

POTTER AND DICKSON

ATTORNEYS AT LAW  
194 NASSAU STREET

PRINCETON, NEW JERSEY 08542

(609) 921-9555

TELECOPIER  
(609) 921-2181

R. WILLIAM POTTER  
MEMBER N.J. AND CA. BARS

PETER D. DICKSON  
MEMBER N.J. AND D.C. BARS

October 21, 2015

Office of Legal Affairs  
Attention: Rulemaking Petitions  
Department of Environmental Protection  
Mail code 401-04L  
401 East State Street, 7<sup>th</sup> Floor  
PO Box 402  
Trenton, New Jersey 08625-0402

Re: Joint Petition for a rulemaking by the New Jersey Department of  
Environmental Protection (DEP)

Dear Commissioner Martin:

This law firm represents the Joint Petitioners, various residents of Eagleswood Township, Ocean County, and joined by Environment New Jersey and the New Jersey Conservation Foundation. Together they file this Joint Petition for a Rulemaking pursuant to Section 4(f) of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-4(f), the procedural rules of the Office of Administrative Law (OAL), N.J.A.C. 1:30-4.1 (2015), et seq., and the General Practice and Procedure Rules of the DEP, N.J.A.C. 7:1D-1, et seq.; see also Murnick v. New Jersey Housing and Mortg. Finance Agency, 309 N.J. Super. 292, 299-300 (App. Div. 1998) (“We are persuaded, therefore, that a rule-making petition is the most effective means of addressing the issue the plaintiff raises....”).

Accordingly, please find the following:

SUMMARY: The Joint Petitioners include certain residential property owners with homes on Dock Road in Eagleswood Township, Ocean County who are threatened by the plan to construct a massive, regional dredged material disposal facility called a “Confined

Disposal Facility” or CDF directly across a 25-foot wide, two-lane street from where they live. These families will be exposed to noxious odors, airborne dust containing silica and other respiratory irritants and whatever else is contained within the dredged material. Their health and quality of life will be at risk as long as the CDF is in existence. Since a CDF is essentially a landfill limited to receipt of dredged material, their properties are rendered virtually unmarketable. Most of these homes represent the life savings of the residents. As a result, they have sought to dissuade the DEP from carrying out this plan, testifying at public hearing, submitting technical comments, presenting the DEP with numerous alternatives – and when this effort failed, they filed an appeal in court which was joined by the co-petitioners New Jersey Conservation Foundation (NJCF) and Environment New Jersey (ENJ). NJCF and ENJ are two of the premier environmental advocacy groups in the state. Hence, this petition cannot be dismissed or disrespected as a NIMBY case.

Together, the Joint Petitioners now propose that DEP adopt three regulations to protect all coastal homes from experiencing similar harm, and to protect critical habitat areas from destruction or damage. First, they petition the DEP to impose a reasonable distance barrier or buffer to protect homes, recreation areas and critical habitat from the siting of a CDF within close proximity. Similar regulations are common at the local level, called “proximity ordinances.” Second, they call upon the DEP to reinstitute the “10-year rule” which prevented the issuance of a General Permit No. 1 (GP1) for the filling of freshwater wetlands for the alleged “re-construction” of a CDF on a former dredged material disposal site if it had not been used for that purpose in the past 10 years. Finally, they propose the closing of a long-standing CAFRA loophole exempting construction of such a dredged material facility from CAFRA review if the new

development will be built within the “footprint” of a pre-existing development. This loophole has been invoked in the Dock Road controversy, in the context of a DEP argument that the planned CDF would not substantially deviate from the footprint of an historic dredged material disposal event at the site and would remain within the footprint of a much smaller, one-time only deposition of dredged material in 1983, more than 30 years ago.

Pursuant to the rulemaking regulations of the DEP and the OAL, the petitioners now propose and state as follows:

**1. The full names and addresses of the Petitioners:**

- a. Martha Steinberg and Gamal El-Zoghby,  
582 Dock Road, West Creek, NJ 08092
- b. Michael Knight and Ricardo Valdes  
576 Dock Road, West Creek, NJ 08092
- c. Michael and Michele Pierro  
570 Dock Road, West Creek, NJ 08092
- d. David Fox  
566 Dock Road, West Creek, NJ 08092
- e. Andreas Beutler and Michaela Banck  
562 Dock Road, West Creek, NJ 08092
- f. New Jersey Conservation Foundation  
170 Longview Road, Far Hills, NJ 07931  
Attention: Emile DeVito
- g. Environment New Jersey  
104 Bayard Street, 6<sup>th</sup> Floor, New Brunswick, NJ 08901  
Attention: Doug O’Malley

**2. The substance or nature of the proposed rulemaking including the text of the proposed rules:**

- a. Promulgation of a “proximity rule:”

The petitioners seek the promulgation of a “proximity rule” prohibiting the

construction or siting of certain inherently incompatible land-uses and facilities. Specifically, this rule would take the form of a regulation establishing a minimum distance or buffer separating establishment of one such incompatible land use, the siting of a large regional dredge spoil management facility, also known as a “confined disposal facility” (CDF), within 2000 feet of existing residential or recreational areas or critical habitat areas.

