

IN THE MATTER OF FLOOD HAZARD AREA VERIFICATION AND FLOOD HAZARD AREA INDIVIDUAL PERMIT, 1113-22-0002.1 LUP220002	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket#: A-001639-22 <u>Civil Action</u> On appeal from final agency action of the New Jersey Department of Environmental Protection
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**INITIAL BRIEF AND APPENDIX OF APPELLANT,
THE WATERSHED INSTITUTE**

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¹ This Brief and Appendix will be printed and bound into one combined volume of less than 200 sheets. R. 2:6-1(c).

² “SICRA” refers to the Respondent DEP’s Statement of Items Comprising the Record in this Appeal, which it filed on June 8, 2023. Items in this Appendix contain references to the SICRA for convenience.

³ “Aa” refers to the Appellant’s Appendix, followed by the page number of the appendix. R. 2:6-8.

⁴ The asterisk indicates that this document has been abridged by omitting all irrelevant or formal portions. R. 2:6-1(b).

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STATEMENT

No one can control when and where it rains, but dangerous flooding can be anticipated and managed by good science and good governance. Since the enactment of the Flood Hazard Area Control Act in 1962, the Respondent New Jersey Department of Environmental Protection (“DEP”) has been given strong and sweeping powers to protect the public by regulating development in and around areas that are *likely* to flood during *predictable* rain events. The DEP must use the best available data and a scientific method to predict where it is likely to flood during these foreseeable rain events. It must not allow inappropriate development that could exacerbate and increase the potential for loss of life, damage to property, and contamination of important water resources.

Appellant, The Watershed Institute (“TWI”), was founded in 1949 with the mission to keep water clean, safe, and healthy. It works to protect and restore the water and natural environment in central New Jersey through a combination of conservation, advocacy, science, and education. TWI focuses much of its work in

the Stony Brook-Millstone and the adjacent part of the Central Delaware River Watersheds, while also leading several statewide initiatives. In particular, TWI works with municipalities on behalf of its 1,800 members to enact stronger stormwater management ordinances and more sustainable land use practices. This

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instant appeal furthers Appellant's core mission because the permit issued to Respondent Bridge Point West Windsor, LLC ("Bridge Point") is arbitrary and capricious, and against the legislative intent of both the Flood Hazard Area Control Act, Water Pollution Control Act, and the Water Quality Planning Act.

The proposed development, on a 650-acre site at the intersection of U.S. Route 1 and Quakerbridge Road, represents the largest warehouse development in the State of New Jersey. The permit authorizes a disturbance of more than 400 acres, an increase of more than 241 acres of impervious coverage, which would include a total of 5.5 million square feet of building footprint coverage, 2,435 car parking spaces, 1,072 truck-trailer parking spaces, internal access roads, improvements to adjacent public roadways, utilities, stormwater management, lighting, and significant landscaping and earth grading. Given the massive scale of the proposed development and the potential for unsafe flooding from this project, the DEP should not have left significant questions unanswered in its permit decision.

For the following three reasons, this Court must vacate and remand the permit to the DEP. First, the permit rests on the DEP's required (but missing) evaluation of whether the stormwater runoff from this proposed development will further impair any of the nearby receiving waterways. Second, the permit authorizes the construction of a pipe culvert and road crossing that the DEP's

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regulations do not allow without an adequate justification, and there is not any justification presented for this serious disturbance to the stream corridor. Third, the DEP arbitrarily failed to require use of the best available data when it issued this permit, because the DEP already had in its possession updated studies showing significant increases in precipitation.

The DEP's errors in this case are a violation of the legislative policies behind the Flood Hazard Area Control Act and the Water Quality Planning Act, a failure to create an adequate record for the public and Court to review, and arbitrary and capricious decision making. The permit decision does not represent the level of good science and good governance that is required and expected of the DEP. Appellant now seeks a reversal of the DEP's erroneous permit decision. In the alternative, Appellant seeks a remand to the agency for further factfinding.

STATEMENT OF FACTS AND PROCEDURAL HISTORY⁵

A. DEP's Recent Statements and Rulemaking Regarding Updated Precipitation Data, Climate Change, and Flooding

Shortly after Superstorm Sandy in 2012, the DEP (under Governor Christie's administration) published an emergency rule to implement amendments to its

⁵ The procedural history and statement of facts are combined for efficiency and convenience.

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regulations under the Flood Hazard Area Control Act ("FHACA"), which became immediately effective upon its issuance. 45 N.J.R. 360(a) (Feb. 19, 2013). Therein, the DEP said that the emergency "amendments enable the use of the best available flood elevation data to determine the flood hazard area design flood elevation for a given site." Ibid. The DEP explained that "[w]ith over 8.4 million residents in its 8,721 square mile area and approximately 3.8 million residents in flood hazard areas, without swift and immediate action, the State is presented with a risk of severe impacts during the next flood event." Ibid.

In response to to Executive and Administrative Orders issued by Governor Murphy and DEP Commissioner McCabe in January 2020,⁶ the DEP undertook significant regulatory efforts to study and incorporate climate change considerations into its land use regulations, which include the DEP's regulations that implement the FHACA. In June of 2020, the DEP issued its "Scientific Report

on Climate Change” in which it announced that “[s]tormwater management systems will [] need to be modified to accommodate more intense precipitation events and increased occurrence of nuisance flooding.”⁷In October of 2021, the DEP issued another report titled “Climate Change Resiliency Strategy” which

⁶ Executive Order 100, issued on January 27, 2020. 52 N.J.R. 365(a) (March 2, 2020); Administrative Order 2020-01, issued on January 27, 2020 (New Jersey Protecting Against Climate Threats (“NJ PACT”)).

⁷ NJ DEP, *2020 New Jersey Scientific Report on Climate Change* at xi (June 2020), dep.nj.gov/wp-content/uploads/climatechange/nj-scientific-report-2020.pdf.

further addressed the necessity of revising its regulations to adapt to climate change in New Jersey, including the DEP’s intention to study and adapt its regulations to the reality of climate change impacts in New Jersey, noting that “more frequent and intense storms, and chronic flooding are among the noticeable changes that communities already experience.”⁸

On November 18, 2021, the DEP issued a Press Release to report that it had released two studies led by Dr. Arthur DeGaetano of Cornell University (hereinafter, the “Cornell Studies”), and peer-reviewed by the DEP Science Advisory Board. Aa184. The studies showed that in New Jersey, “[p]recipitation is already 2.5% to 10% higher” and the “precipitation expectations that presently guide state policy . . . do not accurately reflect current precipitation intensity conditions.” Further, “[p]recipitation is likely to increase by more than 20%” by

2100. Ibid. Dr. Anthony Broccoli, the head of the DEP’s standing committee for Climate and Atmospheric Sciences, stated that “[o]ne of the consequences of climate change is that we can no longer assume that what has happened in the past is a guide to the future,” and “[t]hese studies will provide better guidance for estimating and managing future risks to human life, property, and infrastructure.”

Ibid.

