



Senator Bob Smith
 216 Stelton Rd, Suite E-5
 Piscataway, NJ 08854

April 7, 2016

Dear Senator Smith,

Per your request, summarized below and attached in detail are the signed organizations' top 10 agreed upon changes needed in DEP's 2015 proposed Flood Hazard Rules to protect drinking water and avoid worse flooding.

As proposed, the rules would provide increased clearing of stream buffers that retain flood water and increase development in floodplains. The proposed rules, if adopted, would place people's safety and property in harm's ways and increase damage to water quality including drinking water.

This by no means is an exhaustive list; and we stand in support of our original comments to the NJDEP. The top actions needed to remove the most damaging provisions of the proposed rule that must be corrected to protect people and the environment are:

1. Reinstate the full flood and water quality protections provided by the 300 foot buffers, known as Special Water Resource Protection Areas (SWRPA), to Category One streams.
2. Maintain allowable disturbance
3. Maintain compliance with federal law
4. Eliminate general permits by certification
5. Restore protections for riparian zones
6. Eliminate mitigation provisions
7. Return to the 2008 hardship rules.
8. Reinstate protection of headwater streams
9. Protect buffers on acid producing soils
10. Eliminate expanded grandfathering

However, even if DEP accepted all of these changes, its proposal would still weaken water quality protections. Given that over 90 percent of New Jersey waters fail at least one water quality standard, a preferable approach is to re-adopt without change the rules proposed and adopted in 2008 and include provisions that strengthen water quality protections.

We are pleased to meet to discuss and answer any questions that you may have and to provide additional information as needed.

Sincerely,

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Nancy Hedinger, President, League of Women Voters of New Jersey

Alison Mitchell, Director of Policy, New Jersey Conservation Foundation

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Elliot Ruga, Policy Director, New Jersey Highlands Coalition

Debbie Mans, Executive Director & Baykeeper, New York/New Jersey Baykeeper

Richard Bizub, Director for Water Programs, Pinelands Preservation Alliance

Bill Kibler, Policy Director, Raritan Headwaters Association

Britta Wenzel, Executive Director, Save Barnegat Bay

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Ten Priority Changes in DEP's 2015 Proposed Flood Hazard Rules Needed to Protect Drinking Water & Avoid Worse Flooding

Per the attached letter, please see below the details and rationale for the signed organizations abbreviated top 10 list of the most important changes that need to be made to the NJDEP's June 1, 2015 Proposed Flood Hazard Area (FHA) Control Act Rules.

As proposed, the rules will provide increased clearing of stream buffers that retain flood water and increase development in floodplains. The proposed rules, if adopted, would place people's safety and property in harm's ways, and increase damage to water quality including drinking water.

Many of the signed organizations have all submitted substantial comments to the NJDEP during the public comment period for this rule in 2015. The following list is by no means an exhaustive list; and we stand in support of our original comments to the NJDEP.

Below are the most damaging provisions of the proposed rule that must be corrected to protect people and the environment. An alternative approach to including the 10 provisions below in an effort to improve upon the NJDEP's proposed rules would be to re-adopt without change the rules proposed and adopted in 2008.

The signed organizations submit this top 10 list as an abbreviated list of the most important changes that need to be made to the NJDEP's June 1, 2015 Proposed Flood Hazard Area (FHA) Control Act Rules. As proposed, the rules will provide increased clearing of stream buffers that retain flood water and increase development in floodplains. The proposed rules, if adopted, would place people's safety and property in harm's ways, and increase damage to water quality including drinking water. Many of the signed organizations have all submitted substantial comments to the NJDEP during the public comment period for this rule in 2015. The following list is by no means an exhaustive list; and we stand in support of our original comments to the NJDEP. Below are the most damaging provisions of the proposed rule that must be corrected to protect people and the environment. An alternative approach to including the 10 provisions below in an effort to improve upon the NJDEP's proposed rules would be to re-adopt without change the rules proposed and adopted in 2008.

