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**ENVIRONMENTAL PROTECTION**

**LAND USE REGULATION**

**Notice of Action on Petition for Rulemaking**

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

**Request for amendments related to construction/reconstruction of dredged material facilities/confined disposal facilities**

Petitioners: Martha Steinberg, Gamal el-Zoghby, Michael Knight, Ricardo Valdes, Michael Pierro, Michele Pierro, David Fox, Andreas Beutler, Michaela Banck, the New Jersey Conservation Foundation, and Environment New Jersey

**Take notice** that the Department of Environmental Protection (Department) has determined to deny the petition for rulemaking received on October 21, 2015 from R. William Potter, Esq. on behalf of Martha Steinberg, Gamal el-Zoghby, Michael Knight, Ricardo Valdes, Michael Pierro, Michele Pierro, David Fox, Andreas Beutler, Michaela Banck, the New Jersey Conservation Foundation, and Environment New Jersey (petitioners). Petitioners Martha Steinberg, Gamal el-Zoghby, Michael Knight, Ricardo Valdes, Michael Pierro, Michele Pierro, David Fox, Andreas Beutler, and Michaela Banck are residential property owners on Dock Road, Eagleswood Township, Ocean County. The petitioners request that the Department amend three sections of the Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7. Specifically, petitioners request that the Department impose a buffer between confined disposal facilities (CDF) and residential, recreational and critical habitat areas; restore the “10-year rule” which would prohibit the siting of dredged spoil facilities on a former dredged material disposal site if it has not been used for that purpose in the past 10 years; and eliminate provisions that allow construction of facilities, including a dredged material disposal facility, to occur without CAFRA review if the new development will be built within the “footprint” of a pre-existing development.

The petitioners indicate that construction of CDFs, such as one planned in Eagleswood

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Township, subject those in the area to noxious odors and airborne dust containing silica and other respiratory irritants, which places their health and quality of life at risk, and also renders their properties virtually unmarketable. To protect coastal homes from experiencing this type of harm and to protect critical habitat from destruction or damage, petitioners assert that three amendments to the CZM rules are necessary.

First, petitioners request that the CZM rules be amended to establish a minimum distance or buffer that would prohibit the siting of a CDF within 2,000 feet of existing residential, recreational areas or critical habitat areas. Petitioners suggest this amendment should be accomplished by adding a definition of “inherently incompatible land uses” at N.J.A.C. 7:7-1.5 and amending N.J.A.C. 7:7-15.12(b).

Second, petitioners request that N.J.A.C. 7:7-9.27, Wetlands, be amended at (h) to reflect the requested buffer zone between areas receiving dredged materials and residential, recreational or critical habitat areas and also to require that the site that is to receive dredged material must have been used for such placement within the past 10 years.

Third, the petitioners request that the definition of the term “footprint of development” at N.J.A.C. 7:7-1.5 be amended to provide that, in addition to reconstruction being limited to the horizontal extent of previous development, any reconstructed development be no taller than the structure previously located on the footprint.

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Petitioners assert that the restriction on the proximity of dredged material facilities to residential, recreational and critical habitat areas is necessary because even strict conditions cannot effectively eliminate potential impacts including health hazards from contaminated airborne dust and vermin infestation, displacement/destruction of critical plant and animal habitat areas, aesthetic injuries resulting from views being blocked by berms, excessive truck traffic when materials are eventually mined for beneficial reuse which will also damage sanitary sewers and road beds, contamination of potable water supply, reduction in property value and the ability to market homes or property, and general loss of quality of life.

Petitioners owning property on Dock Road in Eagleswood Township assert that what they identify as the “10 year rule” was part of the Coastal Zone Management rules at N.J.A.C. 7:7E-3.27(h)1 when they purchased their homes and that they relied on this rule to prohibit a CDF from being placed across the road from their homes since the site had not been used for disposal of dredged material since 1983. Under the prior rule, reuse of former dredged material disposal sites for continued dredged material disposal was conditionally acceptable provided enumerated criteria were met including “1. The site has been used for dredged material disposal within the past 10 years.” Petitioners assert they and similarly situated owners were harmed by revocation of the former rule as they are now required to affirmatively disclose that the property across the street, which appears to be open space/critical habitat area, could be reused for dredged material disposal at any time, even if the site has not been used for many years and has reverted to nature. Petitioners assert that the “10 year rule” provides actual notice to potential purchasers of property near a former dredge site that has not been used for over 10 years that re-use of the former

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dredged material management area is not acceptable and that the “10-year rule” is necessary.

