



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Division of Land Use Regulation

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NJDEP Response to Public Comment on Bi-County Settlement

Process

1. Why was the Settlement done so secretively?

The anticipated settlement, which was tentatively executed in January 2014 and which is subject to public comment and review, has not been conducted secretly.

The Department of Environmental Protection ("DEP" or the "Department") has been engaged in litigation with Bi-County since September 2008 when Bi-County/Pinnacle appealed the Department's disapproval of its application for an amendment to the Northeast Water Quality Management Plan (WQMP). During the appeal, the parties discovered the Borough of Oakland had actually submitted to NJDEP a Wastewater Management Plan (the "1990 Oakland WMP") to authorize sanitary sewer service for the project through a connection to the municipal system operated by the adjacent Township of Wayne. This WMP was duly adopted by the Department on February 4, 1991 pursuant to regulation, and no person appealed the 1991 amendment.

Because there is an existing, valid WMP for Oakland, the applicant no longer needs an amendment to the Northeast WQMP. As such, the Department and the applicant entered into settlement talks to resolve this issue and the Department proceeded to review the then pending Freshwater Wetlands general permit applications that had been submitted for this project in 2007 and 2013.

The Department is following the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-1.7(h) which set forth the requirements for notifying the public in the event the Department enters into a settlement of wetlands permit appeals. No timeframe is given in this rule as to when the 'Notice of Intent to Settle' must be issued for public comment. The Department published the Notice of Intent to Settle in the April 2, 2014 DEP Bulletin, and Bi-County sent the required notices to those persons entitled to receive notice.

2. Notice of the start of the public comment period was not done properly. The notices were sent too late and were not sent to everyone who was entitled to receive one.

The Settlement Agreement states that, "upon execution of this Settlement Agreement, the Department shall within thirty (30) days publish a Notice of Intent to Settle and to Issue

Permit in the NJDEP Bulletin and accept public comment for thirty (30) days after receipt of applicable notice.”

The Settlement Agreement was executed on January 28, 2014. However, the ‘Notice of Intent to Settle and to Issue Permit’ was not published in the DEP Bulletin until April 2, 2014. Although this exceeded the deadline set forth in the Settlement Agreement, the public comment period was extended from 30 days to 60 days to ensure the public has sufficient time to comment on the Settlement Agreement.

Additionally, the Department’s Freshwater Wetlands rules at N.J.A.C. 7:7A-1.7(h) set forth the requirements for notifying the public, in the event the Department anticipates entering into a settlement. The rules require that public notices be sent to each person who was provided notice of the application for the permit or approval which is the subject of the appeal; and to each person who commented on the application.

For the then pending Freshwater Wetlands General Permits 10B and 11, the applicant was required to notify the municipal clerk, the municipal environmental commission, the municipal planning board, the municipal construction official, the county planning board, and all owners of land within 200 feet of the property boundary. The applicant submitted a certified list of property owners within 200 feet of the site.

The applicant has provided copies of certified mail receipts to the Department indicating that all parties mentioned above were sent a copy of the public notice.

3. The DEP should extend the length of the public comment period.

At the request of several commenters, the Department extended the 30-day public comment period on this application by an additional 30 days.

4. OPRA did not respond to requests for documents within 7 business days, so commenter Highlands Coalition did not have enough time to review requested documents.

Despite the claim of inadequate time to review documents, the Highlands Coalition did initially submit a series of comments on the proposed Settlement. However, to ensure a full opportunity to review documents and to comment, the DEP, upon review of this objection, afforded an additional opportunity to review the files and to comment. As a result, on September 3, 2014, the Highlands Coalition reviewed the files again and was given another two weeks, which it found acceptable, in which to submit additional comments. As of September 30, 2014, the Highlands Coalition did not submit any added comments or objections.

Environmental – Land Use

5. The DEP should move forward with a preservation plan for the site, not entering an agreement that would allow 204 units to be built. Why isn’t the DEP’s priority protecting environmentally sensitive land and conserving natural resources?

The NJDEP Division of Land Use Regulation (DLUR) implements the State's land use regulations, specifically those with jurisdiction over the Bi-County property: the Flood Hazard Area Control Act and implementing rules at N.J.A.C. 7:13 (FHA rules), the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules), and the Highlands Water Protection and Planning Act N.J.S.A. 13:20-1 (Highlands Act) and implementing rules at N.J.A.C. 7:38 (Highlands rules). The revised project, as proposed, has been deemed exempt from the Highlands rules, and has been found to comply with the FHA rules, as demonstrated by the "Stream Encroachment Permit" issued for this project in November 2007 (File No. 0000-03-0013.4, FHA070001). Furthermore, DLUR has now determined that the pending FWW GP-10B, GP-11, and Transition Area Waiver Reduction applications comply with the FWW rules and will be approved.

