

AMERICAN COUNCIL OF ENGINEERING COMPANIES OF NEW JERSEY (ACEC-NJ)
Comments on the proposed changes to the Freshwater Wetlands Protection Act Rules
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The ACEC-NJ comments are drafted into the following primary sections.

- A. Using conservation easements as a surrogate regulatory program
- B. Creation of a two-tiered enforcement program
- C. Creating a new historic preservation program within the wetlands rules
- D. Changes to the General Permitting program
- E. Revisions to the mitigation program
- F. Changes to miscellaneous provisions

A. USING CONSERVATION EASEMENTS AS A SURROGATE REGULATORY PROGRAM

1. The DEP has revealed to the public that it currently requires deed restrictions for transition area waivers. The rule proposal shows that the DEP intends to expand this practice to a wider range of permitted activities using the Model Deed Restrictions already developed and posted on the DEP website.

The Model Deed Restrictions are 10 to 12 pages long and include clauses that are interpreted as both restrictive covenants and easements. Some easements cover the regulated area, while others include property rights over the entire property. These rights can only be obtained as an express condition of obtaining the permit. The new property rights include but are not limited to:

- The right to enter the owner's property to perform corrective action, even over the owner's objection;
- The right to control commercial transactions on the property;
- The right to acquire property for below market value if the owner does not pay property taxes on time;
- The right to additional remedies above those allowed by law; and
- The right to force property owners to maintain property to the DEP's satisfaction.

The notion of using conservation easements as a surrogate to the regulatory program is an unconventional new area for the DEP. However, easements and restrictions were never intended to be used as a standardized program of general applicability. They evolved over the centuries as a way for owners to use their land in an economically productive way. Most easements and restrictive covenants are specifically tailored to the particular parcel and rarely, if ever, change. They are powerful since they run with the land and are binding generation after generation, even when laws change. Accordingly, a large and complex body of law has been created to enforce the rights and responsibilities of landowners. This body of law is not suitable for acting as a permanent

regulatory scheme. Over time, the DEP will have to enforce laws and easements that are inconsistent and possibly contain conflicts.

By contrast, comprehensive environmental regulations are a relatively new creation. They are designed to be ever changing to adapt to the changing needs of society and the environment. They are readopted every few years and occasionally repealed and replaced. In a very short time, a large and complex body of law has been created to enforce the rights and obligations of the regulated community. It is based upon regulatory interpretation and vested in the office of administrative law. Only for appeals of the administrative courts do applicants have to sue in Superior Court. This prevents the civil and criminal courts from being overwhelmed.

The DEP proposes to regulate wetlands through the use of both relatively ancient and recent legal instruments. Under particular circumstances, a property owner could violate both the regulations and the easements/restrictions. How will the owner and DEP sort out the proper enforcement for these two distinct and complex areas of law?

Considering that wetlands rules are enforced through the administrative process, while property interests are enforced in Superior Court, this presents a puzzling legal situation. The DEP is moving away from the well-settled jurisprudence related to environmental regulation to the very unsettled area of regulatory taking, combined with enforcing regulatory provisions through property interests. This situation gives rise to complex questions such as:

- Does the DEP enforce a violation of an easement as an administrative matter first (e.g. a fine assessment followed by a move to Superior Court to enforce the property right)?
- If so, will the proofs used in the administrative proceeding be binding in the subsequent Superior Court case?
- Will there have to be two proceedings for the violation of the same Act?
- If the DEP chooses to enforce the property right in Superior Court first and it turns out that the activity was also a regulatory violation, how does the court proceed? Does it toll the Superior Court action to await the final action in the Office of Administrative Law?
- If the violation occurs during the permit period and the easement violation is in a portion of the easement not included in the permitted activity, will the DEP proceed with enforcement under Section 16.8 or Section 16.9 or both?
- What happens to the administrative proceeding if the property owner brings their own suit in Superior Court for the DEP's breach of its duty to the property owner? Does the lawsuit brought against the DEP for breach of the easement in Superior Court have to be tolled until the administrative proceeding ends?
- A clause in the proposed regulations gives the DEP priority to acquire a property owner's interest for non-payment of property tax. How does the DEP plan on defending this right:
 - In the event of foreclosure by a bank?
 - Against the Sheriff in a tax sale?
 - In a bankruptcy action?
- Can the federal bankruptcy trustee force the DEP to exercise its right to acquire the owner's interest for Fair Market Value, as provided in the rules in order to speed distribution of assets to other creditors?

