



**New Jersey
Builders Association**

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November 7, 2024

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Attention: DEP Docket No. 05-24-05
Office of Legal Affairs
New Jersey Department of Environmental Protection
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Dear Ms. Abatemarco, Esq.:

The New Jersey Builders Association (NJBA) is pleased to submit the following comments regarding the Department of Environmental Protection's (Department) proposed Resilient Environments and Landscape (REAL) Rule, DEP Docket Number: 05-24-05. Proposal Number: PRN 2024-073.

General

NJBA supports the State taking reasonable steps to increase resiliency and adapt to climate change and, over the past decade, has welcomed and supported countless new rule proposals and code changes that advance new homes' resiliency and energy efficiency. From mandatory electric vehicle charging stations to enhanced green infrastructure stormwater requirements, the building industry recognizes that new homes and redevelopment often represent the simplest means to advance efficiency and resiliency in the face of a changing climate given the highly developed landscape of New Jersey.

Unfortunately, if adopted, the REAL rule would have a wide ranging and devastating impact on our ability to produce much-needed housing in New Jersey while simultaneously harming individual property owners. Many of the proposed changes, such as incorporating 5 feet of sea level rise on top of existing flood hazard areas, the removal of non-mainland coastal centers, and enhancements to the stormwater rules could make it cost-prohibitive to build and redevelop in many areas, including in some of New Jersey's most in-demand urban communities that are dependent on redevelopment.

Most crucially, REAL does not help existing homeowners meet the challenges of climate change and could hurt the ability of residents and communities to make improvements as land is devalued while the costs to build and create resiliency are increased. Furthermore, the effects are unlikely to be felt equally as economically distressed communities will be less able to afford to

Since 1948, the New Jersey Builders Association (NJBA) has been the State's leading trade association and voice of the homebuilding industry in Trenton. As a major influencer on the state's economic strength, its mission is to advocate for a sustainable and healthy economy and a more affordable and vibrant housing market. NJBA's diverse membership includes residential builders, developers, remodelers, subcontractors, suppliers, engineers, architects, lawyers, consultants and industry professionals that are involved in constructing entry-level to luxury units in for-sale, rental and mixed-use developments.

comply with the rules, thus further disincentivizing resiliency. “A study by the National Bureau of Economic Research found that homes within the 100-year floodplain are valued 4.4% to 13.3% less than similar properties outside the flood zone. This decrease in value is largely due to the perceived risk of flooding and the associated costs.”¹ This figure represents a significant burden for municipalities and homeowners. It also means that homeowners could have a harder time making improvements to their homes as some studies estimate that 30%-40% of home improvements are financed by home equity.² Homeowners who cannot afford to elevate their homes – especially homes outside the FEMA flood zone or in the CAFE elevation could be forced to sell their depreciating homes, while NJDEP and municipalities can purchase such properties, the Blue Acres funds are very limited. Further, locally imposed height restrictions could impede raising homes with multiple stories, further devaluing properties.

- Has the Department estimated the dollar figure for the total value of property within the new designation and by how much it may be devalued?
- Has the Department estimated how many homeowners may become “underwater” on their mortgages based upon 4.4%-13.3% devaluation?
- Has the Department estimated the impact to tax bases and the shifting tax burden to property owners who reside in unaffected areas?
- Has the Department evaluated how potentially lower tax bases could impact efforts to address climate change at the municipal level?
- Has the Department considered how much less home equity the average property owner will have as a result of the new CAFE designation?
- Has the Department evaluated approximately how many residents in the Inundation Risk Zone or CAFE have enough disposable income or home equity to afford to raise their home?
- Has the Department evaluated at what rate decreasing home equity could affect the ability of property owners to make improvements that increase resiliency?

Taking steps to encourage development and redevelopment in low-risk areas are not outside of the Department’s rulemaking purview. Stakeholders have long advocated for rule or program changes that incentivize this behavior and could include priority reviews, shorter permit review windows, pre-conforming design types and more. Unfortunately, the REAL rule does not include any enhanced efficiencies for low-risk, resilient or even energy efficient development or redevelopment.

- Did the Department evaluate any rule or permitting incentives for developments that meet certain resilient criteria?

¹ AMRES. (2024). *Understanding and Evaluating the Resale Value of a Home in a Flood Zone*. Retrieved from <https://www.amres.com>

² ConsumerAffairs. (2024). *Home Improvement Industry Trends 2024*. Retrieved from <https://www.consumeraffairs.com>

Beyond the purview of the Department's regulatory scheme, a coordinated effort should have taken place across state agencies and the Legislature to complete the State Plan, make land use reforms, provide financial incentives and contemplate engineering solutions to complement the REAL rule in our fight against climate change, our housing, equity and environmental justice crises. Where these actions are happening, they appear to be taking place in silos as the REAL rule appears to be in direct conflict with aspects of the State Development and Redevelopment Plan, the recently passed affordable housing law, countless local zoning plans, and contemplated engineering solutions to resiliency.

The primary flaw behind the REAL rule is that it alone makes it harder and more costly to develop and redevelop. Without redevelopment and development, the rules themselves do not mitigate the deleterious impacts of climate change. A rule this monumental should be accompanied by a robust package of inter-governmental actions that effectuate change as opposed to simply regulating the small portion of properties that will be developed or redeveloped in regulated areas.

The state needs a plan that helps us build our way to resiliency while tackling our housing crisis. NJ needs both short- and long-term goals to address systemic encumbrances and a desperate need for building, illustrated by an undersupply of at least 200,000 units and an older housing stock in need of rehabilitation and increased resiliency. Meanwhile, the state currently has more than 250,000 policies covered by the NFIP³ which does not include properties in the newly proposed CAFE and approximately 25% of all affordable housing units in the state are at risk of flooding.⁴ NJ averages about 30,000 building permits per year, only a portion of which are for redevelopment. Assuming a very gracious 10,000 units per year are redeveloped and that redevelopment only occurs in areas with flood risks, it would still take 250 years to protect all our housing stock from flooding. While addressing this gigantic planning issue is beyond the purview of Department rulemaking, one should not occur without the other.

- Has the Department considered how many properties within the CAFE and IRZ would need to be redeveloped/raised per year by 2100 to bring all properties into theoretical compliance?
- Has the Department contemplated any funding mechanisms to encourage property owners in harm's way to raise or harden infrastructure?

The issues articulated above could have been evaluated through a proper Cost Benefit Analysis (CBA), which this rule proposal does not include. The impact statements in this rule proposal speak to the inadequacy of any CBA that was performed. This proposal frequently cites the rule

³ New Jersey Climate Change Resource Center. (n.d.). *The National Flood Insurance Program and New Jersey*. Retrieved from <https://njclimateresourcecenter.rutgers.edu>

⁴ StoryMaps ArcGIS. (n.d.). *25% of all NJ Affordable Housing is at risk for flooding*. Retrieved from <https://storymaps.arcgis.com/stories/dd3e9167297243f8bb3f272afd151063>

itself as the means to increasing resiliency when in fact the rule itself will do nothing to increase resiliency if development and redevelopment do not occur.

The Department should look to the U.S. Army Corps of Engineers (USACE) for guidance on how to perform a CBA that details alternative scenarios, provides detailed Benefit Cost Ratios and works with other State agencies and the public to select the option that creates the greatest net benefit. The impact statements in this rule proposal assume that development and redevelopment will continue largely unincumbered and provides zero data documenting why its proposed regulations will offer a net benefit.

- Did the Department evaluate if alternatives such as structural engineering solutions to flooding such as flood gates offer preferable social and economic benefits to increased restrictions?
- Why do the rules not address the impact of engineering solutions that have already been implemented?
- Why does the Department not conduct a CBA?

Generally, the proposal's impact statements appear to be an afterthought as opposed to a crucial consideration made during rulemaking as part of a CBA. The unsubstantiated claims and lack of research provided in the impact statements suggest a lack of concern from the Department and a disregard for the tens of thousands of New Jerseyans experienced economic hardship, particularly as it relates to housing. While it is understandable that the Department of Environmental Protection is focused on environmental impact, economic and social costs should at least be considered extensively enough for the Department to be able to document meaningful impact assessments for the public's consideration. This rule proposal is over 300,000 words long and its Housing Affordability Impact Analysis totals two paragraphs.

N.J.A.C. 7:7 Coastal Zone Management Rules

N.J.A.C. 7:7 Appendix H. The proposed removal of non-mainland coastal centers from the rules without any legacy period is troubling from a planning perspective. Municipalities in these areas have had no planning need to undergo the State Plan endorsement process and will suddenly see their allowable impervious coverage limits decrease. This could affect projects and planning already underway. Municipalities in non-mainland coastal centers should be afforded the necessary time to undergo the plan endorsement process before being penalized for having been previously included in the Department's non-mainland designation.

7:7-1.5. "Cabanos" should not be treated as "dwelling units" as people do not live in cabanos. Dwelling units should be limited to structures used for human occupation as a residence. Structures that are only inhabited on a transitional basis to seek relief from the sun or change clothes while at the beach should not be equated as a residential dwelling. No certificates of occupancy are issued, and overnight occupation is not permitted. Structures used to store things or have running water to rinse pose no greater risk of negatively impacting public health and safety than a "sun shelter" as defined in the proposal. The proposal's purported justification of "inherent dangers to life and property associated with locating such structures in areas subject to storms" exaggerates the stated risk. The proposal provides no substantial data to support the assertion of inherent danger to life and property. "Cabanos" as defined have been a stalwart of the New Jersey Shore tourism industry since its early days. The Department's characterization of inherent dangers and common negative impacts is not consistent with the history and daily use of cabanos at the State's beaches and coastal areas. This proposal is inconsistent with Legislative intent.

7:7 3.3(b) General Permits by Certification: Certain permits are required to be submitted by a professional engineer or license architect. The online system and the permit language should clarify that the engineer or other professional can only certify that the project has been designed in accordance with the permit requirements. However, the construction and other post-issuance conditions must be adhered to by the applicant/permit holder and their builder. The engineer cannot be held responsible for an applicant's decision to not implement the plans as designed.

7:7-3.5. The new Permit by Registration process will demand additional Department time and resources. The Department is already experiencing staff shortages and long delays. How will the Department manage the increased time needed to manage the Permit by Registration system and the intended inspections of projects?

Requiring commencement of an activity within 180 days of permit issuance effectively converts permits into 6-month approvals. The only time a 180-day timeline should be in place is if it is required by the NFIP, in FEMA mapped areas.

7:7-3.9. Requiring submission of a FEMA Conditional Letter of Map Revision (CLOMR) for development in a floodway or a FEMA 100-year flood hazard area that does not have a floodway for applications for a Permit by Registration, Permit by Rule, General Permit By Certification

(GPBC) or General Permit, before issuance of the Department approval, when the proposed activity will result in limited increases in applicable floodway or flood hazard area elevations, either individually or cumulatively, when combined with existing and anticipated development is extremely burdensome and unnecessary for consistency with the FEMA National Flood Insurance Program. The same objectives may be met through issuance of conditional approvals that require the permittee to secure a FEMA CLOMR before commencing the regulated activities. The requirement to account for anticipated development is vague and imposes an undue burden on the applicant who may not know of or have resources to identify other anticipated development. The requirement is also prejudicial as anticipated development is speculative, and subject to varying uncertainties regarding whether development of lands zoned or planned for development will ever come to fruition. To what length should an applicant go to determine what development is anticipated?

7:7-5.7. Reconstruction in the same footprint is exempt under CAFRA, N.J.S.A.13:19-5.2.b, c, and no permit should be required for such activity.

7:7-5.7(a). Single family home expansion will require a GPBC conditioned upon the dwelling being legally occupied, or having been able to be legally occupied, in the last five (5) years. The five-year lookback is arbitrary and should be a function of local zoning and code enforcement. Whether or not the dwelling use is current is irrelevant to the Department's review of activity to protect coastal resources. Why did the Department choose five (5) years?

7:7-6.4, 6.5. Subjecting single family homes to inundation risk zone requirements is onerous and will substantially curtail such developments, and improvements to existing developments, in the inundation risk zone. The rules should be revised to allow for the assessment of actual risk conditions at the time of the application as the inundation risk zone is based on future projections that are speculative and may not occur.

Further, the Rule should be modified to exclude *de minimis* levels of inundation (less than one foot for example). The mapping should more clearly define the level of inundation predicted (that is, not simply a color ramp in which it is almost impossible to differentiate among the shades of blue).

7:7-6.4(m), 6.5(l); 7:7-15.4(e)13.iii; 7:7-15.4(f)11.iii. The setback from shore protection structures of less than 10 feet should be allowed if justified by an engineering certification.

7:7-8.2(g). Regarding the duration of an individual permit, the proposed condition in the context of continuation rights, where work has commenced before the permit expiration date, that the Department consider the reasonable financial investment "in proportion to the project as a whole" is vague and ambiguous. The Department should clarify the meaning of the "project as a whole," and confirm that investment "in proportion to the project as a whole" means the project expenditures and investments up to and at the point that continuation rights are sought.

7:7-9.6(b)6.vi. Water depths of 4 feet in submerged aquatic vegetation areas should be limited to the boat mooring area, which would not include the area under the dock as proposed. Required four (4) feet depth below the end of the dock when depths are less than four (4) feet for other portions serves no meaningful purpose and will create confusion in the application and approval process. The required depths should relate to the mooring location to avoid such confusion.

