

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-285-23

IN THE MATTER OF JOHNSON
DEVELOPMENT ASSOC. INC., PI
1112-04-0011.1, LUP220003

Civil Action

On Appeal From:
New Jersey Department of
Environmental Protection

BRIEF OF APPELLANT
THE ALLIANCE FOR SUSTAINABLE COMMUNITIES

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1. Flood Hazard Area Verification & Flood Hazard area Individual Permit, 1112-04-0011.1, LUP 220003, dated August 14, 2023. (Aa5-Aa45).

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PRELIMINARY STATEMENT

On August 14, 2023, Respondent New Jersey Department of Environmental Protection (“NJDEP”) issued a Flood Hazard Area Verification and Flood Hazard Area Individual Permit, which authorized the construction of two warehouse buildings, stormwater management features, and roadway and parking improvements on the subject property. However, a review of Respondent Johnson Development Associates, Inc.’s (“Johnson Development”) submissions, the review comments from Appellant The Alliance for Sustainable Communities (“TASC”) and its environmental consultants Princeton Hydro, and the Flood Hazard Area Control Act regulations, reveal that the application had serious deficiencies in its stormwater management plan and designs.

While the NJDEP did acknowledge some of the issues raised by TASC’s public comments, Johnson Development did not fully address the deficiencies and therefore failed to provide a compliant stormwater management system as required under the regulations. For the reasons set forth herein, the NJDEP’s approval of Johnson Development’s application for a Flood Hazard Area Verification and Flood Hazard Area Individual Permit was arbitrary, capricious, and unreasonable, and the NJDEP’s issuance of the Flood Hazard Area Verification and Flood Hazard Area Individual Permit should be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

On June 2, 2022, Respondent Johnson Development Associates, Inc. (“Johnson Development”) filed a multi-permit application for Freshwater Wetlands General Permits Nos. 1, 7, 10A, and 11, Freshwater Wetland Transition Area Averaging Plan Waiver, Flood Hazard Area Verification and Flood Hazard Area Individual Permit. (Aa3381-Aa3385). On June 16, 2022, Appellant The Alliance for Sustainable Communities (“TASC”) submitted a public comment to Respondent New Jersey Department of Environmental Protection (“NJDEP”) on the pending application. (Aa95-Aa131).

On June 30, 2022, the NJDEP issued a deficiency letter to Johnson Development. (Aa124-Aa126). On July 18, 2022, the NJDEP issued a second deficiency memo to Johnson Development. (Aa127-Aa131). On July 21, 2022, TASC submitted a supplemental public comment to the NJDEP. (Aa137-Aa148). On November 16, 2022, Johnson Development submitted revised application materials. (Aa3387-Aa3391). On December 14, 2022, TASC submitted a supplemental public comment to the NJDEP. (Aa195-Aa200).

On February 8, 2023, Johnson Development submitted revised application materials. (Aa3395-Aa3399). On March 14, 2023, Johnson Development

¹ The Procedural History and Statement of Facts are inextricably interwoven and, therefore, are presented together herein.

withdrew the application for Flood Hazard Area Verification, Flood Hazard Area Individual Permit. (Aa3400). On April 17, 2023, Johnson Development submitted a revised multi-permit application. (Aa0263-Aa2509). On May 10, 2023, TASC submitted a supplemental public comment. (Aa2521-Aa2537). On June 26, 2023, the NJDEP held a public hearing regarding the release of conservation restriction on the subject property. (Aa3412). Members of the public submitted public comments in response to the request for release of conservation restrictions on the subject property. (Aa3413-Aa3418). On July 11, 2023, TASC submitted a public comment in response to the request for release of conservation restrictions on the subject property. (Aa2546-Aa2633).

On August 10, 2023, the NJDEP issued a Certificate granting the release of conservation restriction on the subject property (Aa2986-Aa3021). On August 14, 2023, Johnson Development submitted additional revised application materials. (Aa3091-Aa3373). On August 14, 2023, the NJDEP issued a Flood Hazard Area Verification & Flood Hazard Area Individual Permit, 1112-04-0011.1, LUP 220003 (“FHA Permit”). (Aa1-Aa45). On September 28, 2023, TASC timely filed a Notice of Appeal. (Aa3374-Aa3377). On March 4, 2024, the NJDEP filed the Statement of Items Comprising the Record on Appeal. (Aa3378-Aa3427).

LEGAL ARGUMENT

The Appellate Division has exclusive jurisdiction to review any action or inaction of a state administrative agency. Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976). The review of administrative actions is limited. In re Proposed Xanadu Redev. Project, 402 N.J. Super. 607, 640 (App. Div. 2008). However, the Appellate Division "may reverse an agency decision if it is arbitrary, capricious, or unreasonable or that it lacks fair support in the record." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013). Furthermore, a court will intervene when an agency's action is clearly inconsistent with its statutory authority. New Jersey Ass'n of Realtors v. New Jersey Dept. of Environmental Protection, 367 N.J. Super. 154, 160 (App. Div. 2004).

In determining the validity of an agency's actions, the Appellate Division considers:

- (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;
- (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
- (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995).

The Court is bound by an agency's findings of fact "when supported by adequate, substantial and credible evidence." In re Taylor, 158 N.J. 644, 656 (1999) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). However, "[w]hen the issue involves the interpretation of statutes and regulations, it is a purely legal issue, which is considered de novo." Pinelands Pres. All. v. N.J. Dep't of Env'tl. Prot., 436 N.J. Super. 510, 524-25 (App. Div. 2014).

The purpose of the Flood Hazard Area Control Act Rules is "to minimize damage to life and property from flooding caused by development within flood hazard areas, to preserve the quality of surface waters, and to protect the wildlife and vegetation that exist within and depend upon such areas for sustenance and habitat. N.J.A.C. 7:13-1.1(c). An individual permit shall not be issued if there are, in relevant part, significant and adverse effects on water quality, flooding, drainage, threatened and endangered species or their current or documented historic habitats. N.J.A.C. 7:13-12.1(b).

Here, TASC, through expert reports submitted through public comments, identified several deficiencies regarding Johnson Development's stormwater management and Johnson Development's failure to consider impacts to certified observations of threatened and endangered species on site. (Aa95-Aa131; Aa137-Aa148; Aa195-Aa200; Aa2521-Aa2537; Aa2546-Aa2633). Despite

some acknowledgment by the NJDEP review staff, these issues were ultimately ignored or dismissed in violation of the Flood Hazard Area Control Act Rules. For the reasons set forth herein, the issuance of the FHA Permit was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

I. The Proposed Stormwater System is Not Compliant with the Stormwater Management Rules, Therefore the Issuance of the FHA Permit Should be Reversed. (Aa2521-Aa2537).

To obtain an individual permit, an applicant must meet the requirements of the Stormwater Management Rules, N.J.A.C. 7:8. N.J.A.C. 7:13-12.2. The New Jersey Stormwater Management Rules, N.J.A.C. 7:8-1.1 to -6.3 (“Stormwater Management Rules”), generally regulate three different performance areas: groundwater recharge, water quality, and peak flow control. N.J.A.C. 7:8-5.4; N.J.A.C. 7:8-5.5; N.J.A.C. 7:8-5.6; N.J.A.C. 7:8-5.7. The goal of the Stormwater Rules is to minimize development impacts on the natural processes with regards to onsite groundwater recharge and stormwater runoff. N.J.A.C. 7:8-2.2. Technical guidance for stormwater management measures are contained within the New Jersey Stormwater Best Management Practices Manual (“BMP Manual”). N.J.A.C. 7:8-5.9; In re Stormwater Management Rules, 348 N.J. Super. 451, 457 (App. Div. 2006).

Princeton Hydro reviewed the application materials and identified deficiencies with the application that hosed a failure to meet the requirements

for groundwater recharge, water quality treatment, and peak flow control. (Aa95-Aa131; Aa137-Aa148; Aa195-Aa200; Aa2521-Aa2537; Aa2546-Aa2633). While the NJDEP staff acknowledged some of these issues, the issues were ultimately ignored, and the FHA Permit was issued without corrections to the deficiencies. For these reasons, the issuance of the FHA Permit was arbitrary, capricious, and unreasonable, and must be vacated and reversed.

A. The Application Fails to Meet the Water Quality Requirements Under the Stormwater Management Rules. (Aa2521-Aa2537).

The purpose of the water quality requirements is to filter suspended solids in stormwater before it enters into bodies of water or into the groundwater. N.J.A.C. 7:8-5.5. Here, in addition to several other BMPs, Johnson Development is proposing fourteen (14) Filterra manufactured treatment devices (“MTDs”). (Aa2524). Filterra MTD works by having stormwater runoff flow into a curb cut and through a soil media with vegetation inside the MTD. (Aa2524). The treated runoff is then collected in an underdrain and discharged into the adjacent pipe run. (Aa2524). Therefore, the ability of the system to freely drain and maintain aerobic conditions in the soil media is required to the Filterra MTD’s functionality. (Aa2524). Documentation from the manufacturer of the Filterra system states that the purpose of the underdrain system “is needed to ensure there’s no standing water in the media for long periods.” (Aa2524). A system that is not permitted to freely drain via gravity would quickly develop

anaerobic conditions and function as a source of water quality impairment rather than as a treatment device. (Aa2524).

Chapter 10.4 of the BMP Manuals states that “[u]nder no circumstances should there be any standing water in the forebay 72 hours after a precipitation event.” BMP Manual, Chapter 10.4, Page 4. A review of the plans revealed that the normal water surface elevation (“NWSE”) of the discharge area is 86.50. (Aa2524; Aa4-Aa45). The discharge area also serves as a sediment forebay. (Aa2524). However, according to the application materials, the sediment forebay is located 10 feet below the groundwater table. (Aa2524). As designed, the sediment forebay will always be full of ponded water, in violation of Chapter 10.4 of the BMP Manual. (Aa2524).

Furthermore, the proposed pipe from the Filterra MTDs runs into the sediment forebay at elevation 79.00. (Aa2525; Aa4-Aa45). This is 7.5 feet below the NWSE of 86.5. (Aa2525; Aa4-Aa45). The outlet invert elevations for each of the MTDs are between 84.10 and 84.60 (Aa2525; Aa4-Aa45). This means that 2ft to 2.5ft of the soil media within the Filterra MTDs will constantly be saturated. (Aa2525). This is in direct conflict with the manufacturer’s requirements on which the State’s MTD certification is based. (Aa2525). The result is that the plants will not survive, the soils will not be able to freely drain, and the system will not be able to treat the runoff for water quality as designed.

The failure of these systems will result in the project failing to demonstrate compliance with the water quality requirements of N.J.A.C. 7:8-5.5. (Aa2525).

The NJDEP staff acknowledged the issue with regard to the Filterra MTDs and requested a response from Johnson Development. (Aa2945-Aa2946). However, a review of the final approved plans shows that this was never addressed or redesigned. (Aa4-Aa45). Therefore, the NJDEP's issuance of the FHA Permit after acknowledging this deficiency, is arbitrary, capricious, and unreasonable, and must be vacated and reversed.

B. The Application Fails to Meet Groundwater Recharge Requirements Under the Stormwater Management Rules. (Aa2521-Aa2537).

Pursuant to the Stormwater Management Rules, an Applicant must maintain the same amount of groundwater recharge for the site pre-development and post-development. N.J.A.C. 7:8-5.4(b). By maintaining the same amount of groundwater recharge pre- and post-development, the goal is to prevent an increase in the amount of stormwater runoff and therefore local flooding impacts offsite. N.J.A.C. 7:8-5.1.

“Whenever the stormwater management design includes one or more BMPs that will infiltrate stormwater into the subsoil, the design engineer shall assess the hydraulic impact on the groundwater table and design the site, so as to avoid adverse hydraulic impacts.” N.J.A.C. 7:8-5.2(h). Therefore, as part of

the design process, the design engineer must analyze groundwater mounding. BMP Manual, Chapter 13, Page 1.

Groundwater mounding occurs when the groundwater table locally rises higher because the water is not conveyed away from the infiltration point at a fast enough rate. BMP Manual, Chapter 13, Page 1. In other words, groundwater recharge not only relies upon the vertical infiltration of water, but also the horizontal movement of the groundwater. The height of the groundwater mounding effect is influenced by the amount of infiltrated runoff, the soil permeability, and the shape of the infiltration basin. BMP Manual, Chapter 13, Page 1-2. If the groundwater mound reaches the bottom of the basin, the rate of infiltration out of the basin is reduced and infiltration stops, creating a failed stormwater management system. BMP Manual, Chapter 13, Page 2.

To model groundwater mounding and determine if the proposed infiltration basin will function properly, the NJDEP permits the use of the Hantush Spreadsheet. BMP Manual, Chapter 13, Page 2. With the Hantush Spreadsheet, the design engineer inserts input values, and the spreadsheet will perform the calculations necessary to determine if the infiltration basin will function properly. BMP Manual, Chapter 13, Page 2. Therefore, the result of the analysis is dependent on accurate input values from the design engineer.

Initially, Johnson Development attempted to reclassify the mapped soil group on site, into soils that would not require groundwater recharge. (Aa2525). However, this was not supportable, and Johnson Development revised their application to propose soil replacement underneath each stormwater basin to promote groundwater infiltration. (Aa2525). Upon review, Princeton Hydro identified that Johnson Development had failed to use the correct input values in the groundwater mounding analysis. (Aa2525-Aa2526).

