IN THE MATTER OF FLOOD HAZARD AREA VERIFICATION AND FLOOD HAZARD AREA INDIVIDUAL PERMIT, 1113-22-0002.1 LUP220002	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket#: A-001639-22 Civil Action On appeal from final agency action of the New Jersey Department of Environmental Protection

INITIAL BRIEF AND APPENDIX OF APPELLANT, THE WATERSHED INSTITUTE

Eastern Environmental Law Center
One Gateway Center, Suite 2600
Newark, NJ 07102
(973) 424-1166
Attorneys for Appellant,
The Watershed Institute

By: Daniel A. Greenhouse, Senior Staff Attorney
Attorney #016102005
dgreenhouse@easternenvironmental.org
Kaitlin Morrison, Staff Attorney
Attorney #433092023
kmorrison@easternenvironmental.org

Date: October 6, 2023

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

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

[3] "Aa" refers to the Appellant's Appendix, followed by the page number of the appendix. R. 2:6-8.

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

TABLE OF DECISION BEING APPEALED

TABLE OF AUTHORITIES

Federal Cases:

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In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 597 (App. Div. 2004)
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In re Proposed Constr. of Compressor Station (CS327), 2023 N.J. Super. LEXIS 94 (App. Div. Aug. 31, 2023)
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6 N.J.R. 391 (Oct. 10, 1974)
39 N.J.R. 4573(a) (November 5, 2007)
45 N.J.R. 360(a) (Feb. 19, 2013)
47 N.J.R. 2531(a) (Oct. 19, 2015)
48 N.J.R. 2244(a) (Nov. 7, 2016)
52 N.J.R. 365(a) (March 2, 2020)
54 N.J.R. 2169(a) (Dec. 5, 2022)
55 N.J.R. 1385(b) (July 17, 2023)

Government website:

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

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

NJ DEP, Water Quality Management Planning Program web page, nj.gov/dep/wqmp/wqmps.html

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

PRELIMINARY STATEMENT

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

Appellant, The Watershed Institute ("TWI"), was founded in 1949 with the mission to keep water clean, safe, and healthy. It works to protect and restore the water and natural environment in central New Jersey through a combination of conservation, advocacy, science, and education. TWI focuses much of its work in the Stony Brook-Millstone and the adjacent part of the Central Delaware River Watersheds, while also leading several statewide initiatives. In particular, TWI works with municipalities on behalf of its 1,800 members to enact stronger stormwater management ordinances and more sustainable land use practices. This

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

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

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

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

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

STATEMENT OF FACTS AND PROCEDURAL HISTORY[5]

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

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

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

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

In response to to Executive and Administrative Orders issued by Governor Murphy and DEP Commissioner McCabe in January 2020,[6] the DEP undertook significant regulatory efforts to study and incorporate climate change considerations into its land use regulations, which include the DEP's regulations that implement the FHACA. In June of 2020, the DEP issued its "Scientific Report on Climate Change" in which it announced that "[s]tormwater management systems will [] need to be modified to accommodate more intense precipitation events and increased occurrence of nuisance flooding."[7] In October of 2021, the DEP issued another report titled "Climate Change Resiliency Strategy" which

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

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

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

On November 18, 2021, the DEP issued a Press Release to report that it had released two studies led by Dr. Arthur DeGaetano of Cornell University (hereinafter, the "Cornell Studies"), and peer-reviewed by the DEP Science Advisory Board. Aa184. The studies showed that in New Jersey, "[p]recipitation is already 2.5% to 10% higher" and the "precipitation expectations that presently guide state policy . . . do not accurately reflect current precipitation intensity conditions." Further, "[p]recipitation is likely to increase by more than 20%" by 2100. Ibid. Dr. Anthony Broccoli, the head of the DEP's standing committee for Climate and Atmospheric Sciences, stated that "[o]ne of the consequences of climate change is that we can no longer assume that what has happened in the past is a guide to the future," and "[t]hese studies will provide better guidance for estimating and managing future risks to human life, property, and infrastructure." Ibid.

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

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

On Oct 27, 2022, the DEP and Governor's office issued a press release regarding the forthcoming Inland Flood Protection Rule ("IFPR"), which would formally enshrine the updated precipitation data in the DEP's regulations on a non-emergent basis. Aa203. Governor Murphy stated that "In order to ensure the safety and economic wellbeing of New Jerseyans both today and in the future, our policy decisions must be informed not by obsolete data, but by the challenging realities currently facing residents and businesses across the state." Ibid. The Press Release noted that the Cornell Studies had been commissioned to "close severe climate data gaps and provide a reliable scientific basis for regulatory adjustments." Ibid.

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

B. Bridge Point Submits the Application to the DEP

On March 14, 2022, well after the DEP had the Cornell Studies in hand and in the midst of its public statements regarding the necessity for an emergency rule, Bridge Point filed its application with the DEP. Aa117-168. The Multi-Permit Application sought to develop the 650-acre site, located at the southeastern intersection of U.S. Route 1 and Quakerbridge Road, including the application for the Flood Hazard Area Verification and Flood Hazard Area Individual Permit that is at issue in this appeal. Aa119. The application states that the "finished project will include a total of approximately 5,563,117 square feet of building footprint coverage, 2,435 car parking spaces and 1,072 trailer parking spaces. Other improvements include internal access roads, improvements to adjacent public roadways, utilities, stormwater management, lighting, and landscaping improvements." Aa118.

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

sewer line, an access road to State Route 1 and internal access roads." Aa151.

Stormwater outfalls would be built to discharge directly into regulated unnamed tributaries to Duck Pond Run and Shipetaukin Creek. Aa151-152. According to the DEP, the stormwater outfalls would also have riparian zone impacts and require in-stream work. Aa035. The applicant also submitted a stormwater report with its application, the most recent version of which was submitted on November 22, 2022. Aa070-093. The stormwater report makes clear that Duck Pond Run discharges directly into the Delaware and Raritan Canal, Aa089, which is a source of drinking water for more than a million people. There was no mention of the new precipitation data, its impact on flood elevations, or any mention of pollutant limitations or impairments to Duck Pond Run or any other receiving waterway (or the people who might receive the stormwater runoff into their drinking water).

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

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

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

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

> I understand you are out of the office today. Please let me know if you have a few minutes on Tuesday to discuss this project. With news circulating about the anticipated Emergency Rule the Department is planning to drop, I'd like to further discuss the information needed to get this application deemed administratively complete.
>
> [Aa109.]

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

The DEP issued a series of deficiency letters to the applicant between April and November of 2022. Within these deficiency letters, there was significant discussion regarding the Route 1 Access Road, the private, internal road that would cross the tributary to Duck Pond Run using a pipe culvert. DEP repeatedly raised the issue that the crossing was not perfectly perpendicular[10] so as to minimize riparian zone impacts at the crossing, insisting that "the current 60-degree crossing proposed for the Route 1 access road must be redesigned to be as nearly

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

[10] The applicant had described the crossing in its application papers as "generally perpendicular." Aa153.

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

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

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

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

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

> Water Quality Management Plan (WQMP) Rules - Consistency Assessment. This project is a sewage-generating development. All proposed activities are located within the limits of the mapped sewer service area, as shown on the plan entitled: "OVERALL NJDEP WETLAND PERMITTING PLAN", Drawing No. WP100, to be approved under Activity No. LUP220001. Therefore, the project is consistent with the Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.
>
> [Aa029.]

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

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

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

> all Federal, State, and local requirements governing roadways cannot be achieved, and that public safety cannot be adequately ensured, without exceeding the limit.
>
> [Aa033-034.]

D. The Watershed Institute's Public Comments and Letters

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

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

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

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

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

The final agency decisions were published in the DEP's Bulletin on December 21, 2022.[12] On February 6, 2023, Appellant filed a notice of this appeal seeking review of the DEP's erroneous December 1, 2023 permit decisions. On June 8, 2023, the DEP served the Statement of Items Comprising the Record on

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

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

LEGAL ARGUMENT

I. STANDARD OF REVIEW
(Aa001)

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

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

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

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

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

(internal citation omitted). Where "there is nothing in the agency record to indicate the Department ever considered the question, much less decided it," vacatur and remand to the agency is appropriate. In re Proposed Constr. of Compressor Station (CS327), 2023 N.J. Super. LEXIS at *3.

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

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

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

allocations[14] for impaired waters,[15] as well as any additional requirements contained in the applicable Areawide Water Quality Management Plans ("Areawide WQM Plans"). The DEP must consider and make a record of this information in order to determine consistency with the applicable Areawide WQM plan, but it did not. The Court should vacate and remand the permit to the agency to develop an adequate record and provide a reasoned Consistency Assessment. See Musconetcong Watershed Ass'n, 2023 N.J. Super. LEXIS at *28-29.

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

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

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

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

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

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

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

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

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

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

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

[17] NJ DEP, Water Quality Management Planning Program web page, available at nj.gov/dep/wqmp/wqmps.html (emphasis added).

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

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

> The Department shall determine if a project or activity is located within an area eligible for sewer service as part of the Department's review of a permit application. There is a rebuttable presumption that a project or activity that generates wastewater that is proposed to be conveyed to a NJPDES regulated wastewater facility is consistent with the areawide plan if it is within the sewer service area of the adopted areawide plan.
>
> [N.J.A.C. 7:15-3.2(b).]

DEP apparently reads this language to mean that the only thing any project that generates wastewater must demonstrate for consistency is that it is within an area eligible for sewer service. First, the DEP is incorrect because looking at the language of the regulation and the purpose of the rules, this rebuttable presumption *only applies* to the sewerage aspect of the project. It simply does not address the

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

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

> As proposed at N.J.A.C. 7:15-3.2(b) through (d), WQM plan consistency will be evaluated when a project or activity seeks a permit from the Department. At the time of permit application, the Department will determine if the project or activity requiring centralized sewer service is located in a sewer service area. If so, there is a rebuttable presumption that the project or activity is consistent with the areawide plan. *If a WQM plan has additional requirements, or a wasteload allocation in an adopted TMDL has been established, these must also be addressed in order for the proposal to be consistent.*"
>
> [47 N.J.R. 2531(a) (Oct 19, 2015) (emphasis added).]

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

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

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

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

> This project is a sewage-generating development. All proposed activities are located within the limits of the mapped sewer service area, as shown on the plan . . . . Therefore, the project is consistent with the Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.
>
> [Aa012, Aa029.]

This minimalist application of the Water Quality Planning Act and Rules cannot be left to stand. Stormwater will flow off of 241 impervious acres of additional impervious surface, through the applicant's stormwater outfalls, and directly into tributaries to Duck Pond Run and Shipetauken Creek. Aa151-152. Duck Pond Run discharges directly into the Delaware and Raritan Canal, Aa089, a major source of drinking water. Entirely absent from the record is DEP's determination of whether these water bodies or those that they feed, including the

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

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

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

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

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

(Aa001)

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

The applicant did not demonstrate that a bridge was infeasible at this location, as required by the regulations, and did not meet multiple other requirements regarding the permissibility of and construction standards for a circular culvert. The DEP never discussed the failure of the applicant to justify building a pipe culvert in its various deficiency notices, and approved its construction. The baseless approval of this circular culvert to facilitate the road crossing, which will cause over 9,000 square feet of riparian zone impacts, also undermines DEP's finding that riparian zone impacts were minimized.

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

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

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

In addition, the regulations for bridges and culverts favor a bridge or three-sided culvert that "completely spans the regulated waterway," and preserves "stable, natural, earthen channel" over a pipe culvert:

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

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

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

> i. Unstable substrate, which would likely undermine any proposed footing within or adjacent to the channel;
> ii. Irregular channel configuration;
> iii. Anticipated adverse hydraulic impact to the channel; or
> iv. Anticipated adverse impacts to offsite flooding, the environment, or public safety."
>
> [N.J.A.C. 7:13-12.7(g)(6) (emphasis added).]

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

> A culvert is proposed to facilitate the bridge crossing based on the width and character of the existing feature. The feature comprises, what appears to be a historically man-made drainage ditch, which presently contains a bed of less than 5 feet wide. The feature is dominated by dense vegetation that offers little or no value to aquatic species. As a result, construction of a culvert is a more practical application at this location.
>
> [Aa155.]

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

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

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

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

> Where a circular, elliptical, or box culvert is found acceptable under (g) above, the culvert shall be constructed as follows:
>
> 1. *The invert of the culvert shall be installed at least two feet below the invert of the natural channel.* In order to create a contiguous flow-path through the culvert that meets and matches the bottom inverts, cross-sections, and profile of the channel beyond the culvert, the culvert shall be filled with native substrate up to the invert of the natural channel; or
> 2. *Where it is demonstrated that the culvert cannot be constructed as described at (h)1 above due to unstable substrate or other physical constraints, the floor of the culvert shall be constructed to incorporate an artificial low-flow treatment*, such as a V-notch or key-notch, baffles to hold substrate in place, or a concave floor. For example, an artificial low-flow treatment can be used

> where the placement of two feet of substrate within the culvert would not be feasible or effective in stabilizing the channel and protecting aquatic habitat under expected flood conditions.
>
> [N.J.A.C. 7:13-12.7(h) (emphasis added)]

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

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

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

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

The FHACA rules require that impacts to the riparian zone must be minimized to only the disturbances that are necessary to accomplish the basic purpose of the development. N.J.A.C. 7:13-11.1. Part of the reason that a bridge spanning a water is preferred to a culvert is that it minimizes impacts to the channel and riparian zone while still facilitating a road crossing, while a circular culvert requires building directly in these regulated areas. It is uncertain to what degree these impacts would be reduced with proper application of the regulations, but that is precisely the point. DEP's failure to apply the regulations intended to mitigate the environmental harm of a stream crossing means that its finding that riparian zone impacts have been minimized is flawed and unsupported.

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

(Aa001)

The DEP arbitrarily and capriciously ignored the best available precipitation data when it issued this permit on December 1, 2022—data that was known to the DEP at least as early as November of 2021. The Cornell Studies, commissioned and peer reviewed by the DEP's scientists, demonstrated that precipitation had already increased 2.5%-10% beyond the information previously relied on by DEP, and would likely increase by more than 20% by the year 2100. Aa184. This information was later formally incorporated into the agency's Inland Flood Protection Rule ("IFPR"). Regardless of when the IFPR became effective, the DEP had a duty *at the time the permit application was reviewed and the permit was issued* to ensure the proposed development was designed to withstand "a flood equal to the 100-year flood *plus an additional amount of water in fluvial areas to account for possible future increases in flows* due to development or other factors."[20]

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

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

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

A. DEP Was Aware That the Preciptiation Data and Associated Flood Elevation Predictions were "Outdated" and "Obsolete" at the Time It Issued the Instant Permit
(Aa001)

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

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

> currently facing residents and businesses across the state," **said Governor Murphy**.
>
> . . .
>
> "Updating the data New Jersey uses to manage stormwater runoff and determine building elevations along rivers and streams will help flood-prone communities to better protect their homes and businesses, making us more resilient to the increasing extreme weather that New Jersey is experiencing," **said Commissioner LaTourette**."
>
> [Aa203. Emphasis in original.]

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

> The proposed amendments are intended to ensure the use of current precipitation data and reliable climate science to aid New Jersey communities in better preparing themselves to confront one of the most critical threats to public safety presented by climate change-increased intensity of precipitation events and the resulting effects of additional stormwater runoff on stormwater management systems and flood elevations in fluvial areas.
>
> [54 N.J.R. 2169(a) (Dec. 5, 2022).]

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

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

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

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

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

> "...are designed to avoid injuries which likely could arise from an improper land use or development during a likely flow of flood waters: injury to onsite property, injury to offsite persons or property in the downstream path of the debris from a wrongful development, and injury to community members who drink or use water contaminated by inappropriate onsite development."
>
> Usdin v. State, Dep't of Envtl. Prot., Div. of Water Res., 173 N.J. Super. 311, 331 (Super. Ct. 1980).

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

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

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

> "Flood hazard area design flood" means a flood equal to the 100-year flood plus an additional amount of water in fluvial areas to account for possible future increases in flows due to development or other factors. This additional amount of water also provides a factor of safety in cases when the 100-year flood is exceeded.
>
> [N.J.A.C. 7:13-1.2, effective until July 17, 2023.]