7:7-9.16(a)3. The proposed rule would seemingly create a presumption that engineered dunes have no impact on the function and value of natural dunes. The existence of engineered dunes created for the purpose of shore protection impacts other natural dune areas that may exist and their function. The impacts of engineered dunes should be taken into consideration in the context of proposed development impacts of natural dune areas through a function and value analysis.

7:7-9.50. The Department should clarify that the inundation risk zone rule does not apply to the repair and maintenance of residential buildings that do not alter the buildings' height or footprint, or increase habitable area, even when such repair or maintenance would constitute a "substantial improvement."

7:7-9.50. The proposed inundation risk zone requirements "[do] not apply to any non-critical commercial, industrial, hospitality, gaming or recreational structures." An inherent conflict exists in the proposal, however, through provisions that will impose 3% impervious cover limitations and enhanced vegetation preservation requirements for commercial development located in an inundation risk zone that requires a CAFRA Individual Permit. Inundation risk zones are identified as a Special Areas. Under proposed N.J.A.C. 7:7-13.16(f)3, 13.17(g) and 13.18 Table I, inundation risk zones are to be designated as Critical Environmental Sites that are subject to 3% impervious cover limits (absent higher legally existing cover amounts) and 70% forested / 5% unforested tree preservation requirements. The imposition of the most severe impervious cover limits and vegetation preservation requirements under the Department's CAFRA rules, based on a commercial development being situated in an inundation risk zone, is entirely at odds, and undermines, the proposed exception against application of inundation risk zones to commercial development. Imposition of such severe limitations will in many instances where legally existing cover does not exist at the subject property make such development impossible to undertake. To remove this inherent conflict, the Department should revise the rule to so that 3% impervious cover limits and 70% forested / 5% unforested tree preservation requirements are not applicable to non-critical commercial development in an inundation risk zone.

The current mapping for the inundation risk zone from the link in the proposal is broken and it is difficult to discern if a site will be subject to a few inches or more significant inundation from other mapping. If the public is required to use a mapping tool, it should provide clearer designation of inundation. Further, ARCGIS maps show that much of the land along Barnegat Bay would be subject to daily inundation by 2100. However, it also assumes that no measures will be taken to improve the situation, such as road work or higher bulkheads.

The Department should provide guidance as to what is needed in an Inundation Risk Assessment.

7:7-9.50(c). The proposed signage requirements applicable to any new or substantially improved habitable building that is financed or subsidized by public funds, other than a single-family home or duplex, to permanently incorporate signage on the subject property indicating projected sea level elevations are onerous, will result in added cost to development and are unlikely to have meaningful beneficial effect. Tying the placement of required signs to the projected 75-year into the future flood elevations and the oversized lettering requirements of the signage will present a physical challenge and local ordinance limitations regarding signage may be implicated. Such signage is likely to become the equivalent of “background noise” and be ignored as people go about their day-to-day activities. Such signs are unnecessary as the Department has already implemented and proposed a program that requires notices regarding potential flood conditions and imposes rigorous, ultra-conservative regulatory requirements for permitting and construction for the purpose of public health, safety and welfare related to potential flood concerns and rainfall increases. Owners/investors/occupants of such buildings will have already been notified and made informed decisions on investment; and will have been protected by the criteria and conditions imposed on the construction through the approval process. The proposal seems intended to serve the purpose of being a scare tactic rather than a meaningful regulatory measure. The measure also ignores that flood elevation information changes over time, which will in many cases render the signage moot and mislead the public. The Department should clarify the definition of public funds in this requirement as the phrase is defined differently across New Jersey’s laws and rules.

7:7-12.23 The provision for allowing nature-based solutions, including spreading dredged material on coastal wetlands to respond to sea level rise provide a net benefit. This beneficial use of dredged material will support navigability of Rivers while having a positive impact on coastal wetlands.

7:7-13.16(b) and (f) The proposal requires Special Areas (bay islands, wetlands, threatened and endangered species habitat, flood hazard areas, riparian zones, inundation risk zones, etc.) to be treated as Critical Environmental Sites (“CES”) if in State Plan growth areas (center, core, node) when such CES’s are implemented after the Rule proposal date, whether by “formal action of the State Planning Commission” and incorporation by reference in the Coastal Rules, or by adoption by the Department pursuant to the procedures of proposed N.J.A.C. 7:7-13.16(b). Based on the Department’s position that protection of CES is inconsistent with “growth”, the Rules will effectively cause such areas to be excluded from centers for purposes of impervious and vegetative cover calculations, through a CAFRA Critical Environmental Site “overlay” when “small or linear areas of environmentally sensitive areas remain within” a growth area (areas less than 1 square mile, which is the minimum size for a Coastal Environmentally Sensitive Planning Area). This will create obstacles to the stated purpose of promoting growth in designated growth areas, contrary to State Planning. It also adds a duplicative layer of protection. Resources identified as CES are already treated as protected Special Areas that are afforded special

protection and require special compliance under the rules. The proposal will effectively add new conditions to the Special Area rules by limiting cover to 3% regardless of their location in a State Plan growth area. This proposal is the antithesis of planning and will create the type of challenges that the regulated public is experiencing in the Water Quality Management Planning process where the Department excludes (unnecessarily) wetland areas from sewer service areas even though wetlands are already protected through the regulatory permitting process. The proposal will make “planning” for development dysfunctional by creating mini pockets of largely non-developable areas (3% impervious cover, unless there is a greater amount of legally existing impervious cover) in so-called “growth” areas. Contrary to the Department’s statements in the rule rationale, the proposal is inconsistent with the provisions of CAFRA set forth at N.J.S.A.13:19-17, which mandates close coordination between the Department’s rules and the State Plan, and fails to adhere to the “delicate balance” between coastal resource protection and the development of compatible land use and economic aspirations of inhabitants of the coastal area called for by the Legislature as set forth at N.J.S.A. 13:19-2.

7:7-13.2; 7:7-13.17(h). Please clarify that a CAFRA CES do not include a CES implemented by approval of the State Planning Commission prior to proposal date of the rules. Clarify that the 3% cover limits under Table H of NJAC 7:7-13.17(h) are only applicable to a CAFRA CES, and are not applicable to CES implemented by approval of the State Planning Commission prior to the proposal date of the rules.

7:7-13.16(f); 7:7-13.17(h). Excluding Special Areas from State Plan growth areas, designation of Special Areas as CES, and imposition of 3% impervious cover limits and 70% tree preservation (forested) and 5% tree preservation/planting (unforested) on Special Areas designated as CES implements regulatory redundancy that conflicts with other regulatory programs of the Department. Special Areas include, among others, wetland, wetland buffers, flood hazard areas, and flood hazard riparian zones. The Department’s Freshwater Wetland Protection Act rules and Flood Hazard Area Control Act rules establish applicable limitations on and allowances for impacts to these regulated areas. The proposal improperly contradicts the rules established under the separate regulatory programs by implementing limits on the amount of disturbance allowed in such regulated areas, and, moreover, contravenes the preemptive effect of the Freshwater Wetland Protection Act, N.J.S.A. 13:9B-30. If the Department wishes to impose impervious cover limits on regulated activities in wetland, wetland transition areas, flood hazard areas or riparian buffers, it should do so by specific amendments to the applicable regulatory program rules, and not through a backdoor condition imposed through the Coastal Rules.

7:7-15.2(e)6. Removal of the infill rule for new single family and duplex development (lots subdivided prior to 1993 and with houses on 100 feet of either lot line) is in conflict with CAFRA. The Infill rule was implemented to reflect statutorily required balancing of environmental and economic protection.

7:7-15.4(f). Conditioning single family home expansion upon the dwelling being legally occupied, or having been able to be legally occupied, in the last 5 years is arbitrary and any

occupation lookback should be a function of local zoning and code enforcement. Whether or not the dwelling use is current should be irrelevant for purposes of the Department's review of protection of coastal resources. Why did the Department choose 5 years versus another time period?

7:7-16.12.(d). The additional requirements in this standard have the potential to make compliance with this standard much more difficult and an unnecessary burden on the applicant. For example, it is common for a given intersection (which is comprised of multiple turning movements within the overall intersection) to operate at Level of Service "LOS" D or better, however, a certain turning movement (for example a left turn from the side / minor street) may operate at less than LOS D. The amended standard would not allow this common scenario, which may generally be acceptable and supported by a traffic engineering analysis, whereas the current standard would. Continuing the example, a general solution to allow the side / minor street turning movement to operation at LOS D or better would be acquisition of additional right-of-way to add lanes / make the intersection more robust. Acquisition of additional right-of-way may not be practical at existing intersections due to existing adjacent development and/or other land constraints, particularly when the applicant's property doesn't immediately abut the intersection (it is common for intersections included in a traffic analysis to not be directly adjacent to the property on which development is proposed). Lastly, the Department adds language regarding compliance with LOS D "during the construction of the proposed development". The Department must clarify what this means. For example, is the Department requiring two traffic studies (one during construction and one after construction)? A traffic study for "during construction" is rare if not unheard of and it is unclear what this type of study would entail for a typical development. This would be an additional, unreasonable cost on the applicant. Another example, is the Department suggesting having one day of less than Level D during construction (for example during a day of temporary traffic restriction or detour associated with roadway improvements) is grounds for permit denial for an otherwise compliant project? This could potentially kill otherwise compliant projects based on a temporary situation / effect and would completely disregard the fact that temporary traffic control during construction is addressed via specific traffic control plans subject to review and approval by the agency with jurisdiction over the roadway.

7:7-26.1(e). CAFRA individual permit applications should be afforded legacy status upon the filing of a technically complete application prior to the effective date of the proposed rules, rather than when the application is "complete for review" as that term is defined under the current Coastal Rules. Current N.J.A.C. 7:7-26.1(e) states: "In reviewing an application, the Department shall apply the requirements of this chapter in effect at the time the application is declared complete for review." As currently defined under N.J.A.C. 7:7-1.5, "complete for review" "means that an application for a coastal permit is both administratively and technically complete and is ready to be evaluated by the Department for compliance with the applicable requirements of this chapter. However, an application for a CAFRA individual permit is complete for review only when it is both administratively and technically complete and either the public comment process set forth at N.J.A.C. 7:7-26.4 or the public hearing and comment

process set forth at N.J.A.C. 7:7-26.5 has been completed. As such, a CAFRA individual permit application that is filed before the effective date of the proposed rules and is technically complete may nonetheless not be afforded legacy status due to a need for completion of the public comment / hearing process. This requirement contradicts statements made by the Department during the stakeholder process and would implement inconsistencies between the procedural requirements of the Department's regulatory programs. The legacy approval provisions of the Department's various regulatory programs should be consistent. Applicants should be treated equally with respect to legacy approval rights regardless of the type of approval being sought. A developer who relies and makes investments based upon the current rules should be afforded the benefit of that reliance and protected against proposed rule changes upon the filing of a technically complete application regardless of the type of approval sought.

7:7-27.2(d)14. Requiring that notice of commencement be given by on-line electronic certified registration of the activity not more than 14 days in advance of the start of authorized work will lead to a reduced compliance rate for such required notifications. Permit holders typically rely on their professionals to provide such notifications. Professionals who do not control when the permittee will begin work will likely be reluctant to provide the required certification, under penalty of fine and imprisonment (as stated in the required certification language), that work will commence within 14 days after the certification is made.

7:7-27.2(d)15. Requiring commencement of construction or recertification of flood hazard conditions within 180 days of permit issuance effectively converts 5-year construction permits into 6-month approvals. It is unrealistic to expect permittees to be in a position to commence work within six months of acquiring approval from the Department given other entitlement requirements, financing, potential need for real property transfer if the permittee is a contract purchaser of the subject development parcel, logistics of contractors and mobilization, to name a few examples. This requirement will chill financing for development projects as lenders will be reluctant to supply financing for projects due to the uncertainty of conditional 180-day approvals.

7:7-27.2(d)15.ii. The proposed definition of "commencement of authorized activities" requires more than just site preparation; it requires installation of structures. In doing so, the Department ignores what is often substantial investment made before installation of structures. Site preparation activity is treated as a regulated activity and often requires substantial investment. Permittees who have completed site preparation should be afforded the benefit of their reliance and the approval.

N.J.A.C 7:7A Freshwater Wetlands Protection Act Rules

7:7A-2.7; 8.1(j). The proposal to require compliance with the Stormwater Management rules if an entire project is a major development regardless of whether the impacts to wetlands/buffers are below major development thresholds will hold permit and transition area waiver applications to the same standards as wetland individual permits and exceeds the Department's jurisdiction under the Freshwater Wetland Protection Act, which only affords jurisdiction for activity in wetlands and transition areas. Stormwater should only be reviewed if the wetlands or transition area activity exceed the jurisdictional requirements of the Stormwater rules. Can the Department explain why it believes it has jurisdiction for this proposal?