- How does the property owner resolve orders from health departments, police officers, and fire departments to remove or control vegetation in wetlands and transition areas controlled by an easement?

Furthermore, it is an open question whether provisions relating to the Municipal Land Use Law are valid since regulation of this area of law is reserved exclusively to local governments. Can the DEP require notice as part of a building permit? How does it enforce the rule allowing a municipality to condition its approval on securing a Letter of Interpretation (LOI) when a LOI is not a precondition for its own permits?

2. The rules propose to use easements to convert non-regulated activities into regulated activities. This appears to be an effort to regulate non-regulated activities, which is inconsistent with the Freshwater Wetlands Protection Act.

Regulating exempt activities will create considerable enforcement confusion since a property owner who has an easement cannot perform some non-regulated activities while his neighbor can. Furthermore, it is possible that some easements will affect only the transition areas. How will the enforcement agent know from afar where the wetland begins and the transition area ends?

3. We recommend that the DEP redraft the proposed easements to allow for repair and improvement of existing public infrastructure, such as roads, bridges, power lines sewer lines and parks, without these improvements needing a release from the easements. Eliminating the need to release the easement will not reduce protection of transition areas and wetlands since the agencies that manage these infrastructures will still be required to secure a permit for impacts to these areas. If the DEP retains this provision as written, it will simply increase taxpayer burden without improving environmental protection.

The process to secure release of the conservation easements for public improvement will result in additional taxpayer costs. County and local governments will have to use three property acquisition processes. First they will have to condemn the underlying land. Second, use an entirely new process, including a separate public hearing, for the release and a separate approval from the DEP commissioner. Finally, multiple deeds have to be filed to accomplish the release and provide the new right of way boundaries.

4. The proposed rules do not address the problems caused should the DEP sell a conservation easement on land that abuts rights of way for public infrastructure. If a public agency needs to acquire land for infrastructure purposes, it must approach the non-profit for a release. Since the easement still retains restrictions issued to the state, the local or county government cannot use its powers of eminent domain to acquire the release for fair market value. The non-profit does not have to consider the public safety responsibilities that bind public agencies and the county cannot condemn the property since it retains its state interest elements. Therefore, they can refuse to release the conservation restriction and block important infrastructure projects, or charge the taxpayers well above fair market value.

5. The DEP will acquire hundreds, if not thousands, of these easements every year. They will be scattered all over the state, requiring hundreds or thousands of responses to certified mail requests from landowners. The DEP will have to administer thousands of rental and lease agreements, staff and manage dozens of hearings for easement releases every year and prepare documents for dozens of separate releases by the DEP Commissioner. The DEP's acquisition of these easements begets the following concerns:

- How does the DEP Enforcement program plan to manage this huge increase in workload?
- Do these resources already exist in the Enforcement Division?
- How does the DEP intend to pay for this effort since permit fees cannot be used to cover it?
- How many resources will it take to create the landowner registry and easement tracking programs?
- Is the DEP prepared to defend the possible lawsuits stemming from enforcing the new powers in court?
- Will the Attorney General's office have to hire more attorneys?

6. Since the DEP intends to post the model easements on its website, the model easements should agree with the rule proposals. The forms, as published, exceed the rule and could not be enforced.

7. It is our recommendation that the DEP change the provisions designed to force the Grantors of easements to file the easement in the courthouse. For more than 200 years, the vast majority of deeds in New Jersey have been filed by the grantees of property rights because the real estate recording acts are designed to protect the grantees from grantors. Therefore, it is not prudent for a grantee to rely upon a grantor to file the proper papers in the courthouse.