1. Reinstate the full flood and water quality protections provided by the 300 foot buffers, known as Special Water Resource Protection Areas (SWRPA), to Category One streams.

We have strong concerns about the negative impacts to water quality that will occur should the proposed rules be adopted and the SWRPAs eliminated.

Under the 2007 Stormwater Management Rules, N.J.A.C.7:8, the DEP adopted a policy of prohibiting development and redevelopment within the entire buffer of Category One (C1) streams. The proposed rules eliminate that provision and allow for development and redevelopment within the inner 150 feet of the 300 foot buffer. This increased disturbance of riparian vegetation and increased development within

riparian buffers along New Jersey's highest quality streams will result in worsening flood impacts and water quality impairment.

The purposes for which SWPRAs were established go well beyond those that relate to the life and property purposes of the Flood Hazard Area rules to embrace the anti-degradation policies for C1 waters (N.J.A.C. 7:9B (d) 2 iii): *“Category One Waters shall be protected from any measurable changes (including calculable or predicted changes) to the existing water quality. Water quality characteristics that are generally worse than the water quality criteria, except as due to natural conditions, shall be improved to maintain or provide for the designated uses where this can be accomplished without adverse impacts on organisms, communities, or ecosystems of concern”*.

Both sets of rules (N.J.A.C. 7:8 and 7:13) are necessary to effectuate the goals of the enabling legislation. While there is a relationship between both sets of rules, the requirements of the Stormwater Rule are designed to address issues not contemplated in the FHA rules. The Stormwater rule at N.J.A.C. 7:85.5 (h) specifically describes the purposes of the SWRPA: *“These areas shall be established for the protection of water quality, aesthetic value exceptional ecological significance, and exceptional fisheries significance of those established Category One waters”*.

The designation of SWRPAs is one of the major strategies for protection of high resource value Category One waters to achieve designated beneficial uses in the State Surface Water Quality Standards. This strategy was crafted to recognize and address the extent of impaired waters in the state, and to be a major tool in the tool box to control diffuse sources of pollution not regulated under the New Jersey Discharge Pollution Elimination System (NJPDES) Program. This anti-degradation requirement is also found in the Clean Water Act regulations. 40 C.F.R. 131.12. Since the Stormwater Management Rule was, in part, promulgated to meet the federal requirements of the Clean Water Act and the State Surface Water Quality Standards approved by USEPA, the repeal of SWRPAs would be inconsistent with both anti-backsliding and anti-degradation provisions of the CWA and SWQS rule

2. Maintain the 2007 table of allowable disturbance in Table C 11.2:

The Department is proposing to increase the amount of permissible impacts in a riparian zone without requiring restoration or mitigation. These increases are found in Table 11.2 formerly Table C. The Department justifies these increases because they state many proposed projects cannot meet the allowable disturbances without a hardship waiver. The Federal rules require a project to avoid impacts first, then minimize those impacts if avoidance is not possible; and lastly mitigate. The Department's stated experience regarding the limits of allowable disturbance for projects leading to too many hardship applications is not a justification to increase the limits of disturbance. The Department's "finding" speaks to an unwillingness of applicants to engage in proper design and adherence to the requirements that a project avoid the impacts, minimize those impacts that are unavoidable and mitigate that which could not be avoided. Existing data demonstrates that increasing disturbance in riparian zones will be detrimental to water quality. According to the most recent draft Integrated Water Quality Report many of New Jersey's waters do not meet designated water quality standards. The following chart

demonstrates these findings as well as the trend, in most cases, to lower water quality:

2014 Integrated Report				
Designated Use	% Meeting Criteria	% Not Meeting Criteria	% Not Assessed	Change from 2012
Water Supply	37	37	26	-9.7561
Recreation	24	41	35	41.17647
Aquatic Life	16	64	20	-27.2727
Shellfish Harvest	27	67	13	-53.4483
Fish Consumption	<0.5	36	64	25