If a proposed development complies with the State's duly adopted land use regulations, the DLUR cannot prevent a property owner from pursuing that development on their site.

6. The Highlands Preservation Area will be adversely impacted.

Pursuant to the Highlands Water Protection and Planning Act (N.J.S.A. 13:20-28a(17) and the Department's rules at N.J.A.C. 7:38-2.3(a)17, the project is exempt from the statute. Therefore, the Department does not hold authority to review the project under the Highlands Act.

7. The development would impact a Category 1 stream which feeds into the Ramapo River, violating DEP anti-degradation standards and resulting in more pollution and runoff in the River. Additionally, the required 300-foot buffer adjacent to Category 1 streams is not being adhered to.

The Division issued a "Stream Encroachment Permit" for this project (File No. 0000-03-0013.4, FHA070001) because the project complied with the standards of the Flood Hazard Area Control Act rules at N.J.A.C. 7:13 (FHA rules) in effect at the time of receipt of a complete application, in accordance with N.J.A.C. 7:13-1.3(c). Additionally, this permit authorization included a review for compliance with the Stormwater Management Rules at N.J.A.C. 7:8, which for major developments require a 300-foot SWRPA buffer adjacent to Category 1 waters that are mapped on either the USGS or Soil Survey maps. DEP determined the project complied with both rules, which means that all requirements for Category 1 streams have been met. As discussed in the Settlement Agreement, the permit expiration date has been tolled, in part, because the permittee was erroneously denied the ability to start construction due to the Department's issuance of an incorrect WQMP Inconsistency Determination letter.

Because the "Stream Encroachment Permit" is still valid (through tolling), the project is not required to comply with the revised FHA rules, which now require a 300-foot riparian zone adjacent to all Category 1 waters.

8. Wetlands will be permanently destroyed.

The Department holds the authority to protect freshwater wetlands under the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules). These rules allow wetlands to be disturbed in a regulated fashion pursuant to the rules. The

applicant has applied for Freshwater Wetlands General Permits 10B and 11 to disturb freshwater wetlands to construct an access road and stormwater outfalls. Under the rules in effect in 2007 (at the time of application), the project did not require mitigation for impacts authorized under general permits. As a matter of fact, the project does meet the general permit standards. As such, the Department will issue permits authorizing the disturbance of 0.155 acre of freshwater wetlands and 0.118 acre of State open waters and transition area on the 83.48 acre parcel.

9. Habitat for the barred owl, a threatened species, will be adversely impacted if not destroyed. Just saving the steep sloped areas does not create habitat conducive to saving a species. Additionally, the 16 acre "Conservation Areas" are not contiguous and are therefore less effective to the barred owl as habitat.

The proposed project has been reviewed by the NJDEP Division of Land Use Regulation's Threatened & Endangered Species Unit (T&E Unit), whose review concluded the following:

The proposed project will require a Freshwater Wetlands General Permit 10B for a road crossing a non-tributary wetland and a FWW GP 11 for stormwater outfall structures. The GP10B will authorize the disturbance of 0.155 acre of freshwater wetlands. The GP11 will authorize the disturbance of 0.118 acre of State open waters and transition areas. The Freshwater Wetlands rules (FWW rules) at N.J.A.C. 7:7A-4.3(b)3 state that all general permit authorizations shall not destroy, jeopardize or adversely modify a present or documented habitat for threatened or endangered species; and shall not jeopardize the continued existence of any local population of a threatened or endangered species. Bi-County has addressed this requirement under section 3.3 of its compliance statement: "Conditions that Apply to all General Permit Authorizations." Bi-County correctly concluded that the loss of less than a quarter-acre of habitat within a habitat patch of approximately 400 acres cannot be determined to "destroy, jeopardize or adversely modify the documented habitat" identified on the Landscape Maps for the barred owl in this particular location. The T&E Unit also notes that no trees of suitable nesting size or habitat features which are critical to roosting or foraging would be disturbed by these proposed activities.

Bi-County has also applied for a Transition Area Waiver Reduction pursuant to N.J.A.C. 7:7A-6.1(d) to reduce the 150 ft. transition area adjacent to the exceptional resource value wetlands by 1.718 acres (74,874 sq. ft.). The proposed transition area waiver reduction of 1.718 acres would enable the construction of several single-family dwellings and a detention basin. To compensate for the transition area reduction, the wetland transition area will be expanded by 1.363 acres. In addition, 16.81 acres of additional forested uplands that provide suitable barred owl habitat on the subject parcel will also be preserved.

