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Attention: DEP Docket No. 05-24-05
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Dear Ms. Abatemarco,

On behalf of the New Jersey Business & Industry Association, the state's largest association representing the business community, please accept our comments on the proposed PACT REAL rules.

Before turning to our specific comments on the rule, we first want to address the process and the complexity of the rule itself. At 1,057 printed pages, this is the longest rule the DEP has ever proposed. While ostensibly intended to address concerns with climate change and sea level rise, it, in fact, totally changes the land use regulatory program, from process to standards. Most of this proposal has nothing at all to do with climate change.

The rule should have been proposed as four or five separate rule proposals. Combining it all into one "mega rule" does a disservice to the regulated community and the public given its complexity, numerous problematic provisions, and the impossibility of trying to comprehend the totality of its impact. The size, breadth and complexity of the proposal is in itself a problem, not only for the regulated community, but also for the Department. We know of no one who fully grasps the entire rule, how it works together, and how it will play out. Unintended consequences will certainly happen. While we will address the issue of impacts on the regulatory process later in our comments, this rule will undoubtedly lead to longer permit review times, more inconsistencies in rule application, and, we fear, harm to the state's economy.

Stakeholder process - The rule proposal summary details in great length the stakeholder process held by the DEP. However, few businesses and organizations participated. There was little, if any, meaningful engagement of the parties, and much of what was proposed was never discussed at any stakeholder meeting with the business community. At the same time this rule was being formulated and drafted, the DEP was also developing its environmental justice regulations. While we have concerns with some of the provisions in the EJ rule, the process for the environmental justice rule stands in stark contrast to the process in developing the PACT REAL rule. NJBIA was afforded one initial stakeholder meeting that consisted primarily of the DEP staff presenting a PowerPoint highlighting mostly the sea level rise provisions of the

rule. There was no time for discussion or an exchange of ideas. While a subsequent meeting was held, at our urging, it was short, we were provided with inaccurate information about what the rule covered, and there was no follow-up. Contrasting that process to the one held for the environmental justice rule, is night and day.

Moreover, the requirements of Governor Murphy's Executive Order No. 63, concerning the rule-making process, were not followed in practice or in spirit. Such a process would have led to a better proposal than the one currently pending. We ask that this rule be withdrawn, and the stakeholder process be restarted. The DEP needs to reengage the business community and others on this rule and allow for meaningful input and dialogue.

General Impact of Rule – While the impact statements generally state that the rule will have mostly positive impacts, we believe this to be inaccurate. This rule will have many negative impacts to the state's economy as well as other priority agendas. Rather than looking toward a resilient future, the rule generally freezes development in place. It only impacts businesses and citizens when positive steps are taken to improve developments or create something new. As such, it serves as an impediment to a more prosperous and resilient future. It will limit new development in the IRZ and CAFE areas, harm urban redevelopment, prevent homeowners from improving their properties, make it harder to sustain a vibrant shore and statewide economy, and drive up the cost of all development. It will do next to nothing to make the state more resilient.

The DEP has stated that as much as 95% of the lands subject to the IRZ, excluding unbuildable areas such as wetlands, are already developed. Thus, the proposed rule impacts only 5% of lands subject to the IRZ. Over 1,000 pages to make such a limited part of the state resilient? What the rule really does is make the 95% of the IRZ, as well as all the lands in the CAFE and throughout the state, static. Over time it will result in shopping centers that can't be redeveloped, downtowns that will stagnate, and homeowners who will be unable to improve their properties.

This rule will harm our low-income housing goals. Just in the last year the Legislature enacted a new law to facilitate long overdue low-income housing development. This is a constitutional mandate and a state priority. However, this rule completely ignores this policy imperative and overlays a complex, new regulatory scheme that all but guarantees that our housing needs will not be met.

While we are in support of environmental initiatives that recognize the real impacts of a warming planet, this rule is overreaching. It is extreme in its approach and standards, and it is unnecessarily complex. Nor is it balanced. It will have unintended consequences that surely will harm our residents without providing any real solution to our resilience needs.