The horizontal hydraulic conductivity is the rate at which water can move in the horizontal direction. BMP Manual, Chapter 13, Page 5. Pursuant to the spreadsheet instructions and the BMP Manual, for projects located within the coastal plan physiographic province of New Jersey, the horizontal hydraulic conductivity rate is generally assumed to be the five times the vertical infiltration rate. BMP Manual, Chapter 13, Page 5.

However, the fact is that Johnson Development is only proposing soil replacement immediately below the infiltration basins. Johnson Development is not proposing to do soil replacement for the entire site or even in the areas surrounding the infiltration basins. Pursuant to the BMP Manual, in a scenario in which the design engineer proposes soil replacement below an infiltration basin, “[t]he horizontal hydraulic conductivity is the same as the original soil as the original soil since... the soil outside the basin footprint will not change.”

BMP Manual, Chapter 13, Page 36. The BMP Manual specifically reminds design engineers that:

soil replacement does not change the horizontal hydraulic conductivity of the soils outside the basin.

The low horizontal hydraulic conductivity will still limit the ability of the runoff to be dissipated into the saturated zone and may result in high groundwater mounding in the unsaturated zone. Therefore, the use of sand replacement in basin designs must still be carefully evaluated with a groundwater mounding analysis.

[(alteration in original) BMP Manual, Chapter 13, Page 38].

Therefore, the BMP Manual is clear that the Johnson Development should have used the horizontal conductivity of the original soil. BMP Manual, Chapter 13, Page 36. In response to Princeton Hydro's comments, Johnson Development corrected the horizontal conductivity values to use the values of the native soils. (Aa3022; Aa3066-Aa3090). Using the native soil horizontal conductivity values, Johnson Development found that the proposed recharge BMPS did not fail the groundwater mounding analysis. (Aa3022; Aa3066-Aa3090). However, in order to get the system to pass the groundwater analysis, Johnson Development failed to follow the BMP Manual in calculating the seasonal high water table.

Pursuant to Chapter 12 of the BMP Manual, the determination of the seasonal high water table shall be taken at the highest level of the observed

mottles or groundwater, whichever is higher. BMP Manual, Chapter 12, Page 12. Furthermore, “[w]hen the purpose of the soil tests is to determine the design soil hydraulic conductivity at the level of infiltration, the slowest of the test replicate results shall be used for design purposes.” BMP Manual, Chapter 12, Page 42.

Here, BMP 201 is a small-scale infiltration basin. In order to find that the BMP 201 passed the groundwater mounding analysis, Johnson Development used three different test pits with varying seasonal high water tables and infiltration rates in order to pass. (Aa3066). However, pursuant to Chapter 12 of the BMP Manual, the analysis should have used the highest seasonal high water table and the slowest infiltration rate for design purposes. BMP Manual, Chapter 12, Page 12, 42. As such, a review of the data should have meant that Johnson Development only had a water table separation of 4.2 feet. (Aa3066). Using the slowest infiltration rate as required would have resulted in a groundwater mounding of 7.5 feet. (Aa3066). 7.5 feet groundwater mounding is greater than the 4.2 feet of separation, which means that BMP 201 would fail. Therefore, using the analysis required pursuant to the BMP Manual shows that BMP 201 fails and does not pass the groundwater mounding analysis.

Using the same analysis required under the BMP Manual, BMP 271 shows only 2.2 feet of separation, and using the slowest infiltration rate, would result

in a groundwater mounding of 2.6 feet. (Aa3066). Again, 2.6 feet rise of groundwater level is greater than 2.2 feet of separation between the bottom of the basin and the groundwater table, meaning that BMP 271 would also fail.

For these reasons, the project fails to meet the groundwater recharge requirements of N.J.A.C. 7:8-5.4, and the NJDEP's issuance of the FHA Permit is arbitrary, capricious, and unreasonable, and must be vacated and reversed.

C. The Application Fails to Meet Peak Flow Requirements Under the Stormwater Management Rules. (Aa2521-Aa2537).

Pursuant to the stormwater regulations, an applicant must demonstrate that post-construction stormwater runoff peak hydrographs do not exceed pre-construction runoff hydrographs. N.J.A.C. 7:8-5.6. In other words, the peak runoff rates cannot be increased post-construction. Here, Johnson Development used a weighted average of the peak flow rates, comparing the entire site and the undisturbed areas. (Aa2527). Johnson Development made an assumption that the peak flow rate of the undisturbed area and the total area has a correlation, which is not necessarily true for all situations. (Aa2527). Furthermore, Johnson Development did not provide a calculation of the peak flow rate of the disturbed area to confirm any such relationship. (Aa2527). Instead, using the weighted average of peak flow rates, Johnson Development claims that the development will comply.

However, the more traditional method of analyzing peak flow rate is to use an area-weighted approach rather than a peak-flow rate weighted approach. (Aa2528).

Using the more traditional area-weighted approach, Princeton Hydro found that the project failed to meet compliance with the peak flow requirements in N.J.A.C. 7:8-5.6. Specifically, for Point of Analysis 1, Johnson Development proposed peak outflow of 28.72, 45.85, and 90.69 for 2-year storm, 10-year storm, and 100-year storm respectively. (Aa2529). However, the allowable peak flow rates are 22.11, 45.78, and 93.92. (Aa2529). Therefore, for Point of Analysis 1, the project failed to comply with the peak flow requirements for 2-year storms and 10-year storms.

For Point of Analysis 2, Johnson Development proposed peak outflow of 20.35, 30.81, and 57.82 for 2-year storm, 10-year storm, and 100-year storm respectively. (Aa2529). The allowable peak flow rates are 16.14, 35.99, 81.08. Therefore, for Point of Analysis 2, the project fails to comply with the peak flow requirements for 2-year storms.

For these reasons, the project fails to meet the peak flow requirements of N.J.A.C. 7:8-5.6, and the NJDEP's issuance of the FHA Permit is arbitrary, capricious, and unreasonable, and must be vacated and reversed.

II. The NJDEP Failed to Adequately Consider Impacts to Endangered or Threatened Wildlife Species Identified on Site, Therefore the Issuance of the FHA Permit Should be Reversed. (Aa2576-Aa2616).

The NJDEP “shall issue an individual permit for a regulated activity only if the activity will not destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species, and shall not

jeopardize the continued existence of any local population of a threatened or endangered species.” N.J.A.C. 7:13-11.6(d). The NJDEP “shall require a survey and/or a habitat assessment for threatened or endangered species as part of an environmental report, as described at N.J.A.C. 7:13-18.8(b), for an individual permit for any regulated activity which is likely to... disturb an area known to contain a threatened or endangered species; or [d]isturb any habitat that could support a threatened or endangered species.” N.J.A.C. 7:13-11.6(e).

In March 2022, the NJDEP processed and approved rare wildlife sighting report forms for Bald Eagles for inclusion in the NJDEP Biotics database and the Landscape Project. (Aa2553-Aa2575). It has been acknowledged by the NJDEP Fish and Wildlife Endangered and Nongame Species Program that bald eagles utilize the subject property. (Aa2553-Aa2557).

As further set forth in the Princeton Hydro report dated April 13, 2023 and a report by Michael McGraw, MES, QAWB, Senior Wildlife Biologist, dated July 7, 2022 and last updated April 7, 2023, adult bald eagles have been and continue to be observed on the site. (Aa2576-Aa2616). These observations include perching in the trees and hunting in the open water on the site during the primary breeding dates of December through May. (Aa2604). As opined by Mr. McGraw, this suggests that the onsite wetlands and open water resources serve

as critical foraging habitat and likely serve as a key resource for a nearby nest. (Aa2604-Aa2616).

In addition to bald eagles, savanna sparrows, a state threatened species, were also observed on site in late May 2022 as well as the adjacent lands, in post-breeding season in August 2022. (Aa2604). Great Blue Herons, a New Jersey species of special concern, are also nesting in the immediately adjacent property and have been observed foraging in the pond and utilizing the site. (Aa2610). As further explained by Mr. McGraw, the site contains landscape-scale matrix of farmland that can support nesting grassland birds, especially savanna sparrows. (Aa2608). Any proposed development will result in adverse impacts to the breeding activity of NJ state threatened savanna sparrows on site and within the immediately adjacent property. (Aa2612).

In response to these observations, the NJDEP stated that the size of the area is not sufficient to support any threatened and endangered species habitat. (Aa59). However, this determination ignores the actual, recent, physical observations of threatened and endangered species using the site. (Aa2553-Aa2575; Aa2540-Aa2545). The NJDEP determined that “there is [not] a reasonable probability that bald eagles use these wetlands for resting or foraging.” (Aa59). However, the observations that were accepted by the NJDEP

Firh and Wildlife Endangered and Nongame Species Program, indicates that bald eagles were resting and/or foraging on the site. (Aa2553-Aa2575).

Given the actual observations submitted by members of the public and the report issued by Mr. McGraw, the NJDEP should have required a formal bird survey to include one full year of wintering, migration, and breeding bird occupancy prior to making any decisions, as required by N.J.A.C. 7:13-11.6(e) and N.J.A.C. 7:13-18.8(b). The actual observation of threatened and endangered species on the property, significantly questions the analysis completed by the NJDEP that the site does not contain suitable habitat. For these reasons, the NJDEP's issuance of the FHA Permit is arbitrary, capricious, and unreasonable, and must be vacated and reversed.

CONCLUSION

In conclusion, for the reasons set forth herein, TASC respectfully requests that this Court vacate and reverse the NJDEP's approval of the Flood Hazard Area Verification & Flood Hazard Area Individual Permit, 1112-04-0011.1, LUP 220003, dated August 14, 2023.

Respectfully submitted,

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Dated: May 20, 2024

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**BRIEF OF RESPONDENT JOHNSON DEVELOPMENT ASSOCIATES,
INC.**

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PRELIMINARY STATEMENT

This appeal is part of a series of challenges by objectors, The Alliance for Sustainable Communities (“TASC” or “Plaintiffs”), to impede Johnson Development Associates, Inc.’s (“Johnson Development”) proposed development of property located in Robbinsville, New Jersey, known as the Mercer Corporate Park. Specifically, TASC is challenging the New Jersey Department of Environmental Protection’s (“NJDEP”) issuance of a Flood Hazard Area Individual Permit (“FHA Permit”) to Johnson Development as arbitrary, capricious and unreasonable. However, TASC consistently ignores the majority of the voluminous record related to the FHA Permit by only presenting the reports and documents submitted by it to the NJDEP and fails to address the responses of Johnson Development and, most importantly, the analysis of the submissions by the NJDEP.

The evidence in the record related to the application and the Statement of Items Comprising the Record on Appeal make clear that although the NJDEP issued deficiency notices related to the FHA Permit application, Johnson Development responded to and addressed each and every deficiency. Moreover, the NJDEP reviewed Johnson Development’s submissions and agreed that all of the requirements of the Stormwater Management Rules and other permit

application requirements were met to warrant the issuance of the FHA Permit.

Therefore, the FHA Permit was properly issued and should be upheld.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

Johnson Development joins in the Procedural History and Statement of Facts set forth in the initial brief of TASC except to add the following additional information.

On June 2, 2022, Johnson Development filed a multi-permit application for Freshwater Wetlands General Permits Nos. 1, 7, 10A and 11, Freshwater Wetland Transition Area Averaging Plan Waiver, Flood Hazard Area Verification and Flood Hazard Area Individual Permit (Aa3381-Aa3385). On June 30, 2022, the NJDEP issued a deficiency letter to Johnson Development related to the permit application. (Aa124-Aa126). Johnson Development made no fewer than 11 supplemental submissions to the NJDEP incorporating responses to NJDEP comments and questions and refiled a portion of the multi-permit application as a separate application for a Freshwater Wetlands Individual Permit¹. These submissions were made on November 17, 2022; December 15, 2022; January 13, 2023; February 8, 2023; February 24, 2023; April 17, 2023; May 10, 2023; July 12, 2023; July 18, 2023; and July 21, 2023. (Aa3378 & DJa001). On August 14,

¹The Freshwater Individual Permit issued by NJDEP on May 29, 2024 is not the subject of this appeal. It has been separately appealed by Plaintiffs herein. *In the Matter of Johnson Development Associates*, Docket No. A-003513-23.

2023, Johnson Development was issued a Flood Hazard Area Verification and Flood Hazard Area Individual Permit pursuant to N.J.A.C. 7:13-1.1(b). (Aa5-Aa45). On August 14, 2023, Johnson Development submitted approved NJDEP permit plans which were stamped by NJDEP and issued with the FHA permit. (Aa0015-Aa0044).

LEGAL ARGUMENT

I. The Court Should Affirm the NJDEP’s Decision to Grant the Flood Hazard Area Individual Permit Since the Decision Complies with the Flood Hazard Area Rules and is Supported by Substantial Evidence in the Agency Record Available to the Court.

The NJDEP decision at issue in this appeal is an FHA Individual Permit issued on August 14, 2023, pursuant to the implementing rules under the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 *et seq.* (“FHACA”). The FHACA requires the NJDEP to protect the health, safety and welfare of the State by delineating flood hazard areas and regulated waters and controlling discharges into these areas through a permit program. *See* N.J.S.A. 58:16A-50b. The regulations at N.J.A.C. 7:13-1 *et seq.* create various permitting programs, including the permit decision involved in this appeal.

