

APPENDIX



T H E S T A T E C H A M B E R

COMMENTS CONCERNING SCR 66

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**SENATE ENVIRONMENT COMMITTEE
JUNE 6, 2016**

My name is Dennis Toft. I am a member of the firm of Chiesa Shahinian & Giantomasi where I head the firm's environmental practice. My practice includes representing developers, public utilities, parties performing remediation of contaminated sites and public entities. I am frequently called upon by my clients to assist them in complying with NJDEP regulations including the Flood Hazard, wetlands and coastal development rules. I am here today to again request that the Committee not release SCR 66 and allow the NJDEP amendments to the Flood Hazard Area rules to go into effect.

The Flood Hazard area rules are fully consistent with legislative intent under the Flood Hazard Area Control Act and other statutes. The rules continue to provide protection against flooding and environmental protection to riparian zones along waterways, threatened and endangered species habitat and other areas which should be protected. At the same time, the rules correct some of the unintended consequences of the 2007 Flood Hazard rules. They were proposed after an extensive stakeholder process.

It is clearly the intent of the legislature to encourage the remediation and redevelopment of previously disturbed sites, to ensure that conflicts between regulatory programs are eliminated and to reduce the administrative burden on both the regulatory agency and the regulated community. The rules do this. They will encourage the remediation and redevelopment of sites by rationalizing riparian zone requirements, incorporating new general permits and permits by rule and by harmonizing acid producing soil requirement with the soil conservation district regulations. The rules provide new options for mitigation of riparian zone impacts which will lead to an increase in creation of new habitat and riparian zone enhancement. The process changes in the rules will

streamline the permitting for necessary infrastructure projects while ensuring the environmental standards for these projects are not reduced.

As noted by NJDEP, the portions of the rule that led to concerns about protections to Special Water Resource Protection Areas or otherwise have either been clarified or are not being adopted. In addition NJDEP is proposing further changes to its regulations which clarify or strengthen the protections that were of concern to the legislature. This is consistent with the commitment NJDEP made at the hearing before this committee on March 7th and is also consistent with the processes contemplated by the Administrative Procedures Act. This process is fair, allows the benefits of the revised rules to be effective now, while directly addressing the concerns that led to the consideration of SCR 66 in the first place. It would be a mistake to force NJDEP to re-propose the entire rule. All of the environmental benefits would be lost; parties would continue to be hamstrung in their efforts to remediate and redevelop sites and appropriately mitigate riparian zones impacts. Sites that could be improved environmentally by incorporation of storm water management controls not currently in place would remain unimproved. In short, adoption of SCR 66 would run contrary to the goals of achieving these benefits which the legislature has expressly recognized in numerous other statutes.

For these reasons I urge that this committee not proceed with the adoption of SCR 66.

Testimony of Doug Lashley, Managing Member, GreenVest
New Jersey Senate Environment and Energy Committee
June 6, 2016

Good morning, Chairman Smith, and members of the Committee. Thank you for accepting this testimony regarding Senate Bill SCR-66 regarding revisions to the Flood Hazard Area Control Act Rules, Coastal Zone Management Rules and Stormwater Management Rules.

My name is Doug Lashley, and I am the founder and CEO of a small 11 person firm known as GreenVest. GreenVest has been around 22 years and is headquartered in Maryland with additional offices in Raleigh, North Carolina and Edison, New Jersey. We are known as an environmental mitigation banking firm. Our first wetland bank project in New Jersey was established in 1994. We are a key provider of mitigation solutions to offset environmental impacts associated with both public and private projects. We have sold mitigation credits in New Jersey for use by the USACE for flood control projects, numerous NJ transportation agencies for a variety of infrastructure improvements, municipalities, energy companies and the private development community. We are also partners with the State, USACE and the Nature Conservancy in implementing several coastal restoration projects utilizing Hurricane Sandy relief funds.