Sea Level Rise Standards – The stated predicate for the flood hazard and coastal changes to this rule is to take into account rising sea levels due to climate change and other natural factors. The rule's assumption of sea level rise is based on the 2019 report from Rutgers titled "NEW JERSEY'S RISING SEAS AND CHANGING COASTAL STORMS: Report of the 2019 Science and Technical Advisory Panel" (STAP report). Among the findings in this report was, that by the year 2100, there would be about a 17% chance that sea levels would rise by 5.1 feet. The rule is using that SLR number as the basis for establishing both an Inundation Risk Zone (IRZ) and a Climate Adjusted Flood Elevation (CAFE). The prediction in the rise in sea levels is based in part on the fact that New Jersey,

and much of the eastern coastal seaboard, has been sinking for thousands of years by about 1 foot every 100 years and due to sea level rise caused by climate change.

The STAP report was a valuable tool to allow communities to be aware of potential risks from sea level rise and to adjust their actions accordingly by balancing risks and benefits. It was not intended to be the basis for a regulatory provision. The STAP report states:

> How to Use This Document:
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> The panel recommends that planners, engineers, elected officials, land managers and other practitioners use the guidance herein to consider community asset exposure to various levels of flooding, such as permanent inundation, tidal flooding, and extreme coastal flooding, both in the near and long-term.

The projections in the STAP report reflect a wide range of possibilities and timeframes. It is flexible, showing a range of likely, and unlikely but possible outcomes. However, climate science is an ever-evolving discipline, with new information and studies continually being published. To its credit, the STAP report recognized that the science on sea level rise is continually evolving and that it should be updated when new studies and data points are released. The report states:

> Additionally, the STAP recommends that SLR projections be revisited periodically, preferably shortly after the releases of any relevant reports from the Intergovernmental Panel on Climate Change (IPCC) or the U.S. National Climate Assessment, to assure that the estimates remain consistent with scientific advances.

Despite the fact that there have been two major studies published in Nature, the release of the Assessment Report 6 from the IPCC, and the release of the National Climate Assessment Report, all which significantly differ from the 2019 STAP report, the DEP has decided to ignore the recommendation to update the STAP report's projections of sea level rise and to rely on outdated data points and scientific assumptions.

The primary reason the STAP report found that sea level rise may be at 5.1 feet was partly due to warming and expanding oceans and to the prediction that ice sheets would collapse in Western Antarctica.

Those new scientific studies have now been developed and they diverge from the STAP report's predictions. Recent scientific reports, including major studies by the Intergovernmental Panel on Climate Change (IPCC - AR6) and the National Oceanic and Atmospheric Administration (NOAA), rejected the ice sheet collapse possibility by 2100 and thus projected an anticipated relative sea level rise well below the now outdated STAP report. Based on these studies, and including the one foot of "sinking," the likely sea level rise in New Jersey by 2100 will be between 1-3 feet.

For the record, we are attaching an analysis and an update to that analysis we had prepared by a climatologist that details these findings. I am also attaching a document that was prepared by the STAP report's authors that compared the original 2019 STAP report to the latest studies. The DEP has this updated report but did not reference it in its analysis of the science or anywhere in the Summary of the rule. The unpublished update to the STAP report is consistent with the analysis provided by our climate expert's report and with the latest studies. It acknowledges that the prediction of a West

Antarctic ice sheet collapse is based on expert opinion (which expert was also a co-author of one of the later, contradictory reports), not on any scientific study or finding. As such it is a "low confidence" assumption, the lowest level attributed to any scientific projection in the climate community. While the ice sheet collapse is possible, it is not likely. In fact, it is unlikely. Given the enormous impact that this rule would impose on the business community and citizens of New Jersey from the use of this projection, we strongly recommend that this number be lowered to a likely sea level rise standard of 2 feet. Such a standard would be protective of the citizens of New Jersey, would be the strictest standard in the nation, if not the world, and can be adjusted over time should actual measurements show an accelerated sea level rise.

We want to emphasize again that even Professor Bob Kopp, in the review of the STAP report, acknowledges that the 2-foot sea level rise attributable to the West Antarctic ice sheet collapse is based on low confidence projections. The updated report suggests that such use of low confidence data can be appropriate depending "on the risk tolerance of the projects and guidance in question … Similarly, the question of whether to consider projections incorporating low confidence processes is a question of risk tolerance."

