



New Jersey Highlands Council

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June 23, 2005

Commissioner Bradley M. Campbell
New Jersey Department of Environmental Protection
401 East State Street
Trenton, New Jersey 08625-0402

Re: Highlands Council comments on the upcoming
Highlands Act rulemaking at N.J.A.C. 7:38

Dear Commissioner Campbell,

On behalf of the New Jersey Highlands Council, please accept the following comments in anticipation of the upcoming Highlands Act rulemaking the New Jersey Department of Environmental Protection's will propose at N.J.A.C. 7:38 ("Phase II rules").

The Council appreciates the opportunity that the Department has given to comment on the upcoming rulemaking before the rules are proposed. The Council recognizes the significance of the rules not only for protecting the important resources of the Highlands but also for achieving that protection in a manner that will be in harmony with the Regional Master Plan the Council is developing.

In preparing these comments, the Council reviewed the Highlands Act rules at N.J.A.C. 7:38 that the Department adopted in May, 2005 ("May 2005 rules"), and considered input received from the public and State agencies. The attachment to this correspondence contains written comments received to date and a summary of the oral comments presented to the Council's Natural Resources Committee.

The Council's comments are based on three major overlapping considerations: First, that the Phase II Highlands rules the DEP will propose will be adopted by May 2006, just one month before the Council will adopt the regional master plan for the Highlands; Second, that the rulemaking schedule established in the Highlands Act allows a brief time for Council input; and Third, that we are not limiting our comments to issues we believe are necessary to ensure that the rules will not limit the Council's responsibility to develop the Regional Master Plan and perform its other statutory duties. The Council's comments are as follows:

Comments

(1) Harmonizing the Department's rules and the Regional Master Plan

The rules the Department will re-propose will be adopted by May 2006 - shortly before the June 2006 adoption of the Regional Master Plan - and thus the Phase II rules will require a mechanism to harmonize the requirements of the Department's rules and the standards developed in the Regional Master Plan. Potential examples would be the Council's development of alternative septic density standards and other water resource protection policies on a watershed or subwatershed basis in the Regional Master Plan.

The proposed rules should include a section detailing a procedure whereby the Department's standards and the Regional Master Plan's standards can be harmonized and can promptly become the applicable standard for the Highlands permit or approval. The Council suggests, therefore, that the Department's rules stipulate that the Regional Master Plan, and any municipal or county master plans, development regulations, ordinances or other regulations approved by the Council in order to conform to the Regional Master Plan, be incorporated by reference upon the Council's approval.

The rules should also include a process allowing permit applicants to address any apparent conflict between the Regional Master Plan and the Department's rule. The burden would be on the applicant to demonstrate the applicability of the requested permit condition, and the Council and the Department would conduct a joint consultation to harmonize the Department's rule and the applicable standards of the Regional Master Plan. In the event the two agencies are unable to agree, the Council requests that the Department's rules state that the Regional Master Plan would have primacy.

(2) Upland Forested Areas

The May 2005 rules at N.J.A.C. 7:38-3.9 include a 16-point system to define an upland forested area. The Council is concerned that the 16-point system, while appropriate for New Jersey's Coastal Plain forests, will not capture many of the mature hardwood forest areas of the Highlands. The Council suggests that the 16-point system be replaced with an alternate methodology that defines upland forested area based on acceptable forestry practices that would be fully protective of upland forest areas in the Preservation Area.

(3) Septic Density Standards

The Highlands Council recommends that the Department evaluate the use of a weighted averaging approach to implementing the septic density standards. Preliminary analysis by the Council indicates that this approach may: reduce the potential for forest clearing in the pursuit of increasing allowable septic density, encourage land assemblage which would prove beneficial to securing non-developable land under conservation restrictions; and achieve an overall potential residential unit reduction and by extension, regional pollutant loading.

As reflected in our comment (1) above, the DEP rules should indicate that the Highlands Council septic density standards shall govern DEP decisions upon adoption of the Regional Master Plan.

In addition, the Highlands Council requests that the Department make publicly available as soon as possible the completed scientific basis for the septic densities in the existing Department rules.

(4) Linear Development (definition and alternatives analysis)

The Department has defined “linear development” to allow access roads and drives across Highlands open waters and their buffers, steep slopes and steep sloped upland forests. The Council notes that although the Freshwater Wetlands Protection Act specifically defines linear development to include access roads and driveways, the Highlands Act contains no such definition. The Highlands Act allows crossings for utilities and infrastructure. While public roads are properly considered to constitute infrastructure, private access roads and driveways generally are not considered as infrastructure. The definition should be modified to exclude private access roads and driveways and these crossing should only be authorized through the waiver process.

With regard to the alternatives analysis for linear development, the rules should also require the applicant to fully address how the proposal will best minimize impacts upon the resources by minimizing the width of the linear development and adhering to specified best management practices.

(5) Reliance (LOIs and HRADs)

The May 2005 rules establish HRAD procedures at N.J.A.C. 7:38-9.4(c)1 that allow an applicant use a pre-Highlands Act Letter of Interpretation (“LOI”) in place of a Highlands open water delineation. An LOI identifies freshwater wetlands but does not identify all the natural resources specified for protection in the Highlands Act. Therefore, a pre-Highlands LOI should not be used “in place of” an HRAD (which identifies all Highlands natural resources). To do so would fail to protect all “Highlands open waters” and fail to give effect to the 300-foot buffer associated with those Highlands open waters. The rules could still provide that a pre-Highlands LOI could be used to identify freshwater wetlands on the site - the purpose for which it was obtained.