Mitigation banking is a key part of the federal permitting process and the final part of the "avoid, minimize, mitigate" in the federally-recognized mitigation hierarchy to offset project impacts. This form of advanced compensatory mitigation means that the environmental benefits are achieved before the project resulting in impacts is permitted. New Jersey as a state has done an incredible job in managing its wetland program and in particular strictly adhering to both federal guidelines and its own tougher State wide requirements. We obviously favor the adoption of the credit banking mechanism to offset riparian impacts written into the proposed SCR-66. It is not a departure from the tough standards which have for a long time been recognized by NJDEP under its own New Jersey Freshwater Wetlands Protection Act and the Section 404 wetland mitigation requirements under the Federal Clean Water Act. The mitigation banking credit is just one tool that can be used to offset impacts but in our view represents the best chance at truly replacing lost functions and values to riparian zones caused by future development. This statement is supported by studies conducted by federal agencies and the National Academy of Sciences.

I am no stranger to federal policy on this exact issue. Having served as President of our National Mitigation Banking Association and being a key influence in securing the Presidential Memorandum issued by the White House on November 3, 2015. This memorandum was issued after a one and half year study by the White House Council on Environmental Quality (CEQ) and the Office of Management & Budget (OMB). Our firm welcomed the Presidential Memorandum because it soundly endorsed the use of mitigation bank credits and other forms of advanced compensatory mitigation by the various federal agencies involved in permitting development activities.

We believe adoption of SCR-66 is a great opportunity for the State to have an impact on the permitting process and to find not just cost savings and efficiencies at a significant level but to secure the best possible form of compensatory mitigation possible. It is also can be recognition by government that creating a framework to encourage private sector entrepreneurial skills, creativity and bringing capital to the table will help address the need to balance economic growth with environmental quality is fundamentally a sound policy.

I appreciate the opportunity to testify, and look forward to answering your questions.

Doug Lashley

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**Comments of Debbie Mans, Executive Director, NY/NJ Baykeeper on
NJ Department of Environmental Protection Flood Hazard Area Control Act
Rule Adoption
New Jersey Senate Environment Committee
June 6, 2016**

For 25 years, NY/NJ Baykeeper has been working to protect, preserve and restore the NY-NJ Harbor Estuary, which includes the tidal rivers and bays of New Jersey's northeast coast.

The NJDEP Rule adoption claims that no distinction is made between urban areas and other areas of the State. However, the adoption document then gives the examples of elevation standards for buildings and roadways being the same to make this point. This ignores the more important factor - which *activities* are allowed in riparian zones. Urban waterways repeatedly suffer from further encroachments and decreased protection.

Along our tidal waterways, which include many of our urban waterways such as the Passaic, Rahway, Woodbridge, and Raritan Rivers, Arthur Kill and 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. (p. 47)

While unable to locate a scientific basis for this broad statement, I did locate the NJ Department of Environmental Protection's 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 floodwaters. 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. Flood storage on a site can be reduced by erecting a structure, which prevents floodwaters from entering a portion of the site, or by raising the ground through the placement of fill material.

Many of the State's more urban waterways are tidally influenced and the NJDEP'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.

NY/NJ Baykeeper submitted comments on the proposed rule in July 2015, many specific to urban waterways. An analysis of the adoption document reveals that the majority of these comments were ignored.

Including:

- *Comment:* 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. This has the potential to increase water pollution and flood risk.

NJDEP Response: However, the Department recognizes that in some cases disturbance within this area will not result in adverse impacts or, in other cases, that disturbance within this area is unavoidable and can be properly mitigated. Where riparian zone disturbance is located adjacent to a bulkhead, retaining wall, or revetment along a tidal water or impounded fluvial water and disturbance is limited to actively disturbed areas, then such impacts to erosion, flooding, and water quality will not occur. Therefore, N.J.A.C. 7:13-11.2(c)1 permits new development to occur in these areas, and N.J.A.C. 7:13-11.2(d)1 allows existing development to remain in these areas. (p. 481)

- *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 mandate better housekeeping practices or even encourage the removal of these potentially hazardous items from a vulnerable area.

This was especially important in light of the flooding that occurred during Hurricane Sandy, where industrial facilities along the lower Passaic River were flooded, mixing hazardous materials with the floodwaters before they moved into adjacent neighborhoods. There needs to be more oversight of these types of facilities, not less, which have the potential to cause significant water pollution.