Finally, petitioners assert that amendment of the definition of “footprint of development” to eliminate the exemption from CAFRA review of the construction or reconstruction of “the building, structure, or other parts of a development, provided that such repair or replacement does not increase or change the location of the footprint of the pre-existing development” is necessary because the exemption allows construction of structures such as a high-rise hotel without any CAFRA permit review as long as it is within the same footprint of a much smaller previous structure such as a motel. Similarly, the exemption allows construction of a much larger and functionally expanded dredged material disposal “dumpsite” on a much smaller abandoned site as long as it is built on the same horizontal footprint of the abandoned site, as is planned on Dock Road.

Petitioners provided suggested rule language to implement the requested changes and assert that the Department has adequate statutory authority to make the requested changes.

On July 6, 2015, the Department adopted amendments to the CZM rules relating to dredging and dredged material management (see 46 N.J.R. 1051(a), June 2, 2014; 47 N.J.R. 1392(a), July 6, 2015). Over the last decade, a number of dredged material management areas adjacent to Federal and State navigation channels have been converted to residential or commercial development or mitigation areas, which has resulted in the inability of the Federal and State governments to maintain these navigation channels for recreational and commercial boating. Due to the loss of

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these areas, the government has had to transport dredged material far from its source at a higher cost, or defer maintenance dredging altogether. The failure to maintain navigational depths creates a hazard to all boating traffic and can impede growth of commercial and recreational activities in coastal communities or even result in reduction of those activities. Maintenance of the navigational channel depths helps to preserve economic and property values throughout the coastal area. In fact, the preservation of existing dredged material management areas is so important to the State's recreational and commercial boating industry and marine commerce that the Department adopted a new special area rule, dredged material management areas at N.J.A.C. 7:7-9.49. This rule is intended to preserve existing dredged material management areas in specific circumstances.

Sediment is in large part soil that has been deposited in water. Although sediments in New Jersey's tidal waters may be impacted to varying degrees by a number of pollutants, not all sediments are considered to be contaminated. In order to place dredged material in an upland confined disposal facility, it must be demonstrated that the placement of the dredged material would not result in significant adverse impacts to terrestrial or aquatic ecosystems or pose risks to public health (see CZM rules, Appendix G, Chapter IV, Management of Dredging Activities and Dredged Material). Further, the CZM rules' dredged material placement on land rule at N.J.A.C. 7:7-15.12 provides that the placement of dredged material on land is conditionally acceptable provided that the use is protective of human health, groundwater quality, and surface water quality, and manages ecological risks. Testing of the dredged material may be required as

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needed to determine the acceptability of the placement of the material on a particular site in accordance with Appendix G.

The Department's regulatory programs are designed to identify and minimize potential adverse environmental impacts resulting from proposed activities. For dredged material upland CDFs, the magnitude of these impacts is dependent upon: (1) the location of the facility and site-specific conditions (including compatibility with adjacent and nearby land uses); (2) the characteristics of the dredged material proposed for placement at the facility; (3) the design and construction of the facility; (4) the operation of the facility; and (5) the final closure and use of the facility site. (See CZM rules, Appendix G, Chapter IV, Management of Dredging Activities and Dredged Material, C- Upland Confined Disposal Facilities)

These five factors are considered collectively in reaching a regulatory decision based on a comprehensive review of a proposed upland CDF. With proper design and operation of the upland CDF, the potential for adverse impacts can be reduced significantly. Upland CDFs are designed, permitted, and operated on a case-by-case basis. Potential adverse impacts are evaluated on a case-by-case basis, initially considering the bulk sediment chemistry analyses of the dredged material placed in the upland CDF and the proposed schedule for future disposal and management operations at the facility.