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

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

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

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

Finally, as a matter of law, the DEP must apply the best and most recent data in its possession during its permit review to avoid acting arbitrarily. Cf. Gaf Corp. v. N.J. Dep't of Envtl. Prot., 214 N.J. Super. 446, 451 (App. Div. 1986) (finding that "[o]bviously, DEP can only use the most recent data it has" and "there was no unfairness [to the discharger] in utilizing the available data"). It is a bedrock principle of environmental law that agencies have a duty to apply the best data and science at their disposal when making decisions, and that they act arbitrarily and capriciously when they fail to do so. E.g., NRDC v. Regan, 67 F.4th 397, 399 (D.C. Cir. 2023) ("In all decisions the agency makes that are based on science, EPA is instructed to use 'the best available, peer-reviewed science.'"); Custer Cty. Action Ass'n v. Garvey, 256 F.3d 1024, 1034 (10th Cir. 2001) (NEPA analysis requires "best available scientific information"); Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988) (analysis of threat to endangered species must use "best scientific and commercial data available"). While the FHACA does not spell out this specific requirement, the DEP itself asserts that "the function of the Division of Science and Research is to help ensure that the department's decision-making is based upon the best possible scientific and technical information."[21] The possibility that the DEP ignored the best available scientific data in its possession regarding critical public health and safety issues should be alarming.

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

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

> While the applicant has asserted that the stormwater management system for the Bridge Point 8 development meets current state requirements, precipitation is likely to increase by more than 20% from the 1999 baseline by 2100. This system is not sized to manage future storms and as a result, threatens to further inundate areas that already flood.
>
> [Aa105.]

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

> We very much support the Inland Protection Rule and using updated rain data. It is extremely important that the application use the projected data to look at contamination and volume.
>
> [Aa046.]

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

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

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

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

numerous wetlands and tributaries should not be based on what the DEP has admitted is "obsolete data [that] will inadequately protect against the adverse impacts of flooding due to increasing precipitation resulting from climate change." 54 N.J.R. 2169(a) (Dec. 5, 2022).

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

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

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

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

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

present, must be known and verified within the project area…." Ibid. It is unclear whether the DEP relied on the exception to this requirement in 5.5(a) by application of 5.5(b) or 5.5(c), and if so, what facts the DEP relied on to determine that either one of those exceptions to this rule was applicable. This record is arbitrarily unclear as to why and how the DEP determined the verification of the floodway lines on the project site was unnecessary.

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

> Unfortunately I just noticed that you have a floodway line on your Riparian Zone plans. *Since we are not verifying any floodways, this line cannot be on there to be approvable.* Is it possible for you to remove the floodway line from the applicable plans?
>
> [Aa050. Emphasis added.]

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

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

2022 permit decision. By the express terms of this permit decision, the DEP approved the plans last revised on November 29, 2022. But the DEP said on November 30, 2022, that the floodway lines "cannot be on there to be approvable." Aa050.

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

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

CONCLUSION

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

Respectfully submitted,

/s/ Daniel A. Greenhouse
Daniel A. Greenhouse (ID #016102005)
Eastern Environmental Law Center
One Gateway Center
Newark, NJ 07102
973.424.1166
dgreenhouse@easternenvironmental.org

/s/ Kaitlin Morrison
Kaitlin Morrison (ID #433092023)
Eastern Environmental Law Center
One Gateway Center
Newark, NJ 07102
973.424.1166
kmorrison@easternenvironmental.org

Attorneys for Appellants
The Watershed Institute

IN THE MATTER OF FLOOD HAZARD AREA VERIFICATION AND FLOOD HAZARD AREA INDIVIDUAL PERMIT, 1113-22-0002.1 LUP220002	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1639-22 **CIVIL ACTION** On appeal from a final decision by the New Jersey Department of Environmental Protection

SUBMITTED: February 5, 2024

BRIEF AND APPENDIX OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Sara M. Gregory
Assistant Attorney General
Of Counsel

Jordan Viana
Deputy Attorney General
Jordan.Viana@law.njoag.gov
Attorney ID: 334042021
On the Brief

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625-0093
Attorney for Respondent,
New Jersey Department of Environmental Protection

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PRELIMINARY STATEMENT

This case challenges the Department of Environmental Protection's ("DEP") routine application of statutory and regulatory flood hazard and stormwater requirements for the December 1, 2022 Flood Hazard Area Individual Permit and Verification (the "Permit") issued to Bridge Point West Windsor, LLC ("Bridge Point").

Bridge Point proposes to construct seven warehouses, internal roadways, parking, stormwater management features, and other associated amenities on a 645-acre property in West Windsor, Mercer County Block 8, Lots 1-3, 12, 16, 20, 28, 32.01, 39-41, 45-47, 49 and Block 15.14, Lots 18-20, 22, 75 (the "Project"). DEP reviewed Bridge Point's Permit application by analyzing thousands of pages of application materials, reports, and public comments, and applying its technical expertise and the existing statutory and regulatory requirements to complex, technical flood hazard and stormwater issues. Ultimately, DEP granted Bridge Point's Flood Hazard Area Individual Permit application and Flood Hazard Area Verification for the Project.

DEP's permitting decision should be affirmed for two reasons. First, DEP's determinations are based on its technical expertise, supported by substantial evidence in the record, and are owed judicial deference. Under duly promulgated regulatory standards in place when the application was deemed

complete, DEP verified Bridge Point's delineation of the flood hazard area for the property and determined that a floodway verification was unnecessary because no activities would take place in the floodway. Similarly, DEP determined that a culvert, rather than a bridge, was proper to facilitate a road crossing over an unnamed tributary for the U.S. Route 1 access road, and that riparian zone impacts were minimized to the greatest extent practicable. Finally, the record supports DEP's determination that the Project does not conflict with an areawide plan or the WQMP rules.

The Watershed Institutes' ("TWI") belated arguments on appeal are unavailing. For the first time, TWI's merits brief raises issues with: (1) the use of DEP's existing Flood Hazard Area Control Act rules; (2) whether a floodway verification was required here; (3) use of a culvert over a tributary; and (4) DEP's determination the Project does not conflict with the Water Quality Management Plan ("WQMP"). Even though TWI had documentation about the culvert and WQMP consistency prior to Permit issuance, TWI chose not to comment on these issues in any of its public comments or during its meeting with DEP. TWI cannot now be heard to complain that DEP did not address the issues in sufficient detail to satisfy TWI and such claims can be dismissed. The only issue that TWI raised in a public comment that is now before this Court concerns riparian zone impacts, which are compliant with DEP's rules.

Because DEP's decision is supported by substantial evidence in the record, and is not arbitrary, capricious, or unreasonable, it should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. Statutory and Regulatory Background

The Legislature granted DEP extensive authority to review development located in flood-prone areas pursuant to the Flood Hazard Area Control Act ("FHACA"), N.J.S.A. 58:16A-50 to -103. DEP was empowered to delineate flood hazard areas and adopt land use regulations controlling development to protect "the safety, health, and general welfare of the people[.]" N.J.S.A. 58:16A-50.

To discharge this statutory duty, DEP adopted the FHACA rules, N.J.A.C. 7:13-1 to -24, governing development in the flood hazard area and riparian zone of FHACA-regulated waters. N.J.A.C. 7:13-1.1(a). Most waters in the State are regulated, N.J.A.C. 7:13-2.2, and there is a regulated flood hazard area along every regulated water with a drainage area of fifty acres or more, N.J.A.C. 7:13-2.3(b). These flood hazard areas include any land, and the space above that land, lying below the flood hazard area design flood elevation, which is an elevation sufficient to hold a flood equal to the one-hundred-year flood plus an additional

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

amount of water to account for possible future increases in flows due to development or other factors. N.J.A.C. 7:13-1.2 (2022). Any proposed structures located below the flood hazard area design flood elevation are considered "in" the flood hazard area. Ibid. Additionally, along each side of a regulated water exists a riparian zone, N.J.A.C. 7:13-2.3(c), which amounts to a buffer area that is comprised of land and vegetation ranging from fifty feet to three hundred feet wide depending on the waterbody's ecological value, N.J.A.C. 7:13-4.1(a), (c). DEP applies FHACA and its accompanying rules to identify the flood hazard area, riparian zone, and determine if proposed development will unduly impact the areas through permitting decisions.

Projects that disturb one or more acres of land must also meet DEP's stormwater management requirements. N.J.A.C. 7:8-1.6. DEP's Stormwater Management Rules, N.J.A.C. 7:8-1 to -6, address the stormwater flowing from developed land. The Stormwater Rules set standards on stormwater quantity, N.J.A.C. 7:8-5.6, stormwater water quality, N.J.A.C. 7:8-5.5, and the types of infrastructure used to meet DEP's stormwater standards, N.J.A.C. 7:8-5.3. There are numerous ways to meet the standards, so DEP created a Stormwater Best Management Practices manual to guide applicants with demonstrated methods specifically designed to achieve numeric stormwater standards. New Jersey Department of Environmental Protection, NJ Stormwater Best

Management Practices Manual, https://dep.nj.gov/stormwater/bmp-manual/. Applicants may use those or any alternate methods so long as the proposed development meets the regulatory standards.

In conjunction with its flood hazard and stormwater management review, DEP must also ensure that permits do not conflict with an adopted areawide plan under Water Quality Planning Act ("WQPA"), N.J.S.A. 58:11A-10, one of several means the Legislature used to address water quality in the State.

B. Bridge Point West Windsor's Permit Application

On March 14, 2022, Bridge Point applied for: (1) a flood hazard individual permit; (2) a flood hazard area verification; (3) freshwater wetlands general permits No. 2, 6, 7, 10B, 11; and (4) a transition area averaging plan waiver. (Aa117).[2] This appeal concerns the flood hazard area individual permit and flood hazard area verification, as DEP is still reviewing the wetland permits and transition area waiver.

Bridge Point sought a flood hazard area individual permit and flood hazard area verification because the Project proposes to place a stormwater outlet within the flood hazard area and proposes numerous activities within the riparian zone. (Aa18; Aa31). The Project is proposed on a 645-acre property

[2] "Aa" refers to Appellant TWI's appendix, "Ab" refers to Appellant TWI's brief; and "Ra" refers to DEP's appendix.

in West Windsor, Mercer County Block 8, Lots 1-3, 12, 16, 20, 28, 32.01, 39-41, 45-47, 49 and Block 15.14, Lots 18-20, 22, 75 (the "Property"). (Aa117-18). The northern portion of the Property contains the former buildings and structures associated with American Cyanamid, while the remaining site consists of agricultural fields, associated outbuildings, and woodlands. (Aa25). The Property is located at the southeastern intersection of U.S. Route 1 and Quakerbridge Road and is bifurcated by Clarksville Road. Ibid. The Property contains several tributaries to the Duck Pond Run and Shipetaukin Creek waterbodies, which required flood hazard area delineations. (Aa13-15). Bridge Point identified the flood hazard area for Duck Pond Run using DEP's delineated flood hazard area, (Aa124-25), but the unnamed tributaries on the Property were not mapped and Bridge Point calculated the flood hazard area for these tributaries, (Aa125).

Bridge Point proposes to construct seven warehouses, internal roadways, parking, stormwater management features, and other associated amenities. (Aa1). The Project proposes two new access roads, one from U.S. Route 1 northbound that crosses an unnamed tributary flowing into the Duck Pond Run waterbody, and a second from Quakerbridge Road. (Aa25). A new sanitary sewer system is also to be installed onsite to serve the Project area which will be connected to West Windsor Township's sewer system. Ibid.

After Bridge Point submitted its Project application, DEP and Bridge Point spent months exchanging information. Between April and November 2022, DEP sent Bridge Point deficiency letters requesting additional information about the Project. (Ra1; Ra7; Aa99; Aa207). Relevant here, DEP initially expressed concern about the design of the U.S. Route 1 access road over an unnamed tributary, noting that the crossing needed to be as nearly perpendicular to the channel as possible to comply with N.J.A.C. 7:13-11.2(h)(6)iii. (Ra4). DEP also asked Bridge Point to demonstrate that wetland disturbances to the road crossing are minimized to the greatest extent practicable. (Ra20).

In response, Bridge Point revised the road crossing design to be perpendicular with the channel, which also reduced impacts to the riparian zone, (Ra20; Aa31), and to avoid a small wetlands area, (Ra31). DEP sought updates regarding Bridge Point's flood hazard area calculations and a plan showing the flood hazard area, to determine flood hazard area compliance, as well as plans labeling where stormwater outfall basins would be located. (Ra31; Ra48). Bridge Point responded to each deficiency letter and provided DEP with sufficient information for DEP to determine the application was complete for review on August 17, 2022. (Ra17; Ra22; Ra26; Ra29; Ra51; Aa68).

While the overall Project application, which included both flood hazard and freshwater wetland components, was complete for review, the Project's potential historical impacts required further information. (Aa28; Aa68). Once a flood hazard application is deemed complete, DEP has ninety days from the date the application was received to issue a decision approving or denying the application. See N.J.A.C. 7:13-21.3; N.J.S.A. 13:1D-32 (requiring DEP action within ninety days or the "application shall be deemed to have been approved[.]").[3] However, the Project's freshwater wetland components required a lengthy State Historic Preservation Office archeological review, which meant those components could not be completed within the ninety-day flood hazard deadline, and which is still ongoing. (Aa28). DEP suggested that Bridge Point either withdraw its flood hazard application or bifurcate the flood hazard application from the freshwater wetlands application. (Ra13-14). Bridge Point chose to bifurcate and move forward with the flood hazard application. (Aa94). The ninety-day flood hazard permitting deadline was later extended thirty days, N.J.A.C. 7:13-21.3(b), to December 1, 2022, (Ra15).

[3] Freshwater wetlands permits are not subject to the same ninety-day timeframe. N.J.S.A. 13:1D-29(b) ("construction permit" definition does not include freshwater wetlands permits).

Throughout DEP's permit application consideration, TWI submitted numerous comments to DEP, though it never raised most of the issues now on appeal. On July 26, 2022, TWI sent DEP a copy of a one-page public comment to the Mercer County Executive voicing a general concern about Project flooding. (Aa105). On September 22, 2022, at TWI's request, DEP virtually met with TWI to hear TWI's Project concerns. (Ra62; Ra69). Then, on October 12, 2022, DEP provided TWI with a OneDrive folder containing the deficiency letters DEP sent to Bridge Point and Bridge Point's Project plans. (Ra77). The Project plans show a culvert for the proposed U.S. Route 1 access road, (Ra81), and the April 8 deficiency letter and October 3, 2022 response discuss Water Quality Planning Act consistency, (Ra3; Ra31).

Even so, TWI later submitted an October 17, 2022 comment discussing site remediation, air quality, site inspections, flooding, stormwater management, wetlands hydrology, and historic preservation. (Aa43-48). DEP directly responded to TWI's concerns about site remediation, air quality, site inspections, and historic preservation, (Ra75-76; Aa44-46), and TWI's remaining concerns were addressed through DEP's rigorous permit review and in DEP's environmental report and engineering report that followed, (Aa12; Aa24). TWI submitted its final comment on December 1, 2022 regarding stormwater BMPs' effect on wetlands and riparian zone disturbance. (Aa205-

06). Nowhere did TWI raise concerns about a floodway verification, the use of culverts, or WQMP consistency.

On December 1, 2022, DEP issued an environmental report and engineering report regarding its Project determinations and addressing public comments. Starting with flooding, even though the Project proposes to disturb over three hundred acres of land, (Aa25), DEP saw that only one structure – a stormwater outfall – is proposed within the actual flood hazard area, (Aa19). No above ground structures or activities are proposed within the inner portion of the flood hazard area, known as the floodway. (Aa15; Aa18). DEP found that the Project complied with riparian zone area rules and that impacts to the riparian zone were eliminated to the greatest extent practicable. (Aa31) (finding .808 acres of "previously proposed riparian zone impacts" eliminated through Project revisions). While the Project proposes impacts to less than half an acre of riparian zone, (Aa36), the Project will preserve and reforest over thirty acres of riparian zone, (Aa31). DEP also determined that a pipe culvert was proper for the access road crossing. (Aa33). DEP accordingly determined that the Project met the flood hazard regulations. In its determination, DEP noted public concern about use of flood data from 1999 to calculate the flood hazard area, (Aa22), but found that Bridge Point's calculations complied with the then-established FHACA rules, (Aa21).

