E-1.1 et seq. This analysis is based on New Jersey's Coastal Zone Management Rules (N.J.A.C. 7:7E-1.1 et seq.), as amended to September 7, 2010.

### **7:7E-3.27 and 3.28 Wetlands and Wetlands Buffers**

#### **Wetlands:**

(a) *Wetlands or wetland means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation.*

1. *Wetlands areas are identified and mapped on the following:*

- i. *National Wetlands Inventory Maps produced by the U.S. Fish and Wildlife Service at a scale of 1:24,000 (generalized locations only);*
- ii. *Coastal wetland maps, pursuant to the Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.) prepared by the DEP at a scale of 1:2,400; and*
- iii. *Freshwater wetland maps prepared by DEP at a scale of 1:12,000 (generalized locations only).*

*Note: Maps referenced in (a) iiii and iii above are available from the DEP Map and Publications sales office (609) 777-1038.*

2. *Generalized locations of some wetland types can be found in county soil surveys prepared by the U.S. Department of Agriculture, Soil Conservation Service.*
3. *The maps referenced under (a) i, iii, and 2 above shall be useful as an indicator to assist in the preliminary determination of the presence or absence of wetlands only. They have been determined to be unreliable for the purposes of locating the actual wetlands boundary on a specific site.*
4. *All tidal and inland wetlands, excluding the delineated tidal wetlands defined pursuant to N.J.A.C. 7:7-2.2, shall be identified and delineated in accordance with the USEPA three-parameter approach (that is, hydrology, soils and vegetation) specified under N.J.A.C. 7:7A-1.4 of the Freshwater Wetlands Protection Act Rules.*

#### **Wetland Buffers:**

(a) *Wetlands buffer or transition area means an area of land adjacent to a wetland which minimizes adverse impacts on the wetlands or serves as an integral component of the wetlands ecosystem (see Appendix, Figure 7). Wider buffers than those noted below may be required to establish conformance with other Coastal Rules, including, but not limited to, 7:7E-3.38 and 3.39.*

1. *A wetlands buffer or transition area of up to 150 feet in width shall be established adjacent to all wetlands defined and regulated under the Freshwater Wetlands Protection Act. (Refer to the Freshwater Wetland Protection Act Rules, N.J.A.C. 7:7A, for further guidance).*
2. *For all other wetlands, including wetlands regulated under the Coastal Wetlands Act of 1970, a wetlands buffer of up to 300 feet shall be established.*

(b) *Subject to (a) above, all wetlands buffers (that is, transition area) associated with wetlands subject to the Freshwater Wetlands Protection Act shall be regulated in accordance with the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A.*

- (c) Development is prohibited in a wetlands buffer around all other wetlands, unless it can be demonstrated that the proposed development will not have a significant adverse impact and will cause minimum feasible adverse impact, through the use of mitigation where appropriate on the wetlands, and on the natural ecotone between the wetlands and surrounding upland. The precise geographic extent of the actual wetlands buffer required on a specific site shall be determined on a case-by-case basis using these standards.*
- (d) In areas of the coastal zone which are within the Hackensack Meadowlands District, the appropriate buffer width shall be determined in accordance with the requirements set forth in the Hackensack Meadowlands District Zoning Regulations.*

**Analysis:**

The Department previously issued a Letter of Interpretation on May 18, 2004 verifying the extent of wetlands on the Property. (File #1500-04-0001.1, FWW040001). The wetlands are classified as intermediate resource value wetlands requiring a 50 foot buffer pursuant to N.J.A.C. 7:7A-2.5(c). The submitted plans accurately reflect the extent of wetlands and the 50 foot buffer. The Applicant submitted CAFRA Individual Permit application on October 22, 2009 which included a Freshwater Wetland General Permit No. 6 ("GP#6") application as well. A review of the submitted documentation shows that the wetlands application meets the requirements of a GP#6 because the proposed development disturbs 0.47 acres of an isolated wetland that is not a water of the United States. The wetland in question is not exceptional resource value, not a special aquatic site, not an EPA Priority and not a State open water. The Project will not affect any white cedar stands and will not introduce any non-native plant species. In order to alleviate the impact associated with the filling of the isolated wetland, the Applicant has proposed to create a 1.0 acre freshwater wetland. The created wetland is designed to function as a vernal pool and will be constructed before the isolated wetlands are filled. There are no disturbances to any wetland buffers except for the wetland buffer filled in association with the GP#6. Therefore, these Rules are met.

**7:7E-3.36 Historic and Archaeological Resources**

- (a) Historic and archaeological resources include objects, structures, shipwrecks, buildings, neighborhoods, districts, and man-made or man-modified features of the landscape and seascape, including historic and prehistoric archaeological sites, which either are on or are eligible for inclusion on the New Jersey or National Register of Historic Places.*
- (b) Development that detracts from, encroaches upon, damages, or destroys the value of historic and archaeological resources is discouraged.*

**Analysis:**

Comments received from the Historic Preservation Office, dated May 24, 2011, indicate that there are no buildings, structures, sites, objects, or historic districts on or adjacent to the project location that are listed on, or that have been identified as eligible for listing on the New Jersey or National Registers of Historic Places. Additionally, the project site was surveyed for historic and archaeological resources in 1987 with negative results (OCE C 173). No further consideration by the HPO is required prior to permit issuance. Therefore, this Rule is met.

### **7:7E-3.38 Endangered or Threatened Wildlife or Plant Species Habitats**

- (a) *Endangered or threatened wildlife or plant species habitats are terrestrial and aquatic (marine, estuarine or freshwater) 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 includes a sufficient buffer area to ensure continued survival of the population of the species as well as areas that serve an essential role as corridors for movement of endangered or threatened wildlife. 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/few/ensphome](http://www.state.nj.us/dep/few/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.*

### **Analysis:**

The Department's Landscape Project identifies the site as a Rank 3 mapping since it contains habitat for northern pine snake, a species classified as State Threatened by DEP. The Project site is located at the extreme northeastern edge of a vast area of mapped pine snake habitat. The site is partially bounded by wetlands and a Conrail railroad ROW to the southwest, commercial development on the northwestern border of the parcel, State Highway Route 37 (a divided highway with four travel lanes) to the north, and Northampton Boulevard to the east. There is dense residential development located on the north side of Route 37 directly across from the property. The Toms River Industrial Park is located directly across from the significant commercial development east of the site opposite Northampton Boulevard, and an extensive residential development lies southeast of the site opposite the Conrail ROW.

In 2005, a field study conducted by EcolSciences, Inc., confirmed the presence of pine snake habitat and documented 2 adult pine snakes on the property. Both snakes were radio tracked. Both snakes left the property while they were being radio tracked, with only one of the snakes returning and overwintering in a hibernaculum on the site. No further telemetry studies have been conducted to date.

Impacts to pine snake habitat on the property as a result of the proposed project include the direct loss of 21.4 acres of habitat. Additionally, the Department has concluded that the proposed project could result in a number of secondary impacts, and that these impacts could affect the suitability of the remaining habitat.

As stated in N.J.A.C. 7:7E-3.38(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 the habitat would not directly or through secondary impacts on the relevant site or in the surrounding area be adversely affected. As part of the information submitted for the current proposal, the Applicant submitted an Endangered or Threatened Wildlife Habitat Impact Assessment and an Analysis of Conceptual Habitat Evaluation Method for Northern Pine Snakes, both dated November 29, 2010. The Applicant has proposed the following measures to ensure that the proposed Project does not directly, or through secondary impacts, result in an overall adverse impact endangered or threatened wildlife species on the site or in the surrounding area.

- The current proposal results in a 9% reduction from the original proposed building, a 71% reduction from the originally proposed garden center, a 30% reduction from the original proposed parking lots, and a 33% reduction in overall impervious cover.
- Preservation of the on-site northern pine snake hibernaculum including a 150 foot buffer around the hibernaculum.
- Construction of a 3,319 LF, 4 foot high wall to minimize human-snake conflicts and to protect pine snakes that use the hibernaculum from the adjoining, heavily traveled, Route 37.
- Preservation of 20.9 acres of on-site habitat, including the hibernaculum, which is contiguous to adjoining off-site habitats.
- Purchase and preservation of several off-site mitigation parcels totaling 192 acres of open space containing mapped habitat for northern pine snake and numerous other endangered and threatened species, which connects the Project site to approximately 13,660 acres of lands protected through the Crossley Preserve, Manchester Wildlife Management Area, and Whiting Wildlife Management Area. This results in an overall total of 212.9 acres of preserved pine snake habitat.
- Habitat enhancements, throughout the pine snake habitat, including selective tree thinning, blocked access, the construction of artificial hibernacula, the creation of upland forest clearings for nesting, and scarifying the ground.

The Division of Land Use Regulation solicited comments from the New Jersey Division of Fish and Wildlife, Endangered and Nongame Species Program (ENSP) on the Endangered or Threatened Wildlife Habitat Impact Assessment and an Analysis of Conceptual Habitat Evaluation Method for Northern Pine Snakes, both submitted by EcolSciences, Inc. The ENSP reviewed both documents and submitted formal review findings to the DLUR via a memorandum dated August 2011 and supplemented by an addendum dated December, 2011. These documents are attached as Appendix I

The Project includes the construction of a 3,319 -foot long (over ½ mile), 4-foot high wall that will serve as a wildlife barrier between the undeveloped areas of the parcel and the proposed Walmart, access road, and paved parking areas. The wall will also serve as an important barrier to preclude northern pine snake access to Route 37, Northampton Boulevard, or the Toms River Industrial Park. The wall extends along the western property boundary to preclude any northern pine snakes from entering the developed commercial property located on the northwestern border of the Property. Currently there is unrestricted access and there is no barrier to stop northern pine snakes from wandering onto Route 37, Northampton Boulevard, the Toms River Industrial Park, or the developed commercial property on the northwestern border of the Property.

The wall prevents northern pine snakes from inadvertently utilizing the developed portions of the site, the bordering roads and developed properties and thus minimizes human-snake conflicts such as roadkills. The linear wall also allows northern pine snakes unimpeded access to contiguous on-site and off-site adjoining foraging areas and to the on-site hibernaculum. The Applicant proposes to preserve 20.9± acres forested snake habitat that serves as a corridor linking the on-site habitat to other suitable pine snake suitable habitat located directly across the Conrail railroad ROW. Within the 20.9 acres of forest, the Applicant has proposed northern pine snake habitat enhancement initiatives, including selective tree thinning.