(1) Text of the proposed “proximity rule:”

Add to definitions section of the Coastal Area Facility Review Act (“CAFRA”) regulations, N.J.A.C. 7:7-1.5, the following definition:

“Inherently incompatible land uses: These are uses of land within the coastal zone area which must be separated by a minimum distance of at least 2,000 feet from existing residential or recreational areas and critical habitat areas due to the inherently disruptive, destructive or environmentally harmful impacts of the proposed development for which the imposition of ‘approval with conditions’ of use and operation cannot provide adequate assurance of protection. One such inherently incompatible use is land to be used for the deposition of dredged material, known as a ‘Confined Disposal Facility.’”

(2) Amendment of N.J.A.C. 7:7-15.12 (b) to read with additional proposed language in bold script:

“Dredged material placement **on land is prohibited within 2,000 feet of an existing residential or recreational area or**

**any area zoned for residential use, or critical habitat area, due to the inherently disruptive, destructive or environmentally harmful impacts of dredged material placement. Dredged material placement on land outside such a 2,000 feet buffer area use, or dredged material spraying with a thin layer of material to enhance marshlands is otherwise** 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] **is required** [as needed] to determine the acceptability of the placement of the material on a particular site in accordance with Appendix G.”

b. Restoration of the “10-year rule” by amending N.J.A.C. [7:7-9.27(h)] to read as follows with additional language in bold:

“(h) For projects which require a waterfront development permit, the use of former dredged material management areas for continued placement of dredged material is **prohibited within 2,000 feet of an existing residential or recreational or critical habitat area, including a zoned area where residential use is permitted, due to the inherently disruptive, destructive or environmentally harmful impacts of such placement, and** is conditionally acceptable **outside an area within 2,000 feet**

**of such residential, recreational or critical habitat area**  
provided the following criteria are met:

1. The site **has been used for dredged material placement within the past 10 years and the site has existing dikes or berms in sound condition, and/or has sufficient volume of previously placed dredged material with suitable geotechnical and engineering properties within the dredged material management area to allow for construction or reconstruction of structurally sound dikes or berms....”**

c. Amendment of the CAFRA “no wider footprint” exemption rule in N.J.A.C. 7:7-1.5 definition of “Footprint of development” as follows with additions in bold and deletions in [brackets]:

“‘Footprint of development’ means the vertical projection to the horizontal plane of the exterior of all exterior walls of a structure and **in the instance of a proposed ‘reconstruction’ of any development the vertical projection of the reconstruction proposed for location atop the footprint shall be no higher than the structure which was previously located within and atop such footprint”**

**3. The reasons for the requests:**

a. The request for promulgation of a proximity rule:

This regulation is necessary because of the inevitably harmful impacts of such a dredged material facility on the human inhabitants and their property interests and on recreational users of the coastal zone, as well as on critical habitat areas. These harmful

impacts cannot be effectively eliminated through imposition of “conditions” of use or construction, no matter how facially strict the conditions might be. These harmful impacts include: contaminated airborne dust from the dewatered dredged material; displacement and destruction of critical habitat areas, including both animal and plant species; noxious odors creating a public nuisance; health hazards from vermin infestation; aesthetic injury as views of the ocean, bay, or nearby natural areas are blocked by high berms encasing the deposited dredged material area; excessive truck traffic as a direct result of the eventual mining of dewatered dredged material for “beneficial reuse;” contamination of potable water supply; damage to sanitary sewers from truck traffic; damage to road beds from such truck traffic; and general loss of quality of life and demonstrable reduction in property values and inability to market homes or property due to the nearby presence of a CDF.

b. Restoration of the “10-year rule:”

This rule was in place at N.J.A.C. 7:7E-3.27(g)1. when the resident petitioners purchased their homes on Dock Road. They reasonably relied on the non-existence of a CDF across the road from their homes. This rule provided petitioners with investment certainty in that the ecologically valuable open space across the street from their Dock Road homes could not be “re-used” for construction of a CDF because the site had not been used for disposal of dredged material since 1983. The former subparagraph 1 to what was formerly N.J.A.C. 7:7E-3.27(g) provided as follows:

“7:7E-3.27 Wetlands

(g) For projects which require a Waterfront Development permit, the reuse of former dredged material disposal sites for continued dredged material disposal is conditionally

acceptable provided the following criteria are met:

1. The site has been used for dredged material disposal within the past 10 years;”

Conversely, the **non-use** of the site for dredged material deposition for more than 10 years would provide actual notice to all would-be purchasers of property nearby that “the [re-use] of former dredge material management areas” is not acceptable. The deletion of this 10-year rule has dramatically harmful impacts which will be experienced by other residential or recreational users if a CDF may be constructed near them on a dredged material site that appears to have been abandoned, reverted to nature, or used for open space.

