



AMERICAN LITTORAL SOCIETY

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March 10, 2011

Via Electronic Mail

Ocean County Section Chief
Division of Land Use Regulation
Department of Environmental Protection
501 East State Street - 2nd Floor
Post Office Box 420 501-02A
Trenton, New Jersey 08625

Re: CAFRA Application #1500-04-0001.2 - CAF090001
Wal-Mart, Ocean County
Block 505, Lots 14 & 15
Toms River Township, Ocean County
Block 44, Lots 2, 3, 4 & 5
Manchester Township, Ocean County

Dear Sir or Madam:

Please accept these comments on behalf of the American Littoral Society in opposition to the “Notice of Intent to Settle” on the CAFRA Individual permit referenced above as published in the January 12, 2011 bulletin. These comments are timely based on the extension of an additional 15-day comment deadline from date of publication, as per the Department’s notice in the February 23, 2011 bulletin.

As it is well aware, DEP lacks the authority to use any form of settlement process to circumvent CAFRA’s substantive permitting requirements. DEP previously determined that the subject application failed to meet many of these substantive requirements (NJDEP Permit Denial 3/15/10, attached). There is nothing in the record to now suggest that this application—with no perceived revisions to the proposed development—somehow meets any of these substantive requirements. We implore DEP, as our courts have, to ‘be diligent in preventing the yard-by-yard destruction of environmentally sensitive land’ rather than go along with this transparent attempt to avoid substantive provisions of CAFRA that are designed to protect our sensitive coastal environs.

Further, we object to the fact that even if the Department asserts that it were within their authority, we have not have not been provided any actual proposed settlement for review and comment.

Instead, a review of the ‘settlement’ file provides a collection of reports by the applicant and NJDEP staff and the same development plan for the subject site. If a settlement document were

available, it would undoubtedly provide for more meaningful public comment on how the Department has presumably arrived at findings of compliance under the rules on an application that was previously denied.

Without such a document, there is no ability to assess critical issues, such as how proposed conservation measures will be implemented, what mitigation activities will take place and what will be required if the proposed mitigation measures do not work. There is absolutely no explanation of how NJDEP would reverse its findings and conclusions of law set out in the prior permit denial for this same development plan, particularly with respect to the grounds for denial that are not affected by the habitat mitigation model and proposal.

The American Littoral Society maintains our original objections on the project and as mentioned above we are unable to comment further on the Department's proposed settlement findings specifically as no such document is available. We only have the applicant's submittals for what they perceive to be in compliance with the rules; but this does not provide the necessary information to determine what information the Department is using to make new affirmative findings under the CAFRA regulations that would justify the issuance of permits.

Specifically we find that issuance of permits is not permissible because of a failure to make affirmative findings of compliance with Coastal Decision Making Process –

N.J.A.C. 7:7E-1.5

In section 10 of the CAFRA statute, the New Jersey legislature set forth certain findings that must be made by DEP before it can issue a CAFRA permit. N.J.S.A. 13:19-10. Thus, in addition to compliance with the specific Coastal Rules that apply to each project, every project must be analyzed in light of these findings. Significantly, even if a development project meets every other Coastal Rule, DEP cannot issue a CAFRA permit unless it finds that the Project does all of the following:

1. Conforms with all applicable air, water and radiation emission and effluent standards and all applicable water quality criteria and air quality standards;
2. 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;
3. Provides for the collection and disposal of litter, recyclable and solid waste in such a manner as to minimize adverse environmental effects and the threat to public health, safety and welfare;
4. Would result in the minimal feasible impairment of the regenerative capacity of water aquifers or other ground or surface water supplies;

5. 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;
6. Is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety and welfare; and
7. Would result in minimal practicable degradation of unique or irreplaceable land types, historical or archaeological areas, and existing scenic public attributes at the site and within the surrounding region.

With regard to this project, it is not possible for DEP to make the necessary findings under this provision.

N.J.A.C. 7:7E-3.38 Endangered or threatened wildlife or plant species habitats

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

Based on the submitted new information the applicant asserts that the rule permits off-site mitigation to justify destruction or degradation of on-site threatened and endangered wildlife species habitats. The rule does not make any allowance for off-site mitigation as an exception to the prohibition.

In support of our objection, we reference the DEP staff memo prior to, and in support of the basis for the 3/15/10 denial, from John H. Heilferty, Principal Environmental Specialist Division of Land Use Regulation (DLUR) to Eric Virostek, Project Manager, DLUR, dated March 10, 2010. Mr. Heilferty states that the CAFRA rules would require the applicant to prove no direct on-site impact, no secondary on-site impact, and no secondary impact in the surrounding area because “any such adverse affects are prohibited by the rule.” Please also see comments on behalf of Pinelands Preservation Alliance, which we support and incorporate into these comments by reference.

N.J.A.C. 7:7E-5B.4., N.J.A.C. 7:7E-5B.5 and N.J.A.C. &:7E5B.6 (e), (g) Impervious Cover Limits, Vegetative Requirements in a CAFRA area and Mainland Coastal Centers

This site is designated Planning Area 2, a Suburban Planning Area, where a maximum 30% impervious cover is permitted in accordance with N.J.A.C. 7:7E-5B.4. This application proposes 73.11% impervious cover and also fails to meet the minimum required Forest Preservation requirement of 35% in accordance with NJAC 7:7E-5B.5.

The applicant continues to erroneously state that they are permitted 80% impervious cover because the site is eligible for inclusion in the Toms River Coastal Center under the Permit Extension Act of 2008. Please see our 1/14/10 comments on the application (attached) outlining this issue. Also see 3/15/10 denial of permit by DEP with findings of non-compliance on same. The Department has offered no explanation on reversal of their findings; and the assertions of the applicant that the limitations of the

Permit Extension Act do not apply based on their original 2005 application are inaccurate and, frankly, laughable.

Lastly, Governor Christie has put in place an agenda to restore Barnegat Bay. The reversal of this prior permit denial with the issuance of a permit on an application such as this is in direct conflict with the policy objectives of his agenda, particularly because of the impacts a development of this magnitude will have on Barnegat Bay.

Based on the substantive issues outlined and the policy objectives of Governor Christie, the Department must not reverse the prior decision to deny this application.

Respectfully,

Helen Henderson

Helen Henderson
Policy Advocate