The Landscape Project indicates that the transmission line ROW southwest of the site and adjacent to the Conrail ROW, has six pine snake records. A 7,025-acre forest polygon with 34 pine snake records occurs opposite the ROW and is bounded by the Conrail ROW to the north, Route 70 to the west, an abandoned Penn Central railway ROW to the south and developed portions of Toms River Township to the east. The old Penn Central ROW is all that separates the 7,025-acre polygon from another 3,546-acre forest polygon with 46 pine snake records that extends southward to County Route 530. An additional 21,741±acre forest polygon with 36 pine snake records is located west of Route 70 in Manchester Township. Approximately 7,500 acres of these primarily forested areas are already protected as part of the Crossley Preserve (2,948 acres), Manchester Wildlife Management Area (3,362 acres), and Whiting WMA (1,190 acres). An additional 6,140-acre (approximate) portion of the adjacent Heritage Minerals tract that is pine snake habitat and is planned for preservation will raise the total area of open space noted here to approximately 13,640 acres.

The size of the Heritage Minerals parcel, which extends for over four miles to the west of the Property, and the sizable areas already owned by the State, meant there were virtually no properties in the immediate vicinity of the Property available to purchase for conservation, pine snake habitat enhancement and mitigation. However, the Applicant did purchase the 21 acre parcel (Block 75.01, Lot 3, Manchester Township) that is directly across the Conrail ROW from the subject parcel and is bordered on the other three sides by lands that are planned to be preserved pursuant to the Heritage Minerals settlement. That parcel is highly suitable pine snake habitat and provides a direct link between the hibernaculum and the pine snake habitat that is to be preserved on the Property and the pine snake habitat that is currently pine snake habitat and is planned to be preserved on the 6,000-acre plus Heritage Minerals parcel. The parcel includes upland pine and pine/oak forests and sand roads that provide the habitat characteristics preferred by northern pine snake. The 2005 radio tracking studies of the two northern pine snakes found on the Property determined that the northern pine snakes were utilizing this parcel and the adjacent portion of the Heritage Minerals parcel.

The portion of the Heritage Minerals parcel that is habitat and is planned to be preserved borders the Crossley Preserve and the Whiting and Manchester Wildlife Management Areas. As noted above, this overall contiguous area contains approximately 13,640 acres (over 21 square miles). However, there are a number of outparcels located within the overall protected lands. Other than the 21 acre parcel referenced above, there were no other nearby lands that were unprotected and pine snake habitat. As a result, the Applicant acquired outparcels to fill in gaps in the overall protected lands and has purchased 5 such parcels in Manchester Township in addition to the 21 acre adjacent parcel. One of these parcels is Block 77, Lots 2, 4, 5, and 6. This 89.29-acre parcel is located on Horicon Road (Beckerville Road). A portion of the Heritage Minerals tract that is pine snake habitat and is planned for preservation is located adjacent to this parcel to the south and east. This parcel provides a link between the Heritage Minerals lands on the north and south sides of Horicon Road. Another parcel is Block 77, Lot 27. This 11.3-acre parcel is bordered by portions of Manchester Wildlife Management Area and the proposed Heritage Minerals open space parcel to the north and south, respectively. A third parcel is Block 73, Lots 31 & 32. This 42.9-acre parcel both fills in gaps between separated portions of the Manchester Wildlife Management Area and separated portions of the proposed Heritage Minerals open space parcel. The fourth parcel is Block 73, Lot 21 which contains 15.8 acres and is bordered to the north and west by the proposed Heritage Minerals open space parcel. The fifth parcel is Block 73, Lots 3 and 4 which contain 11.6 acres. This parcel connects two separated pieces of the proposed Heritage Minerals open space parcel.

In purchasing these parcels and proposing specific pine snake habitat enhancements, the Applicant is addressing the concerns raised in the "Status Assessment of the Northern Pine Snake (*Pituophis m. melanoleucus*) in New Jersey: An Evaluation of Trends and Threats" prepared by the New Jersey Division of Fish and Wildlife Endangered and Nongame Species Program in 2009 (the "Status Assessment"). Specifically, the Status Assessment, in addition to identifying an overall loss of northern pine snake habitat, identifies a trend of increasing habitat fragmentation resulting in more, but smaller, habitat patches. The Status Assessment explains that these smaller patches pose a serious threat to individuals and the local population if they are not of sufficient size to maintain viable populations due to the species' large home range requirements. By acquiring these parcels, the Applicant is reducing the risk of habitat fragmentation in this area.

The 2009 Status Assessment also states that pine snakes nest in open areas with loose sandy soils and outside of the nesting season exhibit a clear association with coniferous dominant forests, shrub habitats and extremely well drained soils. With these specific habitat needs, the species is less flexible with its ability to utilize various habitat types. Even where lands have been permanently protected there is a risk of habitat loss through natural succession. There has been a loss of habitat as shrub communities and coniferous dominated forests have changed to deciduous dominated forests. The habitat enhancement plan proposed by the Applicant specifically addresses these concerns. Numerous open areas will be created to provide nesting habitat in areas where the adjoining State lands and the adjoining Heritage Minerals parcel are densely wooded. The soil will be loosened in specified areas that are already open. An area of pitch pines will be planted in an area where there is currently not a coniferous forest.

The Status Assessment also notes that even where there are development restrictions based on the presence of threatened and endangered species, there continues to be development that otherwise adversely affects the area within the range of known individual pine snakes. The purchase of Block 77, Lots 2, 4, 5, and 6 containing approximately 89.3 acres by the Applicant and its permanent preservation prevents such a result. An application for a three lot subdivision of this parcel that conformed to the density requirements of the Pinelands Comprehensive Management Plan had been submitted to the Pinelands Commission. In addition to eliminating the threat of the property's development, the Applicant is undertaking numerous habitat enhancements on this parcel that will expand the habitat available to pine snakes rather than development and fragmentation of the existing habitat in the area.



By filling in gaps and expanding the approximately 13,640 acres of contiguous open space, once the permanent protection of the Heritage Minerals lands is completed, the Applicant helps to sustain a viable population size in the northern Ocean County portion of the New Jersey range of northern pine snakes. While individual pine snakes in the easternmost portion of the overall contiguous protected area, including the preserved portion of the development parcel, will not be breeding with individual pine snakes located at the westernmost portion of the overall contiguous parcel, the size of the area and the large number of known pine snakes in the area ensure that a large, genetically diverse and sustainable population of pine snakes should remain viable in this protected area.

The Status Assessment identifies off-road vehicles as a significant threat to pine snakes. Some of the mitigation parcels that have been acquired by the Applicant have had significant off-road vehicle usage in the past. The Applicant is proposing measures that will significantly reduce the ability of off-road vehicles to utilize these parcels. As recommended by the Department, these measures include using stump piles to block access to those sites.

While the proposed acquisition of the mitigation parcels and the proposed habitat enhancement activities on those parcels as well as on a portion of the development parcel are significant, they must be considered in the context of the pine snake habitat that will be lost on the development parcel. In order to evaluate the net impact of the Project and the enhancements, ENSP, with input from a group of published pine snake experts, prepared a pine snake Habitat Evaluation Method ("HEM").

The total habitat value that would be added by the enhancement activities has been estimated by ENSP using its HEM and then compared to the estimated value of pine habitat that would be lost as a result of the Project. In reaching a determination of "no net loss in habitat value," ENSP considered the general area circumscribed by the development site plus all of the acquisition and enhancement sites included in the application. When preparing its proposal, the Applicant approached the "no net loss" concept at a relatively broad scale taking into account many of the factors identified in the Status Assessment as adversely impacting pine snakes in New Jersey. As a result, the Applicant has proposed beneficial enhancement activities both on and immediately adjacent to the development parcel to benefit those individual snakes that would experience losses in habitat as a result of the Project and on currently unprotected lands that are distant from the Project but still within an overall contiguous area that is primarily composed of lands that are or are planned for permanent protection and contain large areas of pine snake habitat. While this approach was driven by the fact that apart from the contiguous approximately 21.1 acre Block 75.01, Lot 3, there are virtually no nearby vacant parcels not already protected or proposed to be protected, it also is consistent with the conclusions in the Study Assessment that in order to preserve a viable population of pine snakes in the New Jersey, it is necessary to focus on the broader issues that are adversely affecting the overall population. Protecting the pine snake population requires both protection of habitat for individual snakes and protection of a larger habitat area for the larger population. The Applicant's proposal addresses and takes steps to accomplish both of these purposes. Therefore, the implementation of the proposed habitat enhancements provide overall improvements to pine snake habitats in the area, and the Department concludes that there will be no net loss to pine snake habitat value in this region; i.e., no net adverse impact to pine snakes, provided the recommendation, specifications, and modifications described in ENSP's report are followed.

ENSP estimates that a total of 51.8 habitat units ("HU") for pine snakes would be lost by the development but the implementation of the mitigation proposal would result in an increase of 53 HUs for pine snakes (for a net increase of 1.2 HUs at this spatial scale). To achieve the "no net loss" of pine snake habitat, the implementation of the proposed habitat acquisition and enhancements must be carried out and completed as discussed in this summary prior to the initiation of the construction of the store. Otherwise, the loss of pine snake habitat is not offset by the enhancement Projects and pine snakes would experience a loss in habitat value for a period of time. Similar to the requirements of freshwater wetlands

mitigation (N.J.A.C. 7-7A-15.16), the Applicant must demonstrate that the enhancement activities are constructed as proposed.

To insure that proper funding is available for the long-term maintenance of the enhanced pine snake habitat on these parcels, the Applicant must establish a pine snake habitat maintenance fund totaling \$70,911. This fund will cover the \$28,269 cost needed for short-term maintenance (1-5 years) needed at the Beckerville Road site as well as the \$42,642 cost associated with the long-term maintenance (> 5 years) needed at all sites (calculated below). The amount needed for this fund is based upon the 2011 federal Natural Resource Conservation Service cost tables for habitat management activities in New Jersey. This funding is intended to be used to cover the costs associated with future management/maintenance practices listed below:

Prescribed burning (practice code #528):  $199.4 \text{ ac} \times \$35.36/\text{ac} = \$7,051$

Wildlife focused forest mgmt (#666):  $180.8 \times \$190.31/\text{ac} = \$34,408$

Grassland habitat modification (#645):  $24 \text{ ac} \times \$49.28/\text{ac} = \$1,183$

ENSP and NJ Forest Service will work together to determine the best use of this fund for maintaining and enhancing the pine snake habitat on these parcels.

