

SOKOL, BEHOT & FIORENZO
COUNSELLORS AT LAW
229 NASSAU STREET
PRINCETON, NEW JERSEY 08542-4601
(609) 279-0900
Telefax (609) 497-2577

LEON J. SOKOL (NJ, NY & FL BAR)
JOSEPH F. BEHOT, JR. (NJ & NY BAR)
JOSEPH B. FIORENZO (NJ & NY BAR)
JEFFREY A. ZENN (NJ & DC BAR)
MICHAEL P. FELTMAN
HERBERT B. BENNETT
NEIL YOSKIN (NJ & PA BAR)

14-232
24 A 8 111

CONTINENTAL PLAZA
433 HACKENSACK AVENUE
HACKENSACK, NEW JERSEY 07601
(201) 488-1300
Telefax (201) 488-6541

One Grand Central Place
60 East 42nd Street
Suite #2527
New York, New York 10165
P: 212-661-2523

www.sbfllawfirm.com

STEVEN SIGEL (NJ & NY BAR)
SUSAN B. BURNS (NJ & NY BAR)
ANTHONY M. BEDWELL (NJ & CA BAR)
DAVID RUBENSTEIN (NJ, NY & FL BAR)
ANTHONY S. BOCCHI
MATTHEW J. COWAN (NJ, NY & FL BAR)
JOSEPH C. TRISTANO (NJ & NY BAR)
MICHAEL R. CLESZAK
CHRISTOPHER J. TURANO (NJ & NY BAR)

OF COUNSEL

SCOTT E. REKANT (NJ & PA BAR)
GARY S. ROSENBERG (NJ & DC BAR)

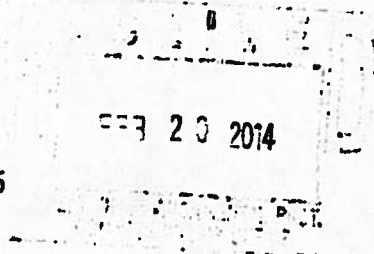
OF COUNSEL FOR MATTERS OF TAXATION
KULZER & DIPADOVA, P.A.

PLEASE REPLY TO
PRINCETON ADDRESS

February 19, 2014
Via E-mail and Regular Mail

Bob Martin, Commissioner
New Jersey DEP
Mail Code 401-07
401 East State Street, 7th Floor
P.O. Box 402
Trenton, NJ 08625-0402

RE: PETITION FOR RULEMAKING
PROPOSED AMENDMENTS TO N.J.A.C. 7:7A-15.6
PETITIONER: Ecologic Mitigation Oxford, LLC



Dear Commissioner Martin:

This office represents Ecologic Mitigation Oxford, LLC ("Oxford"), owner and operator of the Oxford Western Wetland Mitigation Bank, in Oxford Township, Warren County. This Petition for Rulemaking seeks modifications to the Department's Freshwater Wetland Protection Act Rules, specifically N.J.A.C. 7:7A-15.6.

The Administrative Procedure Act (APA), at N.J.S.A. 52:14B-4, provides as follows:

(f) an interested person may petition an agency to adopt a new rule, or amend or repeal any existing rule. Each agency shall prescribe by rule the form for the Petition and the procedure for this submission, consideration and disposition of the Petition. The Petition shall state clearly concisely:

- (1) The substance or nature of the rule-making which is requested;
- (2) The reasons for the request and the petitioner's interest in the request;

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(3) References to the authority of the agency to take the requested action.

DEP has not, to the best of our knowledge, promulgated a form of petition to be used. The following petition therefore follows the format specified in the APA.

1. Substance or Nature of the Rule-making which is requested

The Freshwater Wetland Protection Act (N.J.S.A. 13:9B-1 et seq.) generally requires that compensatory mitigation be provided for any unavoidable adverse impacts to wetlands. Mitigation can take several forms: the restoration, creation or enhancement of wetlands (either onsite or offsite), the purchase of wetland credits from an approved mitigation bank or a monetary payment to the State's Freshwater Wetland Mitigation Fund. See N.J.S.A. 13:9B-13.

N.J.A.C. 7:7A-15.6 establishes a hierarchy for mitigating larger disturbances. It generally states a preference for in-kind, onsite mitigation. Should onsite mitigation prove to be infeasible, the Rule establishes the following hierarchy:

1. The purchase of credits from a mitigation bank located in the same HUC-11 as the disturbance or in an adjacent HUC-11 within the same watershed management area;
2. The purchase of credits from a mitigation bank approved by the wetland mitigation bank prior to January 1, 1999 which includes the disturbance site in its bank service area; or
3. Offsite restoration, creation, or enhancement in the same HUC-11 as the disturbance or in an adjacent HUC-11 within the same watershed management area as the disturbance.