7A-5.4. The proposal will require mitigation for combined impacts under a general permit of 0.1 acres or greater while the existing regulations only require mitigation for greater than 0.1 acres of freshwater wetlands impacts. This is contrary to Section 13 of the Freshwater Wetlands Protection Act, which only authorizes the Department to require mitigation for impacts to freshwater wetlands. To establish General Permits, the Freshwater Wetland Protection Act requires the Department to determine that categories of activities authorized under a General Permit have minimal adverse impacts when performed separately and will have only minimal cumulative adverse impacts and minor impacts on wetlands. The Department could not have issued a Statewide General Permit without having made such a determination. Requiring mitigation for an activity already determined to have only minimal impact is antithetical to the statutory framework for General Permits. Rather than presupposing combined impacts will have a negative cumulative effect and requiring mitigation for such activity, the Department should fulfill its function stated in the rule of continuous monitoring to assess if combined impacts are having negative impacts, and only impose mitigation requirements after having completed that assessment and confirmed that cumulative negative impacts are occurring from the activities authorized under a Statewide General Permit. The rule changes will, due to the enhanced on-line functions, allow DEP to better monitor cumulative impacts. The Department should not require the proposed mitigation before using its new tools to perform a comprehensive analysis of cumulative impacts. The increased frequency with which mitigation is likely to be required could greatly exceed mitigation opportunities. Has the Department evaluated how this will affect mitigation credits or the ability for applicants to create on site mitigation?

7A-5.4. The proposal will also require mitigation for impacts to transition areas based on the argument that transition areas protect wetlands and impacts to transition areas have an indirect negative impact on an adjacent wetland. This is contrary to Section 13 of the Freshwater Wetlands Protection Act, which only authorizes the Department to require mitigation for impacts to freshwater wetlands. Furthermore, no supporting information was documented regarding any study by the Department of transition area impacts and what negative consequences have occurred to wetlands. The proposed mitigation requirements are unnecessary given the already rigorous requirements the Department imposes through its regulatory program to authorize transition area impacts, which exceed Federal requirements. Those same requirements must be met to demonstrate a proposed activity will not negatively affect wetlands. The proposed

mitigation requirement is excessive and essentially acts as a land grab with respect to lands that are not wetlands.

7:7A-5.7(b)1. The proposal will now require General Permit applicants to demonstrate “no other practicable configuration” that would avoid or reduce the impacts to wetlands, effectively holding General Permit applicants to standards similar to the alternatives analysis required for an Individual Permit. Imposing this new requirement is overly burdensome and will marginalize General Permits. By definition, GPs are for activities determined to have minimal impacts on wetlands or transition areas. The Rules does not provide specifics on how “practicable configuration” is to be determined. Site engineering requires evaluation and balance of multiple factors: minimizing environmental impacts in accordance with NJDEP and local Rules, stormwater management requirements, including green infrastructure, balancing cut and fill and meeting project goals. The level of detail for such an analysis should be clarified in the Rules and should not be overly burdensome for a GP.

By using standards similar to an Individual Permit in the General Permit, applicants will be encouraged to simply default to an Individual Permit application to increase the amount of allowable impact. Has the Department considered that this could have the unintended consequence of increasing wetlands impacts? Has the Department considered that this proposal could lead to significantly increased staffing demands given the likely increase in Individual Permit applications?

7:7A-5.7(b)1. This proposal generally conflicts with the Freshwater Wetland Protection Act structure for General Permits in Section 23 and should not be adopted. The proposal requiring General Permit applicants to demonstrate “no other practicable configuration” that would avoid or reduce the impacts to wetlands is likely to result in disputes between applicants and Department staff over project layout and requests for redesign and avoidance of impacts. This type of second guessing will make obtaining approval more challenging and stifle reliance on General Permits, which are supposed to be a more streamlined permitting approach. Applicants who satisfy the criteria of the Statewide General Permit should be afforded the presumption of validity based on the statutory requirement that Statewide General Permits can only be issued in the first instance after the Department determines that the category of General Permit activities will only have minimal impacts. Furthermore, demonstrating that there is “no other practicable configuration” for numerous general permits such as site remediation or maintenance and repair is irrational. This proposal generally conflicts with the Freshwater Wetland Protection Act structure for General Permits and should not be adopted.

7:7A-7.2. The proposal to remove the exemption for horizontal directional drill under wetlands due to “potential” impacts usurps legislative authority and regulates based upon fear of potential impacts rather than demonstration of actual impacts to regulated areas. Under the Freshwater Wetland Protection Act, the Department only has jurisdiction to regulated impacts to wetland and transition area buffers. It does not have jurisdiction to regulate potential impacts.

Jacking and Horizontal Direction Drilling are defined in the Flood Hazard Area Regulations, however, the Freshwater Wetlands Regulations also make reference to and note specific requirements for horizontal directional drilling. Will the Department be utilizing the definitions from the Flood Hazard Area Regulations when reviewing applications for Horizontal Directional Drilling and Jacking for the Freshwater Wetland Regulations?

7:7A-7.5, 7.5. The proposed requirements of mitigation for permanent impacts to wetlands and forested transition areas of greater than 0.1 acres in the context of remedial investigation and landfill closures will discourage and delay remedial activity and landfill closure by adding time, burden and cost to the process. The Department should align its regulatory programs to facilitate, not discourage, remedial activity. Has the Department estimated how many remediation projects may not occur due to the difficulty of mitigation and weighed the harms against the benefits of this proposal?

The Department should consider limiting the proposed mitigation requirement to those that caused the discharge that is the subject of the remediation and not apply this requirement to those conducting remediation.

7:7A-7.6(a)4. The addition of new paragraph 4 to N.J.A.C. 7:7A-7.6(a) is inconsistent with the enabling legislation regarding "non-tributary wetlands." New paragraph 4 adds a new restriction to the issuance of a general permit for "non-tributary wetlands." However, the enabling legislation did not impose that restriction. The Freshwater Wetlands Protection Act was the result of considerable debate and discussion. During the legislative process, the Legislature created additional detail and specifics in response to numerous concerns raised by multiple parties. The provision focusing on a general permit for isolated or non-tributary wetlands was one example. As the regulation of those wetlands is unique to New Jersey's program and not regulated under the federal programs, a general permit was established by the legislature with specific limitations. The proposed rule goes beyond those specific limitations and is violative of the Legislature's mandate. Specifically, N.J.S.A 13:9B-23(b) provides that: "the department shall issue a general permit for an activity in a freshwater wetland which is not a surface water tributary system discharging into an inland lake or pond, or a river or stream, and which would not result in the loss or substantial modification of more than one acre of freshwater wetland, provided that this activity will not take place in a freshwater wetland of exceptional resource value." (Emphasis added). The legislation uses the word "shall" specifically as mandate as to when the general permit and does not provide for the Department's discretion to establish additional limitations or conditions. Further, if the proposed new limitation is not removed, the Department should clarify whether new paragraph 4 to N.J.A.C. 7:7A-7.6(a) would apply to wetlands that are not of exceptional resource value or designated as a priority wetlands by the United States Environmental Protection Agency.

7:7A-7.6. The proposal will require applicants to demonstrate minimization of impacts to vernal habitat if the impacts would extirpate a vernal population and could not otherwise be avoided through project redesign. Further, the proposal conflicts with the Freshwater Wetland Protection

Act structure for General Permits and a New Jersey Supreme Court decision on the issue and should not be adopted. For example, the Freshwater Protection Act mandates that the Department “shall” issue a general permit in certain instance and the Act does not provide for the Department to have the discretion to impose additional limitations or criteria. Requiring minimization conflicts with the Statewide General Permit program under the Freshwater Wetland Protection Act since DEP must have already determined in adopting the Statewide General Permit for isolated freshwater wetlands that impacts are minimal. Applicants who satisfy the criteria of the Statewide General Permit should be afforded the presumption of validity based on the statutory requirement that Statewide General Permits can only be issued in the first instance after the Department determines that the category of General Permit activities will only have minimal impacts. In addition, this General Permit is specifically authorized in the Freshwater Wetlands Protection Act with no reference to protecting vernal habitat.

7:7A-7.26. Reducing impact allowance to 0.5 acres for redevelopment of previously disturbed areas will discourage redevelopment and its associated remediation, which will have a corresponding negative consequence regarding wetland health. Has the Department conducted any analysis of whether this requirement will result in a net negative change to wetlands by discouraging redevelopment?

7:7A-8.1(b)5. The proposal will require impervious surface within 25 feet of a wetland to be removed and the area replanted and put under a conservation restriction, with some limited exceptions to allow cover where removal would increase flooding or have negative consequences, or where removal would prevent reasonable use or access. There is no authority in the Freshwater Wetlands Protection Act for the Department to impose this restriction. The Department should clarify that the listed exceptions are illustrative and not exhaustive.

7:7A-8.2(f). The proposal requires the entire transition area buffer and wetland complex to be deed restricted under a conservation restriction as a condition of a TAW-AP. The proposal is contrary to the Department’s regulatory program that allows use of multiple, incremental General Permits over time subject to overall, cumulative disturbance limits for the site, and will lead to increased disturbance by encouraging parties to maximize impacts before a restriction is imposed under an Averaging Plan to avoid having to later apply for a conservation restriction modification or release. This is unfair to large development and redevelopment projects where future land development cannot be foreseen. The wetland and buffer complex is already protected from future proposed activities through the permitting program, making the conservation restriction requirement merely a means of precluding future development that would otherwise be permissible under the regulatory program, rather than a valid, necessary regulatory initiative. The Department has not provided sufficient justification for implementation of the new rule in the Rule Summary. The Summary states that the conservation restriction is needed to ensure the modified buffer will continue to provide value and functions to protect the wetland. However, to approve the Averaging Plan, the Department would have had to have already determined that the modified buffer would continue to be protective of the wetlands, and the regulatory permitting program requires permits for future additional activities to afford

necessary protection against future impacts. There is also no analysis as to why the current regulations, which only require the expanded compensation area to be deed restricted, has been ineffective. The conservation restriction requirement is simply a mechanism to provide roadblocks and largely prevent future permitting and development opportunities that are expressly contemplated under the Freshwater Wetland Protection Act. Thus, the proposal is inconsistent with the Freshwater Wetland Protection Act. Can the Department explain why a modified buffer approved by the Department would offer greater protection than one that has not been subject to an averaging plan? Can the Department explain why Department approved modifications to a previously modified buffer would offer less protection to the wetlands?

7:7A-8.2(f). Release and de minimis modification provisions relating to conservation restrictions afford only limited, nominal relief as the ability to secure such relief is uncertain and discretionary with the Department. The rules should include provisions that allow for automatic termination / modification of a conservation restriction in instances where wetland conditions change over time and an area under a conservation restriction no longer constitutes regulated wetland or transition area buffer.

7:7A-12.2(b). NJBA supports the rules that allow conservation restrictions to be abandoned where project work has not commenced. Here, the Department acknowledges that the authorized project has commenced, affecting the ability to abandon the project and release the restriction as a matter of right, when any site disturbance, including pre-construction earth movement or vegetation removal occurs. This represents an inconsistency in the Department's rules relating to the duration of CAFRA permits and continuation rights based on regulated activities having commenced prior to permit expiration. For example, under the Coastal Rules, the Department requires installation of improvements to demonstrate commencement. For purposes of due process and administrative efficiency, the Department's rules should be made consistent, and applicants should have the ability to abandon a project and release conservation restrictions if no improvements are installed. Alternatively, the continuation rights for CAFFRA permits under the Coastal Rules should be recognized with commencement of site preparation activities such as clearing or grading.

7:7A-12.2(b). The Department's template conservation restriction should be revised to include language stating that the restriction does not become effective until the commencement of the approved work.

7:7A-16.10(b)2. NJBA supports the proposed allowance for a presence / absence footprint of development Letter Of Interpretation for a redevelopment Transition Area Waiver. The Department should implement rules allowing for same in the context of all Transition Area Waivers.

7:7A-20.2(c)27. Requiring that notice of commencement be given by on-line electronic certified registration of the activity not more than 14 days in advance of the start of authorized work will lead to a reduced compliance rate for such required notifications. Permit holders typically rely on their professionals to provide such notifications. Professionals who do not control when the

permittee will actually begin work will likely be reluctant to provide the required certification, under penalty of fine and imprisonment (as stated in the required certification language), that work will commence within 14 days after the certification is made. Not allowing earlier notice will lead to non-compliance since permittees will innocently forget about this requirement.

Is the requirement to remove all existing impervious surfaces within 25 feet of a wetlands boundary only triggered when proposing a transition area waiver or for any wetlands permit?

Is the requirement to remove all existing impervious surfaces within 25 feet of a wetlands boundary applicable to all onsite wetlands or only the wetland where transition area disturbance is proposed?

N.J.A.C. 7:8, Stormwater Management

7:8-1.2. Restoration. Please clarify what is meant by “restoration” in the new definition of “reconstruction”. Could this include a new roof? Would restoration include roadway mill and overlay?

7:8-1.2 Disturbance. Is the removal of existing impervious surfaces excluded from the total disturbance initially calculated for the project?

7:8-1.2 Retention. In the definition of retention, evapotranspiration is included. Is there a department approved calculation to determine how much evapotranspiration will occur?

In a situation with an underdrained bioretention basin, evapotranspiration will occur, but there is currently no method to calculate it. Would an underdrained bioretention basin meet the requirement to achieve retention of the water quality design storm?

7:8-5.5(b). The proposed requirement of 80% total suspended solids removal for stormwater runoff for new and reconstructed/redeveloped motor vehicle surface, and in some instances 95% TSS removal, will add cost to and discourage redevelopment, hindering remediation that is often completed in tandem with such redevelopment and re-utilization of sites in need of redevelopment in underserved communities and throughout the State.

