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**via** regular mail and email [ryan.anderson@dep.nj.gov](mailto:ryan.anderson@dep.nj.gov)  
Wetlands Region Supervisor  
Division of Land Use Regulation  
NJDEP, Mail Code 501-2A  
P.O. Box 420  
Trenton, NJ 08625-0420

Re: NJDEP Letter of Interpretation  
Jaylin Holdings, LLC c/o Grunin Properties  
File No.: 1500-04-0001.3 (FWW150001)  
Block: 44 Lot: 9  
Approximately 1801 New Jersey State Highway 37  
Manchester Township, Ocean County

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Dear Mr. Anderson,

I am writing on behalf of the Pinelands Preservation Alliance and Save Barnegat Bay to provide comments to the New Jersey Department of Environmental Protection ("NJDEP") concerning this Letter of Interpretation ("LOI").

This property ("the Manchester Site") is dominated by a single, contiguous forested wetland, with isolated areas of developable land at the corners of the property. Jaylin Holdings LLC did not submit this LOI application in order to develop these isolated corners. Rather, Jaylin intended to add the acreage of developable land on the Manchester Site into the impervious cap calculations for Jaylin's CAFRA application concerning the neighboring property (the "Proposed Development Site"). At the time of the LOI application, Jaylin intended to construct a Walmart on the Proposed Development Site. On March 8<sup>th</sup> of this year, Walmart

pulled out of the project.<sup>1</sup> Jaylin does not currently have a viable use for the Proposed Development Site: which eliminates the need for this LOI.

If NJDEP does intend to continue expending resources on the LOI review process, then the agency must return to the original, correct classification of the entire Manchester Site wetland as “exceptional”.

In October 2015, NJDEP correctly classified the entirety of this wetland as “exceptional”. Later, under pressure from Jaylin, NJDEP reversed that decision. This reversal violates the Freshwater Wetlands Protection Act (“FWPA”, N.J.S.A. 13:9B) in six separate ways. NJDEP must correct these violations by returning to the original, correct, October 2015 classification.

First, Jaylin failed to submit a demonstration of the habitat’s long-term prospects, which NJDEP is required to consider in the wetland classification process. Second, NJDEP improperly dismissed the presence of documented habitat for Northern pine snake on the Manchester Site, which mandates an “exceptional” wetland classification. Third, NJDEP relied upon a February 2016 survey that failed to meet the standards set in the FWPA Rules and NJDEP’s Technical Manual. Fourth, NJDEP did not properly weigh the findings in the deficient February 2016 survey against the superior evidence in the Landscape Maps. Fifth, NJDEP split the single, contiguous wetland on the Manchester Site in two for classification, which violates the FWPA Rules and NJDEP’s Technical Manual, and has no scientific or legal basis. Finally, in June 2016, surveyors documented a species occurrence of barred owl in this area, and

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<sup>1</sup> <http://www.app.com/story/money/business/main-street/2017/03/08/walmart-abandons-toms-river-plans-after-13-years/98919376/>

collected evidence that the Manchester Site may be serving as habitat for several other threatened and endangered species as well.

In sum, the LOI is based on incomplete and inaccurate information. Such LOIs are void:

A person who is issued a letter of interpretation pursuant to this subchapter shall be entitled to rely on the determination of the Department, concerning the presence or absence, or the extent of freshwater wetlands... *unless the letter of interpretation is determined to have been based on inaccurate or incomplete information...*

N.J.A.C. 7:7A-3.6(a)(emphasis added).

The Appellate Division has remanded NJDEP decisions when the agency failed to consider information which was required by law to be part of the review process. M. Alfieri v. NJDEP, 269 N.J.Super. 545, 560 (App. Div. 1994).