The FHACA vests jurisdiction in the NJDEP for flooding and flood preparation within the state. The FHACA provides the NJDEP with “broad authority” to “map flood hazard areas, adopt land regulations, control stream encroachments, coordinate the development, dissemination, and use of relevant

information and integrate the control activities of municipal, county, state and federal governments.” *American Cyanamid Co. v. State, Dept. of Env't Prot.*, 231 N.J. Super. 292, 297 (App. Div. 1989). Under this authority, the FHACA provides that the NJDEP must “adopt rules and regulations which delineate as flood hazard areas 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). FHACA further authorizes the NJDEP to regulate, through permitting and otherwise, the development and use of such Flood Hazard Areas and other regulated areas under FHACA in order “to minimize the threat to the public safety, health and general welfare” from flooding. N.J.S.A. 58:16A-55(a). This jurisdictional mandate is implemented through the FHACA rules, at N.J.A.C. 7:13-1.1 *et seq.*

The standard of review requires this Court to uphold a government agency decision which is not arbitrary, capricious or unreasonable and is supported by credible evidence in the record. *In Re: N.J. Pinelands Commission Resolution*, 356 N.J. Super. 363, 372 (App. Div. 2003). The Court’s review of an agency decision is limited, and it is settled that an agency’s interpretation of statutes and regulations and its implementing and enforcing responsibility is ordinarily entitled to deference. *Seigel v. N.J.*

Department of Environmental Protection, 395 N.J. Super. 604, 613 (App. Div. 2007). As the Court has recognized in *In Re: Flood Hazard Area Verification*, Docket No. A-5637-18, 2021 WL5506763 (App. Div. Nov. 24, 2021) (DJa001), deference to DEP is particularly appropriate given the “special expertise required in applying the intricate regulations under the [Flood Hazard Area Control] Act.” *Id.*

II. There is Substantial Credible Evidence in the Record to Support the Decision of the NJDEP That the Approved Stormwater System is Compliant with the NJDEP’s Stormwater Management Rules and is Consistent with Best Management Practices (Response to Point I of Appellant’s Brief).

Plaintiffs’ challenge to Johnson Development’s FHA permit is based solely on the opinions of its consultant, Princeton Hydro, as set forth in a report prepared for Plaintiffs. (Aa0095-Aa0131; Aa0137-Aa0148; Aa0195-Aa0200; Aa2521-Aa2537; Aa2546-Aa2633).

In direct response to comments provided by Plaintiffs referencing that same report, the NJDEP disagreed, stating in its Engineering Report that:

As part of the stormwater management review, the Department has ensured that all applicable requirements of N.J.A.C. 7:8 Stormwater Management rules (last amended March 2, 2021) were met, including stormwater quantity, quality, and groundwater recharge, as well as the newly implemented Green Infrastructure elements. Furthermore, each best management practice was compared to the NJ Stormwater Best Management Practices Manual, which has explicit instructions how each stormwater management feature must be designed.

(Aa0086).

Plaintiffs argue throughout their brief that Princeton Hydro’s review of Johnson Development’s application materials identified alleged “deficiencies” and therefore, Johnson Development’s approved storm water design is not compliant with the NJDEP’s Stormwater Management Rules, N.J.A.C. 7:13-12.2. (Pb6-7). Plaintiffs then urge that the NJDEP ignored the deficiencies and nonetheless issued the FHA Permit to Johnson Development. This is factually incorrect. Johnson Development’s approved design was thoroughly reviewed by the NJDEP, was revised on numerous occasions in response to the NJDEP’s comments, and was ultimately deemed by the NJDEP to be compliant with the Stormwater Management Rules. (Aa3378 & DJa001).

The NJDEP’s authority to regulate storm water is set forth in the Municipal Land Use Law (“MLUL”) at N.J.S.A. 40:55D–93 to 99, and is referred to as the Stormwater Management Act. The Stormwater Management Act “delegates to the DEP ‘the authority to regulate storm water management.’” *In Re: Stormwater Management Rules*, 384 N.J. Super. 451, 454 (App. Div. 2006) (citing *N.J. State League of Municipalities v. Dep’t of Cmty. Affairs*, 310 N.J. Super. 224, 240 (App. Div. 1998), *aff’d*, 158 N.J. 211, 729 A.2d 21 (1999)). It is also settled law that “courts ordinarily recognize that an agency’s specialized expertise renders it particularly well-equipped to understand the issues and enact the appropriate

regulations pertaining to the technical matters within its area.” *Id.* at 465 (citing *In re: Protest of Coastal Permit Program Rules*, 354 N.J. Super. 293, 330 (App. Div. 2002)).

“Ordinarily, DEP is given great deference when it applies its considerable expertise and experience to the difficult balance between development and conservation.” *In the Matter of Stream Encroachment Permit*, 402 N.J. Super. 587, 597 (App. Div. 2008). The Court “may not second-guess those judgments of an administrative agency which fall squarely within the agency's expertise.” *Id.* at 597 (citing *Brady v. Bd. of Review*, 152 N.J. 197, 210, (1997)). “Courts generally defer to an agency's expertise on technical matters within the agency’s field of expertise.” *Id.* (citing *Campbell v. N.J. Racing Comm'n*, 169 N.J. 579, 588 (2001)). “Thus, if substantial credible evidence supports an agency’s conclusion, a court may not substitute its own judgment for the agency’s even though the court might have reached a different result.” *Id.* (citing *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 513 (1992)). “A strong presumption of reasonableness accompanies an administrative agency’s exercise of statutorily-delegated responsibility.” *Id.* at 597 (citing *Gloucester County Welfare Bd. v. State Civil Serv. Comm'n*, 93 N.J. 384, 390 (1983)).

A. Johnson Development’s Stormwater Management Design Was Properly Found by NJDEP to Meet the Water Quality Requirements Under the Stormwater Management Rules (Response to Point IA of Appellant’s Brief).

As indicated in its Engineering Report, Johnson Development’s stormwater design included numerous stormwater BMP’s to help the proposed development meet NJDEP’s water quality standards:

As can be seen in detail in the Green Infrastructure section of this report below, several stormwater management best management practices (BMP’s) are proposed. These consist of two constructed wetlands basins (to replace the incomplete stormwater management basins already on site), five bioretention basins, 20 green infrastructure, manufactured treatment devices (MTD’s), and nine infiltration basins.

(Aa0085).

The NJDEP properly concluded after its thorough review of the design that “stormwater quality was met” through the use of those BMP’s. (Aa0089).

Plaintiffs argue that the storm water design fails to meet NJDEP water quality requirements and “violates” Best Management Practices. (Pb7.)

The Stormwater Management Rules and regulatory scheme,

makes clear that “[t]o the maximum extent practicable, the[se] standards ... shall be met by incorporating nonstructural stormwater management strategies ... into the design” of any project. N.J.A.C. 7:8–5.3(a). That is, a permit applicant must identify the non-structural strategies incorporated into the project’s design, including, but not limited to, minimizing disturbance, minimizing impervious surfaces, minimizing the use of stormwater pipes, preserving natural drainage features, and increasing

natural vegetation. *N.J.A.C.* 7:8–5.3(b). **Guidance** for these strategies can be found in the New Jersey Stormwater Best Management Practices Manual 2002 (BMP manual).

In re: Stormwater Management Rules, 384 N.J. Super. 451, 456-457 (App. Div. 2006) (emphasis added). The NJDEP rule citing the BMP Manual describes the Manual as “technical guidance” and “guidelines for stormwater management measures.” See *N.J.A.C.* 5.8-5.9. The BMP Manual is not regulatory. See *In The Matter of Authorization for Freshwater Wetlands Statewide General Permit 6*, 433 N.J. Super. 385 (App. Div. 2013).

The preamble to the Best Management Practices (“BMP”) Manual on the NJDEP’s website confirms that the BMP Manual is not part of the Stormwater Rules. Rather,

The BMP manual provides examples of ways to meet the standards contained in the rule. The methods referenced in the BMP manual are one way of achieving the standards. An applicant is welcome to demonstrate that other proposed management practices will also achieve the standards established in the rules. The BMP Manual was developed by the New Jersey Department of Environmental Protection, in coordination with the New Jersey Department of Agriculture, the New Jersey Department of Community Affairs, the New Jersey Department of Transportation, municipal engineers, county engineers, consulting firms, contractors, and environmental organizations.

The BMP manual has been drafted to assist review agencies and the regulated community. The methods in the BMP manual can be utilized without need for additional

documentation to address the performance standards in the rule. The Department anticipates providing guidance on additional best management practices and new information on already included practices as research and development occurs in this field.

<https://www.nj.gov/dep/stormwater/bmpmanual2.htm>.

In particular, Plaintiffs allege that, the use of Filterra manufactured system devices approved by the DEP, creates a “system that is not permitted to freely drain via gravity, would quickly develop anaerobic conditions and function as a source of water quality impairment rather than as a treatment device.” (Pb7) (Aa2524). However, the May 5, 2023, report from Princeton Hydro was submitted prior to Johnson Development’s resubmissions to the NJDEP on July 12, 2023; July 18, 2023; July 21, 2023; and August 14, 2023, in response to additional comments and requests by the NJDEP review staff, and prior to the issuance of Johnson Development’s FHA Permit. (DJa001).

The Princeton Hydro Report also states that “as designed, the sediment forebay will always be full of ponded water, in violation of Chapter 10.4 of the BMP Manual.” (Pb8). As noted above, the BMP Manual is a guidance document and, as such, there can be no “violations” of the BMP.

Nonetheless, the conclusion in the Princeton Hydro Report appears to be based upon the assumption that “the profile does not depict the fact that the pipe run, along with the rooftop discharge from the 7.7-ac proposed

warehouse, discharge into a scour hold which also functions as a *sediment forebay* for Basin 2.” (Aa2525) (emphasis added). As a result, Princeton Hydro later concludes that “2 ft to 2.5 ft of the soil media within the Filterra MTDs will constantly be saturated.” (Aa2525).

Plaintiffs then allege that “NJDEP staff acknowledged the issue with regard to the Filterra MTDs and requested a response from Johnson Development. However, a review of the final approved plans shows this was never addressed or redesigned.” (Pb9).

Plaintiffs ignore Johnson Development’s communications with the NJDEP on this issue. Specifically, Johnson Development’s Civil Engineering Firm, Langan, responded via email to the NJDEP regarding this specific issue on August 9, 2023. (DJa017). Langan responded that the BMP Manual Chapter 10.4 requirement for pretreatment required in any type of standard constructed wetlands system, and that the required pretreatment may consist of a forebay or any of the BMPs found in Chapters 9 or 11. *Id.* Constructed Wetlands Basin 2 is not required to provide a forebay and does not provide one because the stormwater runoff is pretreated before entering the BMP through Green Infrastructure MTDs designed in accordance with Chapter 9.5 or is roof runoff pretreated using a leaf screen. *Id.*

Plaintiffs also ignore an August 10, 2023, email from NJDEP Staff Environmental Engineer, Erin Signor to Johnson Development's consultant Langan, which states, in response to further information submitted by Langan that "I don't anticipate needing any plan revisions now that you've explained that the 'forebay' area is not actually a forebay, but a portion of the constructed wetland basin itself. Furthermore you've explained how the flow path will move through the basin, which alleviates our other concern." (DJa028). *See also* August 11, 2023 Engineering Report by NJDEP Staff Environmental Engineer Signor and NJDEP Supervisor Dhruv Patel (Aa0093), reflecting that same conclusion.

According to the August 9, 2023, email from Kevin Webb to the NJDEP, the area Princeton Hydro mistakenly assumed to be a sediment forebay is therefore, not a forebay, but rather an extended portion of the constructed wetlands with two permanent pools separated by low and high marsh areas with stormwater contributing to the BMP travelling through the low marsh, high marsh, and low marsh areas before discharging to the pool area immediately upstream of the outlet control structure. (*Id.*). The approved design also includes two methods for preventing water from Constructed Wetlands Basin 2 from backing up into the upstream manufactured treatment

devices to ensure that each has a free discharge during the water quality storm event. (*Id.* and as shown on Aa0020-Aa0024).

As evidenced by NJDEP Environmental Engineer, Erin Signor's August 10, 2023, email and the August 11, 2023, Engineering Report, the issue regarding the premanufactured treatment devices raised in Princeton Hydro's Report was addressed appropriately and deemed resolved by the NJDEP prior to the issuance of Johnson Development's FHA Permit. (Aa0093).

The NJDEP's approved Engineering Report confirmed this, indicating: "[t]he forebay is actually not the forebay but is lower marsh area of the constructed wetlands basin. Because there is no requirement for a constructed wetlands basin to be elevated above the seasonal highwater table and instead it is fed by groundwater, this concern is alleviated." (Aa0087).

Accordingly, Johnson Development's stormwater management design was found by the NJDEP, based upon substantial credible evidence, and pursuant to NJDEP's expertise in reviewing and interpreting its own requirements, to meet the water quality requirement of the Stormwater Management Rules and the FHA permit was properly issued.

B. Johnson Development's Stormwater Management Design was Properly Found by the NJDEP to Meet the Groundwater Recharge Requirements (Response to Point IB of Appellant's Brief).

The Stormwater Management Rules set forth minimum design and performance standards for groundwater recharge, requiring that a design engineer either:

- i. Demonstrate through hydrologic and hydraulic analysis that the site and its stormwater management measures maintain 100 percent of the average annual pre-construction groundwater recharge volume for the site; or
- ii. Demonstrate through hydrologic and hydraulic analysis that the increase of stormwater runoff volume from pre-construction to post-construction for the projected two-year storm, as defined and determined pursuant to N.J.A.C. 7:8-5.7(d), is infiltrated.