In conclusion, after reviewing the memorandum issued by ENSP, the Endangered or Threatened Wildlife Habitat Impact Assessment, and the Analysis of Conceptual Habitat Evaluation Method for Northern Pine Snakes submitted by the Applicant, the Division has determined that the pine snake habitat on site and in the surrounding area will not be adversely affected. To the contrary, the Division has determined that, even though a portion of on-site habitat will be lost due to the Project, the measures included in the application will sufficiently reduce the risk to the snakes that may remain on the site. The construction of the snake barrier on site will direct snakes away from the Project, Northampton Boulevard, Route 37, and adjacent developed parcel to an undeveloped area that is pine snake habitat. In the long run, installation of the snake barrier that keeps pine snakes away from the roads and intense development adjacent to and in the immediate area of the subject parcel and will be more protective of these snakes. Further, the proposed preservation and/or enhancement of the mitigation parcels that are part of this application will, in fact, improve habitat in the surrounding area by enhancing habitat suitability for northern pine snakes. Based upon the site specific measures to protect individual pine snakes, the acquisition of 192 acres of pine snake habitat in the area, the overall increase in habitat units (habitat value), and the existing adjoining contiguous pine snake habitat on the Heritage Minerals lands which extends for over 4 miles from the edge of the Project, the Project would not adversely affect the relevant site and surrounding area for pine snake habitat. Therefore, this Rule is met.

#### **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.*

**Analysis:**

The Project site contains approximately 39 acres of forest habitat which the Department identifies as "critical wildlife habitat" due to its functioning as migratory bird stopover habitat. Additionally, the forest area contains a small isolated wetland which has been identified as a vernal habitat, providing critical breeding or foraging habitat for a local population of amphibians, as well as related site wildlife. As discussed above, the Project will disturb 0.47 acres of wetlands which includes vernal habitat. Since the initial application was filed, the Applicant has made numerous changes to the site plan to minimize interference with the critical habitat. Considering the designation of the Property as a Regional Growth Area by the Pinelands Commission, the commercial zoning designations of the Property by the Township of Toms River and Manchester Township, and the intensive existing development adjoining and in the immediate vicinity of the Property, it has been demonstrated that there is no feasible or prudent alternative location for the Project. At the Department's request the Applicant did examine other sites identified by the Department as potential feasible alternative sites. The Department concurs with the Applicant's conclusion that none of these sites were feasible. The Project as originally proposed by the Applicant did not propose any disturbance to wetlands and wetlands buffers. In order to reduce the impact on pine snake habitat, the Applicant agreed to the Department's suggestion that the plans be revised so any Project disturbance of the isolated wetlands would comply with the requirements of GP#6.

The Applicant has agreed to mitigate for the disturbance of the forest habitat by the preservation of approximately 20.9 acres of remaining on-site forest as well as several off site parcels. One of the offsite parcels (Manchester Township, Block 75.01, Lot 3) is approximately 21 acres in size, 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 on and adjacent to the Property for use as migratory song bird stopover habitat represents an appropriate mitigative measure. In addition, a majority of the remaining approximately 171 acres of offsite parcels that will be permanently protected by the Applicant are forested critical wildlife habitat.

The Applicant has proposed to mitigate for the impact to the vernal habitat by creating a 1.0 acre vernal habitat on the Property. This compensation is shown on a concept plan entitled "WETLANDS MITIGATION PLAN" revised through November 2, 2011, submitted by the Applicant and approved by the Division. The proposed vernal pool will provide habitat for the species that are utilizing the isolated wetlands that will be impacted. No fill of the isolated wetlands will be allowed until the proposed vernal pool is created.

Therefore, the Applicant meets this Rule.

## **7:7E-5B Impervious Cover Limits and Vegetative Cover Percentages in the CAFRA Area**

### **Impervious Cover Limits:**

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

Site Location	Impervious Cover Percentage
CAFRA Urban Center	90 percent
CAFRA region center	80 percent
Coastal regional center	
CAFRA core	
CAFRA node	
CAFRA town	70 percent
Coastal town	
Military installation	
CAFRA village	60 percent
Coastal Village	
CAFRA hamlet	50 percent
Coastal hamlet	
Coastal Metropolitan Planning Area	80 percent
Coastal Suburban Planning Area, within a sewer service area*	30 percent
Coastal Suburban Planning Area, outside a sewer service area*	5 percent
Coastal Fringe Planning Area	5 percent
Coastal Rural Planning Area	3 percent
Coastal Environmentally Sensitive Planning Area	3 percent

\* "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:**

**Toms River Township:**

For reasons discussed later in this analysis, under 7:7E-5B.6 Mainland Coastal Centers, the portion of the Project site located in Toms River Township is within the boundaries of the Toms River Coastal Regional Center. The maximum percentage of impervious cover allowed for the portion of the site in the Toms River Coastal Regional Center is 80% of the net land area. After subtracting the special water area acreage, the net land area on this portion of the site is 15.665 acres. This results in an allowable 12.535 acres of impervious cover in Toms River. The applicant proposes 11.960 acres of impervious cover in the Township of Toms River.

### **Manchester Township:**

The portion of the Project site located in Manchester Township is within the boundaries of a Coastal Suburban Planning Area, within a sewer service area. The maximum percentage of impervious cover allowed for the Manchester Township Suburban Planning Area portion of the site is 30% of the net land area. After subtracting the special water area acreage, the net land area on this portion of the site is 21.0035 acres, which results in 6.301 acres of allowable impervious cover. The applicant proposes 2.1475 acres of impervious cover in Manchester Township.

The total allowable impervious cover for the entire development is 18.836 acres. The Applicant is proposing 14.1076 acres of impervious cover, therefore this Rule is met.

### **Vegetative Cover Percentages:**

- (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**

Site Location	Tree preservation percentage for forested portion of site	Tree preservation and/or planting percentage for Unforested portion of site
CAFRA urban center CAFRA regional center Coastal regional center CAFRA core	10 percent	0 percent
CAFRA node Military installation	10 percent	0 percent
CAFRA town Coastal town	25 percent	5 percent
CAFRA village Coastal village	30 percent	5 percent
CAFRA hamlet Coastal hamlet	40 percent	5 percent
Coastal Metropolitan Planning Area	10 percent	0 percent
Coastal Suburban Planning Area, within a sewer service area*	35 percent	5 percent
Coastal Suburban Planning Area, outside a sewer service area* Coastal Fringe Planning Area Coastal Rural Planning Area Coastal Environmentally Sensitive Planning Area	70 percent	5 percent

\*"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:**

**Toms River Township:**

For the portion of the site that is within the Toms River Coastal Regional Center, 10% of the existing forested areas within the net land area must be preserved. This portion of the site contains 15.083 acres of forest, of which 1.5083 acres must be preserved. No tree planting or preservation is required in the unforested portion of the site within the Coastal Regional Center.

### **Manchester Township:**

For the portion of the site that is within the Coastal Suburban Planning Area (within a sewer service area), 35% of existing forested areas within the net land area must be preserved and 5% of the unforested areas within the net land area must be preserved or planted with trees. This portion of the site contains 11.862 acres of forest, of which 4.152 acres must be preserved in a cluster and 9.142 acres of unforested area, of which 0.457 acres must be planted or preserved.

The total amount of tree planting and preservation required for the entire site is 6.117 acres. The proposed planting and preservation for the entire site is 8.708 acres. The remaining portion of the net land area that will not be impervious cover will be comprised of planted or preserved herb/shrub vegetation as required by N.J.A.C. 7:27E-5B.5. The 8.708 acres of tree preservation and planting includes over 4.152 acres of clustered forest to be preserved in the suburban planning area portion of the site. Therefore these Rules are met.

### **7:27E-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. 7:27E-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) To reflect changes in mainland coastal centers occurring after February 6, 2006, the Department shall publish in the New Jersey Register a notice of administrative change when the boundaries of a mainland coastal center are established under (a) and (b) above or expire under (c) above.
- (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](http://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](http://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](http://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)1i 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) For purposes of any CAFRA permit application that proposes a 100 percent affordable housing development in a mainland coastal center established in accordance with (b)1 above or an expired coastal center located in a municipality that, prior to October 15, 2005 held a pre-petition meeting

with the Office of Smart Growth in accordance with N.J.A.C. 5:85-7.3, the impervious cover limits and vegetative cover requirements shall be determined in accordance with N.J.A.C. 7:7-5B.4(d) and 5B.5, respectively, provided the CARA permit application is complete for final review pursuant to N.J.A.C. 7:L7-4.6 prior to March 15, 2007. Such applications shall no longer be applicable to developments proposed within a mainland coastal center or an expired coastal center if the Department establishes a corresponding CAFRA center pursuant to N.J.A.C. 7:7E-5B.2(c) or (e).

- (i) For the purposes of (e)5 above, the boundaries of the Critical Environmental Sites on the State Plan Policy Map adopted by the State Planning Commission on March 1, 2001 are incorporated by reference into this subchapter. These boundaries are the boundaries of the Coastal Critical Environmental Sites. Whenever the State Planning Commission formally approves any new or changed Critical Environmental Site boundary within a mainland coastal center, the Department shall evaluate the new or changed boundary to determine whether it is consistent with the purposes of the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq., and this chapter. The Department shall not reject, or reject and revise, a boundary unless it finds that accepting the State Planning Commission approved boundary would result in unacceptable harm to the coastal ecosystem or the resources of the built or natural environment, or would otherwise be inconsistent with the purposes of the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq. or this chapter. For those new or changed Critical Environmental Site boundaries located within the Pinelands National Reserve, the Department shall also, in consultation with the New Jersey Pinelands Commission, determine whether the boundaries are consistent with the intent, policies and objectives of the National Parks and Recreation Act of 1978, P.L. 95-625, section 502, creating the Pinelands National Reserve, and the State Pinelands protection Act of 1979 (N.J.S.A. 13:18A-1 et seq.). Within 90 calendar days after the date on which the State Planning Commission formally approves such boundary, the Department shall publish in the New Jersey Register a notice of its determination to accept, reject, or reject and revise the boundary for the purposes of (e) above.
1. If the Department accepts the State Planning Commission formally approved new or changed Critical Environmental Site boundary, the accepted new or changed boundary is incorporated by reference as the boundary of the Coastal Critical Environmental Site, and shall be operative 30 calendar days after the date of publication of the New Jersey Register notice under this subsection.
  2. If the Department determines under this subsection to reject the State Planning Commission formally approved new or changed Critical Environmental Site boundary, any applicable boundary incorporated by reference under this subsection shall continue to be operative, except as provided under (i)3 below.
  3. The Department may determine under this subsection to reject the State Planning Commission formally approved new or changed Critical Environmental Site boundary and to establish a revised Coastal Critical Environmental Site boundary by promulgating an amendment to this chapter in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. Until the Department promulgates such revised boundary, any applicable Coastal Critical Environmental Site boundary under this subsection shall continue to be operative.