DEP additionally found that the Project met the Stormwater Management Rules, N.J.A.C. 7:8, (Aa22), because Bridge Point properly reduced the quantity and quality of runoff leaving the property, (Aa16-17). Stormwater from the Project will also be effectively managed using numerous stormwater Best Management Practices ("BMPs") that are designed to capture and treat stormwater runoff. (Aa17). Lastly, DEP determined that the Project is in a sewer service area and does not conflict with the areawide water quality management plan. (Aa29). On December 1, 2022, DEP issued a Flood Hazard Individual Permit and Verification (the "Permit") to Bridge Point. (Aa1).

This appeal followed.

ARGUMENT

DEP PROPERLY ISSUED THE PERMIT BY RELYING ON ITS SPECIALIZED EXPERTISE TO APPLY ITS EXISTING REGULATIONS TO THE SUBSTANTIAL RECORD.

This Court should affirm DEP's permitting decision because DEP properly applied its existing regulations and reached a reasonable determination, based on its technical expertise, supported by substantial evidence in the record.

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 burden of proving arbitrary, capricious, or unreasonable action is on the challenger. Bueno v. Bd. of Trustees., Teachers' Pension & Annuity Fund, 422 N.J. Super. 227, 234 (App. Div. 2011).

Moreover, an agency's "interpretation of statutes within its scope of authority and its adoption of rules implementing the laws for which it is responsible" is entitled to "great deference." In re N.J.A.C. 7:1B-1.1 Et. Seq., 431 N.J. Super. 100, 115-116 (App. Div. 2013); see also Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 70-71 (1985) ("[T]he 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)); Am. Cyanamid Co. v. State, Dep't of Env't Prot., 231 N.J. Super. 292, 312 (App. Div. 1989) (holding agency's statutory interpretation "is entitled to substantial weight"). 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." Pinelands Pres. Alliance v. N.J. Dep't of Env't

Prot., 436 N.J. Super. 510, 524 (App. Div. 2014). Thus, 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. Based on well-established regulations, DEP identified the Property's flood hazard area and determined that a floodway verification was unnecessary because no activities were proposed in the floodway. DEP also properly determined that a culvert, rather than a bridge, was proper to facilitate a road crossing over a narrow tributary surrounded by riparian area and containing wetlands for the U.S. Route 1 access road, and that riparian zone impacts for this access road were minimized to the greatest extent practicable. Finally, DEP appropriately determined the Project does not conflict with an areawide plan or the WQMP rules because the Project, which does not require a NJPDES permit yet, is in the sewer service area.

A. DEP Was Not Required to Verify the Floodway Because No Activities Will Take Place In The Floodway. (Responding to Appellant's Point IV (C)).

Concurrent with Bridge Point's flood hazard area individual permit application, Bridge Point sought a flood hazard area verification from DEP. (Aa117). A flood hazard verification reflects DEP's determination of, among

other things, the location of a riparian zone, flood hazard area, and the inner portion of a flood hazard area, known as the floodway. N.J.A.C. 7:13-5.2(a). The verification can be "for either an entire site or [a] portion of a site" as applicable. Ibid. Generally, both the flood hazard area and floodway are verified for DEP to issue a flood hazard area individual permit. N.J.A.C. 7:13-5.5(a). However, a floodway verification is not required where DEP determines, based on a visual inspection of submitted site plans and without reviewing calculations, that: (1) no fill or aboveground structure is proposed within the floodway; and (2) compliance with flood storage displacement requirements in N.J.A.C. 7:13-11.4 does not require knowledge of the floodway location. N.J.A.C. 7:13-5.5(c).

Here, DEP issued a verification for the flood hazard area and riparian zone, N.J.A.C. 7:13-5.2(a), but no floodway verification was required under the FHACA rules. No fill or aboveground structures were proposed in the floodway. (Aa15; Aa18). Instead, Bridge Point proposed a stormwater outfall in the flood hazard area and floodway, (Aa19), which is permitted under N.J.A.C. 7:13-11.3(c)(5), and met the requirements in N.J.A.C. 7:13-12.9. (Aa19). DEP reviewed the site plans and noted that "by inspection, it is clear that the floodway will not be impacted by the proposed stormwater outfall structure proposed in the flood hazard area." (Aa15). Further, DEP concurred with Bridge Point's

calculations that the Project's flood storage displacement requirements in N.J.A.C. 7:13-11.4 were met and thus concluded knowledge of the exact floodway location was not required because "[n]o activities will take place in any floodway." (Aa15).

None of TWI's arguments that floodway verification was required here is correct. TWI argues that per N.J.A.C. 7:13-5.5(a), DEP should have verified the floodway in addition to the flood hazard area. (Ab42). But floodway verification was not required here as the Project proposed no fill or aboveground structures in the floodway and complied with the flood storage displacement requirements. N.J.A.C. 7:13-5.5(c); (Aa15; Aa18). Contrary to TWI's claim, DEP did address the floodway verification, (Aa15; Aa18), just not to TWI's preferred level of detail. TWI also was itself notably silent in its own comments about floodway verification and still has offered no reason why floodways are an issue, other than general flooding concerns. (Ab32).

TWI also mistakenly suggests that the approved plans were last revised on November 29, 2022. (Ab44). Before approving the Permit, DEP noticed that certain riparian zone plans contained floodway lines. On November 30, 2022, DEP asked Bridge Point to remove the floodway lines because DEP was verifying only the flood hazard area, not the floodway. (Aa50). Bridge Point removed the floodway lines that same day, and the riparian zone plans were

digitally approved by DEP on December 2, 2022. (Ra95). Therefore, DEP's verification must be upheld.

B. DEP Correctly Determined That a Pipe Culvert Was Proper. (Responding to Appellant's Point III).

As part of its Permit consideration, DEP also found that a culvert was acceptable to facilitate a road crossing over an unnamed tributary for Bridge Point's U.S. Route 1 access road. DEP's determinations about using a culvert, rather than a bridge, are based on its technical expertise, supported by substantial evidence in the record, and owed judicial deference.

The FHACA rules set forth design and construction requirements for activities proposed in a channel. N.J.A.C. 7:13-11.1. For FHACA purposes, a channel is "a linear topographic depression" that "continuously or intermittently confines and/or conducts surface water" and can be either natural or manmade. N.J.A.C. 7:13-1.2. Where, as here, an applicant proposes crossing a channel, DEP must ensure that channel disturbances are "eliminated where possible" and "minimized" where the disturbance is "not possible to eliminate[.]" N.J.A.C. 7:13-11.1(b)(2).

Accordingly, the FHACA rules prefer that channel crossings utilize "[a] bridge . . . rather than a culvert, where feasible." N.J.A.C. 7:13-11.1(c)(2). Three sided structures, such as bridges, are preferable because these structures

generally preserve natural stream bottoms. See N.J.A.C. 7:13-12.7(f); see also Technical Manual, Flood Hazard Area Control Act Rules N.J.A.C. 7:13, page 247, https://dep.nj.gov/wlm/lrp/flood-hazard-areas/ (the FHACA rules prefer three sided structures that have natural bottoms). In some situations, however, using a bridge is not "feasible," which is why DEP outlined criteria where culverts are acceptable. N.J.A.C. 7:13-12.7(g). Particularly where a channel is narrow, using a bridge "would not preserve the native [stream] substrate due to unavoidable construction techniques." 47 N.J.R. 1041(a) (June 1, 2015).

Bridge footings "may extend under the majority of the channel and footings from both abutments can sometimes even meet in the middle of the channel" meaning "the channel will be fully disturbed during construction." Ibid. In such instances, spanning a channel with a bridge "does not provide significant environmental benefit over constructing" a culvert. Ibid. There also is no "tangible environmental benefit" for spanning a channel without fisheries resources. Ibid. Thus, culverts are conditionally acceptable where the channel is less than ten feet wide, where the channel does not contain fisheries resources, and where spanning the channel is not practicable due to anticipated adverse impacts to the environment. N.J.A.C. 7:13-12.7(g)(2), (5), (6)(iv). Each regulation is applicable here.

The Property contains three unnamed tributaries to Duck Pond Run and one unnamed tributary to Shipetaukin Creek. (Aa12). Prior to Permit issuance, each of the unnamed tributaries on Bridge Point's property contained at least one culvert. (Ra92-94). Bridge Point's Permit allows for the placement of an additional two-foot wide pipe culvert in one of the unnamed tributaries to Duck Pond Run to facilitate a road crossing over the tributary to U.S. Route 1. (Aa33). The pipe culvert will operate by allowing water to flow in the narrow, manmade tributary once the road crossing is constructed.

DEP reviewed Bridge Point's Project plans showing the road crossing over the tributary, (Aa39-40), and Bridge Point's application representing that the tributary bed is less than five feet in width, (Aa155), and determined that a bridge is not feasible, N.J.A.C. 7:13-12.7(g)(5). Bridge Point's permit application additionally notes that the Duck Pond unnamed tributaries to be disturbed or located near the project's disturbance "do not appear to provide suitable habitat for fisheries." N.J.A.C. 7:13-12.7(g)(2); (Aa143). DEP also was aware that spanning the channel could result in adverse environmental impacts. N.J.A.C. 7:13-12.7(g)(6)(iv). Specifically, compared to a pipe culvert, constructing a bridge span would disturb more area beyond the channel due to its spanning requirements and could remove native stream substrate from the tributary. See 47 N.J.R. 1041(a) (June 1, 2015). Further, constructing a bridge for this specific

road crossing could result in greater impacts to riparian zone and wetlands, given the close proximity of wetlands, (Ra54), and riparian zone to this road crossing, (Aa31). Finally, the level of earth movement and grading associated with the installation of bridge abutments could result in more erosion and sediment transfer within the tributary in comparison to the installation of a pipe culvert. See 47 N.J.R. 1041(a) (June 1, 2015).

The proposed pipe culvert also meets N.J.A.C. 7:13-12.7(h), which provides a two-step approach to culvert construction. For the first step, if the applicant demonstrates that the "invert of the culvert" cannot be "installed at least two feet below the invert of the natural channel," then the applicant must instead comply with the second step. N.J.A.C. 7:13-12.7(h)(1). Here, Bridge Point proposed a two-foot pipe culvert "based on the width and character of the" channel. (Aa155). A pipe culvert two feet in diameter should not be constructed more than two feet below ground because burying the entire culvert into the sediment would render the culvert, which is meant to carry the channel's water, inoperable. Technical Manual, Flood Hazard Area Control Act Rules N.J.A.C. 7:13, page 249 (culverts are partially buried to facilitate a natural stream bottom). But when the first approach cannot be met because "the placement of two feet of substrate within the culvert would not be feasible," the applicant can meet the second part of the rule if the floor of the culvert is "constructed to

incorporate an artificial low-flow treatment, such as [ ] a concave floor." N.J.A.C. 7:13-12.7(h)(2). This circular pipe culvert meets this requirement because it will have a concave floor.

Bridge Point's U.S. Route 1 access road also minimized riparian impacts where possible. Applicants proposing to place a culvert in a channel must ensure that "[d]isturbance to the channel is eliminated where possible" and, where not possible, that "disturbance is minimized through methods including relocating the project and/or reducing the size of scope of the project." N.J.A.C. 7:13-11.1(b)(2). Here, Bridge Point relocated the access road crossing to a narrower section of the tributary and reduced the impacts to the riparian zone area around the road crossing by making the access road as perpendicular to the channel as possible and by eliminating grading and associated clearing along the roadway edge. (Aa31). Initially, Bridge Point proposed over fourteen thousand square feet of impacts to riparian zone area around the road crossing, (Aa158), but these riparian zone impacts were reduced to approximately nine thousand square feet, (Aa33). Project wide, DEP and Bridge Point successfully eliminated over thirty-five thousand square feet of riparian zone impacts during the application review. (Aa31).

TWI's concerns regarding the culvert and its impacts are belated and unfounded. TWI had the Project plans showing a culvert in this tributary in

October 2022—before the Permit was issued—and expressed its concerns for the first time in its October 2023 merits brief. Ordinarily, this Court does not address issues not previously raised before DEP. In re Stream Encroachment Permit No. 0200-04-0002.1 FHA, 402 N.J. Super. 587, 602 (App. Div. 2008). Had TWI notified DEP during the public comment period of its concern that Bridge Point sought a culvert rather than a bridge, DEP or Bridge Point would have further explained why a bridge is not feasible and would cause more harm to this channel than a culvert.

TWI's concerns also ignore both the record and the FHACA regulatory structure. Bridge Point's application notes that the tributary bed is less than five feet in width, that Bridge Point designed the culvert based on the width and character of the tributary, and that the Duck Pond Run unnamed tributaries "do not appear to provide suitable habitat for fisheries." (Aa143; Aa155). TWI does not refute the channel's width or the other environmental resources surrounding the channel. (Ab29-30). DEP thus had sufficient information to determine that a culvert was proper for this road crossing, N.J.A.C. 7:13-11.1(c)(2), and that placement of the culvert bottom two feet below the channel was not feasible, N.J.A.C. 7:13-12.7(h).

TWI also argues that the riparian zone impacts for the road crossing exceed allowable limits.[4] (Ab29-30). But the FHACA rules allow applicant in certain instances to exceed the disturbance limits. Here, Bridge Point was limited to riparian zone impacts of four thousand square feet, unless it could demonstrate that safe adequate access to the site, which meets all Federal, State, and local requirements governing roadways cannot be achieved without exceeding the riparian zone impact limit. N.J.A.C. 7:13-11.2(h)(1). Bridge Point showed that compliance with requirements governing roadways could not be achieved, and that public safety could not be ensured, without exceeding riparian zone impact limits. (Aa33-34). The width of the roadway causing riparian zone impacts is "the minimum necessary for safe access to and within the site." (Aa34). DEP could not reduce the road crossing, and the riparian zone impacts for the road crossing, below the minimum necessary for safety. Further, Bridge Point must enhance over fifty-one thousand square feet of existing farmland with native plantings to mitigate the riparian zone impacts. (Aa29).

DEP properly applied the FHACA rules for bridges and culverts, as well as riparian zone impacts and mitigation, and its pipe culvert determination is

[4] TWI's riparian zone impacts argument is at odds with its argument that a bridge rather than a culvert should have been used for this road crossing, as constructing a bridge's footings over this narrow channel would likely result in greater impacts to the riparian zone area and surrounding wetlands.

based on the substantial evidence in the record and is owed deference. Messick v. Bd. of Rev., 420 N.J. Super. 321, 325 (App. Div. 2011).

C. Rulemaking Was Required Before the Cornell Studies Could Be Applied to Permit Applications (Responding To Appellant's Points IV(A) and (B)).

The FHACA authorizes DEP to adopt rules and regulations to delineate flood hazard areas, N.J.S.A. 58:16A-52, "to minimize damage to life and property from flooding caused by development within flood hazard areas," N.J.A.C. 7:13-1.1(c). Identifying the flood hazard area is therefore the first step in the FHACA permitting process. As noted above, the flood hazard area is any land, and the space above that land, lying below the flood hazard area design flood elevation. N.J.A.C. 7:13-1.2. The flood hazard area design flood elevation means the peak water surface elevation that will occur during a one-hundred-year flood[5] plus an additional amount of water to account for future increases in flows due to development and other factors. Ibid. Here, as the Project proposed a stormwater outfall in a flood hazard area and activities within

[5] Here, a "one-hundred-year flood" means a flood that has a one percent probability of being equaled or exceeded within a one-year period for a given geographic location and/or watershed. N.J.A.C. 7:13-1.2.

the riparian zone, Bridge Point had to identify the flood hazard area. See N.J.A.C. 7:13-2.3; (Aa119).

