
Committee Meeting

of

SENATE ENVIRONMENT AND ENERGY COMMITTEE

Senate Concurrent Resolution No. 66

“Prohibits adoption of DEP’s proposed rules and regulations to revise its Flood Hazard Area Control Act Rules, Coastal Zone Management Rules, and Stormwater Management Rules”

LOCATION: Committee Room 10
State House Annex
Trenton, New Jersey

DATE: June 6, 2016
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT:

Senator Bob Smith, Chair
Senator Linda R. Greenstein, Vice Chair
Senator Richard J. Codey
Senator Christopher “Kip” Bateman
Senator Samuel D. Thompson



ALSO PRESENT:

Judith L. Horowitz
Michael R. Molimock
Office of Legislative Services
Committee Aides

Alison Accettola
Senate Majority
Committee Aide

Brian Alpert
Senate Republican
Committee Aide

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Meeting Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, State House Annex, PO 068, Trenton, New Jersey



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New Jersey State Legislature

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COMMITTEE NOTICE

TO: MEMBERS OF THE SENATE ENVIRONMENT AND ENERGY COMMITTEE

FROM: SENATOR BOB SMITH, CHAIRMAN

SUBJECT: COMMITTEE MEETING - JUNE 6, 2016

The public may address comments and questions to Judith L. Horowitz or Michael R. Molimock, Committee Aides, or make bill status and scheduling inquiries to Pamela Petrone, Secretary, at (609)847-3855, fax (609)292-0561, or e-mail: OLSAideSEN@njleg.org. Written and electronic comments, questions and testimony submitted to the committee by the public, as well as recordings and transcripts, if any, of oral testimony, are government records and will be available to the public upon request.

The Senate Environment and Energy Committee will meet on Monday, June 6, 2016 at 10:00 AM in Committee Room 10, 3rd Floor, State House Annex, Trenton, New Jersey.

The following bills will be considered:

S-909 Rice	Exempts person who remediates property in environmental opportunity zone from remediation funding source requirement.
S-2276 Smith, B/Bateman	Establishes NJ Solar Energy Study Commission and modifies State's solar renewable energy portfolio standards.
S-2287 Bateman/Smith, B	Changes submission and notice requirements for short-term and long-term financing for environmental infrastructure projects.
S-2292 Greenstein/Kyrillos	Authorizes New Jersey Environmental Infrastructure Trust to expend certain sums to make loans for environmental infrastructure projects for FY2017.
S-2293 Whelan/Gordon	Appropriates funds to DEP for environmental infrastructure projects for FY2017.
SCR-109 Smith, B	Approves FY 2017 Financial Plan of NJ Environmental Infrastructure Trust.

(OVER)

Senate Environment And Energy Committee
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June 6, 2016

FOR DISCUSSION ONLY:

SCR-66
Lesniak/Smith, B

Prohibits adoption of DEP's proposed rules and regulations to revise its Flood Hazard Area Control Act Rules, Coastal Zone Management Rules, and Stormwater Management Rules.

Issued 5/27/16

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**SENATE CONCURRENT
RESOLUTION No. 66**

STATE OF NEW JERSEY

217th LEGISLATURE

INTRODUCED FEBRUARY 16, 2016

Sponsored by:

Senator RAYMOND J. LESNIAK

District 20 (Union)

Senator BOB SMITH

District 17 (Middlesex and Somerset)

SYNOPSIS

Prohibits adoption of DEP's proposed rules and regulations to revise its Flood Hazard Area Control Act Rules, Coastal Zone Management Rules, and Stormwater Management Rules.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 3/8/2016)

1 **A CONCURRENT RESOLUTION** concerning legislative review of
2 rules and regulations pursuant to Article V, Section IV,
3 paragraph 6 of the Constitution of the State of New Jersey and
4 prohibiting the adoption of certain proposed Department of
5 Environmental Protection rules and regulations.
6

7 **WHEREAS**, Pursuant to Article V, Section IV, paragraph 6 of the
8 Constitution of the State of New Jersey, the Legislature may review
9 any rule or regulation adopted or proposed by an administrative
10 agency to determine if it is consistent with the intent of the
11 Legislature, and invalidate an adopted rule or regulation or prohibit
12 the adoption of a proposed rule or regulation if it finds that the rule
13 or regulation is not consistent with legislative intent; and

14 **WHEREAS**, Upon finding that a rule or regulation, either proposed or
15 adopted, is not consistent with legislative intent, Article V, Section
16 IV, paragraph 6 provides that the Legislature shall transmit its
17 findings in the form of a concurrent resolution to the Governor and
18 the head of the Executive Branch agency which promulgated, or
19 plans to promulgate, the rule or regulation, and the agency shall
20 have 30 days from the time the concurrent resolution is transmitted
21 to amend or withdraw the rule or regulation; and

22 **WHEREAS**, If the agency does not amend or withdraw the existing or
23 proposed rule or regulation, Article V, Section IV, paragraph 6
24 provides that the Legislature may invalidate or prohibit the adoption
25 of the proposed rule or regulation, following a public hearing held
26 by either House on the invalidation or prohibition, the placement of
27 a transcript of the public hearing on the desks of the members of
28 each House of the Legislature in open meeting followed by the
29 passage of at least 20 calendar days, and a vote of a majority of the
30 authorized membership of each House in favor of a concurrent
31 resolution invalidating or prohibiting the adoption of the rule or
32 regulation; and

33 **WHEREAS**, On June 1, 2015, the Department of Environmental
34 Protection proposed for public comment in the New Jersey Register
35 a rule proposal to revise its Flood Hazard Area Control Act
36 (FHACA) Rules, N.J.A.C.7:13-1.1 et seq., Coastal Zone
37 Management (CZM) Rules, N.J.A.C.7:7E-1.1 et seq. (recodified on
38 July 6, 2015 as N.J.A.C.7:7-1.1 et seq.), and Stormwater
39 Management (SWM) Rules, N.J.A.C.7:8-1.1 et seq.; and

40 **WHEREAS**, The notice of proposal lists the following statutes as the
41 authority for the rule proposal: N.J.S.A.13:1D-1 et seq. (the statute
42 establishing the department); N.J.S.A.13:1D-29 et seq. (commonly
43 referred to as the "90-Day Law"); N.J.S.A.13:20-1 et seq. (the
44 "Highlands Water Protection and Planning Act"); N.J.S.A.58:10A-
45 1 et seq. (the "Water Pollution Control Act"); N.J.S.A.58:11A-1 et
46 seq. (the "Water Quality Planning Act"); and N.J.S.A.58:16A-50 et
47 seq. (the "Flood Hazard Area Control Act"); and

1 **WHEREAS**, Assembly Concurrent Resolution No. 249 and Senate
 2 Concurrent Resolution No. 180 declared that the proposal by the
 3 Department of Environmental Protection, published for public
 4 comment in the New Jersey Register on June 1, 2015, to revise the
 5 Flood Hazard Area Control Act Rules, N.J.A.C.7:13-1.1 et seq.,
 6 Coastal Zone Management Rules, N.J.A.C.7:7E-1.1 et seq.
 7 (recodified on July 6, 2015 as N.J.A.C.7:7-1.1 et seq.), and
 8 Stormwater Management Rules, N.J.A.C.7:8-1.1 et seq. is not
 9 consistent with legislative intent; and

10 **WHEREAS**, On January 11, 2016, Senate Concurrent Resolution No.
 11 180 received final approval by the Legislature and was filed with
 12 the Secretary of State and transmitted to the Commissioner of
 13 Environmental Protection; and

14 **WHEREAS**, Senate Concurrent Resolution No. 180 expressed the
 15 Legislature's finding that the Department of Environmental
 16 Protection's June 1, 2015 proposal was not consistent with
 17 legislative intent and informed the department, pursuant to Article
 18 V, Section IV, paragraph 6 of the Constitution of the State of New
 19 Jersey, that the department shall have 30 days following transmittal
 20 of that concurrent resolution to amend or withdraw the proposed
 21 rules and regulations or the Legislature may, by passage of another
 22 concurrent resolution, exercise its authority under the Constitution
 23 to prohibit the adoption of the proposed rules and regulations in
 24 whole or in part; and

25 **WHEREAS**, The Department of Environmental Protection has failed to
 26 amend or withdraw, or provide any notification to the Legislature of
 27 its intention to amend or withdraw, the proposed regulations within
 28 30 days after the transmission of Senate Concurrent Resolution No.
 29 180; and

30 **WHEREAS**, Prior to voting on a concurrent resolution to invalidate an
 31 adopted rule or regulation or prohibit the adoption of a proposed
 32 rule or regulation, a public hearing shall be held on invalidating or
 33 prohibiting the adoption of the proposed rule and the transcript of
 34 that hearing shall be placed on the desk of each member of the
 35 Senate and each member of the General Assembly; now, therefore,
 36

37 **BE IT RESOLVED** by the Senate of the State of New Jersey (the
 38 General Assembly concurring):
 39

40 1. The Legislature prohibits adoption of the proposed rules and
 41 regulations published by the Department of Environmental
 42 Protection for public comment in the New Jersey Register on June
 43 1, 2015, to revise the Flood Hazard Area Control Act Rules,
 44 N.J.A.C.7:13-1.1 et seq., Coastal Zone Management Rules,
 45 N.J.A.C.7:7E-1.1 et seq. (recodified on July 6, 2015 as N.J.A.C.7:7-
 46 1.1 et seq.), and Stormwater Management Rules, N.J.A.C.7:8-1.1 et
 47 seq.

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(This is an excerpt from the Senate Environment and Energy Committee meeting held June 6, 2016, regarding Senate Concurrent Resolution 66.)

SENATOR BOB SMITH (Chair): All right. To one of the two main events -- we're going to go to the Flood Rules. The Flood Rules are officially SCR-66, sponsored by Senator Lesniak and Senator Smith. And this is, basically, overturning the DEP's proposed rules on Flood Hazard Area Control Rules, Coastal Zone Management Rules, and Stormwater Management Rules.

Now, we have been working through a process. In the last Legislature, the Assembly and Senate each voted once to overturn these Rules. We're now in a second session; and my understanding is that the Assembly, on June 16, will be voting for the SCR.

Here, we've had the DEP in twice to describe the new Rules. The problem with the second meeting was that the Rules were not in a place where anybody could look at them; they weren't yet published. The people have had now -- interested parties have now had about two weeks to take a look at the Rule and the proposed Supplemental Rule. And we're going to take testimony on that today. We're not taking a vote on anything today.

And I would appreciate if the DEP would come up, because we're going to do *Saturday Night Live* point-counterpoint. If you have an objection to the Rule--

SENATOR CODEY: (off mike) (Indiscernible) drum.

SENATOR SMITH: Could I send the Sergeant-at-Arms down to get a drum, please? (laughter)

No, I'm sorry.

We'll take a point at a time, and give everybody a chance to talk. The Senators are going to think about what is said today, and then we're going to deal with this at a future meeting.

So let me, first, ask DEP to come on up; I saw Mr. Cantor and Ginger Kopkash.

RAYMOND CANTOR, Esq.: (off mike) Kopkash (indicating pronunciation); very good.

SENATOR SMITH: See, that's the good thing about these hearings. I'm getting the names down straight, which is a good thing. (laughter)

Is there a microphone over there too?

All right. So you know, let me move you guys to the side, because last time you presented what was in the new Rule; and then we'll have anybody who has comments over here (indicating).

Now, when you come up -- you've now had a Rule to look at. So generalities don't get as much weight as specifics. What is it about the Rule or the Supplemental Rule that you like or don't like? And if you can point to the section or, at least the chapter, so that we know what you're talking about -- that would be really, really helpful.

So let's start on the positive note. Tony Pizzutillo, NAIOP; with the Chamber of Commerce and BIA. Are you guys here?

UNIDENTIFIED MEMBER OF AUDIENCE: (off mike) Yes.

SENATOR SMITH: Come on up; unless you have too many people.

UNIDENTIFIED MEMBER OF AUDIENCE: (off mike)
We're going to have Dennis talk--

SENATOR SMITH: As a speaker for everybody.

UNIDENTIFIED MEMBER OF AUDIENCE: (off mile) --for
the whole lot of us.

SENATOR SMITH: So why don't you put Dennis in front of
the microphone, and then the other three just wave, all right? (laughter)

UNIDENTIFIED MEMBER OF AUDIENCE: Okay.

SENATOR SMITH: And Dennis, if you would identify
yourself. I know who you are; I think you're one of the best environmental
lawyers in the state. And I can't practice in that field, so if I have a client
who needs a really good environmental lawyer, I mention your name. They
don't necessarily go to you, but I mention your name. (laughter)

D E N N I S M. T O F T, Esq.: (off mike) I appreciate that very
much, Senator.

SENATOR SMITH: All right. So Dennis -- a little bit about
yourself, and then what do you-- On behalf of the Chamber, BIA, and
NAIOP, what is the position of the three organizations?

MR. TOFT: Thank you very much, Senator.

My name is Dennis Toft; I am a member of the firm of Chiesa,
Shahinian & Giantomasi, in West Orange. I have the privilege of being a
Board Member both of the State Chamber of Commerce and of NAIOP;
and a proud member of the New Jersey Business and Industry Association.

Not surprisingly, all three groups are very much in favor of
allowing the process to proceed; of allowing the DEP Rule to be adopted,
with the Concurrent Proposal to go ahead.

I'll note-- And you have written comments from me. I won't belabor the record by reading them.

But some of the specifics -- and it seems like most of the controversy continues to evolve around Special Water Resources Protection Area buffers.

What a lot of folks don't realize is, that the way these buffers have been applied historically has been an absolute. Within 150 feet, you could do nothing. What's the impact of that? Well, there are contaminated sites where you have contamination within 150 feet of a Special Waters -- of a C1 water. There are sites that are already developed, where's there's development already within 150 feet of a C1 water. There has been no process to address those sites and the redevelopment of those sites; and the current Rules, as originally proposed, went a long way to address that.

I'm familiar with a site up in northern New Jersey, which was a heavily used site. There's development within the 150 feet. The user of that site has left the state and a new developer is coming in to look at that site. But they're stymied because they cannot go within 150 feet of the C1 water to put in things like stormwater controls; to put in improvements that would improve the environment.

What the Rules did by eliminating the absolute and allowing for hardship exemptions under the Stream Encroachment Flood Hazard Rules, (indiscernible) situations to be addressed. So that, overall, in balance, what the Department did in the Rule -- and what they're still trying to do -- is to strike a balance to allow the process to move ahead, while still maintaining protections appropriately in those areas.