[N.J.A.C. 7:8-5.4(b)1].

Plaintiffs argue that Johnson Development's approved stormwater management design fails to meet groundwater recharge requirements by not maintaining the same amount of groundwater recharge in the post-development condition. Plaintiffs cite the requirement within the Stormwater Management Rules for a design that includes one or more BMPs that will infiltrate stormwater into the subsoil at N.J.A.C. 7:8-5.2(h).

Plaintiffs then engage in a lengthy interpretation regarding the requirements of the BMP Manual without citing to any source. (Pb10-13).

Plaintiffs conclude:

Using the native soil horizontal conductivity values, Johnson Development found that the proposed recharge BMPs did not fail the groundwater mounding analysis. However, in order to get the system to pass the groundwater analysis, Johnson Development failed to follow the BMP Manual in calculating the seasonal high water table.

(Pb13).

However, Plaintiffs cite no evidence in support of its conclusion that Johnson Development failed to follow the guidance contained in the BMP Manual when calculating the seasonal highwater table. The NJDEP, which has ultimate authority to assess the BMPs employed by Johnson Development in its design, disagreed, rejecting the assertions made by Plaintiffs related to that design in the NJDEP's approved Engineering Report, finding that the groundwater recharge requirements of the Stormwater Management Rules were met.

Specifically, the NJDEP found that the "post-development recharge deficit is approximately 904,330 ft³. The recharge BMP's provide a total recharge volume of 925,231 ft³." (Aa0088). This finding is based upon credible evidence in the record and consistent with the NJDEP's overall finding that all of the requirements of the Stormwater Management Rules were met. (Aa0087).

Johnson Development's submitted stormwater management design indicated that the seasonal high water table at each test pit was determined by Johnson Development in accordance with Chapter 12 of the BMP Manual. The NJDEP agreed, finding that "each BMP is considered green infrastructure and meets the drainage area requirements, seasonal high water table separation requirements, and conform with all other aspects of the NJ Stormwater Management BMP manual." (Aa0087).

Plaintiffs also contend the following process should be required, and cite to "Chapter 12 of the BMP Manual,"

Pursuant to Chapter 12 of the BMP Manual, the determination of the seasonal high water table shall be taken at the highest level of the observed mottles or groundwater, whichever is higher. Furthermore, "[w]hen the purpose of the soil tests is to determine the design soil conductivity at the level of infiltration, the slowest of the test replicate results shall be used for design purposes."

(Pb12-13).

Again, Plaintiffs cite to no authority to support this position.

Further, Plaintiffs' citation is from the test procedures for a tube permeameter test, BMP Manual Chapter 12, page 40. According to the BMP Manual, the variability of soil hydraulic conductivity test results from multiple tube permeameter tests at one test pit must be evaluated for potential defects. (BMP Manual, Chapter 12, Page 40). However, the process utilized by

Langan did not involve tube permeameter tests. The tests performed by Langan were single ring infiltration tests described in the BMP at Chapter 12, pages 44-48. The hydraulic conductivity is determined by converting the observed field intake rate, as prescribed on page 46.

The NJDEP specifically found that Johnson Development's design had been reviewed and that the NJDEP had found that the geotechnical investigation accompanying the permit application was consistent with Chapter 12 of the BMP Manual and met the requirements for groundwater recharge in N.J.A.C. 7:8-5.4. (Aa085; Aa086).

Plaintiffs also cite to the BMP Manual regarding the determination of the seasonal highwater table without citation of any authority, asserting that "pursuant to Chapter 12 of the BMP Manual, the analysis should have used the highest seasonal highwater table and the slowest infiltration rate for design purposes." (Pb13). The BMP Manual Chapter 12 does not provide that guidance. Rather, the BMP Manual requires calculations for groundwater mounding to be based on location-specific soil hydraulic conductivity data. Langan's stormwater report provided individual groundwater mounding calculations prepared for each test pit within each given BMP. (Aa3048; Aa3066-3098). The relative height of the mound, determined by the location-specific data, was applied to the elevation of the seasonal highwater table to

determine the elevation of the groundwater mound. (*Id.*). In each case, the Langan report demonstrated that the bottom of the BMP is above the elevation of the groundwater mound. Where soil replacement is proposed beneath a given BMP, the horizontal conductivity of the native soils outside the BMP was used to determine the mound, as prescribed by the BMP Manual. NJDEP reviewed this conclusion and agreed that the BMP Manual guidance was met. “Furthermore, the geotechnical investigation accompanying the application is consistent with Chapter 12 of the BMP Manual. All of the necessary BMPs will have adequate separation from the seasonal high groundwater table and appropriate mounding analyses were performed for infiltrating BMPs.” (Aa0085).

In the case of BMP 201, a small infiltration basin, three test pits and three infiltration tests are located at the BMP. The highest seasonal high water table elevation of all three test pits, elevation 84.0, was observed at TP-184. This elevation was used to confirm that the bottom of the basin has sufficient separation from the seasonal high water table. Individual groundwater mounding calculations were performed based on the hydraulic conductivity results at each test pit, and the relative mound was added to the seasonal high water table observed at each test pit to determine the elevation of the groundwater mound. The highest elevation of the groundwater mound was

then compared to the bottom of the basin. At BMP 201, the highest elevation of the groundwater mound is 87.49, which is nearly 8 inches below the bottom of the BMP, elevation 88.15. (Aa0030). NJDEP reviewed and agreed with these conclusions in its finding that the design was consistent with the Stormwater Rules and BMP's. (Aa0087).

For the approved BMP 271, the two test pits and two infiltration tests are located at the BMP. The higher seasonal high water table elevation of 86.8 was used to confirm adequate separation between the seasonal high water table and the bottom of the basin. Groundwater mounding calculations were performed at each, and the relative mound was added to the seasonal high water table observed at each test pit to determine the elevation of the groundwater mound. The highest elevation of the groundwater mound at BMP 271 is 88.65, 3 inches below the bottom of the BMP. (Aa0034). The NJDEP reviewed and found that the design was consistent with the Stormwater Rules and BMP's. (Aa0087).

Based on the submitted data, Johnson Development's Stormwater Management Design was properly found by the NJDEP to meet the groundwater recharge requirements of the Stormwater Management Rules and Johnson Development's FHA Permit was properly issued by the NJDEP. *See*

August 11, 2023, NJDEP Engineering Report regarding conclusions on groundwater recharge compliance. (Aa0086; Aa0087; Aa0088).

C. Johnson Development's Stormwater Management Design was Properly Found by the NJDEP to Meet Peak Flow Requirements (Response to Point IC of Appellant's Brief).

Plaintiffs argue that Johnson Development's design does not meet peak flow requirements of the Stormwater Management Rules set forth at N.J.A.C. 7:8-5.6. This rule requires that the design engineer complete one of the following:

1. Demonstrate through hydrologic and hydraulic analysis that for stormwater leaving the site, postconstruction runoff hydrographs for the current and projected two-, 10-, and 100-year storm events, as defined and determined pursuant to N.J.A.C. 7:8-5.7(c) and (d), respectively, do not exceed, at any point in time, the pre-construction runoff hydrographs for the same storm events;
2. Demonstrate through hydrologic and hydraulic analysis that there is no increase, as compared to the pre-construction condition, in the peak runoff rates of stormwater leaving the site for the current and projected two-, 10-, and 100-year storm events, as defined and determined pursuant to N.J.A.C. 7:8-5.7(c) and (d), respectively, and that the increased volume or change in timing of stormwater runoff will not increase flood damage at or downstream of the site. This analysis shall include the analysis of impacts of existing land uses and projected land uses assuming full development under existing zoning and land use ordinances in the drainage area;
3. Design stormwater management measures so that the post-construction peak runoff rates for the current and projected two-, 10-, and 100-year storm events, as defined

and determined pursuant to N.J.A.C. 7:8-5.7(c) and (d), respectively, are 50, 75, and 80 percent, respectively, of the preconstruction peak runoff rates. The percentages apply only to the post-construction stormwater runoff that is attributable to the portion of the site on which the proposed development or project is to be constructed...

N.J.A.C. 7:8-5.6(b).

The NJDEP specifically found that:

Peak flow rates have been reduced in accordance with N.J.A.C. 7:8-5.6(b)3. The applicant has designed the stormwater management measures so that the post-construction peak runoff rates for the two- 10-, and 100-year storm events are 50, 75, and 90 percent, respectively, of the pre-construction peak runoff rates. The Lake Basin was not taken into consideration while demonstrating compliance with the stormwater quantity requirement.

(Aa0090).

Specifically, according to Plaintiffs, “Johnson used a weighted average of the peak flow rates, comparing the entire site and the undisturbed areas. Johnson Development made an assumption that the peak flow rate of the undisturbed area and the total area has a correlation, which is not necessarily true for all situations. Furthermore, Johnson Development did not provide a calculation of the peak flow rate of the disturbed area to confirm any such relationship. Instead, using the weighted average of peak flow rates, Johnson Development claims the development will comply.” (Pb14). Again, Plaintiffs cite to the Princeton Hydro Report submitted by Plaintiffs to the NJDEP, dated May 5, 2023. (Aa2523).

The peak flow attenuation calculations were performed in compliance with the guidance in the BMP Manual. Due to the site's partially developed condition, in which certain roadway and basin improvements were constructed as part of a prior phase of construction, the runoff from disturbed and undisturbed areas are comingled, each affected by the existing stormwater management system's existing controls. The vast majority of both disturbed and undisturbed areas drain to the common downstream stormwater controls. Johnson Development's consultant calculated the peak runoff for the combined conditions (disturbed plus undisturbed) and separately calculated the runoff from the undisturbed areas. The allowable peak flow rates for each design storm at each Point of Analysis were determined using the required peak flow reduction rates applied to the contribution from disturbed areas only (calculated as the difference between the overall runoff less that from the undisturbed areas) added to the full (i.e., unreduced) contribution from undisturbed areas, as prescribed in Chapter 5 of the BMP Manual.

The NJDEP reviewed Johnson Development's peak flow calculations and determined that they complied with N.J.A.C. 7:8-5.6. The NJDEP found that "each best management practice was compared to the NJ Stormwater best management practices manual, which has explicit instructions how each stormwater management feature must be designed. The applicant has

demonstrated pursuant to N.J.A.C. 7:8–5.6(b)3 that peak reduction rates have been met through the implementation of stormwater management features...” (Aa086).

Based on the submitted data and substantial credible evidence in the record, Johnson Development’s Stormwater Management Design was properly found by the NJDEP to meet the Peak Flow Requirements despite Plaintiffs’ unsupported assertions to the contrary.

III. The NJDEP Adequately and Appropriately Considered Impacts to Threatened and Endangered Wildlife Species (Response to Point II of Appellant’s Brief).

Plaintiffs argue that the NJDEP should have required a formal survey prior to making a determination on Johnson Development’s FHA Permit Application because rare wildlife sighting report forms were submitted to NJDEP in March 2022 (Aa2553-Aa2575) and because a report prepared by Princeton Hydro for Plaintiffs dated July 7, 2022, and last updated April 13, 2023, (Aa2576-Aa2616) alleged the presence of Bald Eagles on the Property. (Pb16-18).

Plaintiffs also contend that sightings of Savanna Sparrows by Princeton Hydro, alleged by Plaintiffs to be a State threatened species, support Plaintiffs’ claims that the Property contains suitable habitat for that species. (Pb17).

Plaintiffs previously submitted a report urging the NJDEP to find the Johnson

Development Property a suitable habitat for these species in an effort to persuade the NJDEP to change the resource value classification for onsite wetlands as set forth in Johnson Development's Freshwater Wetlands Letter of Interpretation which would have resulted in enhanced transition area requirements around those wetlands. (Aa2576-Aa2616). In its Environmental Report, the NJDEP rejected those claims. (Aa0063).

The NJDEP has broad general authority for the protection and enhancement of wildlife, including threatened and endangered species, under The Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A-1 *et seq.*, which vests exclusive jurisdiction in the Commissioner of the NJDEP to develop species protection programs, including protections against killing or harassment of threatened and endangered species. Under this authority, the NJDEP's approach to species protection is reflected by the inclusion of habitat protections in its various land use planning and resource protection regulations. *See, e.g.*, N.J.A.C. 7:7A, N.J.A.C. 7:7, N.J.A.C. 7:13, including the FHACA.

The NJDEP may issue a Flood Hazard Area Permit only if the activity authorized under the Permit "will not destroy, jeopardize, or adversely modify a present or documented habitat for threatened or endangered species." N.J.A.C. 7:13-11.6(d). If the Permit authorizes activity that is

“likely” to disturb “an area known to contain a threatened or endangered species,” or “habitat that could support a threatened or endangered species,” as part of the Permit process, the applicant must submit “a survey and/or a habitat assessment.” N.J.A.C. 7:13-11.6(e). The NJDEP is required to “restrict” development activities during any times when a threatened or endangered species is “especially sensitive to disturbance,” which could include such times as during nesting or migration. N.J.A.C. 7:13-11.6(g).