The FHACA rules set forth six methods for determining the flood hazard area: (1) DEP delineation method; (2) FEMA tidal method; (3) FEMA fluvial method; (4) FEMA hydraulic method; (5) approximation method; and (6) calculation method. N.J.A.C. 7:13-3.1(a) (2022). The DEP delineation method, known as "Method 1," is the preferred method and involves consulting flood maps showing the flood hazard area for certain waterbodies. N.J.A.C. 7:13-3.3(a)(2022). DEP has mapped the flood hazard areas along more than two thousand five hundred miles of New Jersey's waters and these maps are provided in Appendix 2 of the FHACA rules. 45 N.J.R. 360(a) (Feb. 19 2013). Duck Pond Run itself had DEP delineations, so Bridge Point relied upon those delineations to identify that waterbody's flood hazard area.

Where no DEP delineation exists for a waterbody, as was the case for the Duck Pond Run and Shipetaukin Creek tributaries on the Property, an applicant may determine the flood hazard area by calculating the flood hazard area, i.e. "Method 6." N.J.A.C. 7:13-3.6(b), (c)(2022). Calculating the flood hazard area requires a hydrologic analysis and hydraulic analysis. N.J.A.C. 7:13-3.6(c)(1)(i)(1)(2022). Relevant here, these technical analyses require information about historical rainfall amounts and land topography for a given

area to determine the subject waterbody's height and speed of flow during a storm event. Ibid. In essence, historic precipitation data is used in combination with the site's groundcover to determine how fast the waterbody will flow, e.g., its peak flow rate, during a storm event. Ibid. The peak flow rate is then analyzed with the area's topography to determine how high the flood waters will rise, which is the flood hazard area. Generally, the historic precipitation data used for the Method 6 calculation is obtained from a data set known as NOAA Atlas 14. 54 N.J.R. 2169(a) (Dec. 5, 2022). The precipitation data in NOAA Atlas 14 was last revised in December 2000. Ibid.

In October 2021, DEP began updating its FHACA rules to address the impacts climate change was already having on storms in the State, and projected impacts from future storms. This began with a pair of studies authored at Cornell University, titled "Changes in Hourly and Daily Extreme Rainfall Amounts in NJ since the Publication of NOAA Atlas 14 Volume" ("Changes in Rainfall Amounts") and "Projected Changes in Extreme Rainfall in New Jersey based on an Ensemble of Downscaled Climate Model Projections" ("Projected Changes in Rainfall").[6] DEP used these Cornell Studies to update the

[6] Art DeGaetano and Harrison Tran, Changes in Hourly and Daily Extreme Rainfall Amounts in NJ since the Publication of NOAA Atlas 14 Volume, https://dep.nj.gov/wp-content/uploads/sab/nj-atlas-14.pdf; Art DeGaetano, Projected Changes in Extreme Rainfall in New Jersey based on an Ensemble of

precipitation data in NOAA Atlas 14 in December 2022 by proposing the Inland Flood Protection Rule ("IFPR"), which uses "adjustment factors" and "change factors" on the existing NOAA Atlas 14 data to reflect current and future precipitation rates. 54 N.J.R. 2169(a) (Dec. 5, 2022). The adjustment factors are numerical values that modify NOAA Atlas 14's precipitation data to reflect current precipitation rates. Ibid. The change factors are numerical values that modify the NOAA Atlas 14 data to extrapolate the peak flow rate for an anticipated future one-hundred-year flood. Ibid.

Cornell University developed both factors using, among other things, studies that utilized historical precipitation data from 1950 to 2019. Ibid. Relevant here, however, the Cornell Studies do not include the raw precipitation data from 1950 to 2019 that was used to develop the adjustment and change factors. (See Changes in Rain Amounts; Projected Changes in Rainfall). Instead, the Cornell Study on current precipitation provides only the adjustment factors for storms for certain specific weather stations located in New Jersey, New York, Pennsylvania, Delaware, Connecticut, and Maryland. (Changes in Rainfall Amounts).

Downscaled Climate Model Projections, https://dep.nj.gov/wp-content/uploads/sab/projected-changes-rainfall-model.pdf.

The IFPR then used these weather-station-specific adjustment factors from the Cornell Study to create county-wide averages that could be applied throughout the State for calculating the peak flow rate for storms. 54 N.J.R. 2169(a) (Dec. 5, 2022). Further, the anticipated future precipitation Cornell Study developed multiple change factors for each county in the State based on confidence factors associated with various climate change model outputs. (Projected Changes in Rainfall). The IFPR then determined which confidence scenario and associated change factors would apply for calculating the peak flow rate for future storms. 54 N.J.R. 2169(a) (Dec. 5, 2022).

DEP's December 1, 2022 permit used the NOAA Atlas 14 precipitation data to calculate the flood hazard area, without adjustment or change factors, because those factors had yet to be adopted or even proposed via rulemaking. The IFPR was not proposed until December 5, 2022, after Bridge Point received its permit. Instead, DEP approved the Project under the previously-existing FHACA rules.

TWI claims that DEP should have used "the new precipitation data" from the Cornell Studies for Bridge Point's permit application. (Ab34). This argument fails. To begin, it is unclear what "precipitation data" TWI is referring to. TWI does not indicate if "precipitation data" means: (1) the raw precipitation data from 1950 to 2019 the Cornell Studies used; (2) the multiple adjustment

factors and change factors the Cornell Studies created; or (3) something else entirely. This distinction matters. If TWI is referring to historical precipitation data, the Cornell Studies do not include this raw precipitation data. (See Changes in Rainfall Amounts; Projected Changes in Rainfall). If TWI is using the term "precipitation data" to refer to adjustment factors and change factors, then TWI mistakenly conflates these factors with data; they are factors that modify existing data in NOAA Atlas 14 to reflect current and future precipitation amounts. 54 N.J.R. 2169(a) (Dec. 5, 2022). Further, it is unclear how the Cornell Studies could have been applied to the portion of the Property delineated using DEP's prior administratively promulgated flood hazard delineations via Method 1. There would be simply nothing from the Cornell Studies to apply.

As to the Method 6 calculations delineations, DEP could not apply the Cornell Studies by themselves to permit applications without formal rulemaking because it would be unclear to the regulated community how the studies would be used. The Cornell Study on current precipitation identifies adjustment factors for specific weather stations in New Jersey. (Changes in Rainfall Amounts). But this study is silent as to precipitation amounts for properties in between the weather stations. The adjustment factors needed to be synthesized into county-wide adjustment factors for the State, so that they could be applied uniformly.

This is precisely what DEP did in the IFPR. 54 N.J.R. 2169(a) (Dec. 5, 2022). As to the Cornell Study on future precipitation, it contains multiple possible change factors for the same county. (Projected Changes in Rainfall). DEP needed to determine which values would apply before the change factors could be used to calculate the flood hazard area. Through the IFPR, DEP determined the applicable climate change confidence scenario and the associated change factors that apply for calculating the peak flow rate for future one hundred-year floods. 54 N.J.R. 2169(a) (Dec. 5, 2022). None of this information is apparent on the face of the studies.

Thus, rulemaking was required before the adjustment or change factors from the Cornell Studies could be incorporated into DEP's permit application review. Six factors apply when determining whether rulemaking is warranted:

> (1) it is intended to have wide coverage encompassing a large segment of a regulated or general public, rather than an individual or a narrow select group;
>
> (2) is intended to be applied generally and uniformly to all similarly situated persons;
>
> (3) is designed to operate only in future cases, that is, prospectively;
>
> (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;

> (5) reflects an administrative policy that:
>
> (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or
>
> (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and
>
> (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
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> [Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984).]

The Metromedia factors here all demonstrate that rulemaking was required to use the adjustment and change factors from the Cornell Studies. Under factors one, two, and three, using TWI's theory, both studies would be applied to all flood hazard permits throughout the State and could only be applicable prospectively to permit applications. N.J.A.C. 7:7-26.1(e). Likewise, under factor four, using the adjustment and change factors to calculate the flood hazard area is not inferable from the FHACA; while the FHACA authorizes DEP to delineate flood hazard areas, N.J.S.A. 58:16A-52, it does not articulate a specific standard for doing so. Finally, as to factors five and six, using the Cornell Studies' adjustment and change factors would significantly change how applicants calculate the flood hazard area.

Contrary to TWI's claims, prior to the IFPR, applicants did not need to account for precipitation changes due to climate change when calculating the flood hazard area, but instead were permitted to rely on NOAA Atlas 14 data. (Ab37). Without rulemaking, the regulated community would have no way of knowing that these factors were applicable when calculating the flood hazard area, or which factors to use in the first place given the Cornell Studies' outcomes and DEP's subsequent extrapolations during the IFPR rulemaking. 54 N.J.R. 2169(a) (Dec. 5, 2022). These extrapolations were required because, as noted above, the Cornell Study for current precipitation included only adjustment factors applicable to specific weather stations, and the future precipitation study contains multiple possible change factors for each county. DEP's adoption of the IFPR, which incorporates the adjustment and change factors, avoided the outcome TWI urges here, which is for DEP to apply these factors arbitrarily to unsuspecting permit applicants.

TWI also argues that the federal standard requiring agencies to apply the "best data" applies here. (Ab38). But the Cornell Studies do not contain the raw historical precipitation data from 1950 to 2019 and the adjustment factors and change factors that are in the Cornell Studies are not data, and the federal cases TWI cites are not only non-binding on this Court, they also are inapplicable because they do not address Metromedia.

TWI also relies on Gaf Corp. v. N.J Dep't of Env't. Prot., 214 N.J. Super 446 (App. Div. 1986), to support its position that DEP must apply the most recent data in its possession during its permit review. (Ab38). But Gaf Corp. does not support this premise. Gaf Corp. involved DEP's amendment to rules governing permit fees for pollutant discharges, and did not involve a permit review at all. 214 N.J. Super. at 449. There, the appellant challenged DEP's amended rules, which contained a new fee methodology. Ibid. In finding that DEP did not act arbitrarily, this court observed that "DEP can use the most recent data it has [to calculate fees]" because "[f]ees cannot be computed on discharges not yet in being and there was no unfairness in utilizing the available data." Id. at 451. Gaf Corp. has no bearing on the matter before this Court.

TWI's argument that DEP should have simply used the adjustment and change factors in the Cornell Studies without rulemaking ignores Metromedia entirely, violates the Administrative Procedure Act, and deprives the public of basic due process. DEP correctly used the then-existing rules and data when it issued the Permit.

D. TWI's WQMP Consistency Determination Argument Misunderstands How DEP Addresses Water Pollution. (Responding to Appellant's Point II).

TWI's merits brief also asserts for the first time that DEP did not appropriately address Total Daily Maximum Loads (TMDLs) for water pollutants or whether the Project is consistent with the areawide Water Quality Management Plan ("Areawide WQM Plan"). But TWI never raised this concern in the multiple public comment letters it submitted, at the virtual meeting held with DEP, or even in its Case Information Statement. Had TWI done so, DEP would have explained why the Project is consistent with the Areawide WQM Plan. See (Aa12; Aa24) (addressing TWI's other public comments).

The public may "comment on the consistency of [DEP's] permits with areawide WQM plans" and these "comments shall be taken into consideration prior to the issuance of a final permit." N.J.A.C. 7:13-3.2(e). This is particularly relevant here because the parties agree "[t]here is a rebuttable presumption" that a wastewater generating project that conveys the wastewater "to a NJPDES regulated wastewater facility is consistent with the areawide [WQM] plan" if it is in a sewer service area.[7] N.J.A.C. 7:15-3.2(b). No one

[7] "Sewer service area" means "the land area identified in an areawide WQM plan from which wastewater generated is conveyed to, or has been determined to be

disputes the Project is in a sewer service area and that it includes a proposed sewer service extension line. (Ab17-24). Thus, both portions of the presumption are facially fulfilled and DEP received no comments—from TWI or any other party—raising any WQM consistency issues. Given the extensive regulatory scheme governing water discharges, and no specific concerns raised regarding this Project's WQMP compliance, DEP proceeded accordingly.

That TWI took issue with DEP's WQMP consistency determination is not even made clear by its Case Information Statement. Under the Court Rules, deficiencies in a Case Information Statement and failure to seasonably amend a Case Information Statement are grounds for this Court to reject the Notice of Appeal or dismiss the appeal. R. 2:5-1(h)(3); see also N.J. Citizens Underwriting Reciprocal Exchange v. Collins, 399 N.J. Super. 40, 50 (App. Div. 2008) (declining to consider defendant's argument and observing that defendant failed to give notice to the Attorney General as required by R. 2:5-1(h)). Here, TWI's Case Information Statement specifically takes issue with DEP's application of the FHACA rules, N.J.A.C. 7:13, and Stormwater Management

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eligible, in accordance with this chapter, to pursue a permit to connect to a domestic treatment works or industrial treatment works. Inclusion in a sewer service area does not guarantee that capacity exists or will exist to provide treatment for all flow from that area." N.J.A.C. 7:15-1.5. Areas eligible for sewer service are established pursuant to N.J.A.C. 7:15-4.4.

Rules, N.J.A.C. 7:8, but nowhere raises concern about DEP's application of its WQMP rules, N.J.A.C. 7:15. Accordingly, Appellant's WQMP consistency determination argument should be dismissed.

Despite its silence below, TWI now belatedly asks this Court to vacate the Permit because there is an insufficient record to assuage its brand-new WQMP-related concern. But even if this Court were to consider TWI's substantive arguments, the statutory and regulatory provisions and the record demonstrate that DEP followed the governing rules and processes and the Permit does not conflict with the Areawide WQM Plan. Specifically, DEP's approval of the Project comports with the requirements of the Water Quality Planning Act ("WQPA"), N.J.S.A. 58:11A-1 to -16. and the WQMP rules, N.J.A.C. 7:15, and is supported by the record. Moreover, as contemplated by the WQPA and the WQMP rules, DEP's regulatory programs, especially the NJPDES program, separately address stormwater and any applicable TMDL requirements.

The WQPA and its companion statute, the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 to -60, "constitute the Legislature's response to the Federal Water Pollution Control Act, 33 U.S.C. 1251 to 1376, which established an integrated federal system to address water pollution" nationally. In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 558 (App. Div. 2006). Both statutes are intended to restore and maintain the quality of waters

of the State. N.J.S.A. 58:11A-1; N.J. Builders Ass'n v. Fenske, 249 N.J. Super. 60, 64 (App. Div. 1991). The WPCA predominantly addresses water pollution through its New Jersey Pollution Discharge Elimination System ("NJPDES") permitting requirements, which are implemented by DEP. N.J.S.A. 58:10A-6; see also N.J.A.C. 7:14A.

The WQPA requires the Commissioner of DEP to undertake a continuing planning process ("CPP"), which shall:

> a. Integrate and unify the statewide and areawide water quality management planning processes;
>
> b. Conduct a statewide assessment of water quality and establish water quality goals and water quality standards for the waters of the State;
>
> c. Develop a statewide implementation strategy to achieve the water quality standards which shall include, but not be limited to:
>
> (1) the determination of effluent limitations and schedules of compliance at least as stringent as those required by the Federal Act;
>
> (2) the determination of the total maximum daily load for pollutants necessary to meet the water quality standards;
>
> (3) the incorporation of all elements of any areawide waste management plan prepared pursuant to this act;
> . . . .

[N.J.S.A. 58:11A-7].[8]

"The Department conducts a CPP that is broadly accomplished throughout the Department and includes a Statewide implementation strategy to achieve the water quality standards and objectives and meet the requirements of the [WQPA] and the Clean Water Act." N.J.A.C. 7:15-2.2. DEP's CPP sets forth the comprehensive manner in which DEP addresses water quality. As explained in DEP's current CPP:

> The Water Quality Management Planning rules at N.J.A.C 7:15 represent one component of the CPP. These rules focus on procedures for adopting new or amended areawide water quality management (WQM) plans, including Wastewater Management Plans (WMPs); Lists of water quality limited (impaired) waters; and total maximum daily loads ("TMDL") for impaired waters. The CPP describes how these processes, along with other Department programs, integrate and unify water quality management planning processes, establish and assess attainment of water quality goals and standards, and implement control measures necessary to maintain, improve, and protect water quality throughout the State.
>
> [New Jersey Department of Environmental Protection, Water Resources Management New Jersey's Continuing Planning Process: Executive Summary

[8] These statutes, rules, and processes form the backbone of DEP's water pollution oversight and are augmented by other authorities as well. See, e.g. In re Stormwater Management Rules, 384 N.J. Super. 451, 454-55 (App. Div. 2006) (describing objectives of Stormwater Management Act, N.J.S.A. 40:55D-93 to -99 which applies to municipalities and DEP).