⁸ Michael Baker International, Inc., *State of New Jersey, Climate Change Resilience Strategy* (Oct. 2021) at 2, dep.nj.gov/wp-content/uploads/climatechange/nj-climate-resilience-strategy-2021.pdf.

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In the Spring of 2022, the DEP publicly discussed the need for another emergency rule, similar to the emergency rule it promulgated in 2013, to protect the public health and safety from increased intensity of precipitation and flooding in New Jersey. Aa187-202. Despite its public statements and discussions of the need for another emergency rule based on the Cornell Studies’ updated precipitation data, the DEP did not enact an emergency rule. Ibid.

On Oct 27, 2022, the DEP and Governor’s office issued a press release regarding the forthcoming Inland Flood Protection Rule (“IFPR”), which would formally enshrine the updated precipitation data in the DEP’s regulations on a non-emergent basis. Aa203. Governor Murphy stated that “In order to ensure the safety and economic wellbeing of New Jerseyans both today and in the future, our

policy decisions must be informed not by obsolete data, but by the challenging realities currently facing residents and businesses across the state.” Ibid. The Press Release noted that the Cornell Studies had been commissioned to “close severe climate data gaps and provide a reliable scientific basis for regulatory adjustments.” Ibid.

The IFPR was proposed on Dec. 5, 2022 and adopted on July 17, 2023. 54 N.J.R. 2169(a) (Dec. 5, 2022); 55 N.J.R. 1385(b) (July 17, 2023).

B. Bridge Point Submits the Application to the DEP

On March 14, 2022, well after the DEP had the Cornell Studies in hand and in the midst of its public statements regarding the necessity for an emergency rule, Bridge Point filed its application with the DEP. Aa117-168. The Multi-Permit Application sought to develop the 650-acre site, located at the southeastern intersection of U.S. Route 1 and Quakerbridge Road, including the application for the Flood Hazard Area Verification and Flood Hazard Area Individual Permit that is at issue in this appeal. Aa119. The application states that the “finished project will include a total of approximately 5,563,117 square feet of building footprint coverage, 2,435 car parking spaces and 1,072 trailer parking spaces. Other

improvements include internal access roads, improvements to adjacent public roadways, utilities, stormwater management, lighting, and landscaping improvements.” Aa118.

Regarding surface waters on site, the application explains that northern and southern portions of the site drain to separate watersheds, consisting of Duck Pond Run to the north and Shipetauken Creek to the south. Aa124. There are several unnamed tributaries to these surface water bodies on the site. Ibid. Further, “the project involves work within regulated waters and/or associated riparian zones and flood hazard areas. This includes widening the existing public roadway Clarksville Road, grading work, and the construction of four stormwater outfalls, a sanitary

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sewer line, an access road to State Route 1 and internal access roads.” Aa151. Stormwater outfalls would be built to discharge directly into regulated unnamed tributaries to Duck Pond Run and Shipetaukin Creek. Aa151-152. According to the DEP, the stormwater outfalls would also have riparian zone impacts and require in-stream work. Aa035. The applicant also submitted a stormwater report with its application, the most recent version of which was submitted on November 22, 2022. Aa070-093. The stormwater report makes clear that Duck Pond Run discharges directly into the Delaware and Raritan Canal, Aa089, which is a source of drinking water for more than a million people. There was no mention of the new

precipitation data, its impact on flood elevations, or any mention of pollutant limitations or impairments to Duck Pond Run or any other receiving waterway (or the people who might receive the stormwater runoff into their drinking water).

In addition, the permit application explained that “[c]onstruction of the access road to U.S. Route 1 in the northern portion of the site will require disturbance of a Duck Pond Run” tributary. Aa152. It proposed to install a 24-inch circular pipe culvert in the tributary to Duck Pond Run to facilitate a road crossing for the Route 1 Access Road. Aa166. The applicant claimed that the stream offers little or no value to aquatic species. Aa155. The applicant stated that “construction of a culvert is a more practical application at this location,” ibid., and the “design

does not propose installation of the culvert at least 2 feet below the invert of the channel.” Aa166. The applicant claimed that “[c]hannel disturbance has been reduced to the extent practicable based on its location within a narrow portion of the feature and an alignment that is generally perpendicular to the orientation of the channel.” Aa153. The applicant provided no information as to whether a bridge or three-sided culvert had been considered, or any justification as to why such alternative and preferred options were not feasible or practicable due to physical constraints. It likewise does not explain why a circular culvert cannot be constructed 2 feet below the invert of the channel at this location.

C. Post-Application Communications and Deficiency Notices Between the DEP and Applicant

On May 22, 2022, the engineering firm corresponding with the DEP on behalf of the applicant emailed the following to the Environmental Specialist managing the permitting process:

I understand you are out of the office today. Please let me know if you have a few minutes on Tuesday to discuss this project. With news circulating about the anticipated Emergency Rule the Department is planning to drop, I'd like to further discuss the information needed to get this application deemed administratively complete.

[Aa109.]

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The DEP employee set up a video meeting with the applicant, and after the meeting responded that they could “send an email confirming/clarifying that the submitted stormwater management review is pending under the FWW-GP11, which was accepted as a complete application. That way, it is grandfathered under the FWW component.” Aa108. The representative for the applicant and the DEP then discussed back and forth the possible date that the emergency rule would be filed or enacted by the DEP. Aa107.⁹

The DEP issued a series of deficiency letters to the applicant between April

and November of 2022. Within these deficiency letters, there was significant discussion regarding the Route 1 Access Road, the private, internal road that would cross the tributary to Duck Pond Run using a pipe culvert. DEP repeatedly raised the issue that the crossing was not perfectly perpendicular¹⁰ so as to minimize riparian zone impacts at the crossing, insisting that “the current 60-degree crossing proposed for the Route 1 access road must be redesigned to be as nearly

⁹ The record contains no other mention of this effort to rush towards “administrative completeness,” but from this email chain it appears that the DEP and the applicant were working in concert to avoid having to comply with the new rule in the event the application was not yet deemed complete for review by the time the rule was effective. It is not clear from this record why the DEP would have preferred the application be “grandfathered” rather than for the applicant to address all of the deficiencies in the permit application first and then be governed by the imminently forthcoming set of emergency regulations.

¹⁰ The applicant had described the crossing in its application papers as “generally perpendicular.” Aa153.

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perpendicular to the channel as possible.” Aa207. The applicant eventually capitulated, and revised the channel crossing to be perpendicular.

However, this same access road proposes to cross the waterway by means of the pipe culvert, and in none of the deficiency letters did the DEP ever question the applicant’s use of a pipe culvert or raise the regulations regarding a bridge or a culvert that require additional justifications. Nor in any of these communications did the DEP ever ask whether the applicant had applied the latest precipitation data

from the Cornell Studies, or insist that this information be applied.