Appendix G, Chapter IV, Management of Dredging Activities and Dredged Material, C(5) and (6) discuss the potential impacts to the terrestrial ecosystem and public health resulting from the

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operation of an upland CDF, and the regulatory requirements to minimize any impacts. When dredged material is allowed to dry in an upland CDF, there is potential for odors and dust generation. With regard to dust, this potential is greater when the dredged material consists of fine particles and the CDF has not revegetated. With proper management techniques, dust generation and the potential impacts to public health and the environment can be successfully controlled. Potential management techniques include interim/final capping of contaminated and exposed dredged material and the use of erosion control mats. Noticeable odors may or may not emanate from drying dredged material, depending on its characteristics (for example, predominantly sandy dredged material will emit few, if any, noticeable odors). While the Department acknowledges that some minor odors can be anticipated during the operation of an upland CDF, any odors emitted by drying dredged material are expected to be short-lived and to dissipate soon after dredged material placement operations have ceased.

The siting of a new CDF is evaluated using the CZM rules, including the buffers and compatibility of uses rule at N.J.A.C. 7:7-16.11. This evaluation considers potential impacts to nearby land uses resulting from the operation of the CDF, including residential, recreational, and critical habitat areas. Existing CDF locations may be proximate to residential or recreational areas depending upon when they were originally established, as well as local land use development patterns. The CZM rules require impacts associated with the placement of dredged material be minimized to the maximum extent practicable (see CZM rules, Appendix G, Chapter IV, Management of dredging activities and dredged material, addresses management of, among other things, confined disposal facilities and discusses the design, construction, operation,

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closure, and permitting of upland CDFs). As required under Chapter IV, in order to place dredged material in an upland CDF, the applicant must demonstrate that the placement of the dredged material would not result in significant adverse impacts to terrestrial or aquatic ecosystems, or pose risks to public health.

A CDF can be designed, constructed, and operated in a manner so as not to have the negative impacts suggested by the petitioners. There is a difference between impacts that can be minimized or managed to acceptable levels and those that cannot. Where potential impacts associated with the CDF can be minimized or managed to acceptable levels through the use of best management practices as specified in Appendix G to achieve compliance with the CZM rules, it can be permitted. Where utilization of a CDF is permitted, conditions would be included in the permit to ensure the impacts suggested by the petitioners would not occur. Accordingly, the Department does not believe establishment of a generic, 2,000-foot buffer between an upland CDF and residential and recreational areas is needed. In situations where pre-existing CDFs and residential areas are in close proximity, management techniques will be required to minimize the potential for nuisance conditions.

The use of existing upland CDFs is not anticipated to significantly adversely affect property values, since the proximity between these uses has already been established. Moreover, potential impacts to property values are not specifically considered by the Department when it evaluates compliance of a project with the CZM rules as CDF facilities are difficult to locate and are essential to safe navigation of the State's waterways. Even if new or added material has not been

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disposed recently at a site, existing CDF facilities serve important functions with continued storage of dredged material.

As explained previously, a number of dredged material management areas have been converted to other uses, negatively impacting the maintenance dredging of Federal and State navigation channels that can subsequently affect the growth of commercial and recreational activities in coastal communities. To address this issue and to minimize impacts to special areas such as wetlands, threatened and endangered species habitat, and critical wildlife habitat associated with the construction of a new CDF, the Department determined that it is appropriate to allow for additional flexibility in the use of former dredged material management areas based on existing environmental conditions at the time an application is submitted to the Department, rather than limiting use based upon the number of years since the site was last used for dredged material management. Accordingly, the Department amended the CZM rules' wetlands rule to remove the "10 year requirement" referenced by the petitioners (see 46 N.J.R. 1051(a), June 2, 2014; 47 N.J.R. 1392(a), July 6, 2015). However, during the review of an application to dredge a waterbody, which includes review of where the dredged material are proposed to be placed, if it is determined that critical wildlife habitat, threatened and endangered species habitat, wetlands, or other natural resources are present on or in the vicinity of the proposed dredged material management area, the proposed dredged material management area would be required to comply with all applicable CZM rules, such as the special area rules addressing wetlands, threatened or endangered wildlife or plant species habitat, or critical wildlife habitat. These rules contain specific standards to protect critical wildlife habitat, threatened and endangered species habitat,

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and wetlands and ensure that the environmental impacts associated with the proposed activity are minimized. Mitigation for impacts to these special areas will be required in accordance with the applicable rule.