After a thorough review of all relevant documentation, the T&E Unit finds the proposed plan is consistent with the standards of the FWW rules, as the proposed plan would not appreciably result in increases in sediment, nutrient or pollutant loading and/or degrade water quality in the wetland that would result in an alteration of the wetlands' ability to provide suitable habitat for the barred owl. In regard to impacts to the wetland habitat of the barred owl, the plan will result in the final net loss of 0.355 acre of habitat within the transition area of the largest wetlands onsite. However, the T&E Unit has determined that this relatively small loss of habitat is more than offset by the supplemental preservation of 16.81 acres of suitable

upland forest habitat, which is proximate to the wetlands and within the same Barred owl habitat, as depicted on the site plan entitled: "NJDEP Permitting Plan for Bi-County Oakland, Block 3001, Lots 1, 4, 15 and 18, Tax map Sheet #30, Borough of Oakland, Bergen County, New Jersey," consisting of one sheet, dated May 18, 2012, last revised October 5, 2012 and prepared by Maser Consulting P.A. (the "Plan"). The T&E Unit has determined that the preservation of the forested steep slope areas on site through creation of conservation areas not only preserves habitat for barred owl, but also provides an additional level of habitat protection by serving as a screen from the forthcoming development. While the proposed development project will segment the forested habitat on-site, the amount and quality of remaining forest, both upland and wetland, will continue to provide suitable habitat for the barred owl. As a result, the barred owl can still use the remaining wetlands and the preserved forested areas for resting and foraging, and the remaining on-site habitat will also serve as a corridor to habitat south and north of the parcel.

The development will result in a total, permanent loss of 0.628 acres of regulated barred owl wetland, State open water, and transition area habitat (0.273 acre permanent wetlands, State open waters and transition area loss through general permit activities; 0.355 acre permanent transition area loss through transition area reduction). After a thorough review of all relevant documentation, the T&E Unit finds the proposed plan is consistent with the standards of subchapters 5 and 6 of the Freshwater Wetland Protection Act rules. The T&E Unit believes the amount of wetland and transition area habitat lost to development is minor in comparison to the amount of wetland and transition areas that remain and that will be preserved. In combination with the additional upland conservation areas onsite, the forested wetlands on site will retain the same structure and function as they did prior to development and continue to provide barred owl with the necessary habitat components without adversely affecting the existing population in the area.

10. According to the Highlands Coalition, the Highlands Council notes that any disturbance to the mapped habitat for Barred Owl will result in forest fragmentation, which would be inconsistent with the policy statement prohibiting the alteration or disturbance of critical wildlife habitat. These areas should be protected from damage or destruction resulting from indirect impact of development activities.

The potential disturbances to barred owl habitat meet the requirements of the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A and are therefore permissible. See the response to #9 above.

11. Other endangered species may be present, such as Indiana bat and small-whorled pogonia. A survey for these species has been requested by the USFWS.

The site has been identified as potential habitat for Indiana bat, northern long-eared bat, and small-whorled pogonia by the U.S. Fish and Wildlife Service (USFWS), and the USFWS is requesting that the site be surveyed for these species. The Department has informed Bi-County of the USFWS requirement to survey for these species. Bi-County will be required to complete these surveys and adhere to any subsequent USFWS recommendations as a condition of any Freshwater Wetlands permits for the project and prior to any site disturbance or construction.

12. Some of the houses are located too close to the Exceptional Resource Value wetlands, which will adversely affect the wetlands. There is one house located entirely within the wetlands protection area.

The Department holds the authority to protect freshwater wetlands and transition areas under the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules). However, the rules allow wetlands and transition areas to be permanently impacted in certain circumstances. Contrary to the commenter's claim, none of the proposed houses are located within freshwater wetlands, although some of the houses are located within the adjoining freshwater wetlands transition areas. The applicant has applied for a Transition Area Waiver Reduction pursuant to N.J.A.C. 7:7A-6.1(d). As part of the applicant's compliance with N.J.A.C. 7:7A-6.1(d), the applicant proposes to permanently conserve 16.81 acres of forested areas on-site to offset the proposed encroachments into transition areas.

The Department has reviewed the project for compliance with the standards at N.J.A.C. 7:7A-6.1(d). The project does meet these standards and as such, the Department will issue a Transition Area Waiver in accordance with the FWW rules.

13. Lakes and streams in the vicinity of the project will become polluted. The heavily wooded site will be replaced with impervious surfaces, roads, and fertilized lawns, resulting in harmful runoff to C-1 streams and Exceptional wetlands.

The Division issued a "Stream Encroachment Permit" for this project in November 2007 (File No. 0000-03-0013.4, FHA070001) because the project complied with the standards of the Flood Hazard Area Control Act rules at N.J.A.C. 7:13 in effect at the time of permit issuance. Additionally, this permit authorization included a review for compliance with the Stormwater Management rules at N.J.A.C. 7:8. The Department determined the project complied with both Flood Hazard and Stormwater Management rules, which means the project complies with State regulations regarding stormwater runoff and off-site flooding impacts.