- 1) **Jaylin failed to submit a demonstration of the long-term prospects of threatened species habitats, which the FWPA requires to be considered in the wetland classification process.**

In October 2015, NJDEP correctly classified the Manchester Site wetland as “exceptional,” based on the Landscape Maps and a follow-up October 2015 ground survey.<sup>2</sup> The Landscape Maps and the October 2015 survey both identify this wetland as a habitat for Pine Barrens treefrog and Northern pine snake. Id. The October 2015 classification is further supported by the critical role that this wetland plays in the Barnegat Bay tributary system, as well as information from the state’s Natural Heritage

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<sup>2</sup> October 13, 2015 Threatened and Endangered Species Habitat Review, July 1, 2016 Amplification Letter p. 5.

Program Database, the wetland's listing on the EPA Priority Wetlands List, and the wetland's presence in the Pinelands National Reserve.<sup>3</sup>

Once NJDEP has classified a wetland as "exceptional" due to its status as a documented habitat for threatened and endangered species, the classification is not easily reversed. The applicant must submit a written request to lower the classification, with a "demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species". N.J.A.C. 7:7A-2.4(c).<sup>4</sup>

Under this regulation, before NJDEP can reverse the classification of the Manchester Site wetland as "exceptional", the agency must have proof that the wetland will eventually become unsuitable for both Pine Barrens treefrog and Northern pine snake, even though the wetland is currently suitable for both species. N.J.A.C. 7:7A-2.4(c) further places the burden of proof upon Jaylin, as the applicant. Jaylin's request did not meet this burden; in fact Jaylin did not even submit a written request.<sup>5</sup> Under N.J.A.C. 7:7A-2.4(c), NJDEP should have dismissed Jaylin's request as incomplete and issued the LOI with the original, correct classification of the wetland as "exceptional".

In sum, NJDEP may not change the original, correct decision to classify the entire Manchester Site wetland as "exceptional", until Jaylin provides proof of the long-term loss of the habitat requirements for both Pine Barrens tree frog and Northern pine snake.

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<sup>3</sup> October 13, 2015 Threatened and Endangered Species Habitat Review, April 13, 2016 Letter of Interpretation p. 2, New Jersey Pinelands Land Capability Map.

<sup>4</sup> In this case, that demonstration must address both Pine Barrens treefrog and Northern pine snake.

<sup>5</sup> Our knowledge of the request only comes from its reference in NJDEP's amplification letter.

**2) NJDEP ignored the presence of habitat for Northern pine snake (a threatened species) during the wetland classification process, in violation of the FWPA.**

The entire Manchester Site is a documented habitat for Northern pine snake, a threatened species.<sup>6</sup> A wetland that is documented habitat for a threatened and endangered species must be classified as “exceptional”. N.J.S.A. 13:9B-7(a)(2), N.J.A.C. 7:7A-2.4(b)(2). However, in this case, NJDEP has claimed that Northern pine snake is “non-wetland dependent”, and that a wetland where Northern pine snakes breed, rest or feed does not have to be classified as exceptional. Id. This is wrong, because NJDEP’s assertion of a distinction between “wetland-dependent species” and “non-wetland dependent species” has no basis in science or law.

First, the distinction NJDEP attempts to draw is oversimplistic, because experts have long recognized that “individual animals use various habitat features to fulfill their foraging, sheltering and breeding needs.”<sup>7</sup> Northern pine snakes travel, rest and forage in wetlands.<sup>8</sup> In fact, NJDEP’s own studies have found that wetlands are the second largest land-cover type in the Northern pine snake’s New Jersey range.<sup>9</sup>

Moreover, the FWPA requires NJDEP to classify a wetland that serves as habitat for a threatened or endangered species to breed, rest or feed as “exceptional”, regardless of whether it is a “wetland-dependent species” or a “non-wetland dependent species.” N.J.S.A. 13:9B-7(a)(2), N.J.A.C. 7:7A-2.4(b)(2). Indeed, the terms “wetland-dependent species” and “non-wetland dependent species” appear nowhere in the FWPA, the FWPA

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<sup>6</sup> October 13, 2015 Threatened and Endangered Species Habitat Review, July 1, 2016 Amplification Letter p. 5.