**Analysis:**

The March 15, 2010 denial discussed reasons that the Project did not meet this rule, specifically, 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.

However, the materials currently under review are a result of ongoing settlement discussions from the original 2004 submittal and the appeal of the 2006 denial. Therefore, this rule is not applicable, because at the time of the 2004 application, the Toms River Regional Coastal Center was in existence.

The Department's original denial of the CAFRA application in June 2006 found that the development of the Toms River portion of the site was subject to the Coastal Center impervious coverage limit of 80% and vegetative cover percentage of 10% tree preservation for the forested portion of the site and 0% tree preservation for the unforested portion of the site. The Applicant's revised proposal relates back to the 2006 denial and the present development proposal and accompanying permitting decision is the result of a continuing appeal, negotiation and now settlement with the Department. Accordingly, since the current proposal for development stems directly from the original application, the Department finds that the Applicant has met the requirements of the applicable standards at N.J.A.C. 7:7E-5B.6(f). Similarly, the application was received by the Department prior to February 7, 2005 and was deemed complete for final review prior to March 15, 2006. As such, the original impervious coverage and vegetative cover requirements apply.

In addition, since the 2006 Department denial, the Legislature has enacted the Permit Extension Act of 2008, N.J.S.A. 40:55D-136.1 et seq., (the "PEA"). The PEA provides that the running of the period of any government approval in existence during the defined extension period is automatically suspended for the extension period. The extension period is defined as beginning January 1, 2007 and continuing through December 31, 2012. An approval is defined very broadly and includes "any other government authorization of any development application . . . whether that authorization is in the form of a . . . permission, determination, interpretation . . ." N.J.S.A. 40:55D-136.3. As a result of the appeal of the 2006 denial, the Department's determination that the development was in a Coastal Regional Center, and that the 80% impervious coverage limits and corresponding vegetative cover percentages would govern, remained in effect as of January 1, 2007. Under the PEA, the Department's determination that the site is subject to the impervious coverage and vegetative cover percentages of a coastal center are extended to cover the current proposal.

The PEA is intended "to prevent the wholesale abandonment of approved projects and activities due to the present unfavorable economic conditions. N.J.S.A. 40:55D-136.2(m). The PEA extended center designations pursuant to CAFRA as well as center determinations made pursuant to the State Planning Act. N.J.S.A. 40:55D-136.3. This is confirmed through the Department's own website and the document contained on that website entitled "Mainland Coastal Center Boundaries Extended Under the Permit Extension Act of 2008." The only areas excepted from the reach of the Permit Extension Act were those within environmentally sensitive areas as defined by the Act. Those include areas in Planning Area 4B and Planning Area 5. Specifically excluded from the definition of environmentally sensitive areas were growth areas designated in the Comprehensive Management Plan ("CMP") of the Pinelands Commission pursuant to the Pinelands Protection Act. The site in question is not located in any defined environmentally sensitive area and, as such, enjoys the protection of the PEA. The subject property is designated as a Regional Growth Area in the CMP. Therefore, the Rule is 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:

This rule provides that "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." N.J.A.C. 7:7E-6.2(a). The Project will not impact the public health, safety and welfare. The Project will not affect public or private property. The Applicant will comply with Department of Transportation requirements related to improvements to Route 37 and the Route 37/Northampton Boulevard intersection. The Project will not affect marine fisheries. The Project will be served by public sewers. The Project will comply with all stormwater management requirements. These requirements are designed to avoid adverse impacts to ground and surface water quality and serve to protect Barnegat Bay which is located several miles downstream.

The Applicant has continually demonstrated a willingness to modify the Project and to acquire additional lands for preservation in order to accommodate a threatened species, the northern pine snake, and to fulfill its obligation to minimize impacts to wildlife and to preserve, protect, and enhance the natural environment. In addition, the Department is imposing conditions in the permit in order to ensure that these requirements of this Rule are met. The Project has been designed to cause minimal interference with the natural functioning of the plant, animal, fish, and human life processes at the site and the surrounding region by complying with applicable municipal and State land use regulations and by making every effort, short of Project abandonment, to protect the northern pine snake located within and adjacent to the Project area and to promote the viability of northern pine snakes in the region.

Therefore, this Rule is met.

### 7:7E-7.10 Commercial Facility Use Rule

*(b) Standards relevant to retail trade and services are as follows:*

- 1. Retail and trade service is a broad category including, but not limited to, establishments selling merchandise for personal and household consumption, such as food stores and clothing stores; offices; service establishments such as banks and insurance agencies; establishments such as restaurants and night clubs; and establishments for participant sports such as bowling alleys and indoor tennis courts.*
- 2. In special urban areas, new or expanded retail trade and service establishments are conditionally acceptable in filled water's edge areas and over large rivers on structurally sound existing pilings as part of mixed use developments, provided that the development is consistent with the rule on Filled Water's Edge (N.J.A.C. 7:7E-3.23) and Special Urban Areas (N.J.A.C. 7:7E-3.43), and the existing total area of water coverage is not expanded except where it can be demonstrated that extensions are functionally necessary for water dependent uses.*
- 3. Elsewhere in the coastal zone, new or expanded retail trade and service establishments are conditionally acceptable provided that the development:*
  - i. Complies with all applicable Location and Resource rules;*
  - ii. Is compatible in scale, site design, and architecture with surrounding development; and*
  - iii. Where appropriate, utilizes the water area as the central focus of the development.*
- 4. Rationale: See the note at the beginning of this Chapter.*

### **Analysis:**

The Project falls into the retail trade category. As noted at N.J.A.C. 7:7E-7.10(b)3, new or expanded retail establishments are conditionally acceptable provided that the development: i. Complies with all applicable Location and Resource rules; ii. Is compatible in scale, site design, and architecture with surrounding development; and iii. Where appropriate, utilizes the water area as the central focus of the development. As set forth in this Summary, the Project complies with all applicable Location and Resource rules. The Property is bordered to the northwest by a retail center and directly across Northampton Boulevard from the site, on both sides of Route 37, is the Toms River Industrial Park. A Super Wawa is located diagonally across the intersection of Northampton Boulevard and Route 37 from the Property. A multifamily senior housing development is located on the north side of Route 37 immediately opposite the Property. The Project is compatible in scale, site design and architecture with this surrounding development. The third condition is not applicable as the Property is not a waterfront property. Therefore, this Rule is met.

### **7:7E-8.4 Water Quality and 7:7E-8.7 Storm water Management**

#### **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.*

#### **Stormwater Management:**

*If a project or activity meets the definition of "major development" at N.J.A.C. 7:8-1.2, then the project or activity shall comply with the Stormwater Management rules at N.J.A.C. 7:8.*

### **Analysis:**

The Department has reviewed this Project for compliance with the water quality and stormwater management rules. 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 Best Management Practices ("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. The Project complies with the Stormwater Management rules at N.J.A.C. 7:8.

A request for water service in Toms River Township with a demand of 25,290 gallons per day has been approved by United Water Toms River, and a copy of the "willingness to serve" letter is enclosed in the file.

A request for sewer service in Toms River Township with a daily flow of 19,827 gallons per day has been approved by the Ocean County Municipal Utilities Authority, and a copy of the approval is enclosed in the file.

Therefore, these Rules are 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:**

As previously submitted, no groundwater withdrawals are proposed. This Rule is not applicable.

#### **7:7E-8.8 Vegetation**

- (a) Vegetation is the plant life or total plant cover that is found on a specific area, whether indigenous or introduced by humans.*
- (b) Coastal development shall preserve, to the maximum extent practicable, existing vegetation within a development site. Coastal development shall plant new vegetation, particularly appropriate coastal species native to New Jersey to the maximum extent practicable.*

#### **Analysis:**

The proposed retail building will adhere to the preservation standards for vegetation relevant to a development in a Coastal Regional Center and a Coastal Suburban Planning Area. The Project is preserving to the maximum extent practical the existing vegetation on the site. All vegetation planted as a result of this Project will be indigenous to the area and appropriate for the substrate available. Therefore, this Rule is met.

#### **7:7E-8.12 Scenic Resource and Design**

- (a) *Scenic resources include the views of the natural and/or built landscape.*
- (b) *Large-scale elements of building and site design are defined as the elements that compose the developed landscape such as size, geometry, massing, height and bulk structures.*
- (c) *New coastal development that is visually compatible with its surroundings in terms of building and site design, and enhances scenic resources is encouraged. New coastal development that is not visually compatible with existing scenic resources in terms of large-scale elements of building and site design is discouraged.*
- (d) *In all areas, except the Northern Waterfront region, the Delaware River Region and Atlantic City, new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk and higher than 15 feet in height measured from the existing grade of the site or boardwalk shall comply with the following, unless it meets the requirements at (e) below:*
  - 1. *Provide an open view corridor perpendicular to the water's edge in the amount of 30 percent of the frontage along the waterfront where an open view currently exists; and*
  - 2. *Be separated from either the beach, dune, boardwalk, or waterfront, whichever is further inland, by a distance of equal to two times the height of the structure, except for the following:*
    - i. *Infill sites within existing commercial areas along a public boardwalk where the proposed use is commercial and where the set-back requirement is visually incompatible with the existing character of the area; and*
    - ii. *Wind turbines.*
- (e) *Coastal development that modifies a historic structure on or eligible for inclusion on the New Jersey or National Register of Historic Places, is adjacent to a bay, ocean, bayfront or oceanfront, beach, dune or boardwalk, and is higher than 15 feet in height measured from the existing grade of the site or boardwalk need not comply with (d) above provided the development meets the requirements at 1 and 2 below. This exception does not apply to new development proposed to be located outside of the historic structure's footprint of development as defined at N.J.A.C. 7:7E-1.8.*
  - 1. *The development preserves the historic structure; and*
  - 2. *The development will not detract from, damage, or destroy the value of the historic structure.*

#### **Analysis:**

The existing land use in the immediate vicinity of the Project site consists of commercial service and retail establishments. There are no residential uses located on the south side of Route 37 in the immediate vicinity of the Property. The Project is compatible with the adjoining uses in terms of building and site design. Therefore, this Rule is met.