14. The site is a resting stop for migratory birds.

The NJDEP Division of Land Use Regulation's Threatened & Endangered Species Unit (T&E Unit) and the U.S. Fish and Wildlife Service (USFWS) have both reviewed the proposed project. The site has been identified as barred owl habitat by the T&E Unit, and as potential habitat for Indiana bat, northern long-eared bat, and small-whorled pogonia by the USFWS. No concerns have been identified regarding migratory bird species by either entity.

15. The 2004 LOI is now over 10 years old.

The Department issued a Freshwater Wetlands Letter of Interpretation (LOI) for this site on February 26, 2004 (File No. 0000-03-0013.1, FWW030001), establishing the regulatory extent of freshwater wetlands, transition areas, and State open waters on-site. Bi-County applied for an extension of the LOI which the Department issued on November 13, 2009, and which extended the terms of the LOI until February 26, 2014. The LOI Extension has now expired; however, a valid LOI is not required for the Department to issue a decision on Freshwater Wetlands General Permit or Transition Area Waiver applications. More important, during the course of recent site

inspections to review the freshwater wetlands general permit applications, the Department did not identify any new or added wetlands areas that would be affected by the proposed project.

16. The property should not be developed because it contains steep slopes, unique geology, and a mature forest.

The NJDEP Division of Land Use Regulation (DLUR) implements the State's land use regulations, specifically with jurisdiction over the Bi-County property: the Flood Hazard Area Control Act and implementing rules at N.J.A.C. 7:13 (FHA rules), the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules), and if applicable, the Highlands Water Protection and Planning Act and implementing rules at N.J.A.C. 7:38 (Highlands rules). The FHA and FWW rules do not regulate unique geologic features or mature forests, unless the forests lie within a regulated area such as a wetland, transition area, or riparian zone. Much of the forested areas on-site fall outside of these regulated areas. Steep slopes are not regulated under the FWW permits for which the applicant has applied for this project.

This project is exempt from the Highlands Act, and the proposed Settlement Agreement does not involve the statutory Highlands exemption. DLUR has determined the project complies with the FHA rules. Furthermore, DLUR has determined that the project complies with the FWW rules through its review of the FWW GP-10B, GP-11, and Transition Area Waiver applications.

17. The site has historical significance and was used as a lookout during the Revolutionary War.

The project has been reviewed by the Department's State Historic Preservation Office (SHPO). Its review concluded that based on the project's topographic setting, the location of the proposed project indicates a high sensitivity for the potential presence of Native American archaeological resources, including potential rock quarries, rock shelters, burials, and/or ceremonial sites. Additionally, due to the history of Revolutionary War activity on Governor Mountain, the project location also exhibits a high sensitivity for the potential presence of historic archaeological resources. Therefore, to comply with the provisions of the Freshwater Wetlands rules at N.J.A.C. 7:7A, a Phase I archaeological survey must be completed to assess the extent of archaeological resources within the project area for all portions of the project located outside the footprint of the previous self-storage development. If archaeological resources are identified, a Phase II survey will be required to evaluate the National Register eligibility of the site and assessment of project impacts. The applicant has been notified of these survey requirements. All SHPO surveys and mitigation will be conducted prior to any site disturbance and construction and in a manner which is fully acceptable to the SHPO.

18. This development at the top of a ridge will cause runoff to flow into the town and river, which will flood Oakland, Wayne, and Pompton Lakes. The development will cause downstream flooding at the Manitou Development in Wayne.

The Division issued a "Stream Encroachment Permit" for this project in November 2007 (File No. 0000-03-0013.4, FHA070001) because the project complied with the standards of the Flood Hazard Area Control Act rules at N.J.A.C. 7:13 in effect at permit issuance. Additionally, this permit authorization included a review for compliance with the Stormwater Management rules at N.J.A.C. 7:8. The Division found the project complied with both sets of rules which

means the project complies with State regulations regarding stormwater runoff and off-site flooding impacts. As a result of the approved proposed engineering, the Division does not anticipate downstream flooding from the project.

19. Why did the applicant withdraw the FWW GP-6 and apply for a GP-10B?

The applicant withdrew the FWW GP-6 application because the site contains exceptional resource value wetlands and therefore did not qualify for the GP-6. The applicant therefore withdrew the GP-6 application and submitted an application for a GP-10B, to authorize the construction of a linear roadway, through freshwater wetlands, to access the proposed development. Pursuant to the regulations, roadcrossings must be minimized to the "extent practical."

20. DEP should require Bi-County to set up a fund to perpetually preserve, protect, and restore the wetlands. They should be required to mark the wetlands boundaries by a fence and have the area checked regularly by environmentalists.