Among the principal harms which the revocation of the 10-year rule has visited on the Dock Road homeowners seeking to sell or refinance their property at this time, they must affirmatively disclose to each prospective purchaser or financing source that the property across the street – which appears to be a critical habitat area adjacent to the Edwin B. Forsythe National Wildlife Refuge – could be reused for dredged material disposal at any time, even though the site has not been used for dredged material deposition for many years and was allowed to revert to nature. Such disclosure will at a minimum greatly reduce the market value of nearby residential properties and could render them virtually unmarketable. Put bluntly, no one wants to buy a home at the fabled Jersey Shore if a foul smelling, noxious dumpsite – a CDF – could be hastily reactivated across the street at anytime, no matter how many years have elapsed since any dredged material was placed there. The 10-year rule therefore is necessary as a “public notice” protection and safeguard rule.

- c. The request for amendment to the CAFRA exemption rule:



N.J.A.C. 7:7-1.5 of the CAFRA regulations exempts from CAFRA review 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.” In other words, this “reconstruction” exception removes a development from CAFRA policies and procedures if the construction of a CDF – or other industrial use – is to be built on the same “footprint” of pre-existing but demolished or abandoned facility provided it would occupy the same or no greater horizontal space. This would exempt the equivalent of a Trump-style high-rise hotel being constructed without any CAFRA permitting review, provided it would be done on the same “footprint” of a former Motel 6. With this rationale, the DEP is exempting construction of a much larger and functionally expanded dumpsite on the ruins of a much smaller and abandoned site on Dock Road since it would be built (allegedly) on the same horizontal footprint of the abandoned site.

**4. The Petitioners’ interest in the requests including any relevant organization affiliation or economic interest:**

The Joint Petitioners include residential property owners with their homes located on Dock Road in Eagleswood Township, Ocean County. The DEP has issued approvals for the development of a regional CDF on land directly across the street from these homes; these approvals are on appeal in the Appellate Division of Superior Court . In the Matter of Westecunk Creek State Channel Maintenance Dredging and CDF Renovation, NJDEP File No.. 1508-02-0009.2, WFD100001 and FWW100001, Appellate Division Docket No. A-00493-14/T1. The Dock Road property owners are joined as co-petitioners by the New Jersey Conservation Foundation and Environment New Jersey.

These parties have a strong environmental, economic and property interest in this matter. In addition, the Environmental Rights Act (ERA), N.J.S.A. 2A:35A-1, et seq.,

provides that every resident of the state has a cognizable and enforceable legal interest in taking steps to protect the environment, as follows: “The legislature finds and determines that the integrity of the state’s environment is continually threatened by pollution, impairment and destruction, **every person has a substantial interest** in minimizing this condition, that is therefore in the public interest to enable ready access to the courts for the remedy of such abuses.” Emphasis added.

**5. The statutory authority under which the DEP may take the requested action:**

a. The statutory authority for the DEP to promulgate a “proximity rule” to separate inherently incompatible land uses from residential, recreational or critical habitat areas:

The CAFRA statute, N.J.S.A. 13:19-2, provides ample authority for DEP adoption of this rule. Section 2 in relevant part states as follows: “The Legislature finds and declares that New Jersey’s bays, harbors, sounds, wetlands [etc.] ... constitute an exceptional unique, irreplaceable and delicately balanced ... natural environment... And therefore it is in the interest of the people of the State that all of the coastal area should be dedicated to those kinds of land uses which promote the public health, safety and welfare, **protect public and private property**, and are reasonably consistent and compatible with the ... environment of the coastal area.... It is further declared that the coastal area of the State will suffer continuing and ever accelerating serious adverse **economic, social and aesthetic effects** unless the State assists ... in the assessment of impacts, stemming from the **future location and kinds of developments** within the coastal area ... **The Legislature further recognizes ... and wishes to encourage the development of compatible land uses** in order to improve the overall economic position of the inhabitants of that area....” Emphasis added. Moreover, N.J.S.A. 13:19–17 provides explicit authority for the DEP to “effectuate the purposes of this act” through the

promulgation of necessary rules and regulations.