#### **7:7E-8.13 Buffers and Compatibility of Uses**

- (a) *Buffers are natural or man-made areas, structures, or objects that serve to separate distinct uses or areas. Compatibility of uses is the ability for uses to exist together without aesthetic or functional conflicts.*
- (b) *Development shall be compatible with adjacent land uses to the maximum extent practicable.*
  - 1. *Development that is likely to adversely affect adjacent areas, particularly Special Areas N.J.A.C. 7:7E-3, or residential or recreation uses, is prohibited unless the impact is mitigated by an adequate buffer. The purpose, width and type of the required buffer shall vary depending upon the type and degree of impact and the type of adjacent area to be affected by the development, and shall be determined on a case-by-case basis.*
  - 2. *The standards for wetland buffers are found at N.J.A.C. 7:7E-3.28.*

3. *The following apply to buffer treatment:*

- i. *All buffer areas shall be planted with appropriate vegetative species, either through primary planting or supplemental planting. This landscaping shall include use of mixed, native vegetative species, with sufficient size and density to create a solid visual screen within five years from the date of planting.*
- ii. *Buffer areas which are forested may require supplemental vegetative plantings to ensure that acceptable visual and physical separation is achieved.*
- iii. *Buffer areas which are non-forested will require dense vegetative plantings with mixed evergreen and deciduous trees and shrubs. Evergreens must be at least eight feet tall at time of planting; deciduous trees must be at least three inches caliper, balled and burlapped; shrubs must be at least three to four feet in height.*

**Analysis:**

The proposed retail development is compatible with other sites in the Dover RHB (Retail Highway Business) and Manchester HD-3 (Highway Development) zoning districts in which the Property is located. There are no adjacent residential or industrial uses. Landscaping will be provided along Route 37, Northampton Boulevard, and the access driveways. The plantings will include 105 shade trees, 22 evergreen trees, 322 evergreen shrubs, and 204 deciduous shrubs. A masonry screening wall will be provided for the trash compactor areas in the back of the store. As discussed above, the Project complies with the wetlands buffer requirements contained in N.J.A.C. 7:7E-3.28. Therefore, this Rule is met.

**7:7E-8.14 Traffic**

- (a) *Traffic is the movement of vehicles, pedestrians or ships along a route.*
- (b) *Coastal development shall be designed, located and operated in a manner to cause the least possible disturbance to traffic systems.*
  1. *Alternative means of transportation, that is, public and private mass transportation facilities and services, shall be considered and, where feasible, incorporated into the design and management of a proposed development, to reduce the number of individual vehicle trips generated as a result of the facility. Examples of alternative means of transportation include: van pooling, staggered working hours and installation of ancillary public transportation facilities such as bus shelters.*
- (c) *When the level of service of traffic systems is disturbed by approved development, the necessary design modifications or funding contribution toward an area wide traffic improvement shall be prepared and implemented in conjunction with the coastal development, the satisfaction of the New Jersey Department of Transportation and any regional agencies.*
- (d) *Any development that causes a location on a roadway to operate in excess of capacity Level D is discouraged. A developer shall undertake mitigation or other corrective measures as may be necessary so that the traffic levels at any affected intersection remain at capacity Level D or better. A developer may, by incorporating design modification or by contributing to the cost of traffic improvements, be able to address traffic problems resulting from the development, in which case development would be conditionally acceptable. Determinations of traffic levels which will be generated will be made by the New Jersey Department of Transportation.*
- (e) *Coastal development located in municipalities which border the Atlantic Ocean, except as excluded under (e) 1 and 3 below, shall satisfy the requirements for parking specified in this subsection. Coastal development subject to this subsection shall provide sufficient on-site and/or off-site parking for its own use. In general, on street parking spaces along public roads cannot be credited as part of off-site parking provided for a project. All off-site parking facilities must be located either in areas within reasonable walking distance to the development or areas identified by any local or regional transportation plans as suitable locations. All off-site parking facilities must also comply with N.J.A.C. 7:7E-7.5(d), the parking facility rule, where applicable.*



1. *The non-oceanfront portions of the following municipalities which border the Atlantic Ocean are excluded from the parking requirement at (e) above:*
  - ii. *Brick, Toms River and Berkeley Townships, Ocean County: Those portions of these municipalities which are not located between Barnegat Bay and the Atlantic Ocean;*

**Analysis:**

Access to this site is proposed via the construction of new access roads from Route 37 and Northampton Boulevard. Two access drives off Northampton Boulevard near its intersection with Executive Drive will be constructed. One drive will cross in front of the proposed retail building and will be for patrons. The other drive will be for deliveries and will circulate trucks to the rear of the building. A turn around will be provided at the rear of the building to facilitate the movement of exiting trucks. An entrance/exit on Route 37 for eastbound traffic will be provided approximately 1000 feet west of the Northampton Boulevard intersection. New Jersey Department of Transportation ("DOT") requirements preclude locating this entrance any further to the east on the Property. To avoid environmentally sensitive areas, the 36 foot wide access drive will follow the northern site boundary before entering the parking lot.

While the Northampton Boulevard/Route 37 intersection is currently signalized, improvements will be made to the intersection in order to meet the requirements for obtaining a Major Access Permit from DOT. These improvements include re-aligning the ramp from Route 37 eastbound to Northampton Boulevard. The permit will be conditioned on the Applicant obtaining the DOT Major Access Permit prior to site preparation. Therefore, this Rule is met.

**Section 10 Compliance N.J.S.A 13:19-1 et seq.**

- 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.*

In addition to other information previously submitted to the Division, water and sewer commitment letters have been obtained from the respective utility or authority. In addition, the New Jersey Department of Transportation is requiring the proposed intersection improvements which will enable the Project to comply with air quality standards.

- c. *Provides for the [handling and] collection and disposal of litter [trash and refuse], 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.*

The Project includes areas for the storage of both solid waste and recyclables until those materials are picked up an authorized hauler.

***d. Would result in minimal feasible impairment of the regenerative capacity of water aquifers or other ground or surface water supplies.***

Based on the information provided to the Division by the Applicant, the Division has determined that the proposed Project meets the requirements with regard to water quality and stormwater management. These requirements are designed to protect ground and surface water quality and quantity. In addition to other information previously submitted to the Division, water and sewer commitment letters have been obtained from the respective utility or authority.

***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.***

While no construction activity is without some impact to the land resources on which it is located, this Project has been designed to cause minimal interference with the natural functioning of the plant, animal, fish, and human life processes at the site and the surrounding region by complying with applicable municipal and State land use regulations and by making every effort, short of Project abandonment, to accommodate a threatened species (northern pine snake) located within or adjacent to the Project area.

As discussed at length in the Endangered or Threatened Wildlife Habitat Impact Assessment and the Analysis of Conceptual Habitat Evaluation Method for Northern Pine Snakes, the Applicant has repeatedly demonstrated a willingness to accommodate pine snake habitat and populations in order to fulfill its obligation to minimize impacts as required under this section. Many of these accommodations, now codified in the proposed plan, were suggested by the Department as a potential way to resolve potential conflicts posed by the Project. These negotiations have continued to the present. Efforts on the part of the Applicant have included pine snake field studies with trapping and radio telemetry, multiple revisions in layout and reductions in the size of the site plan activities, permanently protected conservation buffers and corridors that surround an on-site pine snake den and link undeveloped on-site and off-site habitats (approximately 50% of the site will remain undeveloped following construction), and the purchase of an additional 192 acres to be permanently preserved as open space. Additionally, the Applicant has agreed to enhance a significant amount of the 192 additional acres of the off site preserved lands as enhanced habitat for pine snakes such that, through scientific evaluation by qualified professionals outside and in the Department of the factors contributing to pine snake habitat, the overall regional pine snake population is benefitting from this development.

To this end, the Department developed a Habitat Evaluation Method, subjected it to peer review, and applied the Method to the mitigation parcels, concluding that overall, with the required improvements, pine snake habitat will be enhanced in the area subsequent to the development. In assessing the improvement to regional pine snake habitat, the Department did not award any credit or recognize any improvement to pine snake habitat by the acquisition of the 212 acres, but rather only recognized a benefit to those areas on the 212 acres upon which the habitat for pine snake will be enhanced/improved. Given these facts, the Applicant contends that not only does the Project fully comply with the requirement to cause minimal feasible impact to natural processes, but that approval would enhance long term stability and viability of these processes within the region via permanent protection of approximately 212 acres of suitable threatened and endangered species habitats, including accompanying pine snake habitat enhancement. The Department concurs that the Project, as approved with accompanying conditions and required habitat enhancements, meets the regulations. The Department determined that no threatened, endangered animal or rare plant would be impacted with the pine snake habitat enhancements referenced herein. The Department will insure the implementation of the pine snake habitat enhancements by requiring all of the habitat enhancements to occur prior to the start of

development of the Project and by compliance inspections by the Department's staff to insure completion of the required habitat enhancements prior to the development of the Project start.

*f. Is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety and welfare.*

The Project involves construction of a commercial retail project consistent with Toms River Township and Manchester Township zoning ordinances and the State Development and Redevelopment Plan. The Project includes site remediation of certain of the lands to be acquired for preservation and habitat enhancement. The Project design includes best management practices and mitigation measures to minimize impacts to human life processes, including dust control practices, the use of efficient air pollution control devices, the operation of machinery during work periods permitted by local law and the use of noise abatement devices on all construction machinery.