I'd also like to note, where the issue here is whether the Rule reflects legislative intent or not. One of the key elements of the Rule was to improve the process by allowing for increased use of General Permits and Permits by Rule. And that is specifically called for in N.J.S.A. 52:14B-27. The legislation already exists to encourage agencies to promote the use of streamlined processes wherever possible. In fact, there's a bill pending now, S-482, co-sponsored by Senator Oroho and Senator Stack, which encourages agencies to increase use of these expedited processes, which is exactly what the Flood Hazard Rules do.

Overall, the Rules also address some of the unintended consequences of the 2007 Flood Hazard Rules, specifically having to do with acid-producing soils, and having to do with the overreliance on hardship waivers in cases where strict applicability to the Rule just doesn't make sense.

So I think the compromise the Department came up with -- with taking out the controversial parts of the Rule, reproposing another Rule to address those more specifically -- works. The Rule, as adopted, should be allowed to stand, and the process should go forward with the reproposal.

SENATOR SMITH: Okay. So one of the things that you said that caught my attention was that under the -- prior to any new Rule or supplementary Rule, that under the "old Rules" -- that there was no process to deal with the CI buffers. I thought there was a hardship process that was in place prior to the new Rule.

Ginger, am I wrong in that?

GINGER KOPKASH: You would have to get a hardship.

SENATOR SMITH: You would have to get a hardship. So--

MS. KOPKASH: You would have to apply for and be eligible for a hardship.

SENATOR SMITH: And how tough it is to get a hardship?

MS. KOPKASH: Very difficult.

SENATOR SMITH: Can you tell me, in 2015, how many hardship applications there were?

MS. KOPKASH: No, I can't.

SENATOR SMITH: Okay. Does anybody know?

SENATOR CODEY: (off mike) Do you have any sense of it?

MS. KOPKASH: We get thousands of applications in a year.

SENATOR CODEY: (off mike) Okay.

MS. KOPKASH: And probably less than 100--

SENATOR SMITH: Each year?

MS. KOPKASH: Yes.

SENATOR SMITH: So you would say, less than 100 each year, over the last several years.

MR. TOFT: But, but--

SENATOR SMITH: Hold on one second. Let me get the information.

So in terms of how the hardships were processed in the DEP, how many of those applications were successful, on average -- half of them, a quarter of them? Just a guess.

MS. KOPKASH: I don't want to mislead you, sir.

SENATOR SMITH: All right. Can you get back to us on that?

MS. KOPKASH: Yes.

SENATOR SMITH: Because I would really like to know the answer to that.

MS. KOPKASH: Yes, I will.

SENATOR SMITH: And you wanted to make a comment on that, Dennis?

MR. TOFT: Yes. That reflects the people who are willing to even seek the hardship. Oft times, someone looking at a site -- if they hear they would need a hardship waiver, won't even proceed with the redevelopment of that property. And we're talking about properties that people would want to redevelop; properties that are in urban areas, are in areas that have already been developed. We're not talking about sites where the development community recognizes they need to be preserved in their current state. Those sites aren't really ones that folks are looking to develop anymore.

SENATOR SMITH: Okay.

Ginger, you wanted to get a word in?

MS. KOPKASH: Yes. I wanted to add that during our stakeholder process, what we heard from our stakeholders is that for the remediation sites, the deterrent to them, in having a viable individual coming in, is having to go through the hardship from a financing perspective, is that it was unpredictable, and that was partly why we put the standards of the -- that you had to be a contaminated site. And we put the standards in the Rule itself without having to get a hardship.

SENATOR SMITH: So is it--

MS. KOPKASH: So it's more predictable.

SENATOR SMITH: So your position is, it's still hard--

MS. KOPKASH: Yes.

SENATOR SMITH: --because you have to meet the conditions and the standards. But it's--

MS. KOPKASH: It's predictable.

SENATOR SMITH: --predictable; okay.

MS. KOPKASH: See, the hardship provisions are very broad. For the individual circumstances, it doesn't have -- spell out, "For site remediation projects, you shall do X, Y, and Z." They're just very broad standards that are applicable to anything that you may be doing. You may need a hardship just to put a sign up, because there are no provisions on the Rule that will allow a sign to be constructed in a riparian zone.

So Dennis -- what he's getting at, we heard that during the stakeholder process --

SENATOR SMITH: Okay.

MS. KOPKASH: --is that financing is difficult when you have to get a hardship.

SENATOR SMITH: All right. If you wouldn't mind getting back to us on that question, though.

MS. KOPKASH: Yes, sir.

SENATOR SMITH: How many applications in, how many get approved, and how many get denied.

SENATOR CODEY: (off mike) Mr. Chairman.

SENATOR SMITH: Governor.

SENATOR CODEY: (off mike) Counsel, are there anything -- like old stories -- you can tell us where the projects, (indiscernible) you know, in a general sense to be good projects (indiscernible)?

MR. TOFT: There are projects I've dealt with in the Newark area, where folks have just, when they heard -- as Ginger said, when they heard they needed a hardship waiver, they have just walked away. It never even got to the point of submitting an application.

The project I just mentioned is up in Bergen County, where a developer now is trying to determine whether they can proceed with a redevelopment of this site. And it's a site that is fully developed. And if they need a hardship waiver, they're probably going to not proceed with the project.

The other key element is the increased options that are provided in the Rule for riparian zone mitigation. One of the hardest things to do when you have an impact in a riparian zone, even on a contaminated site, is finding means to mitigate for that riparian zone impact. It's not always possible to replant trees along a waterway on a contaminated property. So by allowing for more options for riparian zone mitigation, the Rules encourage environmental improvements and also help with the process.

SENATOR SMITH: (off mike) Very good; thank you.

So I have slips for Dennis, on behalf of the Chamber; Jeff Kolakowski, on behalf of New Jersey Builders; and Sara Bluhm, on behalf of BIA. And I guess Tony is going to speak on behalf of--

ANTHONY PIZZUTILLO: Thank you, Mr. Chairman.

I would just like to add, with what--

MR. TOFT: Dennis.

MR. PIZZUTILLO: --Dennis stated-- Again, on behalf of the commercial real estate industry, NAIOP, I just would like to comment on the process -- to understand this process.

First of all, you had mentioned that the Assembly floor will be voting on invalidation on June 16.

SENATOR SMITH: Right; correct. That's what I hear.

MR. PIZZUTILLO: As you stated, the next step would be the Senate floor, correct?

SENATOR SMITH: When and if it is released from this Committee, it goes to the Senate. It should be going to the Senate floor.

MR. PIZZUTILLO: The Senator floor; right. Not through this Committee again. Okay.

SENATOR SMITH: Well, this is already, like, the fifth time we're talking about this.

MR. PIZZUTILLO: I understand. Again, this puts a lot of fear in a lot of projects, as you heard. And the ramifications can be significant. As not to reiterate what Dennis just stated, but we would recommend that cooler heads prevail here, and understand the ramifications, and allow for the promulgation of a majority of the Rules on June 20; and allow for a period for DEP to consider the reproposal before any additional action is taken by the Senate.

SENATOR SMITH: We appreciate your comments.

MR. PIZZUTILLO: Thank you.

SENATOR SMITH: Now, you actually end up being the only-- I'm sorry; there's one other objector to this, going forward, and that's Tim

Martin, Community Associations Institute, saying “opposed, no need to testify.” The rest are all witnesses in favor of--

MR. TOFT: I think there is one other gentleman here who is opposed.

SENATOR SMITH: Who is that?

MR. TOFT: Mr. Douglas Lashley, who I think checked the wrong box when he filled out the form. (laughter)

SENATOR SMITH: Well, you know, on that note, it’s a great segue. David Zimmer, New Jersey EIT; and Frank Scangarella, New Jersey EIT, have checked the box “in favor,” and no need to testify. So--

SENATOR CODEY: (off mike) (Indiscernible).

UNIDENTIFIED MEMBER OF AUDIENCE: (off mike) I think he (indiscernible) in error.

UNIDENTIFIED MEMBER OF COMMITTEE: (off mike) He probably put the wrong bill number on there.

SENATOR SMITH: No, they have SCR-66.

UNIDENTIFIED MEMBER OF COMMITTEE: (off mike) I know; they probably meant SCR-109.

SENATOR SMITH: Oh, they probably meant SCR-109.

All right; well, just to make sure that we don’t have any craziness, can somebody give them a quick call and make sure that they checked the wrong box, or what their actual position is? Because I didn’t see it, and they left. Can you make a quick call to EIT?

Anyway, let’s-- To try a little balance, I’ll do two or three of the proponents, and then-- Who is the other gentleman who wanted to speak?

MR. TOFT: Doug Lashley.

SENATOR SMITH: Doug Lashley; I don't have him on a slip, but we'll be happy to include him.

UNIDENTIFIED MEMBER OF AUDIENCE: (off mike) Is he here?

MR. TOFT: Yes.

UNIDENTIFIED MEMBER OF AUDIENCE: (off mike) Have him stand up. Where is he?

SENATOR SMITH: All right; so let's get some proponents of the SCR up here and see what they have to say.

How about Elliott Ruga, New Jersey Highlands Coalition? Oh, no -- Elliot says in favor of the SCR, but no need to testify. So you don't have to--

E L L I O T T R U G A: (off mike) Mr. Chairman, may I ask a question?

SENATOR SMITH: Sure; come on over.

MR. RUGA: (off mike) I had a family emergency that's (indiscernible) circulation for a little over a week.

Since you're not voting today, may I submit written comments to you?

SENATOR SMITH: Please; we'd love to have them.

MR. RUGA: Thank you.

SENATOR SMITH: All right. Tim Dillingham, in favor of the SCR.

Tim, are you present?

T I M D I L L I N G H A M: Good morning, Mr. Chairman, members of the Committee.

I'll be brief, because I know you have a lot of people.

I think, as Mr. Toft said, I think the centerpoint of the controversy about this Rule is the buffer zones around the Special Resource Waters.

I think that the changes go beyond enabling what, I think, everybody would agree are valuable activities, like the remediation of contaminated sites. I would argue that redevelopment of properties ought to figure out how to incorporate and accommodate the buffers. You talk to the scientists, and water quality issues -- buffer zones around streams and contributing watersheds-- are probably the single-most effective technique and practice we can use to restore the waters.

And if you take a look at the Department's own inventories and status reports about the quality of waters in the state, you'd know that we are in dire straits. We have -- the majority of the waters are not attaining their uses; a lot of that, if not most of that, is a result of stormwater-contributed pollutants.

So this is, indeed, an argument about one of the key tools in both protecting and restoring the state's waters.

As we said at the very beginning of this, we believe the Department went too far in trying to enable development to happen and really came up with what was, in many ways, a wish list. We've heard from the development community about standards that they find to be too rigorous, too onerous; and to weaken them.

So (indiscernible) in opposition to enabling the cleanup of contaminated sites to happen. But the Rule goes beyond that.

It would be really, I think, instructive to see a side-by-side as to what are the new uses that have been changed, in terms of the allowable infringements and alternations of the buffer zones.

So, that; and then I think the other questions is just the fundamental change of the jurisdiction of the Rule -- being in the Flood Hazard Rules, as opposed to being in the Stormwater Rules. I am not an expert in this, but in talking with people who know it better than I do, they say that that changes the triggers; it changes the type and scope of development that is captured by these Rules, and then subject to the standards. So that's a fundamental flaw that still remains in the reproposal.

On the hardship process -- you know, if we set a standard and we think the standards are important for the protection of the waters in the state, it ought to be difficult to violate that standard or to go beyond it. The hardship process is a process, and it is granted; people make their way through it. It is an opportunity to examine alternatives, examine different strategies that might be integrated into the development proposal. But we may not get there if the Rules are changed in such a way that you, in essence, give them a hardship approval right off the bat that allows you to vary from the standards. So that's, again-- I know the Department has taken some steps in this reproposal to make that more rigorous. And in many ways, that's sort of an acknowledgeable that it was too loose to start off with. But again, that's something that should not be waged, not be integrated into the standards. You shouldn't automatically get to go in a situation in which you're asking to vary from the standards.

And then lastly, as I understand the Rule, there are expansions in terms of roads and utilities, and what's allowed in association with those

activities. In a state that's facing an onslaught of pipeline proposals, I think we should be very, very cautious about how we change the protections that are in place for the waters of the state, in regards to such activities.

And then lastly, in terms of the Concurrent Proposal -- you know, again, that's a-- The Department, I think, is to be commended for trying to take steps to address the criticisms that they heard on this Rule. But it needs to come into play at the same time. And as I understand, the Department's proposal is to adopt, later this month -- move forward with that, and then move forward with a Concurrent Proposal that is supposed to fix some of the problems -- with no promise that that should happen. And I don't know whether there's another alternative process, or an emergency basis, or something else in which those Rules might come into effect concurrently. But then the fixes -- that you might call them -- would happen at the same time that the Rule, as adopted, comes into play.

SENATOR SMITH: (off mike) Just sit for a minute.

Ginger -- a chance to respond.

MS. KOPKASH: I tried to write down, as quickly as possible; I don't know if I got everything.

So you recognize remediation is valuable, and redevelopment should incorporate a riparian zone. So if an applicant is doing an activity-- And I'm going to couch this-- We're just talking about SWRPAs?

MR. DILLINGHAM: Yes.

MS. KOPKASH: Okay, all right; good.

So I think in the last hearing we were at, we talked about the upfront standards. So if you need an Individual Permit -- which you would under those circumstances -- before you get to the table which gives you

allowable disturbances, you have to first meet this one criteria. “The basic purpose of the regulated activity cannot be accomplished onsite without clearcutting or removing of vegetation.” And then we go into a standard that if you are clearcutting and removing vegetation, that you meet the first standard -- that you minimize that impact.

We also have criteria in there about replanting a 25-foot buffer in the riparian zone -- so in a redevelopment situation.

And then on top of that, there are Individual Permit criteria, with respect to a remediation project, that they also have to follow. And then if they meet all that criteria, they still have to mitigate 100 percent for the loss of that riparian zone vegetation.

And what we-- With respect to hardship, every remediation project that took place in a 50-foot, 150-foot, or 300-foot riparian zone required a hardship, because there are no rules or criteria. And we heard it from numerous stakeholders -- that it was impacting the ability to quickly remediate sites. And that they asked that we put standards in the Rule that they would have to meet in all-- In the Coastal Rules and in the Freshwater Wetland Rules, we have a General Permit that covers remediation projects -- because we don't want to get in the way of properly remediating a site.

So this was our-- We require an Individual Permit, because we didn't feel we could craft a General Permit effectively. So we crafted an Individual Permit standard for remediation projects. The same is true for solid waste landfill closures -- that was required to go through a hardship. And one of the things we heard-- We sat down at the table -- all of us, internally -- and said, “If everything requires a hardship, then we're missing something in our Rules.” That it should be an exception to have to go

through the hardship; that if every project that undertakes that same activity -- it would be like every roadway project would have to be a hardship, you know? It just doesn't make any sense.