[emphasis added]

The Rule goes on to provide a similar hierarchy for successive scenarios, but all of them place the purchase of credits from an approved mitigation bank on an equal footing with offsite, in-kind mitigation. This is the case even though DEP's policies otherwise discourage the construction of scattered mitigation sites, and even though Federal wetlands policy favors the use of mitigation banks.

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For the reasons explained below, Oxford believes that the more appropriate public policy would be a preference for the purchase of credits from an approved mitigation bank over the restoration, creation or enhancement of wetlands at an offsite location.

2. Reasons for the request and petitioner's interest in the request

The rationale for favoring the use of mitigation banks over offsite, in-kind mitigation is best explained in the Federal Mitigation Rules at 33 CFR 325 and 32 and 40 CFR 230. The U.S. Army Corps of Engineers' Regulations, at 33 CFR 332.3(b) (Type and Location of Compensatory Mitigation) state as follows:

Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee – responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the District Engineer should give preference to the use of mitigation bank credits when these considerations are applicable.

These clearly stated policy considerations explain why mitigation banking was conceived of in the first place – it is often better than piecemeal, multi-site mitigation.

N.J.A.C. 7:7A-15.6, by placing mitigation banking and offsite mitigation on an equal footing, differ from the requirements of the Federal regulations. Oxford notes in this regard that Paragraph 1(e) of Gubernatorial Executive Order No. 2 dated January 20, 2010 provides that state agencies shall:

[d]etail and justify every instance where a proposed rule exceeds the requirements of Federal law or regulation. State agencies shall, when promulgating proposed rules, not exceed the requirements of Federal law, except when required by state statute, or in such circumstances where exceeding the requirements of federal law or regulation is necessary in order to achieve a New Jersey specific public policy goal.

DEP has so far encouraged the use of private capital to construct mitigation banks, implying that it favors their use. The mitigation hierarchy adopted by DEP is not only inconsistent with this policy, there is no articulated New Jersey specific public policy goal that it advances. In light of that fact, DEP should amend N.J.A.C. 7:7A-15.6 to create a preference for the purchase of credits from mitigation banks in circumstances where onsite restoration, creation or enhancement is not feasible.

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The Petitioner's interest in this request is an obvious one. Oxford has expended approximately \$5,800,000.00 to purchase land and obtain the approvals necessary for the Oxford Western Bank. It chose a location whose values and functions were destroyed decades ago by the construction of a sod farm. The Bank's location is such that it will provide a degree of ecological uplift onsite and in the surrounding area that is proportionately greater than a simple increase in the amount of wetland acreage.

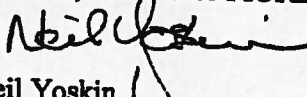
Oxford undertook the mitigation bank project with the expectation that its largest customer base would be the utilities that are engaged in upgrading the region's energy infrastructure. A significant potential purchaser of mitigation credits from the Oxford Bank is PSE&G. PSE&G has received a Wetland Permit from DEP authorizing the disturbance of 14.47 acres of forested wetlands in seven counties for upgrades to its transmission line grid. However, because N.J.A.C. 7:7A-15.6 places offsite mitigation and the purchase of credits from an approved bank on an equal footing, DEP has allowed PSE&G to propose a piecemeal, far flung and so far incomplete mitigation plan. It is likely, if DEP persists in this course of action, that neither Oxford nor any of the other approved wetland banks in New Jersey will be able to provide the ecological benefits that they were created to provide.

3. References to the authority of the Agency to take the requested action

The Freshwater Wetland Protection Act gives the Department ample authority to take the requested action.

The APA provides that the Department shall, within 60 days of receiving this petition, either deny it (giving a written statement of its reasons), grant it and initiate a rule-making proceeding or refer the matter for further deliberations (not to exceed 90 days). I will, therefore, look forward to the Department's response within 60 days of receiving this letter

Sincerely,
SOKOL, BEHOT & FIORENZO


Neil Yoskin

NY/cl

cc: James Kasten, EMO
Jennifer DeLorenzo, EMO

WetlandBankingMitigation.com Bob Martin Bob Commissioner DEP ID-1944 re ecological resource group petition for return