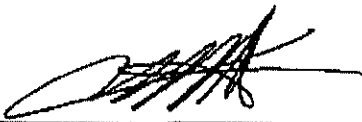
*g. Would result in minimal practicable degradation of unique or irreplaceable land types, historical or archaeological areas, and existing public scenic attributes at the site and within the surrounding region.*

The Department's State Historic Preservation Office has reviewed the Project and has determined that no historic or archaeological areas would be affected by the development. No public commenters have raised any issues concerning historic sites or archaeological areas. To the extent that any unique or irreplaceable land types are being degraded, the Applicant has taken measures to minimize the degradation. As noted above, the Applicant has complied with the Department's suggestions to reduce the size of the Project and modify the footprint of the Project. The Applicant will permanently preserve approximately 212 acres of lands that contain land types that are comparable to the land types that will be disturbed by the Project. The extensive existing development east and west of the property on both sides of Route 37 minimize the existing public scenic attributes at the Property. The off-site lands the Applicant will permanently preserve contain significant public scenic attributes.

**Recommendation:**      **CONDITIONAL APPROVAL**

**Permit Conditions:**      See permit.


Prepared by:

  
Eric M. Virostek  
Environmental Specialist 3  
Bureau of Coastal Regulation

Date:

4/18/12

Approved by:

  
David B. Fanz  
Manager  
Bureau of Coastal Regulation

Date:

4/18/12

**DIVISION OF LAND USE REGULATION  
BUREAU OF COASTAL REGULATION  
RESPONSE TO PUBLIC COMMENTS**

April 2012

CAFRA & Freshwater Wetland General Permit No. 6  
#1500-04-0001.1, APL080001, FWW090001

**Applicant:** Jaylin Holdings, LLC

**Location:** Block(s): 505 Lot(s): 14, 15  
Township of Toms River, Ocean County

Block(s): 44 Lot(s): 2, 3, 4 (part), and 5  
Township of Manchester, Ocean County

During the course of the Department's review of this application in 2011 and 2012, numerous comments were submitted in response to the notice of intent to settle and the notice of settlement. Although the substance of many of the comments has been addressed in the Summary Analysis, this section provides specific responses to the comments filed regarding the proposed development.

**Comments Related to Northern Pine Snakes:**

1. Some commenters have expressed the opinion that the mitigation properties are not suitable as habitats for the local population of northern pine snake and specifically reference the conditions at the "Beckerville Road" property as unacceptable.

**Response:**

The Department considered the suitability of these parcels as well as the potential for these habitats to be enhanced for the species. Many of the enhancements address the general lack of forest management and loss of nesting habitat identified in the Department's "Northern Pine Snake Status Assessment" as major threats to northern pine snakes. These enhancements will increase the habitat value of the mitigation parcels for the pine snake population. With regard to the specific conditions at the "Beckerville Road" property, the Department has required the removal of all waste, pollutants, and contaminant materials that may be present throughout the mitigation properties. The Department has further required that all soils shall be at or below the numeric concentrations needed to meet Residential Cleanup standards and at or below the numeric concentrations for all standards of waste in N.J.A.C. 7:26E-1.8 and the Groundwater Quality Standards. The removal of waste, pollutants and contaminant materials identified on, above, below or throughout the properties shall be completed so that, once the pine snake habitat enhancement is completed, there is no further need to disturb the habitat.

2. Some commenters have expressed concern that the proposed mitigation properties will not support the local pine snake population because, for example, the properties are separated by barriers to movement, such as heavily traveled roadways.

**Response:**

For the purposes of assessing the offsetting measures proposed by the applicant, the Department considered the losses and benefits to pine snake habitat within the population of pine snakes located in the northeast region of Ocean County. A "population" is generally understood to be the number of individuals within a given area. It is acceptable (and reasonable) to take a broad approach in evaluating the habitat losses or gains to a particular population. In its evaluation of the applicant's proposal, the Department did not infer that snakes from the development site directly interacted with snakes from the mitigation sites, but simply considers both areas to contain habitat that is utilized by individuals from the northeastern Ocean County pine snake population.

3. Some commenters have stated their concern that the northern pine snake population will not tolerate the proposed development.

**Response:**

The Department concluded that the portion of the site not being disturbed will retain some value for pine snakes based on the proposed enhancement to this area, the proximity of this area to other permanently preserved pine snake habitat, and the measures to be taken by the applicant (such as the snake wall) to prevent pine snakes from accessing the developed portion of the site. Furthermore, the preservation of this portion of habitat will provide any pine snakes that might use the documented hibernaculum on site with opportunity to access the adjacent habitat that is being preserved on adjoining lands.

4. Some commenters have expressed their concern that the mitigation properties look to the general region rather than focusing on the "local population." In a recent filing with the Department, the commenters noted their opinion that habitat enhancements will not benefit the local population because they will be performed at distances further than pine snakes have been documented to move.

**Response:**

See Response #2 above.

5. Some commenters have stated their opinion that the 150 ft. buffers included in the proposed development are not sufficient to ensure adequate protection of the northern pine snake population. Commenters recently described 300 ft. buffers as "the usual size" and further questioned whether all existing 300 ft buffers on other sites will be reduced to 150 ft to allow for denser development.

**Response:**

The Department recognizes that, in some other instances, 300 foot buffers have been used to ensure the protection of northern pine snakes. Indeed, there have been other instances where the Department has approved buffers that are less than 300 feet. The regulations do not define a specific buffer and the Department has not identified one buffer as superior to the others. Rather, the Department ensures the protection of a species based upon the specific facts presented on a case by case basis. Here, the hibernaculum's proximity within approximately 240 feet of Route 37 and significant

development are existing conditions that the Department cannot change. Based on these specific facts, the Department has determined that 150 foot buffers are sufficient, especially when combined with the construction of the linear wall designed specifically to prevent pine snake movements into the development or onto Route 37 and to channel snake movements to preserved habitats.

6. Relying on reports prepared by their experts, some commenters question whether the habitat enhancements are based on consideration of actual northern pine snake behavior.

**Response:**

The Department's consideration of the proposed habitat enhancements were based on documented pine snake habitat use, personal observations, discussions with experts, and published research on the species (for a summary of relevant published literature on northern pine snakes see the Department's 2009 publication entitled, "Status Assessment of the Northern Pine Snake (*Pituophis m. melanoleucus*) in New Jersey: An Evaluation of Trends and Threats"; hereafter referred to as the Department's "status assessment.") For example, artificial dens have been shown to be suitable locations for overwintering pine snakes. The construction of 3 artificial dens is intended to provide alternative hibernacula locations for pine snakes that may have previously used the area for denning. As further example, in determining appropriate sand depth for the experimental nesting habitat creation on the "Beckerville Road" mitigation parcel, the Department relied on the average nest chamber depths published in Drs. Burger and Zappalorti 1991 report.

7. Regarding the Jenkins memorandum, commenters have provided a report stating that exclusion fences are not effective and can actually harm snakes and other wildlife. The commenters recommend the second alternative in the Jenkins memorandum, with the inclusion of covers inside the boxes or funnel traps.

**Response:**

The required type of fence in this case has been specifically designed to avoid these problems and should provide an effective barrier that does not harm snakes. The exclusion fences are not intended as permanent measures. The dual fences will be present only during construction until the permanent snake wall is constructed. The fences will be monitored daily to minimize risk to snakes and wildlife.

8. In their recent comments, supported by their reports, the same commenters also expressed concern that the habitat enhancements will not be completed when they will be most needed by the pine snake population.

**Response:**

The Department has required that the installation of all habitat enhancements except for the planting of saplings be completed prior to allowing any site disturbance to the proposed development area.

9. Some commenters expressed the opinion that the presence of wetlands on the proposed mitigation properties diminishes their suitability as pine snake habitat. Also, the commenters recently claimed the Department will authorize development on prime pine snake habitat without assessing whether the mitigation properties include wetlands.

**Response:**

Recent radio-telemetry research has shown that pine snakes do use wetland habitats within their home range, but wetlands are not considered as critical habitat for pine snakes. Therefore, when evaluating the applicant's mitigation plan, the Department did not consider wetland habitat for calculating impacts or mitigation for pine snakes when evaluating this application.

10. Several commenters expressed concern that the mitigation properties do not form a contiguous area proximate to the site sufficient to support the pine snake population.

**Response:**

See response # 2. Additionally, the applicant proposes the permanent preservation of 20.9± acres of on-site forested/vegetated open space to serve as a corridor linking the on-site habitat with the thousands of acres of adjoining habitat located directly across the Conrail railroad ROW. Within this corridor, the applicant proposes northern pine snake habitat enhancement initiatives. Directly across the Conrail ROW, the applicant purchased 21 acres that border the lands that are presently pine snake habitat and are planned to be preserved pursuant to the Heritage Minerals settlement. This 21-acre parcel provides a direct link between the hibernaculum and the pine snake habitat preserved onsite and the existing pine snake habitat that is on the Heritage Minerals parcel, planned for future permanent preservation. Moreover, this mitigation property includes habitat characteristics that are preferred by northern pine snake. The Heritage Minerals parcel which is pine snake habitat and is planned for preservation borders the Crossley Preserve and the Whiting and Manchester Wildlife Management Areas. The mitigation property fills a crucial gap that results in an overall contiguous area of more than 21 square miles of preserved lands. The applicant has purchased five outparcels that will also fill gaps in the overall protected lands in Manchester Township. These properties lie beyond the home-range of the two snakes documented on the development site, but they will contribute significantly to the protection of the northern pine snakes in the northeastern region of the Pinelands. The acquisition of these properties prevents further curtailment of pine snake habitat and diminishes the risk of limiting genetic diversity among pine snakes in this region due to isolation. Thus, the applicant has gone to extraordinary lengths to ensure the protection of the northern pine snake in accord with the Department's mission.

11. Regarding the August and December 2011 Golden and Jenkins memoranda, some commenters discussed the timing restrictions on the implementation of enhancements intended to help the pine snakes and noted the most vulnerable times for pine snakes (from November to the end of April). In particular, the commenter note that the Golden memorandum indicates that planting will occur in March or April, prior to the completion of construction.

**Response:**

The Department requires planting in March and April because those months typically see the greatest rain fall, which is necessary for the plantings to take root. This will maximize the success of the plantings which will maximize the protection of pine snakes.