On September 9, 2022, the DEP advised the applicant that “it does not currently seem feasible that all information required” for the freshwater wetlands and transition area waiver aspects of the multi-permit application would be completed by the FHACA deadline, and recommended withdrawing and resubmitting the application at a later date. Aa103-04. The DEP also gave the applicant the opportunity to bifurcate the application, but noted that “[t]he benefit of issuing both the FHA and [freshwater wetlands] permits together is that it avoids any need for a future modification.” Ibid. On October 3, the applicant notified DEP that it had chosen to bifurcate the application, and resubmitted accordingly. Aa94. The Freshwater Wetlands General Permits and Transition Area Waiver are still pending before the DEP.¹¹

¹¹ Again, see footnote 9, it is unclear from this record why the DEP would have preferred to bifurcate the permit application when doing so almost certainly

On November 30, 2022, as a part of its review, the DEP issued an environmental report. Aa024-041. The DEP made the following sole finding regarding its duty to determine that the proposed project is consistent with the areawide water quality management plans:

Water Quality Management Plan (WQMP) Rules - Consistency Assessment. This project is a sewage-generating development. All proposed activities are located within the limits of the mapped sewer service area, as shown on the plan entitled: “OVERALL NJDEP

WETLAND PERMITTING PLAN”, Drawing No. WP100, to be approved under Activity No. LUP220001. Therefore, the project is consistent with the Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.

[Aa029.]

Regarding the proposed pipe culvert, the DEP describes the large disturbance for the crossing, and notes that mitigation will be required, but makes no findings as to the underlying justification for the pipe culvert:

Riparian zone impacts proposed under this section includes the permanent disturbance of 9,091 square feet (0.209 acres) to construct a new access road crossing from Route 1 (above the allowable limit of 4,000 square feet under Table 11.2). All impacts are to shrub/scrub and herbaceous vegetation associated with a man-made tributary to Duck Pond Run and involve installing a pipe culvert beneath the crossing. The activities require mitigation for exceeding the allowable limit. However, the applicant has demonstrated that compliance with

presents complicating inefficiencies in the administrative process and any subsequent litigation. It remains likely that this appeal may be complicated by the bifurcated and pending aspects of the FWW permit application.

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all Federal, State, and local requirements governing roadways cannot be achieved, and that public safety cannot be adequately ensured, without exceeding the limit.

[Aa033-034.]

D. The Watershed Institute’s Public Comments and Letters

The Watershed Institute engaged in meetings and submitted comments on

this permit application throughout the process. On July 26, 2022 Appellant The Watershed Institute submitted a public comment detailing its concerns regarding flooding resulting from stormwater from the proposed project. Aa105. The Comment noted that a project of this size should not be located so near flood hazard areas, where flooding is likely. Ibid. The comment noted that “While the applicant has asserted that the stormwater management system for the Bridge Point 8 development meets current state requirements, precipitation is likely to increase by more than 20% from the 1999 baseline by 2100. This system is not sized to manage future storms and as a result, threatens to further inundate areas that already flood.” Ibid.

In an October 17, 2022 letter to various DEP officials, Appellant informed the DEP that “The site and its surroundings have been well-known for their historic flooding.” Aa046. The comment also urged the DEP to apply the Cornell Studies’ updated precipitation data when considering stormwater and flooding at the site, noting that rainwater is projected to increase 40% in Mercer County over the next

100 years. Aa046-047. It raised specific concerns about the stormwater management plan and urged the DEP to strictly apply the stormwater management rules. Aa046. On December 1, 2022, Appellant again submitted a letter urging the department to deny the FHACA permits. Aa205.

E. The DEP's Permit Decision and the Instant Appeal

On December 1, 2022, the NJ DEP issued the final agency decision regarding the “Flood Hazard Area Verification and Flood Hazard Area Individual Permit, 1113-22-0002.1 LUP220002” to Bridge Point. Aa001-011. The permit “authorizes the construction of seven warehouses, associated internal roadways, parking, stormwater management features and other associated amenities.” Aa001. The DEP also “determined that this project meets the requirements of the Stormwater Management rules at N.J.A.C. 7:8.” Aa004. While the pipe culvert is not specifically mentioned, the “statement of authorized impacts” includes a new roadway crossing a water with 9,091 square feet of riparian zone impacts. Aa002.

The final agency decisions were published in the DEP's Bulletin on December 21, 2022.¹² On February 6, 2023, Appellant filed a notice of this appeal seeking review of the DEP's erroneous December 1, 2023 permit decisions. On June 8, 2023, the DEP served the Statement of Items Comprising the Record on

¹² DEP, Bulletin Vol. 46, Issue 24 at 239 (Dec. 21, 2022)

Appeal. On June 23, 2023, this Court issued a scheduling order, and later granted two 30-day extensions. This brief and appendices followed.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

(Aa001)

The Appellate Division “will reverse an agency decision if it is arbitrary, capricious, or unreasonable or if it is not supported by credible evidence in the record.” In re N.J. Pinelands Com’n Resolution, 356 N.J. Super. 363, 372 (App. Div. 2003). In doing so, the Court must consider “whether: 1) the action violates express or implied legislative policies; 2) the record contains substantial evidence to support the agencies’ findings; and 3) in applying the legislative policy to the facts, the agency erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.” Ibid.

This Court is “in no way bound by the agency’s interpretation of a statute or its determination of a strictly legal issue.” Del. Riverkeeper Network v. N.J. Dep’t of Env’tl. Prot., 463 N.J. Super. 96, 113 (App. Div. 2020) (internal citation omitted). Nor will any deference be accorded when “an agency’s statutory interpretation is contrary to the statutory language, or if the agency’s interpretation undermines the Legislature’s intent.” In re Proposed Constr. of Compressor Station (CS327), 2023

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N.J. Super. LEXIS 94, at *7 (App. Div. Aug. 31, 2023). Nor will a court defer to an agency’s interpretation of its own regulations where it is “plainly unreasonable.” In re Eastwick Coll. LPN-to RN Bridge Program, 225 N.J. 533, 541-42 (2016).

The DEP’s decisionmaking regarding permits is a “quasi-judicial function[] [that] must set forth basic findings of fact, supported by the evidence and supporting the ultimate conclusions and final determination, for the purpose of informing the parties and any reviewing tribunal so that it may be readily determined whether the result is sufficiently and soundly grounded.” Musconetcong Watershed Ass’n v. N.J. Dep’t of Env’t Prot., 2023 N.J. Super. LEXIS 81, at *28-29 (App. Div. Aug. 3, 2023) (internal alterations and citation omitted); see Am. Civil Liberties Union of New Jersey v. Hendricks, 233 N.J. 181, 200 (2018) (“An action that comes to us as a result of final agency action must have a fully developed record so that a reviewing court may engage in meaningful appellate review.”). “In reviewing administrative adjudications, an appellate court must undertake a careful and principled consideration of the agency record and findings.” In re Adoption of Amendments to Ne., Upper Raritan, Sussex Cty., 435 N.J. Super. 571, 584 (App. Div. 2014) (internal citation omitted). The Court “may not simply rubber stamp an agency’s decision.” Ibid.

The DEP “cannot issue or deny a permit ‘absent satisfaction of the applicable statutory criteria.’” Riverkeeper Network, 463 N.J. Super. at 113

(internal citation omitted). Where “there is nothing in the agency record to indicate the Department ever considered the question, much less decided it,” vacatur and

remand to the agency is appropriate. In re Proposed Constr. of Compressor Station (CS327), 2023 N.J. Super. LEXIS at *3.

