UTILITY and TRANSPORTATION CONTRACTORS ASSOCIATION OF NEW JERSEY

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February 2, 2023

Lauren Zarrillo, Esq.
ATTN: DEP Docket No. 08-22-10
NJ Department of Environmental Protection
Office of Legal Affairs
Mail Code 401-04L; PO Box 402
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Trenton, NJ 08625-0402

ELECTRONICALLY SUBMITTED VIA: www.nj.gov/dep/rules/comments

Re: Comments on Notice of Proposed Amendments, Repeal and New Rule N.J.A.C. 7:8-1.2, 1.6, 2.1, 5.4, 5.6 and 5.7; N.J.A.C 7:13-1.1, 1.2, 3.3, 3.4, 3.6, 10.1, 12.6 and Appendix 1 ("Inland Flood Protection Rule Proposal")

Dear Mrs. Zarillo:

Please accept the following comments on the above referenced rule proposal on behalf of the Utility and Transportation Contractors Association of NJ (UTCA). Public works construction projects delivered by UTCA members and our partners in labor serve to improve the real-world challenges in communities. Increased intensity of precipitation events and the resulting effects of additional stormwater runoff on stormwater management systems and flood elevations in fluvial areas is a justified concern that requires attention.

While infrastructure projects are designed and permitted prior to any one contractor being engaged, having the right design, permit conditions and an expeditious schedule are of utmost concern to UTCA members. Infrastructure that is designed to stand the test of time (with proper maintenance and upkeep) is in the best interest of New Jersey's taxpayers and ratepayers.

With increased federal and state funding for infrastructure there is a dearth of projects in active review and, therefore, not yet permitted to proceed to construction. We are generally concerned that unnecessary delays in project delivery could risk to erode public support for long-overdue infrastructure investment in New Jersey and nationwide.

We offer the following detailed comments to the Department of Environmental Protection (Department) on the proposed "Inland Flood Protection Rule" (IFP Rule Proposal):

Rule Making Process

We thank the Department for following the lawful approach of rule-making and not proceeding with this critical technical rule proposal through the emergency process originally contemplated. We encourage all rules of this nature to proceed with at least a 60 days of public comment, associated public hearing(s) and other forms of stakeholder engagement.

Major Development – "Preferred Alternative" Approach

7:8-1.2 (Definitions)

- UTCA generally supports the Department's proposed new definition of a "Public roadway or railroad" but recommends the following amendment:

"Public roadway or railroad" means a pathway for use by motor vehicles or trains that is intended for public use and is constructed by, or on behalf of, a public transportation entity. A public roadway or railroad does not include a roadway or railroad constructed as part of a private development **unless [regardless of whether]** the roadway or railroad is ultimately to be dedicated to and/or maintained by a governmental entity.

- UTCA supports the Department's definition of **"Public transportation entity"** as proposed.

- UTCA recommends that the Department (upon final adoption) include definitions for a **"Utility project"**, **"Local utility"** and **"Public utility"** modeled after definitions that exists in current state law (P.L. 2022, Chapter 107 / P.L. 2021, C. 263):

> **"Utility Project"** means a project performed by a local utility or a public utility to improve infrastructure under their jurisdiction or any work conducted in a public utility right-of-way.
>
> **"Local utility"** means any sewerage authority created pursuant to the "sewerage authorities law," P.L.1946, c.138 (C.40:14A-1 et seq.); any utilities authority created pursuant to the "municipal and county utilities authorities law," P.L.1957, c.183 (C.40:14B-1 et seq.); or any municipal, county, or regional utility, authority, commission, special district, or other local government entity, not regulated by the Board of Public Utilities, that provides electricity, gas, heat, power, sewer, or water service.
>
> **"Public utility"** means a public utility, defined pursuant to R.S.48:2-13, providing electric, gas, sewer, or water service to customers.

7:8-1.6 (f) (Applicability to major development)

- UTCA supports the addition of provision (f) which provides a justifiable path for public roadway or railroad projects to proceed without redesign after a reasonable point of time. In addition, we recommend the following amendment to accommodate the same for critical utility projects that serve the same function and follow similar regulatory approval paths:

> "Notwithstanding any rule to the contrary, a major development for any public roadway or railroad project **or utility project** conducted by a public transportation entity, **local utility, or public utility** that has determined a preferred alternative or reached an equivalent milestone before (the effective date of this rulemaking), shall be subject to the stormwater management requirements in effect prior to (the effective date of this rulemaking)."