It is difficult to envision a more “incompatible land use” than the siting of a huge CDF dumpsite – enclosed by 12-foot-high berms filled with noxious drying dredged material mud, open to extreme weather conditions, vulnerable to high velocity winds and sending swirling wind-borne dust into the homes and lungs of people living there – across a narrow 2-lane road from a residential neighborhood. That this CDF facility has received DEP approvals in the face of such strong policies against its location at this site is a strong indication of the need for the explicit protection which promulgation of a 2000-foot separations rule will provide.

The courts of New Jersey have repeatedly sustained versions of the “proximity rule.” As a result, many municipalities have enacted similar regulations – also known as “separation ordinances” or “distance ordinances” – as part of their land-use controls. For example, these ordinances prevent the construction of new gasoline service stations within 1000 to 2000 feet of existing gasoline stations and residential areas. Similar restraints have been imposed to limit the location of fast food restaurants or other incompatible uses which necessitate their separation from residential areas, churches, places of worship, schools, and the like. See, e.g., Exxon Co. v. Far Hills Bd. of Adjustment, 196 N.J. Super. 183, 189 (Law Div. 1984) quoting Stone v. City of Maitland, 446 F.2d 83, 89 (5 Cir. 1971) (separation ordinance justified to prevent “blighted eyesore and one greatly diminished in aesthetic and commercial appeal”); Harvard Ent., Inc. v. Bd. of Adjustment of Tp. of Madison, 56 N.J. 362,369 (1970) (N.J. Supreme Court approving of a 2000 foot separations rule) and citing such precedent as Schmidt v. Board of Adjustment, 9 N.J. 405 (1952) and Socony Mobil Oil Co. v. Township of Ocean, 56 N.J. Super. 310 (Law Div. 1959).

b. The statutory basis for the “10 year rule:”

The statutory basis for restoration of this regulation is, simply stated, the same statutes which were cited by the DEP when it initially adopted this rule providing as follows: “(h) For projects which require a waterfront development permit, use of former dredge material management areas for continued placement of dredge material is conditionally acceptable provided: 1. The site has been used for dredge material disposal **within the past 10 years**; 2. The site has existing dikes or berms in sound condition [etc.]...” Emphasis added

These statutes include: CAFRA, N.J.S.A. 13: 19-1, et seq.; the Wetlands Act of 1970, N.J.S.A. 13:9A-1, et seq.; the Freshwater Protection Act, N.J.S.A. 13:9B-1, et seq.; the Waterfront Development Act, N.J.S.A. 12:5-2, et seq.; the Clean Water Act, 33 U.S.C. § 1341; and the Coastal Zone Management Act, 16 U.S.C. § 1456. For example, the Wetlands Act of 1970, N.J.S.A. 13:9A-2 provides as follows: “The legislature hereby finds and declares ... that in order to promote the public safety, health, and welfare, and to protect public and private property ... it is necessary to preserve the ecological balance of this area and prevent its further deterioration and destruction by regulating the **dredging**, filling, removing or otherwise altering or polluting [of coastal wetlands]....”

c. The statutory basis for amendment of the CAFRA exemption rule:

CAFRA, N.J.S.A. 13:19-3 and 13:19-5b and c provide ample statutory authority: “‘Development’ [subject to CAFRA permit requirements] means the **construction**, relocation or **enlargement** of any building or structure and **all site preparation** thereof, the grading, excavation or **filling** on beaches or dunes, and shall include residential development, commercial development, **industrial development, and public development....**” N.J.S.A. 13:19-3. Clearly, the construction of a CDF such as the one

planned for Dock Road involves the “construction ... or enlargement ... [of] industrial ... and public development.”

6. Existing Federal or State statutes and rules which the Petitioners believe may be pertinent to the request:

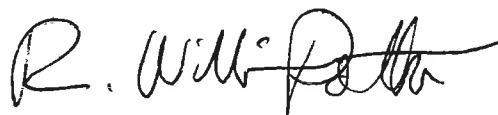
See statutory citations in response to Items 5(b) above.

**Conclusion:**

For the reasons set forth above, the Joint Petitioners hereby call upon the DEP to accept and docket for public comment this proposed rulemaking which will (1) establish a reasonable distance between residential, recreational and critical habitat areas and the siting of dredged material disposal facilities known as Confined Disposal Facilities or CDFs, (2) restore the 10-year rule which prohibits the siting of dredge spoil facilities on lands that have not been used for dredged material for at least 10 years, and (3) require a CAFRA review of any facility meeting the revised definition of “reconstruction” of a “Development.”

Respectfully submitted,

POTTER AND DICKSON



By R. William Potter  
Attorneys for the Petitioners