So that is--

MR. CANTOR: (off mike) Ginger, can you just verify for the Committee what projects we're talking about?

MS. KOPKASH: I'm going to go through what we added to the table--

MR. CANTOR: It's not every one (indiscernible); it's very defined (indiscernible) what we're talking about.

MS. KOPKASH: Yes; so Individual--

SENATOR SMITH: Let's hear-- Go ahead.

MS. KOPKASH: What's new is Individual Subsurface Sewage Disposal Systems. You're limited to 5,000 square feet. Those would normally not require a-- The SWRPA would not apply, because -- you remember? -- SWRPA applies to major development projects. It's an acre of disturbance or a quarter-acre of impervious; 5,000 square feet is obviously less than 43,560 square feet -- 43,560 square feet is an acre.

Hazardous Substance Remediation was added to the table, which means that you could get an Individual Permit for it. Solid Waste Landfill Closure -- you have to get an Individual Permit. Trail or boardwalk, which is limited to 10 square feet per linear foot; a footbridge, which is limited to 1,000 square feet. Once again, these projects would not rise to the level of needing -- to comply with the SWRPA. Removing sediment or debris from a regulated water for the access point was limited to 1,000 square feet -- did not meet the limit for the SWRPA; and removing

existing fill or existing structures from a floodway. We had projects like that -- where, if they wanted to actually take fill out of the floodway, they had to get a hardship to do that. That is not to exceed one acre. And once again, that's removal of material -- that's a good thing -- and then restoration of the area afterwards.

So that's what was added to the-- Those are the new standards in the Rule, with respect to -- on the table.

MR. CANTOR: (off mike) And again, Mr. Chairman, you can see -- it's just a very defined universe of what's being added.

SENATOR SMITH: Got it.

MR. CANTOR: And again--

SENATOR SMITH: How about Tim's suggestion -- that instead of having a gap period, that the Supplemental Rule be made an Emergency Rule until such time as they're finally adopted? What would be the harm? Then you wouldn't have a gap.

MR. CANTOR: (off mike) Well, if I could just quickly address that.

SENATOR SMITH: Yes, sure.

MR. CANTOR: (off mike) One, there are statutory criteria by which emergency rules are adopted as -- you had to show eminent harm. I'm not going to opine on that at the moment, but that is the standard in order to (indiscernible) Emergency Rule.

But as we explained last time, everything we're doing on the adoption -- by taking out the definitions for headwaters, the two (indiscernible)--

SENATOR SMITH: Good stuff.

MR. CANTOR: All good stuff; all-- The Concurrent Proposal is not meant to fix the Rule. We fixed the Rule on adoption by not adopting certain things, and making some other clarifications.

SENATOR SMITH: Right.

MR. CANTOR: All the Concurrent Proposal does, as it relates to riparian zones, is add additional mitigations over and above what is right now. So we don't think, again, that the Concurrent Proposal is needed to fix the concerns with the original proposal; those concerns are being fixed. What the Concurrent Proposal does is, over and above, add things that are not in the law right now.

SENATOR SMITH: Okay. And that being said -- still go back to the Commissioner and talk about the Concurrent Proposal being an Emergency Rule so that the paranoia-- You have two emergencies -- one is paranoia, okay? People want to know that those fixes are going to happen. And secondly, having a gap means that there are two sets of rules for some period of time. And then, thirdly, if part of this is with regard to hazardous site mitigation, that can be your emergency. I mean, there are ways to frame it so that the lawyers in the Department and the lawyers in the real world are going to be satisfied. It's a very small thing that would take one of the major issues off the table, in my view.

Anyway, Tim, thank you for your comments.

MR. DILLINGHAM: Thank you, Mr. Chairman.

SENATOR SMITH: Ginger, anything else you wanted to say, with regard Tim's testimony?

MS. KOPKASH: Oh, yes. I will mention pipelines.

SENATOR SMITH: Yes, let's hear about pipelines.

MS. KOPKASH: He is correct. We do have quite a number of pipeline projects in the queue.

SENATOR SMITH: You have more pipeline projects than you have fingers. (laughter)

MS. KOPKASH: Yes.

MR. CANTOR: (indiscernible) What about pipelines (indiscernible)?

MS. KOPKASH: Let me just-- Yes-- No, (indiscernible) correct.

So SWRPA does not regulate an underground utility line, nor an aboveground utility line. You didn't have to abide by the SWRPA requirements.

SENATOR SMITH: Under the old rule.

MS. KOPKASH: Under the current Stormwater Rules, they're exempt; as well as sidewalks and trails are exempt activities. So in the Flood Hazard Rules, we do regulate them; and we do have standards in our rules that talk about -- you have to demonstrate that you have no alternative; once again, the basic project purpose; you have to actually go through the stream. We also go through the avoidance criteria, about directionally drilling. If you have to go, what are methods that you can employ to minimize that impact? And those standards still prevail, and I would say we're getting stricter with (indiscernible).

SENATOR SMITH: Why do you say they're getting stricter than what you had?

MS. KOPKASH: Because we have more IP criteria in here. We have more language about the basic purpose of the regulated activity; a

project cannot be accomplished onsite without clearcutting or removing vegetation. And we're making our standards more robust, with respect to getting and obtaining an Individual Permit, in going through riparian zones.

SENATOR SMITH: And that's in the Rule, or in the Supplemental?

MS. KOPKASH: That's in the current Rule that--

SENATOR SMITH: The current Rule that's been filed?

MS. KOPKASH: No, no. The Rule that will be adopted--

SENATOR SMITH: On June 20.

MS. KOPKASH: Yes, the June--

SENATOR SMITH: Published in the *Register*.

MS. KOPKASH: Yes, the June publication or proposal -- we've added additional criteria.

SENATOR SMITH: So you think that the Rule, as proposed, provides greater environmental oversight of any pipeline project in the state?

MS. KOPKASH: Yes.

MR. CANTOR: (off mike) And again, just to clarify. That's in the riparian zone. The SWRPA exempted those.

MS. KOPKASH: Yes; it wasn't regulated.

MR. CANTOR: So under the SWRPA, under the Stormwater Rules, we did not regulate above or underground utility lines.

SENATOR SMITH: Okay; I appreciate the comments.

Mike Pisauo, Stony Brook Watershed Association.

Mike.

MICHAEL L. PISAURO Jr., Esq.: Thank you very much.

My name is Mike Pisauero; I'm the Policy Director for the Stony Brook-Millstone Watershed Association.

I'd like to thank the Chairman for this opportunity.

You know, let me start with the SWRPA. As Mr. Toft indicated, that inner 150 was inviolable. And you could not build within that inner 150, at least from a stormwater perspective. And what the SWRPA did is -- which is now no longer in the Rules, as DEP proposes to adopt -- on the outer 150, a developer could come in and seek permission to develop that outer 150, if it was already developed and they prove, they show through analysis -- just looking through my notes -- that the impacts from a functional analysis would not impact the C1 and the SWRPA. So you had to do an analysis to do the outer 150; that the Category 1 water in the SWRPA was protected. Because under our rules and under our statutes, the Category 1s are antidegradation waters. You cannot have any measurable change to those waters.

So under the preexisting SWRPA, you had to have an analysis to show that there was going to be no change in the outer 150. That no longer exists. And now within the inner 150, as DEP proposes in the Concurrent Proposal, there can be 7,000 square feet of disturbance in that inner 150 -- not along the outer 150, but in the inner 150 you can still have 7,000 without having to show that there's not going to be an impact to the Category 1 water or to the SWRPA. So there's one issue; and that's in the Concurrent Proposal.

And Mr. Chairman, you suggested -- at the last time, and just a few minutes ago -- they should be combined and not adopted as is, because there's nothing that would require DEP to adopt the Concurrent Proposal.

And the current Rules that DEP is scheduled to publish does not have those protections, at least from the SWRPA perspective.

And having this protected water quality, which the riparian zones -- from a SWRPA and a non-SWRPA perspective is vitally important. The last several times I was here I recited the statutes, saying basically -- and there are several of them -- but the goal, the sentiment in the Legislature, back in 1972 or so, was that our waters were in jeopardy from pollution; and that it was the goal -- it was of paramount interest of the State to restore and enhance those waters.

Currently, modern-day water pollution is nonpoint source pollution. It's not generally coming from the pipe. I mean, that's still an issue, but generally, it's the nonpoint pollution. So how do we address that? Well, the Department and the science say the best way to deal with that are wide, intact buffers. Those are the two ways, in our current world, that we can protect water quality. And what the 2015 proposal, as adopted, does -- and still does -- is the death by a thousand cuts, almost, because we have increased -- as you heard, under Table 11.2 -- the amount of incursions into the riparian zone. So now you no longer have as many intact buffers as you did.

You also, from a mitigation perspective, don't have to mitigate onsite if you don't want to. You can show-- And it can be somewhere else. But the Department, back in the 2006 proposal-- Expanding the riparian buffers was necessary to preserve the functions of the riparian system. Now, that was from the 2006 proposal. The scientific literature, then and now, still supports maintaining those intact buffers.

And what we have seen, and what the Department said this morning again, is that they've received too many hardship requirements (*sic*). And the table that previously existed wasn't sufficient to accomplish goals. Well, I think the table may have been -- may need to be ratcheted down, but what the table does is exactly what the hardship waiver, under the preexisting rules, was supposed to do and what Federal law requires. And under 40 CFR Part 230 -- and that's the Dredge and Fill, but the sentiment is the same -- is avoid the impact first. So we design our projects to avoid the impacts to the riparian buffer because water quality is too important. The State said that in the 1970s. If you can't avoid it, then you minimize it. And that's what, again, our preexisting hardship requirements did. You had to prove you had, basically, no other alternative. And that is something that-- Well, let me strike that.

So what the current rules do is, *a*) increase the amount of allowance you can do to the buffer before you can then get to the hardship. And in some respects, they then made the hardship easier to get. So under Federal law -- and we cannot be any less stringent -- we're avoiding that sort of hierarchy: avoid, minimize, then mitigate. And really, what we're jumping to is mitigation.

And this is important, because water quality is decreasing. In the 2014 *Integrated Report*, which is required by Federal law every two years -- a status of water quality -- of those waters that were assessed-- And not all waters are assessed; and every two years, sort of, the State moves around as to what they're going to monitor for this report. DEP says, "These results reflect an increase in the number of impaired waters in New Jersey compared to previous cycles." Now, they've changed methodologies and, as

I noted, they've changed locations. But that's the same for 2012. In 2012, of those waters that were actually monitored, only 37 percent of those waters met the designated standard for public water supply. All waters in New Jersey should meet water supply standards.

Only 16 percent of those waters that were assessed met recreation standards. So we have two years -- or two separate reports showing water quality not meeting-- Maybe not the same waters, but a trend. And I will say to you -- I didn't do this analysis, but my recollection of the 2010 report -- you're not going to see drastic, better numbers or worse numbers. In DEP's own words, the trend is towards worse.

So our higher waters are getting worse, and our worse waters might be getting a little bit better; DEP does note that. But you have those impacts.

And under Federal law, and under our water quality standards -- and I will finish with this -- we're not allowed to make waters worse. So under 40 CFR Part 130, the State is required to develop and adopt a statewide Antidegradation Policy which, at a minimum, should include "existing instream water uses; and the level of water quality necessary to protect the existing uses shall be maintained and protected." So if we have waters that are not meeting standards, these rules, under the law, are required to move us towards meeting those standards. And as DEP, in the 2006 -- and even in their adoption document -- notes, riparian zones are vital to the protection of water quality. Increasing those incursions, making it easier to do those incursions, is counter.

So I thank you for your time.

SENATOR SMITH: We appreciate your comments.

Ginger, first -- the one that jumped out of Mike's comments was that we're violating the Federal Antidegradation Policy. Would you respond to that?

MS. KOPKASH: I respectfully disagree.

SENATOR SMITH: Okay.

MS. KOPKASH: That we have added-- When we went and examined the Rule proposal, we did really listen very closely to everyone's comments and their concerns. And then we went back, as I mentioned before, and had a discussion. What are we missing? Everybody had the same feeling that we're allowing something to take place in the SWRPA that we didn't allow before. And that was the -- which resulted in the deletions of the actively disturbed area, the quarter-acre; and then, as well as the other category. We started to believe that those could be areas of abuse and could result in an adverse impact to the stream and the quality of the water there.

So with those deletions, as well as with some agency-initiated changes in the Rule, we believe that we are consistent with the high bar that was set years ago -- that we are maintaining our buffers; we are maintaining water quality protections.

SENATOR SMITH: (off mike) What about the--

MS. KOPKASH: And then, on top of that, because we regulate everything in the Flood Hazard Area -- and I mean everything. If you want to store your car in a Flood Hazard Area -- which is why we have so many Permits by Rules -- we look at more in the riparian zone standards than were ever looked at in the Stormwater Rules.

SENATOR SMITH: What about Mike's comment that the outer 150 has lesser protections?

MS. KOPKASH: Well, I believe what he was getting at was the Administrative Order by Lisa Jackson that had a-- The inner 150 is kind of a no-touch zone; and then the outer 150 -- you could go and get a hardship to undertake activities. But people were getting a hardship for anything; also in the inner 150. So remediation projects that took place in the inner 150 were applying for hardships in order to allow that to happen.

The way we have the Rules structured is, if you're anywhere in that 300-foot riparian zone, it's a regulated activity. If you have to get an Individual Permit, regardless if you're in the outer 150, you have to demonstrate you need to be there to begin with; and that the whole function and value assessment -- the end result of the function and value, of the way it was structured -- I would say was less stringent in the sense that it got you right to mitigation.

And the way the Rule is structured now, it resembles the Freshwater Wetlands. And then as Mike pointed out, the Federal regs, which talk about avoidance -- and that's what I read to you before -- your basic project purpose -- you have to need to be in that zone to complete your basic project purpose. And we even go into detail about accomplishing your project somewhere else, which is consistent with those requirements. Then if you're in that -- if you have to be there, then you need to minimize your impact. And then once you've minimized, then you mitigate. So we do follow that order.

SENATOR SMITH: Your position is that there are not lesser standards in the outer 150.

MS. KOPKASH: No.

SENATOR SMITH: Okay.

MS. KOPKASH: No, sir.

SENATOR SMITH: Okay; thank you very much, Mike.

An opposing point of view -- Doug Lashley. Doug, are you here?

DOUGLAS LASHLEY, Esq.: (off mike) Yes, sir.

Mr. Chairman, members of the Committee. First, my apology for inaccurately designating my position on this bill (*sic*). I'm used to -- I put "in favor," and, in fact, am against a revision of the bill. I'm the one who Dennis Toft referred to.

SENATOR SMITH: (off mike) (Indiscernible) triple-negative.
(laughter)

MR. LASHLEY: I know; that was the confusion.