The DEP has historically not used such low confidence data in its analysis of risk tolerance in setting standards. The DEP has tried to find more likely and accepted scientific bases for its regulatory standards. In fact, the Legislature, in amending the law concerning site remediation standards, prohibited the DEP from using "redundant conservative assumptions." The Legislature understood that science is not always precise, that a certain amount of uncertainty exists, but that if the DEP always assumed the most protective standards that society could not function. Given the enormous economic impacts of imposing a high and unlikely regulatory standard today, based on models, a prediction 75 years from now, with a 17% confidence level, and then compounding it with low confidence assumptions, the DEP should not move forward with this proposal. It should adopt a realistic sea level rise standard of 2 feet and adjust as needed over the course of this century. We have time to adjust.

While we generally are supportive of considering future sea level rise, even to the end of the century, so long as the science is supportable, updated, and likely, others have argued for a more incremental approach. They would suggest selecting a standard for the year 2050, which may be more predictable and, as we have stated, can be adjusted. We would not object to this approach as an incremental measure.

Resiliency vs. Retreat - NJBIA recognizes that climate change poses a growing threat to our coastal state and that with its low-lying coastal plain we are especially vulnerable to storms and sea level rise. We always have been, even without sea level rise. We thus applaud the Department for undertaking an effort to raise the profile of being resilient in response to climate threats and for taking the initial steps in setting forth a policy direction. We agree with many of the strategies in the rule to make our coast more resilient, especially in using nature-based solutions to mitigate against potential harm. We also think it is important to coordinate government actions and policies. We learned from Superstorm Sandy that allowing one town to lack sufficient beach and dune protections jeopardizes every town around it. We are also generally supportive of providing public information and encouraging engagement of citizens and local governments.

However, we reject the unstated, but underlying motive of this rule proposal – beginning the regulatory process of compelling a "managed retreat" from the New Jersey coast. This rule, by establishing a 5-foot regulatory sea level rise standard and the commensurate IRZ and CAFE and the onerous provisions attached to each, is making it more difficult to live, work, and do business in our coastal communities. That seems to be the intent. The rule was very specific in stating that development should not be allowed or encouraged in the IRZ. The IRZ, while a small area of the state as a whole, is a large area in many of the coastal communities. For instance, about 46% of Cape May County is in the IRZ.

It its 2021 "Climate Change Resilience Strategy," the DEP specifically calls for a managed retreat from the Jersey Shore and coastal communities. Strategy 6.9 "Support and Incentivize Movement to Safer Areas" specifically calls for measures to be taken now to begin the process of a managed retreat. It provides:

> ***Action must be taken now*** to prepare communities for the inevitable shift that will occur as people, businesses, and coastal functions move to safer areas. Alternately referred to as managed retreat, managed realignment, resilient relocation, or transformational adaptation, whatever the term, the result is the same; whether through individual or market decisions, people, businesses, and coastal functions will eventually move to safer areas. While large-scale managed retreat from New Jersey's coast is unlikely to be necessary or mandated in the immediate future, planning, policy, and ***regulatory actions must be taken now*** to alleviate the potential economic and societal losses that will be caused by significant unplanned migration away from vulnerable areas. (emphasis added)

It is clear that the REAL PACT rules are following this resilience strategy by setting an unrealistic prediction of sea level rise, imposing onerous and costly standards, and making it difficult for residents and businesses to continue to thrive in our state's most valuable land areas. Following the resilience strategy of moving in the direction of a managed retreat, the PACT REAL rules are the first step by the DEP in its long-term strategy of a managed retreat.

With all due respect to the DEP's role in regulating coastal development, we find nothing in the statutory law or DEP's enabling statutes that authorizes it to determine that the millions of people who live along our coastal water bodies need to move to safer ground in a managed retreat. This decision is a major policy that is best made by elected officials, especially the Legislature, which is in a better position to evaluate options, balance interests, and take a more holistic approach to the risk of sea level rise. We would recommend that the State should be more focused on ways to make New Jersey more resilient to the inevitable coastal storms and sea level rise. There may be some areas that may need to be abandoned, now or over time. We have a Blues Acres program for those situations. But this is a major policy decision, one the DEP is not equipped institutionally to address.