II. THE DEP FAILED TO MAKE AN ADEQUATE WATER QUALITY MANAGEMENT PLAN CONSISTENCY DETERMINATION (Aa001)

The DEP failed to make an adequate “Consistency Assessment” in violation of the Water Quality Planning Act and Water Quality Management Planning Rules, because it failed to make any findings regarding pollutant limitations and other requirements of the areawide water quality management plans applicable to the waterways into which the project will directly dump stormwater. The DEP found that the project was consistent with the Water Quality Planning Act and corresponding rules solely because the development is within a mapped sewer service area. Aa012, Aa029. While this is a key determination for a Consistency Assessment, it is insufficient standing alone. The DEP is also required to make a record regarding Total Maximum Daily Loads (“TMDLs”)¹³ and any wasteload

¹³ A “Total maximum daily load” or “TMDL” is the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will continue to meet water quality standards for that particular pollutant. See N.J.A.C. 7:9B-1.4.

allocations¹⁴ for impaired waters,¹⁵ as well as any additional requirements contained

in the applicable Areawide Water Quality Management Plans (“Areawide WQM Plans”). The DEP must consider and make a record of this information in order to determine consistency with the applicable Areawide WQM plan, but it did not. The Court should vacate and remand the permit to the agency to develop an adequate record and provide a reasoned Consistency Assessment. See Musconetcong Watershed Ass’n, 2023 N.J. Super. LEXIS at *28-29.

The Water Quality Planning Act was enacted in New Jersey in 1977 in response to analogous sections of the federal Clean Water Act, and claimed the same objective: “to restore and maintain the chemical, physical and biological integrity of the waters of the State.” N.J.S.A. 58:11A-2. As described at the time the act was passed, the WQPA “establishes a process for planning and managing a comprehensive pollution control program for municipal and industrial wastewater, storm and combined sewer runoff, nonpoint source pollutants and water quality as it relates to land use.” Aa223. “With specific regard to water resources,” the

¹⁴ A wasteload allocation is the amount of a pollutant that is allocated to a specific point source, and combined with other sources, makes up the TMDL, or total maximum daily load. See N.J.A.C. 7:9B-1.4 (definition of wasteload allocation). Stormwater discharged through an outfall is considered a point source discharge under the Clean Water Act. 33 U.S.C. § 1362(14).

¹⁵ Impaired waters are those that do not support their designated uses because they exceed the pollutant levels required by the surface water quality standards. These are commonly referred to as impaired waters. Sierra Club, Inc. v. Leavitt, 488 F.3d 904, 907 (11th Cir. 2007).

WQPA “provides for the restoration and maintenance of water quality in this State, including a planning process to control and maintain water quality.” In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 558 (App. Div. 2011).

Under the WQPA, “All projects and activities affecting water quality in any planning area shall be developed and conducted in a manner consistent with the adopted areawide plan. . . . The commissioner shall not grant any permit which is in conflict with an adopted areawide plan.” N.J.S.A. 58:11A-10. This mandate means that a Consistency Assessment under the WQPA is a prerequisite for all permits, including those at issue here.

The Water Quality Management Planning Rules (“WQMP Rules”) similarly provide that, “All projects and activities affecting water quality shall be developed and conducted in a manner that is consistent with this chapter and adopted areawide plans. *The Department shall not issue a permit or approval that conflicts with an adopted areawide plan or this chapter.*”¹⁶ N.J.A.C. 7:15-3.2(a) (emphasis added). Regarding the areawide plan or Areawide WQM Plan, these are developed at the county level, and “identify and address selected *water quality and*

¹⁶ Regarding consistency with “this chapter,” it should be noted that Subchapter 5 of this chapter, “sets forth the processes for identifying and listing the 303(d) List of Water Quality Limited Waters, setting the priorities and schedule for development of total maximum daily loads (TMDLs) to address impairments in water quality limited waters, and for developing TMDLs and plans to implement TMDLs.” N.J.A.C. 7:15-5.1. Thus, consistency with “this chapter” also requires that surface water quality be considered, including TMDLs.

wastewater management issues for a particular jurisdictional area, including strategies to address both point and nonpoint source pollution. The Areawide WQM Plan is the basis by which the Department and the designated planning agencies (DPAs) conduct selected water quality management planning activities for a particular area of the State.” N.J.A.C. 7:15-2.3 (emphasis added).

In contrast, a “[w]astewater management plan” or “WMP” means a written and graphic description of wastewater service areas, and wastewater treatment needs.” N.J.A.C. 7:15-1.5. Wastewater Management Plans (WMPs) “are components of the areawide plan.” In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. at 560. As the DEP explains on its website

The areawide WQM plans are umbrella plans, each with various adopted components that address different aspects of water resource planning. Wastewater Management Plans (WMPs) assess the cumulative water resource impact of future development and *are a component* of the areawide WQM plans. Total maximum daily loads (TMDLs), which address existing water quality impairment and establish an implementation plan to restore the water quality of those waters, *are another component* of the areawide plans.”¹⁷

Put simply, Areawide WQM Plans contain both wastewater and water quality/TMDL components, and consistency with Areawide WQM Plans require a consideration of and demonstration of consistency with *both*. The WQPA and WQMP Rules require consistency with the Areawide plans, not simply the

¹⁷ NJ DEP, Water Quality Management Planning Program web page, available at

wastewater management plans. N.J.S.A. 58:11A-10; N.J.A.C. 7:15-3.2(a). The Areawide WQM Plan at issue in this matter does not appear in this administrative record, nor does it otherwise appear to be available to the public anywhere else.

In 2015, the DEP amended the WQM Rules, seeking to “streamline” and “simplify” the planning process, including the Consistency Assessment. As a part of these proposed revisions, the DEP “eliminate[d] the separate formal consistency determination review as part of the water quality planning process” and shifted this requirement to the permitting process, “when actual proposals and current conditions can be part of the decision making.” 47 N.J.R. 2531(a) (Oct. 19, 2015).

The WQM rules as amended provide that

The Department shall determine if a project or activity is located within an area eligible for sewer service as part of the Department’s review of a permit application. There is a rebuttable presumption that a project or activity that generates wastewater that is proposed to be conveyed to a NJPDES regulated wastewater facility is consistent with the areawide plan if it is within the sewer service area of the adopted areawide plan.

[N.J.A.C. 7:15-3.2(b).]

DEP apparently reads this language to mean that the only thing any project that generates wastewater must demonstrate for consistency is that it is within an area eligible for sewer service. First, the DEP is incorrect because looking at the language of the regulation and the purpose of the rules, this rebuttable presumption

other valence of a Consistency Assessment described above—protection of water quality from other sources of water generated by the development, such as stormwater discharges.