The NJDEP gave adequate and appropriate consideration to the presence or absence of threatened and endangered species during the NJDEP’s review of Johnson Development’s FHA Permit Application. Upon the receipt of Plaintiffs’ reports, the NJDEP conducted a thorough in-office review as well as three (3) site inspections assessing the Johnson Development Property for suitable bald eagle breeding, resting, or feeding habitat. (Aa0055). The August 14, 2023, Environmental Report issued by the NJDEP indicates that, on July 11, 2023, NJDEP Division of Fish and Wildlife confirmed to NJDEP Land Resource Protection Program that the Johnson Development Property does not fall within a bald eagle nest buffer under State or Federal standards and, as a result, the wetlands classifications on the Johnson Development Property were properly assigned a resource classification of intermediate and

that a wetlands classification upgrade to exceptional was not warranted.
(Aa0058).

The Environmental Report describes the conclusions of the NJDEP's review, and goes onto affirm with respect to bald eagle foraging, that:

Even with the accepted bald eagle sighting records [provided by Plaintiffs], the Mercer Corporate Park Property would not be valued, or documented, for bald eagle foraging by the next version of Landscape Project Mapping. The Program reached out to Fish and Wildlife to ascertain whether the accepted eagle sighting would result in a change to mapping. Fish and Wildlife noted that this area would not be documented as bald eagle foraging habitat under the future version of mapping because mapping of bald eagle foraging require waterbodies greater than 8 hectares...The wet detention basin in the center of the property (1.8 hectares) along with the wet detention basin along the western side of the site (2.1 hectares) only equal a combined 3.9 hectares of open water on the property. As a result, lack of Landscape documentation for bald eagle foraging now and in the future further supports an intermediate resource value classification of the wetlands on site.

(Aa0058-Aa0059).

For that reason, the NJDEP found that the Johnson Development Property did not contain suitable bald eagle foraging habitat.

The NJDEP also found that, due to the size and the habitat composition of the wetlands on the Johnson Development Property, the wetlands do not meet the standards for suitable wetland habitat for bald eagles. (Aa00058).

The NJDEP provides its rationale for that determination in the Environmental Report:

The state laws that establish the lists of species of animals and plants as endangered or threatened species in and of themselves, do not provide any specific protection to the habitat for those species. Rather, the actual protection of habitat is secured through an array of statutes and regulations designed to primarily regulate development activities in various physical or geographical locations of New Jersey (In this case, freshwater wetlands). Each of these laws has specific jurisdictional boundaries where activities are regulated, and within which endangered or threatened species, habitats can be protected. Outside of these areas, such protection no longer applies. Protection is limited to legislatively defined jurisdictions, and the wetlands themselves must provide suitable habitat.

(Aa0059).

In connection with the NJDEP's review of Johnson Development's FHA Permit, the area of law providing the protection for threatened and endangered species are the Freshwater Wetlands Protection Act and Regulations. N.J.S.A. 13:9B-1, *et seq.*, and N.J.A.C. 7:7A-1, *et seq.* For that reason, notwithstanding the recorded sightings of bald eagles, any areas of protection are limited to the wetlands and transition areas on the Johnson Development Property. NJDEP reviewed each of the seven (7) wetlands identified as intermediate resource value and, because five (5) of those wetlands were under half an acre in size found due to their size and the limited habitat they contain, these wetlands are not suitable habitat for bald eagle." (Aa0059).

In the Environmental Report, the NJDEP also provided its analysis for the remaining two wetlands (identified as Wetland “C” and Wetland “O”). (Aa0061). The NJDEP concluded that, based upon NJDEP’s site inspection, Wetland “C” contained unsuitable vegetation for bald eagle habitat and Wetland “O” while containing more forested vegetation, “is not directly associated with any open water large enough in size to provide foraging opportunities for bald eagle.” (Aa0061).

Plaintiffs also allege the observation of savannah sparrows on the Johnson Development Property in May of 2022 and argue that the NJDEP acted arbitrarily, capriciously and unreasonably in issuing the FHA Permit to Johnson Development as a result. (Pb17).

As indicated in the NJDEP’s Environmental Report, savannah sparrows (and other species, including great blue heron, American kestrel, and grasshopper sparrow), are “either not threatened/endangered or not considered freshwater wetland species under the Freshwater Protection Act Rules.” (Aa0055). As a result, and consistent with NJDEP’s jurisdictional rationale, *supra*, the NJDEP did not have jurisdictional authority to withhold approval of the FHA Permit based upon Plaintiffs’ alleged concerns regarding these species.

Plaintiffs assert that the “NJDEP should have required a formal bird survey to include one full year of wintering, migration, and breeding bird occupancy prior to making any decisions, as required by N.J.A.C. 7:13–11.6(e) and N.J.A.C. 7:13–18.8(b). The actual observation of threatened and endangered species on the property, significantly questions the analysis completed by the NJDEP that the site does not contain suitable habitat.” (Pb18).

Plaintiffs neglect to mention that the NJDEP properly responded to Plaintiffs’ concerns related to the presence of suitable habitat and concluded that, based upon NJDEP’s exhaustive review that such a survey was not necessary:

While a survey could potentially accurately document any additional wildlife on site, ultimately the department must consider its jurisdiction on the property, the size of the property and potential habitat, and the quality of the habitat. Here, the extent of wetlands is limited, and the potential habitat is far short of the strength to merit or require a 2–year survey of the freshwater wetlands on the property.

(Aa0064).

In fact, Plaintiffs’ claims alleging the presence of threatened and endangered species related to the overall property were also specifically rejected by the NJDEP by way of an August 10, 2023, Certificate of the Commissioner of the Department of Environmental Protection Granting a Release of Conservation Restriction

burdening the Johnson Development property. (Aa2926). As specifically indicated in the Certificate, the NJDEP affirmatively investigated by internal review and site inspection, the alleged presence of the species identified by Plaintiffs and found that the property does not contain suitable habitat for any of the species identified by Plaintiffs. (Aa2933-Aa2937).

In that same regard, in its Environmental Report, the NJDEP concluded that a wildlife survey for Johnson Development's FHA Permit application would not alter the Threatened and Endangered Species Unit determination its review of Plaintiffs' comments. (Aa0049). The NJDEP thoroughly reviewed the reports submitted by Plaintiffs, including species sighting reports, and properly determined to issue Johnson Development's FHA Permit pursuant to the scope and limits of its jurisdictional authority. Therefore, the NJDEP did not act arbitrary, capriciously or unreasonably in issuing the FHA Permit to Johnson Development.

CONCLUSION

For all of the reasons discussed in this brief, the decision of the NJDEP to issue the FHA permit to Johnson Development is supported by credible evidence in the record on the application, conforms fully with Stormwater Management Rules, and considered concerns regarding impacts to threatened and endangered

species. Therefore, the Flood Hazard Area Individual Permit was properly issued and should be upheld.

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Dated: July 19, 2024

228892284 v8

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-285-23

IN THE MATTER OF
JOHNSON DEVELOPMENT
ASSOC. INC., PI 1112-04-
0011.1, LUP220003

:
: CIVIL ACTION
:
: ON APPEAL FROM
: NEW JERSEY DEPARTMENT OF
: ENVIRONMENTAL PROTECTION
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BRIEF OF RESPONDENT NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Date Submitted: July 19, 2024

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

On June 2, 2022, Johnson Development Associates, Inc. submitted permit applications to DEP for General Permits Nos. 1, 7, 10A and 11 and a Transition Area Waiver/Averaging Plan under the Freshwater Wetlands Protection Act (“FWPA”), N.J.S.A. 13:9B-1 to -30, and a Flood Hazard Area Verification and Individual Permit under the Flood Hazard Area Control Act (“FHACA”), N.J.S.A. 58:16A-50 to -101. Johnson proposes to construct two warehouse buildings with associated parking, access roads and stormwater management facilities (the “Project”) on property located at Block 41.01, Lots 31, 31.01, 31.02 and 31.03 in Robbinsville Township, Mercer County (the “Property”). (Aa5).² The Property is approximately ninety-one acres and is bordered by undeveloped land and Interstate Route 195 to the north, undeveloped land to the east, a residence and farmstead to the south, and Robbinsville-Allentown Road (County Route 526) to the west. (Aa823). The Property is partially developed with an office building, a loop road, and some stormwater management features from a prior, partially constructed project. (Aa83). The Property was also

¹ Because they are closely related, the procedural and factual histories are combined for efficiency and the court’s convenience.

² Aa refers to Appellants’ Appendix. Ab refers to Appellant’s Brief.

partially covered by a conservation restriction that was recorded as a permit condition for the prior partially constructed project. (Aa332).

The Project is subject to both flood hazard and stormwater review. DEP regulates the flood hazard area under the FHACA and its implementing regulations, N.J.A.C. 7:13-1.1 to -24.11 (“FHACA Rules”). Indian Run, a regulated waterway, and two of its tributaries traverse the Property. (Aa81). The Project proposes construction activities within regulated waterways including the maintenance and repair of an existing culvert and work within the flood hazard area, and therefore required a FHACA permit. (Aa293). The Project will also disturb approximately fifty-five acres of land. (Aa298). As such, the Project is considered a “major development” under the Stormwater Management Rules and DEP also has jurisdiction to review the Project’s stormwater management controls. N.J.A.C. 7:8-1.2; see also N.J.A.C. 7:13-12.2(b) (requiring stormwater management compliance for a FHACA individual permit). As Appellant The Alliance for Sustainable Communities (TASC)’s appeal focuses on the sufficiency of the proposed stormwater controls, further information about DEP’s stormwater statutory oversight is provided below.

In 1981, the Legislature amended the Municipal Land Use Law by adding the Stormwater Management Act. N.J.S.A. 40:55D-93 to -99. This Act

delegates to the DEP “the authority to regulate storm water management.” In re Stormwater Mgmt. Rules, 384 N.J. Super. 451, 454 (App. Div. 2006) (internal quotation omitted). Stormwater is defined as “water resulting from precipitation (including rain and snow) that runs off the land's surface” and “stormwater runoff” is “water flow on the surface of the ground or in storm sewers, resulting from precipitation.” N.J.A.C. 7:8-1.2. Stormwater runoff picks up pollutants from the land surface and creates water quality and quantity problems. In re Stormwater Mgmt. Rules, 384 N.J. Super. at 454. Stormwater management measures address these issues and are defined as “any structural or nonstructural” methods intended, among other things, “to control or reduce stormwater runoff and associated pollutants[.]” N.J.A.C. 7:8-1.2.

Stormwater management is both property and project-specific, often lending itself to multiple engineering solutions, so DEP’s stormwater oversight includes the Best Management Practices (BMP) Manual.³ The BMP Manual

³ N.J.A.C. 7:8-1.2 defines the "New Jersey Stormwater Best Management Practices (BMP) Manual" or "BMP Manual" as “the manual maintained by [DEP] providing, in part, design specifications, removal rates, calculation methods, and soil testing procedures approved by [DEP] as being capable of contributing to achievement of the stormwater management standards specified in this chapter.” The rule notes DEP “periodically amend[s]” the manual “as necessary to provide design specifications on additional best management practices and new information on already included practices reflecting the best available current information about the particular practice and [DEP’s] determination as to the ability of that best management practice to contribute to compliance with the standards contained in this chapter.” It also

provides guidance and examples of engineered mechanisms such as detention basins, infiltration basins, cisterns, grass swales, and vegetative filter strips, to address and meet the stormwater management regulations. The BMP Manual offers many ways of achieving stormwater compliance, but an applicant may propose other stormwater management practices, as long as they meet the regulatory standards. N.J.A.C. 7:8-1.2.

To meet the regulatory stormwater requirements, Johnson proposed several stormwater control measures, including bioretention basins, infiltration basins, grass swales, manufactured treatment devices (“MTDs”), and modifications to the existing constructed wetlands (Basin 2) and the existing infiltration basin (Basin 3) from the prior partially constructed project. (Aa824). Basin 1 is the existing central retention pond. (Aa823). Under Johnson’s proposal, Basin 2 discharges into Basin 1. Basin 2’s watershed includes runoff from the proposed Building 1 truck court trailer parking, the Building 1 roof, the northern section of Robbinsville-Allentown Road, and a portion of the

confirms that “[a]lternative stormwater management measures, removal rates, or calculation methods may be utilized, subject to any limitations specified in this chapter, provided the design engineer demonstrates to the review agency, in accordance with N.J.A.C. 7:8-5.2(g), that the proposed measure and its design will contribute to achievement of the design and performance standards established by this chapter.”

internal loop road. (Aa829). Basin 1 discharges into the onsite drainage ditch. Basin 1's watershed includes runoff from the trailer parking east of Building 1, Building 1's southern and eastern parking lots, a portion of Building 1's roof, the loop road, and the existing office building. Ibid. Basin 3 discharges into an onsite drainage ditch downstream of Basin 1. Basin 3's watershed includes runoff from proposed Building 2, its associated parking lots, and the southern section of Robbinsville-Allentown Road. Ibid. The MTDs discharge into Basins 2 and 3. (Aa834). The overall water quality treatment for the proposed water quality management systems is 66.1% total suspended solids (TSS) removal, which exceeds the Property's required 55% TSS removal. N.J.A.C. 7:8-5.5(e); (Aa89; Aa835). The constructed wetlands, soil replacement below the infiltration basins, and the MTDs are primarily at issue here.

The BMP Manual explains that constructed wetlands are stormwater management systems designed to maximize the pollutant removal from stormwater runoff and may be used to address the quantity impacts of land development.⁴ Flow is directed through an engineered, open marsh system where pollutants are removed through settling and vegetative uptake/filtration. Ibid.