So my name is Doug Lashley; I'm new to this Committee. I own a company called GreenVest; we're headquartered in Annapolis, Maryland. We do work throughout the mid-Atlantic, from North Carolina to Connecticut. We are in the mitigation industry.

I know the mitigation component of this bill is not the primary focus. But to the extent that there are any questions about the mitigation-banking component of this bill, I'm prepared to answer those. I've addressed a good part of it in the written testimony that I submitted.

We do have a long history in the State of New Jersey. We had our first wetland mitigation bank approved by the Wetland Mitigation Council in 1994. That document, at that time, was nine pages long. To show you where the State has come since then, in terms of tough standards,

tough requirements, in terms of durability and success of the standards for performing mitigation -- I think they've done a fabulous job; in fact, probably better than I've seen in any other jurisdiction in the country. Our documents today are 175 to 190 pages; which includes significant engineering plans, hydrology reports, soils analysis, long-term maintenance and monitoring requirements, and financial assurances.

So to the extent that the provisions of this bill mimic the standards for compensatory mitigation under the Freshwater Wetlands Act, the State will be well served by keeping the provisions allowing for bank credits to be established.

We are doing a lot of work in conjunction -- as partners with the State, the Corps of Engineers, and the Nature Conservancy on coastal resiliency and coastal restoration work utilizing FEMA funds. We're no stranger to the standards. This Department, when it comes to-- I can't speak so much as to their toughness when it comes to-- When it comes to avoidance and minimization, I know what those standards are. But even their standards for mitigation are the highest that I've seen almost anywhere else in the country. They take it very, very seriously.

The other thing that I'd like to point out is that the concept of mitigation banking as a remedy -- it's not the sole remedy. So contrary to just one very brief comment I heard earlier, there can be onsite mitigation for impacts to riparian zones if the Department determines that it's the best environmental result. But what we have found, historically, is that oftentimes mitigating one site does not generate the best environmental result. November 3, 2015 -- just six, seven months ago -- was a landmark time in our industry. The President issued a Presidential

Memorandum instructing Federal agencies -- including the Department of Interior, EPA, NOAA, U.S. Fish and Wildlife Service under DOI -- to look at mitigation banking as a very efficient and effective way for government agencies to be certain that impacts to environmental resources were properly mitigated for. And I played a material role in helping the Office of Management and Budget and the Council on Environmental Quality in shaping that document. And all of the Federal agencies are looking at it, and I'm confident that EPA is doing everything that it has to, to oversee what's done in this state when it comes to water quality.

So for all of those reasons, I am not in favor of this bill--

SENATOR SMITH: (off mike) Overturning the Rules.

MR. LASHLEY: --overturning the Rules, and I welcome questions, whether now or in the future, on the banking component of it.

Thank you.

SENATOR SMITH: Thank you very much for your comments.

I assume DEP has no response to that one. (no response)

Debbie Mans, New York/New Jersey Baykeeper.

MR. LASHLEY: Thank you, Chair.

SENATOR SMITH: I'm sorry, I have that wrong. Debbie, you're going to go right after Jennifer Coffey.

DEBORAH A. MANS: (off mike) Okay.

SENATOR SMITH: She was the next in the line.

And Debbie, while she's walking up, are you -- is your title *New York/New Jersey* Baykeeper, or is it *New Jersey/New York* Baykeeper?

MS. MANS: In New Jersey, it's New Jersey/New York; and in New York-- (laughter)

JENNIFER M. COFFEY: I call her *New Jersey/New York*.

I have copies of comments that I would like to pass over. Thank you, Debbie.

Good morning. Thank you, Chairman, and thank you members of the Committee.

I want to start by offering you a sincere thanks for all of the time that you have spent dedicated to these hearings. This is a very important issue to this Committee, I know; and it's a very important issue to me as well. It's an issue and rules that I've been working on and with for about the past 10 years. And so I've taken a very detailed look at these regulations, as proposed.

Thank you, Debbie.

And so I want to just start off by saying, first of all, that there are this many (indicates) pages of response to comments in support, and this many (indicates) pages of response to comments in opposition to the original Rules. The Rules, as adopted by the DEP, include minor changes to the Rules as proposed. And there are lots of concerns with those. They are minor because, if they weren't minor, then the Rule would need to be repropose, which is why we have the Concurrent Regulations.

So I want to start by talking about the weakening of water quality protections, and the compounding of environmental justice issues that are included in these regulations for the mitigation provisions. So I want to pick up on those mitigation provisions.

So the amendments -- the Rules that are being proposed for adoption, or that will be adopted and published later this month. On page, let's see, 25 in the *Response to Comments* -- because the *Response to Comments*

are included with the changes, it says, “The amendments expand the locations available for mitigation in order to provide applicants with more opportunities to perform restoration and enhancement activities; to promote these activities in degraded areas that may not be in close proximity to the site of disturbance.”

This is a huge issue of concern for ANJEC, as a statewide organization. So there is no nexus that is required to the original riparian area injury. So you have greater risk of flooding from clearcutting areas in riparian zones, particularly in areas that already flood; and in urban areas, you will overburden already overburdened communities. So that is a huge concern for us in exacerbating existing flooding issues.

Second point: I want to talk a little bit about hardship exemptions -- and they were discussed today. And after reading these regulations, I am under-- It is my assessment, from looking at these in detail, that there are more hardship provisions that are allowed with these adopted Rules than were in the previous Rules. So I disagree with the Department’s assessment that in providing these additional hardship there’s no impact because, “projects would have been approved anyway using the hardship exemptions in 2007.”

SENATOR SMITH: So what are the new exemptions that you think are significant?

MS COFFEY: So the new exemptions, as they were mentioned earlier -- so there’s fill removal, there is sediment removal, there is septic system installation, there’s hazardous site remediation, and here are a few others. So installing septic systems, as a by right, along a stream, is a problem in a state where we have increasing impairments to water quality.

And so those applications should be looked at with a closer eye, rather than allowing the by right installation of their systems.

With regard to hazardous site remediation or contaminated site remediation, I completely agree that there should be a system for addressing contaminated sites that are within close proximity to our streams. We are a very developed state; we are 350 years old -- 351 years old; we're one of the 13 original colonies. We certainly should be looking to address our legacy of development issues. But there should be a General Permit or a Permit by Rule, not a blanket hardship exemption for doing site remediation.

Thirdly, I want to talk a little bit about the establishment of something in this Rule called a *Permit by Certification*. This is a self-certification establishment that is created in this Rule. It says "with regard to, first, threatened and endangered species, the standards therein apply to both present and documented endangered species."

The Department -- this is not quoting the Rule -- the Department, in my opinion, fails to ensure that the species are adversely affected by regulated activity, although they state the contrary, because this provision is applicable to Permits by Certification.

Finding threatened and endangered species on a site for suitable habitat or presence thereof is not the easiest thing to do. They're rare species. So establishing a Permit by Certification -- a permit by self-certification, for me to go out there as someone who doesn't have training in habitat analysis and say, "Sure, there's no threatened and endangered species, here, so I certify that I'm going to go ahead with this activity in compliance with the regulations," is a system that's established to fail, and we have a great concern with that.

My fourth issue is that -- it is a simple issue. In the adopted regulations, or in the adopted rules, there's a new regulatory term that's introduced called -- hold on; I misquoted here. The term is *truncated tributaries*. Or no, it's called *tributaries*. And so I -- from studying river science, I understand what a tributary is. But *tributary* replaces or seems to replace in reference to regulated waters. So if you want to change the terminology, I don't have a problem with changing terminology. But terminology should be defined. So if you have *tributaries* inserted where *regulated waters* used to be, it should also be included in the definition section.

I'm almost there.

The fifth issue is with regard to headwaters. And I thank the Department for seeking to include headwaters; however, as I read it, on page 760 -- and this is where we get into, Chairman, triple negatives. Because there is an applicability of the Rules to all areas with the exception of areas that drain less than 50 acres, including one of the following. The last of the following is undifferentiated banks; undefined bed and banks. So if you are a stream that defines less than 50 acres, and you don't have defined banks, you are a headwater. So I have some concern that perhaps the Department's intent to include headwaters in the Rule is not actually included, but is specifically excluded in the Rules. And that's new language that was included in the proposal.

Number six -- and we're almost there -- this is an issue that Mr. Toft had referred to. We've got Permits, Permits by Rule, Permit by Certification. This, again, gets to the self-accounting practice of a Permit by Certification. So with this provision, it sets forth an attempt to limit

riparian zone disturbance. So there are thresholds and triggers for specific activity disturbance in Table 11.2, which has been discussed at length. However, this provision sets forth an attempt to limit riparian zone disturbance and riparian vegetation clearing, but there's no provision for record keeping and enforcement. So we've already heard, Chairman -- you asked the question again today which you had asked two weeks ago -- about how many hardship exemptions were applied for or given in 2015. And the Department could not provide an answer in the affirmative. If they cannot provide an answer in the affirmative with regard to hardship applications, how is the Department proposing to keep track of Permit by Certification clearing on riparian buffers?

So again, this is a self-certification. The Department makes it more complicated with new language that is added by saying, on page 771, "The subdivision, sale, or transfer of ownership of a site after November 5, 2007, does not reduce or increase the area of riparian zone vegetation that can be clearcut." So that's good. How am I, as an individual property owner, supposed to keep track of what permits my neighbors have applied for by certification without a public, Internet-available database to tell how much land has been cleared? How is the Department supposed to ensure that additional lands, in excess of Table 11.2 and applied for by certification, are not addressed -- or kept within the limits?

Number seven -- and it's my last point -- with the Rule adoption, the Department confirms permission for unlimited clearcutting in what they call *truncated portions* of a riparian area. They have amended the definition of a truncated area by saying that a truncated area of a riparian area has to be cut off by a railroad or a lawful roadway. So that's good;

they provide some definition. That's an improvement. I appreciate that. However, there's no length of area, and they do not require any limitations on vegetative clearing in riparian areas. So you've got a truncated area of a stream that could be 100 feet or 1,000 feet, with houses lining that truncated area of the riparian zone -- that now you have an unlimited amount of clearcutting that's allowed. This will certainly exacerbate flooding, and it's unacceptable.

Excuse me, my voice went out.

So I want to thank you, again, for the opportunity to speak to these Rules. I'm obviously very passionate about it; we have had enormous flooding events in New Jersey from Sandy, Irene, Floyd, Lee. But simply from one- and two-year events that flood roads and close down businesses-- This is simple. Sometimes the answer is no, you have to stay away from the streams. We cannot afford more development, more riparian vegetative clearing, in our riparian zones. We need to take account for the flooding that we've had and the flooding that will come.

So respectfully, I request that the Senate Environment Committee consider moving forward with a positive vote on SCR-66.

And I really appreciate the time.

SENATOR SMITH: Good. So would you pass the microphone to Ginger?

Ginger, Ms. Coffey made some interesting issues. And I tried to take good notes. One was the question of the nexus of the mitigation areas to the area where you need mitigation.

MS. KOPKASH: Yes.

SENATOR SMITH: How do you respond to that comment?

MS. KOPKASH: We have provisions in the Rules that get at that objective. So as Mr. Lashley testified, when we were scripting these Rules, we looked at the Freshwater Wetland Program as our example of how to mitigate for losses. It's tried and true at a Federal level, and obviously at the State level. So we do have provisions in there about having to mitigate, and if you want me to read it to you I can.

If you're going to purchase credits from a bank, you have to be within that service area of the bank. The service area of a bank is designated by an *ecoregion*. So you can't mitigate for a loss far from the impact. And if you're doing it yourself, you have to be in the same Watershed Management Area as the impact itself. And generally, in my experience, when it comes to this, people want to mitigate in close proximity to the loss. And the staff will push them in that direction to do that.

SENATOR SMITH: What about -- the hardship exemptions are expanded, and she specifically-- The two that jumped out were sediment removal and septic system installations.

MS. KOPKASH: Yes, I want to clarify something. I hear this word *exemption*; they're not exemptions. I want to go back to -- in the very beginning of the IP standards, they're just a set of activities that if you cannot avoid the riparian zone, and you have minimized, that there is criteria -- individual permit criteria that you have to follow to allow that activity to take place. I said this before -- for commercial development, there is no provision, no individual permit provisions that allow you to put that building in a riparian zone. There are no provisions to allow residential housing developments to take place in a riparian zone. It's site mediation

activities that we added to the table; they're not exemptions. They still have to demonstrate that they need to be in that area. It can't be someone trying to make something look like a remediation activity, and it really isn't. (Indiscernible) closure--

SENATOR SMITH: So, for example, on the septic -- what would be the requirements?

MS. KOPKASH: On the septic -- what we often get for septic is, when a house is being transferred, there's a sales transfer, we will get into our office a request to rebuild the septic system because the current septic system does not meet Health Department standards. So we issue -- and I know in the Freshwater Wetland program -- about 90 of these septic system approvals a year. The Health Department--

SENATOR SMITH: Are they all replacements, or are they new ones?

MS. KOPKASH: I don't -- I couldn't tell you. Most of them, I'm going to say, 95 percent are replacements, because it's triggered by a sale of a home. Once again, you don't have to place your septic system in a riparian zone -- a new one. You're going to have to demonstrate that there is no other place for you to place it, including downsizing the size of your home, moving the house more forward on the lot, having to get a variance. So there are strict criteria in the Rules for something new. It's often a failing septic system in a house transaction.

SENATOR SMITH: Okay.

MS. KOPKASH: So we added the criteria to the Rule, because they would have to go through a hardship or through the other category.

SENATOR SMITH: Got it.

How about the Permit by Self-Certification (*sic*)? The implication was that the fox is guarding the henhouse.

MS. KOPKASH: Yes.

SENATOR SMITH: What do you think about that?

MS. KOPKASH: Well, the Permit by Certification program is an online computerized system. Everything is recorded and retrievable, including the data fields regarding the square footage of impact. So in this build, we had our team include as many data fields regarding impact as possible so it was very open and transparent to the public. And this is kind of our segue into electronic submission -- adding more data fields into our system helps the public as well as the State analyze its performance. Because currently, as pointed out, it's very hard to mine out data, currently, from NJEMS.

SENATOR SMITH: Okay.

MS. KOPKASH: Oh, and then with respect to impacts to threatened and endangered species. There will be an embedded map. The individual will be -- it will pull up the polygon -- the parcel that the individual is seeking the permit for. And included in that will be a map that will show the Landscape project. If you're familiar with Landscape, it will identify all rank 3, 4, 5 -- which is State-listed threatened and endangered species, as well as federally listed species. And the individual will be able to see whether or not their project is impacted in that -- has a threatened and endangered species on their property. If they do, based on Landscape, then they can't proceed forward.