With respect to former N.J.A.C. 7:7E-3.27(h)1, the intent of this provision was not to provide property value protection for any person or development in the coastal area against continued storage and added usage of a CDF, as asserted by the petitioners. Rather, it addressed the impacts of the reuse of a dredged material management area on wetlands. N.J.A.C. 7:7-9.27(h)1 through 6 (former N.J.A.C. 7:7E-3.27(h)2 through 7) serve to minimize impacts of the use of a former dredged material management area on surrounding land uses and coastal resources. Further, as detailed above, the CZM rules require an applicant to demonstrate that the placement of dredged material would not result in significant adverse impacts to terrestrial or aquatic ecosystems, or pose risks to public health, and to employ management techniques to minimize the potential for nuisance conditions where pre-existing CDFs and residential areas are in close proximity.

In 2013, the Department amended the Coastal Permit Program Rules at N.J.A.C. 7:7-2.1(b)13iii (currently codified in the CZM rules at N.J.A.C. 7:7-2.2(b)13iii) to include the rehabilitation and use of an existing dredged material management area within the same footprint as an activity that is not a development under CAFRA and therefore does not require a CAFRA permit (See 45 N.J.R. 1141(a), May 6, 2013; 45 N.J.R. 1696(a), June 15, 2013.). The Department's determination that rehabilitation and use of an existing dredged material management area within the same footprint does not require a CAFRA permit is consistent both with CAFRA itself and

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with its application of these rules to similar projects. Particularly, CAFRA at N.J.S.A. 13:19-5.2c. specifies that a permit is not required for the enlargement of any development if the enlargement does not result in the enlargement of the footprint of the development or an increase in the number of dwelling units within the development. The 2013 amendment to the CZM rules simply reflects the application of this statutory provision to dredged material management areas. The petitioners assert that the existing definition of “footprint of development” would allow for the construction of a high-rise hotel without any CAFRA permit review as long as it is within the same footprint of a much smaller previous structure such as a motel. While such a development could be exempt from obtaining a permit under CAFRA in accordance with N.J.S.A. 13:19-5.2, such an exemption would only apply if the high-rise structure had the same number of units as the existing motel. Once the number of dwelling units (which as defined in the CZM rules at N.J.A.C. 7:7-1.5 includes hotel and motel rooms) is increased, the development would be subject to CAFRA permit review under the CZM rules.

Finally, in its review of an application for dredging activities, the Department evaluates the material and areas to be dredged, as well as the area in which the dredged material will be placed. In addition to requiring a waterfront development permit, these activities also require a water quality certificate under Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. § 1341. The CZM rules are used to review the permit application and certification request. For example, the CZM rules’ wetlands rule at N.J.A.C. 7:7-9.27(h) sets forth the standards for the reuse of dredged material management areas that require a waterfront development permit. The water quality rule at N.J.A.C. 7:7-16.3(a) requires compliance with the Surface Water Quality

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Standards at N.J.A.C. 7:9B. Accordingly, while the reconstruction of the CDF itself is not regulated under CAFRA when located within the same footprint as the existing development, the reconstruction and operation of the CDF will need to incorporate any water quality structures required under the water quality certificate and/or waterfront development permit. Further, the reconstruction of the existing CDF will be limited to the engineering constraints of the structure itself, as well as any local requirements. For example, in order for a CDF to be constructed within an existing footprint, the berms must step in towards the interior as they increase in height to ensure that the footprint of the structure is not increased. In many cases, this will result in a decrease in the capacity of the CDF.

Therefore, in accordance with N.J.S.A. 52:14B-4(f) and N.J.A.C. 1:30-4.2, after careful consideration of the petition, the Department has determined to deny the petition for rulemaking. A copy of this notice has been mailed to the petitioners as required by N.J.A.C. 1:30-4.2.