We do support efforts in the rule proposal to better inform local governments and residents about the risk of sea level rise. However, we need to avoid ideologically driven policies disguised as scientific facts. It is just as important to tell the public what we do not know as it is to tell them what we do know. We should not be afraid to express uncertainty, and we must always be truthful. We also generally support promoting climate-informed investments to ensure our public monies are spent wisely and in the most effective manner. We do believe, however, that the state should take a greater

role in providing resiliency funding. The needs are often too great for local governments to afford, and this is precisely why state government should have a leading role.

The assumption the Department uses on future sea level rise is crucial. It is as important, if not more important, than any strategy contemplated. Assumptions on sea level rise will impact economic decisions and outcomes today as flood hazard regulations will be changed to reflect those assumptions. It will impact decisions on shore protection structures and feasibility, as well as cost benefit. Whether you are planning to protect a population from a 1-foot sea level rise as opposed to a 5-foot rise will determine how big a dune must be, how wide a beach must be, and whether such engineering is structurally feasible or cost-effective. Choosing a 5-foot standard will mean fewer shore protection projects will happen. The result will leave more coastal communities vulnerable to the storms and climate impacts that the strategy is intended to protect against.

The selection of 5-foot sea level rise standard will also drive the policies on retreat. We may very well be able to protect ourselves from a 1-foot or even 2-foot sea level rise, and do so economically, but a 5-foot sea level rise projection may make it physically impossible and fiscally imprudent to prepare for in a resiliency strategy. The mere fact that a 5-foot sea level rise is used as a planning and regulatory tool may itself be the impetus for retreat. It becomes a self-fulfilling prophecy. Set a standard that can't be met, regulate to that standard, drive fear of that standard, don't provide protections because of that standard, and people will no doubt abandon their homes and communities and retreat. Even if they don't retreat voluntarily, the policies put in place due to that standard will prevent otherwise feasible resiliency projects from being built, thus making living in many areas difficult. The assumption of a 5-foot sea level rise by the Department will force a retreat from coastal communities not because elevated sea levels make it impossible to live in those areas, but because that assumption will drive policies that drive the outcome. What makes this assumption all the worse is that it is not based on the latest science as previously discussed.

Given the enormous implications of the Department's policies based solely on this one, older, non-peer reviewed, outlier STAP report, we ask that the Department look at other authoritative sources for sea level rise projections. We believe the Department should take a more measured approach by using a 2-foot sea level rise projection, which is consistent with most climate science studies using a moderate emissions scenario and adjust as needed based on actual measurements over time.

We note that according to one of the authors of the STAP report, Bob Kopp, projections of sea level rise are an area of "deep uncertainty." We also note that the STAP report's projections for 2030, just six years from now, are falling far short of even their lowest end projections. If that report cannot even accurately project sea level rise six years out, how can it be the basis for major policy decisions based on a 75-year projection?

IRZ/CAFE – There is no need to create a new regulatory Inundation Risk Zone. It should not be adopted. Any protections for persons developing in these areas can be adequately addressed through existing flood hazard area protections.

The IRZ is merely an area carved out of the flood hazard area that the DEP believes will be permanently inundated with water at some point in time. This assumption of impact is based on the DEP's improper use of the 2019 STAP report as a basis and need for additional regulation. While the

DEP claims it is not telling people they cannot build in these areas, it is setting up a regulatory system that will make it more costly and time-consuming and, thus, less likely to happen.

First, if the DEP adopts our recommendation for using a likely 2-foot sea level rise projection, some of our concerns on the IRZ go away because the impact is less. However, even at 2 feet this provision is not necessary. People can readily build higher and with more resilience. Shore protection measures, which are not recognized by the rule proposal, but should be, can also serve as a layer of protection against impacts. The rule proposal acts as if the world will be static for the next 75 years and that we will do nothing to protect development and infrastructure. We will. If there comes a time when an area is permanently inundated with water, there is no need for further regulation, the practicality of living and the market will take care of the issue without government mandates. Of course, it is also very possible that the lands in the IRZ will never be inundated at all.