NJDEP Response: The purpose of permits-by-rule 51, 52, and 53 is to ensure that facilities that predate the November 5, 2007 FHACA Rules may continue to operate while also limiting expansion of the facilities and potentially increasing flood damage potential. The Department does not believe that it would be reasonable to require facilities that existed prior to the effective date of the rule, and which are located within flood hazard areas, to retrofit their facilities to meet the current requirements of this chapter. In fact, such retrofitting would prove to be a hardship in the vast majority of cases. However, where

an expansion or change of use is proposed, such activities are subject to the requirements of this chapter. (p. 404-405)

- *Comment:* Removal of the hardship exception requirement removes the presumption that the NJDEP should not issue permits for certain types of activities in a flood hazard area. These activities include the placement, storage, or processing of hazardous substances, solid waste or recyclable materials in a regulated area.

NJDEP Response: In accordance with the hardship exception rules previously codified at N.J.A.C. 7:13-9.8 (recodified and amended at adopted N.J.A.C. 7:13-15.1), all cases where hardship was found to exist warranting the grant of a hardship exception included a demonstration by the applicant that the proposed activities, including the required riparian zone vegetation impacts, would not adversely affect the use of contiguous or nearby property and that the proposed activities did not pose a threat to the environment or to public health, safety, and welfare (prior N.J.A.C. 7:13-9.8(b)2 and 3; adopted N.J.A.C. 7:13-15.1(c)2 and 3). In light of the findings made in many cases for these types of hardship exceptions that impacts at the increased disturbance levels would not adversely affect use of nearby properties and would not pose a threat to public health, safety, and welfare or the environment, the Department, based on its experience of reviewing and issuing flood hazard area permits since 2007, determined that the increased maximum allowable disturbance to riparian zone vegetation for regulated activities in Table 11.2 will have a *de minimis* impact on riparian zone functionality while reducing the unnecessary regulatory burden of seeking a hardship exception for activities having such a minimal impact. (p. 507)

I wanted to cite two specific examples of why appropriately regulating our flood hazard areas, especially in urban areas, is important.

A few years ago, NJDEP permitted, through a hardship waiver, the construction of a Class B Recycling facility on the lower Rahway River in Carteret, NJ. 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 "cap" will be over 20 feet. This site was flooded during Hurricane Sandy, however, NJDEP never required the applicant to conduct a flood study or assess how bringing over 4 million cubic yards of fill onto the site would impact both the surrounding neighborhood and waterways.

Separately, just across the Rahway River in Linden, NJDEP permitted another site, 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. The unconsolidated fill material will be used to raise the area out of the Flood Hazard Zone – that is 20 acres removed from Flood Hazard Zone.

This 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. And these sites are primarily being cited along our urban waterways, with quick access to the Turnpike and a willingness by NJDEP to reduce protections along waterways many deem as dirty and unrecoverable.

When the Legislature adopted the Water Pollution Control Act, it did not distinguish between different waterways in different parts of the State.

The Legislature finds and declares that pollution of the ground and surface waters of this State continues to endanger public health; threaten fish and aquatic life, science and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural and other uses of water, even though a significant pollution abatement effort has been made in recent years. It is the policy of this State to restore, enhance and maintain the chemical, physical, and biological integrity of its waters, to protect public health, to safeguard fish and aquatic life and scenic and aquatic values, and to enhance the domestic, municipal, recreational, industrial and other uses of water. (N.J.S.A. 58:10A-2)

NJDEP'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 to enhance the domestic, municipal, recreational, industrial and other uses of water."

MEMO

To: Senate Environment and Energy Committee

From Jennifer M. Coffey, ANJEC

Date: June 6, 2016

Re: Partial Assessment of Impacts of Adopted NJDEP Flood Hazard Rules

The Department of Environmental Protection has adopted revisions to the Flood Hazard Area Management Act Rules largely as proposed on June 1, 2015. The Department has made minor revisions upon adoption of the rules. Those rule revisions are minor, however, otherwise the rules have had to have been re-proposed and opened to public comment as per the Administrative Procedures Act. Those minor changes have resulted in some improvements in the rule, but they remain minor. The majority of ANJEC's original concerns with regard to protecting public health, safety, and environment remain with regard to the Flood Hazard rules as adopted.

The Department has also proposed concurrent rules for adoption to make further changes to the Flood Hazard Rules. Those changes are not discussed herein as there is no guarantee of adoption. Our concerns remain with the potential damage that may ensue with the rules as adopted. It is ANJEC's position that the rules as adopted may violate the original legislative intent of the Flood Hazard Area Control Act as emphasized below.