(January 18, 2024, 10:41AM), https://www.nj.gov/dep/wqmp/docs/cpp.pdf (emphasis added).]

In addition to the CPP, the WQPA also requires the development of Areawide WQM Plans. N.J.S.A. 58:11A-5. Areawide WQM Plans must be consistent with the CPP and are statutorily required to, among other things, (1) identify necessary water treatment works to meet municipal waste treatment needs and establish construction priorities for such treatment works, (2) create a regulatory program that addresses point and nonpoint sources, (3) identify entities and financing necessary to carry out the plan, and (4) identify and address specific pollution sources such as agricultural pollution, mine-related sources of pollution, construction activity pollution, and saltwater intrusion. N.J.S.A. 58:11A-5(a)-(k). The WQPA dictates that "[a]ll projects and activities affecting water quality in any planning area shall be developed and conducted in a manner consistent with the adopted [Areawide WQM Plan] . . . The commissioner shall not grant any permit which is in conflict with an adopted [Areawide WQM Plan]." N.J.S.A. 58:11A-10; see also N.J.A.C. 7:15-3.2(a). To satisfy this requirement, DEP relies on the process set forth in N.J.A.C. 7:15-3.2(a), which establishes a rebuttable presumption that when activities are located in a sewer service area, they are consistent with the Areawide WQM Plan. N.J.A.C. 7:15-3.2(b). DEP's comprehensive and

separate robust water quality programs allow a WQMP consistency determination under N.J.A.C. 7:15-3.2(b) to focus on whether the project is in the sewer service area.

Beyond this sewer service area inquiry, DEP also ensures there is no conflict with an Areawide WQM Plan through separate regulatory programs, including, relevant here, the NJPDES and Stormwater programs. The WQMP rule proposal in 2015 explains:

> The Department is proposing to significantly revise the WQMP rules in order to streamline the planning process and better integrate it with existing permitting programs
>
> . . .
>
> By combining the determination of technical WQM plan consistency with the review and assessment of a permit application's technical merits, the technical criteria of the applicable environmental regulations will serve as the determination of consistency with the water quality and quantity considerations of a WQM plan, determined in real time, under current environmental conditions, considering current standards and technology and relying upon the expertise of programmatic review staff best equipped to make the determinations. This will provide substantial positive economic impacts by greatly streamlining multiple planning, permitting, and funding-source processes.
>
> [See 47 N.J.R. 2531(a) (Oct. 19, 2015) (emphasis added).]

As such, DEP's WQMP rulemaking contemplated that existing permitting and regulatory programs would address WQMP consistency requirements.

Here, DEP found that Bridge Point's Project was a sewerage generating development and that all activities are located within the limits of the sewer service area identified in the Areawide WQM Plan. (Aa29). Thus, under N.J.A.C. 7:15-3.2(b), there was a rebuttable presumption that the Project was consistent with the Areawide WQM Plan. As noted above, the presumption was never rebutted; indeed, DEP never received any comments regarding consistency of the Project with the Areawide WQM Plan, despite having the opportunity to do so, and as such could not consider nor create a record relating to such concerns prior to permit issuance.

Even now, TWI does not point to an inconsistency with any specific Areawide WQM Plan or TMDL. Instead, TWI relies on rule proposal summary language; specifically, a statement in the rule proposal that "[i]f a WQM plan has additional requirements, or a wasteload allocation in an adopted TMDL has been established, these must also be addressed" for consistency, (Ab22), to argue that DEP was required to "make a record" of TMDLs for this FHACA permit, and that considering TMDLs for this FHACA permit is "the only sensible reading of the rules." (Ab17; Ab22-23). But the WQMP rules have no such TMDL-record-generating requirement relating to WQMP consistency. See N.J.A.C. 7:15. And nowhere does TWI allege that DEP did not adhere to a specific rule requirement.

Further, applicable TMDL requirements, if any, would not be addressed through a WQMP consistency determination for this FHACA permit, but would instead addressed through separate regulatory permitting schemes not before the court. TMDLs are considered one part of an applicable Areawide WQM Plan and are generally developed for water quality limited waters, i.e. waters that are impaired for one or more pollutants. See N.J.A.C. 7:15-5.3. A TMDL calculates the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards. N.J.A.C. 7:15-1.5. "It is the sum of the allowable loads of a single pollutant from all contributing point and nonpoint sources and includes a margin of safety and consideration of seasonal variations." Id.

TMDLs are not implemented through land use permits, like the FHACA Permit on appeal before this court. When developed, TMDLs must include load allocations (the portion of the receiving water's total maximum daily load for a specific pollutant that is allocated to existing or future nonpoint sources of pollution) for nonpoint sources of pollutant load and wasteload allocations (the portion of the receiving waterbody's TMDL for a specific pollutant that is allocated to one of its existing or future point sources of pollution) for point sources of pollutant load and an implementation plan to achieve water quality standards. N.J.A.C. 7:15-5.3(b)(5) and (6). TMDLs are typically implemented

through NJPDES permits, which establish limits and conditions to ensure water quality standards are met. N.J.A.C. 7:14A-2.4; N.J.A.C. 7:14A-13.2(a)(2); N.J.A.C. 7:14A-25.6(e). Dischargers of pollutants must discharge in conformance with NJPDES permits. N.J.S.A. 58:10A-6. And, stormwater NJPDES permits may be required for a particular activity to control stormwater based on a TMDL. N.J.A.C. 7:14A-24.2(a)(7).

Here, the Project may require an NJPDES permit during construction to manage stormwater. See N.J.A.C. 7:14A-24.7 (requiring certain sites to obtain and comply with a 5G3 NJDPES permit to manage stormwater during construction). Further, post-construction, depending on the nature of the activities on site, an NJPDES permit may be required in the future for the ongoing management of stormwater or wastewater. See N.J.A.C. 7:14A-2.4 (identifying activities that generally requires a NJPDES permit; N.J.A.C. 7:14A-24.2 (identifying activities that require a NJPDES stormwater permit).

Any applicable TMDL and corresponding load or wasteload allocation requirements for stormwater are also addressed through the Municipal Separate Stormwater Sewer System ("MS4") program, which issues a specific type of NJPDES permit to municipalities and other entities for their required stormwater management programs. N.J.A.C. 7:14A-25. MS4 permits require municipalities to impose any "additional measures" required by an applicable

Areawide WQM Plan or TMDL throughout the municipality. N.J.A.C. 7:14A-25.6(e). The MS4 permits require the municipal permittees to take actions relating to TMDLs. See New Jersey Department of Environmental Protection, Tier A Municipal Stormwater General Permit (January 18, 2024 11:15AM), https://dep.nj.gov/njpdes-stormwater/municipal-stormwater-regulation-program/tier_a/.

Through the MS4 program, municipalities reduce discharges of pollutants to the maximum extent practicable to protect water quality and satisfy applicable water quality requirements. N.J.A.C. 7:14A-25.6(a). In addition, water quality near the property is also addressed through the Stormwater Rules, N.J.A.C. 7:8-5.1 to -5.9, which are part of the suite of water quality measure identified in the CPP. See New Jersey Department of Environmental Protection, Water Resources Management New Jersey's Continuing Planning Process (January 18, 2024, 10:41AM), https://www.nj.gov/dep/wqmp/docs/cpp.pdf, page 28 (identifying the FHACA riparian zones as one of the measures DEP relies upon to ensure protection of the State's waters from stormwater runoff). The Stormwater Rules set water quality standards for stormwater runoff. N.J.A.C. 7:8-5.5. These water quality standards are met using BMPs that reduce, to the maximum extent feasible, the post-construction nutrient load from a developed site. N.J.A.C. 7:8-5.5(f). The Stormwater BMP Manual sets forth BMP

measures and the percentage of suspended solids those measures remove from stormwater. See New Jersey Department of Environmental Protection, NJ Stormwater Best Management Practices Manual, Chapter 4, page 2, https://dep.nj.gov/stormwater/bmp-manual/.

DEP reviewed this Project for stormwater compliance because it is a "major development" that disturbs one or more acres of land. N.J.A.C. 7:8-1.6. DEP thoroughly reviewed Bridge Point's stormwater proposals, (Aa16-22), and determined that the numerous BMPs for the Project complied with its rules by reducing the total suspended solids in stormwater runoff by eighty percent. N.J.A.C. 7:8-5.5(b)(1); (Aa17). Certain BMPs even exceeded Stormwater Rule requirements. (Aa17). TWI did not challenge any of DEP's specific stormwater determinations. Its assertions now misunderstand the WQPA and the WQMP process and are relied on broad, unspecific and unsupported allegations that DEP's permitting decision failed to consider or make a record regarding unspecified TMDL requirements pertaining to an unspecified water body. Notwithstanding TWI's concerns, this court should find that DEP followed the duly promulgated rules in determining WQMP consistency, the Project is in the sewer service area, stormwater management issues are appropriately addressed in accordance with the TMDL, specifically through supporting regulatory programs, including the NJPDES program and

the Stormwater Management programs, and appropriately determined the Project was consistent with the Areawide WQM Plan.

CONCLUSION

For these reasons, this Court should affirm DEP's decision.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL
OF NEW JERSEY

By: /s/ Jordan Viana
Jordan Viana
Deputy Attorney General
Attorney ID: 334042021
Jordan.Viana@law.njoag.gov

Superior Court of New Jersey

Appellate Division

Docket No. A-001639-22

IN THE MATTER OF FLOOD HAZARD AREA VERIFICATION AND FLOOD HAZARD AREA INDIVIDUAL PERMIT,1113-22-0002.1 LUP220002.	:	CIVIL ACTION ON APPEAL FROM A FINAL AGENCY ACTION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF NEW JERSEY DOCKET NO. 1113-22-0002.1 LUP220002

BRIEF ON BEHALF OF RESPONDENT BRIDGE POINT WEST WINDSOR LLC

On the Brief:
JOHN G. VALERI JR.
Attorney ID# 028211990
RAFAEL CORBALAN
Attorney ID# 162912015

CHIESA SHAHINIAN & GIANTOMASI PC
Attorneys for Respondent Bridge Point West Windsor LLC
105 Eisenhower Parkway
Roseland, New Jersey 07068
(973) 325-1500
jvaleri@csglaw.com
rcorbalan@csglaw.com

Date Submitted: February 5, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (326560)

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Respondent Bridge Point West Windsor, LLC ("Bridge" or "Respondent"), submits this Memorandum of Law in response to the instant appeal filed by The Watershed Institute ("Appellant").

PRELIMINARY STATEMENT

This appeal involves property located in West Windsor, Mercer County, New Jersey, that in part consists of the former American Cyanamid facility. Aa025. Bridge has proposed redeveloping this underutilized property into several warehouses, along with parking and access roads, as well as improving internal access roads and adjacent public roadways, utilities, stormwater management, lighting, and landscaping improvements (the "Project"). In order to construct the Project within certain regulated areas on the property, Bridge filed a multi-permit application on March 14, 2022 (the "Application"). The Application included requests for freshwater wetlands general permits and transition area waivers, as well as a Flood Hazard Area Verification and Flood Hazard Area Individual Permit pursuant to the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13-1 to -24.11. (the "FHA Rules").

After extensive review, on December 1, 2022, the New Jersey Department of Environmental Protection ("NJDEP") issued Bridge a Flood Hazard Area Verification and Individual Permit, No. 1113-22-0002.1 LUP220002 (the "Permit"). In addition to approving the Project, the Permit sets forth in detail a number of

general and special conditions providing enhanced environmental protection, including green stormwater infrastructure to protect water quality from stormwater runoff, and requirements for on-site mitigation to compensate for the permitted disturbance area.

During the pendency of the Application underlying this Permit, and as required by the FHA Rules, the NJDEP published a notice of permit application and solicited public comments, during which time the Appellant had an opportunity to submit comments relating to any substantive aspects of the Application and pending permit. The NJDEP responded to a number of comments regarding the Project and Application. As demonstrated by the record, the NJDEP considered all relevant information presented to it in relation to the Permit, including information adverse to the Application.

No doubt recognizing the conclusive and exhaustive permitting analysis undertaken by the NJDEP, Appellant has no meritorious challenge to raise on its appeal, and instead merely now seeks to muddy the relevant legal standards to attack the Permit's issuance. Appellant's arguments, at best, amount to complaints that the NJDEP came to a different factual determination than Appellant would have hoped. As the record overwhelmingly shows, NJDEP's issuance of the Permit more than complied with applicable statutory and regulatory requirements. Moreover, different factual determinations are not equivalent to the NJDEP having decided the Permit

in an arbitrary or capricious manner. Bridge respectfully submits that this is not a close call, and that this Court should uphold the Permit as issued by the NJDEP.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On March 14, 2022, Bridge submitted its Application with respect to the property known as "Bridge Point 8 Industrial Park" located approximate to the southeastern intersection of U.S. Route 1 and Quakerbridge Road, in West Windsor Township, Mercer County, New Jersey (the "Property").[2] Aa117.[3]

Following a pre-application conference between Bridge and the NJDEP on June 14, 2021, the Application sought development consisting of the demolition of existing improvements on site, and the construction of seven warehouses and accessory improvements. The requested improvements consist of internal access

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[1] The facts and procedural history are inextricably intertwined, and thus Respondent has combined them for the convenience of the Court.

[2] The Property consists of Block 8, Lots 1, 2, 3, 12, 16, 20, 28, 32.01, 39, 40, 41, 45, 46, 47 and 49; and Block 15.14, Lots 18, 19, 20, 22 and 75 of the Tax Maps of West Windsor, New Jersey.

[3] The Application originally requested freshwater wetland general permits in addition to the Flood Hazard Area Verification and Flood Hazard Area Individual Permits at issue in this appeal. The Application was bifurcated due to ongoing review by the State Historic Preservation Office. Aa025 ("[D]ue to the State Historic Preservation Office's ongoing review of the project, the wetland permits will remain pending[.]"); Ra42; Ra122; Ra125; Ra135. The NJDEP gave Bridge the option of bifurcating the flood hazard area portion of the Application, with the understanding that the later determination of the freshwater wetland approvals may require future modification, and the flood hazard area approvals would not allow construction until the freshwater wetland approvals are obtained. See, e.g. Ra46. Bridge opted to bifurcate the flood hazard area aspects of the Permit.

roads, adjacent public roadways, utilities, stormwater management, lighting, and landscaping. Aa118. As set forth in Bridge's Application, a flood hazard area verification and individual permit were requested because improvements were proposed to occur within the flood hazard area and riparian zones. Aa119.

Prior to its decision to grant the Permit, the NJDEP engaged in an extensive review of the Application, which included making several requests to Bridge requesting more information and revisions on its Application. See Ra1 to Ra96. Bridge fully responded to the NJDEP's information requests. Ibid. In supporting the Permit, the NJDEP issued its factual analysis and conclusion for issuing the Permit in a thorough Engineering Report (Aa102) and Environmental Report (Aa025). After an exhaustive review, the NJDEP issued the Permit effective December 1, 2022 (Ra482), and timely published notice of the decision on the public bulletin on December 21, 2022. On February 6, 2023, Appellant filed the instant appeal (Ra484).

As set forth below, the record is replete with evidence that (i) water quality assessments were conducted in full compliance with the Water Quality Planning Act,[4] the Water Quality Management Planning Rules[5] (the "WQMP Rules"), and the Stormwater Management Rules;[6] (ii) the approval of a circular culvert at the

[4] N.J.S.A. 58:11A-1 to -16.
[5] N.J.A.C. 7:15-1 to -6.8.
[6] N.J.A.C. 7:8-1 to -6.3.

drainage ditch crossed by the U.S. Route 1 Access Road was thoroughly considered and is adequately supported by the record; and (iii) the NJDEP used the best flooding data available authorized by the FHA Rules at the time the Permit was issued.