<sup>7</sup> Landscape Project Manual p. 17.

<sup>8</sup> Landscape Project Manual Appendix II, Northern Pine Snake section

<sup>9</sup> *New Jersey Division of Fish and Wildlife. 2009. Status Assessment of the Northern Pine Snake (Pituophis m. melanoleucus) in New Jersey: An Evaluation of Trends and Threats. New Jersey Department of Environmental Protection, Trenton, NJ. p. 7.*

Rules, or the Protocols For the Establishment of Exceptional Resource Value Wetlands Pursuant to the FWPA (the "Protocol"). NJDEP has repeatedly classified wetlands as exceptionally valuable because they serve as habitat for threatened and endangered species, without any analysis of whether the species is "wetland-dependent." ZRB LLC, Petitioner, 2007 WL 4794053 at \*7 (Cmm'r Final Decision 2007)(NJDEP classified a wetland that served as habitat for barred owl as "exceptional", with no analysis of whether that species is "wetland-dependent"); Angela Depaolo, Petitioner, NJDEP, Respondent, 2005 WL 1805828 at \*5-6 (OAL Initial Decision 2005)(bald eagles); Christopher Maier, Petitioner, 2004 WL 1393565 at \*1 (OAL Initial Decision 2004)(wood turtle); Dunlap Corp., Petitioner, ESA 725, 2002 WL 444124 at \*2 (OAL 2002)(barred owl); Joseph Lucchese, Petitioner, ESA 4412-99, 2001 WL 605203 at \*7 (OAL 2001)(barred owl).

In sum, under the FWPA, the presence of documented Northern pine snake habitat on the Manchester Site mandates that NJDEP classify the Manchester Site wetland as "exceptional." Pine snakes utilize habitats on both the Manchester Site and the Proposed Development Site, so NJDEP's decision on this point affects both properties. Pinelands Preservation Alliance v. NJDEP, 436 N.J.Super. 510, 517 (App. Div. 2016). NJDEP's dismissal of the Northern pine snake as a "non-wetland dependent species" has no basis in science or law.

### **3) NJDEP's February 2016 survey failed to meet the standards set in the Protocol.**

As detailed above, in October 2015, NJDEP correctly determined that the Manchester Site wetland must be classified as “exceptional”, based on the “precise habitat mapping” in the Landscape Maps, as well as a follow-up ground survey.<sup>10</sup> Jaylin, displeased with this result, pressured NJDEP to lower the value classification, and so NJDEP decided to conduct a second ground survey.<sup>11</sup> Because NJDEP had already improperly dismissed the fact that this wetland is documented Northern pine snake habitat, the February 2016 survey did not include a search for Northern pine snake or Northern pine snake habitat, and instead was limited to the Pine Barrens treefrog. Id. The failure to survey for Northern pine snake habitat, on its own, invalidates the February 2016 ground survey. N.J.S.A. 13:9B-7(a)(2), N.J.A.C. 7:7A-2.4(b)(2). In addition, the survey was taken in seasonal conditions under which it would be difficult or impossible to accurately assess Pine Barrens treefrog habitat. Finally, the survey failed to comply with the Protocol’s standards and specifications for Pine Barrens tree frog surveying.

The Protocol serves as an NJDEP Technical Manual:

The Department identifies present or documented habitat for threatened or endangered species ... using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened or endangered wildlife species. The details of this method are described in the Division of Land Use Regulation freshwater wetlands technical manual...

N.J.A.C. 7:7A-2.4(c). As a Technical Manual, the Protocol is not merely a guidance document. Rather, it is binding upon NJDEP and has the force of law:

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<sup>10</sup> October 13, 2015 Threatened and Endangered Species Habitat Review, Landscape Project Manual p. 6.

<sup>11</sup> Amplification Letter p. 5.

“Policies and interpretations contained in a technical manual ... shall be binding upon both the department and a permit applicant...” N.J.S.A. 13:1D-112(a). See also ZRB LLC, supra, 2007 WL 4794053 at \*7.