8. We further recommend that the DEP remove the provisions intended to fine or punish the applicant Grantors to file deeds that protect the DEP grantee. These provisions create an undue burden on the regulated public that can be more efficiently performed by the DEP.

9. Government possessory interests in land acquired by the DEP in exchange for granting a permit are called exactions. Exactions are a relatively new tool for the DEP, but municipalities have used exactions in the planning process for decades. Accordingly, there is a significant body of law developed to deal with exactions. Courts have found that environmental agencies need to consider the constitutionality of the exactions, especially when those exactions give the agency possessory interest in land. One of the standard DEP conditions allows it to enter an owner's property, perform remedial work for the benefit of the public, and then bill that owner for the work performed. Has the DEP considered the constitutionality of this clause? Has the DEP considered the constitutionality of other clauses in the proposed model easement?

10. The conservation easement authority cited by the DEP was created by the legislature as a tool to authorize voluntary agreements fairly negotiated between the state and private landowners to preserve land for public conservation use or benefit for acquisitions not otherwise required by law. The legislature did not intend that the DEP would convert this program into a regulatory instrument to provide the DEP with enhanced enforcement powers beyond what is included in the Freshwater Wetlands Protection Act.

We recommend that the rules be rewritten to eliminate use of conservation easements as an alternative regulatory program and return to using conservation easements in the permitting process as an extraordinary tool, to be used only when existing regulations do not provide acceptable protections based upon an assessment of unique situations encountered on specific sites for site-specific reasons.

B. CREATION OF A TWO-TIERED ENFORCEMENT PROGRAM

The DEP proposes to restructure the enforcement program to create two tiers of enforcement: one for actions without a permit under Section 16.8 and another for all other violations under a new section, Section 16.9. The primary purpose of this new section is to create an administrative penalty system that would allow the DEP to enforce the Freshwater Wetlands Act for applicants and permittees who choose to seek a permit. Other provisions in the rules are designed to help the DEP expand the range of parties that can be fined in a permit action, as described below.

1. The DEP has proposed changes to Section 2.1 (c) to no longer hold the permittee solely liable for permit violations and expand potential liability to a range of parties that are hired to work on the permit. The DEP proposes to hold any party hired by the permittee to prepare the permit and to oversee the construction of the permitted activity allowed by a wetland permit potentially liable for violations. The language the DEP uses creates joint and several, strict liability so it can fine any party involved in a permit for any or all violations. This allows the DEP to fine the consultants for the violations of their client, the contractor for the violations of the consultant, the wetland scientist who located the wetland line for the actions of a contractor and so on.

Joint and Several Liability has proven to increase uncertainty in permitting programs and makes enforcement much more expensive. Most contractors contract directly with the developer or owner and do not have contracts between each other. Therefore, there is no way for one contractor to sue another contractor for a fine imposed by the DEP. By not identifying parties actually responsible for the violation, the DEP gives innocent parties no choice but to sue the DEP to avoid paying for another's careless action. Lawsuits are very expensive and consume a lot of time for the DEP. In addition, fear of being fined for another's actions will discourage many qualified consultants from working on wetland permits and will increase the costs of the consultants that will do this work.

Under current industry practice, only the permittee has the power to control sharing of liability. They are the ones who contract with the various people to work on the project. It is not possible for a consultant hired independently to file suit against a contractor who was the party that actually violated the permit since there is no contracting status between the consultant and the contractor.

Furthermore, most professional liability insurance policies cover only negligent acts, errors, or omissions. Insurers do not cover claims that cannot be linked to negligent errors and will not cover a claim by the DEP to resolve a permit violation. The real result of the proposed rule will not be improved wetland protection but it could have just the opposite effect. This could stop qualified consultants from providing services for wetland permits making it less likely that wetlands will be properly delineated and more likely that applications will be deficient and take longer to approve.

Joint and Several Liability should be the enforcement tool of last resort. Many states allow Joint and Several Liability to be used in permit enforcement actions only if there is a legislative mandate to do so. We are unaware of such mandate in New Jersey.