We do not object to providing developers and local governments with information about the potential future impacts from sea level rise. We would also not object to measures to raise the land on which a development will occur if sea level rise at a harmful level is likely to occur within the normal lifespan of that particular development. However, we object to an alternatives analysis, at least for residential development. If public infrastructure or safety developments are treated differently by steering them away for more vulnerable areas, it may make good public policy.

We also question why regulation in the IRZ is limited to residential and critical buildings. If the DEP were so convinced that these areas will be inundated, other developments would be regulated as well. The decision to select residential and critical development seems more a political compromise than a serious policy concern.

We would support the creation of the Climate Adjusted Flood Elevation if it were based on sound science of likely sea level rise. This proposal is not. We agree that given the very real existence of sea level rise, flood hazard elevations should take those future impacts into account. While most new developments will likely not be in place at the turn of the century due to obsolescence and changing market conditions, we do not object to this longer planning horizon, again, if the standards are based on likely outcomes.

We object, however, to the requirement for deed notices to inform future purchasers of the potential for sea level rise impacts. First, the Legislature already passed a law mandating seller disclosure when a property is in a flood zone. That notice serves the purpose of informing the buyer before a sale. A deed notice locks in a presumption of sea level rise that may never come to fruition. It is unenforceable by the DEP and a poor method of regulatory compliance. These deed notices will also lower property values and, in turn, be a cause of tax appeals on the assessed value of a property. Those tax appeals will then lead to property tax reevaluations. This will cause enormous confusion and disruption in areas with an IRZ. Because there already exists a requirement of seller disclosure, there is no benefit from the deed notice.

The DEP has also made statements that additional elevation standards will save property owners money because of lowered flood insurance costs. This is a simple statement that overlooks how insurance rates are set by the NFIP. We agree that elevating a structure above a FEMA mapped flood elevation will lower flood insurance costs. But we are unaware of any additional savings by elevating even higher. Being 1 foot above the base flood elevation will earn a property owner the full discount

from the NFIP. Going up another 5 feet to meet the requirements of this rule will not save any money, it will only drive up costs, perhaps to the point where it becomes economically infeasible for the property owner.

We note that such a requirement is inequitable. Wealthy homeowners on large waterfront lots will likely have no problem paying the $100,000 or more in costs for the additional elevations. However, a less affluent homeowner with a postage stamp lot, whose home may have been passed along in the family, will not be able to absorb those costs. It is also very possible that homes on smaller lots may not have the room to elevate and still provide access to the property that meets building standards. Seniors and the disabled will also likely be disproportionally impacted by such high elevation standards. There may also be economic impacts to towns from elevating buildings due to fire requirements for buildings of a certain height. Has the DEP analyzed these impacts?

Downtown Development/Streetscapes – Imposing a CAFE or IRZ elevation of an additional 5 feet will also negatively impact our older towns and urban centers along tidal waters that have downtowns. These downtowns are already under enormous economic pressure from online sales and suburban centers. They rely on foot traffic of people on sidewalks entering into retail stores and restaurants. This is already a problem in many towns that have to comply with existing base flood elevations if they build, rebuild, or expand. However, at existing levels there may be opportunities for commercial buildings to meet flood standards through wet or dry floodproofing. While this can limit certain uses of these downtown buildings, and it can be costly, it can be an option. Imposing an additional 5 feet to the elevation standards may make such engineering solutions impractical or impossible. Has the DEP investigated this issue and determined how it would impact downtowns in areas like Hoboken, Jersey City, Long Branch, Asbury Park, and Atlantic City?

Dry Access – The requirement for dry access is currently a significant issue and will only be exacerbated by the adoption of this rule proposal. There are many valuable, developable lands in the state that are negatively impacted by the DEP's dry access rules. This proposal raises the flood hazard elevation by 5 feet, which not only makes it more difficult to comply with the standard but would subject many more lands to the dry access requirements. The rule also does not specify how far off the property the dry access requirements apply. This uncertainty on standards, cost, time, and the ability to comply creates a significant chilling effect on development, including much needed housing. We would recommend that the dry hazard requirement be dropped, especially in areas where shelter in place can be safely accomplished. At the least, do not exacerbate an existing problem by making it even harder to comply. Has the DEP done any analysis on how many more properties would be subjected to the dry access requirements should the rule be adopted?