The Department holds the authority to protect freshwater wetlands under the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules). These rules regulate disturbances to wetlands, but do authorize limited disturbances under certain conditions. The applicant has applied for a Freshwater Wetlands General Permit 10B and 11 to disturb freshwater wetlands to construct an access road and stormwater outfalls. Furthermore, the Department has reviewed the project for compliance with the standards of these general permits under the FWW rules, in effect in 2007, when the applicant submitted a complete application. As the project does meet these general permit standards, the Department will issue the requested general permit authorizations.

The FWW rules do not require applicants to establish wetlands funds or require permanent wetlands inspections by environmentalists.

21. Runoff from this development will negatively impact the downstream Great Oak Park property.

The DEP issued a "Stream Encroachment Permit" for this project in November 2007, (File No. 0000-03-0013.4, FHA070001) because the project complied with the governing standards of the Flood Hazard Area Control Act rules at N.J.A.C. 7:13 at the time of permit application and issuance. Additionally, this permit authorization included a review for compliance with the Stormwater Management rules at N.J.A.C. 7:8. The project was found to comply with both sets of rules which means that the project complies with State standards regarding stormwater runoff and off-site flooding impacts. As a result of the approved engineering plans, the DEP does not anticipate adverse impacts to the downstream Great Oak property.

Environmental – Watershed Management/Water Supply

22. The project will destroy an irreplaceable Preservation Area that is part of a larger biosphere in the Highlands. The site has been identified by the NJ Natural Heritage Program as part of the Preakness Mountain Macrosite, with a biodiversity rank of B2, which has a very high biodiversity significance. The project will sever this corridor.

Environmental resources, such as Natural Heritage Priority sites, would be considered as part of an environmental review for any proposed amendment to a Water Quality Management (WQM) Plan. However, as noted in the Settlement Agreement, the project was previously determined to be consistent with the adopted Oakland Township Wastewater Management Plan (WMP) (adopted February 4, 1991) and Exempt from the Highlands Water Protection and Planning Act under N.J.S.A. 13:20-28(a)(17).

As per *this* Settlement Agreement, on September 26, 2001, by Order of Final Judgment, the Court determined that the Township of Wayne had a constitutional obligation to accept wastewater from the project and ordered Oakland and Wayne to execute a municipal service agreement to provide for such wastewater service. Therefore, an amendment to the WQM Plan is not required. Despite the foregoing, the proposed project is still subject to any outstanding federal, state or local approvals that may be applicable.

23. All three source water subwatersheds are in deficit of net water availability. Any exacerbation of that deficit is inconsistent with the Highlands Regional Master Plan, unless 125% mitigation is provided in the deficit subwatersheds.

Pursuant to the Highlands Act and the implementing rules at N.J.A.C. 7:38-2.3(a)17, the project is exempt from that statute. Therefore, the Department holds no authority to review the project for consistency with the Highlands Act or the Highlands Regional Master Plan (RMP).

24. The settlement approves a depletive use of the Ramapo River, which violates the Highlands Regional Master Plan, as the watershed is in a deficit and additional depletive uses should not be approved. The development will result in less available water for downstream uses.

This settlement was entered into pursuant to the Water Quality Planning Act, the Freshwater Wetlands Protection Act and the Flood Hazard Area Control Act. Pursuant to the Highlands Act and its implementing rules at N.J.A.C. 7:38-2.3(a)17, the project is exempt from that statute. Therefore, the Department holds no authority to review the project for consistency with the Highlands Act or the Highlands Regional Master Plan (RMP). The settlement requires that "Petitioner must obtain any other approvals required by local, state or federal law". This would include any and all requirements of the Water Supply Management Act N.J.S.A. 58:1A-1, the Water Supply Allocation Permits rule N.J.A.C. 7:19 and the Safe Drinking Water Act rules N.J.A.C. 7:10, as applicable. An assessment of any potential adverse impact of a diversion would be made if an application for an increased water allocation is submitted to the Department.

25. The development will result in potentially higher levels of pollutants in the Ramapo River as less water is available for dilution.

Neither the Freshwater Wetlands Protection Act nor its implementing rules regulate the dilution of pollutants. Therefore, the DEP's issuance of freshwater wetlands general permits and transition area waivers is not contingent on the dilution of pollutants.

26. The Project's proposed diversion would constitute an inter-basin transfer and would result in a loss of water to the Upper Passaic Basin and to the North Jersey District Water Supply

Commission system. Depletive losses to a surface water supply/intake and interbasin transfers of water are discouraged by the Department.

This settlement was entered into pursuant to the Water Quality Planning Act, the Freshwater Wetlands Protection Act and the Flood Hazard Area Control Act. As noted elsewhere, the settlement requires that "Petitioner must obtain any other approvals required by local, state or federal law". This would include any and all requirements of the Water Supply Management Act N.J.S.A. 58:1A-1, the Water Supply Allocation Permits rule N.J.A.C. 7:19, and the Safe Drinking Water Act rules N.J.A.C. 7:10, as applicable.