2. The DEP proposes to rework the entire enforcement process to create an enhanced penalty structure for property owners who choose to exercise their right to apply for a permit. The proposed Section 16.9 creates a penalty structure to be used only against permittees who have obtained a permit.

DEP's rule proposal presumes that all permittees' violations will be knowing violations. By making this presumption, the DEP can impose higher fines without making an attempt to prove if the permittee deliberately violated the permit. The permittee is forced to request an expensive and time consuming hearing in front of an Administrative Law judge to rebut this presumption. These presumption defeats the reason for having a graduated penalty structure and their removal from the rule proposals is highly recommended.

3. Section 16.9 also proposes to create a fine structure that equates actions that only have the potential to harm the environment to actions that cause actual harm to human health, safety or the environment. With this change, the DEP vastly expands the range of activities that qualify for the harshest penalties. This approach results in considering all permit deviations violations upon which the DEP can impose fines, even if these deviations do not result in environmental harm. This provision significantly confuses the general understanding that the greater the harm, the greater the punishment. Furthermore, this enhanced punishment scheme can only be enforced against owners who voluntarily seek a permit. All other violations will be prosecuted under Section 16.8.

This enforcement program is unbalanced. It can be used to fine a person who chooses to use the rules more harshly than one who does not. For instance, under Section 16.9, the DEP will apply the highest possible fine, \$10,000 a day, to a permittee that does not file a deed restriction on their property in a timely manner, despite there being no harm to the environment. At the same time under Section 16.8, the Department could only impose a fine of \$1,500 a day, if, without a permit, an individual unintentionally filled 3 acres of wetlands resulting in actual harm to the environment. Another example: under Section 16.9, the DEP could fine a farmer \$10,000 a day for painting their 75-year old barn without SHPO approval. This violation does not even involve a wetland; while under Section 16.8, the DEP could only fine a landowner who cut down three acres of trees in a transition area \$1,500 if he was unaware that an exceptional resource value wetland happened to be located within 150 feet on someone else's property.

Since Section 16.8 does not have Joint and Several Liability, lacks presumptions of knowing intent, has lower fines, and does not trigger liability created by the permit, more property owners may consider filling wetlands without a permit since they are less likely to be fined than if they did apply for a permit. If they are fined, it will cost them less than the cost of applying for the permit in the first place. Under these circumstances the DEP has a much harder time proving that a violation occurred since the pre-fill condition is not always apparent.

C. CREATION OF A NEW HISTORIC PRESERVATION PROGRAM WITHIN THE WETLANDS RULES

1. DEP is proposing an expanded permit program to regulate historic resources using the Freshwater Wetlands Protection Act based on the assertion that it has “responsibilities relating to compliance with Section 106 of the National Historic Preservation Act.” Furthermore, it asserts that the new historic resource provisions are needed so that the state program remains as stringent as the federal Section 404 program.

We suggest the DEP consider the following facts.

According to the Memorandum of Agreement through which the Federal 404 Program was assumed, all permits issued by the state are state actions. Section 106 relates only to federal actions and therefore Section 106 is not binding on the state.

The US Supreme Court has concluded that when Congress enables a state to assume a federal program that Congress does so with the foreknowledge that regulations of federal government-wide applicability like Section 106 will not be binding on state programs. That is why federal agencies promulgate rules that tell the state how to assume and what to assume. The rules require the federal agency to take a hard look at the state program before it deems it as stringent as the federal program and signs the assumption agreement. The Federal agency only looks to state law and state resources to make this determination. If the federal agency finds that the state program is inadequate, it can ask the state to change its laws or it can include conditions in the Memorandum of Agreement needed to make sure important federal interests are protected.

The EPA performed this review of New Jersey’s wetland program. At the time of assumption, the EPA was aware that the state’s existing historic preservation law limited DEP review only to historic resources already listed on the state register and encroached upon by government actors. Therefore, to make sure important federal interests were protected, the EPA retained its review of discharges affecting sites listed on the National Register, historical monuments or sites already identified or proposed for the National register. Any impact to these resources will be addressed through EPA review. Otherwise, the EPA found state law to not be less stringent than the federal 404 program. The EPA review specifically excluded the need to consider impacts to sites on the state register or on sites potentially eligible for the federal register. Therefore, the DEP is required only to consider cultural resources as a function of the freshwater wetlands permit as required by state law to remain in compliance.