As the Integrated Report demonstrates, New Jersey’s water quality is not meeting the standards that our statutes require. The Flood Hazard Act rules implement the State’s Water Pollution Control Act and Water Quality Planning Act. N.J.S.A. 58:10A-1 et seq. and N.J.S.A. 58:11A-1 et seq. These acts seek to protect, enhance and improve New Jersey’s water quality. N.J.S.A 58:11A-2(a). The Water Quality Planning Act provides that New Jersey has a “paramount interest in [the] restoration, maintenance and preservation of the quality of the waters of the State.” Id. The statutes set out their objective to “wherever attainable, to restore and maintain the chemical, physical and biological integrity of the waters of the State.” Id. at (b). These requirements mirror those of the Clean Water Act.

The Department has acknowledged in its 2006 rule proposal the importance of maintaining adequate riparian zones. 38 N.J.R. 3950(a) (2006). The Department again acknowledged the importance of buffers in this current rule making: “[g]iven the many important ecological functions and benefits that a riparian zone provides, adequately protecting such areas is essential to protecting New Jersey’s natural resources and water supply” 47 N.J.R. 1041a, 1050 (2015). Unlike in the 2006 rule proposal, the FHA rule proposal provides no scientific explanation, rationale, study, or justification for these limits of disturbance. The proposed limits in Table C are in direct conflict with the empirical data and evidence of water decline shown in the degradation of water quality between the 2012 and 2014 Integrated Reports released by the NJDEP. The original limits of disturbance should therefore be restored. With the scientific background behind riparian zones, proposed Table 11.2 should be restructured to require avoidance of impacts in the first instance, minimization of the impacts if avoidance is impossible. The Table does not make such a requirement. Additionally the proposed regulatory section would allow an applicant to stack several different allowances, under the table, so that the cumulative effect of the allowed impacts can be significantly greater than any individual allowance. Under the CWA, NJDEP is not permitted to allow impacts to the riparian zone that would jeopardize a water body’s meeting water quality standards. 40 C.F.R. 131.12(a)(1). As proposed this table could very well have this impact.

Proposed Table 11.2 would also eliminate the prohibition on stormwater discharges within the inner 150 foot and outer 150 foot riparian zone and allow stormwater discharges directly into surface waters. These proposed changes constitute a major shift in stormwater management policy and are at odds with decades of research regarding buffer science and non-point source pollution control. Direct discharges

into streams will increase sediment and pollution loading and will increase the amount of scouring and erosion in vital riparian habitat.

3. *Maintain Compliance with Federal Law- restore changes to section 2.2 – regulated waters*

The Department is modifying the definition of regulated waters to exclude waters as State Waters if they have been piped, culverted or bridged. In short, whether these waters were naturally occurring or not; if they have been piped, culverted or bridged they are no longer waters of the New Jersey in the proposed rules. This definition runs contrary to the definitions of the Waters of the United States (WOTUS). WOTUS provides a waterway would remain a regulated water even if it has been placed in a bridge, culvert or pipe. 40 C.F.R.- 230.3(o)(iii). Therefore, the Department’s proposal is inconsistent with Federal law.

4. *Eliminate General permit by certification*

The Department is proposing additional general permits, permits by rule and permits by certifications. Under the Clean Water Act, these types of permits can only be promulgated if there is a finding that the proposal has a de minimis impact on the environment either individually or cumulatively. 40 C.F.R. 233.21(b). The Department has not provided in its proposal specific findings to support its conclusion that impact are de minimis. In particular the proposed general permit by certification does not set out the Department findings that these new permits will have a de minimis impact both individually as well as cumulatively. Therefore, the Department has not met the standards for proposing this new program.

Under the proposal there is no determination by the Department prior to the issuance of the permit that the application is in fact in compliance with the regulations. For example there is no assurance that an applicant has designed the project or activity in a way that avoids the impacts in the first instance; if avoidance is impossible to minimize those impacts and lastly to mitigate those impacts in compliance with a pre-determined set of environmental criteria to protect water quality and minimize flooding impacts. The Department also has limited resources to inspect these proposals prior to their construction and little evidence that enforcement actions will be taken in situations where the certifications were incorrect. Given the lack of oversight and prior review of applications it is difficult to justify the Department’s position that issuance of permits will not have an individual or cumulative impact.