Delayed Operative Date

On October 25, 2019 the Department adopted what was known as the "Green Infrastructure Stormwater Rule." Based on public comments, the Department proceeded with non-substantial amendments upon final

adoption that included an effective date of March 2, 2020 and a delayed operative date of March 2, 2021. **The UTCA is recommending the same paradigm upon final adoption of the IFP Rule Proposal.**

When the Department issued its final adoption of the "Green Infrastructure Stormwater Rule" it properly acknowledged that the Department needed time to update various guidance documents (E.G. FAQs, BMPs, General Permit language, etc) to reflect applicable changes. In addition, local governments needed appropriate time to update local development ordinances. The Department agreed at the time that a delayed operative date was needed to deal with equity / fairness issues related to the transition to relevant new standards related to project design and layout. The same conditions exist with the IFP Rule Proposal, and the same treatment is warranted.

The Department anticipates that applicants conducting regulated activities that are subject to N.J.A.C. 7:8 may be required to provide expanded or additional stormwater BMPs due to the amendments, repeal, and new rule, which require the applicant to apply a change factor to the projected rainfall depths as part of the calculation to determine adequate stormwater BMPs for a site.

Similar to the potential economic impacts discussed for compliance with the amendments, repeal, and new rule related to the design flood elevation above, costs associated with expanded or additional stormwater BMPs could include application fees, site evaluation, engineering, design, raw materials, and labor associated with constructing and/or installing stormwater BMPs for projects subject to N.J.A.C. 7:8. In addition, the Regulatory Flexibility Analysis properly identifies that the Department cannot predict the exact impact of this proposal.

For these reasons, we are formally requesting an effective date of five months after the final adoption date and a full one year delayed operative date for all projects.

Flexibility to Amend / Incorporate More Accurate Data

UTCA supports that the IFP Rule Proposal allows applicants to calculate a floodway utilizing Method 6 but notes that this approach is time-consuming and costly, making it difficult for cost constrained projects and residents to utilize. Therefore, we believe the Department should create a process that, if numerous applicants in a region have utilized a Method 6 calculation which shows flood elevations are different than the Department-issued design flood projections, those elevations be recalculated in that region by the Department.

Scientific Models Projecting Future Conditions

The Department has publicly acknowledged through the PACT process that models that project conditions past 2050 have far less certainty. **Therefore, we recommend that updated precipitation projections be limited to conditions up to 2050.** The Department can and should update its standards over time as the accuracy of these models is tested against reality.

The rule proposal claims that "as precipitation depth, intensity, and duration increase due to climate change, fluvial flood elevations will increase, as well." While a logical connection exists for this claim, no evidence describing a calculatable nexus between increasing precipitation and flood elevation is provided. The 2020 New Jersey Scientific Report on Climate Change does not appear to reference any studies which specifically focus on increased fluvial flooding or the effects of increased precipitation as it relates to floodplain size and depth. **The UTCA requests that the Department clarify what "science" it is pointing to when drawing its claims.**

Existing Infrastructure

The Department acknowledges the limitations of the IFP Rule Proposal and that it does not impact existing development or infrastructure. Much of the justification of why this proposal is necessary related to failed existing infrastructure and not the risk of new major development, which the IFP Rule Proposal focuses on.

While the Department anticipates that the proposed amendments, repeal, and new rule will result in increased public safety, minimization of property damage, and reduced need for relief measures the **UTCA believes that these positive impacts of this proposal will be minimal. What will make these potential benefits fully realized is a concerted focus from the Federal government and the State of New Jersey on accelerating the improvement of existing infrastructure.**

Without upgrades to existing infrastructure, any measurable long-term economic savings related to decreased damages and loss of property will remain elusive. The idea that the State of New Jersey, with very little buildable land available for development, can regulate its way to these benefits is intellectually dishonest. Much more than this rule proposal is needed to protect people and property in the State of New Jersey. New Jersey needs serious infrastructure upgrades (construction) to protect our residents' lives and property.

Department Capacity

The Department lacks the capacity to deal with the torrent of questions and issues that will undoubtedly come when the IFP Rule Proposal is adopted. **The UTCA requests that the Department disclose its plan to address its staffing capacity issues in the final adoption document, including any plans to supplement its internal application review capacity with complementary qualified engineers from private firms.**

Thank you for the opportunity to comment on this proposal.

Sincerely,

Dan Kennedy

Senior Director / Environmental and Utility Operations

About the UTCA of NJ

The Utility and Transportation Contractors Association of New Jersey is a non-profit trade association headquartered in Wall Township, New Jersey. Founded in 1965, UTCA represents approximately 1,000 member firms in the public and private sectors, active in all phases of heavy, highway, utility, and marine construction, as well as site work including remediation of brownfields and contaminated sites.

On behalf of its member firms, UTCA strives to create a positive impact on New Jersey citizens, the health of the environment and our shared economic prosperity by leveraging its respected expertise and relationships to promote a sustainable infrastructure sector. We assist our members in achieving success through a collective focus on infrastructure funding, legislative and regulatory advocacy, labor relations, improved working conditions and project-based problem solving.