A. Water Quality Assessments

As set forth in the Application, the Project will improve approximately 387 acres of land, and is therefore considered a "major development" pursuant to the Stormwater Management Rules.[7] Accordingly, the Project required analysis of all three areas of regulation under the Stormwater Management Rules, including water quality management.[8] Aa164. Bridge fully assessed the water quality in the Overall Stormwater Management Report (last updated November 22, 2022) in the application process (Ra458, Ra477), and in full compliance of the stormwater runoff quality standards set forth in N.J.A.C. 7:8-5.5. Aa004 (Permit §§ 10, 11).

Specifically, the Project sets forth green stormwater infrastructure of approximately 104 features including 82 small-scale bioretention basins, 3 large-scale infiltration surface basins, 2 constructed wetlands, 2 large-scale subsurface infiltration basins, and 15 areas of permeable pavement (11.5 acres).

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[7] N.J.A.C. 7:8-1.2; N.J.A.C. 7:8-5.2.

[8] The other areas of regulation under the Stormwater Management Rules are water quantity management and groundwater recharge. N.J.A.C. 7:8-5.4 and 5.6.

Ra82, Ra85-Ra86. In addition, because the Property is located, in part, within the jurisdiction of the Delaware and Raritan Canal Commission (the "Commission"), the Stormwater Management Rules require that discharges of stormwater meet the Commission's more stringent standards for the removal of total suspended solids ("TSS") of 95% in select areas of the property. N.J.A.C. 7:45-8.3(a)(5) & N.J.A.C. 7:45-8.7. Overall, Bridge designed the aforementioned stormwater infrastructure for the removal significantly more than 80% of TSS in the stormwater runoff. Aa090. The NJDEP concluded that these green stormwater infrastructure improvements "not only meet but exceed NJDEP requirements" for water quality. Aa017. In addition, the Overall Stormwater Management Report appended a Stormwater Maintenance Plan (Appendix F) outlining the benefits of the various green infrastructure methods to address water quality impacts. Ra97 and Ra117-118; Aa017.

In addition to the stormwater management considerations above, the NJDEP determined that the Project was consistent with the WQMP Rules as it is a sewer-generating development, and all proposed activities are located within the limits of the mapped sewer service area. Aa012, Aa029; Ra54, Ra56.

B. The U.S. Route 1 Access Road Upgrade

Appellant attacks the Permit based on Bridge's request to construct a private access road to U.S. Route 1 abutting the northern portion of the Property

(the "Access Road") and crossing an unnamed tributary of Duck Pond Run. This unnamed tributary consists of a minor man-made agricultural ditch (less than 5 feet in width) with little or no flowing water and dense vegetation. Aa155; Aa158-159; Aa134; Aa166. As set forth in the Application, a 24-inch culvert is proposed to facilitate the bridge crossing based on the width and character of the existing feature. Aa155. Construction of the Access Road is required to obtain access because the northern portion of the Property is separated from the rest of the site by a stream/wetland complex that traverses the length of the Property and continues offsite to the east. Ra93-94.

Contrary to Appellant's assertions, the Access Road was designed and proposed with careful attention to the actual and potential benefits the ditch provides (which are limited), and after a diligent consideration of all feasible alternate routes. For instance, "[d]ue to the prevalence of surface waters throughout the northern portion of the site, there are no other opportunities onsite to construct a roadway to Route 1 that avoids a stream crossing." Aa161. This prevalence of surface waters throughout the northern portion of the site also means that relocating the necessary Access Road would not reduce channel impacts. Aa152-153. In fact, "[c]hannel disturbance has been reduced to the extent practicable based on its location within a narrow portion of the feature and an alignment that is generally perpendicular to the orientation of the

channel." Aa153. Moreover, the ditch is dominated by dense vegetation that offers little or no value to aquatic species. Aa155. NJDEP agreed with Bridge's analysis, also concluding that no adverse impacts to fishery resources are expected from the development. Aa035. Mitigation for the disturbed riparian zone associated with the Access Road and other Project components is proposed through enhancement of approximately 51,672 square feet of currently disturbed riparian zones, pursuant to N.J.A.C. 7:13-3.4. Aa161-162.

With respect to the culvert used to facilitate the Access Road crossing, Bridge proposed a 24-inch culvert based on stormwater conveyance calculations. The culvert is proposed to be constructed in accordance with the NJDEP's specifications, which include headwalls and associated footings extending at least three feet below the invert of the ditch, and constructing the Access Road perpendicular to the ditch. Aa166; Ra54; Ra82.

As a result of the revisions Bridge made to its original plans, the NJDEP concluded that the "riparian zone disturbances have been significantly reduced[,]" and noted the proposed mitigation for the disturbance. Aa031, Aa034. The NJDEP concluded that Bridge "demonstrated that compliance with all Federal, State, and local requirements governing roadways cannot be achieved, and that public safety cannot be adequately ensured, without exceeding the [permitted] limit." Aa034. Moreover, the NJDEP concluded that

the Access Road will "cross a narrow portion of the stream corridor and will be aligned perpendicular to the orientation of the channel[,]"that "no other feasible opportunities for access to Route 1 exist that would avoid crossing a stream[,]" and "that all impacts have been minimized." Aa034.

C. Flood Hazard Area Assessment

As set forth in the Application, Bridge requested a Flood Hazard Area Verification for the four (4) surface waters to be located on and adjacent to the Property: a Shipetauken Creek unnamed tributary, located in the southwestern corner of the Property; two Duck Pond Run unnamed tributaries, located in the northeastern portion of the Property; and the Duck Pond Run, located adjacent to the site's eastern border. Aa149. A Flood Hazard Area Verification was previously issued for the Property on July 11, 2013, confirming the limits of the regulated waters and associated riparian zones and flood hazard area. Ra138. The prior Verification expired on July 11, 2018, and Bridge requested a new Verification as part of the Application. Aa149. Bridge calculated the regulatory flood hazard areas pursuant to the methods set forth in the FHA Rules. N.J.A.C. 7:13-3.2(c)(1). Aa150-161. In issuing the Permit, the NJDEP confirmed the methods used by Bridge in calculating the flood hazard areas. Aa012-015. NJDEP approved and issued the Permit on December 1, 2022. Aa001.

On December 5, 2022, after the effective date of the Permit, the NJDEP proposed the Inland Flood Protection Rules ("IFPR") which sought amendments to the Stormwater Management Rules (N.J.A.C. 7:8-1 to -6.3) and Flood Hazard Area Control Act Rules (N.J.A.C. 7:13-1 to -24.11). 54 N.J.R. 2169(a) (Dec. 5, 2022); Ra142. Pursuant to the NJDEP's statements in its notice of proposal, Cornell University conducted a study of projected precipitation totals for New Jersey, known as the Cornell Projection Study. 54 N.J.R. 2169(a) (Dec. 5, 2022); Ra149-150. After public notice and comment, the IFPR was enacted on July 17, 2023. 54 N.J.R. 2169(a) (July 17, 2023); Ra196.

LEGAL ARGUMENT

I. THE NJDEP'S PERMIT DECISION IS ENTITLED TO DEFERENCE BECAUSE IT INVOLVES AGENCY INTERPRETATION OF REGULATIONS AND ASSESSMENT OF SCIENTIFIC AND TECHNICAL MATTERS WITHIN THE AGENCY'S EXPERTISE

"The scope of appellate review of a final agency decision is limited." In re Carter, 191 N.J. 474, 482 (2007). It is well-established that when a reviewing court is considering an appeal from agency action, the limited standard of review is whether the agency's decision was arbitrary, capricious or unreasonable; that it lacked fair support in the evidence; or that the agency did not follow the law. See, e.g., In re Carter, 191 N.J. at 482; In re Virtua-West Jersey Hosp. Voorhees

for a Certificate of Need, 194 N.J. 413, 422 (2008); Barrick v. State, 218 N.J. 247, 259 (2014).

Appellate review of an administrative agency's final determination is limited and deferential. See, e.g., In re Herrmann, 192 N.J. 19, 27 (2007) (citing In re Carter, 191 N.J. 474, 482 (2007)); Matter of Crown/Vista Energy Project, 279 N.J. Super. 74, 79 (App. Div. 1995), certif. denied, 140 N.J. 277 (1995); In re Stream Encroachment Permit No. 12400, 231 N.J. Super. 443, 454 (App. Div. 1989), certif. denied, 115 N.J. 70 (1989). Importantly, courts accord "a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutory delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (internal citations omitted); see also Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, 186 N.J. 5, 16 (2006). A reviewing court may "not substitute its judgment . . . for that of [the] administrative agency." In re Young, 202 N.J. 50, 70 (2010). In considering these inquires, the court "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," but is "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs." In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div.), certif. denied, 176 N.J. 281 (2003). Where substantial evidence in the record supports more than one conclusion, the agency's choice prevails. Flanagan v. Civil Service Dept., 29 N.J. 1, 12 (1959); see

also United Hunters Ass'n of N. J., Inc. v. Adams, 36 N.J. 288, 292 (1962) (Where a subject is debatable, the agency determination must be upheld, because a court would usurp the legislative body if it attempted to determine the results of the debate). Similarly, agencies are entitled to significant deference in the "interpretation of statutes and regulations within its implementing and enforcing responsibility." Bueno v. Bd. of Trs., 422 N.J. Super. 227, 234 (App. Div. 2011) (citations omitted).

Agency deference is particularly important with respect to technical matters within the agency's special competence. In re Adoption of Amendments to Ne., Upper Raritan, Sussex Cty., 435 N.J. Super. 571, 583 (App. Div. 2014). "This deference is even stronger when the agency, (. . .) 'has been delegated discretion to determine the specialized and technical procedures for its tasks.'" In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (App. Div. 2004) (citations omitted). The court's deference to administrative agencies "stems from the recognition that agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are 'particularly well equipped to read and understand the massive documents and to evaluate the factual and technical issues that ... rulemaking would invite.'" New Jersey State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999) (alteration in original) (citation omitted); accord. In re Stormwater Mgmt. Rules, 384 N.J. Super. 451, 465 (App. Div. 2006). In particular, the "DEP is given great deference when it applies its

considerable expertise and experience to the difficult balance between development and conservation." Crema v. N.J. Dep't of Envtl. Prot., 192 N.J. Super. 505, 510 (App. Div.), certif. denied, 96 N.J. 306–07 (1984). The party challenging the DEP's decision to issue a permit "has the burden of demonstrating, not that the agencies' action was merely erroneous, but that it was arbitrary." Ibid. (quotations omitted).

The term "arbitrary and capricious" means having no rational basis. In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642 (App. Div.), certif. denied, 197 N.J. 260 (2008). In connection with administrative bodies, the term means "willful and unreasoning action, without consideration and in disregard of circumstances." Ibid. The burden is on the appellant to prove the agency's error by a "clear showing." Twp. of Fairfield v. State, Dep't of Transp., 440 N.J. Super. 310, 318 (App. Div. 2015) (quoting Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009)).

II. NJDEP PROPERLY DETERMINED CONSISTENCY WITH THE WATER QUALITY MANAGEMENT PLAN AND ITS DECISION IS ADEQUATELY SUPPORTED BY THE RECORD

Appellant cherry picks select regulatory language to confuse the actual requirements of "consistency assessments" under the Water Quality Planning Act[9] and the applicable regulations for wastewater (i.e., stormwater runoff).

[9] N.J.S.A. 58:11A-1 to -16.

Moreover, Appellant improperly raises its objections to the NJDEP's consistency assessment for the first time on appeal. However, there is nothing to indicate that the issuance of the Permit conflicts with an areawide plan. N.J.S.A. 58:11A-10. Instead, the permit issuance falls squarely within the scope of the WQMP Rules set forth in N.J.A.C. 7:15-1.1 to -6.8.

A. Appellant Failed to Raise its Concerns of the Water Quality Management Planning During the Comment Period and its Late Challenge in this Appeal Should be Disregarded

Appellant raises the argument that NJDEP did not comply with the applicable Water Quality Management Plan ("WQMP") for the first time on appeal. The record of Appellant's comments includes no objection or even discussion of NJDEP's consistency assessment during the public notice and comment period. Ra399. Such failure to do so is fatal and a basis alone to reject Appellant's argument. See Pub. Serv. Elec. & Gas Co. v. New Jersey Dep't of Envtl. Prot., 101 N.J. 95, 108 (1985) (citing Bergen Pines County Hosp. v. New Jersey Dep't of Human Servs., 96 N.J. 456, 474 (1984)). "The fundamental principle is that issues and evidence available to the individual must be raised before the agency or the right to raise them is waived[,]" and "[t]he whole scheme of the statute setting up the agency * * * would be defeated if a party could go into court and present his evidence for the first time there." Bergen Pines, 96 N.J. at 474 (quoting B. Schwartz, Administrative Law §§ 114, 206 (1976)) (alterations in original) (internal quotations omitted); see also In re

Adoption of N.J.A.C. 11:3-29 ex rel. State, Dep't of Banking & Ins., 410 N.J. Super. 6, 26 (App. Div. 2009). Appellant's failure to raise these concerns in its public comments improperly undermines the administrative process, and Appellant should not be permitted to benefit from such gamesmanship to attack the Permit. Appellant's attacks on the NJDEP's consistency assessment therefore should be disregarded.

B. NJDEP Properly Determined that the Application Meets the Applicable Water Quality Management Plan for the Property

Even if the Court were to excuse Appellant's failure to properly raise its consistency assessment argument before the NJDEP (and it should not), Appellant's argument is easily dispatched on the merits as well. Appellant focuses on N.J.A.C. 7:15-3.2(a) (procedures for consistency determination reviews) which states:

> (a) All projects and activities affecting water quality shall be developed and conducted in a manner that is consistent with this chapter and adopted areawide plans. The Department shall not issue a permit or approval that conflicts with an adopted areawide plan or this chapter.
>
> [N.J.A.C. 7:15-3.2(a).]

However, Appellant ignores the clear language applicable to the Permit in section N.J.A.C. 7:15-3.2(b) providing a presumption of area plan consistency when the proposed project involves wastewater:

> (b) The Department shall determine if a project or activity is located within an area eligible for sewer service as part of the Department's review of a permit application. **There is a rebuttable presumption that a project or activity that generates wastewater that is proposed to be conveyed to a NJPDES regulated wastewater facility is consistent with the areawide plan if it is within the sewer service area of the adopted areawide plan.**
>
> [N.J.A.C. 7:15-3.2(b) (emphasis added).]

Appellant's position that the "rebuttable presumption" set forth in N.J.A.C. 7:15-3.2(b) "*only applies* to the sewerage aspect of the project[,]"[10] and not the stormwater aspect, is simply wrong. Appellant does not cite any part of the WQMP Rules to support its position because it cannot. In the case at bar, and as acknowledged by Appellant, the applicable designated planning agency that conducts areawide water quality management planning for Mercer County is the Mercer County Board of Chosen Freeholders. The WQMP for Mercer County consists of a Wastewater Management Plan, adopted in 2013, with various amendments.[11] The Wastewater Management Plan includes existing

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[10] Ab21 (emphasis in original). "Ab" refers to Appellant's Initial Legal Brief, R. 2:6-8.

[11] Ra401 (Mercer County Wastewater Management Plan webpage, available at https://www.mercercounty.org/departments/planning/plans-and-reports/wastewater-management-plan) (last visited 2/2/2024); Ra403 (Adopted Amendment to the Mercer County Water Quality Management Plan, October 9, 2013, available at: https://www.mercercounty.org/home/showpublisheddocument/1132/636058287832670000) (last visited 2/2/2024).

sewer service areas ("SSA") in Mercer County. As identified in the Application, the proposed development is entirely located within an SSA. Aa143, Aa183. The NJDEP agreed with this conclusion, and therefore indicated that the Project is consistent with the applicable WQMP adopted under the Water Quality Planning Act. Aa029. Based upon the plain regulatory language, NJDEP properly concluded that the Project is consistent with the Mercer County WQMP. Aa029; Ra54, Ra56.