Under the binding Protocol standards, a proper Pine Barrens treefrog survey is taken on a warm night in May or June.<sup>12</sup> The ground survey upon which NJDEP relies was taken on a frigid day in February.<sup>13</sup> NJDEP also violated two other Protocol standards that specify that surveyors use taped treefrog calls and artificial refugia during Pine Barrens treefrog surveys.<sup>14</sup> Finally, NJDEP violated the Protocol standard specifying that surveyors use a control population, in order to confirm that seasonal conditions are right for the survey. Id. Since the Protocol is binding upon NJDEP, these failures invalidate that survey.

Had NJDEP used a control population during the February 2016 ground survey, as the Protocol requires, the agency would have immediately realized that the surveyors would not be able to accurately assess Pine Barrens treefrog habitat under the seasonal conditions at that time. N.J.A.C. 7:7A-3.1(e) prohibits NJDEP from relying on a ground survey taken under such conditions:

...in some cases, seasonal conditions make it difficult to determine the resource value classification of a wetland.

...

In such a case, the Department shall notify the applicant that seasonal conditions do not permit an accurate assessment of resource value, shall provide an explanation of the seasonal conditions involved, and shall give the applicant the option to accept an exceptional resource value classification, or to wait for the LOI until the Department can determine the resource value of the wetland.

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<sup>12</sup> Protocol p. A7-2.

<sup>13</sup> Amplification Letter p. 5.

<sup>14</sup> Protocol p. A7-2.



Since an accurate assessment could not be made in February 2016, NJDEP was required to either delay LOI issuance until seasonal conditions were suitable for a survey, or classify the Manchester wetland as “exceptional”. Id.

In sum, the February 2016 survey failed to follow the Protocol standards, which are binding upon NJDEP. Those Protocol standards are heavily focused on ensuring that surveys are taken under proper seasonal conditions, because proper conditions are critical to obtaining an accurate assessment. Indeed, the FWPA Rules prohibit NJDEP from relying upon surveys, like the February 2016 survey, taken in the wrong seasonal conditions. For all of these reasons, the February 2016 survey was deficient and must be ignored.

**4) NJDEP did not properly weigh the deficient February 2016 survey against the superior evidence from the Landscape Maps.**

The February 2016 ground survey failed to include a search for Northern pine snake, was not conducted in proper seasonal conditions, and failed to comply with the Protocol. Moreover, NJDEP did not properly weigh the results of this isolated ground survey against the “accurate, reliable and scientifically sound”<sup>15</sup> decision, reached through consultation of the Landscape Maps, that the Manchester Site wetland must be classified as “exceptional”.

When NJDEP implemented the Landscape Project in July 2002, the agency rejected the practice of classifying wetlands based on observations from a single, isolated ground survey, and instead chose to rely on Landscape Maps, which “transparently document[] threatened and endangered species habitat”, and thus

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<sup>15</sup> Landscape Project Manual p. 14.

provide a “more precise method of delineating habitat” than reliance on isolated ground surveys.<sup>16</sup> The Landscape Maps also increase predictability, by allowing the public to be assured that the habitats documented through the Landscape Maps will be protected.

Id.

In this case, NJDEP did exactly what the agency had promised *not* to do in July 2002: under pressure from a developer, NJDEP simply seized upon an event that “happened to be observed at one point in time”<sup>17</sup> during the deficient February 2016 ground survey, and classified the Manchester Site wetland based on that single piece of evidence. In doing so, NJDEP ignored contradictory findings from the October 2015 ground survey and the “peer-reviewed, scientifically sound information” that NJDEP has painstakingly collected and incorporated into the Landscape Maps.<sup>18</sup> This *ad hoc* method of decision-making violates the FWPA, and offers none of the predictability or superior habitat protection that the Landscape Maps provide.