MR. CANTOR: And Chairman, just to clarify that point, we don't require, in this part of the process--

SENATOR SMITH: Talk into the microphone, please.

MR. CANTOR: We don't require, in this part of the process, for an individual to go out and find an endangered species and to certify that it exists or not. The Landscape project, as Ginger had mentioned -- we have mapped out the entire state. And any potential habitat for those species, based on sightings and suitable habitat, is all mapped. So the only time we would ever require people to go out there and look for a species, is to disprove that those maps are accurate.

SENATOR SMITH: Okay. What about the concern about the headwaters definition?

MS. KOPKASH: I believe what you're getting at is sections that we are not adopting. So we're not adopting the changes to tributary--

MS COFFEY: (off mike) Yes, they are. (Indiscernible).

MS. KOPKASH: They are?

MS COFFEY: Yes.

MS. KOPKASH: They are; okay.

MS COFFEY: I'm talking about sections that are being adopted.

MS. KOPKASH: Okay.

MR. CANTOR: She's talking about under (indiscernible) with less than 50 acres of drainage system.

MS. KOPKASH: Current regulations.

MS COFFEY: (off mike) (Indiscernible) section.

MS. KOPKASH: Right; they are the current regulations, not new changes.

MS COFFEY: No, there's a new bolded change that's inserted.

All right -- the water has no discernable channel; it's added.

MS. KOPKASH: Yes, I believe it is existing regs.

MS COFFEY: It was in the (indiscernible) as an addition.

MS. KOPKASH: Yes, but it shows up as bold because it was moved, probably. That's why it's showing up that way.

MS COFFEY: Okay.

MS. KOPKASH: Yes, we did not change definitions.

MS COFFEY: And it does not, to me, appear to incorporate the headwaters, as the Department's seeks to do so.

MR. CANTOR: So Mr. Chairman, this is an existing provision of the Rules, again going back to the SWRPA versus riparian zones. Those definitions have not changed. In order to be a regulated stream under the SWRPA, you have to be on one of the official maps. And those maps are not necessarily accurate; they don't show everything. So again, as a practical matter, we don't think we're changing the regulated criteria at all.

SENATOR SMITH: Right. But one of the things that you said at the last meeting was that you had responded to the headwaters definition -- to clean that up. Ginger, how did you clean that up?

MS. KOPKASH: We didn't adopt the changes that caused so many people to write in comments regarding-- We changed *tributary*, I believe, it was like-- We were proposing to change tributary-- We were deleting the word *tributary* and inserting *regulated water*. And that caused a lot of angst for people. So we just went back to our original--

SENATOR SMITH: Original.

MS. KOPKASH: --standards for what we regulate.

SENATOR SMITH: Okay.

MS. KOPKASH: It has to actually be a water.

SENATOR SMITH: How about the comment that there's no provision for record keeping or punishment if people say one thing and do another? And by the way, and how does the neighbor know what's going on?

MS. KOPKASH: Okay; well, there is -- notification is required to adjacent property owners--

SENATOR SMITH: Okay.

MS. KOPKASH: --in the system.

SENATOR SMITH: And the notification is serviced -- just that you're applying for this, or do you have to--

MS. KOPKASH: No, it tells-- You have to file the notification provisions that we added to the Flood Hazard Rule. Currently, in the Flood Hazard Rules, you don't have to notify if you're undertaking a General Permit activity. So we've added provisions in our rules that require a robust notification process. We use the Freshwater Wetlands Rule as our model. And then for the General Permit by Cert, we included the provisions that they had to notify. It is an electronic submission system, so it is minable. You can read the system through Data Miner; everything will be on there. So as soon as the individual receives that approval, you'd be able to see that -- if they do receive an approval. And then our enforcement staff felt that this was a good method to enforce upon, because the individual certifies to a series of facts, and if they falsified, it's an easier way to enforce against them.

SENATOR SMITH: What kind of enforcement tools do you have?

MS. KOPKASH: All the enforcement tools afforded to us in the Flood Hazard Control Act, which include--

SENATOR SMITH: Fines?

MS. KOPKASH: Yes, fines -- everything. Yes, sir.

SENATOR SMITH: Okay. And how about the last comment that Ms. Coffey made--

MS. KOPKASH: The truncated--

SENATOR SMITH: --which was that there were no limitations on clearing in the riparian zones.

MR. CANTOR: Right; there are no limitations on clearing--

MS. KOPKASH: Truncated?

MR. CANTOR: --for the truncated parts of the streams.

SENATOR SMITH: And what do you mean by the *truncated* part of the stream?

MS. KOPKASH: So we added, in our Rules-- During our stakeholder portion of our rulemaking, we had individuals state to us that you have riparian zones, and you don't get at functionality. And that you can have a roadway or a portion of a riparian zone that sheds to a completely different stream, and not to the stream in question; and you have these standards that are set to protect a riparian zone to that stream.

So we added provisions in here. We didn't take into consideration--

(Senator Smith's cell phone rings)

SENATOR SMITH: Go ahead.

MS. KOPKASH: --everything that was being asked of us. But we felt that this was a fairly straightforward argument. If you have a

riparian zone to a stream, and there is a portion of the riparian zone that is separated from that stream by a railroad or a public roadway; and the area also does not slope towards a regulated water, and the stormwater runoff from that area does not drain into the regulated water, then the riparian zone ends at the road and the railroad. So basically, it has to shed in completely different directions; the stormwater cannot discharge into that water even at an upstream end of it.

MR. CANTOR: It, essentially, is not functioning as a riparian zone at that point and time.

MS. KOPKASH: Correct.

SENATOR SMITH: Okay.

MS. KOPKASH: And that's similar to -- we have provisions like that in the Freshwater Wetland Rules.

SENATOR SMITH: Thank you.

MS. KOPKASH: So once again, we tried to borrow from other--

SENATOR SMITH: Okay.

Jennifer, anything you disagree with?

MS. COFFEY: Just a few things -- one, with regard to the truncated, because that's where we left off.

That area is still going to flood. So if you-- And if you have homes and businesses along that, you're still dealing with flooding issues. So if you eliminate the riparian zone, the vegetated area along that stream section, then you are impairing that water body's ability to hold, retain flood waters from the surrounding businesses and homes. So that remains a concern that we have.

One other, if I can -- I won't go back, point for point, because I know we're pressed for time here -- this is the first time I've heard of this open system that will be available to the public, and citizens can go check it for Permit by Certification. I have used Data Miner for years; it is a very difficult system to use, and it's not always fully updated up to the last six months. So my question would be if this new system is going to be available at the date of effectiveness of these Rules, because that's when it would need to be used.

SENATOR SMITH: Ginger, any response to that?

MS. KOPKASH: Yes. We have had stakeholder sessions on our Permit by Certification program. But I will offer up to anyone who wants to sit down and we'll go through it. And then also I can find out if there is a way in Data Miner we can do some improvements to how viewable it is. I know the Department has been spending a lot of time -- our RM folks -- on Data Miner, because we have heard those complaints before about finding information. But I'm happy to have a dialogue on that, absolutely.

SENATOR SMITH: And hopefully improve where it's needed.

MS. KOPKASH: And I think, as a career DEPer, our best asset is the public; and the public's informing us of things that are taking place in the community; because I live in the community. So anything that will help with that dialogue and our system I'm happy to have that conversation.

SENATOR SMITH: Thank you.

MS COFFEY: So it's not a new electronic system; it's Data Miner -- would be the system to use.

MS. KOPKASH: Data Miner pulls off of NJEMS.

MS COFFEY: Yes.

MS. KOPKASH: The data system. And this online permit system also communicates with NJEMS and feeds all the information. It is migrated into NJEMS.

MS COFFEY: Okay.

MS. KOPKASH: Everything is.

SENATOR SMITH: Thank you.

Debbie Mans, the New Jersey/New York Baykeeper.

MS. MANS: I made a mess of the desk here; hold on.
(laughter)

We have a lot going on up here.

I'm just going to spend some time talking about our urban waterways, and the impacts of the Rule.

The Rule adoption claims that there's no distinctions made between urban and other areas of the state. However, in order to show this, the adoption document gives the examples of elevation standards for buildings and roadways being the same, to make the point.

But this ignores the most important factors, which are which activities are you allowing in the riparian area. And what we're seeing is that urban waterways are repeatedly suffering from further encroachments and decreased protection.

Along our tidal waterways, which include many of our urban waterways such as the Passaic River; Rahway, Woodbridge, Raritan rivers; the Arthur Kill, and the Kill Van Kull, the adoption document states that, "Unlike fluvial areas, where fill and structures can displace flood storage

volume and exacerbate flooding, the Department recognizes that the placement of fill in tidal flood Hazard Areas does not cause additional flooding.”

I was unable to locate the specific modeling or science behind that statement, but I did locate the New Jersey DEP 2008 draft technical manual for Flood Hazard Control Act Rules, which states, “A property that lies in a Flood Hazard Area is periodically inundated by flood waters. Consequently, a certain volume of floodwater will occupy that property during a flood. If a significant volume of floodwater is prevented from occupying a site, the excess floodwater will instead occupy neighboring and downstream properties, thus worsening flood conditions on those sites.”

I was unable to find a distinction in that manual between tidal and fluvial flooding.

Many of the state’s more urban waterways are tidally influenced. And DEP’s departure from even the basic principles of protection of floodplains in these areas, where the majority of the population lives, places many homes, businesses, and waterways at risk for increased flooding and pollution.

We submitted comments to the Rule -- Baykeeper did -- in July 2015, many specific to urban waterways. An analysis of the adoption documents reveals that the majority of these comments were ignored, including allowing increased construction and activity within the regulated area by allowing activity within 25 feet of the top of the bank if the area is adjacent to an existing bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water. As you know, that is a large portion of our urban waterways.

I've included the response in the written document to you, so I won't go over that.

The second comment -- creation of Permits by Rule for the storage of unsecured material; the placement, storage, or processing of hazardous substances; and the placement, storage, or processing of solid waste or recyclable materials in a riparian zone. The Rule does not even mandate better housekeeping practices or even encourage the removal of these potentially hazardous items from a vulnerable area for grandfathered properties.

We've talked a lot about the hardship exception requirement. Why this is important is that it removes the presumption that the DEP should not issue permits for certain types of activities in a Flood Hazard Area. And I thank Ginger for really walking through the IP thorn, I'm going to say, replaces this. But then you walk into just changing the presumption of where we are with these rules; and these activities, again, included the placement, storage, or processing of hazardous substances, solid waste, or recyclable materials in a regulated area. And I do want to talk about two specific examples of why that's important.

But first some of the discussion today around the mitigation banking, which we are familiar with, on the Wetlands side. One of the comments that was, I don't think, adequately addressed is, what authority does the DEP have to authorize or approve riparian mitigation banks? I understand it on the Wetlands side. But this is essentially a financial instrument that needs authority for approval. And then there are transactions that take place, and those are approved by the Wetlands

Mitigation Council. How does this -- how would this work in the riparian realm? I don't think those are unanswered. (*sic*)

So back on the examples -- and these are two projects that came in as remediation projects. A few years ago, DEP permitted, through a hardship waiver, the construction of a Class B recycling facility on the Lower Rahway River in Carteret, New Jersey. The sole purpose of this facility is to import petroleum-contaminated soil, primarily from out-of-state contaminated sites, to place on the site as a cap. In some areas of the site, the site will be over 20 feet. This is considered a remediation; however, no contaminated material is being removed, and more is being brought in -- upwards of over 4 million cubic yards of fill onto the site, which we argue would impact both the surrounding neighborhoods and waterways. In fact, they have to build up the floodplain in order to put the processing equipment onto the site.

Separately, just across the Rahway River in Linden, NJDEP just permitted another site last year, which is now allowed to take in over 500,000 cubic yards of fill material with elevated PAHs and metals. This site also required a hardship waiver, which was granted; again, for remedial purposes.

The unconsolidated fill material will be used to raise the area out of the Flood Hazard Zone. This is 20 acres removed from a Flood Hazard Zone.

The Rule adoption now eliminates even that minimum hurdle established by regulation to really assess the alternatives to placing hazardous materials and solid waste in Flood Hazard Areas -- the hardship exception. These sites are primarily being sited along our urban waterways

with quick access to the Turnpike, and a willingness to reduce protections along waterways -- many deem as *dirty and unrecoverable*. When the Legislature adopted the Water Pollution Control Act, one of the authorities for this Rule, it did not distinguish between different waterways in different parts of the state. And I provided to you the citation. DEP's recently adopted Flood Hazard Area Control Act Rules are not consistent with the Water Pollution Control Act from which it derives, in part, its authority. The adopted Rules are not designed to restore, enhance, and maintain the chemical, physical, and biological integrity of its waters, to protect human health, to safeguard fish and aquatic life, and scenic and aquatic values, and enhance the domestic municipal, recreational, industrial, and other uses of this water.

Thank you very much.

SENATOR SMITH: Okay.

So Ginger, would you like to respond to some of those issues?

MR. CANTOR: Tidal-fluvial?

MS. KOPKASH: Okay, tidal versus fluvial. Currently, in the Rules -- the current Flood Hazard Rules -- fluvial areas are treated differently than tidal areas. And that's because in a fluvial area, if you place fill in the floodplain, you will disperse the flood waters that were on your property onto another person's property, as Debbie pointed out, as written in the tech manual.

In a tidal area, the elevation of the floodwaters is determined by the ocean. There's not -- you're not going to push any more water onto your neighbor's property in a tidal situation. The flood is determined by elevation, not by fill. So if you're at elevation 10, and the flood is at

elevation 11, you have a foot of water on your property, regardless of whether your neighbor put 12 feet of water on their property. It's being driven by that. In the current rules, that's how we look at them and, going forward, that's how we continue to look at it.

SENATOR SMITH: Okay.

How about the comment that the new Rules will provide permit by Rule for the placement of dangerous materials in Flood Hazard Areas?

MS. KOPKASH: Yes, we currently do have provisions in our Rules, and we did make amendments -- Debbie is correct -- to the storing, as she pointed out -- the grandfathering and storing of materials in a Flood Hazard Area, such as recyclables. A lot of municipalities have property that floods. And we did add provisions in there to address some concerns.

SENATOR SMITH: So are they better? What it is that adds additional safeguards?

MS. KOPKASH: All right, I'll read through them. We talk about the facility has to be a lawfully existing facility, established on or before November 5, 2007. So we make it real clear that you had to already exist--

SENATOR SMITH: Nothing new, right?

MS. KOPKASH: We added *recyclable materials* to that, because a lot of municipalities do store recyclable materials at their yards. So we added that into the rules. So I guess if that is considered--

SENATOR SMITH: You're saying it's existing facilities--

MS. KOPKASH: Yes, sir.

SENATOR SMITH: --as of 2007?