5. *Restore Protections for Riparian Zones*

As noted above, wide intact riparian zones are vital to water quality and as further noted above increased allowances in the riparian zone in Table 11.2 are contrary to statutory goals.

We ask specifically that:

a. 11.2(f)1 Riparian buffer protections be restored to match that of the 2008 rule.

We understand that the Department may be re-proposing the rule to remove the 2015 proposed N.J.A.C. 7:13-11.2(f)(1). This provision would have allowed the disturbance of one-quarter acre of riparian zone without the need for mitigation in addition to those amounts provided in Table 11.2. As that proposal lacks definitive criteria for mitigation and is contrary to both the science and goals of the statutes; this provision is contrary to legislative intent.

b. 11.2(f)7: Eliminate exemptions for roadways within a riparian area.

The DEP proposes to exempt any regulated activity from disturbance limits if the riparian area is situated along an existing road or within an area next to a road provided that the area was “disturbed for the initial construction of the roadway.” New Jersey is one of the oldest states in the nation. Much of our roadways were built in the 1950’s. Many of the previously disturbed areas adjacent to roadways are now forested habitat with 60+ year old trees. Those trees provide flood water retention, filter and retain pollutants from road runoff before they reach our streams, and provide habitat. Proposing to allow clearcutting without regulation of riparian areas because they were once disturbed 60 years or more ago is irresponsible and sweeping in scope. This provision must be deleted from the proposed rule.

c. 11.2(f)8 Eliminate exemptions that provide for unlimited clearing and cutting or vegetation in a “truncated” section of riparian zone

The DEP proposes to exempt limitations on clear-cutting riparian vegetation in areas they propose to newly define as “truncated.” “Truncated” is an arbitrary, non-scientific, new regulatory term. “Truncated” areas, as defined in the proposed rule, will flood just as surely as non-truncated areas. Riparian vegetation is a common-sense, scientifically sound means of retaining flood waters and minimizing additional impacts of flooding. This section of the rule should be deleted.

6. Eliminate the provisions for mitigation.

There is no provision in the federal or state statutes that authorizes the creation of riparian or flood area mitigation banks. This is contrary to what can be found in the Freshwater Wetlands Protection Act where mitigation banks are specifically authorized. Therefore, we oppose the proposed riparian mitigation banks. DEP propose the allowance of mitigation measures that will not work. The rule proposes the allowance of a variety of construction and requires only mitigation. The proposed rule would permit the construction of a house next to a stream in Wayne, Passaic County in exchange for planting trees in Sussex County. The proposed rules would permit a septic system within 50 feet of a Category One stream in Ocean County in exchange for mitigation near the Delaware Bayshore in Cumberland County. The mitigation provision proposed in the rules fails to address localized impacts for water quality and flooding. As written, the rules propose an environmental pay-to-play system that would allow for more development and destruction of the environment without any real remediation. The only potentially acceptable mitigation provisions would be under limited instances for certain individual permits and within the same subwatershed.

7. Return to the 2008 Hardship Rules.

Under the existing rules, an applicant that created the conditions on their property resulting in the need to apply for a hardship waiver would be disqualified from meeting the conditions in this provision. The Department is proposing to remove the prohibition against self-created hardships. Proposed N.J.A.C. 7:13-15(c). Instead it is proposing to make self-imposed hardship a factor to be considered. Proposed N.J.A.C. 7:13-15(d). An example would be an applicant who subdivided their property in such a way that the remaining lot is incapable of accommodating development outside of the riparian zone. Under the existing rules, this would prohibit an applicant from obtaining a hardship waiver; while under the proposed rules this applicant could still obtain a hardship waiver. There are no standards set out in this provision to explain to the public or an applicant what the Department will consider in this instance. The proposal is in fact creating an incentive for applicants to design their projects in such a way as to require a hardship waiver. The approach in the 2008 rule should be retained.