Second, the agency’s contemporaneous statements in the proposed and final rulemaking for these amendments make clear the amendments were not intended to limit the Consistency Assessment *only* to whether a project was within a mapped sewer service area, but to continue to address water quality through the Areawide WQM Plan and TMDLs. In the DEP’s rulemaking document for the proposed amendments to the WQM rules, the DEP explained:

As proposed at N.J.A.C. 7:15-3.2(b) through (d), WQM plan consistency will be evaluated when a project or activity seeks a permit from the Department. At the time of permit application, the Department will determine if the project or activity requiring centralized sewer service is located in a sewer service area. If so, there is a rebuttable presumption that the project or activity is consistent with the areawide plan. *If a WQM plan has additional requirements, or a wasteload allocation in an adopted TMDL has been established, these must also be addressed in order for the proposal to be consistent.*”

[47 N.J.R. 2531(a) (Oct 19, 2015) (emphasis added).]

DEP repeated this exact statement in the final rule response to concerned commenters. 48 N.J.R. 2244(a) (Nov. 7, 2016) (response to comment #164). The

significance of the DEP's own explanation in the rulemaking process cannot go unheeded. The DEP made clear that the sewer service determination was not the sole requirement, and that any additional requirements in a WQM plan

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“must” be addressed, including TMDLs. That the DEP must consider TMDLs and water quality is also the only sensible reading of rules that are intended to ensure the implementation of areawide WQM plans, which concern *both* wastewater conveyed to municipal treatment works, and stormwater that could pollute surface waters.

With this background, the DEP's Consistency Assessment for the project is plainly inadequate. The following is the sum total of the agency's Consistency Assessment:

This project is a sewage-generating development. All proposed activities are located within the limits of the mapped sewer service area, as shown on the plan Therefore, the project is consistent with the Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.

[Aa012, Aa029.]

This minimalist application of the Water Quality Planning Act and Rules cannot be left to stand. Stormwater will flow off of 241 impervious acres of additional impervious surface, through the applicant's stormwater outfalls, and directly into tributaries to Duck Pond Run and Shipetauken Creek. Aa151-152. Duck Pond Run discharges directly into the Delaware and Raritan Canal, Aa089, a

major source of drinking water. Entirely absent from the record is DEP's determination of whether these water bodies or those that they feed, including the

Delaware and Raritan Canal, Assunpink Creek, and the Delaware River,¹⁸ are impaired, or subject to any TMDLs or wasteload allocations.

The purpose of the Water Quality Planning Act and its requirement that all permits be consistent with the Areawide WQM Plans is to ensure that these big picture, county-level impacts are not missed at the permitting stage. This safeguard is particularly important since the 2015 amendments shifted this analysis from the planning stage entirely to the permitting stage. Yet, in the instant permit decision, the DEP created no record and made no findings that it even considered whether the Mercer County WQM plan has any additional requirements, or if a wasteload allocation in an adopted TMDL has been established in any of the impacted waterbodies. Because the agency either did not consider the critical water quality aspects of the Consistency Assessment, in violation of the legislative intent of the WQPA, or created no record of this matter, vacatur and remand to the agency is appropriate.¹⁹In re N.J. Pinelands Com'n Resolution, 356 N.J. Super. At 372 (an action that violates express legislative policies is reversible error); In re Proposed Constr. of Compressor Station (CS327), 2023 N.J. Super. LEXIS at *3 (vacatur and

remand is appropriate where DEP left no record that it considered the issue).

¹⁸ The DEP has not made a complete record as to which waterways will be impacted by stormwater flowing off of the site, by which the public and this court could determine whether there are any applicable TMDLs.

¹⁹ Nor does it appear that this was considered anywhere else in the DEP's technical permitting review, including in its analysis of the project's compliance with the Stormwater Manage Rules at N.J.A.C. 7:8. Aa004.

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III. THE DEP ERRONEOUSLY PERMITTED A CIRCULAR CULVERT IN VIOLATION OF THE FLOOD HAZARD AREA CONTROL ACT RULES AND SHOULD BE REVERSED (Aa001)

The permit application proposes to install a 24-inch circular pipe culvert in a tributary to Duck Pond Run to facilitate a road crossing for the Route 1 Access Road. Aa166. This circular culvert was erroneously permitted by DEP in violation of the relevant Flood Hazard Area Control Act regulations regarding Requirements for Regulated Work in a Channel, N.J.A.C. 7:13-11.1, Requirements for a Regulated Activity in a Riparian Zone, N.J.A.C. 7:13-11.2, and Requirements for a Bridge or Culvert, N.J.A.C. 7:13-12.7.

The applicant did not demonstrate that a bridge was infeasible at this location, as required by the regulations, and did not meet multiple other requirements regarding the permissibility of and construction standards for a circular culvert. The DEP never discussed the failure of the applicant to justify building a pipe culvert in its various deficiency notices, and approved its

construction. The baseless approval of this circular culvert to facilitate the road crossing, which will cause over 9,000 square feet of riparian zone impacts, also undermines DEP's finding that riparian zone impacts were minimized.

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A. DEP Approved a Circular Culvert Without Evidence that a Bridge was Infeasible
(Aa001)

Installation of a pipe culvert is a regulated activity in a channel. Regarding such activity, the “Department shall issue an individual permit for a regulated activity in a channel only if . . . [d]isturbance to the channel is eliminated where possible [and] where not possible to eliminate, disturbance is minimized.” N.J.A.C. 7:13-11.1(b)(2). Where the applicant demonstrates that a channel modification is necessary for the construction of a bridge or culvert, the regulations require that “[a] bridge is constructed rather than a culvert, where feasible.” N.J.A.C. 7:13-11.1(c)(2).

The applicant does not provide any explanation in the application or correspondence with the DEP that a bridge is not feasible at this location. Nor did the DEP ever question the use of a circular culvert at this location in any of its post-application communications with the applicant. This was error.

In addition, the regulations for bridges and culverts favor a bridge or

three-sided culvert that “completely spans the regulated waterway,” and preserves “stable, natural, earthen channel” over a pipe culvert:

The Department shall issue an individual permit to construct a new bridge or culvert . . . only if the new or reconstructed structure is a bridge, arch culvert, or three-sided culvert . . . unless the applicant demonstrates that a circular, elliptical, or box culvert is acceptable under [the conditions] below.

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[N.J.A.C. 7:13-12.7(f)]

In order to justify building a circular culvert, an applicant can submit information to demonstrate that spanning the channel “*would not be practicable due to one or more of the following physical constraints:*

- i. Unstable substrate, which would likely undermine any proposed footing within or adjacent to the channel;
- ii. Irregular channel configuration;
- iii. Anticipated adverse hydraulic impact to the channel; or
- iv. Anticipated adverse impacts to offsite flooding, the environment, or public safety.”

[N.J.A.C. 7:13-12.7(g)(6) (emphasis added).]

No information regarding any of these physical constraints was provided by the applicant. Instead, the applicant states only that:

A culvert is proposed to facilitate the bridge crossing based on the width and character of the existing feature. The feature comprises, what appears to be a historically man-made drainage ditch, which presently contains a bed of less than 5 feet wide. The feature is dominated by dense vegetation that offers little or no value to aquatic species. As a result, construction of a culvert is a more practical application at this location.