12. Regarding the August and December 2011 Golden and Jenkins memoranda, commenters stated that the success of the site inspection depends on the season and weather conditions because pine snakes spend a considerable amount of time underground.

**Response:**

The inspections will be done on a daily basis during site preparation and construction to ensure protection of the pine snakes.

13. Commenters note that pine snakes will traverse dense pitch pine forests and so the proposed cover will not keep snakes away from the highway.

**Response:**

The plantings are intended to reduce the potential that snakes will use the area adjacent to the road for nesting or basking, and, therefore, reduce the likelihood of snakes to travel near the roads.

14. Commenters said the Jenkins and Golden memoranda will not markedly improve the pine snake habitat on either the development site or mitigation lands and do not adequately respond to concerns about habitat enhancements raised in previous comments.

**Response:**

It is the opinion of the Department's experts that the required habitat enhancements will more than off-set the lost habitat value associated with the proposed development. In acquiring these parcels and proposing specific pine snake habitat enhancements, the applicant is addressing some of the concerns raised in the Status Assessment. Applicant's significant actions are discussed in detail above, but some require further note here. Notably, the Status Assessment stresses that the isolation of pine snakes in New Jersey from populations of pine snakes located in other States increases the risk that pine snake population in New Jersey may fall below a minimum viable population size. The applicant's acquisition of several properties fills in gaps and expands the open space furthering the Department's mission to ensure that a viable population size is maintained. The Status Assessment also notes that even where there are development restrictions based on the presence of threatened and endangered species, there continues to be development that impacts the area within the range of known individual pine snakes. To address this concern, the approximately 89.3 acre parcel to be purchased by the applicant is to be permanently preserved and will be enhanced to increase its suitability for pine snakes instead of being developed with four (4) single family dwellings as authorized by Manchester Township's land use ordinances and the Pinelands Comprehensive Management Plan. The Status Assessment identifies off-road vehicles as a significant threat to pine snakes, so the applicant is proposing measures that will significantly reduce the ability of off-road vehicles to utilize its properties. A complete overview of the applicant's significant measures and their response to concerns are discussed above.

15. Some commenters contend that the best protection for the local northern pine snake population, and the community at large, would be for the Department to again deny the application and oppose Settlement.

**Response:**

When circumstances merit, the Department denies permit applications. Upon reviewing the Project, the Department has twice denied a permit to the applicant. The applicant has since made substantial and significant modifications to its original application. The Department has completed extensive review of the applicant's proposed project, as well as the significant measures taken to protect the local pine snake population and contribute to its sustainability. The Department now finds that



regulatory requirements have been met. It should be noted also that the pine snake den located on the development site lies within approximately 240 feet of Route 37 and other significant development, as shown by the aerial photographs on file. The no-build alternative commenters recommend would leave the pine snakes utilizing the property vulnerable, whereas the applicant is required to construct a wall and make habitat enhancements intended to minimize human and snake interaction. While preventing northern pine snakes from inadvertently utilizing the developed portions of the site, the bordering roads, and developed properties, the snake wall will minimize the loss of snakes and encourage unimpeded access for the snakes to contiguous on-site and off-site foraging areas as well as access to the on-site hibernaculum. Similarly, the applicant is required to remediate its properties to residential standards and preserve those properties from further development. Commenters' alternative would not protect the population from Route 37, enhance existing pine snake habitat, or remediate disturbed lands.

16. One commenter recommended converting the Walmart on Route 37 into open space preserved for the pine snakes before the Department authorizes the development of the proposed site.

**Response:**

The Department considers the lands proposed for preservation to be better suited for the protection of northern pine snakes than the Walmart site which abuts heavily traveled Route 37. Construction of the commercial facility along the intensely developed Route 37 highway corridor in conjunction with construction of the permanent linear barrier wall surrounding the hibernaculum along with adequate preservation and enhancement of 212 acres of pine snake habitat provides better protection than leaving the population unprotected near the highway.

**Comments Related to Coastal Zone Management Policy:**

1. Some commenters have expressed concern that the proposed development will increase run off into the Barnegat Bay contrary to the current comprehensive action plan intended to address the health of the Bay.

**Response:**

The Department is committed to implementation of the comprehensive action plan to address the health of Barnegat Bay. The Department's stormwater regulations are designed to avoid adverse impacts to ground and surface water quality and serve to protect Barnegat Bay, which is located downstream. The Project complies with these regulations. As such, the Project will not adversely impact the Barnegat Bay.

2. One commenter has twice noted its support for the settlement and the Department's compliance with Governor Christie's Executive Order No. 2 requiring the application of "common sense principles" in administrative action.

**Response:**

The Department acknowledges the commenter's support. Executive Order No. 2 requires that State agencies reduce unnecessary regulatory burden on businesses so that development and economic growth continues to move the State forward. However, the goal of reducing regulatory burden does not diminish the Department's mission to protect the environment. The Settlement addresses development that complies with the regulatory requirements and protects the environment.

3. Some commenters have expressed their concern that this settlement will be viewed as precedent setting and "so expose vast swaths of undeveloped land proximate to the proposed project area (and Barnegat Bay) to intensive and injurious development."

**Response:**

The Department reviews each permit application on a case by case basis. Here, the proposed development is located in a Pinelands Regional Growth Area. The property is bounded by significant development to the west, and the parcel is also bordered by Route 37 and Northhampton Blvd. The factual circumstances presented in this case, including the supplemental land acquisitions and pine snake habitat enhancements, the adjoining pine snake habitat and the findings in this case, are not applicable to another proposed development. The Department reserves the right to review each application on its own individual merits.

4. Commenters also noted their concern that the Department sought a political "way around" the CAFRA regulations rather than following the regulations to the letter.

**Response:**

The settlement is fully supported by the CAFRA regulations. The Department has not waived or otherwise ignored applicable regulatory requirements. Instead, the Department has required the applicant to make significant modifications to its original development proposal and to acquire, preserve and enhance over 200 acres of land to ensure compliance with the Coastal Zone Management regulations.

5. Some commenters noted their concern that the project location is in an area of the CAFRA Zone that is overlapped by the Pinelands National Reserve and that the Memorandum of Understanding between the Department and the Pinelands Commission has not been met.

**Response:**

As discussed in comment no. 4 above, the project location is not within the Pinelands National Reserve, but in the Pinelands Management Area. Specifically, the project site is located within the Pinelands Regional Growth Area. In Regional Growth Areas, the Department solicits comments from the Pinelands Commission, but the Commission defers to the Department for final decision.

**Comments with Regard to Legal Authority:**

1. Some commenters contend that the Settlement is not supported generally by environmental legislation or the Department's own regulations.

**Response:**

The Department has reviewed the applicant's project to ensure compliance with all applicable regulations. As noted above, the Department has required the applicant to make significant modifications to its original development proposal. In furtherance of the Department's mission to actively conserve New Jersey's biological diversity, the Department has been required the applicant to preserve and enhance over 200 acres of land for the protection of the northern pine snake. The Department's action was squarely within the authority delegated to it by the Legislature and in accord with the agency's regulations.

2. Some commenters have repeatedly claimed that the plain language of the CAFRA regulations do not permit off-site mitigation.

**Response:**

The Department believes that the proposed settlement conforms to the CAFRA rules. No "mitigation value" was assigned to the acquisition or conservation protection from development of the lands in the applicant's mitigation plan. Instead, only the proposed habitat enhancements on the lands permanently preserved by the applicant were considered to offset the estimated loss in habitat value that would occur in the development area. The Department has not allowed the proposed mitigation as an exception to or waiver of the CAFRA rules.

3. Some commenters have questioned the tree preservation percentage and contend that the proposed pine snake corridor may not form a part of that percentage.

**Response:**

The total amount of tree planting and preservation required for the entire site is 6.117 acres. The proposed planting and preservation for the entire site is 8.708 acres. The Department has calculated these percentages in accord with the applicable regulations.

4. Some commenters claim that the proposed development exceeds the maximum allowable impervious coverage under the CAFRA regulations and contend that the coverage for coastal centers cannot be applied to the proposed development. These comments were recently enhanced with the contention that the coverage is absent from on the site plan.

**Response:**

The proposed development straddles the municipal boundaries of the Township of Toms River and Manchester Township. The underlying planning area across the entire site is a Coastal Suburban Planning Area, which authorizes a maximum of 30% impervious cover. The Department has calculated the total allowable impervious cover for the development to be 18.836 acres. The applicant proposes a total of 14.108 acres of impervious cover. The Department notes that the portion of the site located in the Township of Toms River lies within the boundaries of the Toms River Coastal Regional Center which has a maximum impervious cover limit of 80%. The applicant proposes 11.960 acres, or 76.33%, of impervious cover in the Township of Toms River. In the Suburban Planning Area of Manchester Township, the applicant proposes 2.148 acres, or 10.22%, of impervious cover.

5. Some commenters claim that the portion of the site within the Township of Toms River does not lie within the boundaries of the Toms River Coastal Regional Center, because Toms River Township never formally adopted that portion of the site. Based on this rationale, the commenters contend that impervious coverage on the entire site should fit within the Suburban Planning Area limits. Commenters recently raised this concern again and requested a copy of the Toms River resolution or concurrence in the designation.

**Response:**

The Department disagrees with the commenters' claim that a portion of the site lies outside the Township of Toms River Center designation. The materials currently under review are the result of

ongoing and repeated appeals from the original 2004 application. At the time of the 2004 application, the Toms River Regional Coastal Center was in existence. The Department's original denial of the CAFRA application in June 2006 found that the development of the Toms River portion of the site was subject to the Coastal Center impervious coverage limit of 80% and vegetative cover percentage of 10% tree preservation for the forested portion of the site and 0% tree preservation for the unforested portion of the site. The applicant's revised proposal relates back to the 2006 denial and the present development proposal and accompanying permitting decision is the result of a continuing alternate dispute resolution process with the Department. The application was received by the Department prior to February 7, 2005 and was deemed complete for final review prior to March 15, 2006. Accordingly, the Department has reviewed applicant's impervious coverage limitations based upon the original submission which remains on appeal.

6. Some commenters have opined that the Permit Extension Act is not applicable to the application because the site is not located within a mainland coastal center. Commenters again argue that the Township never approved the site as a part of the center. In a recent filing, the commenters enhance their previous comments by contending that the area is environmentally sensitive and not appropriate for center designation.