If the DEP wishes to regulate under Section 106, the state has the option of assuming those responsibilities as well. However, it must apply to the Department of the Interior for approval.

2. The DEP points out that it can create wetland rules that are more stringent than federal law. This is true except when there is another existing state law that would prohibit it. According to current state law, DEP can only regulate historic resources through “The New Jersey Register of Historic Places Rules”. NJAC 7:4-1.1 states “this chapter shall constitute rules of the Department of Environmental Protection concerning the preservation of the state’s historic, architectural,

archeological, engineering and cultural heritage....” Since the DEP does not propose changing these rules, state law bans it from proposing contradictory rules under the Freshwater Wetlands Protection Act.

3. Even if the DEP decides to continue to regulate historic resources, the rules as proposed are inconsistent. One provision leaves it up to an archeologist to determine the required content of a study, another points to a Phase 1A checklist that does not exist, and another requires applicants and their consultants to divulge information about resources on property not even subject to the application. Furthermore:

- none of the proposed rules lay out the process for dealing with impacts to any historic resources discovered;
- the proposed rules do not limit the assessment to resources impacted within the jurisdiction of the rules; and
- the proposed rules allow DEP to demand an unlimited array of restrictions, such as requiring specific performance for breach.

We believe that it is impossible for the DEP to enforce these provisions, except in an arbitrary manner. State law does not allow arbitrary enforcement of environmental rules. We recommend that the DEP re-propose rules that can be followed by the regulated community and that the DEP remove the cultural resource provisions from the wetlands rules.

4. The Division of Parks and Forestry has hundreds of historic buildings in various stages of disrepair across the state because stringent regulatory restrictions make them too expensive to maintain or unattractive to private investment. Has the DEP considered the indirect impact to private historic buildings when owners abandon them because they are too expensive to maintain? How is a DEP biologist, who issues wetland permits, to know what an effective balance is?

D. CHANGES TO THE GENERAL PERMITTING PROGRAM

1. The legislature incorporated the statewide General Permit (GP) program based upon the need to balance environmental protection with compliance costs. By creating a range of permits designed to regulate with little, if any, delay or paperwork for activities having minimal impacts, the DEP not only reduces its own time to review and approve permits, but also creates a powerful tool to reduce overall impact to wetlands. Developers favor GPs because they are faster, less expensive and more reliably issued than Individual Permits (IP). Therefore, developers are willing to reduce the impacts to wetlands and transition areas for most applications submitted to the DEP simply to meet the limitations in the GP. However, under the proposed rules, the DEP plans several changes to the GP program including minimization, adding deed restrictions, and increasing the mitigation requirements. As the new rules propose, if the DEP treats GPs like mini-IPs and requires alternatives analysis to prove minimal impact, GPs begin to lose their appeal. Please explain the basis for these requirements that complicate the statewide GP program set up by the legislature.

2. By their very nature, alternatives analyses require more time to review and are subjective. They require judgment on feasibility, reasonable costs, and efficient use of the land. The proposed rule change lacks meaningful standards as to how minimization will be evaluated. Therefore, reviewer

opinions and applicant opinions are likely to differ from one reviewer to another regarding the sufficiency of the analyses. This can lead to numerous meetings and the need to supply and to review supplemental submissions. If the development community can no longer rely on the GP program to speed up approvals, it has much less incentive to reduce project scope to avoid wetland impacts. Therefore, it is more likely that some developers will use IPs and be able to justify increased wetland impacts in order to pay for the increased costs via more area for development.

3. The DEP justifies many of the proposed changes using the argument that the proposed rules must remain as stringent as the federal standards. However, the existing state rules are already more restrictive and include regulation of wetlands no longer in the federal program as discussed in recent Supreme Court cases (e.g. SWANCC, Rapano and Carabell). Other federal programs assumed by the state have been evaluated based upon the program as a whole. Is there federal regulation that requires that the state rules need to be as stringent as federal rules on a subsection-by-subsection basis?