8. *Reinstate Protection of Headwater Streams*

The rules propose the elimination of protection for Category One streams and their buffers, including headwaters, which are where streams begin. Protected buffers for headwaters are critical for flood minimization and good water quality. Once the headwaters are impacted, a cascading effect in water quality and flooding ensues downstream.

The DEP's proposed rules would permit construction in the currently protected Category One stream buffers and permit outfalls into the stream. Allowed construction under DEP's rules includes additional buildings and septic systems. The proposed rules would also provide for the removal of protections for forest buffers, which are vital to holding back flood waters from causing additional damage to life and property, and to protecting water quality. Environmental impacts of removing headwater protections include degradation of trout-associated waters. These critical Category One and trout-associated streams are the most highly-sensitive and best quality stream areas in New Jersey, and they must be protected in their natural state.

With proposed deletion of the SWRPA buffers, water resources used for drinking will be substantially impacted. The Highlands, for example, are the gathering grounds of headwaters that further downstream grow into the defined streams and rivers that comprise some of the State's most important drinking water resources. Protection for the uppermost origins of these riverine systems are the swales and intermittent streams that are proposed for deletion under the DEP's rules. In the western Highlands where limestone is the predominant bedrock, important tributaries to Category One waterbodies are easily misidentified because only a small segment of a waterbody may actually rise to the surface—and when miscategorized as an isolated wetland feature, they would lose their protections if the SWRPA buffers are eliminated as proposed.

Threats to water quality in the Pinelands are similar to those in the Highlands under the DEP's proposed rule. The Pinelands Commission has spent considerable effort and monies to protect the water dependent

natural resources of the Toms River Watershed. Weakening Category One protections this watershed will have detrimental consequences on the Pinelands itself.

9. *Protect buffers on Acid producing soils.*

The Departments proposal eliminates the 150' riparian zone along streams with acid producing soils. Instead the Department is reducing the riparian zone to 50' and permitting the direct discharge of stormwater into the stream. It is our position that piping stormwater directly into the stream will increase erosion into the stream and expose the very soils the Department is attempting to protect. Not only will this proposal increase erosion in the streams but it will introduce into the stream additional pollutants and water quantity that the current rules avoid by requiring the discharge to flow through the riparian zone. The solution to the problem identified by the Department is to require green infrastructure so to promote additional infiltration of the stormwater prior to it entering the riparian zone and therefore further dissipating the energy of the runoff. These are current requirements of the stormwater rules. The Stormwater rules require the use of green infrastructure to the maximum extent practical. N.J.A.C. 7:8-5.4-. Unfortunately it is a requirement that is rarely enforced. The Department should incorporate those requirements into the FHACA rules especially for areas with acid producing soils.

10. *Eliminate the Expanded Grandfathering Provisions*

The proposed expansion of the grandfathering provision would expand the exemptions for old regulated activities from what used to be a narrow municipal approval category to “any one of five different types of approvals under the Municipal Land Use Law [that] was obtained prior to November 5, 2007:

- A. A preliminary or final site plan approval,
- B. A final municipal building or construction permit,
- C. A minor subdivision approval where no subsequent site plan approval is required,
- D. A final subdivision approval where no subsequent site plan approval is required, or
- E. A preliminary subdivision approval where no subsequent site plan approval is required.

This proposed expansion would allow the inclusion of private development projects into the grandfathering provisions, limit the protections on riparian zone habitat for those projects, thereby increasing the risk of impacts of flooding. There is no compelling reason to reach back more than eight years to change the rule's applicability. The DEP's proposed grandfathering provisions are in essence an attempt to codify the permit extension act. The Permit Extension Act is set to expire on June 2016. The Legislature has not seen fit to extend the act a fifth time. The Department should not be permitted to codify a permanent extension. The proposed grandfathering provisions must be removed from the rule proposal.