**Response:**

The issuance of this permit is a result of an ongoing appeal and accompanying settlement discussions stemming to the original denial. The center designation relates back to the original application which is still on appeal. The extension period under the Permit Extension Act ("PEA") was initially defined as beginning January 1, 2007 and continues through December 31, 2012. An approval is defined very broadly and includes "any other government authorization of any development application . . . whether that authorization is in the form of a . . . permission, determination, interpretation . . ." N.J.S.A. 40:55D-136.3.

As a result of the appeal of the 2006 denial, the Department's determination that the development was in a Coastal Regional Center remained applicable as of January 1, 2007. Under the PEA, the Department's determination that the site is subject to the impervious coverage and vegetative cover percentages of a coastal center are extended to cover the current proposal. The PEA is intended "to prevent the wholesale abandonment of approved projects and activities due to the present unfavorable economic conditions. N.J.S.A. 40:55D-136.2(m). The PEA extended center designations pursuant to CAFRA as well as center determinations made pursuant to the State Planning Act. N.J.S.A. 40:55D-136.3. This is confirmed through the Department's own website and the document contained on that website entitled "Mainland Coastal Center Boundaries Extended Under the Permit Extension Act of 2008." With regard to the commenters' claim that the area is environmentally sensitive, the Department finds no support for that contention as that term is defined in the PEA. Specifically excluded from the definition of environmentally sensitive areas were growth areas designated in the Pinelands Comprehensive Management Plan. This property is designated as a Regional Growth Area in the CMP.

7. Some commenters claim noncompliance with the Basic Location Rule at N.J.A.C. 7:7E-6.2.

**Response:**

Pursuant to the regulation, the Department may reject or conditionally approve the proposed development of the location when reasonably necessary. The decision is not automatic, but reliant on the Department's discretion. Here, the Department, for the reasons stated above finds no need to exercise its rights pursuant to the Basic Location Rule.

8. Some commenters claim that the proposed settlement is in direct contravention to the Pinelands Comprehensive Management Plan, because it does not avoid irreversible, adverse impacts on the habitat of the local population of northern pine snakes.

**Response:**

The regulations and standards contained in the Comprehensive Management Plan are designed to promote orderly development to preserve and protect the significant and unique resources of the Pinelands. To that end, the Comprehensive Management Plan designates certain areas to be Regional Growth Areas. The subject property is located in a Regional Growth Area. In addition, to allowing development within an area designated for growth, the settlement advances the goal of protecting the northern pine snake. The applicant will undertake the significant mitigation efforts to ensure no irreversible, adverse impacts on the northern pine snake population. Therefore, the Department believes that the proposed settlement conforms to the purpose, intent, and letter of the Pinelands Comprehensive Management Plan.

9. Some commenters have expressed their concern that the application fails to comply with water quality standards due to the location of the basins in environmentally sensitive areas. These comments were reinforced in a recent filing with the Department.

**Response:**

The Department has reviewed the proposed development and found compliance with water quality standards. The location and structure of the stormwater basins conforms to applicable standards. As discussed above, the proposed infiltration/detention basins will 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 required buffers to freshwater wetlands are also maintained.

10. One commenter evaluated the applicant's stormwater management system, reviewed the engineering assumptions underlying the proposed system, and opined that the proposed system does not comply with the stormwater regulations, including post-construction peak flow rate control, groundwater recharge, and stormwater runoff quality standards.

**Response:**

The Department's regulations establish the design and performance standards for stormwater management measures as well as the safety standards for stormwater management basins. The Department has found that the Project will fully comply with all stormwater management requirements. These requirements are designed to avoid adverse impacts to ground and surface water quality and serve to protect Barnegat Bay which is located several miles downstream.

11. Some commenters have opined that this development should be reviewed as though it is assigned a limited growth rating and so a major commercial development on the site is not authorized. Recently expanding on their previous comments, the commenters explained that the area should be designated a limited growth rating because it is an upland waterfront development with an environmentally sensitive area due to the depth of the water table.

**Response:**

The Department disagrees with commenters underlying assumptions. The site is not located in an environmentally sensitive area. Instead, the site is located in an area designated for growth under the Pinelands Comprehensive Management Plan. Development is expected and planned for this location.

**Comments Related to Traffic and Community Concerns:**

1. Some commenters have expressed concern that the proposed development would result in a significant increase in traffic that will require additional improvements and necessitate an air quality study.

**Response:**

Traffic impacts have been discussed above. Notably, the applicant is proposing changes to traffic and signaling patterns to minimize traffic impacts in the area. DOT has conditionally approved the intersection improvements that will enable the development to comply with air quality standards. An additional air quality study is not necessary.

2. Commenters recently expressed further concern that the traffic report does not include traffic generated by a new WaWa and seek the Department's independent review in addition to the DOT's review.

**Response:**

The applicant needs to obtain any and all relevant DOT approvals as part of this process. The DOT's review will consider any new development adding to the traffic congestion or necessitating additional improvements.

3. Some commenters claim that an additional retail store is not necessary and may contribute to the economic deterioration of Toms River Township by forcing local businesses to close.

**Response:**

The Department acknowledges the commenters' concerns, but the Department's regulations do not consider the potential economic impact or necessity of a competing retail store.

**Comments related to the Department's Habitat Evaluation Method:**

1. One commenter questioned the HEM requirement for direct coordination with the Department and sought confirmation that the Department would work with applicants to evaluate the suitability of a site for the northern pine snakes and ensure no net loss of suitable habitat on site.

**Response:**

Similar to the Federal HCPs and HEPs, the pine snake HEM requires direct collaboration with the government agency responsible for the protection of the species being addressed. The Department will continue to work with applicants.

2. Some commenters expressed concern that the Conceptual Model and No Net Loss of Habitat Value methodology were not presented to the Endangered and Nongame Species Advisory Committee ("ENSAC"), tested, peer reviewed, or open to public comment.

**Response:**

The Department does not typically solicit ENSAC input on individual permit decisions. The use of the Conceptual Model and No Net Loss of Habitat Value methodology for Pine Snakes was developed specifically for evaluating and addressing the impacts of this project. However, the Department did solicit, receive, and incorporate input from pine snake experts in the preparation of the Conceptual Model.

3. Some commenters took issue with the model's failure to include the presence of actual snakes as a modeling criterion and questioned the lack of evidence of northern pine snakes present on or finding critical habitat within the mitigation properties. Recently-filed comments also state that the presence of snakes or the presence of known hibernacula should take precedence in the evaluation and scoring process.

**Response:**

All habitats considered for enhancements were identified as existing pine snake habitat based on the Department's Landscape Project, and the Division of Fish and Wildlife's species-based-patch pine snake habitat model (New Jersey Division of Fish and Wildlife. 2012. New Jersey Landscape Project, Version 3.1. New Jersey Department of Environmental Protection, Division of Fish and Wildlife, Endangered and Nongame Species Program. pp. 36). By taking this approach, the Department did not rely on pine snake sightings on a particular parcel to consider it a pine snake habitat. Moreover, because it would be nearly impossible to exhaustively survey all of the pine snake habitat in New Jersey, the Department does not have a comprehensive list of pine snake hibernacula locations in the State. As a result, using known hibernacula as the most important criterion for valuing habitats with the pine snake HEM could result in undervaluing important habitats merely because there are no *documented* hibernacula in an area even though (undiscovered/undocumented) hibernacula may actually exist in the area.

4. Commenters' experts contend that the Department's reliance on its database only represents a limited dataset that likely underestimates where pine snakes exist and creates bias.

**Response:**

See Response #3 above.

5. Some commenters have questioned the Department's threat assessment in the HEM as biased and deterministic. In a recently filed expert report, commenters expand on these concerns and argue for a quantitative assessment.

**Response:**

A quantitative threat assessment would have to include, and rely on, an extremely complex relationship between numerous variables and would therefore be subject to great uncertainty. The Department instead opted for a methodology that used guided expert evaluation to provide judgment re. the value of areas of pine snake habitat. In the Department's HEM, the evaluation of threats was a

qualitative scoring, guided by application of specific principles and in some cases a threat could make a parcel more valuable as a mitigation site. For example, the threat of development would make a parcel more valuable to obtain as a mitigation parcel because permanent preservation would remove this threat (see the Department's 2010 "Conceptual Habitat Evaluation Method for Northern Pine Snakes" for additional details on the qualitative nature of the scoring and additional examples of the threats that were considered).

6. Commenters' expert report contends that the HEM assigns value to habitat enhancements that are inappropriate for pine snake biology, fail to consider other ecological measures that are important to the maintenance of local populations, and are unlikely to succeed.

**Response:**

As referenced in the Department's 2010 "Conceptual Habitat Evaluation Method for Northern Pine Snakes", the HEM was based on detailed scientific research on the habitat requirements of pine snakes as well as the extensive field work of DEP and independent consultants. Where possible the Department required habitat enhancements which have been previously demonstrated in scientific literature and shown to benefit the northern pine snake. Furthermore, the pine snake habitat enhancements required by the Department were designed to achieve the documented and published needs of northern pine snakes.

7. Some commenters contend that the HEM uses subjective rankings of habitats and habitat enhancements with no basis in any objective research and qualitative study.

**Response:**

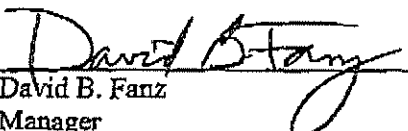
The Department's pine snake HEM takes the biological and physical characteristics of a site into consideration and assigns a score (or value) to the site being considered based on guided expert opinion rather than on quantitative models. Enhancements to habitat quality based upon future proposed enhancement carried out on a site, to augment habitat or abate threats, are also quantifiable using this method. The criteria used in the HEM are based on extensive scientific research of pine snakes and their habitat preferences (see the Department's 2010 "Conceptual Habitat Evaluation Method for Northern Pine Snakes" for background and references).

8. Some commenters contend that the HEM cannot be tracked or followed to determine success or failure, because it has been untested and there is no baseline data.

**Response:**

See Response #6. Furthermore, during the initial evaluation of the project site and the mitigation sites the Department and the applicant's consultants visited each site and assigned a baseline habitat value using the HEM. This baseline value could be compared against future habitat value to measure success.

Approved by:

  
David B. Fanz  
Manager  
Bureau of Coastal Regulation

Date:

4/12