In order for Oakland Borough and/or the Division of Water Supply & Geoscience to issue any water supply permits, including but not limited to water main extension permits and/or a modification to the Water Allocation permit, Oakland Borough must demonstrate full compliance with the above noted statutes and regulations, including but not limited to N.J.A.C. 7:19-1.5 and N.J.A.C. 7:19-2.2(f)3. Compliance with water supply regulations has not been evaluated or addressed by this settlement agreement.

27. Since site conditions have not changed, how is the DEP able to reverse its 2008 decision? The serious environmental concerns that caused the DEP in 2008 to stop this development still exist.

As noted in the Settlement Agreement, the project was determined to be consistent with the previously adopted Oakland Township Wastewater Management Plan (WMP) (adopted February 4, 1991) and exempt from the Highlands Act under N.J.S.A. 13:20-28(a)(17). Neither the DEP nor Bi-County realized in 2008 that Bi-County had already secured a WQMP amendment in 1991. Further, as referenced by *this* Settlement Agreement, on September 26, 2001, by Order of Final Judgment, the Superior Court determined the Township of Wayne had a constitutional obligation to accept wastewater from the project and ordered Oakland and Wayne to execute a municipal service agreement to provide for such wastewater service.

28. An adjacent township has been directed by the courts to accept the project wastewater, even though their existing wastewater treatment system was not engineered to support development outside of their borders.

This settlement recognizes that Bi-County originally secured a WQMP Amendment in 1991 and has applied for Freshwater Wetlands permits. The Township of Wayne has also been a party to Bi-County's affordable housing constitutional litigation with the Borough of Oakland.

29. If water is pumped out of Oakland into Wayne, what will Oakland do when their supply of water is depleted?

This settlement was entered into pursuant to the Water Quality Planning Act, the Freshwater Wetlands Protection Act and the Flood Hazard Area Control Act. The settlement recognizes that "Petitioner must obtain any other approvals required by local, state or federal law". This would include requirements under the Water Supply Management Act N.J.S.A. 58:1A-1, the Water Supply Allocation Permits rules N.J.A.C. 7:19 and the Safe Drinking Water Act rules N.J.A.C. 7:10. Compliance with water supply regulations has not been evaluated or addressed by this settlement agreement.

30. The wastewater from the project would exceed the total maximum daily load of contaminants in the Pompton River.

The settlement recognizes the longstanding, pre-existing 1991 WQMP amendment and the issuance of permitting decision for two Freshwater Wetlands general permits. It does not affect the potential need to amend other permits issued to the Township of Wayne.

31. How can DEP rely on a 1990 Wastewater Management Plan, when so much has changed since then?

The adopted 1990 Oakland Township WMP remains valid until such time that it is amended.

Legal

32. The proposed Settlement neglects to consider any impacts to the public trust resources the Department is charged with protecting. It is unconscionable that a legal loophole could trump the Department's primary responsibility of environmental protection.

The proposed Settlement addresses all applicable public trust resources which are subject to regulation pursuant to the Freshwater Wetlands Protection Act, See N.J.S.A. 13:9B-1 et seq. and its implementing regulations, N.J.A.C. 7:7A-1.1. *et seq.* ("FWPA"). Pursuant to the Settlement, the Department acknowledges the prior adoption of the 1990 Borough of Oakland Wastewater Management Plan (23 N.J.R. 910 – March 18, 1991) as part of a 1991 amendment of the Northeast WQMP to address the municipality's constitutional affordable housing obligation.

The Department is issuing wetlands permits for a minor road crossing and outfalls and an accompanying transition area waiver all of which meet the stormwater standards. As part of the Settlement and to ensure adequate protection of resources, the applicant has agreed to grant a conservation restriction for approximately 16 acres of barred owl habitat for certain proximate uplands besides compliance with wetlands and transition area buffer area requirements. In addition, the wetlands permits include accompanying conditions recommended by the Department of Interior US Fish & Wildlife Service to protect federally listed bat species.

Further, pursuant to the State's assumption of Section 404 of the federal Clean Water Act and consistent with Section 106 of the National Historic Preservation Act, the Department's State Historic Preservation Office is mandating certain surveys to ensure protection of historic and archaeological resources. Thus, the Department's general wetlands permitting determination protects all relevant regulated resources. As stated herein, Bi-County previously secured a "Stream Encroachment Permit" which included a stormwater management review.

33. The Settlement violates the Dragon decision. The DEP is using its settlement power to avoid forcing Bi-County's compliance with the Highlands Water Protection and Planning Act, and is also using its settlement power to redefine the term 'final approval' as used in the Municipal Land Use Law. The project's exemption under the Highlands Act has expired because the

Oakland Planning Board granted the project preliminary and final approval on July 12, 2007. More than three years have elapsed since the final approval and no construction has commenced.