The revised Rule no longer considers net impervious or motor vehicle surface in the definition of major development. By requiring stormwater management for reconstruction of a building or parking lot, many small redevelopment projects (less than one acre) will be required to add stormwater management. This will increase costs and will likely reduce redevelopment to create needed housing. For a project of less than one acre and which do not have net increase in drivable surface, the improvement in water quality is likely minimal. The reconstruction of a building would only generate roof runoff and a reconstructed parking area is likely to be small.

Should DEP move forward with the removal of the existing impervious exemption, NJBA strongly supports broadly worded waivers from compliance with this potential requirement. Waivers should exist for sites where remediation has occurred, or the placement of stormwater treatment systems have the potential to result in the mobilization and spread of contaminants of concern. Furthermore, waivers should exist to allow for sites that demonstrate that the incorporation of stormwater treatment systems would make a project financially unfeasible. The Department, consistent with past policy, should implement policies that allow for less improvements in stormwater than the level of stormwater compliance required on uncontaminated sites. Such a policy would facilitate and increase the likelihood of successful redevelopment and completion of remediation, while also improving stormwater conditions at such sites. Partially improved stormwater conditions on a completed redevelopment site would undoubtedly represent a net benefit as compared to the status quo of stormwater and remedial action implementation not being addressed at all and sites being left undeveloped due to project failure based on financial infeasibility.

For non-public transportation entities, please confirm if the requirements to treat existing impervious and Motor Vehicle Surface Area at 50% are removed from the Quality Standard.

It is our understanding that reconstructed motor vehicle surface area is required to be treated for 80% TSS removal, with milling and repaving exempt from that requirement. Is this correct?

7:8-5.5(j). The proposal does not identify best management practices available to be incorporated in stormwater management design for consistency with TMDLs approved or established by EPA, and is vague and ambiguous. How does the Department anticipate this can or will be implemented for stormwater management measures?

7:8-5.6(d). The proposed requirements that runoff be detained equal to the water quality design storm of 1 ¼ inches of rainfall in 2 hours will have a disproportionate impact on brownfield and other redevelopment impact. The new requirements will lead to parcels laying fallow and delay much needed renovations and redevelopment, or loss of such opportunities.

NJAC 7:8-5.6 (b) & (d). Are all major developments required to conform to the Volumetric Standard requirements set for in NJAC 7:8-5.6 (d)? NJAC 7:8-5.6 (b) only references the Volumetric Standard for Quantity Standard 2.

7:7-5.6(b). Item 1 under this is not proposed to be changed. It exempts a site from quantity management if the post-development hydrographs “do not exceed, at any point in time, the pre-construction runoff hydrographs for the same storm events.” Item 2 under 5.6(b) requires more complex modeling but is proposed to include “and the change in timing is solely a result of the proposed installation of BMPs to comply with N.J.A.C. 7:8-5.5.” Shouldn’t that also apply to Item 1 where redevelopment of a fully developed small site that will not add any impervious surface, but is required to implement water quality due to reconstruction of motor vehicle surface, may also have a change in timing but not in overall volume of runoff? An exemption to conducting detailed study should be provided for a site that is fully impervious and is to remain that way or reduces impervious cover.

There is often confusion regarding how to implement Standard 2 (NJAC 7:8-5.6 (b)2.). We request that NJDEP provide an example to ensure all necessary calculations are included to demonstrate that the designed project meets this standard.

It is our understanding that if a BMP is proposed solely for quality and volumetric reductions and in proposing the BMP the timing of runoff released changes, the design does not need to show that the proposed hydrograph is completely under the existing hydrograph. Is this correct?

7:8-5.10. The Department should expand the proposed variance provision to allow the Department to issue variances independent of a MS4 permittee or municipality.

N.J.A.C. 7:13 Flood Hazard Area Control Act Rules

The NJ STAP report projects a 17% chance of sea level rise reaching 5.1 feet by 2100. The Intergovernmental Panel on Climate Change 2021 projects under a moderate emissions scenario (RCP4.5), a median sea level rise of approximately about 1.8 to 2.6 feet by 2100 and under a high emissions scenario, projections increase to about 2.6 to 3.6 feet.⁵ The National Oceanic and Atmospheric Administration provides a range of projections, with a median estimate of around 2 to 4 feet under high greenhouse gas scenarios.⁶ The United States Geological Survey (USGS) projects a median rise of about 1.6 to 2.6 feet based on moderate emissions scenarios.⁷ The United Nations Environment Programme reports a global average sea level rise projection of 2 to 4 feet by 2100, based on moderate to high emissions scenarios.⁸ NJBA believes that the Department should use an average of projections from varying studies and utilize the median result since sea level rise projections can vary widely.

The Department's proposal to incorporate a 17% chance of occurrence for 5.1 ft of sea level rise in 2100 and to apply this to the 1% annual flood, effectively means the Department is regulating land that has a 0.17% chance of flooding in 2100, less than a 1 in 500 chance. Has the Department evaluated what percentile flood this equates to in today's standards? The Department additionally applies a one-foot factor of safety which is unnecessary given the very conservative and low probability of flooding to the CAFE. This extremely unreasonably conservative approach means that properties in the flood zone based on the CAFE, particularly those on the fringes will now be burdened with new regulatory requirements despite an extremely low risk of flooding, and at the outer edges, which is likely to be at minimal depths in the year 2100.

7:13-2.1: The proposal uses different vesting dates for legacy approval status depending on whether a project involves a fluvial or tidal flood hazard area. For projects in tidal flood hazard areas, legacy status may be obtained if a complete application is filed before the new rule's effective date. However, for fluvial flood hazard areas, legacy status may be obtained if a complete application is filed before July 17, 2023, being the date that the Department's Inland Flood Protection Rules came into effect. The rule proposal includes numerous substantive rule changes applicable to projects located solely in fluvial flood hazard areas that go well beyond the rule changes that were implemented under the Department's July 17, 2023, Inland Flood rules. Therefore, the Department's rationale for relying on the July 17, 2023, effective date of the Inland Flood rule for purposes of legacy approval status under the current rule proposal is flawed. Applicants in fluvial flood hazard areas have planned and invested in development projects based upon the current rules and should be afforded legacy status based upon the

⁵ Intergovernmental Panel on Climate Change. (2021). *Sixth Assessment Report: The Physical Science Basis*. Retrieved from <https://www.ipcc.ch/report/ar6/wg1/>

⁶ National Oceanic and Atmospheric Administration. (2022). *Global and regional sea level rise scenarios for the United States*. Retrieved from <https://oceanservice.noaa.gov>

⁷ United States Geological Survey. (n.d.). *Sea level rise projections*. Retrieved from <https://www.usgs.gov>

⁸ United Nations Environment Programme (UNEP). (2022). *Climate Change Science Compendium*. Retrieved from <https://www.unep.org>

effective date of the current proposal to ensure that such investments are protected against substantive changes to be implemented by the rules that could not have been anticipated or addressed by applications submitted prior to July 17, 2023.

The Rule language should further clarify that if newer maps are published by FEMA, prior to adoption, the older maps, unadopted maps are not regulatory even if the elevation are higher on those maps. The Rule explanation supports this, but the wording that “more recent” advisory or preliminary maps should be used does not clearly state that once the preliminary maps are published, the advisory maps are not regulatory. The Coastal Rules use “most recent” in reference to FEMA mapping, which is clearer.

7:13-1.2 (Definitions) In the context of the definition of “FEMA flood mapping”, DEP acknowledges that FEMA’s proposed / preliminary flood maps are subject to public comment and scrutiny before adoption, yet the Department relies upon preliminary FEMA maps when those maps are more conservative than effective FEMA maps. The Department should defer utilization of proposed / preliminary FEMA flood maps until the public comment process is finalized and the final maps are adopted. Failure to do so effectively nullifies the process and is a violation of due process.

Regarding FEMA flood mapping, the inconsistency and inequity of the Department’s approach of relying on advisory / preliminary FEMA maps is reflected in its acknowledgment that if a preliminary FEMA map is less conservative than an effective FEMA map, the preliminary map is not utilized and the effective map is relied upon. Thus, the Department is not utilizing the most current, “best available science.” The Department’s practice is arbitrary, capricious and unreasonable, and the rules should be amended to require the Department to utilize only effective FEMA maps.

7:13-1.2 (Definitions) Regarding the definitions of “substantial damage” and “substantial improvement”, the requirement that “all investments made in structure cumulatively after the effective date” of the rules be accounted for in consideration of whether substantial damage / improvement has occurred is vague, ambiguous, and unduly burdensome. While this standard exists in the NFIP, the regulated area is much smaller, more appropriately calculated, property owners are more familiar with their risk thanks to decades of FIRM maps, and are required to have flood insurance. Applying these standards to the CAFE will needlessly subject untold numbers of property owners to the often maligned and inequitable 50% rule.

Further, the rules provide no meaningful criteria on what types of investments fall within the scope of the rule or how the Department will meaningfully track such investments. Are normal property maintenance investments such as painting, replacement of light fixtures, landscaping, fencing, new faucets, replacement windows, and other similar investments covered by the rule? Clarification should be provided regarding the meaning of “all investments made in structure”.

The Rule explanation notes that the Department does not mean to include windows or other maintenance activities, and that such work would improve flood resilience, but this is not

reflected in the Rule language. The time frame also is not provided. Maintenance activities (roof, windows, water heater) are required to keep a structure in good repair and do not necessarily result in an increase in the value of a home and thus are not an “improvement” and could be considered exempt under NFIP criteria.

Also, the Department’s rules should account for depreciation of investments made in a structure over time. For instance, if an applicant performs modest improvements over the course of 50 years, the cumulative value of replacements could easily reach 50% even though the improvement made 49 years ago is obsolete if depreciation is not factored in. How are improvements required to be documented, especially in the case of properties changing hands? How will the Department track this?

In economically depressed areas with lower property values, the substantial improvement threshold can be reached with a nominally lower actual value than in areas with higher property values, despite the cost of a particular improvement being relatively independent of location. Has the Department evaluated this inequity in the context of social justice, wherein areas with lower property values are more likely to trigger these rules for the same improvement when compared to properties in high value areas? Is the Department concerned that this provision leads to disincentivizing redevelopment and improvements in distressed areas over others?

NJBA recommends that the rules only be triggered by the complete replacement of a structure, a substantial improvement not including maintenance activities within 5 years, or the increase in its footprint or size and that the substantial improvement trigger to the rules automatically provide an exemption for a structure connected to an adjacent property. For instance, it would likely be infeasible to raise one unit in a row of brownstones or one unit in a townhome community.

7:13-2.1(d). The rule proposes to add conditions to legacy approvals that would negate legacy status for regulated activities that are revised unless, among other things, “all qualifying approvals remain valid”. Please clarify what is meant by “all” qualifying approvals. Does this mean all project approvals, or just the approval under which the project qualifies for legacy status?

7:13-2.2(a)3iii. The Department should maintain the exemption for waters that drain 50 acres or less that are an isolated pond or depression with no outlet. The rule proposal recites a justification for the removal of the exemption that such isolated ponds often drain / dissolve and reappear. However, the Department only provided one example of where this circumstance arises, namely where isolated ponds are not truly isolated, referencing “karst” topography. Instead of only removing the exemption for this specific scenario, the proposal would entirely remove the exception for waters that drain 50 acres or less that are an isolated pond or depression with no outlet. The Department’s proposal fails to justify the need for removal of the exemption for isolated waters and the exemption should be preserved except in circumstances such as karst where there is an apparent basis to support the water is not isolated based on water periodically

reappearing. Has the Department evaluated how much land would be affected by this potential change?

7:13-2.3(c)1ii. Imposing riparian zones along the bay side of barrier islands, which are largely developed, will have unintended consequences, discouraging property improvements and reinvestment. Has the Department considered the drastic economic impact of placing a riparian zone in this developed area of the iconic “Jersey Shore” which is crucial to the State’s beach and coastal tourism industry?

7:13-2.3(c)vi. Removal of the exemption for and implementing riparian zones along manmade open channels created for stormwater conveyance will present undue burdens with respect to maintenance of stormwater conveyance structures and discourage investment in maintenance and improvements of such structures.

7:13-2.3 Figure 2.3D. How is the extent of fluvial flooding within a tidal FHA zone determined?

7:13-2.5(a)11. Clarification is required regarding what constitutes exempt milling, repaving, repair or resurfacing of lawfully existing pavement where pavement subbase is disturbed as a necessary component of the activity.

7:13-2.6. The ability to secure an applicability determination to confirm whether a water is regulated provides an important resource for the regulated public and should be maintained by the Department as a simple mechanism to determine flood hazard jurisdiction. There should also be a provision confirming that a jurisdictional determination can be obtained either through an Applicability Determination or a Verification. Confirming whether a water is regulated, or not, enables the public to make better informed decisions regarding investment in a parcel and the necessity of submission of applications to the Department. If a newer map is based on better and more accurate data, why wouldn’t it be used if it indicates a lower elevation?

7:13-3.4(c). Utilization of an interactive, on-line map tool that is subject to change without notice will create uncertainty in the regulatory process and unpredictable results, and is arbitrary, capricious and unreasonable. For example, the IRZ mapping link in the proposal is broken. Will the Department publish notice of map updates in the NJ Register for public comment and if not, why does the Department not need to utilize the Administrative Procedures Act to publish updated boundaries that affect the regulation of property? How often should property owners be expected to check for updated mapping during the development regulatory process?