⁴ https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swbmp_10.4-standard-constructed-wetlands.pdf

The Manual also describes infiltration basins as stormwater management systems constructed with highly permeable components designed to maximize the pollutant removal from stormwater, promote groundwater recharge and address the quantity impacts of land development. BMP Manual, Section 10.2.⁵ Pollutants are treated through settling, filtration of the runoff through, and biological and chemical activity within, the components. Ibid.

Finally, the Manual explains that MTDs are proprietary stormwater treatment systems used to address the stormwater runoff quality impacts of land development and rely upon a variety of mechanisms to remove pollutants from stormwater runoff.⁶ Green infrastructure MTDs rely upon specialized technology and incorporate an engineered, high-flow rate filter media to remove stormwater pollutants, allowing for a smaller footprint than conventional bioretention systems. Some of the designs include one or more plants within the unit to form a plant/soil/microbe complex to remove pollutants. Ibid.

⁵ https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swbmp_10.2-infiltration-basins.pdf

⁶ <https://dep.nj.gov/wp-content/uploads/stormwater/nj-swbmp-chapter-9.5-july-2023.pdf>

Johnson proposed using the Filterra green infrastructure MTDs, which DEP certified as satisfying the Stormwater Management Rules.⁷

Throughout the permit application review process, TASC submitted public comment on Johnson's application. For instance, on June 16, 2022, TASC submitted a comment asserting that the Property contained habitat for the bald eagle, a State threatened species. (Aa95). TASC also hired Princeton Hydro, an environmental engineering firm, which submitted reports to DEP together with TASC's public comments addressing alleged noncompliance with the Stormwater Management Rules. (Aa95; Aa137; Aa195; Aa2251, Aa2546).

On June 30, 2022, DEP issued to Johnson a deficiency letter pertaining to the June 2, 2022 permit applications. (Aa124). That letter advised Johnson that DEP required additional information and revisions to the site plans to deem Johnson's permit applications complete. Ibid. DEP noted: (1) the existing lake basin (Basin 1) which discharges to an unnamed tributary of Indian Run must be redesigned so that no untreated stormwater discharges will enter the downstream waterway; (2) under N.J.A.C. 7:8-5.6(c), water quantity controls must be put in place before runoff enters Basin 1; (3) under N.J.A.C. 7:8-5.5, stormwater runoff quality standards require that the Project use either the green

⁷ <https://dep.nj.gov/stormwater/stormwater-manufactured-treatment-devices/>

infrastructure BMPs or an alternative stormwater management measure approved under N.J.A.C. 7:8-5.2(g); (4) Basin 2's design must be modified to have a beneficial reuse component and have vegetation along 50% of the shoreline; and (5) additional soil tests were required to reclassify the hydrologic soils groups onsite. (Aa124-125).

On November 16, 2022, Johnson submitted revised permit applications, (Aa149), addressing DEP's comments. On December 14, TASC submitted another public comment to DEP asserting deficiencies with Johnson's stormwater management plan pertaining to water quality and groundwater recharge, claiming that the MTDs will become permanently inundated and fail to perform as designed. (Aa195). On February 8, 2023, Johnson submitted further revisions to its permit applications, adjusting its stormwater plans to include infiltration features decreasing stormwater volume and using Natural Resource Conservation Service soil data rather than the previously proposed soil reclassification. (Aa259).

Then, on or about March 14, 2023, Johnson withdrew its FHACA permit applications because recorded conservation easements from the partially constructed prior development had to be partially released before DEP could reach a determination on both the FWPA and FHACA permit applications.

(Aa3400; Aa264). The prior conservation easement was required to protect stormwater management facilities that were never fully constructed and contained 12.280 acres of restricted area. (Aa51). Since Johnson's proposed project encroached on the existing restricted area, the easement needed to be released and modified. Ibid. Johnson proposed to modify the existing stormwater restriction to cover an amended area of 15.70 acres (increasing the area by 3.42 acres for stormwater) and separately proposed a new conservation restriction to protect 19.75 acres of freshwater wetlands, State open waters, and transition areas. (Aa52).

On June 26, 2023, DEP held a public hearing about the partial release of the conservation restriction on the Property. (Aa3412). On July 11, 2023, TASC commented on the conservation restriction release, claiming bald eagle and Savannah sparrow, State threatened and endangered species, use the Property as habitat and again asserting that Johnson did not meet the water quality, groundwater recharge and peak flow stormwater requirements. (Aa2546). On August 10, 2023, DEP released the conservation restriction on the Property. (Aa2986). TASC has not appealed this release.

On April 17, 2023, Johnson resubmitted its FHACA permit applications for the Project. (Aa264). On May 10, 2023 TASC submitted an additional

public comment, again reiterating its claims that Johnson's stormwater plan was deficient because it failed to meet water quality, peak flow control and groundwater recharge requirements. (Aa2521).

Throughout the permitting review process, DEP considered TASC's comments and Princeton Hydro's reports and asked Johnson to address them as well. (Aa54; Aa86; Aa2656). With regard to TASC's comments that the site constitutes threatened and endangered species habitat, DEP conducted both a site inspection and in-office review and determined that the Property does not fall within a bald eagle nest buffer, the Property is not mapped as bald eagle habitat by the Landscape Project Mapping, and the size of the wetlands and type of habitat present is not suitable habitat for bald eagles. (Aa55). Specifically, DEP found the relatively small size and configuration of the wetlands on the Property mitigates against use by bald eagles, in part because the Property's narrow, closed canopy stream corridor would hinder bald eagles' foraging navigation ability due to the species' 6- to 8-foot wingspans. (Aa62). Further, while DEP had accepted the prior bald eagle sighting records, DEP Fish and Wildlife staff explained that "bald eagle foraging" habitat "require[s] waterbodies greater than 8 hectares" while the combined (fragmented) wetlands on the Property were only 3.9 hectares. (Aa58-59). In addition, as to the

Savannah sparrow, DEP explained that the habitat includes fallow fields, grasslands, upland meadows or pastures. (Aa55). Accordingly, DEP found that the species “do not use or rely upon freshwater wetlands or ... transition areas for their essential functions such as breeding, resting or feeding.” Ibid.

With regard to TASC’s comments about the stormwater management controls, DEP determined that Johnson complied with the Stormwater Management Rules, finding that Johnson showed peak reduction rates were met through the implementation of its stormwater management system and the increase in impervious cover would not adversely impact flooding. (Aa86). DEP further determined that TASC’s comments about the MTDs discharging into the forebay were incorrect because there is no forebay; rather the area is a lower marsh area of the constructed wetlands basin which is not required to be elevated above the seasonal high water table. (Aa87).

On August 14, 2023, Johnson submitted final plans. (Aa3091). On that same date, DEP issued the FHACA permits to Johnson. (Aa1). On September 28, 2024, TASC filed its notice of appeal challenging the FHACA permit. (Aa3374). On January 5, 2024, DEP issued a corrected FHACA permit to Johnson, which remedied revision dates on some of the plans which were erroneously listed in the August 14, 2023 permit. (Aa1).

ARGUMENT

POINT I

DEP CORRECTLY ISSUED THE FHACA PERMIT.

Appellate review of an administrative agency’s final determination is limited and deferential. In re Herrmann, 192 N.J. 19, 27 (2007); In re Taylor, 158 N.J. 644, 656 (1999). “The ‘fundamental consideration’ in reviewing agency actions is that a court may not substitute its judgment for the expertise of an agency ‘so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.’” In re Distrib. of Liquid Assets, 168 N.J. 1, 10 (2001) (quoting Williams v. Dep’t of Human Servs., 116 N.J. 102, 107 (1989) (additional citations omitted)). The challenger bears the burden of proving arbitrary, capricious or unreasonable action. Bueno v. Bd. of Trs., Teachers’ Pension & Annuity Fund, 422 N.J. Super. 227, 234 (App. Div. 2011). Moreover, an agency’s “interpretation of statutes and regulations within its implementing and enforcing responsibility” is entitled to deference. Ibid. (citation and internal quotation marks omitted); see also Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 70-71 (1985) (“the grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislative goals.” (citations and internal quotation marks omitted)). Courts

“extend substantial deference to an agency’s interpretation and application of its own regulations, particularly on technical matters within the agency’s special expertise.” In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004); see also Lipman v. Rutgers-State Univ. of New Jersey, 329 N.J. Super. 433, 441 (App. Div. 2000) (some agencies exercise technical expertise that is not possessed by the courts). It has also long been held “that where an administrative agency is concerned with technical matters the courts will give weight to its presumed expertise in reviewing its decisions” which includes “an initial assumption of competence in the field” for agency staff. Shahmoon Indus., Inc. v. Dep’t of Health, 93 N.J. Super. 272, 282-83 (App. Div. 1966). A court will not reverse an agency decision “because of doubts as to its wisdom or because the record may support more than one result.” In re N.J. Pinelands Comm’n Resolution, 356 N.J. Super. 363, 372 (App. Div. 2003). Such deference is owed here.

Contrary to TASC’s contention, the Stormwater Management Rules do not require an applicant to strictly comply with the BMP Manual. The BMP Manual is a technical guidance document, as permitted by N.J.S.A. 13:1D-111. It is true that stormwater management measures “designed in accordance” with the BMP Manual are “presumed to be capable of providing stormwater controls”

under the stormwater rules. N.J.A.C. 7:8-5.2(f). However, the rules also provide: “[a]n alternative stormwater management measure, alternative removal rate, and/or alternative method to calculate the removal rate [to the BMP Manual] may be used if the design engineer demonstrates the capability of the proposed alternative stormwater management measure and/or the validity of the alternative rate or method to the review agency.” N.J.A.C. 7:8-5.2(g). Thus, the BMP Manual provides recommendations, not requirements. See Stormwater Mgmt. Rules, 384 N.J. Super. at 457 (“Guidance for these strategies can be found in the New Jersey Stormwater [BMP] Manual 2002.” (emphasis added)). The stormwater rules emphasize this repeatedly. N.J.A.C. 7:8-5.9 (“[t]echnical guidance for stormwater management measures can be found in the documents listed . . .”); N.J.A.C. 7:8-5.9(a)(1) (“[g]uidelines for stormwater management measures are contained in the [BMP] Manual . . .”). TASC’s claim that the BMP Manual imposes mandated requirements is misplaced, and DEP correctly accepted Johnson’s alternate measures to satisfy the Stormwater Management Rules.

A. The Application Met the Water Quality Requirements under N.J.A.C. 7:8-5.5. (Responds to Appellant’s Brief Point I.A.)

As noted above, DEP’s stormwater oversight addresses numerous issues including stormwater quality. Here, DEP found Johnson met stormwater quality

requirements by using several BMPs, including bioretention basins, green infrastructure MTDs, a grass swale and infiltration basins. (Aa89). DEP's analysis relied in part on data submitted by Johnson's engineer. (Aa834). The overall water quality treatment for the proposed water quality management systems is 66.1% total suspended solids ("TSS") removal, which exceeds the Property's required 55% TSS removal. N.J.A.C. 7:8-5.5(e); (Aa89; As835). TSS include sediment and other pollutants that can be removed from water through filtration.⁸

Rather than challenge the TSS removal rates, TASC instead contends that the proposed water quality management system does not satisfy Chapter 10.4 of the BMP Manual which governs standard constructed wetlands.⁹ However, as noted above, the BMP Manual does not impose strict requirements so long as the regulations are satisfied. TASC also challenges the MTD efficacy based on elevation concerns, as some of the MTDs discharge into Basin 2. (Aa834). Neither argument works.

Starting with Chapter 10.4 compliance, TASC predicts that the forebay of

⁸ https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swbmp_1_final_-9-27-16.pdf

⁹ https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swbmp_10.4-standard-constructed-wetlands.pdf

Basin 2 – the previously constructed wetlands basin - will constantly be filled with ponded water, causing the stormwater quality design to fail. (Ab8; Aa2524). For standard infiltration basins, the forebay is where stormwater gathers before entering the infiltration system and removes larger debris that would otherwise clog the infiltration area. BMP Manual, Chapter 10.2, at 18.¹⁰ That larger debris is then removed as part of an infiltration system’s standard operations and maintenance. Ibid. However, the location of the forebay at an elevation below the groundwater table is inconsequential here because Basin 2 is a constructed wetlands basin. (Aa29). DEP’s Engineering Report explains that what TASC characterizes as the forebay is actually not a forebay but is a lower marsh area of the constructed wetlands basin. (Aa87). Importantly, a constructed wetlands basin is not required to be elevated above the seasonal high-water table because – by its very design and nature – the wetlands basin is fed by groundwater.¹¹ Accordingly, TASC’s arguments about the forebay elevation fail.

TASC’s contention that the pipe connecting the Filterra MTDs to the

¹⁰ <https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj-swbmp-10.2-infiltration-basins.pdf>

¹¹ https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swbmp_10.4-standard-constructed-wetlands.pdf

constructed wetlands basin is flawed because it is not separated from the seasonal high water table also fails due to the MTD design Johnson selected here. The Filterra MTD filters stormwater runoff through soil and thus satisfies the definition of green infrastructure.¹² Per the manufacturer's specifications, Filterra MTDs can be configured with or without a precast vault. Ibid. Here, the MTDs design included the precast vault. (Aa28). According to DEP's Filterra MTD certification, see n. 12, only installations that will not include a precast vault should comply with the BMP Manual's recommendations about separation from the seasonal high water table (SHWT). Because Johnson's MTD design included the precast vault, TASC's claim that the MTD will not work is unfounded.