In 2007, NJDEP Commissioner Lisa P. Jackson considered a case similar to this one, involving conflicting evidence between a ground survey and the Landscape Maps. ZRB LLC, Petitioner, supra, 2007 WL 4794053. In ZRB, Petitioner’s expert conducted twenty-five ground surveys, which he claimed demonstrated the absence of the barred owl (a threatened species) from the property at issue. Id. at \*7. NJDEP came to the opposite conclusion, relying substantially on the Landscape Maps, which demonstrated that the Site was documented habitat for barred owl. Id. Commissioner Jackson ultimately decided that the Landscape Maps were better evidence than Petitioner’s

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<sup>16</sup> Landscape Project Manual pp. 5, 8.

<sup>17</sup> Landscape Project Manual p. 17.

<sup>18</sup> Landscape Project Manual p. 7. NJDEP’s decision is also contradicted by information from Natural Heritage Database, the EPA Priority List, and the Pinelands Capability Map.

ground surveys, describing the Landscape Project as the “methodology that was required by law and departmental policy”, and further as “embodied in DEP’s regulations that were adopted with all the procedures required by the Administrative Procedure Act and subsequently approved by our courts”. Id.

NJDEP’s reliance on the February 2016 ground survey is misplaced, for the same reasons laid out in ZRB. If anything, the evidence from the February 2016 ground survey is even weaker than the ZRB ground surveys: in ZRB, Petitioner’s expert conducted dozens of ground surveys, using a control site and taped calls. Id. at \*3-4. In this case, NJDEP relies on a single ground survey, taken without using a control site or taped calls (not to mention that a previous ground survey reached the exact opposite conclusion).<sup>19</sup> Contrast this to the “rigorous evaluation by ENSP biologists” of the thousands of “high-accuracy” species sightings that are incorporated into the Landscape Maps.<sup>20</sup> NJDEP’s decision to rely on a single deficient ground survey over the far superior evidence in the Landscape Maps is not only scientifically unsound, but also a violation of the FWPA.

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<sup>19</sup> Amplification Letter pp. 5-6.

<sup>20</sup> Landscape Project Manual pp. 5, 18.

**5) NJDEP's decision to split a single, contiguous wetland into two, for the purposes of classification, violates the FWPA.**

The Manchester Site is dominated by a single, contiguous wetland. In October 2015, NJDEP correctly classified the entire wetland as "exceptional".<sup>21</sup> Later, under pressure from Jaylin to find additional developable land on the Manchester Site, NJDEP devised a novel scheme to split the wetland into two parts.<sup>22</sup> NJDEP cited no legal or scientific authority for this scheme. The wetland split violates N.J.A.C. 7:7A-2.4 of the FWPA Rules on wetland classification, which only allows a single classification for each wetland:

- (a) The Department shall consider the resource value classification of a *wetland* in...
- (b) A freshwater *wetland* of exceptional resource value, or exceptional resource value *wetland*, is a freshwater *wetland* which...
- (c) ...the Department shall review all available information, and shall make a final classification of the *wetland*.
- (d) A freshwater *wetland* of ordinary resource value, or an ordinary resource value *wetland*, is a freshwater *wetland* which...
- (e) A freshwater *wetland* of intermediate resource value, or intermediate resource value *wetland*, is...
- (f) To obtain a Department determination of the resource value classification for a particular *wetland*, an applicant may obtain a letter of interpretation from the Department under N.J.A.C. 7:7A-3.

N.J.A.C. 7:7A-2.4(emphasis added).

The Landscape Project Manual and the Protocol both highlight the value of a single large, contiguous wetland like that on the Manchester Site, and the danger of splitting up such a wetland:

"...much of the [wildlife] habitat that remains is less suitable for wildlife due to habitat fragmentation. This is especially detrimental to imperiled wildlife, as many of these species require large, contiguous tracts of habitat."

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<sup>21</sup> October 2015 Threatened + Endangered Species Habitat Review

<sup>22</sup> Amplification Letter p. 5.

126a.