Many thousands of homes and other properties that are currently not in a regulated flood zone will now be regulated. How will the Department notify the affected public? Will the burden of notifying thousands of property owners be passed on to municipalities with no mapping?

7:13-3.4(c). Where a survey is completed to determine the limits of the Inundation Risk Zone, the rules should be revised to clarify that the surveyed location will control in case of conflict with the interactive map.

7:13-3.6. Regarding the procedure for determining the flood hazard area and floodway from FEMA flood mapping, the rule Summary section states that if a party believes the FEMA mapping is incorrect, they must go to FEMA to seek correction. However, it also states the Department will allow calculation without requesting a FEMA map revision. That language does not appear in the rule itself, and it should be added to clarify that a party who relies on calculations to demonstrate FEMA mapping is incorrect does not need to seek a FEMA map amendment.

7:13-4.1(c)2.iii. The rule Summary suggests that a 150-foot riparian zone will exist on both sides of a stream based on threatened and endangered species habitat associated with a water flowing through a flood hazard area “regardless of whether the habitat exists on one or both sides of the stream segment.” This suggests that the Department intends to regulate areas as expanded 150-foot riparian zone associated with protected species habitat even when no such habitat exists. Subjecting lands to an enhanced riparian zone buffer when no protected species habitat exists amounts to restricting reasonable use of land without any justifiable basis and is arbitrary, capricious and unreasonable. Under such circumstances, the standard 50-foot riparian zone should apply. The Department does not explain or provide any research to justify why an increased riparian zone on the opposite side of a waterway is needed if the habitat is not suitable for the species. Did the Department evaluate how much land is affected by this potential change, especially in the context of this rule proposal’s impact statements?

7:13-4.1(c)2.iii. The Department should revise the rules to clarify that “present or documented habitat” for threatened and endangered species critically dependent upon regulated water for survival means habitat that is presently used by such species or that has been documented as having actually been utilized by such species and does not include land area where no evidence exists of any present or past species sighting or utilization. Absent this change can the Department justify why land that would be unsuitable for an endangered species would be within a riparian zone for such purposes?

The Rule suggests that the list of species critically dependent on the water is being expanded but no such list was provided. Can the Department clarify whether the current list is not being changed or if it is, provide the updated list for public comment?

7:13-4.1(c)2.iii. The rules should include provisions allowing for site specific habitat suitability studies to demonstrate that documented habitat based on some past occurrence of a threatened and endangered species is not suitable for use and does not warrant imposition of a 150-foot riparian zone for consistency with other Department Rules and based on equitable principles given the potential for change of conditions over time.

7:13-5.2(e). The proposed rule that will allow the Department to void a Verification if it becomes “outdated” due to changed flood mapping or riparian zone data will introduce substantial uncertainty in the land development process. Regulated parties rely upon Verifications to invest and move forward with development plans and must have the ability to meaningfully rely on the Department’s determinations. The Department’s rulemaking is singularly focused on possible

“threats to public health, safety, welfare, and the environment.” However, the proposal fails to take into consideration other policy concerns regarding economic-backed investment expectations, the need for consistency in regulatory determinations, and property rights, which must be considered by the Department. The Flood Hazard rules establish an incredibly robust and conservative flood protection regulatory program that sufficiently protects public health, safety and welfare concerns. Imposing last minute changes on the regulated public goes above and beyond what is necessary to protect the public from potential flood threats. How will potential applicants be aware of a changing floodplain? How often will applicants need to check to ensure a Verification is still accurate when designing a project? Without certainty as to a reasonable duration of a Verification, applicants will be at a constant risk of needing to completely redesign a project and potentially reapply for certain permits until such time as they apply for an FHA permit.

7:13-5.2(e). The threat of constant changing Verifications will cause parties to delay obtaining Verification until submission of a related permit application, which will put greater administrative burden on the Department to timely act upon Verifications within a 90-day permit review.

7:13-5.4(a)2. The proposed rule amendments that will condition reissued Verifications upon updates to reflect climate change flood elevations will effectively nullify a party’s ability to meaningfully rely upon Verifications issued before the rules come into effect and introduce substantial uncertainty in the land development process. Parties who obtain Verifications prior to the rules coming into effect or otherwise secure legacy rights should have the ability to rely upon such determinations of the Department upon reissuance of a Verification.

7:13-5.4(a)2. With respect to reissuance of a Verification, the rules should be revised to clarify that a Verification reissued with an approval that is afforded legacy status will not be required to be updated to account for increased flood elevations based on climate change predictions, which is necessary for consistency with legacy status afforded qualifying approvals.

7:13-6.5(d). Requiring certification that activities authorized under a permit by registration to have commenced within 180 days of registration effectively converts 5-year construction permits into 6-month approvals. It is unrealistic to expect permittees to be in a position to commence work within six months of acquiring approval from the Department given other entitlement requirements, financing, potential need for real property transfer if the permittee is a contract purchaser of the subject development parcel, logistics of contractors and mobilization, to name a few examples. This requirement will chill financing for development projects as lenders will be reluctant to supply financing for projects due to the uncertainty of conditional 180-day approvals.

7:13-6.5(f). The proposal provides that a party may request an adjudicatory hearing to contest re-registration required under 7:13-6.5(d). The Department should clarify that the regulatory requirement for re-registration under 7:13-6.5(d) constitutes a final agency determination.

7:13-6.6(b). Parties who secure General Permit by Certification (GPBC) approvals rely on those approvals in the same manner and for the same purposes as General Permits and Individual Permits. The rules should be amended to allow extension of GPBC's provided the underlying GPBC provisions of the rules on which the authorization is based remain effective.

7:13-6.8(b)2, 3. Requiring submission of a FEMA Conditional Letter of Map Revision (CLOMR) for development in a floodway or a FEMA 100-year flood hazard area that does not have a floodway on applications for a permit by registration, GPBC or General Permit, before issuance of the Department approval, when the proposed activity will result in limited increases in applicable floodway or flood hazard area elevations either individually or cumulative when combined with existing and anticipated development is extremely burdensome and unnecessary for consistency with the FEMA National Flood Insurance Program. The same objectives may be met through issuance of conditional approvals that require the permittee to secure a FEMA CLOMR before commencing the regulated activities. The requirement to account for anticipated development is vague and imposes undue burdens on the applicant who may not know of or have resources to identify other anticipated development. To what length should an applicant go to determine what development is anticipated? The requirement is also prejudicial as anticipated development is speculative, and subject to varying uncertainties regarding whether development of lands zoned or planned for development will ever come to fruition.

Current Permits by rule 7 through 14, 16, 22, 24, 29, 30, 33 through 39, 41, 43, 49, 50, 57 and 62. Eliminating the current allowance for disturbance within 25 feet of top of bank where there is an existing bulkhead, wall or revetment unreasonably assumes 100% structure failure. Further, the potential for failure impacting the upland will vary for low bulkhead and a stabilized high streambank. Thus, the blanket prohibition is not warranted. Certain projects would have a lower risk and cost even if some level of failure occurred. If 100% structure failure was accepted as the norm for engineered improvements, as a society, we would never authorize bridges, tunnels or other structures that interact with waters or other weather-related events. Engineering mechanisms may be implemented to ensure structural integrity. The rules should include provisions to allow for disturbance to remain based on an engineering analysis.

Current Permits by rule 7 through 14, 16, 22, 24, 29, 30, 33 through 39, 41, 43, 49, 50, 57 and 62. Eliminating the current allowance for disturbance within 25 feet of top of bank where there is an existing bulkhead will have the unintended consequence of discouraging public access to waters. The Department should encourage access to, use of and interaction with waters, and their surrounding environs, including through river walks and other improvements that may involve disturbance within 25 feet of top of bank where there is an existing bulkhead.

7:13-2.5(a)13. Horizontal directional drilling of underground utilities should be treated the same as "jacking" and identified as an exempt activity. The rules usurp legislative function by regulated based upon fear of potential impacts rather than demonstration of actual impacts to regulated areas. Horizontal drilling should only be subject to regulation of the exemption criteria are not met.

7:13-8.1. Regarding the GPBC for the expansion, reconstruction, relocation or elevation of a building outside of floodway, imposition of new requirements that the building must be outside of the inundation risk zone will severely curtail use of this GPBC in developed coastal areas including barrier islands. Normal property repair and maintenance through reliance on this GPBC will be discouraged because of the imposition of requirements that the first floor elevation of the building be elevated to meet NFIP standards.

7:13-9.6. Precluding use of a general permit, and requiring an individual permit, for construction of one single family home due to improvements or fill located in a inundation risk zone is extremely onerous. The Department should encourage the use of streamlined permitting for small scale development with limited impacts.

7:13-9.6. The proposal will impose a 25-foot setback from top of bank even in situations where a bulkhead, retaining wall, or revetment exists along a tidal water. Engineering mechanisms may be implemented to ensure structural integrity and the rules should allow an applicant to demonstrate justification for a reduction of the standard 25-foot setback based upon an engineering analysis.

7:13-9.11. The Department should encourage, rather than create additional obstacles, to the development of solar panels consistent with the State's Energy Master Plan goals and policies. This exemplifies the lack of mechanisms to implement the Governor's renewable energy goals.

7:13-10.4(b). Requiring submission of a FEMA Conditional Letter of Map Revision (CLOMR) for development in a floodway or a FEMA 100-year flood hazard area that does not have a floodway on applications for an individual permit, before issuance of the Department approval, when the proposed activity will result in limited increases in applicable floodway or flood hazard area elevations either individually or cumulatively when combined with existing and anticipated development, is extremely burdensome and unnecessary for consistency with the FEMA National Flood Insurance Program. The same objectives may be met through issuance of conditional approvals that require the permittee to secure a FEMA CLOMR before commencing the regulated activities. The requirement to account anticipated development is vague and imposes undue burden on the applicant who may not know of or have resources to identify other anticipated development. The requirement is also prejudicial as anticipated development is speculative, and subject to varying uncertainties regarding whether development of lands zoned or planned for development will ever come to fruition.

7:13-11.2(b)3. The proposal will eliminate the current rule provisions that allows disturbed areas within 25 feet of a bulkhead, retaining wall or revetment to remain (except for public transportation). Engineering mechanisms may be implemented to ensure structural integrity, which is made apparent by the Department's creating an exception that allows public roadways, railroads and public transportation projects to remain. The rules should allow an applicant to demonstrate justification for impervious surface within the 25-foot setback based upon an engineering analysis.

7:13-11.2(b)6. Requiring mitigation for riparian zone impacts, including in 150 foot and 50 foot riparian zone buffers, will increase the cost of development, curtail residential development opportunities and exacerbate the State's housing shortage. The Rules already require riparian zone disturbance to be minimized and justified. The limits in Table 11.2 were determined to have minimal impact on the structure and function of the riparian zone. The proposal's summary does not provide any evidence that the allowed disturbances in the current rule are not sufficiently protective of the structure and function of the riparian zone.

Small areas of impacts to the riparian zone, for example, a pipe or stormwater outfall, that are scattered across a property would not reduce the riparian zone function. This may also have the unintended consequence of moving development into wooded areas outside of the riparian zone on a site and preservation of unwooded areas to allow trees to be planted as required under the mitigation standards. In a 150-foot zone, 2,000 square feet only allows a strip 13.33 feet wide through the zone. For a large project that requires several stormwater outfalls or a road crossing, it would not be possible to design a project without mitigation.

With no provision for allowing averaging, mitigation will add to project cost, which will add to housing costs, without providing a defined environmental benefit.

7:13-11.2(f)7. The proposal's Summary does not provide a compelling case for removal of the existing exemption for impacts to vegetation in truncated riparian zone and protection of truncated riparian zones. The truncated portion of the riparian zone is separated from the stream by a road or railroad and does not drain toward the stream and does not provide any riparian zone benefits to the stream. Thus, there is no stream protection basis for the removal of this removal. The exemption has been in place given the disconnected nature of truncated riparian zones relative to regulated waters and the marginal environmental benefits of such areas. To the extent the exemption is removed, the rules should establish a procedure whereby applicants may attempt to demonstrate through a functions and values analysis that protection of the truncated riparian zone is unwarranted.

7:13-11.4. The imposition of a new flood storage volume analysis level – between the 100-year flood and the CAFE together with the requirement to achieve first floor elevations of 1 foot above the CAFE for residential development will present a substantial burden, and added monetary cost, on the ability of residential development to satisfy requirements for net fill balancing.

It appears that three volumes instead of two will be calculated (e.g., from grade to the 10-year flood elevation and from the 10-year to the FHADF). However, if the 10-year, 100-year, and climate-adjusted flood elevations are determined using Method 6, would six different volumes be calculated and compared, or three based on future adjustments? Please clarify.

7:13-11.4(d)1. Amending the tidal exemption such that only volume sections for which the higher flood elevation is tidally controlled shall be exempt and the flood storage volume displacement limits apply to any flood event that is fluvially governed. Examples illustrating

how to implement this process in a real project would be helpful to understand how to comply with this requirement.