As DEP considered both the specific BMPs Johnson selected as well as the design parameters for those BMPs in determining Johnson's proposed stormwater system would meet water quality standards, DEP's expert determinations should be upheld.

B. The Application Met the Groundwater Recharge Requirements under N.J.A.C. 7:8-5.4. (Responds to Appellant's Brief Point I.B.)

TASC next contends that the Project fails to meet groundwater recharge

¹² https://dep.nj.gov/stormwater/stormwater-manufactured-treatment-devices/wp-content/uploads/stormwater/mtd-pdfs/green-infrastructure/filterra_certification_2-17-2020.pdf

requirements. Groundwater recharge is “the amount of water from precipitation that infiltrates into the ground” beyond plants’ root zone to recharge the groundwater table.¹³ Groundwater is key as both a source of potable water and for providing water to surface water bodies such as streams or ponds. Ibid. However, development can impact recharge, particularly through impervious surface construction or underlying soil compaction. Ibid. The Stormwater Management Rules require a permittee to demonstrate either that the site and its stormwater management measures maintain 100% of the average annual pre-construction groundwater recharge volume or show through a hydrologic and hydraulic analysis that the increase in stormwater runoff volume from pre-construction to post-construction for the two-year storm is infiltrated. N.J.A.C. 7:8-5.4(b)(1)(i)-(ii).

Here, DEP found that the Project met these criteria. In its Engineering Report, DEP determined that the Project satisfied N.J.A.C. 7:8-5.4(b)(1)(ii) because the post-construction recharge deficit (i.e. the increase in stormwater runoff volume) is 904,330 cubic feet and the stormwater management system provides a recharge volume of 925,231 cubic feet, resulting in an annual surplus of 20,901 cubic feet. (Aa88). In other words, Johnson’s proposed stormwater

¹³ https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swbmp_1_final_-9-27-16.pdf, at 3.

management system will provide more groundwater recharge than the Property currently experiences.

Similar to the water quality arguments, TASC does not challenge the overall recharge values DEP determined, but rather levies several more targeted attacks. First, TASC argues that because Johnson proposes soil replacement below the infiltration basins, rather than soil replacement throughout the entire 91-acre Property, Johnson violated the BMP Manual as its groundwater mounding analysis was deficient. (Ab11-12). Not so.

Groundwater mounding is the increase in the groundwater elevation as a result of the infiltration from the proposed stormwater management facilities. Matter of Thomas Orban/Square Props., LLC, 461 N.J. Super. 57, 66 n. 3 (App. Div. 2019). Groundwater mounding is temporary because the infiltrating runoff builds up in the unsaturated zone as stormwater infiltrates or recharges and then gradually spreads out to the surrounding area. The height of the mounding is affected by the amount of infiltrated stormwater runoff, the soil permeability, the saturated zone thickness, and the BMP. If the mounded groundwater reaches the bottom of the stormwater infiltration basin, the rate of infiltration out of the BMP is reduced and infiltration may stop.¹⁴

¹⁴ https://dep.nj.gov/wpcontent/uploads/stormwater/bmp/nj_swbmp_13.pdf

Johnson's engineer undertook the required groundwater mounding analysis using the Hantush equation, which calculates the maximum height of the temporary groundwater mounding and assumes all groundwater flow is horizontal above an infinite aquifer.¹⁵ (Aa1369-1400). Johnson's study used conservative input values to measure groundwater mounding, such as a 0.50 recharge rate as opposed to the standard 5.0 recharge rate, and correctly applied the coastal plain multiplier based on the Property's geographic location. Ibid. The graphs included therein demonstrate that groundwater mounding would not impact any of the basins or proposed structures. Ibid.

TASC next argues that Johnson should have replaced and tested the soil under the proposed buildings as well as under the infiltration basins. This claim is unfounded because the Stormwater Management rules do not require a soil analysis throughout the entire Property as soils under the buildings will be compacted by the weight of the structure. DEP rejected Johnson's attempt to reclassify the soils on the Property during the permitting process because DEP found that Johnson initially failed to perform sufficient testing. (Aa124). Johnson resubmitted its application, correcting the deficiency and recalculating using the values of the native soils, as admitted by TASC. (Ab12).

¹⁵ https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swbmp_13.pdf, at 2.

Finally, TASC contends that Johnson failed to correctly calculate the SHWT and infiltration rates according to the BMP Manual for BMP 201 and BMP 271. (Ab13-14). The SWHT is the highest elevation in a specific location to which groundwater rises during the year.¹⁶ BMP 201 and BMP 271 are small-scale infiltration basins which discharge into Basin 3. (Aa3066; Aa88). Basin 3 is a constructed wetland basin located in the southwest portion of the Property. (Aa19).

TASC argues that Johnson should have calculated groundwater mounding by using the highest SHWT and the slowest infiltration rate pursuant to the BMP Manual, and that its failure to do so results in groundwater mounding greater than the water table separation for both BMP 201 and BMP 271. However, DEP found that both these BMPs met the groundwater recharge requirements of N.J.A.C. 7:8-5.4(b)(1)(i) because Johnson's hydrologic and hydraulic analysis showed the stormwater management measures maintained more than 100% of the average annual pre-construction groundwater recharge volume. (Aa88).

Moreover, TASC conflates test pit data in an effort to support its desired end. For BMP 201, the data for Test Pit 184 demonstrates a groundwater mounding clearance of 0.7 feet. (Aa3066). TASC uses the groundwater

¹⁶ https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swmp_12.pdf

mounding data from Test Pit 181 (7.5 feet) and applies it to the water table separation data from Test Pit 184 (4.2 feet) to reach its conclusion that BMP 201 will fail. Ibid. TASC employs the same strategy for BMP 271, instead using data from Test Pit 183 and comparing it to the data from LTP 6. Ibid. This argument compares apples to oranges to attain an incongruous result.

The facts instead demonstrate DEP performed its due diligence in evaluating Johnson's FHACA applications. DEP questioned Johnson's engineer about the groundwater mounding analysis during the permitting process. (Aa2687). Johnson's engineer explained that a "total of 11 small-scale BMPs provide recharge" and that Johnson was "not seeking any waivers from groundwater recharge" because "the site provides a surplus of recharge." Ibid. (referencing Tables 3.6.1 and 3.7.1 of the report). Table 3.6.1 found in Johnson's Engineering Report provides a summary of the green infrastructure stormwater management systems. (AA835). This table demonstrates that several proposed small-scale infiltration basins and bioretention basins were designed to provide groundwater recharge, and Johnson proposed to import fill of permeable soil where the existing soil under the basins had low permeability. (Aa836). Table 3.7.1 shows the approximate 21,000 cubic feet surplus of groundwater recharge based on the calculations. (Aa837). As such, DEP

applied its expertise and correctly determined that Johnson's hydrologic and hydraulic analysis showed the stormwater management measures maintained more than 100% of the average annual pre-construction groundwater recharge volume in compliance with N.J.A.C. 7:8-5.4. (Aa88). The court should defer to DEP's findings in this highly technical field and affirm DEP's permitting decision. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. at 488-89.

C. The Application Met the Stormwater Runoff Quantity Standards under N.J.A.C. 7:8-5.6. (Responds to Appellant's Point I.C.)

TASC also argues that Johnson failed to meet the peak flow requirements of N.J.A.C. 7:8-5.6. TASC is incorrect.

To satisfy the requirements of N.J.A.C. 7:8-5.6(b), an applicant must complete one of four listed methodologies to demonstrate control of stormwater runoff quantity impacts. Here, Johnson opted to use the methodology detailed at N.J.A.C. 7:8-5.6(b)(3), which requires an applicant to design stormwater management measures so that the post-construction peak stormwater runoff rates for the two, 10- and 100-year storm events are 50, 75 and 80% of the pre-construction runoff rates. These percentages apply only to the post-construction stormwater runoff attributable to the part of the site on which the project is to be constructed. Ibid.

After analyzing all of the data Johnson provided in its permit application

and responses to DEP's information requests, DEP determined Johnson's proposed project met the water quantity requirements. First, DEP found Johnson used two points of analysis on the Property (one before the existing Lake Basin and the other discharging from the Lake Basin to Indian Run) to show compliance with this rule. (Aa90; Aa829). DEP further determined that each point of analysis satisfied this rule's requirement that the post-construction peak runoff rates for the two, 10- and 100-year storm events be 50, 75 and 80% of the pre-construction runoff rates. (Aa90; Aa830). Indeed, the charts compiling the data from the permit application demonstrate that the runoff rates were all below the regulatory maximum percentages. Ibid.

TASC questions the approach Johnson's engineer used to analyze the peak flow rate, opining that the "more traditional" methodology is to use the area-weighted approach instead of the peak reduction approach. (Ab14). The area weighted approach uses the total area of the Property to calculate the peak flow rate whereas the peak reduction approach analyzes the disturbed areas of the Property to calculate the peak flow rate. (Aa2527); N.J.A.C. 7:8-5.6(b)(3).

TASC's contention amounts to mere quibbling over which model is more appropriate. Notably, TASC does not contend that the peak flow weighted approach is not viable; rather, it argues that its expert thinks the area weighted

method is “more traditional.” (Ab14). But the Stormwater Management Rules explicitly allow an applicant to use the peak flow weighted approach. N.J.A.C. 7:8-5.6(b)(3). If the record supports more than one result, a court should not second guess the selected methodology, particularly as the decision to accept this method is a technical matter within DEP’s engineering expertise. Pinelands Preservation Alliance v. N.J. Dep’t of Env’t Prot., 436 N.J. Super. 510, 524 (App. Div. 2014); In re N.J. Pinelands Comm’n Resolution, 356 N.J. Super. at 372. TASC’s attempt to substitute its expert’s judgment for DEP’s does not demonstrate DEP acted arbitrarily or capriciously here.

In sum, the substantial evidence in the record shows DEP exercised its engineering and technical expertise in finding the Project met the Stormwater Rules’ regulatory requirements. As such, this court should affirm the grant of the FHACA permit.

POINT II

DEP PROPERLY CONSIDERED IMPACTS TO ENDANGERED OR THREATENED SPECIES HABITAT. (Responding to Appellant’s Brief Point II)

TASC also challenges the FHACA permit issuance because TASC contends the Property is threatened and endangered species habitat. DEP conducts threatened and endangered species assessments as part of the FHACA

Individual permitting process. N.J.A.C. 7:13-11.6(d). If a project is likely to disturb threatened and endangered species habitat, DEP requires a permit applicant to conduct a survey or habitat assessment. N.J.A.C. 7:13-11.6(e).

Using standard agency practice when applying its regulations, DEP determined that the wetlands located on the Property were not habitat for threatened or endangered species but rather were of ordinary and intermediate resource value. (Aa55). DEP supported its decision, noting that the Property was not suitable habitat for the species TASC asserts were seen on-site, the Savannah sparrow and the bald eagle. Ibid. While TASC also notes Great Blue Herons may be present on site (Ab17), DEP explains that species is not listed as either threatened or endangered. (Aa55).

As to the Savannah sparrow, DEP noted that the species “do not use or rely upon freshwater wetlands or ... transition areas for their essential functions such as breeding, resting or feeding.” Ibid. Rather, the Savannah sparrow habitat includes fallow fields, grasslands, upland meadows or pastures. Ibid.

As to the bald eagle, DEP conducted both a site inspection and in-office review of the Property to assess whether the Property was suitable habitat for breeding, resting or feeding for the species. Ibid. DEP found that the Property is not located proximate to a bald eagle nest buffer; the size of the wetlands on

the Property and the type of habitat present in the wetlands is not suitable for the species; and the Landscape Project Mapping¹⁷ did not map the Property as bald eagle habitat. Ibid.; see also (Aa64) (noting the relatively small size and configuration of the wetlands on the Property mitigates against use by the species). While DEP had accepted the prior bald eagle sighting records, DEP Fish and Wildlife staff explained that “bald eagle foraging” habitat “require[s] waterbodies greater than 8 hectares” while the combined (fragmented) wetlands on the Property were only 3.9 hectares. (Aa58-59). Finally, DEP found that due to the Property’s narrow, closed canopy stream corridor, bald eagles would have extreme difficulty navigating to forage because of the species’ 6- to 8-foot wingspans. (Aa62). Thus, while there may have been bald eagle sightings by members of the public, that alone does not end the habitat suitability question as TASC argues, as DEP’s Landscape Mapping “method ‘uses species sightings in conjunction with their known habitat characteristics, focusing upon actual land cover and land use to generate habitat mapping.’” ZRB, LLC v. N.J. Dep’t of Env’t Prot., Land Use Regulation, 403 N.J. Super. 531, 556 (App. Div. 2008) (quoting In re Adopted Amendments to N.J.A.C. 7:7A-2.4, 365 N.J. Super. 255, 262-63 (App. Div. 2003)). DEP undertook just such an analysis here, combining

¹⁷ N.J.A.C. 7:7A-3.2(c).

on-site data with the prior species sightings to determine the Property was not suitable bald eagle habitat.

DEP therefore found that the Property was not a suitable habitat for threatened or endangered species. The court should defer to DEP's expertise in this area. Pinelands Preservation Alliance, 436 N.J. Super. at 533. DEP's permitting decision should be affirmed.