MS. KOPKASH: Yes, yes. I'm reading out the--

MS. MANS: (off mike) (Indiscernible)

SENATOR SMITH: Can't hear you, Deb. You have to--

MS. MANS: (off mike) I was just saying, for the new facilities --that was your question -- it was my understanding there's a (indiscernible).

MS. KOPKASH: I don't think-- I think the provisions are pretty strict.

SENATOR SMITH: Do you have a section, Deb?

MS. MANS: (off mike) Technical 7:13-11.2(c)1.

MS. KOPKASH: 11.2; that's the IP Standards; that's what I was just reading from the IP Standards.

SENATOR SMITH: So that's not a Permit by Rule?

MS. KOPKASH: No, sir.

SENATOR SMITH: That's an Individual Permit, right?

MS. KOPKASH: Yes, the Permits by Rule would be in subchapter 7.

SENATOR SMITH: Okay; so that was inaccurate.

Any other comments?

MS. KOPKASH: I didn't get everything that-- You talked about riparian zone banking, but I'm not -- I started to write down riparian zone--

MS. MANS: (off mike) I was just (indiscernible) the authority to create--

MS. KOPKASH: Oh, the authority.

MS. MANS: (off mike) (Indiscernible) banking--

MS. KOPKASH: Yes.

MS. MANS: --systems.

MS. KOPKASH: Okay, so the mitigation-- We view the purchase of credits from a mitigation bank the same as offsite mitigation. You contract with a consultant to build and design your mitigation site. It's the same thing; it's just the contracting is slightly different in the sense that they're paying them money, and then the banker has an instrument with us -- the DEP -- in advance where we set provisions that they had to meet certain milestones--

SENATOR SMITH: Right.

MS. KOPKASH: --before they can sell a credit. This would not be run through our Freshwater Wetlands Mitigation Council, because they have no authority to review a riparian zone bank if that's all it strictly is. However, if the riparian zone happens to also be a wetland that they're reconstructing along a stream, then indeed it would go through our Freshwater Wetland Mitigation Council if they also wanted to sell wetland credits.

SENATOR SMITH: Okay. Deborah, were you taking the position that a riparian mitigation bank was a good or a bad thing, or is it just that you wanted to find out how it would work?

MS. MANS: (off mike) Service areas that are being proposed in (indiscernible) areas; I believe there are only five in the state. So they are very, very large service areas. And this does, as Ginger was indicating, parallel what's been happening in the Wetland Mitigation context.

I do know they-- I think the Concurrent Regulation added some of the hierarchy requirements that were in the wetlands. So there is concern. I understand the argument behind saying, "Well, let's consolidate

some of these smaller impacts. But at the same time, if you're doing them-- You know, we were at one point, in -- for the Wetlands Mitigation Council, where a number of the impacts were right along the Passaic River going down to Cape May County. And that was -- that has been changed. But there is a problem, and I think as Jen pointed out, especially when you're in urban areas and this is where a lot of the impacts occur. To continue to move those into the upper parts of the watershed, or into even a different -- 14 watershed, it just compounds what's going on in that community and it makes it worse for acute flooding and pollution impacts.

So there's that, but then I saw the response; they cite the general authorities of the enabling statutes. But those-- I was just under the impression that if you are creating a financial instrument, a banking instrument -- that that specifically needs to be given to the Department. And then, also, how are those decisions made? And right now, in front of the Wetlands Mitigation Council, there are public meetings; we have access to the documents, and things like that.

SENATOR SMITH: So you would be happier if that was in front of the Mitigation Council? Or you wouldn't be happy at all?

MS. MANS: I think if we had much, much smaller service areas, and then a more transparent policy about how those are created--

SENATOR SMITH: It could be a good thing.

MS. MANS: It could.

SENATOR SMITH: All right.

MS. MANS: I don't want to be "no, no, no."

SENATOR SMITH: Okay; anything further on any of these witnesses' comments, Ginger?

MS. KOPKASH: I would just add that -- I'd be happy to meet with you, Debbie, and go over any issues or concerns you have about the banking. I mean, we obviously have -- we don't have any, right now. And to make sure that public notice is incorporated into everything -- we do have that standard. If it's a mitigation site, they have to receive -- public notice has to occur. And your concerns about the service areas--

MS. MANS: (off mike) (Indiscernible) I do appreciate hearing that because Baykeeper did try to get into the last stakeholder meeting at DEP, and we were not allowed to come.

SENATOR SMITH: All right, on that happy note, Jeff Tittel, Sierra Club. (laughter)

MS. COFFEY: Thank you.

MS. KOPKASH: Thank you.

MS. MANS: Thank you.

SENATOR SMITH: Mr. Tittel.

J E F F T I T T E L: Thank you.

I'll try not to be repetitive. A lot of us have been working together on this -- Mike, and Jen, and I.

So I wanted to start off with just one observation, which is one of the concerns about the Concurrent Proposal -- is that between the time since the Rule has been adopted and it will be published in the next *Register*, June 20, and the Concurrent Rule becoming adopted at some point -- six months from now, a year from now we really don't know -- how many permits will be given out based on the Rule that was just signed before the changes in the Concurrent Rule? It could be thousands and they will be grandfathered, and so on, and so forth.

SENATOR SMITH: (off mike) The gap.

MR. TITTEL: Good for five years. That gap could be something large enough to run a couple of bulldozers through.

And that's the real concern. I think, to us, the biggest issue is the SWRPA, and the opening up of the inner 150 foot. And it could be for almost anything; and the burden to get to the chart is pretty low. I mean, pretty much any reason you can come in, any of the GPs-- You know, you can go up to 750 feet to 1,500 square feet for almost anything. And on top of that, you can go up to 6,000 square feet.

And I think the concern that I have is, what is going to be the cumulative impact of those cuts? When you look at this proposal, you see one General Permit after another. And there's an assumption by the DEP that since they're General Permits, the impacts are going to be relatively minor. But there's no study; there's no look at the impact to surface water quality standards. And properties can get multiple bites at the apple. I mean, there's a cap at about a quarter-acre; but above a quarter-acre, you can do mitigation. So how far can you go? What's the damage?

You mentioned about the General Permit for pipelines. Well, PennEast alone is going to cross at least 88 C1 tribs -- probably more -- as we look at it. And each one will get a GP on each different piece of property for this massive linear project that's going to have major impacts that -- I don't believe can meet the 401 Water Quality Standards because of the impacts. But yet, the Commissioner, at the Budget Hearing, said, "Well, if FERC approves a pipeline, we have to approve it," which is not the law, but that is what he stated.

So the concern I have is, when you're looking at something like the PennEast pipeline, with all those different tributaries on the CI streams, there are eight major streams and there could be at least 88 tribs along that route, and probably more as we identify them. So, to me, that just shows what's wrong with this.

A couple of other things -- when we look at Permit by Rule -- where's the Antidegradation criteria? Again, these are mostly CI streams. I mean, one of the fallacies -- and I wish Governor Codey was still here -- is, you had a couple of people talk about, well, in Newark -- well, there are not CI streams in Newark. Those are 50-foot buffers on riverfronts, or streams. The main focus of this Rule and the rollback is on the Category I streams; those 300,000-plus acres that get regulatory protections because of that. And those are the inland areas; those are the areas in the Pines, and the Highlands, and the areas adjacent to them. And that's where you see the significant, I think, rollback; because it's property after property that can just come in and automatically get a GP, or get multiple GPs, or a Permit by Certification, and so on. And then when once you just hit a cap, you can go above it and do mitigation.

And I think the point that -- because it was in our comments and in Bill Wolfe's comments too -- the point that I think Debbie was trying to get at was, what legal statutory authority allows you to charge somebody money when it's not in the statute; put that money in an account; and then use that money? In the Wetlands law, it's very clearly there. Does the Treasurer -- does it get held in the Treasurer's Office? Does it get held in the DEP account? And we see what happens when it

goes to Treasurer's Office. So I think that was the point that she wanted to kind of make.

Also, in the Permit by Rules, there's a slight difference between how the DEP looks at the Permit by Rule and how the Feds look at it. Under the DEP Permit by Rule, they're asserting that they're *de minimus*. There's no proof. Under the Federal requirements, there is supposed to be a finding. So again, when you look at some of these different things, from bulkheads to whatever, you can pretty much do what you want. Because, again, they're just asserting it; they're not showing any-- And we know, from water models and everything else, when you're open up a buffer what the increased loads will be. So there is actually data that can be used; there are studies, there's been-- Even DEP's own reports on why we need the buffers show what happens when you remove those buffers -- even small pieces of them; 6,000 square feet is actually a pretty big piece.

Also, in the Concurrent Proposal you can, pretty much, in a buffer, grow grass, cut things down. There's another change in the Concurrent Proposal that makes me a little bit nervous about forest management plans -- and the ability to go in there and, pretty much, do whatever you want, even if it's C1 streams and 300-foot buffers. That is also a serious concern.

And I think that when you look at this Rule overall, you're seeing really a dismantling of the Flood Hazard Rules. I think on Jen's issue, on the headwaters, the old definition and the definitions of streams, there's a -- it had from *tributary to source*. That would make it very simple to say when it's the source of a stream -- how it's written there, it is confusing; I think it does give headwater protections, but it's, again, something if we

had time or we did a new proposal, you could actually straighten out and do it right, versus having it in sort of a gray area.

Another issue that I wanted to raise is the elimination of protections to acidic soils. I think those areas, especially in the Pinelands-- And I read the response document. Those areas are -- many of them are environmentally sensitive areas that have T & E; they drain to Barnegat Bay and places like that, and our tributaries. So to remove the 150-foot buffer, I think, will cause a lot of environmental damage.

Again, when you look at the Rule -- again, it defaults in that section and in other sections to the Natural Resource Conservation Service's rules and best management practices. DEP is giving its authority to a third party. And BMPs, under ultimate conditions, are, at best, a 50 percent reduction in stormwater. And again, you're supposed to be looking at these permits and these General Permits, especially on C1 streams, with an antidegradation protection. And I don't see it there, because there will be a measurable change in the water quality.

Then getting to my bigger pieces, and why the Legislature, a few months ago, passed the Oversight Resolution in the first place, was the belief by this Legislature and the finding by this Legislature that the Rules violated the Water Pollution Control Act, the New Jersey Clean Water Act -- that the Rules undermined protection of high-quality streams, violation to the Surface Water Quality Standards. And again, when you look at all these GPs and Permits by Rule, there is no connection to Surface Water Quality standards. They make an assumption that it meets the standard, but there's no proof. And again, when you do all these kinds of cuts and development-- And I'll just use the septic system as an example. You put a

septic 50 feet from a stream, you will have a direct impact, because a lot of those lands are alluvial and their drainage-- And what makes no sense to me is under Chapter 199, it's 150 feet you're supposed to have between a well and a septic; 100 feet, plus 50 feet minimum of casing. But for a CI stream, 50 feet is okay. Something is wrong there.

And that's the point I'm trying to get at, overall: When you look at these Rules -- that I think the real findings by this Legislature are still accurate. Many of these buffers that now will be opened up for development are in many of the municipalities and the stormwater plans. They are in TMDLs in the Passaic and Raritan rivers because, again, the reductions in pollution -- they're counting on these buffers for those protections and reductions.

And so, you know, I just want to end with saying that-- Oh, I have one other point I wanted to make on the FEMA stuff.

I just want to end with saying that I think that the same reasons they still have these Rules, even though there have been some improvements, overall; still roll back some critical protections in a state that is running out of clean water and running out of pristine streams-- There is only one stream system in the entire state that meets all fishable, swimmable, and drinkable qualities, and that is Flatbrook. Everywhere else, we have areas that have been impacted. And most of those impactments come from nonpoint runoff.

And just one thing on the-- because I think a lot of the positive changes were in the FEMA section, where they took a lot of things from the Feds and put it in the Rule to fix where we saw development in some pretty dangerous areas.

But one concern I do have is how they measure-- A freeboard is -- again, New Jersey's using the definition that the structural support and the Feds and NFEBS used -- the first floor. And that differential could impact people and their flood insurance rates, and also in flooding, because as we know, storms are getting greater and floods are getting higher. And so having that margin of safety I think is critical. Again, these Rules don't address sea-level rise or stormwater for the coastal urban areas in particular, like Jersey City and Newark. There's a lot more we could be doing as well. But I think, in general, the changes, as the DEP Commissioner at the Budget hearing said, were minimal -- and they are minimal -- and therefore, the major problems still exist in opening up critical areas of New Jersey for development and destroying stream buffers.

SENATOR SMITH: (off mike) Thank you for your comments.

Ginger.

MS. KOPKASH: I have a lot.

All right. I want to clarify something. Currently, for the pipeline projects-- PennEast is-- It would be an Individual Permit, unless, for some reason, they directionally drilled under every stream. But that would be an Individual Permit. There's no General Permit for that kind of utility line construction.

MR. TITTEL: Under your definition of *utility line*, it could include underground utilities; therefore, it includes pipelines. There is not a differential.

MS. KOPKASH: No, it would require an Individual Permit to construct a utility line across a stream. Any of the pipeline projects we've

had -- they've all been Individual Permits. And there are no changes that would make it any different.

And the types of activities that are General Permits are bridges, reconstruction of existing bridges, trails, stormwater outfall, footbridges, mosquito control activities. Obviously you know about the stream cleaning, because of the Stream Cleaning Bill. Reconstruction and elevation of a building in a floodway. So if they want to raise up, but it's an existing building, we would give them a General Permit to do that. But there are constraints under each one of those.

The types of activities that are Permits by Rule are things like maintenance, as Deb pointed out. You can mow your lawn that is in the Flood Hazard Area; in-kind replacement of a lawfully existing structure; an in-kind replacement limits you to less than 50 percent. Removal of fill in the floodway, but that's limited to a quarter of an acre. Removal of an obstruction in a stream. So if there is a car, or furniture, or whatever, and you have to -- the town has to get in there and remove it, that's a Permit by Rule. We can counter that after floods blocking bridges and culverts. Five cubic yards of landscaping material -- that's a Permit by Rule. He mentioned the FEMA -- the changes regarding FEMA. We are consistent with them for the finished floor; but in a V zone, it's the lowest horizontal member, which FEMA wanted us to make that change to be consistent with DCA requirements, as well as NFIP requirements. So they measure in a V zone -- one of our issues was, we measured the height of the flood at the finished floor--

(Senator Smith's cell phone rings)

Okay; sorry, sir.

We measured the--

SENATOR SMITH: (off mike) I'm sorry. (laughter)

MS. KOPKASH: --at the finished floor, and now we will be measuring it from the lowest horizontal structural member, which will be below that. So that's the base of the floor.