7:13-11.5(a), (b). The Inundation Risk Zone Rule does not distinguish among areas in which sea level rise will cause only a few inches of water versus a few feet. This rule should not apply to an area where there is only a 17% chance that less than one foot of water will be present and only at mean higher high water. The mapping for these zones must be provided in a better format. The proposal requires data to be submitted for an individual permit application for a building in an inundation risk zone regarding inundation that a roadway may experience, and requires avoidance and alternative measures to be implemented. The proposal conflicts with current rules and proposed rules (proposed 7:13-12.6(m)2, 12.6(c)2) that allow residential buildings in a tidal flood hazard area to be served by an access road less than 1 foot above the applicable flood elevation if it is not feasible to construct a dry access road 1 foot above the applicable flood elevation. Does the Department intend for developments situated in the inundation risk zone to have an opportunity to demonstrate it is not feasible to provide an access roadway 1 foot above applicable flood elevation?

Proposed N.J.A.C. 7:13-11.5(a)2iii addresses projects by public transportation entities that have reached certain milestones. Can the Department explain why it would not be in the public interest for these projects to be redesigned to meet the new standards? Dry access concerns along roadways are often impossible to address through applications by individual applicants due to the size and cost of raising entire roadways. Often the only feasible approach to resolving community wide access concerns is to raise an entire roadway. Accordingly, why would redesigning the roadway to meet new standards not be in the public interest if eventually, the roadway must be raised?

N.J.A.C. 7:13-11.5(b)1 requires an applicant to disclose the minimum amount of inundation that would cause the lowest portion of the primary roadways providing regular or emergent access to the site to be inundated daily, as well as the corresponding maximum depth of inundation on the roadway itself. The Department does not specify which roadways constitute regular or emergent access which leaves applicants in the impossible position of guessing how far from a site this data should be provided. For the sake of public safety, the Department should identify roadways that provide regular access and emergent access to properties, so applicants and existing residents are aware of whether their property is adequately served by current conditions.

7:13-11.5(b)2. Further guidance by the Department and examples of acceptable risk assessments or a model form should be provided.

7:13-11.5 (b)3. The proposed requirements regarding site alterations and alternatives analysis for activities that require an individual permit in the inundation risk zone effectively renders such areas no build zones for activities requiring individual permits. Demonstrating that are no practicable alternative offsite locations sounds like an impossibility. Can the Department explain how this could be accomplished and provide some examples?

7:13-11.5(c). The proposed signage requirements applicable to any new or substantially improved habitable building that is financed or subsidized by public funds, other than a single-family home or duplex, to permanently incorporate signage on the subject property indicating projected sea level elevations are onerous, will result in added cost to development and are unlikely to have meaningful beneficial effect. Tying the placement of required signs to the projected 75-year into the future flood elevations and the oversized lettering requirements of the signage will present a physical challenge and local ordinance limitations regarding signage may be implicated. Such signage is likely to become the equivalent of “background noise” and be ignored as people go about their day-to-day activities. Such signs are unnecessary as the Department has already implemented and proposed a program that requires notices regarding potential flood conditions and imposes rigorous, ultra-conservative regulatory requirements for permitting and construction for the purpose of public health, safety and welfare related to potential flood concerns and rainfall increases. Owners/investors/occupants of such buildings will have already been notified and made informed decision on investment; and will have been protected by the criteria and conditions imposed on the construction through the approval process. Requiring such signage is simply redundant and merely imposes a burden on the parcel owner / developer. The proposal seems intended to serve the purpose of being a scare tactic rather than a meaningful regulatory measure. The measure also ignores that flood elevation information changes over time, which will in many cases render the signage moot and mislead the public. The Department should clarify the definition of public funds in this requirement as the phrase is defined differently across NJ’s laws and rules.

7:13-11.6(e)2. Allowing timing restrictions to exceed a cumulative annual period of 183 days will be extremely disruptive to the construction process for approved development, creating logistical challenges and adding significant cost to the construction process that will result in a more costly end product for the consumer.

7:13-11.6(e)2. The proposal to allow timing restrictions to exceed a cumulative annual period of 183 days demonstrates why the separate proposal to require recertification of flood conditions every 180 days is unreasonable.

7:13-12.4(t)(5). Prior regulations required only one primary means of escape and rescue above the 100-year flood elevation. Can the Department explain why two are now needed? If the assumption is that one is for today’s sea level and one is for the projected 2100 sea level, this ignores that sea level will be at varying levels between today and 2100. What is the justification for this proposal? Why not just provide one means of escape above the CAFE?

7:13-12.5. Many sections of this rule require an applicant to demonstrate that it is not “feasible” to meet the strict requirements of the rule. The Department should, to the extent possible, include exceptions in the rule that are widely used. For example, single family homes near bays and tidal rivers are often along roadways that are not one foot above the current flood elevation and will clearly be nowhere near one foot above the CAFE. As it is clearly never feasible or possible for a single-family home to raise the road elevation at their home to meet the requirement, the rule

should provide that exception. In other cases, the Department should provide clear and consistent guidance on what is acceptable in demonstrating that some is infeasible.

7:13-12.5(a). NJBA appreciates the proposed revisions clarifying that sites modified to remove buildings from the flood hazard area are not subject to regulation. However, the requirement to obtain a revision of a state delineation or FEMA Letter of Map Revision is onerous, time consuming and costly. The Department should accept an engineering certification demonstrating that the site was raised, and the building is no longer in a regulated flood hazard area in place of a revision of a state delineation or FEMA Letter of Map Revision.

7:13-12.5(b)3. The requirement in the context of an individual permit for a building to demonstrate that “every practicable effort has been made to locate the building on portions of the site where higher ground exists within a riparian zone” will lead to uncertainty, second guessing and delays in the application review and approval process, creating challenges for applicants and the Department’s staff. Which rule will govern in this instance? The requirement to locate a building at a higher point in the riparian zone or the requirement to minimize riparian zone disturbance? Would an applicant be required to ask for local variances to meet this requirement? The Department imposes and is proposing onerous restrictions and mitigation requirements on riparian zone impacts. The riparian disturbance allowances are rendered less certain by the proposed requirements that speak to analysis of alternative on-site configuration and location of proposed improvements within a riparian zone. The Department should continue to rely upon the impact limits and mitigation requirements established as protective of riparian zones. If the Department does not change this requirement, clear guidance should be issued to applicants and staff as to how “practicable” can be met to provide consistency.

7:13-12.5(c). Regarding legalization of buildings, the rules should allow the Department flexibility and discretion to legalize structures in instances where it is not practicable to meet applicable requirements of the Section of the Rules or where such legalization would not be detrimental to public health, safety, welfare, or the environment. This is particularly important if the current owner/applicant did not construct or have any knowledge that the home was not constructed in violation.

7:13-12.5(d), (e). The proposal removes the existing allowance for buildings within 25 feet of top of bank if there is an existing wall or bulkhead and imposes a new setback requirement of 25 feet from a pipe, culvert, or bridge that encloses a regulated water, provided that the setback may be relaxed in certain circumstances with an engineering certification demonstrating that building stability may be achieved without replacing or repairing the retaining wall / bulkhead. The proposal does not provide any scientific basis for the 25-foot requirement, except that failure may occur. However, there is a difference between the potential failure of a high streambank and of a low bulkhead or wall along an impounded stream. Is there a history of failure of bulkheads along the bay shoreline causing horizontal slumping 25 feet wide?

The proposal effectively removes the bulkhead or wall feature from the consideration of stability and requires a false assumption that the existing condition does not exist. The proposal is overly

conservative and burdensome, and the rules should allow the existing, actual conditions to be considered in the engineering stability analysis.

7:13-12.5(h). The requirement that the lowest floor of single-family and duplex dwellings be raised to 1-foot above CAFE is overly conservative and based on speculative projects that will add unnecessary cost and burden on developers and purchasers, putting negative pressure on housing supply, and putting the State at a competitive disadvantage. Similarly, the one-foot factor of safety at N.J.A.C. 7:13-12.5(b)1 for impact loads and hydrostatic pressure and 7:13-12.5(m)2. for roadways is unnecessary. The Department should eliminate the 1-foot factor of safety from the FHA rules entirely. The Department explained in its rationale in choosing the 17th percentile chance of occurrence for sea level rise that this would constitute an additional factor of safety over the median or more likely sea level rise figure. As previously noted, the CAFE is based on a 17% chance of sea level rise in 2100 AND only a 1% chance of a storm that will cause that flood elevation. Adding an arbitrary additional 1-foot now serves no purpose other than to add even more unexplainable conservatism to an already conservative approach. Adding an additional foot of foundation to a single-family home adds to the cost and to the design features, as well as impacting the municipal requirements for building heights. The Department of Housing and Urban Development's recent rule proposal regarding building height cited the cost of just a one-foot increase at up to \$7,800. For existing homes, this is likely to be much higher than new construction. In New Jersey, every \$1,000 of increased cost to a home price, roughly 2,591 out of the market because they would no longer qualify for a mortgage⁹. Can the Department explain any substantial reasoning for adding 1 foot versus 0, .5 feet or a two-foot factor of safety?

7:13-12.5(l). The proposal will extend the provision of the current rules that precludes construction of a single-family home on a lot created after 2007 in a fluvial flood hazard area if there is already an existing habitable building or authorization for same from the Department to multi-residence buildings. The current and proposed rules place undue restraints on private property rights that implicate Fifth and Fourteenth Amendment Takings clause protections. Rather than being expanded, the provision of the rules that limits development on lots created after 2007 should be removed entirely, and approvals should be available to landowners subject to the proposed development meeting the Department's rigorous development standards.

7:13-12.5(l). The proposal would preclude the issuance of an individual permit for a multi-residence building on lot created after 2007 in a fluvial flood hazard area if there is already an existing habitable building or authorization for same for any of the lots of the subdivision. Under current rules, this limitation only applies to single family and duplex dwellings. The Department's singular focus on disruption during flood events ignores other critical policies, such as the substantial need for housing and affordable housing. The extension of this policy to

⁹ Zhao, N. (2024). *Nearly 77% of U.S. households cannot afford a median-priced new home*. National Association of Home Builders. <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2024/special-study-households-cannot-afford-a-median-priced-new-home-april-2024.pdf?rev=cb6f4f7d507341cb9ece97b90b6709c3>

multi-residence buildings will severely curtail development opportunities throughout the State. The severe limitations imposed on housing under the rule will shape the State's housing policy and by doing so the Department is usurping legislative intent. Instead of precluding housing, the Department should focus on mitigative efforts for allowable housing that meets standards in the event of periodic flood events to address the State's growing housing shortage.

7:13-12.5(l). The rule precluding issuance of an individual permit for a single family and duplex dwellings, and as proposed, multi-residence buildings, on lots created after 2007 in a fluvial flood hazard area if there is already an existing habitable building or authorization for any of the lots of the subdivision represents an overreaching restriction on property rights and should be eliminated. With proposed expansion of flood hazard areas based on 75-year into the future with less than 17% chance sea level rise projections, many more parcels will be affected by this rule significantly curtailing development opportunities. The Department has taken little to no measures in the rule proposal to attempt to mitigate the impact of its rules by incentivizing development elsewhere. The rules should allow for applicants to demonstrate that subdivision and additional residential dwellings may occur without substantial negative impact on flood related concerns.

7:13-12.5(l). With respect to the rule precluding issuance of an individual permit for single family and duplex dwellings, and as proposed, multi-residence buildings, on lots created after 2007 in a fluvial flood hazard area if there is already an existing habitable building or authorization for same for any of the lots of the subdivision, the Department should clarify that if a prior approval is abandoned, the subdivision restriction is no longer applicable. Permittees have a right to abandon approvals and the limiting effect of not being able to construct based on a valid authorization should not apply if approval is abandoned or expires with no construction.

7:13-12.5(l). With respect to the rule precluding issuance of an individual permit for a single family and duplex dwellings, and as proposed, multi-residence buildings, on lots created after 2007 in a fluvial flood hazard area if there is already an existing habitable building or authorization for same for any of the lots of the subdivision, the Department should develop other means of providing protection against flood threats rather than its approach of precluding additional development.

7:13-12.5(l). This proposal unnecessarily creates a type of no build zone where an applicant could otherwise comply with all aspects of the FHA rules for structures, ensuring safety of the structures.

7:13-12.5(m)1. The proposal is adding two or more single-family homes or duplexes to the requirement that the home not be located in a V zone that previously applied only to critical and multi-residence buildings. While development in the V zone should be discouraged, a small infill development of two homes would not significantly raise flood risk. The Coastal Rules already limit development in areas subject to high waves (e.g. beaches or dunes). The provision is that "no portion of any building is located in the V or VE zone." If one home can be constructed in a V zone, built to V zone standards as allowed by FEMA, why can't more than one home be

constructed properly? There should be a mechanism to allow an applicant for more than one single family home to demonstrate that the home design is in accordance with all standards.

7:13-12.5(m)2. With respect to the requirement of the current rules applicable to critical and multi-residence buildings, and the proposal applicable to two or more single-family and duplex dwellings, that such buildings be served by at least one roadway one foot above CAFE, the Department is requiring individual landowners who want to develop on a particular parcel to address remote, off-site roadway network infrastructure and emergency management issues that are municipal and regional concerns well beyond the scope of whether a development on a parcel is designed to meet regulatory requirements. DEP is effectively creating no-build zones and usurping municipal land use planning by precluding residential development where dry access is not achievable.

If the Department wants to address regional roadway network infrastructure issues, it should impose a mitigation requirement. Individual applications should not be forced to forgo development opportunity (due to inability to address remote off-site existing roadway networks) or shoulder the monetary and logistical burden of this issue alone.