CONCLUSION

For these reasons, DEP's permit decision should be affirmed.

Respectfully submitted,

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By: /s Jason T. Stypinski
Jason T. Stypinski
Deputy Attorney General

Dated: July 19, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-285-23

IN THE MATTER OF JOHNSON
DEVELOPMENT ASSOC. INC., PI
1112-04-0011.1, LUP220003

Civil Action

On Appeal From:
New Jersey Department of
Environmental Protection

REPLY BRIEF OF APPELLANT
THE ALLIANCE FOR SUSTAINABLE COMMUNITIES

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Dated: August 2, 2024

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PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

TASC relies on the procedural history and statement of facts set forth in its initial brief.

LEGAL ARGUMENT

I. The Proposed Stormwater System is Not Compliant with the Stormwater Management Rules, Therefore the Issuance of the FHA Permit Should be Reversed. (Aa2521-Aa2537).

As set forth in the initial brief, technical guidance for stormwater management measures is contained within the New Jersey Stormwater Best Management Practices Manual (“BMP Manual”). N.J.A.C. 7:8-5.9; In re Stormwater Management Rules, 348 N.J. Super. 451, 457 (App. Div. 2006). This is not just a guidance document that interprets the implementation of the regulations, but actual technical details on how to do the stormwater management calculations and analysis and incorporated by reference as a regulation at N.J.A.C. 7:8-5.9. The BMP Manuals use of “shall” and “must” and other similar terms reflect that the BMP Manual is not just recommendations.

NJDEP also argues that it has the authority to consider alternative stormwater management measures as opposed to those set forth in the BMP Manuals, and therefore these are not requirements. (DEPb14). First, it is

¹ The Procedural History and Statement of Facts are inextricably interwoven and, therefore, are presented together herein.

common to set forth requirements but then permit the governing authority to permit exceptions or approve alternatives. Regardless, the NJDEP did not consider and approve alternatives here, it is evident that the applicant followed the BMP Manuals and that the NJDEP reviewed and approved pursuant to the BMP Manuals. Therefore, it is undisputed that the BMP Manuals are the standards in question here.

A. The Application Fails to Meet the Water Quality Requirements Under the Stormwater Management Rules. (Aa2521-Aa2537).

TASC raised two separate and distinct issues with the water quality treatments, being (1) sediment in the forebay, and (2) inundation of the Filterra MTDs. (Ab7-Ab9).

Pursuant to the BMP Manual, “[p]retreatment is required in any type of standard constructed wetland system. Pretreatment reduces the velocity of incoming flows and captures coarser sediments and debris.” BMP Manual, Chapter 10.4, page 4. The BMP Manual does not say pretreatment is discretionary, it is required. The NJDEP argues that Basin 2 is a constructed wetlands basin and therefore it does not matter if the forebay is underwater. (DEPb16). The issue raised by TASC and Princeton Hydro is not that Basin 2 is underwater. The issue is that the apparent forebay is underwater, and “under no circumstances should there be any standing water in the forebay 72 hours after

a precipitation event.” BMP Manual, Chapter 10.4, Page 4. Again, this language is not discretionary, it is required.

Johnson Development relies upon an email between Johnson Development and NJDEP to explain an alleged resolution to the issue. (Dja17-Dja18). First, TASC did not just ignore this information. TASC was not copied on this email and was never provided this email prior to the appeal being filed. This email was not provided in response to TASC’s many OPRA requests to the NJDEP on the application materials. Princeton Hydro had no ability to review this information and assess the impact of the information.

Although the information appears to have been on the final plans, this information was not clearly identified on the site plans and in fact, mislabeled. The diversionary structure being discussed is MH-112A but the diversion structure detail is identified as MH-111A. (Dja17). In addition, the pipe profile on the plans did not identify the diversion structure; there is no 8” pipe on the plans that should otherwise be on the pipe profile sheet. (Aa3114).

Contrary to Johnson Development’s assertion, this explanation was not found in the NJDEP engineering report, and not relied upon in NJDEP’s response brief here. (Aa81-Aa93). If this is now being relied upon by NJDEP in issuing the permit, the matter should be remanded so that Princeton Hydro may

have the opportunity to review the information that was not previously available to it and submit a supplemental public comment if necessary.

Therefore, the NJDEP's issuance of the FHA Permit is arbitrary, capricious, and unreasonable, and must be vacated and reversed. At a minimum, a remand should be provided so that TASC may have the opportunity to review this information with its experts and present a new public comment if necessary.

B. The Application Fails to Meet Groundwater Recharge Requirements Under the Stormwater Management Rules. (Aa2521-Aa2537).

With regard to the groundwater recharge requirements, the issue is that BMP 201 and BMP 271 failed to meet the separation requirement of the bottom of the basin and the seasonal high water table.

In response, NJDEP argues that there is no issue with separation issue because the volume of stormwater being recharged post-construction is greater than the volume pre-construction. (DEPb21-22). This completely misses the issue, which is that the BMP 201 and BMP 271 fails to have any separation between the bottom of the basin and the seasonal high water table and therefore these basins fail.

NJDEP further argues that TASC is conflating test data to show the lack of groundwater mounding clearance by using values from different test pits to come up with the failure. (DEPb21-22). However, as explained in TASC's initial brief, this is exactly what the BMP Manual requires an applicant to do. For

design purposes, the seasonal high water table shall be taken at the highest level of the observed mottles or groundwater of the test results, and use the slowest of the test replicate results to calculate infiltration. BMP Manual, Chapter 12, Page 11-12; BMP Manual, Chapter 13, Page 4.

Here, BMP 201 is a small-scale infiltration basin. Johnson Development used three different test pits with varying seasonal high water tables and infiltration rates. (Aa3066). However, pursuant to Chapter 12 of the BMP Manual, the analysis should have used the highest seasonal high water table and the slowest infiltration rate for design purposes. BMP Manual, Chapter 12, Page 12; BMP Manual, Chapter 13, Page 4. As such, a review of the data should have meant that Johnson Development only had a water table separation of 4.2 feet. (Aa3066). Using the slowest infiltration rate as required would have resulted in a groundwater mounding of 7.5 feet. (Aa3066). 7.5 feet groundwater mounding is greater than the 4.2 feet of separation, which means that BMP 201 would fail. Therefore, using the analysis required pursuant to the BMP Manual shows that BMP 201 fails and does not pass the groundwater mounding analysis.

Using the same analysis required under the BMP Manual, BMP 271 shows only 2.2 feet of separation, and using the slowest infiltration rate, would result in a groundwater mounding of 2.6 feet. (Aa3066). Again, 2.6 feet rise of groundwater level is greater than 2.2 feet of separation between the bottom of

the basin and the groundwater table, meaning that BMP 271 would also fail. NJDEP's reliance on the claim that more groundwater is being recharged post-construction does not address the issue at hand, which is that two of the basins would fail pursuant to the design parameters of the BMP Manual.

Johnson Development argues that there is no requirement that they use the highest observed seasonal highwater table or the slowest infiltration rate for design purposes. (JDb17). To determine the seasonal high water table, Chapter 12 of the BMP Manual states:

1. Where mottling showing redoximorphic features is observed at any season of the year, **the SHWT shall be taken as the highest level at which the mottling is observed**, except when the water table is observed at a level higher than the level of the redoximorphic depletions or concentrations. For details on determining whether saturated soils are present, the guidance document published by NRCS, "Field Indicators of Hydric Soils in the United States" may be used.
2. Where mottling showing redoximorphic features is not observed, the SHWT shall be determined based upon either of the following methods, depending on the time of the year during which the testing is performed:
 - a. During the months of January through April, inclusive, water levels may be measured directly within soil profile pits or borings. Whenever the Department determines that there has been a significant departure from normal climatic conditions, the Department may, with due notice to the administrative authority, lengthen or shorten the period allowed for direct measurement during any

given year. In low lying coastal areas where groundwater levels fluctuate with the tides, **measurements shall be taken at the time of highest groundwater elevation in response to tidal fluctuation or**

- b. During other times of the year, the depth to the SHWT may be obtained from the NRCS Web Soil Survey provided that the soil series present at the site is identified based upon comparison of soil profile morphology observed within a soil profile pit and the soil profile description provided for the soil series in question within the NRCS Web Soil Survey. **In cases where SHWT is shown as a range of elevations in the NRCS Web Soil Survey, the highest elevation of the range shall be used as the SHWT.**

[(emphasis added) BMP Manual, Chapter 12, Page 11-12]. In any situation, the seasonal high water table is to be taken at the highest level for each basin.

Chapter 13 of the BMP Manual further states that using the Hantush Spreadsheet, “Since the actual permeability rate may vary from soil testing results and may decrease over time, a factor of 2 must be applied to the slowest tested permeability rate to determine the design permeability rate.” (emphasis added) BMP Manual, Chapter 13, Page 4. It is unambiguously stated and required that a user must use the slowest tested permeability rate with a safety factor of two.

The Hantush Spreadsheet was designed to “simulate groundwater mounding beneath stormwater infiltration basins.” BMP Manual, Chapter 13,

Page 2. “The model developed by USGS, hereafter referred to as the Hantush Spreadsheet, calculates the maximum height of the transient mounding formed and assumes all groundwater flow is horizontal above an infinite aquifer.” BMP Manual, Chapter 13, Page 2. “The maximum height of the groundwater mounding is affected by the amount of infiltrated runoff, the ability of the soil layers to transport water, the thickness of the saturated zone, and the shape of the BMP. If the mounded groundwater reaches the bottom of the basin, the rate of infiltration out of the BMP is reduced and infiltration may stop.” BMP Manual, Chapter 13, Page 1-2.

The BMP Manual makes it evident that groundwater mounding analysis is for the entire basin, not for sections of the basin. The BMP Manual further makes it clear that the groundwater mounding analysis would use input values of the slowest infiltration rate in the basin and the highest seasonal high water table. Therefore, taking selective analysis in different sections of the basin in order to show a passing groundwater mounding analysis is in direct conflict with the instructions of the BMP Manual.

Johnson Development also alleges that Princeton Hydro’s analysis is incorrect because it cited the BMP Manual instructions relating to tube permeameter testing rather than single ring infiltration testing. However, Johnson Development did in fact use Shelby Tube Tests, which are tube

permeameter testing. (Aa1627-Aa1635). Regardless, Chapter 13 makes it clear and unambiguous that for groundwater mounding analysis, the slowest infiltration rate shall be used.

For these reasons, the project fails to meet the groundwater recharge requirements of N.J.A.C. 7:8-5.4, and the NJDEP's issuance of the FHA Permit is arbitrary, capricious, and unreasonable, and must be vacated and reversed.

C. The Application Fails to Meet Peak Flow Requirements Under the Stormwater Management Rules. (Aa2521-Aa2537).

Respondents' response to this argument is simply that pursuant to calculations using a less common method, the project complies. However, Princeton Hydro's review shows that using the most common method for calculating peak flow, the project fails. This should not be a situation where under one method of calculation it fails, but under another, it passes. Furthermore, Johnson Development made an assumption that the peak flow rate of the undisturbed area and the total area has a correlation, which is not necessarily true for all situations. (Aa2527). There is no data to support this conclusion. This should not be a situation where an applicant can simply pick and choose the methodology that provides the desired result.

For these reasons, the project fails to meet the peak flow requirements of N.J.A.C. 7:8-5.6, and the NJDEP's issuance of the FHA Permit is arbitrary, capricious, and unreasonable, and must be vacated and reversed.

II. The NJDEP Failed to Adequately Consider Impacts to Endangered or Threatened Wildlife Species Identified on Site, Therefore the Issuance of the FHA Permit Should be Reversed. (Aa2576-Aa2616).

In this matter, TASC produced photographic evidence of bald eagles utilizing the site as well as an expert report by Michael McGraw, MES, QAWB, Senior Wildlife Biologist. (Aa2553-Aa2575, Aa2576-Aa2616). Importantly, the NJDEP processed and approved these Bald Eagles sightings for inclusion in the NJDEP Biotics Database and the landscape Project. (Aa2553-Aa2575). In response, NJDEP argues that it believes the site is not suitable for bald eagles or savannah sparrows. (DEPb26-27).

It is still not clear how the NJDEP can determine that the property is not suitable habitat to support Bald Eagles and Savannah Sparrows, when there have been actual, recent, physical observations of Bald Eagles using the site, including foraging. (Aa2553-Aa2575; Aa2540-Aa2545). The NJDEP itself accepted the reports identifying Bald Eagles as resting and/or foraging on the site. (Aa2553-Aa2575). The NJDEP's analysis basically boils down to acknowledging that there is evidence of the site being used by threatened and endangered species, but then determining that this does not fit with the textbook requirements for the threatened and endangered species and therefore it does not exist. At a minimum, because there were actual sightings of the use of the site,

the NJDEP should have required a formal bird survey as required by N.J.A.C. 7:13-11.6(e) and N.J.A.C. 7:13-18.8(b).

For these reasons, the NJDEP's issuance of the FHA Permit is arbitrary, capricious, and unreasonable, and must be vacated and reversed.

CONCLUSION

In conclusion, for the reasons set forth herein and in TASC's initial brief, TASC respectfully requests that this Court vacate and reverse the NJDEP's approval of the Flood Hazard Area Verification & Flood Hazard Area Individual Permit, 1112-04-0011.1, LUP 220003, dated August 14, 2023.

Respectfully submitted,

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Dated: May 20, 2024

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