4. Adding minimization to GPs is justified in the proposed rules by the fact that the federal program is adding minimization to the NWP program. However, the proposed DEP minimization program is largely inconsistent with the federal program. The federal program requires minimization only for permits that require mitigation. Mitigation is only required on NWPs that have 0.1 acre of disturbance and require pre-notification. Mitigation above 0.1 acre is discretionary for those permits that do not require pre-notification. No mitigation is required below 0.1 acre. Therefore, since the DEP has based this rule change on remaining as stringent as the federal program, it is recommended that the rule be revised accordingly.

5. Urban streams are the most under-restored habitats in the state. We recommend that the DEP add provisions in GP 16 for Habitat Enhancement that encourages restoration of urban streams on private property. Such provisions would relax limitations on GP 16 to allow private property owners on their own initiative or in cooperation with local governments or non-profits to identify and execute habitat restoration in streams. Currently, GP 16 is effectively limited to projects on public property that have state or federal sponsors or are on farms under USDA auspices. These agencies rarely work with private property owners in developed areas. Given the number of private parties who need to give permission to restore streams, the DEP should exempt stream restoration projects from needing conservation easements. Stream corridors are already protected by many regulations and new easements only complicate the process without improving environmental protection.

6. GP 16 could also be redrafted to eliminate the restriction that it can only consider habitat functions. For instance it should allow a habitat improvement to be combined with a flood control project, or to combine GP 16 with GP 10 minor road crossing for NJDOT reconstruction projects. This process is especially beneficial for urban streams since many public works sponsors will include mitigation elements within a project but will not independently fund habitat restoration. This approach can use other sources of money to restore damaged ecosystems.

7. We further recommend that the DEP reconsider the mitigation provisions inside of GPs to exempt mitigation requirements for projects located in Smart Growth areas to encourage growth

where it belongs. We would like to direct DEP's attention to NJSA 13:1D-146. This provision of P.L. 2004, c89 is not related to expedited permitting in Smart Growth areas, so Executive Order 45 did not suspend it. Furthermore, since the federal program does not regulate vernal habitats, state regulations regarding vernal habitats cannot impact the validity of the state assumption of the federal program. Therefore, this provision of P.L. 2004, c89 remains in effect and is binding on the DEP. We recommend the DEP revise the GP regulations regarding vernal habitats to be in accordance with state law.

E. REVISIONS TO THE MITIGATION PROGRAM

1. The proposed rules dramatically increase the amount of wetland mitigation required for permitted projects. DEP data indicate that more than 100 acres of wetlands are legally filled every year through the Statewide General Permitting Program. The proposed rules would require a contribution of up to \$300,000 per acre for wetland mitigation. Consequently, it is possible that the proposed rules would result in generating between \$10 million and \$20 million dollars worth of compensatory mitigation every year. The proposals discourage small-onsite mitigation projects and encourage contributions to off-site mitigation which the DEP will have complete autonomy to control.

There seems to be a potential conflict of interest by proposing a program to dramatically increase the level of cash contributions required for wetland permits while at the same time eliminating the oversight role of the independent Wetland Mitigation Council. The proposed rule change should include discussions on how the DEP proposes to deal with the apparent conflict created by eliminating oversight on how the money will spent.

2. The DEP Division of Watershed Management has determined that nonpoint source pollution is the predominant problem in 98% of the state's most polluted waterways. Within the urban zone, stormwater runoff from existing development is the primary nonpoint source polluting the streams and lakes. Loss of wetlands and reductions in stream buffers in these older areas are frequently cited as the cause of stream pollution in developed areas. As written, the proposals do not encourage restoration of urban wetlands or urban riparian buffers. We recommend that steps be taken to coordinate the mitigation proposals with the Division of Watershed Management prior to finalizing the proposed rules.