The rule does not provide guidance as to how far away from a site a roadway must exist above the FHA to qualify as “serving” the building. Similarly, the rules do not articulate a specific size or capacity of the roadway, leaving projects subject to a time-consuming and costly site-by-site evaluation. Applicants and communities are thus unable to effectively plan without conducting a detailed analysis of all potentially impacted properties. Even with this analysis, communities would be unable to definitively confirm which areas would meet the definition of “served” without submitting an application to DEP. Accordingly, NJBA believes that the impact of access requirement is too important to be resolved on a case-by-case basis, and that applicants should not be forced to attempt to address this provision of the rules through hardship exception applications, which require significant expenditure of resources by applicants and the Department and have proven mostly futile. The developed nature of the state and its existing roadway system that is extensively below the flood hazard area requires the Department to address this issue through the implementation of rules that create uniformity rather than leaving applicants to the whim of case-by-case, discretionary hardship waiver determinations.

A specific distance limit for access should be required. This would provide predictability and also encourage the creation of more resilient roadways since applicants would be more likely to be able to overcome the financial burden of limited roadway improvements versus large ones. The greater the financial burden, the less likely the project is to succeed and the less likely the roadway in question will ultimately be raised. The burden of raising roadways is often too large for individual applicants to meet, but collectively over time, minor improvements by a larger share of projects will help realistically enhance our resiliency.

If an applicant can demonstrate a building can be served by police, fire departments or other emergency services, this should suffice to meet the definition of “served” and be clearly defined

as such in the rule or guidance. Furthermore, emergency access plans should exist in every region of our state and be available to the Department for approval. In the event an access plan is insufficient, the issuing authority should address it as soon as practical. Lastly, these plans should be made available to the public as a matter of security.

In certain circumstances, providing access becomes an obvious impossibility and exemptions should exist in the rule to account for this. For instance, in more developed areas, entire roadway networks may lie below flood elevation or numerous other sites may utilize the roadway in question. This is a prevalent issue that deserves uniform standards. This would create additional efficiencies for the department and applicants who currently need to go through the time-consuming and costly process of demonstrating hardships.

Finally, clarification should be provided for how close an access road must be to a structure, especially considering the structure may be at a different elevation and slope and site access concerns could arise.

Also, some buildings are constructed to allow residents to shelter in place with redundant utilities, etc. The only criteria for these buildings is whether emergency services can access the buildings, not whether the residents have dry access.

7:13-12.5(m)2. Subdivisions with more than two single family or duplex dwelling units should not be made subject to the same access road elevation requirements currently applicable only to multi-residential and critical buildings, the latter which place a greater demand on emergency service responders due to greater number of occupants in the event a building is impacted by significant flood conditions.

7:13-12.5(m)2, 12.6(c), (d). With respect to access roadway requirements for buildings at redevelopment sites, the Department is discouraging redevelopment opportunities by removing the minimal flexibility currently afforded to redevelopment projects that allows for dry access roads to be up to a foot below the applicable flood elevation where it is not feasible to elevate. The Department should encourage redevelopment consistent with other State policies aligned with brownfield and other redevelopment by, at a minimum, maintaining the current provision in the rules or, preferably, expanding the flexibility to allow for roadways to be more than a foot below applicable flood elevations.

7:13-12.5(m)2, 12.6(c)2. With respect to access roadway requirements for buildings in tidal flood hazard areas, where the applicant seeks to demonstrate that providing a roadway 1 foot above CAFE is not feasible, the Department should clarify that the list of feasibility factors is not exhaustive, and that a feasibility analysis may be justified based on other circumstances in addition to the examples listed in the proposal, as the Department may not be able to reasonably anticipate at the time of rule writing all factual circumstances that may make it infeasible to satisfy the rule.

7:13-12.5(m)2, 12.6(e). The rules will strictly preclude development of critical buildings, multi-residence building or two or more single-family or duplex dwellings in fluvial flood hazard areas in the event the development is not served by an access roadway one foot above CAFE. DEP is effectively creating no-build zones and usurping municipal land use planning by precluding residential development where dry access is not achievable. Such development should be subject to the same feasibility factor analysis as sites located in tidal flood hazard areas. At a minimum, the provision in the current rules that provides flexibility for redevelopment sites in fluvial flood hazard areas to demonstrate it is not feasible to raise roadways and allows roadways to be up to a foot below the applicable flood elevation should be preserved to promote redevelopment goals and opportunities.

7:13-12.5(m)3. The proposal requires, in the context of an individual permit for a critical building, multi-residence building or two or more single-family or duplex dwellings, that pedestrian areas outside of building footprints to be graded to one foot above CAFE, unless the applicant demonstrates it is not feasible to do so and attempts are made to raise the grade to the extent practicable, and a peak runoff rate analysis is performed. This new requirement will result in a need for significantly more fill relating to such development and will have a substantial burden and added monetary cost on the ability of residential development to satisfy requirements for net fill balancing. The basis for this requirement is not provided in the rule summary and raising the pedestrian area to one foot above the CAFE does not appear to provide flood mitigation, particularly in tidal areas where the entire area will be flooded. Does this apply only to public sidewalks?

7:13-12.5(m)3. With respect to the proposal for grading pedestrian areas outside of building footprints to one foot above CAFE, the proposed requirement for a peak runoff analysis should depend on whether the stormwater rules are applicable. If the project is not subject to stormwater compliance, the analysis should not be required, otherwise the proposal effectively imposes stormwater requirements on projects not regulated under the Stormwater rules.

7:13-12.5(m)3. With respect to the proposal for grading pedestrian areas outside of building footprint to be graded to one foot above CAFE, the proposal will result in construction challenges in scenarios where the portions of the building are allowed to be constructed below lowest first floor elevation. For example, mixed use buildings allow non-residential portions of the building below the CAFE. How can the rest of pedestrian area outside of the building be elevated to 1-foot above CAFE for such development? This requirement has the effect of nullifying the ability to construct ground floor commercial or other uses below the flood hazard level. The Department should also evaluate this requirement in the context of access for individuals with disabilities. The construction of ramps will become extremely difficult if pedestrian areas are also elevated 1 foot above the CAFE and could require that adjacent properties be modified. The Department should clarify if this requirement applies or does not apply to buildings with ground floor commercial or other uses that meet the requirements of 7:13-12.5(n).

7:13-12.5(m)3. With respect to the proposal for grading pedestrian areas outside of building footprint to be graded to one foot above CAFE, the Department should clarify its proposed justification and underlying purpose for this requirement. The rule will necessitate additional fill in the flood hazard area contrary to other policies implemented by the Department that seek to limit fill occupying flood storage areas. Additionally, the reasonable expectation is that pedestrians will either go inside or leave in the event of a flood. The concern about pedestrian traffic during flood conditions is unreasonable and will lead to the need for more fill, which will exacerbate concerns regarding flood storage displacement.

7:13-12.5(o) This section for substantially damaged homes requires a single-family home to be raised to one foot above the CAFE. NJBA appreciates the inclusion of “to the extent feasible” in the wording. However, no guidance is provided to demonstrate whether raising the home is feasible. FEMA requires substantially damaged homes to be raised to the FEMA elevation. However, with the dramatic expansion of the regulated flood zones in the proposed Rules, many homes will not be subject to FEMA jurisdiction. Further, the proposed Rule also references local ordinances. If the local ordinance is required to match the NJDEP Rules, and not the FEMA requirements, this provision offers no relief. Homeowners may simply not have the funds to raise their homes to meet this requirement. FEMA flood insurance does not offer sufficient funding, even under the Increased Cost of Compliance coverage to raise a home in New Jersey. The Department is not offering any funding for this to occur. A homeowner may be able to pay for repairs, but not elevation, especially to 6 feet above the FEMA elevation which could easily cost \$100,000 or more. Thus, the homeowner would be able to continue to live in their home if not required to elevate it. This is clearly more likely for less expensive homes. The homeowner may face significant economic consequences if forced to abandon their home or sell it at a significant discount. There has to be a balance between reducing flood risk and forcing homeowners to abandon their homes. For homes not subject to the NFIP requirements, homeowners could be allowed to repair their homes but be given a certain amount of time to elevate them and deed restrictions on sales or other improvements could be set forth that would restrict other activities.

The Department also should provide funding or other assistance to homeowners in these expanded flood zones in the event of flooding.

Homeowners that are not in a FEMA flood zone would not know that they can and should obtain flood insurance since it is not required. Accordingly, the Department should provide specific notice to every property that will be affected by these rules.

7:13-12.5(p). Subjecting homeowners who seek to make improvements to legally existing dwellings to requirements to raise first floor elevations to CAFE and other onerous provisions of the rules will chill investment in and maintenance of existing dwellings. These rules exceed FEMA by requiring the cumulative cost of all improvements made to a structure after the date of adoption to be counted as discussed above. Does this mean that work done now would count 50 years from now? Existing dwellings are important to the State’s housing stock and policies

should be implemented to incentivize maintenance and reinvestment in such structures, particularly given the absence of incentives in the rules to promote development and housing opportunities in non-flood risk areas. The wording does not allow homeowners to maintain and improve their homes for their own enjoyment in some cases. While these rules, like the NFIP, intend to capture improvements done in such a way as to circumvent the SI definition (doing more than one improvement in a few years' time), requiring long-term accounting, with several owners, or with maintenance work accumulating over time is excessive and burdensome.

In the summary, the Department indicates that it does not intend to count maintenance activities that in fact increase flood resiliency, but the rule language does not reflect that. The Department should provide an exhaustive list of maintenance activities that are exempt from this requirement and set a realistic time frame in which the improvements must be considered to avoid incentivizing neglect. In the lowest value properties, basic maintenance and repair could easily trigger the 50% threshold over a few years, disincentivizing refurbishment in buildings where it is most needed. NJBA recommends that the rules only be triggered by the complete replacement of a structure or the increase in its footprint or size outside of NFIP regulated areas.

7:13-12.5(r), (s). NJBA agrees with the modification to allow enclosures in a V zone, as long as they are constructed properly. Please clarify that a critical building, multi-residence building or two or more single-family or duplex dwellings may be constructed with enclosures below CAFE when in a Coastal A, V or VE zone, where such buildings are flood proofed, provided the enclosure is constructed with breakaway walls or similar non-load bearing elements. Please clarify whether this allowance will be made retroactive to prior development that precluded enclosures below applicable flood elevations.

7:13-12.5(v). Clarify that the preclusion against individual permits for buildings in flood hazard areas where the building has below ground enclosures, including basement or below ground parking, only applies if the floor of the enclosure is situated below the adjoining exterior grade along all exterior walls, and how this differs from the existing rule.

The proposal provides that the Department shall not issue an individual permit for any below ground enclosure beneath a building, including any basement or below ground parking area, within a flood hazard area. For the purposes of this section, a below ground enclosure is any portion of a building in which the floor of the enclosure is situated below the adjoining exterior grade along all exterior walls. Please clarify how this differs from the Department's current rules.

7:13-12.6(e). The new requirement that access roadways serving sites in fluvial flood hazard areas be able to "accommodate two-way traffic" shows utter disregard for the state of the State's existing roadway network and the inability of individual applicants to address such off-site conditions. The Department should grant approvals where access roadways meet the applicable elevation requirements even if they are one-way streets. See prior overlapping comments in the context of 7:13-12.5(m)2. This requirement would effectively make development impossible along one-way streets under the FHA, especially in urban environments. Has the Department evaluated how many areas and roads in the state this could impact?

7:13-12.7. The proposal repeals the previous General Permit (#10) for a bridge or culvert replacement on a regulated stream. The General Permit included criteria that could be used to demonstrate that the hydraulic capacity of the bridge or culvert would not change. The individual permit requirements do not include provisions that allow demonstration that the hydraulic capacity does not change and instead requires detailed modeling to demonstrate that flooding will not be increased, like that for a new bridge or culvert. Further, the rules now require that a reconstructed bridge or culvert must convey the flows from the CAFE without a change in velocity. That suggest that a simple replacement is likely not possible (unless the existing structure was oversized). Is it the Department's intension that an existing culvert or bridge that is in disrepair cannot be replaced in-place and in-kind?

7:13-12.8. In requiring an IP for directional drilling of a utility line, the summary indicates that the reason is that impacts may occur from an "inadvertent return." How would an applicant demonstrate that the activity will not adversely impact regulated areas as per 12.7(c)1?

7:13-12.17(b)2.i. The requirement that materials relating to remediation activities are stored outside of the inundation risk zone will create logistical challenges and hardships in the ability to complete remediation in a timely and cost-effective manner. The rules should allow and provide for storage of materials relating to remediation activities in the inundation risk zone where properly contained to mitigate against off-site transport during a flood event. Additionally, as the inundation risk zone is based on future projections that are speculative and may not occur, the rules should include provisions to allow on-site storage based on assessment of the potential risk of inundation at the time of such activity, taking into account whether daily inundation is actually occurring where the remediation activity is taking place, based on the reasonable professional judgment of the Licensed Site Remediation Professional responsible for the remediation.

7:13-12.6(c)2.(i). Elevating a substantial portion of a parking lot or roadway will almost always come with a prohibitively high construction cost or construction costs that are disproportionately high compared with any benefit that would be obtained. Can the Department provide additional guidance as to what a high construction cost is and what proportion of project cost it considers high?