MR. TITTEL: But when you do freeboard, which is the 2-foot-- If you measure it from the bottom, that means-- The best way to do it is measuring at the top, because if you have a freeboard -- that they're recommending -- you're higher up. I mean, that's the concern.

(Senator Smith's cell phone rings)

SENATOR SMITH: (off mike) It won't quit. (laughter)

MR. TITTEL: Nope.

SENATOR SMITH: Sorry.

MS. KOPKASH: You're a popular man. (laughter)

SENATOR SMITH: (off mike) Go ahead. Do you have anything else?

MS. KOPKASH: I think that's it.

SENATOR SMITH: (off mike) Okay; all right.

For the record, Tim Martin, Community Association Institute, opposed, no need to testify; it looks like Bruce Shapiro, New Jersey Realtors, opposed, no need to testify; Bill Wolfe, not representing -- representing citizens.

B I L L W O L F E: (off mike) Good folks; people.

SENATOR SMITH: All right.

MR. WOLFE: Citizens.

SENATOR SMITH: We're down to our last three on this.

MR. WOLFE: Thank you.

I don't want to get too close.

Thank you, Mr. Chairman. I want to raise just three specific points; two from the Rule adoption document, and one from the Concurrent Proposal.

But before I get into that, I want to clarify two points made in the prior testimony; one with respect to Mr. Toft's claims with redevelopment. The SWRPA does not apply to the footprint of disturbance in the stream corridor. So he doesn't have a constraint on redevelopment. That's a sham argument, all right?

Number two, with respect to the gentleman who runs the mitigation bank. Debbie Mans was correct, but didn't quite express it with clarity. The Freshwater Wetlands Act clearly authorizes a mitigation bank, mitigation trading, and puts standards in place and a public process of mitigation. The Highlands Act, the Pinelands Act, the State TDR Act -- all legislatively authorized various forms of trading schemes. There is nothing in the Flood Hazard Act, which is the authority pursuant to which these Rules are proposed -- there is no authorization for a mitigation scheme; and there is certainly no authorization for a mitigation bank.

So given that lack of authority, there clearly can't logically be legislative intent. So on that basis alone, the Legislature should strike these Rules; on that basis alone.

Now, with respect to where we are now. The Department has painted a picture here that they engaged in a stakeholder process and reviewed staff's recommendation, and conducted, basically, a bottom-up technical reform exercise. They listened to some stakeholder input; they

rejected some stakeholder input. That would create the appearance that this is a policy-neutral exercise; that there was no policy objective other than more efficiency and an alignment. Those are the two rationales: Make it more efficient; and make it quicker, and better, and cheaper, and make the Rules consistent -- align them. That's their logic.

However, they're ignoring the record; and the record begins with a very ugly history. One, the transition report to the Department, January 2010, very specifically says, "Reassess the buffers." And it goes further, not only to say "Reassess the buffers," but "implement an omnibus regulatory initiative to deal with the problems we're encountering" -- and these were written by the business community -- "encountering in a stream encroachment, the Flood Hazard, and the C1 buffers." They're targeted; they were targeted for what Executive Order 2 called *regulatory relief*; to relieve regulatory burden. That's the Governor's policy.

Thirdly, Commissioner Martin, to Administrative Orders, implemented his transformation initiative, which targeted the C1 buffer program. And the Department did an independent technical review, issued November 2012, of the Category 1 program. And the Commissioner did not get the answer from his staff experts that he anticipated. That report explicitly says, "The preexisting Category 1 program has scientific justification and is a good program; and we recommend an expansion of 122 more stream miles to be designated Category 1," all right?

So the staff -- the bottom-up staff part refuted the Administration's policy agenda -- to cut back on this program and make it easier to get permits and develop in-stream corridors.

SENATOR SMITH: All right; stop for a minute.

Is that true?

MR. WOLFE: I have text from the documents I'd be glad to share.

SENATOR SMITH: Okay; let me ask the question.

MS. KOPKASH: No; I respectfully disagree with Bill Wolfe.

When I was part of-- This is when I was just a worker bee, sitting at a computer. Vinnie Mazzei and I sat down and we developed a stakeholder list. Everything, of course, you know, had to go up and make sure we had approval. But when we went in to those stakeholder sessions, the one thing we did have in mind is administrative alignment. And that was out of the fact that -- trying to get information out of DEP's database is very difficult. And trying to assess our performance is very difficult in the current way we are structured in NJEMS. So when we sat down-- We actually hired a business analyst who looked at our processes, and across the board said in order to computerize this electronic submission, you're either going to have to get a statutory change to align all the statutes, or do a regulatory change in order to accomplish that.

So that was in the back of our minds; but other than that, we went in there with our ears open and captured everybody's comments. We were open to everything that we were hearing at those meetings. And so I disagree that we went in there with a mission in mind. We didn't, other than to hear what people had to say.

SENATOR SMITH: Okay.

MR. WOLFE: Okay, that's fine. I will submit for the record every document that I just referenced, which specifically, in black letter, contradicts that analysis.

Secondarily, these meetings -- these stakeholder meetings were by invitation only. And Dennis Toft and I clearly do not have the same policy objective, with respect to regulatory frameworks. And there were clearly people who should have been at those meetings who were excluded from those meetings. And for the Committee's reference, I was one of three people who wrote the subject rules in question, with two other professionals. And the DEP manager signed off on it; the Attorney General's Office signed off on it; and the DEP Commissioner signed off on it. And the Governor's Office signed off on it. And those rules -- the text of those rules very specifically created in the inside 150-foot buffer that Mike referred to earlier -- Mike Pisauro referred to earlier. The text reads -- I'll give you the regulatory text, "In no case shall the remaining SWRPA be reduced to less than 150 feet." No case; no case; no, all right?

Now, the Department has now, retrospectively, in the adoption document -- and this is the first of my three points -- retrospectively reinterpreted history and they said, "Well, it really was never a--" -- and this is a quote -- "never not a no-billed regulation. It was never a prohibition." And the Department then cites a Response to Comments in the February 2004 *Register* -- which is the Response to Comments document adopting the original Category 1 buffer rules and the Stormwater Rules. And they say, "We anticipated this problem of the prohibition inside 150 feet; and we said we would go through the hardship waiver provisions of the various permit program rules. So we never really meant it that way; we meant to do it, and we've done it that way since the beginning of time. And the environmental critics just don't understand that."

So this morning I went and I said, “Oh, geez, I’ll go and track down that Response to Comment.” And what they leave out -- and this is why this is such a slippery enterprise we’re engaged in here, because I look at the text. And the Department said they anticipated using the waiver provisions and not having a prohibition.

Now, Tony D., who represented the Builders Association; and Paul Schneider, who is a former DAG, who represented Pulte Homes, submitted comments saying, “Hey, your rule text guys -- do you realize it’s a prohibition? You have to give us some relief; you have to give us-- Suppose we have a landlocked parcel, you know?” Implicitly there would be a taking. “You have to give us some relief; you can’t do this.”

And the Department -- similar to what the Department just said in the adoption document, “Oh, yes, we’re anticipating using the hardship waiver.” But they said -- before they said that, they said, and this is a quote, “Unavoidable encroachments into the Special Water Resource Protection Area for certain linear developments, such as the widening of existing roads and utility crossings, are allowable provided they meet the standards in another portion of the Rules.” So they dismissed the portion of the arguments -- that there really isn’t a prohibition. There were standards in place for widening of existing roads and utilities.

But then they go on to say, “For other crossings, like private driveways, developments,” not the trails and all the niceties we’re hearing from the Department; the nice things. You know, the New Jersey Trail Council wants to build a trail along a Category 1 stream; they have to go and get a hardship waiver. Why should they spend \$30,000? Site mediation, landfills -- whatever.

This is a quote. “The Department anticipates proposal of an amendment to the Rule to allow additional waivers from strict compliance for new road crossings where there is no alternative route or access that would avoid encroachment into the Special Water Resource Protection Area.”

So the Department had anticipated going through rulemaking to fix the alleged problem. And I was part of a policy debate within the Department, and these rules were not written by the Stream Encroachment Engineering program. They were written by ecologists in the Watershed Program, all right? And they were designed intentionally to make the existing stream encroachment engineering technical review and loopholes for waivers not applicable. We were in the business, if you recall at that time -- we were in the business of making things very, very difficult around Category I waters. And that policy went, as you’ll recall, six months later, into drafting the Highlands Act -- which I sat down with you in OLS, and we wrote the Highlands Act together; S-1, the introduced version.

So what I’m saying is, we were making it very, very rigorous. And now the Department just erases that history, and they erase it in a very disingenuous way. And they didn’t note the fact that their own language says they were going to propose rules to fix it.

So what they’re relying on, from a legal standpoint, is they’re relaying upon text from a Response to Comments document, buried in a 12-year-old rule adoption document, to wave a magic wand over a whole entire 12-year period of granting these exemptions and hardship waivers; where there was no regulatory text in place, and the regulatory text that was in place explicitly established a prohibition.

Now, if you've read the various cases that go through the courts, Response to Comments documents have no legal standing. They explain the agency's understanding of their own rules. The text of a Response to Comments document has no weight against the absolute black letter prohibition in the rule.

So that has all been massaged with a misleading and false statement in the Response to Comments document. And that's problem number one -- is that we are changing what used to be a prohibition on disturbance into a by right, and back it up with a mitigation scheme if you can't meet the "standards."

Which takes me to my second point. The word *standard* has been kicked around. There are standards in the Stormwater Rules for treatment of the runoff. You have to remove 85 percent of the suspended solids, whatever. That's a standard. There are standards in the riparian buffer rules and the SWRPA, which talk about the disturbance of vegetation and soils. That's another standard. And then there's a third standard, and this is the real standard -- the ambient water quality standard in the stream. That's what the crux of this whole debate is, is can we get enforcement of the ambient water quality standard? And that deals with TDS, and dissolved and suspended solids; it deals with temperature; it deals with numeric limits for specific criteria; it deals with what's called *antidegradation* -- how much you can allow the water to degrade. All those things are in that ambient water quality standard.

That's all been glossed over with this conflation of the word *standard*. And it's very, very, very misleading by the Department as to what standard they're really talking about.

And what I'm trying to convey to you is that the real standard, the ambient water quality standard, is the key. And the way you understand that is read -- and I'll provide this document to you -- read the New York state DEC's denial of the Constitution pipeline, where they say that the disturbance of vegetation and soils, harvesting of trees, will bring sunlight and erosion and runoff; jacking under a stream, trenching through a stream will violate ambient water quality standards. And therefore, they denied the Clean Water Act's 401 Water Quality Certification for failure to comply with water quality standards.

The failure in the DEP's Land Use programs, in the Stream Encroachment program has been -- there's no explicit regulatory linkage between a stream encroachment permit and the actual ambient water quality standard. The SWRPA provides that bridge. That's why it's so important. It's the link to the ambient water quality standard, and it's the link to the Clean Water Act. And by repealing it, you are taking away authority that we can use to force the denial of a permit.

SENATOR SMITH: Whoa; stop there.

Ginger or Ray -- the point about the connection to ambient water quality standards. Do we have them in New Jersey?

MR. CANTOR: (off mike) The SWRPA was put in place, again, under the Stormwater Act.

SENATOR SMITH: Into the microphone, okay? Pass the microphone down.

MR. CANTOR: The SWRPA was put in place, as mentioned, under the Stormwater Act. And that, in a sense, brought in the antidegradation, nondegradation standards. There was concern when we

were appealing the SWRPA that we were now breaking that link between the Water Pollution Protection--

SENATOR SMITH: Right; that's what he just expressed.

MR. CANTOR: --and riparian zones.

SENATOR SMITH: Right.

MR. CANTOR: We've put that back -- is that in the adoption?

MS. KOPKASH: Yes, it's in the adoption.

MR. CANTOR: Well, we--

SENATOR SMITH: Whoa, whoa. So it's in the Rule to be adopted?

MR. CANTOR: Yes.

MS. KOPKASH: Yes, sir.

MR. WOLFE: (off mike) Mr. Chairman, I--

SENATOR SMITH: Back to the gap.

MR. WOLFE: No, no, no, no; wait, wait, wait; no, wait, wait.

MR. CANTOR: In the adoption document -- it's in the adopted Rule for June 20.

SENATOR SMITH: Okay. So you're saying the ambient water quality standard--

MR. CANTOR: (off mike) It was raised that we were missing that legal link, (indiscernible) and it was never our intent to do that. We were able to-- In the document that's going to be published on June 20 for adoption, that linkage is explicitly made there.

MR. WOLFE: All right, that's beautiful.

I'm glad you said that, Ray, because that's my third point. This is important.

SENATOR SMITH: (off mike) Is there anybody coming in at 1 o'clock here?

UNIDENTIFIED MEMBER OF COMMITTEE: (off mike) I'm not aware of it.

SENATOR SMITH: (off mike) Go check. I don't want us to get chased out. (laughter)

MR. WOLFE: Mr. Chairman, this is a key point, because the Concurrent Proposal, in the explanatory basis section, says exactly what Ray just said. It says, "We have taken the provision from the Freshwater Wetlands Act and the Freshwater Wetlands Rules," and the Freshwater Wetlands Rules say you cannot issue a Wetlands permit that would violate an ambient water quality standard. There's regulation that is cited.

The text of the Concurrent Proposal says we have incorporated similar -- they use the word *similar* -- to the Freshwater Wetlands Act. And then I went and read the text of the Rule and that specific provision from the Wetlands Rules, which prohibit issuance of a Wetlands permit that would violate a water quality standard, is not there. Again, which shows the dishonesty of the process. It is not there.

SENATOR SMITH: (off mike) Stop, stop, stop.

So Ray--

MR. CANTOR: (off mike) Again, the explicit language between the Water Pollution Control Act and the riparian zones for major developments is now explicitly in the Rule that's being adopted--

MS. KOPKASH: On June 20.

MR. CANTOR: --the Proposal. Ginger, you had something else to add about it?

MS. KOPKASH: No, I think you're talking about the Concurrent Proposal.

MR. WOLFE: (off mike) I said, the Concurrent Proposal says what Ray just said. And if, in fact, it's in the adoption document, why would they bring it up again in the Concurrent Proposal?

MS. KOPKASH: Okay, so let me-- Can I clear something? I think I can clear something up.

MR. WOLFE: Sure.

MS. KOPKASH: I think I'm following you.

So in the Proposal that we are adopting on June 20, we established the link to the Stormwater Rules, correct?

MR. CANTOR: In the rules that are being adopted.

MS. KOPKASH: The ones that are being adopted.

In the Current Proposal, what we did was -- once again looking at alignment -- we went to the Freshwater Wetland Rule as a guide, and we said if you're developing in that inner 150, or you are developing in a SWRPA, we're going to even have a tougher threshold that you're going to have to meet. And it's more prescriptive Individual Permit criteria. And I think what you're getting at -- if you went down word for word, that word is missing. But our attorneys felt it was necessary because we were already referring to it as a *cross-reference*.