3. The DEP has invested heavily in protecting streams and wetlands by creating transition and buffer areas, but has done little if anything to craft rules that encourage restoration of degraded urban streams. One incising stream can discharge many times the sediment removed by adjacent riparian buffers. We recommend the proposed wetland mitigation rules identify ways to help restore incising streams.

4. Most streams in the heavily urbanized areas of the state are unstable. Numerous streams traversing public lands have serious distress. The proposed rules prohibit using mitigation money for stream restoration on Green Acres property or other public property unless purchased for that

specific purpose. Since the Green Acres rules do not consider restoration to be a diversion of use, we recommend that DEP reconsider this restriction.

5. The DEP uses the argument that it must add mitigation to GPs since the federal program is adding mitigation to the NWP program, suggesting that failure to follow federal lead could risk the autonomy of the state program. Review of the federal program shows that the proposed DEP mitigation strategy is inconsistent with the federal program as noted below:

- The NWP program mitigation element requires mitigation only for a subset of NWPs and then only when impacts exceed 0.1 acre of disturbance for NWPs that require pre-notification. The DEP plans on mitigation for any disturbance. At the federal level, mitigation for discharges causing greater than 0.1 acre for permits that do not require pre-notification is discretionary, allowing the US Army Corps of Engineers (USACE) greater flexibility in approval of innovative projects. Please provide reasoning why the DEP should be inconsistent with federal rules.
- The federal “no net loss” policy is a nationwide goal that includes consideration of restoration activities, including those in the Everglades and Upper Mississippi River. That is why it does not require no net loss on a permit-by-permit basis. The DEP could easily comply with the federal no net loss mandate since it requires 2:1 mitigation ratios on IPs. Please explain why the DEP is concerned about meeting the minimum thresholds when it can point to the fact that its existing program is already more stringent.
- The federal program places a preference for restoration of damaged wetlands. The DEP program favors converting stable uplands to wetlands. Why should the DEP program disfavor restoration in conflict with the federal program?
- The federal program favors stream restoration when streams are impacted. The DEP program discourages stream restoration by including provisions that make stream restoration too difficult and too expensive to perform. Why are the proposed DEP rules inconsistent with the federal rules?

6. Stream restoration can significantly reduce non-point source suspended solids sources in urban streams. Reducing this discharge will improve water quality in degraded stream segments. Please explain why the proposed rules do not encourage use of wetland mitigation rules to improve water quality in the state’s streams?

7. The regulatory changes propose a zero residual contaminant cleanup standard for mitigation sites. This is more restrictive than residential standards. Why does the DEP propose such high cleanup standards for mitigation sites?

9. Many of the state’s parent soils contain trace contamination. The DEP proposed changes require cleanup standards well below this threshold. Please describe the reasons that man-made systems have to be cleaner than natural systems?

10. The DEP requires an owner to certify that no new source of contamination could ever impact the mitigation site. Please explain how a developer of a streamside mitigation site can provide this assurance given that under peak flood conditions wastewater treatment plants are submerged and can introduce many contaminants into the streams.

11. The proposed rules provide complete discretion to the DEP to determine exceptions to the zero residual contamination rule. Does the Division of Land Use Regulation have the in-house expertise to make objective decisions regarding acceptable residual contamination exceptions?

12. Stormwater treatment wetlands effectively remove and treat many of the diffuse pollutants found in stormwater runoff including e-coli and other pathogens. Why does the DEP prevent owners from constructing stormwater treatment mitigation wetlands in the developed areas of the state?

13. Please provide statistics on existing mitigation banks approved by the DEP and provide information on how many of these treat surface water and reduce flooding.

14. Why did the DEP not address Executive Order 38 that requires it to use mitigation fees to expedite restoration of environmentally impacted properties?

15. We recommend that the proposed rules be redrafted to eliminate restrictions that mitigation can only be performed on sites on land acquired in fee simple. Mitigation sites should be selected based upon their ability to maximize ecosystem function. Sometimes this could mean that a mitigation site be located along a damaged urban stream that contains a utility easement or on an urban site that retains a reverter clause if the site is converted to a particular use. The DEP convenience for having fee simple sites should not be the bar to using an otherwise effective site. This requirement discourages mitigation in the urban zones where titles frequently include easements or other restrictions.