This information is nonresponsive to the regulations and does not demonstrate that a bridge is not feasible, N.J.A.C. 7:13-11.1(c)(2), or spanning the channel is not practicable due to physical constraints, N.J.A.C. 7:13-12.7(g)(6). Whatever the applicant means when it says it is not “practical,” this does not demonstrate that it is not “practicable.” The DEP did not request additional

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information from the applicant to rectify these deficiencies. The DEP therefore impermissibly issued this permit “absent satisfaction of the applicable statutory criteria.” Riverkeeper Network, 463 N.J. Super. at 113 (internal citation omitted).

B. DEP Did Not Hold the Applicant to the Strict Requirements for a Circular Culvert
(Aa001)

Even if the applicant had demonstrated that a bridge or three-sided culvert was not feasible or practicable, which it did not, in order to justify a circular culvert, the applicant would have had to demonstrate that at least one of the conditions in N.J.A.C. 7:13-12.7(g) applies (such as the tributary being manmade or fully lined with concrete) *and* adhere to the strict construction requirements of 12.7(h) as follows:

Where a circular, elliptical, or box culvert is found acceptable under (g) above, the culvert shall be constructed as follows:

1. *The invert of the culvert shall be installed at least two*

feet below the invert of the natural channel. In order to create a contiguous flow-path through the culvert that meets and matches the bottom inverts, cross-sections, and profile of the channel beyond the culvert, the culvert shall be filled with native substrate up to the invert of the natural channel; or

2. Where it is demonstrated that the culvert cannot be constructed as described at (h)1 above due to unstable substrate or other physical constraints, the floor of the culvert shall be constructed to incorporate an artificial low-flow treatment, such as a V-notch or key-notch, baffles to hold substrate in place, or a concave floor. For example, an artificial low-flow treatment can be used

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where the placement of two feet of substrate within the culvert would not be feasible or effective in stabilizing the channel and protecting aquatic habitat under expected flood conditions.

[N.J.A.C. 7:13-12.7(h) (emphasis added)]

The application clearly states that the “design does not propose installation of the culvert at least 2 feet below the invert of the channel,” Aa166, but does not accordingly “demonstrate[] that the culvert cannot be constructed” two feet below invert or propose to incorporate an artificial low-flow treatment. There is no exception in the regulations by which the applicant could justify forgoing even this minimal level of protection for the stream. Thus, in addition to failing to require an explanation why a bridge was not feasible and a bridge or three-sided culvert was not practicable, the DEP failed to hold the applicant to this additional layer of regulatory requirements for a circular culvert, and erroneously approved the permit.

C. DEP Failed to Support Its Finding that Riparian Zone Impacts Have
Been Minimized
(Aa001)

The DEP's failure to hold the applicant to the regulations regarding in-channel work, bridges, and culverts also means that DEP's finding that riparian zone impacts have been minimized is unsupported. There are 9,091 square feet of riparian zone impacts for the access road to Route 1, well over the 4,000 allowable

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for a road crossing a waterway, and all are associated with the stream crossing, including installation of the pipe culvert and rip rap necessary to stabilize the pipe culvert. Aa033-034. The DEP states in its environmental report that the applicant has “demonstrated that all riparian zone impacts have been eliminated and minimized to the greatest extent practicable” including by “redesigning the alignment of the proposed Route 1 access road to cross a narrower section of a stream.” Aa031. But inexplicably, no effort was made to reduce the riparian zone impacts by holding the applicant to the requirements for bridges and culverts.

The FHACA rules require that impacts to the riparian zone must be minimized to only the disturbances that are necessary to accomplish the basic purpose of the development. N.J.A.C. 7:13-11.1. Part of the reason that a bridge spanning a water is preferred to a culvert is that it minimizes impacts to the channel and riparian zone while still facilitating a road crossing, while a circular culvert

requires building directly in these regulated areas. It is uncertain to what degree these impacts would be reduced with proper application of the regulations, but that is precisely the point. DEP's failure to apply the regulations intended to mitigate the environmental harm of a stream crossing means that its finding that riparian zone impacts have been minimized is flawed and unsupported.

IV. THE DEP IMPROPERLY ISSUED THE FHACA PERMIT BECAUSE THE DEP DID NOT MAKE ANY FINDINGS REGARDING THE BEST AVAILABLE PRECIPITATION DATA AND ASSOCIATED FLOOD ELEVATION FORECASTS
(Aa001)

The DEP arbitrarily and capriciously ignored the best available precipitation data when it issued this permit on December 1, 2022—data that was known to the DEP at least as early as November of 2021. The Cornell Studies, commissioned and peer reviewed by the DEP's scientists, demonstrated that precipitation had already increased 2.5%-10% beyond the information previously relied on by DEP, and would likely increase by more than 20% by the year 2100. Aa184. This information was later formally incorporated into the agency's Inland Flood Protection Rule ("IFPR"). Regardless of when the IFPR became effective, the DEP had a duty *at the time the permit application was reviewed and the permit was*

issued to ensure the proposed development was designed to withstand “a flood equal to the 100-year flood *plus an additional amount of water in fluvial areas to account for possible future increases in flows* due to development or other factors.”²⁰

Despite this duty and the new data in its possession, the DEP appears to have allowed a massive development with 241 acres of new impervious surface to

²⁰ See N.J.A.C. 7:13-1.2 (emphasis added), the DEP’s definition of “flood hazard area design flood” which was in effect at the time this permit application was deemed complete for review on August 4, 2022 (Aa024).

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proceed under outdated flooding forecasts and obsolete precipitation data. This arbitrary decision violates the express legislative policy of the Flood Hazard Area Control Act (FHACA) to avoid the “improper development and use of [flood hazard areas] which would constitute a threat to the safety, health, and general welfare from flooding,” N.J.S.A. 58:16A-52(a), and violates the agency’s own regulations requiring it to account for additional water to protect the public from flooding, N.J.A.C. 7:13-1.2, and to “minimize damage to life and property from flooding caused by development within flood hazard areas.” N.J.A.C. 7:13-1.1(c). The permit must be vacated and remanded to the DEP.

A. DEP Was Aware That the Precipitation Data and Associated Flood Elevation Predictions were “Outdated” and “Obsolete” at the Time It Issued the Instant Permit

The DEP announced on November 18, 2021, that “New Jersey-Specific Studies Confirm Rainfall Is Intensifying Because Of Climate Change.” See DEP’s November 18, 2021 press release. Aa184. Touting this new data again, the DEP announced a joint press release with the Governor’s office on October 27, 2022, a month before the issuance of the instant permit, stating that:

“In order to ensure the safety and economic wellbeing of New Jerseyans both today and in the future, our policy decisions must be informed not by obsolete data, but by the challenging realities

currently facing residents and businesses across the state,” **said Governor Murphy.**

. . .

“Updating the data New Jersey uses to manage stormwater runoff and determine building elevations along rivers and streams will help flood-prone communities to better protect their homes and businesses, making us more resilient to the increasing extreme weather that New Jersey is experiencing,” **said Commissioner LaTourette.**”

[Aa203. Emphasis in original.]