MR. WOLFE: Let's refresh -- let's get specific here.

The language from the Freshwater Wetlands regulation says that no wetland permit shall be issued -- "will not cause or contribute to a violation of any applicable State water quality standard." That's a very clear restriction on the issuance of a Wetlands permit that would violate--

It's never been implemented by the Department, by the way. It's kind of an ignored provision; and it's there because it's required under the Clean Water Act, because the Freshwater Wetland Program is a Federally delegated program under the Clean Water Act. It's a Federal requirement. But it's been ignored by the Department because the EPA failed to promulgate what are called *Wetlands criteria* under the Federal water quality standards. So it's a fiction; it's a narrative standard. But it's been ignored.

What I'm saying is, given the New York situation, it's not ignored anymore. Every attorney in the world and every water quality engineer in the world right now is looking at how to connect the dots between hydraulic -- the HTD under the stream drilling, stream trenching, and pipeline crossings to find a violation of an ambient water quality standard. Including if you-- In New York state, if you just cut the trees in the riparian corridor, you get sunlight in the water and it increases the water quality (*sic*) -- it increases the temperature and you violate a temperature criteria.

Suspended solids -- that's the logic of defeating pipelines, including any development in a riparian zone. And everybody now knows it because New York state put it out there so clearly. Connecticut had done it as well, but under different authority and not so clear. But New York has put it out there and made it very clear. That's why it needs to stay.

SENATOR SMITH: (off mike) Last point.

So Judy, if you wouldn't mind, research that issue -- whether the proposed rules -- whether the proposed supplemental rule in any way abrogates the ambient water quality standards.

Bill, I think that's what you're saying--

MR. WOLFE: Yes.

SENATOR SMITH: --that the Concurrent Proposal--

MR. WOLFE: It lacks inclusion--

SENATOR SMITH: --would take away some--

MR. WOLFE: It lacks inclusion of the Wetlands prohibition, and it eliminates the SWRPA. So if you're cross referencing to the Stormwater Rules, it's a hollow shell. They've taken out the 5.5 H--

SENATOR SMITH: Got it.

MR. WOLFE: The 5.5H -- whatever.

SENATOR SMITH: We're going to look forward to seeing your--

MR. WOLFE: My final point is, there's a case on point -- on the question of jurisdiction with respect to headwaters streams. And I submitted this earlier in the testimony as it was going through the first round. There's an Appellate Division 2008 opinion that's on point here. And it specifically talks about the distinction between streams that drain less than 50 acres without a defined bed and bank -- are not provided riparian zone protections under the Flood Hazard Area regulations. But they are under the SWRPA. So the question becomes -- we're clearly losing some protections for those streams. The Department says -- they use the word *rare* -- that this is a very rare occurrence because some of them are swales and some of them don't drain to Category I waters, and some of them are not mapped on the U.S.G.S. maps that trigger the jurisdiction for a SWRPA. So they've come up with a plausible explanation of why this is, in fact, rare; but they have not offered any evidence. And having been there and worked in their shoes, I know their technical capabilities. And they

have an ability, very easy -- it's not a workload-intensive operation -- to take their stream network -- which is a GIS data-layered system -- and determine where the extended jurisdiction lies under the SWRPA rules and where it ends under the Flood Hazard Rules. And tell me, is it 10 stream miles or it 10,000 stream miles? And this is just a seat-of-the-pants kind of operation that if they had any confidence in their assertion that it is rare, they would clearly produce the evidence that would support that claim.

And this goes to your earlier question starting the hearing. Tell me how many-- They're making the case that these hardship waivers were routine, that they were cookie-cutters. They were coming out -- there were so many of them, they were wasting staff time. They had to streamline the process.

Mr. Toft's testimony says there was a prohibition on inside the 150. What is it? Is it the Department's assessment that these things were routine; that we have to make it easier, because there are so many of them? Or is it Toft's analysis that you can't do it, and it's stopping redevelopment throughout New Jersey. Which is it?

With testimony that far apart -- on how the Rule is actually administered and implemented, without any data that has credibility, like a report, like-- The DEP issued a staff report on the Category 1 program. It identified all the Category 1 streams; did a technical evaluation; public could review it, and look it, and see whether it's credible or not. They're just making mere assertions about the occurrence of events to justify a regulatory -- a major regulatory initiative. This is the first time I've ever seen the Department rely on experience. When we had to justify the Category 1 buffers-- Look, the team I worked with -- we had to go out and

do scientific-- We had to review the literature; we had to show studies that demonstrated pollutant reduction removals that would attain ambient water quality standards. This is the exercise we did. And now these guys, 12, 14 years later, come over and wave a magic wand and call it a *realignment*.

Again, from a legislative intent standpoint, that's not something you want. All environmental laws require the best available science and good regulatory basis. And that's just -- those are just pillar principles of environment regulation. And they're all being thrown out the window in this rulemaking.

And I think I've been on my soapbox long enough.

SENATOR SMITH: (off mike) (Indiscernible) (laughter)

MR. WOLFE: It's true. And the other thing is, Mr. Chairman, I first met you and spoke before you since you started a hearing in response to Tittel's comments 20 years ago. You had a bill in on a water infrastructure package.

SENATOR SMITH: (off mike) Right.

MR. WOLFE: I met you over 20 years ago, when you were Chairman of the Assembly Labor Committee.

SENATOR SMITH: (off mike) I was never Chair of the Assembly Labor Committee.

MR. WOLFE: You held hearings on NAP technology's explosion. And I testified--

SENATOR SMITH: (off mike) That was the Environment Committee.

MR. WOLFE: Excuse me; I thought it was the Labor Committee.

So it was the Environment Committee; you were chairing the Environment Committee. I testified, and I got into the weeds, like this, on why the Whitman Administration's rollback of the right-to-know regulations explicitly impeded the emergency response capabilities at that disaster. And after 20 minutes of this, kind of, in the weeds stuff, you said, "You know, Mr. Wolfe, thank you very much; that's the best testimony I've heard today. I really appreciate it." And I've spent the last 25 years in the weeds, trying to get out the meaning that's buried in the weeds and holding -- either as a professional when I was in the Department, or as a public advocate on the outside -- the process accountable to science and law. And I've really spent a lot of time and energy on this, and I heard a lot of things today that, frankly, were just not accurate. And that's why I will submit the documents in writing, because I've reviewed the documents.

Thank you.

SENATOR SMITH: Good.

Thank you very much for taking the time to go through that.

Dave Pringle, who says he has a very brief statement to make.

DAVID PRINGLE: He put words in my mouth.

Thank you. I will do my darndest not to repeat, and provide some new context.

I think it's very easy to lose the forest through the trees that we've been talking about. And I think DEP has really done an injustice. They have managed to make the U.S. Federal Tax Code look simple. These rules are needlessly complex, to the point where I think they're doing it purposefully to undermine environmental protection.

And I think you just have to look at the underlying laws that they cite and that Mr. Toft cited: The Water Pollution Control Act, the Highlands Act, the Water Quality Planning Act. When it gets down to the basics, those laws are designed to protect and improve water quality.

The Administrative Procedures Act and the other Administrative Procedural forums are designed to make government efficient. And I think, by any measure, these rules do not -- only not do that, but what they are proposing to do, in response to the initial proposal, makes things worse.

There are four things here -- and I don't think anybody can accurately distinguish between the existing rules, the original proposal, what's been adopted, and the Concurrent Proposal. It's not good government, it's not environmental protection, and it's not going to serve the economy and the building industry.

In DEP's own words and Mr. Cantor's testimony at the last hearing -- he said projects will be denied if this Rule Proposal doesn't go forward. There's clearly going to be more clearcutting; there's clearly going to be more vegetative buffers. By any measure of science, that's going to degrade water quality; that's going to increase flooding; that's a direct violation of the legislative intent of these bills. You can quibble over the details; you can't argue it's an *if*; it's a matter of *how much*.

And some of these projects will be more than *de minimus*. But when you're talking thousands of projects, pretty quickly, *de minimus* isn't minimum anymore.

And in a world of Sandys, and Irenes, and Floyds, and the storm last night, and so many other unnamed storms, with climate change

making things worse, we can't afford to have things be so complicated and so weak.

We talked about -- in terms of the mitigation, I heard from DEP, at one point, the mitigation will take place in the Watershed Management Area and, in another case, in ecoregion. *Ecoregion* is undefined; I actually -- during the testimony I Googled *ecoregions*. One of New Jersey's ecoregions runs from Trenton to Newark, and everywhere south of that line, with the slight exception of a small part of the Delaware Bayshore. So over half of New Jersey is one ecoregion. So by that definition, you could be trashing one part of the state, and mitigating for it somewhere else, totally unrelated. Even if it's the Watershed Management Areas, of which there are 20, you could do a development project in West Orange, and mitigate for it in Rahway, allowing more flooding in Millburn, Cranford, and Springfield. You could do a project in Manalapan, or in Bridgewater, and do the mitigation in Sayreville. You could do development in Allentown, and have the mitigation occur in Bridgewater.

It's not going to mean -- it's going to mean more flooding, in a nutshell, wherever you live. You could have the development in West Milford, and fix it in Wayne.

This isn't about contaminated sites; it isn't just about the "good projects," even if we all could agree on what a *good project* was. Clearly, the greatest motive behind this is the large development projects. If this was about contaminated sites, this whole process would have been very, very different. And DEP made sure that it was not.

Does anybody, credibly, think that the goal of this Administration is to improve our water quality? I mean, just look at the

track record of what they've done to DEP and the rules to date. It doesn't pass the straight-face test.

And even if we put gas pipelines to the side, there's a very controversial proposed pipeline -- Pilgrim Oil pipeline -- that's not a regulated utility; that is going to be crossing many of the rivers that are important in the Highlands that provide most of North Jersey's drinking water. It goes over the Ramapo Aquifer, over the Buried Valley Aquifer in eastern Morris County.

So these are the kinds of projects that are looking for permits, that would get permits, or could get permits here that wouldn't otherwise get them. So we need the stronger protections. There's nothing in the Concurrent Proposal or what was adopted that suggests that you shouldn't be continuing to hold DEP's feet to the fire. Move the resolution and get them to do this Proposal right.

Thank you.

SENATOR SMITH: (off mike) Thank you for your comments.

Ginger, any response?

MS. KOPKASH: I just want to clarify something.

When you are mitigating, you're mitigating for riparian zone impacts; you are not mitigating for flooding impacts. Those flood standards still stand on their own. They cannot -- you cannot change the flood dynamics on your property and push it onto someone else's. That is a separate section of the Rules. The mitigation is associated with the riparian zone impact, not the flooding impact.

SENATOR SMITH: (off mike) What about the seven examples that you -- the same example every time. The seven examples you made (indiscernible) of mitigating far upstream, or on the other side of the state.

MS. KOPKASH: Yes.

SENATOR SMITH: How do you respond to that?

MS. KOPKASH: Well, first off, I should not have used the word *ecoregion*. The Rules say *service area*, and that is the -- the service area of the mitigation bank. I used the word *ecoregion* to, sort of, provide a visual--

SENATOR SMITH: Okay.

MS. KOPKASH: --to individuals here.

SENATOR SMITH: But your rules -- don't your rules--

MS. KOPKASH: We talk about a Watershed Management Area. Yes, he's right; that you could mitigate-- As long as you're in the same Watershed Management Area, the Rule is designed consistent with how we do it for Freshwater Wetlands.

SENATOR SMITH: Okay.

MS. KOPKASH: Yes.

SENATOR SMITH: Thank you.

MR. PRINGLE: So again, just to clarify. Watershed Management Area in West Orange is in the same Watershed Management Area as Rahway.

SENATOR SMITH: Okay.

MR. PRINGLE: And all of those examples--

SENATOR SMITH: Got it.

MR. PRINGLE: --other than the Newark-Trenton-Delaware Bayshore. Every other example (indiscernible) is the same.

SENATOR SMITH: Got you. Send the microphone back.

MS. KOPKASH: Can I just add, though, something else that I neglected to point out?

For Special Water Resource Protection Areas, you need to mitigate along the same segment of stream -- along the same stream. So--

SENATOR SMITH: It could be pretty far away as well -- is what you're saying.

MS. KOPKASH: Well, it has to be along the same Category I stream--

SENATOR SMITH: Okay.

MS. KOPKASH: --or its upstream tributary. Yes, sir.

SENATOR SMITH: Got it.

Okay, anything else, Mr. Pringle?

MR. PRINGLE: Just that the League of Women Voters asked me to enter into the record that they support our position, and they sent you an e-mail this morning backing that up.

SENATOR SMITH: Okay, thanks.

Our last witness -- and let's give her a hand; Amy Hansen -- for being so patient -- from the New Jersey Conservation Foundation.

A M Y H A N S E N: Thank you, Chairman. And we greatly appreciate your work on this issue.

New Jersey Conservation Foundation submitted comments on the DEP Rule Proposal last summer; several of our serious concerns remain. We have reviewed the comments of the Association of New Jersey

Environmental Commissions. These detail our concerns, and we would like to be on the record as in strong support of ANJEC, and my colleagues -- our colleagues' comments.

We urge the rapid passage of SCR-66.

Thank you.

SENATOR SMITH: That concludes our hearing on the Flood Rules. You've given the Committee a lot to think about. We're asking that there be a transcription of today's hearing so that all of this stuff is readable by anybody who might not be here, like other legislators.

And we're going to think it over. I thought the hearing was very good. I hope you didn't mind the point-counterpoint format; but I think that's the way we ultimately get to, hopefully, what the truth is and what the right thing is to do.

MR. CANTOR: (off mike) (Indiscernible).

SENATOR SMITH: Yes, sir -- Ray.

MR. CANTOR: (off mike) We appreciate the point-counterpoint; we appreciate the ability to be here (indiscernible).

SENATOR SMITH: Okay. You always need to say stuff like that into the microphone.

MR. CANTOR: (off mike) You need more microphones.

SENATOR SMITH: You know, we do. Could we put in request for another microphone on the other side of the table?

UNIDENTIFIED MEMBER OF COMMITTEE: (off mike)
Normally, there are two.

SENATOR SMITH: Normally, there are two.

UNIDENTIFIED MEMBER OF COMMITTEE: (off mike)

And I'll make sure there are two.

SENATOR SMITH: Okay, that's great.

Anyway, thank you very much for your participation. We're going to take a five-minute recess before we -- a bathroom break -- a five-minute recess before we start the Energy Bill. That's next on our agenda.

And we're not getting chased out, right? There's no other Committee?

MS. HOROWITZ: (off mike) No, there's no other Committee.

SENATOR SMITH: Okay; five minutes.

(EXCERPT CONCLUDED)