NFIP – One of the stated reasons for many of the provisions in this rule proposal is to comply with NFIP flood development standards and to protect community ratings. This is the stated objective of many of the permit reporting requirements and certifications of NFIP compliance. We believe the DEP to be wrong in mandating NFIP compliance.

First, we already have one of the most stringent, if not the most stringent statewide flood hazard regulatory programs in the nation. Given that, why do we need to do more when most states do not do what we do? The argument that we would be in non-compliance and thus suffer some penalty does not comport with reality.

Further, and the DEP learned this after adopting regulations after Superstorm Sandy, the NFIP standards are complicated, contradictory, onerous, costly, and largely not strictly adhered to by most of the nation. We already have strict flood hazard development standards at the state and local levels. Building inspectors already ensure compliance with building codes that take into account the needed NFIP standards.

However, we are aware that statements of the need for strict compliance have been made by various officials that are not supported by law or practice. Applicants for minor permits are in no position to certify compliance in part because it is hard to determine what compliance means. We are aware of instances where neither the DEP nor the code officials at DCA were able to discern an NFIP standard for development on piers despite statements from federal flood officials alleging noncompliance. How can the DEP mandate compliance when state officials do not even understand the requirements in the federal rules? Why would the DEP mandate applicant certification of compliance when this is really a local responsibility?

No Build Zones – The DEP has stated that this rule does create "no build zones," yet it does exactly that. These rules establish expansive inundation risk zones that the DEP is claiming will be under water in 75 years. Not only would development there, including redevelopment, expansions, and substantial reconstructions, be subject to elevation (5 feet higher than existing elevation standards), more stringent building requirements, alternatives analysis, and deed notices, but they would be subject to a 3% impervious cover standard for the site, once approved by the State Planning Commission and accepted by the DEP. Impervious cover includes the building, parking, driveways, and sidewalks. The imposition of these stringent limitations, especially the 3% impervious cover standard, effectively makes the IRZs "no build" zones for all development subject to the IRZ and coastal regulations.

Barrier islands – Despite the fact that tens of thousands of people own homes on the barrier islands, and hundreds of thousands if not millions of people vacation there each year, the proposed rules seek to economically harm these already developed areas. The proposed rule would remove coastal center designations returning these lands to an environmentally sensitive area status and thus subject to a 3% impervious cover standard. As with the IRZ sensitive environmental status and its 3% impervious cover standards, this will result in no build standards for lands that are already mostly developed and vital to the shore and state economy. Has the DEP done any analysis on the economic impact of removing the center designations? The DEP originally established these center designations in recognition of the fact that barrier islands are already mostly developed. It is a recognition of reality that the DEP now wants to ignore. It is clear that the DEP's intent of withdrawing these center designations is to make it harder to develop and live on the barrier islands.

Further, these rules would be imposing riparian zone requirements on the bay side of the islands. Riparian zones were established to protect vegetation and habitat along stream corridors, not to impose regulatory requirements along a long line of developed streets with large houses. The imposition of riparian zones will impact what homeowners and others can do to their property without any environmental benefit. It will result in the micromanagement of normal property activities, such as the removal of vegetation and expanding buildings. In areas not developed, there are already existing resource protection rules that are adequate.

We are also concerned with how the barrier island provisions will impact the marinas that are located there. By necessity they are at low levels adjacent to the water. They would be subject to the 3% impervious cover standards as well as the riparian zone restrictions. Such regulatory requirements may make it difficult if not impossible to maintain their businesses, which are vital to providing navigation access to the water consistent with the Public Trust Doctrine.

Infill Development – In the past, the DEP expended significant resources, including legal, in trying to prevent a homeowner from developing an open lot along the ocean in areas where development existed on either side. Very little benefit was gained from these regulatory and legal fights, and the DEP was forced to focus on numerous such cases rather than on developments that had much larger environmental impacts. It was for this reason that the DEP adopted the infill rule so that it would allow developments to occur in already developed areas. The ability of the DEP to protect beaches, dunes and other resources was not lost from the infill rule. But valuable time was not wasted fighting these house-by-house projects. The DEP seems to have forgotten the lessons learned and is now seeking to return to the bad old days by proposing to repeal the infill rule. We warn the DEP that not only will it end up fighting dozens of cases with very little environmental value, but if it wins, it will result in a taking, subjecting the state to paying millions of dollars for these small lots of little environmental but great economic value.