The DEP published its proposal for the Inland Flood Protection Rule to formalize the application of the updated precipitation data, which amended the FHACA and Stormwater Management Rules, on December 5, 2022. 54 N.J.R. 2169(a) ((Dec. 5, 2022)). The DEP described the necessity of the new data as

follows:

The proposed amendments are intended to ensure the use of current precipitation data and reliable climate science to aid New Jersey communities in better preparing themselves to confront one of the most critical threats to public safety presented by climate change-increased intensity of precipitation events and the resulting effects of additional stormwater runoff on stormwater management systems and flood elevations in fluvial areas.

[54 N.J.R. 2169(a) (Dec. 5, 2022).]

The DEP further found that, “*stormwater BMPs and flood hazard calculations based on this obsolete data will inadequately protect against the adverse impacts of flooding* due to increasing precipitation resulting from climate change.” Id. at 2172 (emphasis added). This is a damning admission by the DEP.

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To be clear, the Appellant does not claim that the IFPR should have governed the procedures for the DEP’s permit decision in this case. See N.J.A.C. 7:13-21.1(e) (“In reviewing an application, the Department shall apply the requirements of this chapter in effect at the time the application is declared complete for review”). And the Appellant generally supports the DEP’s eventual adoption of the IFPR, on July 17, 2023. 55 N.J.R. 1385(b). Rather, these statements by the DEP demonstrate that at the time the DEP issued this permit on December 1, 2022, the DEP had already decided that the old data would not sufficiently protect against flooding. Therefore, it was necessary to employ the new precipitation data in this administrative record

and make the requisite factual findings regarding the associated flood elevation predictions so that the DEP could adequately protect against threats from likely flood events.

B. DEP's Failure to Make Findings to Support its Instant Permit Decision Based on the Best Available Precipitation Data Violated its Regulations and Duty to Protect the Public (Aa001)

Fundamental to the FHACA permit at issue here is the mandate that the DEP must delineate and regulate the the "flood hazard areas" which consist of "such areas as, in the judgment of the department, the improper development and use of which would constitute a threat to the safety, health, and general welfare from flooding." N.J.S.A. 58:16A-52(a). This statutory mandate controlled the DEP's

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permit decision in this case and has not changed since the FHACA first became effective on April 3, 1962. See Am. Cyanamid Co. v. State, Dep't of Env'tl. Prot., 231 N.J. Super. 292, 301-02 (App. Div. 1989); L. 1962, c. 19. The DEP's first regulations to implement the FHACA were proposed expressly because "*Floods can be matters of life and death and the cause of injuries and property damage.*" 6 N.J.R. 391 (Oct. 10, 1974), emphasis added. In addition, it is well settled that the strong mandates in the FHACA:

"...are designed to avoid injuries which likely could arise from an improper land use or development during a likely flow of flood waters: injury to onsite property, injury to offsite persons or property

in the downstream path of the debris from a wrongful development, and injury to community members who drink or use water contaminated by inappropriate onsite development.”

Usdin v. State, Dep’t of Env’tl. Prot., Div. of Water Res., 173 N.J. Super. 311, 331 (Super. Ct. 1980).

The legislature made clear that the FHACA “shall be liberally construed to effectuate the purpose and intent thereof.” N.J.S.A. 58:16A-64. This clearly expressed legislative policy must not be violated when DEP reviews and approves permits, In re N.J. Pinelands Com’n Resolution, 356 N.J. Super. at 372, particularly for developments of this magnitude. The seriousness of the legislative intent of the FHACA (to protect public health and safety from improper development that could result in flooding) necessitates strict application of the DEP’s regulations when it

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conducts a permit review. Dragon v. N.J. Dep’t of Env’tl. Prot., 405 N.J. Super. 478, 491 (App. Div. 2009).

Critical to understanding the DEP’s failure in this case is the following regulatory definition that was in effect at the time the DEP was considering the instant permit application:

“Flood hazard area design flood” means a flood equal to the 100-year flood plus an additional amount of water in fluvial areas to account for possible future increases in flows due to development or other factors. This additional amount of water also provides a factor of safety in cases when the 100-year flood is exceeded.

The “flood hazard area design flood elevation” is governed by stormwater runoff and is a critical measurement in the DEP’s assessment of any proposed development that it regulates under the FHACA. The extent of a flood hazard area on a given site is determined by applying the “flood hazard area design flood elevation” to the best topographic data available. This is the requisite scientific procedure to predict the location and extent of flooding in New Jersey. Thus, the DEP must take into account “*an additional amount of water*” when the DEP determines that there will be reasonably foreseeable impacts to the “flood hazard area design flood” and the associated flood hazard area.

This definition of “flood hazard area design flood” was revised by the DEP’s formal adoption of the IFPR to specifically add “climate change” as a possible

reason for increases in precipitation and runoff. 55 N.J.R. 1385(b) at 1462. This addition does not mean that changes due to climate change were irrelevant under the prior definition, nor is there any regulatory history to that effect. To the contrary, in 2007 the DEP added the words “possible future increases in flows due to development or other factors” to the definition in place of “expected runoff increases due to future development of the drainage area.” 39 N.J.R. 4573(a) (November 5, 2007). Clearly, the DEP’s addition of “or other factors” to the

definition in 2007 shows that it intended the definition to include expected runoff increases *from any possible factor* and not just further development of the drainage area.

It is evident from the regulatory history of the DEP's definition of "flood hazard area design flood" that the DEP was required to include the best available precipitation and flood forecasting data in its review of this permit application, including the data from the Cornell Studies that DEP had on its desk during its permit review. The key to the Appellant's instant argument is that the DEP could not have satisfied its obligation to anticipate "a flood equal to the 100-year flood *plus an additional amount of water in fluvial areas to account for possible future increases in flows due to development or other factors*" without an express reliance on the newest available precipitation data that is in the Cornell Studies.

Finally, as a matter of law, the DEP must apply the best and most recent data in its possession during its permit review to avoid acting arbitrarily. Cf. Gaf Corp. v. N.J. Dep't of Env'tl. Prot., 214 N.J. Super. 446, 451 (App. Div. 1986) (finding that "[o]bviously, DEP can only use the most recent data it has" and "there was no unfairness [to the discharger] in utilizing the available data"). It is a bedrock principle of environmental law that agencies have a duty to apply the best data and

science at their disposal when making decisions, and that they act arbitrarily and capriciously when they fail to do so. E.g., NRDC v. Regan, 67 F.4th 397, 399 (D.C. Cir. 2023) (“In all decisions the agency makes that are based on science, EPA is instructed to use ‘the best available, peer-reviewed science.’”); Custer Cty. Action Ass’n v. Garvey, 256 F.3d 1024, 1034 (10th Cir. 2001) (NEPA analysis requires “best available scientific information”); Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988) (analysis of threat to endangered species must use “best scientific and commercial data available”). While the FHACA does not spell out this specific requirement, the DEP itself asserts that “the function of the Division of Science and Research is to help ensure that the department’s decision-making is based upon the best possible scientific and technical information.”²¹ The possibility that the DEP ignored the best available scientific data in its possession regarding critical public health and safety issues should be alarming.