The Flood Hazard Area Control Act, 58:16A-50, requires:

- *"the department shall adopt rules and regulations which delineate as flood hazard areas such as areas as, in the judgement of the department, the improper development and use of which would constitute a threat to the safety, health, and general welfare from flooding" [58:16A-51(a)], emphasis added.*
- *"The department is authorized, pursuant to the 'Administrative Procedures Act' to adopt, amend, or repeal rules or regulations and to issue orders concerning the making, rebuilding or renewing of any structure or alteration and the development or use of land in the area which would be inundated by the 100 year design flood of any nondelineated stream, which rules and regulations shall be designed to preserve the flood carrying capacity of the stream to minimize the threat to the public safety, health and general welfare..."[58:16A-55.2(b)], emphasis added.*

1. *Adopted rule weakens water quality protections and increases potential to compound environmental justice issues by allowing mitigation without any provisions rooted in watershed science to protect environment public health or safety.*

"The amendments at N.J.A.C. 7:13-13 expand the locations available for mitigation in order to provide applicants with more opportunities to perform restoration and enhancement activities and to promote these activities in degraded areas that may not be in close proximity to the site of disturbance." (pg. 25, response to comments)

Rather than providing a nexus to the original riparian area destruction, the adopted rule provides no nexus to address localized impacts. The rules are now clear that clear-cutting riparian areas in North Jersey can be mitigated in South Jersey. This creates greater risk of flooding, impacts to water quality, and sets the stage to exasperate environmental justice issues by further burdening

over-burden communities without providing environmental mitigation for damage to their local natural environment. The mitigation provision proposed in the rules fails to address localized impacts for water quality and flooding. As written, the rules propose an environmental pay-to-play system that would allow for more development and destruction of the environment without any real remediation. The only potentially acceptable mitigation provisions would be under limited instances for certain individual permits and within the same subwatershed.

2. Adopted Rules Eliminate Special Water Resource Protection Areas (SWRPA) to Category One streams, weakens provisions for hardship exemption, and thereby allow more development in riparian areas.

The 2016 adopted rules eliminate the SWRPA. ANJEC disagrees with the Department's assessment that doing so has no impacts because projects would have been approved anyway using the hardship exception under the 2007 rules. "The adopted amendments create a process for projects that would have been ultimately approved under the prior rules after significant time, money, and resources were spent both by the applicant and the Department" (pg 21, rule adoption document).

The hardship exception in the 2007 rules was designed to be a limited exception. No project had a right to a hardship exception. The DEP's choice to issue hardship exceptions as a defacto policy when a project violated the other provisions of the 2007 flood hazard rules is an ineffective policy to codify into the 2016 rules because providing permits for any project that claims a hardship fails to uphold the integrity of buffers designed to protect exceptional value waterways designated as such for drinking water or ecological reasons. The Department's example of seeking to provide a process for site remediation within the flood plain could be handled by writing a new general permit, not by establishing a blanket repeal of the SWRPA.

3. The Department abdicates responsibility for implementing the Flood Hazard Area Management Act as prescribed by the NJ Legislature by establishing permits by self-certification known as permit-by certification.

The adopted rules state with regard to threatened and endangered species in riparian areas, "...the standards therein apply to both present and documented threatened and endangered species..." By their nature threatened and endangered species are rare and difficult to find. The Department fails to ensure that species are adversely affected by regulated activity despite their claims otherwise because they have determined that the provision is applicable to "permits-by-certification" in addition to permits-by-rule and general permits. It is unreasonable to expect that individuals claiming disturbance of flood hazard areas and clearing of riparian areas under the permit-by-certification have also conducted a thorough evaluation as to the presence of threatened or endangered species. It requires extensive habitat and ecological knowledge and this cannot be expected within a self-certification, expedited permit system.

Additionally, this should be expanded to include "suitable habitats" to ensure the protection of species that are known to be declining.

4. *In the rule adoption, the Department introduces a new regulatory term in making amendments to the Riparian Zone section of the rules, 7-7-9.26 without ever defining it or referring to a definition of such by incorporation.*

The term is "tributaries." The term "tributaries" is neither defined in the Flood Hazard area rules, 7:13, nor the Coastal Zones Management Rules, 7:7. This is unacceptable and opens the entire Riparian Zone section of the rule for interpretation.