16. As the rules are now written, the type of site that is most predictable to develop and most likely to get fast approval would be a clean, rural, farm site that has been excavated to use clean groundwater as the sole hydrology source. Therefore, the DEP is indirectly encouraging mitigation sprawl in undeveloped areas that use only pristine groundwater to support wetland plants rooted only in pristine soil constructed outside of stream buffers. This type of site only serves a few wetland functions and will not include wetland functions that purify surface water, purify groundwater, improve physical stability of streams, reduce storm damage, reduce flooding and provide spawning habitat for fish. We recommend that DEP consider redrafting the provisions to give developers incentives to maximize wetland functions of mitigation sites.

17. The mitigation proposal discourages mitigation in the regions of the state that have contaminated property and degraded streams. However, these areas coincidentally are most likely to contain low-income populations. Please address the regulatory bias that favors habitat restoration over other wetland functions, since this bias also discourages mitigation in low-income parts of the state.

18. The rules for mitigation banking require compliance with conservation easement requirements under Section 2.12. The DEP has included many unusual requirements in these model easements. The proposed model easements do not allow an owner to prevent a contractor to file a mechanics lien. Contractors often file mechanics liens in contract disputes. The only way the owner could prevent the lien from being filed would be to pay for defective work or materials, then claim against the contractor. We recommend that the DEP avoid placing easement restrictions that affect the standard contracting approaches in the state. This approach almost always results in increased legal costs without improving effective mitigation.

19. The DEP plans on giving Conceptual Review approval of Mitigation Bank sites but also retain the right to void the approval every time it chooses to change the rules. Banking sites require construction financing just like other proposals and these proposals require a certain level of certainty. The DEP should be willing to abide by its commitments based upon good faith negotiations during the approval process.

20. Section 15.26 is being proposed to require applicants to provide offsite mitigation for impacts to transition areas under Section 6.3(g). The purpose of Section 6.3(g) is to encourage applicants with the legal right to fill wetlands to avoid the wetlands and impact transition areas instead. This minimizes overall environmental impact since the DEP has determined tiers of increasing impact that determines wetland disturbance to have a greater environmental impact than disturbance to transition areas. The DEP now proposes to require that applicants who choose to reduce overall impacts pay to mitigate for impacts to the transition area. This approach will make it more expensive than it would be if the applicant actually filled wetlands and consequently encourages owners to increase impacts. It is recommended that Section 15.26 be removed from the rules.

F. CHANGES TO MISCELLANEOUS PROVISIONS

1. The federal program requires a legal instrument over stream restoration projects because, on a nationwide basis, most states do not have strict transition area or stream buffer rules. Why does the DEP require burdensome conservation easements to protect stream restoration projects when in New Jersey the existing buffer regulations appear sufficient for this purpose?

2. Conservation easements proposed by the DEP include numerous provisions that will discourage voluntary restoration of habitats on private property. Has the DEP considered the impact to the voluntary improvement of the environment caused by these proposals? Has the DEP discussed the impact its conservation easement provisions will have on NRCS- sponsored habitat restoration projects? Has the DEP discussed the proposals with the Department of Agriculture to determine if there is an adverse impact on farmland preservation programs?

3. Currently, there is little economic incentive to use green technologies to naturally treat low-level contamination since natural attenuation processes can take several years. It is more plausible that an owner would choose one of these sustainable methods if, after the clean up was complete, he could then sell wetland mitigation credits. Why would the DEP include strict cleanup standards that would discourage this kind of progressive approach by landowners?

4. The DEP is proposing Section 15.12 to address potential exposure of Land Use staff to contaminated sites. However, the DEP is proposing the applicant provide information that is inconsistent with Site Remediation rules regarding clean up of contaminated sites. Even if the applicant could provide the information requested by the proposals, does the Land Use Regulation staff reviewing the submittal have the training needed to interpret the information and make reasoned judgment that the site is safe to enter?