²¹ See NJ DEP, Division of Science and Research homepage, dep.nj.gov/dsr. 38

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Troublingly, the new precipitation data publicly announced and touted by the DEP on November 18, 2021, and October 27, 2022, and relied on as compelling and scientifically sound in the DEP’s IFPR, is not mentioned anywhere by the applicant or the DEP in this administrative record. There is simply no explanation or factual findings in the administrative record as to whether this updated information was either ignored or applied herein. The Appellant even submitted a

public comment, found in this record, which stated as follows:

While the applicant has asserted that the stormwater management system for the Bridge Point 8 development meets current state requirements, precipitation is likely to increase by more than 20% from the 1999 baseline by 2100. This system is not sized to manage future storms and as a result, threatens to further inundate areas that already flood.

[Aa105.]

And the Appellant was part of a group that submitted a comment specifically requesting that the DEP employ the Cornell Studies for this permit review:

We very much support the Inland Protection Rule and using updated rain data. It is extremely important that the application use the projected data to look at contamination and volume.

[Aa046.]

But the DEP never provided any response to Appellant's comments. The only mention of the IFPR or the DEP's newest data was an inappropriate effort between the applicant and the DEP permit review staff to have this permit application

deemed administratively complete before the IFPR was proposed and adopted. Aa109. It is unclear why the DEP preferred to rush towards "administrative completeness" under the old rules, by bifurcating the FWW and FHACA permit applications, rather than patiently and efficiently requiring the applicant to iron out all of the deficiencies in the multi-permit application at the same time (even if it

meant the permit applications would be governed by the IFPR).

Thus, it appears the instant FHACA permit is based only on what the DEP referred to as “outdated” and “obsolete” precipitation data that was collected through 1999, and does not provide an accurate representation of the potential for flooding from a massive development such as this. This failure, if true, means that DEP violated the legislative purpose of the FHACA to protect the public from flooding due to development, and violated its own regulations which require that the flood hazard area design flood must include additional water sufficient to protect the public safety. In addition, the failure to create any record on this issue is an error that must be fixed on remand.

The DEP ought to have recognized that the permit it issued in this matter represents a uniquely dangerous situation that required a corresponding amount of scrutiny, and that an appropriate record be made, because it is the single largest warehouse development proposed in the State. The development of 400 acres of a 650 acre site, with an addition of 241 acres of impervious surfaces amongst

numerous wetlands and tributaries should not be based on what the DEP has admitted is “obsolete data [that] will inadequately protect against the adverse impacts of flooding due to increasing precipitation resulting from climate change.”

54 N.J.R. 2169(a) (Dec. 5, 2022).

This Court should not accept the DEP's determination that the permit is adequately protective of the public health and safety without a more fully developed record which explicitly makes factual findings and adequately discusses the impact of the newest precipitation data on its application of the FHACA to this proposed development. DEP failed to provide a "fully developed record so that a reviewing court may engage in meaningful appellate review." Am. Civil Liberties Union of New Jersey v. Hendricks, 233 N.J. 181, 200 (2018); see also In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 597 (App. Div. 2004). Therefore, this Court should remand the matter to the DEP so that it can make the requisite findings, of sufficient clarity for the public and any reviewing tribunal, regarding the new data and potentiality for increased flooding from this proposed major development.

C. The Lack of Consideration of the New Precipitation Data Also Undermines DEP's Assertion that Floodway Delineation Was Unnecessary
(Aa001)

The failure to make an adequate record as to whether the appropriate

precipitation data was used to verify the flood hazard area also means that the DEP's unusual decision not to verify any of the floodways on site was also unjustified. Aa015, Aa050. "The inner portion of the flood hazard area is called the floodway and the outer portion of the flood hazard area is called the flood fringe." N.J.A.C. 7:13-1.2. The legislature gave the DEP a broad and unequivocal mandate to "minimize the threat to the public safety, health and general welfare" protect the public safety, health and general welfare by regulating "development and use of land in any *delineated floodway*." N.J.S.A. 58:16A-55(a) (emphasis added).

The DEP claims that "no activity will take place within the floodway" and "the floodway was not delineated for any of the watercourses on site because by inspection, it is clear that the floodway will not be impacted by the proposed stormwater outfall structure proposed in the flood hazard area." Aa015. This record is unclear regarding what specific part of its regulations the DEP relied on to apply the exception that all flood hazard areas and floodways on the site need to be verified for purposes of this permit application. See N.J.A.C. 7:13-5.5(a).

The DEP's regulations expressly provide that "Except as provided at (b) and (c) below, the flood hazard area design flood elevation, and floodway limit, where

present, must be known and verified within the project area...." Ibid. It is unclear whether the DEP relied on the exception to this requirement in 5.5(a) by application of 5.5(b) or 5.5(c), and if so, what facts the DEP relied on to determine

that either one of those exceptions to this rule was applicable. This record is arbitrarily unclear as to why and how the DEP determined the verification of the floodway lines on the project site was unnecessary.

The DEP's decision not to verify any of the floodways on site is especially confusing because on November 30, 2022, the day before it issued this FHA permit, the DEP emailed the applicant's engineer and said:

Unfortunately I just noticed that you have a floodway line on your Riparian Zone plans. *Since we are not verifying any floodways, this line cannot be on there to be approvable.* Is it possible for you to remove the floodway line from the applicable plans?

[Aa050. Emphasis added.]

Thus, it is difficult to understand whether the DEP asserted that it was unable to approve the applicant's floodway line because it was incorrect or for some other reason.

Even more confusing is the fact that the instant permit decision authorized plans which were last revised on November 29, 2022. Aa009-10. Therefore, the DEP's request on November 30, 2022 to remove the applicant's floodway lines from the plans, and associated assertion that the floodway lines were not "approvable" doesn't seem to have been incorporated into the DEP's December 1,

2022 permit decision. By the express terms of this permit decision, the DEP approved the plans last revised on November 29, 2022. But the DEP said on

November 30, 2022, that the floodway lines “cannot be on there to be approvable.”

Aa050.

The DEP must clarify whether it approved the floodway lines that existed on the plans which were last revised on November 29, 2022, as expressly stated in the permit decision, or whether it did not approve of the floodway lines as it asserted it could not do in an email to the applicant on November 30, 2022. The DEP cannot have it both ways. The plans approved by the permit cannot be altered after the last revision date listed in the permit decision.

In addition, it must be considered that the applicant and the DEP could not have sufficiently determined (or estimated) the extent of the floodway in this matter by mere visual inspection or estimation precisely because the updated precipitation data would have affected the calculation of the extent of both the total flood hazard area and the floodway. It is unclear what type of data was used for the DEP’s finding that “it is clear that the floodway will not be impacted.” It also cannot be determined from the record whether any activity will take place within a properly delineated floodway. The failure to make an adequate record and findings on this related point also requires a remand to the DEP for a more fulsome adjudication and application of the DEP’s regulations.

CONCLUSION

For all the above reasons, this Court should reverse the DEP's December 1, 2023 Flood Hazard Area Verification and Flood Hazard Area General Permit, or in the alternative, this Court should remand these decisions to the agency for further factfinding.

Respectfully submitted,

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