Commercial Development – By creating a large inundation risk zone (IRZ) and subjecting these areas to a 3% impervious cover standard, the rule would create vast "no build" zones, even in many of our urban and suburban areas needing redevelopment. The "substantial improvement" trigger in the rule will prevent many commercial buildings from being redeveloped or retrofitted to accommodate emerging societal needs. It will have the effect of freezing development in time and ultimately lead to urban and suburban decline. Rather than address the impact of these "no build" zones, the DEP has denied the rule's effect in creating them.

Urban Redevelopment – The IRZ "no build" zones discussed above will apply to many of the state's largest urban areas, such as Hoboken, Jersey City, Sayreville, Asbury Park, Atlantic City, and Camden. This will prevent any new development in these areas, prevent the expansion of existing developments, and will make redevelopment difficult if not impossible. Exacerbating the impediments to urban redevelopment are the changes to the stormwater rules contained in the proposal. The DEP has historically recognized that the need for urban redevelopment outweighed any minor benefits that would be gained by imposing additional stormwater requirements on redevelopment projects. This proposal ignores the impacts on redevelopment and changes the stormwater requirements so that a redevelopment project in an urban area would need to meet the same stormwater requirements as if it were being built in a greenfield in a rural area. While we agree that water quality in urban communities should be improved, the way to do so is not through site-by-site stormwater requirements but through regional planning and implementation efforts.

The manner in which combined sewer overflows are being addressed is precisely the way stormwater should be addressed and is being addressed. The DEP should not harm urban redevelopment in order to mandate ineffective regulatory requirements.

Affordable Housing – The need for affordable housing, both for our workforce and citizens, is great. It is toward that end the Legislature passed comprehensive reform measures to help ensure that the needed units are actually built. The Department of Community Affairs just released affordable

housing needs in each of our municipalities. Despite this action to secure needed affordable housing for all our residents, the DEP rules go in the opposite direction. It is as if the DEP is ignoring or not aware of the need for affordable housing. By creating large IRZ "no build" areas, extending flood mapping into areas that have never and will never flood, making the development process more complicated, time consuming, and less predictable, and subjecting development in many areas to increased regulatory requirements, the DEP is acting in direct contravention of the state's affordable housing policies. We cannot have a prosperous society and a robust economy if the residents of the state cannot afford to live here. While the business community recognizes that affordable housing perhaps should not be built in areas subject to flooding, this DEP proposal needlessly places thousands of acres of developable and prime real estate out of bounds due to its extreme projections and provisions.

Changes to the Permit Process – The rule proposal would eliminate most of the existing permits by rule changing them to either permits by registration, by certification, or as general permits. Various other permits are changing categories. Additional professional certifications and sign offs are being added to a number of these permits. We will not comment on all the changes being made but rather we will offer a statement of concern with the general philosophy behind these changes.

The DEP somehow believes it needs to better track minor activities either for NFIP purposes, for enforcement reasons, or to better understand all the impacts of development within a watershed. While these may be ideal goals, they ignore history and reality. First, as we have mentioned, there is no need to track all the activities in a flood zone for NFIP purposes. Most states do not even have statewide flood hazard programs so this obviously cannot be a reason why New Jersey would be required to keep track.

The DEP also lacks the capacity to inspect and enforce all of the permits by registration and certification. These activities all need local approvals, and the tracking and enforcement should be done at a local level. To the extent that some activities may be outside local jurisdictions, such as in-water construction, there are other ways to leverage local involvement than to extend limited DEP resources to these minor developments.

Most important is lessons learned. The DEP has spent the last two decades trying to use regulatory incentives to move activities from IPs to GPs to permits by certification to permits by rule. The concepts are to incentivize people, through an easier regulatory process, to perform development activities that have the least environmental impact. Making it harder, or even eliminating categories of permits, works against these incentives. The DEP should be focusing its resources on activities with larger or potentially larger environmental impacts, not the minor activities that are the subject of a permit by rule.