“The rapid suburbanization of the landscape has led to the loss and degradation of critical wildlife habitat and the fragmentation and isolation of the habitats that remain. Many rare species populations require large contiguous blocks of habitat for long-term survival.

178a.

NJDEP concedes that there is “no discernable change in the vegetation” throughout the Manchester Site wetland.<sup>23</sup> The uniformity of conditions across the wetland is another reason not to split it up. On p. 2 of the letter attached as Exhibit A, GZA GeoEnvironmental Inc. further explains why the wetland split is improper.

In sum, NJDEP’s decision to split a single contiguous wetland into two classifications has no legal or scientific basis, and moreover is contradicted by the FWPA Rules, the Landscape Project Manual, the Protocol, and NJDEP’s own fact findings.

**(6) NJDEP has not adequately surveyed the Site for threatened and endangered species.**

NJDEP’s analysis of the Site has focused on Pine Barrens treefrog and Northern pine snake. As detailed above, the agency’s analyses of these two species has been deficient, and the resulting LOI does not adequately protect either of them.

In addition, NJDEP has not adequately surveyed the Site for other threatened and endangered species, and species of special concern. In June 2016, expert surveyors visited the Site at the behest of Pinelands Preservation Alliance.<sup>24</sup> The surveyors immediately identified the call of a barred owl (a threatened species). Id. P. 3. Later in June 2016, the surveyor submitted a Rare Wildlife Sighting Report Form to NJDEP.<sup>25</sup>

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<sup>23</sup> Amplification Letter p. 6.

<sup>24</sup> See Exhibit A, June 23, 2016 letter from GZA GeoEnvironmental Inc. to Pinelands Preservation Alliance.

<sup>25</sup> Attached as Exhibit B

The surveyors also identified five species of special concern at the Site.<sup>26</sup>

The surveyors next analyzed the habitat mosaic at the Site, and determined that it was consistent with the jurisdictional life history parameters and ecologic tenancy metrics for seven threatened and endangered species, including barred owl.<sup>27</sup>

The Protocol, which is binding upon NJDEP, requires the agency to use information submitted by members of the interested public in analysis of threatened and endangered species habitats:

The Department will also use other sources of information relating to the presence or absence of endangered or threatened species. These sources include, but are not limited to new valid sightings received from ... members of the interested public...

Protocol p. VI.

Therefore, NJDEP is obligated to consider all of the information in the attached June 2016 letter and June 2016 Rare Wildlife Sighting Report, before making a final decision on classification of the Manchester Site Wetland.

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<sup>26</sup> Brown Thrasher, Least Flycatcher, Great Blue Heron, Veery, and Whip-Poor-Will. Id. p. 4.

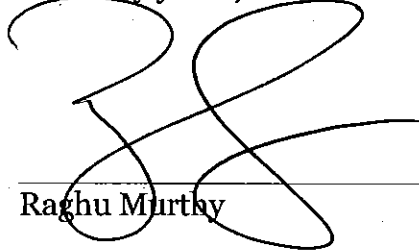
<sup>27</sup> Barred Owl, Red-Shouldered Hawk, Red-Headed Woodpecker, Corn Snake, Southern Gray Treefrog, Northern Long Eared Bat, and Little Brown Bat. Id.

## CONCLUSION

In sum, NJDEP's April 2016 classification of the Manchester Site wetland violates six different FWPA requirements, and relies on incomplete and inaccurate information. The information is inaccurate because NJDEP relies on a ground survey which was conducted in unacceptable seasonal conditions and was deficient by the agency's own survey standards. The information is incomplete because NJDEP has ignored the Landscape Maps, ignored the presence of Northern pine snakes and failed to obtain any demonstration of the habitats' long-term prospects: these are all items which the FWPA requires to be included in the wetland classification process.

For all of these reasons, NJDEP must return to the original, correct October 2015 decision, classifying the entirety of the wetland at the Site as "exceptional."

Sincerely yours,



Raghu Murthy

3.17.17

Date

c: **via** email

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