C. Appellant Wholly Fails to Overcome the Presumption that the Stormwater Runoff is Consistent with the Areawide Plan

Appellant cannot demonstrate that the Permit is inconsistent with the areawide plan either, which explains why it failed to even address this in its opening brief. First, Appellant fails to demonstrate that the Permit violates any additional requirements in the Mercer County WQMP. In fact, despite Appellant's involvement in reviewing and commenting upon the Application, it does not appear that Appellant ever reviewed the Mercer County WQMP. Ab21. Otherwise, it would have seen that the Mercer County WQMP clearly consisted of the Wastewater Management Plan adopted by Mercer County, which sets forth the designated SSAs.

Second, Appellant glosses over the fact that the Project was reviewed as a "major development" under the Stormwater Management Rules. In complying with the Flood Hazard Rules, Bridge was required to prepare a stormwater management plan to address the detailed requirements of the Stormwater

Management Rules, which was submitted with the Application.[12] Aa070. As a result, Bridge submitted an Overall Stormwater Management Report as part of the Application, which details the effectiveness of all the methods and infrastructure designed to manage stormwater, including, as mentioned above, the increased requirements of the Delaware and Raritan Canal Commission to treat TSS. Aa070, Aa089-090. As a result of this exhaustive analysis, the NJDEP determined that the Project meets the requirements of the Stormwater Management Rules. See Aa004.

Specifically, the Project sets forth green stormwater infrastructure of approximately 104 features including 82 small-scale bioretention basins, 3 large-scale infiltration surface basins, 2 constructed wetlands, 2 large-scale subsurface infiltration basins, and 15 areas of permeable pavement (11.5 acres). Ra82, Ra86. In sum, these features would result in significantly more than the state's required 80% TSS removal rate in the stormwater runoff. Aa090. The NJDEP concluded that the green stormwater infrastructure improvements "not only meet but exceed NJDEP requirements." Aa017.

[12] The FHA Rules state that NJDEP shall not issue an individual permit for a regulated activity associated with a major development unless it complies with the Stormwater Management Rules. N.J.A.C. 7:13-12.2(b). The Stormwater Management Rules define a "major development" to include, inter alia, individual developments that disturb one or more acres of land. N.J.A.C. 7:8-1.2.

Third, Appellant's argument that a "wasteload allocation" was required lacks merit. The WQMP Rules define a "wasteload allocation" as "the portion of a receiving water's total maximum daily load[[13]] ["TMDL"] for a specific pollutant that is allocated to one of its existing or future **point sources**[[14]] or categories of point sources of pollution (. . .)." N.J.A.C. 7:15-1.5 (emphasis added). In fact, NJDEP states that to the extent regulatory measures are utilized that are necessary to address TMDLs, those measures include effluent limitations or additional measures that are incorporated into wastewater or stormwater permits issued pursuant to the New Jersey Pollution Discharge Elimination System ("NJPDES") program.[15] The NJPDES program involves the issuance of discharge permits under the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 to -73, and

[13] As set forth in Appellant's brief, the "total maximum daily load" or "TMDL" is a "calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards or a different target where the water quality is better than the water quality standard. It is the sum of the allowable loads of a single pollutant from all contributing point and nonpoint sources and includes a margin of safety and consideration of seasonal variations." N.J.A.C. 7:15-1.5.

[14] "Point source" is defined as "any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel, or other floating craft, from which pollutants are or may be discharged." N.J.A.C. 7:15-1.5.

[15] Ra451 (NJDEP Division of Water Monitoring and Standards, Total Maximum Daily Loads, available at: https://www.nj.gov/dep/wms/bears/tmdls.html) (last visited 2/2/2024).

applicable regulations at N.J.A.C. 7:14A-1 to -25.10. No NJPDES approval is part of the Permit issued by NJDEP, and therefore issues involving TMDLs are inapplicable to this matter.

Moreover, Appellant's position that water quality standards were not addressed at all is baseless. As set forth above, the record contains substantial evidence that the NJDEP sufficiently considered water quality management of stormwater runoff pursuant to the Stormwater Management Rules and, as a result, adopted the numerous green stormwater management features. Appellant also ignores relevant parts of the 2016 amendments to the WQMP Rules with respect to consistency determinations. 48 N.J.R. 2244(a) (Nov. 7, 2016). Pursuant to the 2016 amendments, WQMPs and wastewater management plans prepared and adopted in accordance with the prior version of the WQMP Rules were accepted as comparable components for a WQMP pursuant to the 2016 amendments, and remain in full force and effect until modified. N.J.A.C. 7:15-1.3. 48 N.J.R. 2244(a) (Nov. 7, 2016) (Response to Comments 346 and 357).

As required, the Mercer County Wastewater Management Plan contained "an assessment of nonpoint source pollution impacts of planned future development" in accordance with former regulation N.J.A.C. 7:15-5.25(g) (effective July 7, 2008, repealed by R.2016 d. 149).[16] Ra403, Ra410. Pursuant to the prior version of

[16] There is no dispute that stormwater runoff constitutes a potential "nonpoint

N.J.A.C. 7:15-5.25(g), the Wastewater Management Plan underwent "[a]n assessment of nonpoint source pollution impacts of planned future development [with a demonstration] that the environmental standards for stormwater, riparian zones, [. . .] as well as measures identified in adopted TMDLs [. . .] shall be met."). Appellant's arguments that the Wastewater Management Plan fails to consider any nonpoint source impacts lacks merit.

Therefore, Appellant wholly fails to overcome the presumption that the stormwater runoff is consistent with the areawide plan.

III. THE APPROVAL FOR THE U.S. ROUTE 1 ACCESS ROAD CULVERT IS FULLY SUPPORTED BY THE RECORD

Appellant's arguments challenging the approval for the U.S Route 1 Access Road culvert amount to nothing more than complaints that the NJDEP's conclusions based on the substantial record do not align with Appellant's interpretations. "[The Court] may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result." In re New Jersey Pinelands Comm'n Resolution, 356 N.J. Super. 363, 372 (App. Div.) certif. denied, 176 N.J. 281 (2003).

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source" as defined in N.J.A.C. 7:15-1.5.

A. Appellant Failed to Raise its Concerns of the U.S. Route 1 Access Road Culvert During the Comment Period and its Late Challenge in this Appeal Should be Disregarded

Appellant asserts that the approval for the U.S. Route 1 Access Road (the "Access Road") culvert was in violation of the FHA Rules, namely: N.J.A.C. 7:13-11.1; N.J.A.C. 7:13-11.2; and N.J.A.C. 7:13-12.7. Once again, Appellant raises this argument for the first time on appeal, as it failed to raise these concerns regarding the culvert during the public notice and comment period. Ra399. For the reasons cited above in Section III(A), Appellant's failure to raise these concerns in its public comments frustrates the administrative process, and Appellant's attacks on the Access Route culvert should be rejected on this basis alone.

B. A Feasibility Assessment was Adequately Conducted for the U.S. Route 1 Access Road

Appellant misinterprets the applicable regulatory requirements and ignores critical parts of the record to argue that the approval for the Access Road violated the FHA Rules. The crux of Appellant's challenge to the Access Road rests upon the isolated citation to N.J.A.C. 7:13-11.1(c)(2)(ii), which states that an individual permit for a channel modification necessary for the construction of a bridge or culvert requires an analysis that "a bridge [be] constructed rather than a culvert, where feasible." According to Appellant, the record is devoid of any determination showing that a bridge was not feasible. Additionally, Appellant argues that the NJDEP failed to demonstrate that a circular culvert was warranted as opposed to a

bridge or three-sided culvert. N.J.A.C. 7:13-12.7(f). However, Appellant improperly separates and misreads both these regulatory provisions, as well as ignores substantial support in the record.

"Regulatory provisions adopted together and addressing the same problem are read and understood together." In re New Jersey State Funeral Directors Ass'n, 427 N.J. Super. 268, 273–74 (App. Div. 2012) (citing US Bank, N.A. v. Hough, 210 N.J. 187, 198–99 (2012). As such, N.J.A.C. 7:11.1(c)(2)(ii) must be considered together with N.J.A.C. 7:13-12.7 (Requirements for a bridge or culvert) to assess what is feasible in deciding between a bridge or circular culvert.

The regulations in N.J.A.C. 7:13-12.7(f) and (g) provide the factors for comparison when deciding between: (i) bridges, arch culverts, and three-sided culverts (N.J.A.C. 7:13-12.7(f)); and (ii) circular, elliptical, and box culverts (N.J.A.C. 7:13-12.7(g)). This dichotomy essentially differentiates between crossings least impactful to the channel (bridges, arch culverts, and three-sided culverts) and more impactful crossings (circular, elliptical, and box culverts). Pursuant to the FHA Rules, NJDEP requires construction of a bridge, arch culvert, or three-sided culvert, unless the applicant demonstrates that a circular, elliptical, or box culvert is appropriate under the rules. N.J.A.C. 7:13-12.7(f) & (g).

As Appellant points out, the Access Road involves a circular culvert. Pursuant to N.J.A.C. 7:13-12.7(f), an applicant can demonstrate a circular culvert is acceptable as opposed to a bridge pursuant to N.J.A.C. 7:13-12.7(g), which states:

> (g) The construction or reconstruction of a circular, elliptical, or box culvert is conditionally acceptable where **one or more** of the conditions listed at (g)1 through 6 below exist and the culvert meets the construction standards at (h) below.
>
> 1. The regulated water does not possess a discernible channel;
>
> **2. The channel does not contain fishery resources;**
>
> 3. The channel is manmade (not including any water that historically possessed a naturally-occurring, discernible channel, which has been modified by humans);
>
> 4. The channel is fully lined with manmade impervious material such as cement or concrete;
>
> 5. The channel is less than 10 feet in width as measured between the top of bank of each side of the channel; **or**
>
> 6. Spanning the channel under (f) above would not be practicable due to one or more of the following physical constraints:
> i. Unstable substrate, which would likely undermine any proposed footing within or adjacent to the channel;
> ii. Irregular channel configuration;
> iii. Anticipated adverse hydraulic impact to the channel; or
> iv. Anticipated adverse impacts to offsite flooding, the environment, or public safety.
>
> [N.J.A.C. 7:13-12.7 (emphasis added).]

Appellant seeks to mislead the Court by arguing that a showing under N.J.A.C. 7:13-12.7(g)(6) is required. However, as set forth above, an applicant only needs to demonstrate **one or more** of the conditions listed at (g)1 through 6. The record easily supports the conditions of subparagraph g(2).

Specifically, the records supports that the ditch is a man-made agricultural ditch that is less than five (5) feet wide, with little or no flowing water. Aa155, 158-159; Aa134; Aa166. The record also supports that the ditch is dominated by dense vegetation that offers little or no value to aquatic species, or fishery resources. Aa155. Similarly, the NJDEP concluded that no adverse impacts to fishery resources are expected from the development. Aa035.

As a result of the revisions Bridge made to its original plans, the NJDEP concluded that the "riparian zone disturbances have been significantly reduced[,]" and noted the proposed mitigation for the disturbance. Aa031, Aa034. The NJDEP concluded that Bridge "demonstrated that compliance with all Federal, State, and local requirements governing roadways cannot be achieved, and that public safety cannot be adequately ensured, without exceeding the [permitted] limit." Aa034. Moreover, the NJDEP concluded that the Access Road will "cross a narrow portion of the stream corridor and will be aligned perpendicular to the orientation of the channel[,]"that "no other feasible

opportunities for access to Route 1 exist that would avoid crossing a stream[,]" and "that all impacts have been minimized." Aa034.

As such, Bridge complied with the feasibility analysis in N.J.A.C. 7:13-11.1(c)(2)(ii) by satisfying the requirements in N.J.A.C. 7:13-12.7(g).

C. The Construction Requirements for the Circular Culvert Are Adequately Supported by the Record

Appellant frets over the issue of whether the culvert will be installed at least two feet below the invert of the ditch pursuant to N.J.A.C. 7:13-12.7(h)(1). As set forth in N.J.A.C. 7:13-12.7(h)(1), the purpose of this condition is to create a "contiguous flow-path through the culvert that meets and matches the bottom inverts, cross-sections, and profile of the channel beyond the culvert[.]" Importantly, this requirement assumes a "contiguous flow-path." However, the record demonstrates that any existing, natural "flow-path" in the channel is limited, and continues to be adequately preserved by modifications made to the Application and accepted by the NJDEP after careful consideration.

As set forth above, the record supports that the ditch is a man-made agricultural ditch that is less than five (5) feet wide, **with little or no flowing water**. Aa155, 158-159; Aa134; Aa166. Moreover, the record also supports that the ditch is dominated by dense vegetation that offers little or no value to aquatic species, or fishery resources. Aa155. Similarly, the NJDEP concluded that no adverse impacts to fishery resources are expected from the development. Aa035.

As a result of the revisions Bridge made to its original plans, and as stated above, the NJDEP concluded that the "riparian zone disturbances have been significantly reduced[,]" and noted the proposed mitigation for the disturbance. Aa031, Aa034. The NJDEP concluded that Bridge "demonstrated that compliance with all Federal, State, and local requirements governing roadways cannot be achieved, and that public safety cannot be adequately ensured, without exceeding the [permitted] limit." Aa034. Moreover, the NJDEP concluded that the Access Road will "cross a narrow portion of the stream corridor and will be aligned perpendicular to the orientation of the channel[,]"that "no other feasible opportunities for access to Route 1 exist that would avoid crossing a stream[,]" and "that all impacts have been minimized." Aa034. Therefore, NJDEP's conclusions satisfy the analysis required in N.J.A.C. 7:27-12.7(h).

Despite the clearly limited and intermittent flow-path of the man-made agricultural ditch at issue, Appellant asserts that the selection of the culvert was nevertheless arbitrary as the Application failed to demonstrate that the culvert could not be constructed two feet below the insert, or that an artificial low-flow was not proposed or considered. Again, Appellant misconstrues the record by assuming that the culvert interferes with an existing stream consisting of a "contiguous flow-path" that requires such measures to maintain its flowing characteristics. Such conditions are not supported by the record, and therefore the NJDEP's determination for the

selection of the culvert is eminently reasonable, and not "arbitrary and capricious." See In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. at 642 (the term "arbitrary and capricious" means "willful and unreasoning action, without consideration and in disregard of the circumstances.")

In addition, it should be noted that the construction of the culvert also meets the requirements of N.J.A.C. 7:13-12.7(h)(2) governing the construction of the floor of the culvert. Pursuant to the aforementioned section, where it is demonstrated that the culvert cannot be constructed as described in N.J.A.C. 7:13-12.7(h)(1), i.e. two feet below the natural channel, the floor of the culvert should be constructed to incorporate artificial low-flow treatment, "such as a V-notch or key-notch, baffles to hold substrate in place, **or a concave floor**." N.J.A.C. 7:13-12.7(h)(2) (emphasis added). In this case, the culvert is a 24-inch circular pipe and consists of a concave floor.

D. The Record Supports the Finding that Riparian Zone Impacts Have Been Minimized

Appellant asserts that the alleged failure to comply with the requirements above (N.J.A.C. 7:13-11.1(c)(2)(ii) and N.J.A.C. 7:13-12.7) necessarily means that the NJDEP failed to demonstrate that riparian zone impacts have been minimized. However, as set forth above, Bridge complied with all the requirements set forth in the regulations above, and the record supports the NJDEP's decision. In addition, the plans originally submitted in the Application were revised resulting in

significantly reduced riparian zone impacts. Aa031. Accordingly, Appellant's argument that the riparian zone impacts have not been minimized also fails.

In sum, Appellant fails to set forth a clear showing that that the NJDEP's determination was arbitrary. See In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642 (App. Div.), certif. denied, 197 N.J. 260 (2008) (citing Bayshore Sewerage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199 (Ch.Div. 1973), aff'd., 131 N.J. Super. 37 (App.Div.1974)) (In connection with administrative bodies, the term arbitrary means "willful and unreasoning action, without consideration and in disregard of circumstances.")