In addition, the rules should include a methodology or reference the development of a technical manual upon which Highlands open waters, which have not been previously regulated and for which there are no current field identification and delineation methodologies, and other Highlands resources may be properly identified and delineated in the field.

In addition, HRADs themselves should not entitle the applicant the reliance currently provided for in the May 2005 rules. HRAD determinations identify the most important natural resources for a site. The rules at N.J.A.C. 7:38-4.6(a) should delete the HRAD reliance provisions and should be replaced with a broad provision allowing for a HRAD to be re-opened based on new information.

(6) Public Comment and Public Hearings

Public comment is very important to sound regulatory decision-making and this is especially true in the Preservation Area of the Highlands. The rules at N.J.A.C. 7:38-11.3(c) should expand the 30-day comment period to at least 45 days. In addition, the 15-day public comment in N.J.A.C. 7:38-11.5(c) should also be 45 days. A public hearing should be granted when requested by the Council under N.J.A.C. 7:38-11.4 and 11.5. In addition, in N.J.A.C. 7:38-11.4(g) and 11.5(d), the requirement for a court reporter and verbatim transcript should be replaced with a requirement of audio recording of hearings.

(7) Brownfields Waiver Process

The Highlands Act empowers the Council to “promote brownfield remediation and redevelopment.” The Council especially wants to promote sites where, in their present unremediated condition, contaminants are having an adverse impact on the water quality in the Highlands. In order to qualify as a Highlands brownfield site, one must apply and qualify for one of three “tracks” established by the rules. The tracks defined in the rules do not capture all the existing brownfields that might be appropriate opportunities for redevelopment. Unless all appropriate brownfields sites are included in the Department’s list, the Highlands Council’s ability to promote the remediation of these sites will be limited. The Council recommends that a fourth track be added to facilitate the inclusion of appropriate sites that do not qualify for one of the three tracks.

It is important to note that simply qualifying as a Highlands Brownfields site does not, in any way, mean that that the site will be approved for redevelopment or for a waiver. Once a site makes the Department’s list, the Council will identify areas that are appropriate for redevelopment. The Council is presently developing a set of detailed redevelopment criteria, and will work with the Department to draft appropriate standards for potential brownfields redevelopment sites. The Council determination that an area is appropriate for development would not create a presumption that a particular site is eligible for a waiver from the Department. The Department would apply specific standards when making the waiver determination.

(8) Narrative Standards in Section 36

The rules at N.J.A.C. 7:38-6.2 includes the narrative standards from Section 36 of the Highlands Act requiring that the Department issue an approval only if it determines that that the proposed major Highlands development would meet the seven narrative standards. Narrative standards, such as de minimus impacts, minimum feasible alteration, or minimum feasible cumulative adverse impacts, require a detailed analysis to be implementable. Accordingly, the rules should include a process for the applicant to demonstrate compliance with the narrative standards.

(9) Highlands Applicability Determinations (HAD)

Certain types of exemptions should be reevaluated to establish whether they merit individual review by the Department. The Council recommends that the first single family dwelling exemption (exemption #1), the improvement to a single family dwelling (#5), activities under a woodland or forest management plan (#7, provided the plan is submitted to the

Department and the Council), and trails with nonimpervious surfaces (#8) should not require a HAD and the costs associated with obtaining the HAD.

The rules should also include a definition of a single family dwelling to implement the exemption and to also reflect the Municipal Land Use Law's provisions for duly licensed group homes, community residences, community shelters, family day care homes, and board of education child care programs as specified in N.J.S.A. 40:55D-66.c through 40:55D-66.7a. In all cases, a single family dwelling should be defined with a maximum wastewater discharge design.

Additional Issues

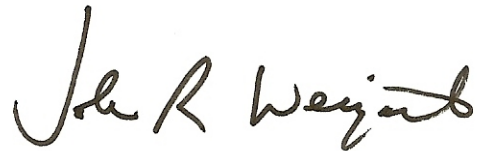
In addition to the above list of comments, the following list includes additional issues identified by the Council:

- Existing NJDEP rules should be modified to reflect the existence and role of the Highlands Council.
- Land management activities including, but not limited to stream restoration, wildlife habitat enhancement and restoration, riparian corridor enhancement, invasive species control and historic restoration, should be regulated differently than major Highlands Development. A simplified permit process or general permit should apply to land management activities;
- Fees (for Highlands-related reviews) should be adequate for the work performed by the Department, as equitable as possible for applicants, and should be refunded where the Department grants an exemption.
- Forestry exemption language should not exclude private owners with approved forest management plans just because they are not enrolled in the farmland assessment property tax program.
- Scenic attributes should include federal public land.
- Threatened and endangered species habitat assessments should require the consultation of the U.S. Fish and Wildlife Service.
- Forest mitigation should be required to follow an established hierarchy.
- Steep slope provisions-- consistent with the Highlands Act, the Department should consider more graduated standards on lesser slopes.
- Category one provisions of the antidegradation and stormwater regulations should apply to all Highlands open waters.
- Wastewater treatment facilities provisions should add "with a waiver" in N.J.A.C. 7:38-3.4(a)2 to make it clear that wastewater facilities may only be authorized if the project is exempt from the Act or if an approval with a waiver is granted.

- Agricultural / horticultural uses: Before determining the applicability of an agricultural or horticultural use or development as a major highlands development, the Department should consult with the Department of Agriculture.
- Preserved farmland: The rules should respect the rights and responsibilities created by deed restrictions on preserved farmland.

Thank you again for the opportunity to provide comments.

Sincerely,

A handwritten signature in black ink that reads "John R. Weingart". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

John Weingart, Chair,
Highlands Council