The DEP should not be putting itself back in inspecting and enforcing minor activities in people's "backyards." It is a waste of resources, creates conflicts, and has little environmental impact. This proposal indicates that the DEP has forgotten its prior lessons.

We appreciate the DEP's desire to track activities so that they can better plan from a watershed perspective. It is an admirable goal and one that the DEP has tried to achieve, and failed, on multiple occasions. It is not that the DEP lacks many very intelligent professionals. It is that watershed management is complex, multifaceted, and with unlimited data points. The DEP lacks the capacity

to track everything, and it has no ability to understand the cumulative impacts of thousands of minor development decisions. There are already tens of thousands of permit documents that the DEP already has that it cannot properly analyze due to a lack of resources. Why would the DEP want to burden the regulated community with submitting more data that will also be useless. The DEP's resources would be better spent in looking at macro trends in watersheds, coordinating between programs on larger projects, and taking affirmative actions to solve watershed wide issues. The DEP has not even updated the science used to support impervious cover standards in a watershed to reflect current conditions.

These permitting changes will also place burdens on homeowners and small businesses which most certainly will result in thousands of paperwork violations for failing to register activities per the new rules. This puts the DEP into an enforcement mode dealing with unsophisticated persons. It is a waste of resources.

The DEP is already challenged in processing permits in a timely manner. We worry that these permit changes will only exacerbate the permit delays without any meaningful benefit to the environment. Do less but do it better.

Wetland Changes – Subsection b. of NJSA 13:9B-23 requires the DEP to issue general permits for isolated wetland impacts of under 1 acre. There are exceptions to this general permit requirement for wetlands of exceptional resource value or for USEPA priority wetlands. The DEP has never required an alternatives analysis for these wetlands impacts and it is doubtful they have the legal authority to do so given that the statute requires the issuance of a general permit. Requiring an alternatives analysis for these wetlands impacts negates the rationale for the establishment of general permits – providing a regulatory incentive to focus development away from higher quality wetlands, to minimize the extent of impacts, and to balance the needs of the development community. The DEP should not require an alternatives analysis for these wetlands impacts nor should it be requiring mitigation.

We appreciate the desire of the DEP to impose additional permit conditions when vernal habitats are being impacted. The DEP previously attempted regulatory changes to discourage impacts to vernal habitats but those restrictions were overturned by the courts as being violative of 13:9B-23. We do not believe the current regulatory proposal can withstand a legal challenge and therefore should not be adopted.

Directional Drilling – NJBIA objects to the provisions that would require new permits for horizontal directional drilling under wetlands or open waters. These activities involve utility or similar lines or pipes. The intent of eliminating the permit requirements was to encourage the use of these techniques which have little or no impacts on the resource. The DEP's rationale for now requiring a general permit with conditions for these activities is because of incidents where chemicals were released or other impacts occurred.

There is no need to require a permit for these activities to address the concerns of the DEP. The incidents cited by the DEP in the rule proposal are rare and accidents will not be prevented by requiring a permit. The persons undertaking directional drilling are sophisticated construction companies and workers. Incidents are rare and are addressed and mitigated when they occur. Requiring permits for these activities, which typically take place for long, horizontal infrastructure

projects, will only drive up costs, create uncertainty, and delay necessary projects for the public good. The DEP should not adopt these changes.

Zane – The changes to the "Zane" rule violate the underlying statute and overturn over 40 years of how the DEP interprets and implements the law. We understand that the DEP may want to better regulate the construction of certain previously existing docks, piers, and wharfs. However, the law is clear that if the structure existed on January 1, 1981, there is an absolute right to rebuild it even if it does not exist at the time of application, which is what the proposal seeks to require. The DEP cannot change the meaning and words of a statute because it does not like the result. We don't know how many of these previously existing structures exist and may be subject to reconstruction. What we do know is that the owners of these lands have a vested right to rebuild the structures pursuant to law that the DEP cannot change by a regulatory change.

Other Provisions – While we have detailed our concerns with a number of proposed regulatory changes, given the enormous length of this proposal, we have only touched the surface of anticipated impacts. We have reviewed the comments of other business associations, in particular the New Jersey Builders Association and NAIOP. We are in agreement with and support their concerns and incorporated them into our comments.

Thank you for the opportunity to comment on these rules.