5. *In the adopted rules, the Department specifically codified the concerns of environmental organizations that the headwaters or beginnings of streams will NOT be regulated under the flood hazard rules (pg. 760), 7:13-2.2(i).*

The Flood Hazard Control Act requires, "the department shall adopt rules and regulations which delineate as flood hazard areas such as areas as, in the judgement of the department, *the improper development and use of which would constitute a threat to the safety, health, and general welfare from flooding*" [58:16A-51(a)], *emphasis added*. The Department is effectively saying that protect of headwaters is unimportant to protecting safety, health, and general welfare from flooding whereas there is strong established science to the contrary. Protecting headwaters is critically important because headwaters provide exceptional ecological value as well as flood protection (<http://www.delcoed.org/wp-content/uploads/2016/01/The-Science-Behind-the-Need-for-Riparian-Buffer-Protection.pdf>; additional resources can be provided).

6. *The rules enshrine process that ensures failure of cumulative impacts of general permits, permits by rule, and permits by certification and ensures increased clearing of riparian buffers and floodplains thereby "constitute(ing) a threat to the safety, health, and general welfare from flooding" [58:16A-51(a)].*

The Department reaffirms the self-accounting practice for ensuring limits of disturbance in riparian areas (rule adoption pg762). ANJEC has concerns with regard to 7:13-11.2(n). The proposed rules call for the limits of disturbance for the "construction of an addition to a lawfully existing single-family home or duplex, or the construction of an accessory structure to an existing single-family home or duplex...if the total area of riparian zone vegetation to be cleared, cut, and/or removed within the riparian zone *does not exceed the limits set forth in Table 11.2 above, cumulatively since November 5, 2007.*" (*emphasis added*) While this provision sets forth an attempt to limit riparian zone disturbance and riparian vegetation clearing, there is no provision for record keeping and enforcement.

The issue is further complicated wherein the Department adopts, "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 cleared, cut, and/or removed under this paragraph, (pg. 771, 7:13-11.2(f)1i). Property owners applying for an individual permit would be expected under this provision to acquire records of any permits by certification for riparian zone disturbance activity for any lots subdivided from theirs after 2007. This is an unreasonable and unenforceable expectation.

The lack of ability to enforce this cumulative impacts provision will result in the degradation of riparian buffer, their ability to manage flood water, and protect against flood damages to property and environment. This is in direct conflict with the original legislative intent of the Flood Hazard Area Control Act to "preserve the flood carrying capacity of the stream to minimize the threat to the public safety, health and general welfare..."[58:16A-55.2(b)]

7. *With the rule adoption, the Department confirms permission for unlimited clear cutting in a "truncated" portion of a riparian zone.*

The Department adopted exemptions to limitations on clear-cutting riparian vegetation in areas they newly defined as "truncated." "Truncated" is an arbitrary, non-scientific, new regulatory term. "Truncated" areas, as defined in the proposed rule, will flood just as surely as non-truncated areas. Riparian vegetation is a common-sense, scientifically sound means of retaining flood waters and minimizing additional impacts of flooding (pg 772, 7:13-11.2(f)7).

a. *Need to eliminate exemptions for roadways within a riparian area.*

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

This section of the rule was amended slightly upon adoption to include the provision providing that "Any clearing, cutting, and/or removal of riparian zone vegetation within a truncated portion of a riparian zone for the purposes of this paragraph, an area is considered to be a truncated portion of a riparian zone if: The area is separated from a regulated water body by a *lawfully existing* railroad or public roadway...(rule adoption pg 771, 7:13:11.2(f)7)" This provision, however, is inadequate to "preserve the flood carrying capacity of the stream to minimize the threat to the public safety, health and general welfare..." as required by the Flood Control Act [58:16A-55.2(b)] because it fails to take into account the people and buildings that may be situated along that truncated distance. Additionally, there is no limited on the truncated section, it could be between one foot and greater than thousands of feet."

Because of the aforementioned detrimental impacts to "*preserve (ing) the flood carrying capacity of the stream to minimize the threat to the public safety, health and general welfare...*"[58:16A-55.2(b)], ANJEC therefore respectfully requests that the NJ Senate and Environment Committee move forward with an affirmative vote of SCR 66, which "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. "