7:13-12.6(c)2.(ii). Excessive volumes of fill that exceed the flood storage displacement limits will most likely occur in most urban settings. Can the Department clarify what quantity of fill would be deemed excessive?

7:13-12.6(d)2.(iii). Elevating roadways will often be impractical while maintaining the no-net fill requirements that now apply in fluvial/tidal influenced areas.

7:13-12.18. The preclusion against issuance of a permit for placement, storage or processing of hazardous substances in an inundation risk zone will preclude many lawful activities that involve use of hazardous substances based on future projections that are speculative and may not occur. Such blanket restrictions on lawful activities in areas of the State identified as being subject to an inundation risk zone will have severe economic consequences and impose a hardship on business

operations and residents who rely on such business in affected areas of the State. The rules should be revised to have the Inundation Risk Zone taken into consideration and be evaluated in terms of impacts to these areas with respect to applications for a permit for placement, storage or processing of hazardous substances, but not necessarily prohibited.

7:13-13.9. The requirement to address the permanent loss of the benefits provided by the forest component when it is replaced by non-forest vegetation, by finding another riparian zone location in the same watershed, devoid of trees and to plant trees in that location is extremely burdensome. Has the Department evaluated how often this would be possible? The Department unintentionally discourages the preservation of forested areas through its stormwater rules. The Department should immediately allow applicants to utilize forested areas for stormwater quality and quantity control.

7:13-13. The rules do not provide any scientific basis for requiring mitigation for disturbance at levels below that in Table 11.2. The allowed disturbances in that table were determined in prior rulemaking as unlikely to cause a significant adverse impact to the structure and function of the riparian zone. The allowed disturbances in that table for the 150-foot riparian zone are generally much larger than 2,000 sq. ft. and that limit will be passed by many projects.

When the Flood Hazard Area Rules were overhauled in 2007, the October 2006 proposal included the following statement about the allowed disturbances for various activities. As noted, these limits were based on the Department's review experience, which was used to determine disturbances that would not impact the structure or function of the riparian zones. Given the much larger area of disturbance that the Department recognized was required for various activities back in 2006 (as modified in more recent rule changes), what is the basis for 2,000 sq. ft.? The Department should provide some scientific evidence that the current limits are not protective enough. The rule then and now requires minimization and justification for disturbances.

Proposed Table B sets forth the maximum area of vegetation that the Department will allow to be disturbed within the riparian zone for various activities. The values presented in Table B were established based on the Department's experience with thousands of projects reviewed over the past 20 years. The Department believes that these values represent the upper-limit of disturbance that is reasonably required to accomplish the various activities listed in the table. It should be remembered that the values contained in Table B represent the maximum allowable disturbance for a given activity and that all disturbances must first be justified and minimized under proposed N.J.A.C. 7:13-10.2(d).

And concludes:

The values established in Table B are those determined by the Department to be the maximum levels allowable to assure that healthy riparian zones, which have been proven to be an essential part of preserving clean water necessary for both humans and wildlife, are preserved. By establishing stringent guidelines to prevent unnecessary and adverse

impacts in riparian zones, the Department is confident that it is best achieving its mandate to serve and protect the residents of the State. The levels in Table 11.2 should be retained, with mitigation required only if those values are exceeded.

Further, the requirements for on-site mitigation can be difficult to achieve when projects are designed to preserve the wooded riparian zone on the property to the extent feasible. Five years of monitoring is typically required. The Rules require planting only in riparian zone areas that are not already forested. If averaging is acceptable for wetlands, why not for riparian zones? This could achieve the goal of avoiding riparian zone vegetation loss and fragmentation without requiring expensive mitigation for minor impacts.

7:13-13.12. The provisions in the current rules that allow justification of mitigation at amounts less than the stated ratios in the rules should be preserved. Regardless of limited utilization of such procedures to date, there may instances where actual field conditions warrant utilization of a mitigation amount less than the stated ratio and applicants should not be foreclosed from that opportunity simply because there has not been a past prevalence of approvals of mitigation at lower than the standard ratio.

7:13-15.1. The Department's hardship exception process needs to be revamped to create a process where applicants have a meaningful opportunity to demonstrate hardship. The current rules have proven to be ineffectual for providing applicants with meaningful hardship relief. The proposed rules should expand hardship opportunities, and relax requirements to obtain a hardship, given the significantly expanded and conservative scope of the proposed Rules.

7:13-15.1(b)2. With respect to hardship exceptions, the rules should be revised to require the Department to consider the cost of compliance in relation to the project costs and financial hardship on the applicant.

7:13-15.1. Under the current rules, the Department has taken an approach of declaring applications for hardship exceptions incomplete without the submission of extensive documentation regarding costs of activities for which a hardship is sought. For example, the Department often requests economic studies of the cost of elevating public roadways that are lined by existing development for multiple miles. It is not practical to submit such costs estimates when the excessive cost of such undertaking is self-evident. Applicants should not be required to incur additional expense to hire professionals to prepare cost estimates for activities the excessive cost of which is self-evident and for which the estimates are futile as the applicant would never be in a position to actually implement the activity (such as elevating an off-site public road lined by existing development for miles).

7:13-22.2(d)13. Requiring that notice of commencement be given by on-line electronic certified registration of the activity not more than 14 days in advance of the start of authorized work will lead to a reduced compliance rate for such required notifications. Permit holders typically rely on their professionals to provide such notifications. Professionals who do not control when the permittee will actually begin work will likely be reluctant to provide the required certification,

under penalty of fine and imprisonment (as stated in the required certification language), that work will commence within 14 days after the certification is made.

7:13-22.2(d)14. Requiring commencement of construction or recertification of flood hazard conditions within 180 days of permit issuance effectively converts 5-year construction permits into 6-month approvals. It is unrealistic to expect permittees to be in a position to commence work within six months of acquiring approval from the Department given other entitlement requirements, financing, potential need for real property transfer if the permittee is a contract purchaser of the subject development parcel, logistics of contractors and mobilization, to name a few examples. This requirement will chill financing for development projects as lenders will be reluctant to supply financing for projects due to the uncertainty of conditional 180-day approvals.

The Department should clarify whether Department approval is required before a permittee starts construction of an approved project when the CAFE, floodway limits, or flood zone designation has changed. If the project is not required to be revised notwithstanding the changed flood hazard conditions, is Department approval required prior to commencement of construction? Is Department approval required prior to commencement of construction if project changes are necessary to address changed flood conditions?

7:13-22.3. Deed notices should not be required if the approval authorizes an activity, such as filling, that will result in the site buildings being located above the applicable flood elevation.

Impact Statements

The proposal claims “To the extent that the proposed amendments require increased design standards for properties in high-risk areas, the cost of new housing may increase locally, particularly for single-family residential units and for multi-family units that may be unable to easily put residential dwellings on the first floor. However, it is unclear whether these increased costs stem directly from the rulemaking or are reflective of a larger awareness from the public, insurers, and the Federal government (among others) of the increased risks of building in these areas.” The cost of raising an existing structure will also be significant. Furthermore, multi-family units will need to comply with countless other new proposals in this rule that will increase costs, regardless of whether first floor residential is possible. The statement suggests that it is unclear whether increased costs stem from the rulemaking or public awareness. What costs are being referenced? For instance, why would awareness from the Federal government about the REAL rules affect costs? No study or other information is provided for any of these statements. Studies suggest property values decrease with new flood designations while costs of construction increase.

The proposal claims “Proposed amendments pursuant to the Stormwater Management rules will help reduce flooding, improve water quality, increase groundwater recharge, increase protection of stream channel integrity, reduce erosion, and maintain the integrity of dams. This will result in more resilient communities. In addition, the proposed amendments also provide clarity and improve consistency in rule implementation and, as such, will improve regulatory predictability. While compliance with the proposed amendments may require the use of stormwater management BMPs to achieve reduction of stormwater runoff, usage of BMPs is already a requirement in the current version of the rules. Finally, proposed amendments relating to the use of green infrastructure for public roadway or railroad projects would not result in a change to, or influence, the affordability of housing.” This statement completely ignores the current impervious coverage exemption for redevelopment and does not offer any estimate of cost increases.

The proposal claims “there are several proposed amendments, such as the creation of the inundation risk zone and more stringent construction standards within modified tidal flood hazard areas, that address projected sea level rise and flooding and will promote development that is more resilient to the damage of flooding and extreme storm events and will encourage increased protection of natural resources. By mitigating the deleterious impacts of climate change that disrupt the social well-being of the people who live, work, and recreate in New Jersey, these proposed amendments will have an overall positive impact on the social well-being of the State.” This statement largely assumes that redevelopment will occur. Without redevelopment and development, the rules themselves do not mitigate the deleterious impacts of climate change.

The proposal claims “The proposed onsite retention standard in the Stormwater Management rules will mitigate the current and expected burdens on stormwater management facilities by

reducing stormwater runoff volume. This will help mitigate the damaging impacts of flooding discussed above, including protecting the serviceability of critical infrastructure like roadways and utilities from flooding driven or exacerbated by stormwater runoff.” The proposed onsite retention standard will not help reduce stormwater runoff unless a property is redeveloped. This rule proposal requires applicants in certain circumstances to contemplate future development. Has the Department evaluated how many potential redevelopment projects may not occur due to the increased cost of compliance and if the difference from the status quo and current TSS removal standard will truly have a net positive benefit for stormwater?

The proposal claims “The proposed creation of the IRZ, expanded tidal flood hazard area, and more protective construction standards for development within these regulated areas pursuant to the FHACA rules, will also mitigate the damaging effects of flooding and sea level rise.” This should be corrected to reflect that only development and redevelopment conducted pursuant to the new standards mitigates damage.

The proposal claims “The proposed amendments also afford protections from damage related to flooding and coastal storm events by encouraging new development and redevelopment on previously disturbed land outside of regulated areas, rather than undisturbed, vegetated land within regulated areas.” This claim should be further explained. It is unclear why this rule would discourage greenfield development. The proposal to increase stormwater requirements on redeveloped impervious surface will discourage development on previously disturbed land.

The proposal claims “The proposed amendments to require 80 percent TSS removal from redeveloped motor vehicle surface and to require compliance with applicable TMDLs will result in improved water quality, particularly in urbanized areas, and will proactively prevent degradation of water quality in less developed areas. The higher TSS removal requirement will help improve water quality in overburdened communities and will provide residents of those communities with their right to live, work, and recreate in a clean and healthy environment.” This claim fails to consider if the rate of redevelopment will slow down due to increased costs to comply with the new standards. Has the Department evaluated at what rate redevelopment will slow and at what rate greenfield development may increase due to the increased standards? Has the Department evaluated at what rate redevelopment must continue for the new standards to have a net positive result compared to the current standard?

The proposal claims “The proposed amendment to the definition of major development to include the reconstruction of one-quarter acre or more of regulated motor vehicle surface or regulated impervious surface will qualify more development projects for being major developments and may result in additional costs for stormwater treatment. Since the stormwater runoff quality standard of 80 percent TSS removal already applied to major developments that include one quarter acre or more of new impervious coverage, the additional costs will be limited to those development projects that proposed significant amounts of motor vehicle surface reconstruction. Although the cost of treating stormwater to the developer may increase due to the new requirements discussed above, current practice has required at least a 50 percent TSS

removal requirement on existing impervious surfaces when a major development creates one quarter acre or more of impervious surface (motor vehicle surface after March 2, 2022). Therefore, the TSS removal rate increasing from 50 to 80 percent or 80 percent to 95 percent may not have a significant increase in the cost of stormwater treatment, considering treatment was already required and that the green infrastructure requirements have been in place since March 2, 2022, and many of the green infrastructure BMPs provide an 80 percent TSS removal rate.” This statement should be reevaluated. The costs will not be limited to those development projects that proposed significant amounts of motor vehicle surface reconstruction as stated, but also projects that include more than one-quarter acre or more of regulated impervious surface. This is likely to be a majority of redevelopment projects. Has the Department evaluated approximately what percentage redevelopment projects would be affected by this proposed change?

The proposal claims, “The proposed new rules, repeals, and amendments are consistent with the law and policy of New Jersey to promote smart growth and to reduce the negative effects of sprawl and disinvestment in older communities,” This rule proposal is likely to increase sprawl since many urban centers will be likely to see redevelopment curtailed by the proposed IRZ, CAFE and proposed changes to the stormwater rules. The proposal’s changes appear more likely to incentivize greenfield development as compared to the Department’s current rules.

The proposal claims “Executive Order No. 4 (2002) states that New Jersey requires sound and integrated planning, as well as coordination with local planning, in order to conserve natural resources, revitalize urban centers, protect the environment, and provide needed housing and adequate public services, all at a reasonable cost, and all while promoting beneficial economic growth, development, and renewal. The executive order also encourages redevelopment, repair, rehabilitation, and replacement of existing facilities. These goals are reflected in several existing provisions that will be continued in the amended rules.” The Department should identify which provisions it is referencing. The proposed IRZ and CAFE have extremely consequential impacts to Planning Areas 1 and 2 and create impediments to growth in areas identified by the State Plan as targets for growth and rehabilitation. The claim that this proposal continues providing State Plan goals at a reasonable cost includes no evidence. The rule proposal is extremely likely to increase regulatory compliance costs, construction costs and land scarcity, negatively impacting economic growth, development, and renewal.

Thank you for your consideration of NJBA’s comments. Please feel free to reach out to us with any questions.

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