The Settlement complies with *Dragon v Department of Environmental Protection and Kelly*, 405 N.J. Super. 478 (App. Div.), cert. denied 199 N.J. 517 (2009), as the resolution of this litigation complies with all applicable regulations.

The Department determined in 2005 the proposed project was exempt from the Highlands Act. That statutory proviso exempts development located in State Planning Areas 1 or 2 where a Mount Laurel settlement had been reached in Superior Court to help satisfy a municipality's affordable housing fair share obligation. Bi-County executed such an affordable housing settlement dated January 14, 1991 entitled "Agreement Between Bi-County Development, Inc., and The Borough of Oakland in the County of Bergen, and The Planning Board of the Borough of Oakland." A January 29, 1991 Stipulation of Dismissal with Prejudice (Docket NO. L-022851-87PW) was also executed.

Contrary to the commenter's statement, the exemption has not expired, as Bi-County has not yet received all final approvals required pursuant to the Municipal Land Use Law N.J.S.A. 40:55D-1 *et seq.* ("MLUL"). The Legislature enacted various exemptions to the Highlands Act, including exemption number 3 which required as a pre-condition obtaining various site plan or subdivision approvals or a final building or construction permit, among other requirements. However, under the subject exemption number 17, the Legislature specified that the exemption would expire "if construction beyond site preparation does not commence within three years after receiving all final approvals required pursuant to the MLUL."

In this case, the proposed project has not secured all final approvals required by the Planning Board and pursuant to the MLUL. In particular, Bi-County has not obtained county planning board approval which is required by the MLUL under N.J.S.A. 40:55D-50(b), since the subject property fronts on a county road.

In addition, the Oakland Borough Planning Board's own July 12, 2007 MLUL authorized preliminary and final site plan approval declared that the site plan approvals are subject to all approvals to be issued by DEP. Additionally, in that July 2007 approval, the Oakland Planning Board opined that re-design of road "D" may result in a re-design of the detention system, roads and buildings near that road "at which time the Applicant will be required to return to the Planning Board for amended site plan approval." Thus, Bi-County has not yet secured all final approvals required pursuant to the MLUL and the municipal planning board. Condition number 15 of the Planning Board approval also requires approval of a stormwater management plan by the Borough Engineer. Condition number 38 requires municipal approval of a "Conservation Easement for all areas designated as wetlands and wetlands buffer." Thus, Bi-County has not yet secured all final approvals and the three year period referenced in exemption 17 has not yet started to run.

34. The proposed development is not in accordance with Executive Order 114, which was issued by Governor Corzine and remains in effect.

Executive Order 114 requires the Department to take appropriate action to ensure that no approval is given to any portion of a WQM Plan amendment in the Protection Zone, the Conservation Zone, or the Environmentally-Constrained Sub-Zones, as delineated in the Highlands Plan, within a HUC14 subwatershed that is in, or anticipated to be in, a deficit of net water availability, as identified by the Highlands RMP, unless the approval is conditioned on a Municipal Water Use and Conservation Management Plan, consistent with the policies in the Highlands Plan, having been approved by the Highlands Council and having been fully implemented. However, as noted in the Settlement Agreement, the proposed project is exempt from the Highlands Act. In addition, no WQMP amendment is authorized under the settlement, and that approval was secured in 1991. In addition, the project has been determined to be consistent with the Oakland Township Wastewater Management Plan, and so no amendment is necessary.

Miscellaneous

35. Development of the site may require extensive blasting, causing structural damage to existing homes and property.

The NJDEP Division of Land Use Regulation (DLUR) implements the State's land use regulations, specifically those that had jurisdiction over the Bi-County property include: the Flood Hazard Area Control Act and implementing rules at N.J.A.C. 7:13 (FHA rules), the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules), and when applicable the Highlands Act and implementing rules at N.J.A.C. 7:38 (Highlands rules). These rules do not regulate blasting, and the applicant is responsible for compliance with all other applicable federal, state, and local requirements.

36. The project will violate the Federal Highlands Conservation Act, signed by President Bush on 11/30/04, which recognizes the value and priority of conserving land and natural resources in the Highlands Region (NJ, NY, PA, CT).

Pursuant to the Highlands Act (N.J.S.A. 13:20-28a(17)) and the implementing rules at N.J.A.C. 7:38-2.3(a)17, the project is exempt from the Highlands Act. Therefore, the Department holds no authority to review the project for Highlands Act compliance.

37. The project is completely contrary to the Smart Growth principles promulgated by our State and the EPA. The location of this development does not make sense. Low income housing should be in an area within walking distance of transportation, shops, and other facilities.

The NJDEP Division of Land Use Regulation (DLUR) implements the State's land use regulations, specifically those with jurisdiction over the Bi-County property: the Flood Hazard Area Control Act and implementing rules at N.J.A.C. 7:13 (FHA rules), the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules), and the Highlands Water Protection and Planning Act and implementing rules at N.J.A.C. 7:38 (Highlands rules). These rules do not regulate the location of low-income housing. Such concerns should be addressed to other agencies.

38. Traffic in the area will be even worse with the proposed development.

The NJDEP Division of Land Use Regulation (DLUR) implements the State's land use regulations, specifically those that have jurisdiction over the Bi-County property: the Flood Hazard Area Control Act and implementing rules at N.J.A.C. 7:13 (FHA rules), the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules), and if applicable, Highlands Act and implementing rules at N.J.A.C. 7:38 (Highlands rules). These rules do not directly regulate the impact of a proposed development on local traffic. However, the applicant must meet all applicable traffic standards established by the State, county, or municipality.

39. I support Wayne Township Resolution 135 objecting to the terms of the proposed settlement.

The January 2014 Settlement Agreement between Bi-County and DEP recognizes that in 1991 Bi-County secured a WQMP amendment for the Property and consequently Bi-County no longer needed to file such an administrative application. In addition, Bi-County submitted applications for freshwater wetlands permits for a road crossing and stormwater outfalls. DEP is issuing permitting decisions for these wetlands applications; that is the extent of the January 2014 Settlement Agreement.

The Township of Wayne objects to the Settlement Agreement citing the September 26, 2001 Final Judgment of the Bergen County Superior Court Law Division between Bi-County, the Borough of Oakland and the Township of Wayne. That judgment concerned affordable housing and the Township of Wayne's constitutional obligation to accept the effluent wastewater from Bi-County's Property, and the conditions pursuant to which Wayne would need to, or not need to, accept such effluent. DEP was not a party to that litigation. Any outstanding conditions or issues arising out of that litigation must be addressed before the Law Division or Council on Affordable Housing, as appropriate. The 2014 Settlement Agreement does not affect the respective parties' rights and obligations recognized by the 2001 Final Judgment or the subsequent 2006 settlement between those other parties.

40. Adding 200+ homes to Oakland will exacerbate already high taxes and limited resources, such as volunteer first aid, fire departments, and schools.

The NJDEP Division of Land Use Regulation (DLUR) implements the State's land use regulations, as these may be applicable to the Bi-County property, including: the Flood Hazard Area Control Act and implementing rules at N.J.A.C. 7:13 (FHA rules), the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules), and the Highlands Act and implementing rules at N.J.A.C. 7:38 (Highlands rules). These rules do not regulate local property taxes and municipal services.

41. No one has studied how the proposed development and associated water usage will affect neighboring property owners who have private wells.

This settlement was entered into pursuant to Water Quality Planning Act, the Freshwater Wetlands Protection Act and the Flood Hazard Area Control Act and delegated to the Department's Division of Land Use Regulation to settle matters relative to those specific programs. However, based on the fact the proposed development is to be served by the Oakland Borough public community water system, the Department does not expect any impacts

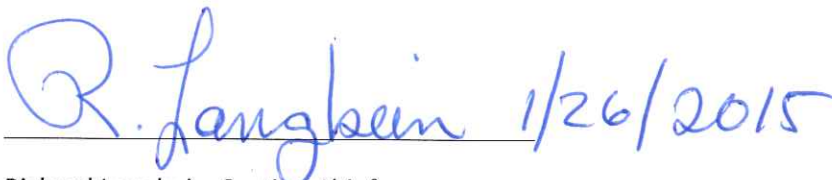
to private wells that have not already been evaluated during the Oakland Borough water allocation permit review.

42. Why are rules and environmental laws that were made to protect our resources being bent for this developer? Has the developer paid off someone in the DEP?

The Department has applied and will continue to apply all of the environmental statutes and regulations that pertain to this project. The Department has received no money from Bi-County beyond the required permit application fees.

43. Oakland attempted to purchase the property from Bi-County, and even designated and received grants of millions of dollars to do so, but the developer has refused to sell or negotiate with Oakland.

The NJDEP Division of Land Use Regulation (DLUR) implements the State's land use regulations, as these may be applicable to the Bi-County property, including: the Flood Hazard Area Control Act and implementing rules at N.J.A.C. 7:13 (FHA rules), the Freshwater Wetlands Protection Act and implementing rules at N.J.A.C. 7:7A (FWW rules), and the Highlands Act and implementing rules at N.J.A.C. 7:38 (Highlands rules). DLUR rules do not preclude or require a property owner to sell its property. Questions concerning the Borough of Oakland's possible acquisition of the subject property should be addressed to the municipality.

 R. Langbein 1/26/2015

Richard Langbein, Section Chief
Division of Land Use Regulation