IV. IMPLEMENTATION OF THE CORNELL STUDIES REQUIRED FORMAL RULEMAKING WHICH WAS NOT PROPOSED UNTIL AFTER THE PERMIT WAS GRANTED

Appellant's final argument lacks any legal basis. First, the express language in the Flood Hazard Area Control Act, 58:16A-1 to -17. (the "FHA Act") requires that the NJDEP comply with formal rulemaking when it updates its delineations of flood hazard areas, which necessarily involves the use of updated and recent data applicable to all permit applications. Second, the FHA Rules, both the prior version and as more recently amended, grandfathered the Permit to apply the flooding data available prior to the proposal of the Inland Flood Protection Rule ("IFPR") on December 5, 2022. Third, the NJDEP is a government agency which cannot take sweeping actions to implement new data

for all permit applications without conducting formal rulemaking and appropriate stakeholder outreach, as set forth in N.J.S.A. 52:14B-2 & 3.

A. The Legislature Required Formal Rulemaking for Any Change in Flood Data Used for Permits

Appellant asserts that the NJDEP, a government agency, should be able to take sweeping regulatory actions with broad applications without formal rulemaking as required under the New Jersey Administrative Procedures Act. N.J.S.A. 52:14B-1 to -31.

Appellant's argument purposefully omits clear and relevant language set forth in the FHA Act, which expressly requires that all rules delineating and updating flood hazard areas undergo formal rulemaking pursuant to the Administrative Procedures Act. Specifically, the FHA Act states:

> a. The department shall study the nature and extent of the areas affected by flooding in the State. **After public hearing upon notice, and pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), the department shall 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**. These delineations shall identify the various subportions of the flood hazard area for reasonable and proper use according to relative risk, including the delineation of floodways necessary to preserve the flood carrying capacity of natural streams. The department shall, within the limits of funds appropriated or otherwise made available therefor, update delineations of flood hazard areas as appropriate as

> provided in subsection b. of this section. **The department shall update its delineations of flood hazard areas at least once every 15 years and shall prioritize the preparation of updates based upon flood risk. The department may, after public hearing upon notice and pursuant to the "Administrative Procedure Act," revoke, amend, alter, or modify such regulations if in its judgment the public interest so warrants.**
>
> [N.J.S.A. 58:16A-52(a) (emphasis added).]

Appellant's blatant failure to cite this fundamental statutory language is remarkable. Clearly, the NJDEP, through the IFPR, sought to update its delineations of flood hazard areas by way of studying and implementing new scientific data. As set forth above, such updates require formal rulemaking pursuant to the New Jersey Administrative Procedures Act.

B. The Flood Hazard Area Control Act and Regulations Expressly Include a Legacy Provision that Grandfather the Permit

The regulations also set forth express legacy provisions which provide for the grandfathering of the Permit based on the regulations and related data in effect when the Permit was granted. Again, the Permit was granted on December 1, 2022. Aa001. It was after the Permit was issued that the NJDEP proposed the IFPR on December 5, 2022, revising the Stormwater Management Rules and the FHA Rules to account for the new data assessed in the Cornell Studies. 54 N.J.R. 2169(a) (Dec. 05, 2022); Ra149-150. The proposed IFPR underwent public notice and comment as required by the New Jersey Administrative Procedures

Act, and the NJDEP enacted the final IFPR on June 2, 2023, with an effective date of July 17, 2023. Ra196, 54 N.J.R. 2169(a) (July 17, 2023)

Moreover, since November 5, 2007, the FHA Rules have contained a legacy provision protecting permitholders from changing flood hazard requirements. N.J.A.C. 7:13-2.1 (effective April 5, 2021 to July 16, 2023). When N.J.A.C. 7:13-2.1 was amended on July 17, 2023, this legacy provision continued with the modification of protecting all permits issued prior to July 17, 2023, the effective date of the IFPR. N.J.A.C. 7:13-2.1(c)(1). Specifically, N.J.A.C. 7:13-21.1(e) provides that "[i]n reviewing [a permit] application, the Department shall apply the requirements of this chapter in effect at the time the application is declared complete for review." N.J.A.C. 7:13-21.1(e).[17] As set forth in the IFPR enactment, the NJDEP's response to comments stated:

> The Department has routinely included provisions for legacy applications, which are applications determined to be completed in advance of the effective date of revised rules. Such provisions are therefore included as part of this rulemaking, as reflected at adopted N.J.A.C. 7:8-1.6(b) and (c). [. . .] [amended] adopted standards will not apply to any major development that does require Department approval pursuant to the [Flood Hazard Area Control Act], provided that the Department has received an administratively and technically complete application that includes a stormwater management review component prior to the effective date of this rulemaking. This is consistent with the FHACA rules at N.J.A.C. 7:13-21.1(e),

[17] Effective since June 20, 2016.

> which affirms that, in reviewing an application, "the Department shall apply the requirements of this chapter in effect at the time the application is declared complete for review." [. . .]
>
> [Ra264 (Response to Comment 279), 54 N.J.R. 2169(a) (July 17, 2023)]

Notwithstanding this clear statement by the NJDEP to grandfather permits, Appellant boldly asserts, without authority, that the NJDEP had the duty to retroactively apply the data used in the 2023 promulgation of the IFPR amendments to the Permit that was issued to Bridge in 2022. Ab31. If Appellant believes that the grandfathering provisions are inappropriate (which Respondent denies based upon the plain reading of the Act), the proper procedure for Appellant to challenge these grandfather protections is through an appeal of the IFPR rulemaking. The case at bar is clearly not the forum to challenge this long-standing regulatory requirement.

C. The NJDEP's Assessment and Use of the Cornell Studies in All Future Permitting Requires Formal Rulemaking

Moreover, Appellant fails to assert any credible argument to support its position that the retroactive use of the Cornell Studies on permit decisions does not amount to an administrative rule requiring formal notice and stakeholder

comment.[18] After public notice and comment, the IFPR was enacted on July 17, 2023. Ra0196, 54 N.J.R. 2169(a) (July 17, 2023).

The New Jersey Administrative Procedures Act defines an "administrative rule" to include an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2. The New Jersey Supreme Court previously set forth the following factors to determine whether an agency has created an administrative rule:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
> (2) is intended to be applied generally and uniformly to all similarly situated persons;
> (3) is designed to operate only in future cases, that is, prospectively;
> (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
> (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a

[18] The Cornell Projection Study set forth a range of projected precipitation totals for New Jersey based on various factors. Ra149-150, 54 N.J.R. 2169(a) (Dec. 5, 2022). Accordingly, in promulgating the IFRP, the NJDEP was required to select a specific projection range in the Cornell Projection Study. Despite the different ranges provided by the Cornell Projection Study, Appellant seems to assert that the NJDEP was nevertheless required to pick whatever range it deemed fit for the specific permit application at issue. The Appellant oversimplifies the conclusiveness of the data set forth in the Cornell Studies.

> material and significant change from a clear, past agency position on the identical subject matter; and
> (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [See e.g., Metromedia v. Division of Taxation, 97 N.J. 313, 331–32 (1984); see also Chemistry Council of New Jersey v. NJDEP, 2017 WL 6492521 (N.J. App. 2017) (Ra453).]

As such, Appellant cannot assert any good faith argument that the retroactive use of the Cornell Studies to Bridge's Application is statutorily permitted without formal rulemaking. The NJDEP's ability to change the data to be relied upon on all pending permit decisions without any rulemaking process would result in administrative anarchy.

Following Appellant's logic, any aspirational or informational comments made by the Governor or the NJDEP to the public regarding climate data that is being peer reviewed should be sufficient to freeze and modify the analysis used for all pending permit applications in New Jersey. Such legal precedent would result in an absurd outcome, as the NJDEP would be completely stonewalled from considering and discussing new peer reviewed data with the public. Appellant's irrational arguments should be completely disregarded by the Court.

D. The Record Supports the NJDEP's Position that Floodway Delineation was Unnecessary

Appellant last argument on this issue attempts to confuse the issue of whether the Cornell Studies should have been utilized (which as demonstrated above, they should not) with an argument as to whether the floodway should have been verified as part of the application. This is nonsensical; the fundamental issue of whether a floodway must be verified is a clear regulatory requirement. Contrary to Appellant's "confusion," the FHA Rules provided NJDEP with clear discretion to issue a Flood Hazard Verification without the floodway limit.

Pursuant to N.J.A.C. 7:13-5.5(c), a verification of only the flood hazard area design flood elevation and not the floodway limit is appropriate, provided that NJDEP makes a determination based upon visual inspection of submitted site plans and without review of calculations, and the following requirements are satisfied: 1) no fill or aboveground structure is proposed within a floodway; and 2) compliance with the flood storage displacement requirements of N.J.A.C. 7:13-11.4 does not require knowledge of the floodway. N.J.A.C. 7:13-5.5(c)(1-2). The Application details the proposed work as it may impact a floodway. Bridge indicated that the only work within a floodway would be limited to improvements on Clarksville Road, which involve widening the road. Aa162. Bridge further indicated that the work would be constructed at grade to avoid the placement of fill in the

floodway. Aa162-Aa163. In addition, there is no above-ground structure that is proposed in any floodway in the Application. NJDEP concurred with Bridge's analysis that no activity will take place in a floodway and concluded based upon visual inspection that "it is clear that the floodway will not be impacted by the proposed stormwater outfall structure proposed in the flood hazard area." Aa015. Therefore, the first requirement of N.J.A.C. 7:13-5.5(c) is satisfied. As to the second requirement of N.J.A.C. 7:13-5.5(c), as part of its Application, Bridge addressed the flood storage displacement requirements in concluding that there would be no loss of flood storage onsite. Aa163. NJDEP reviewed the flood storage calculations and concluded that the Project complies with the flood storage requirements of N.J.A.C. 7:13-11.4. Aa015.

Appellant's characterization that it was "unclear what type of data was used" (Ab44) is belied by the clear requirements of the FHA Rules, the application data, as outlined above, and NJDEP's review of that information, as indicated in the NJDEP Engineering Report. Aa012. As such, Appellants argument is negated by the record.

CONCLUSION

For the foregoing reasons, Appellant's challenge is unsupported by the clear reading of the applicable statutory and regulatory provisions governing the Permit, and NJDEP's extensive review of the Application as cited in the record. Accordingly, Appellant has failed to show any evidence that the NJDEP acted arbitrarily, capriciously, or unreasonably in issuing the Permit. Appellant's baseless challenges should be rejected, and this Court should grant NJDEP deference and uphold its decision to issue the Permit.

Respectfully submitted,

CHIESA SHAHINIAN & GIANTOMASI PC
Attorneys for Respondent Bridge Point West Windsor, LLC

By */s/ John G. Valeri*
JOHN G. VALERI JR.

Dated: February 5, 2024

IN THE MATTER OF FLOOD HAZARD AREA VERIFICATION AND FLOOD HAZARD AREA INDIVIDUAL PERMIT, 1113-22-0002.1 LUP220002	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket#: A-001639-22 Civil Action On appeal from final agency action of the New Jersey Department of Environmental Protection

REPLY BRIEF OF APPELLANT, THE WATERSHED INSTITUTE

Eastern Environmental Law Center
One Gateway Center, Suite 2600
Newark, NJ 07102
(973) 424-1166
Attorneys for Appellant, The Watershed Institute

By: Daniel A. Greenhouse, Senior Staff Attorney
Attorney #016102005
dgreenhouse@easternenvironmental.org

Kaitlin Morrison, Staff Attorney
Attorney #433092023
kmorrison@easternenvironmental.org

Date: March 11, 2024

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Appellant relies on the Statement of Facts and Procedural History set forth in its Initial Brief filed with this Court on October 6, 2023.

LEGAL ARGUMENT

I. THE DEP FAILED TO MAKE AN ADEQUATE CONSISTENCY ASSESSMENT

(Aa001)

The DEP failed to make an adequate Consistency Assessment in violation of the Water Quality Planning Act ("WQPA") and Rules, because the DEP "shall not issue a permit or approval that conflicts with an adopted areawide plan or this chapter." N.J.A.C. 7:15-3.2(a); N.J.S.A. 58:11A-10. Areawide Water Quality Management ("WQM") Plans address both wastewater and surface water quality/TMDL components, N.J.A.C. 7:15-2.3, and a Consistency Assessment must consider both. The DEP argued that "nowhere does TWI allege that DEP did not adhere to a specific rule requirement." DEP Rb40.[1] But as Appellant argued, see Ab 17, 19-20 & n.16, a Consistency Assessment that does not make findings regarding any TMDLs with wasteload allocations in the Areawide WQM Plan, or consistency with "this chapter," is a violation of the Rules.

The DEP and Bridge Point argued that other regulatory regimes satisfy the

[1] "DEP Rb" refers to the DEP's Respondent brief and "BP Rb" refers to Bridge Point's Respondent brief, both filed February 5, 2024. "Ab" refers to Appellant's brief, filed October 6, 2023.

consistency determination, DEP Rb39, BP Rb17-20, but refer to either future permits (*e.g.*, NPDES, MS4) that cannot satisfy the Consistency Assessment required before this permit was granted, or to regulations with different requirements (stormwater rules). Under the Water Quality *Planning* Act, all projects "shall be *developed* and conducted in a manner consistent with the adopted areawide plan." N.J.S.A. 58:11A-10. DEP's own rule says the Consistency Assessment must precede the permit. N.J.A.C. 7:15-3.2(a). The DEP argued that TMDLs should categorically not be addressed here,[2] as "the Project may require an NJPDES permit during construction" and "post-construction, depending on the nature of the activities on site . . . ." DEP Rb42. Compliance with potential NJPDES permits during and after construction of the project does not satisfy the requirement to determine if the project is consistent with the Areawide WQM Plan *before* the project is built. The same is true of any future Tier A MS4 permit. Future permits may regulate the conduct of the facility, but not its *development*. The purpose of the DEP's regulations is frustrated if the DEP may permit the construction of a facility when the discharges and corresponding permits that will be required in the future could be incompatible with the WQPA.

[2] Appellant does not argue that new TMDLs and wasteload allocations must be *generated* as part of the consistency assessment, as the respondents incorrectly asserted, DEP Rb41; BP Rb19, but rather that the proposed development's consistency with any *existing* TMDLs and wasteload allocations must be investigated and considered before the DEP issues a permit.

At the very least, if the DEP has spread around its WQPA statutory mandates to various other regulatory programs as it now claims, DEP Rb38-39, the DEP must have explained or made findings in the record as to how these regulations satisfy the Consistency Assessment for this project as a prerequisite to this permit. There is no such record, and thus there is nothing for the Appellant or this Court to review.

To the extent that the DEP alleges that the WQMP Rules do not require that surface water quality be addressed in the Consistency Assessment required as a prerequisite for this permit, that is inconsistent with the plain language of the WQPA statute. The Rules do not limit consideration solely to wastewater.[3] The 2016 WQMP rule proposal and adoption made clear that if an areawide "WQM plan has additional requirements, or a wasteload allocation in an adopted TMDL has been established"—criteria that relate to surface water quality—"these must also be addressed in order for the proposal to be consistent." 47 N.J.R. 2531(a) (Oct 19, 2015) (rule proposal); 48 N.J.R. 2244(a) (Nov. 7, 2016) (rule adoption). The purpose was not to eliminate surface water quality from consideration, but to shift the analysis from the areawide planning stage to the "permitting stage, when

[3] Bridge Point asserted that Appellant "ignores" the rebuttable presumption, BP Rb15, but Appellants explained the proper role of the rebuttable presumption in its opening brief. Ab21-22. And contrary to Bridge Point's assertion, BP Rb20 n.16, stormwater conveyed via pipes or channels such as stormwater outfalls is a textbook example of a point source discharge, which requires a permit under the Clean Water Act.

detailed site specific information is available." 47 N.J.R. 2531(a).

Respondents also claim that Appellant should have pointed to a specific violation of the Areawide WQM Plan. DEP Rb44; BP Rb17. Here, Appellant challenges the DEP's failure to make a sufficient Consistency Assessment as required under the WQPA and Rules. To prevail on such a claim, Appellant must show only that the DEP's Consistency Assessment did not rest on adequate findings or an adequate record. E.g. Musconetcong Watershed Ass'n v. N.J. Dep't of Envtl. Prot., 476 N.J. Super. 465, 488 (App. Div. 2023).

II. THE DEP ERRONEOUSLY PERMITTED A CIRCULAR CULVERT (Aa001)

The core deficiency regarding the DEP's approval of the culvert is that there is nothing in the record to indicate that the DEP determined that constructing a bridge was not feasible. Per the Flood Hazard Area Control Act (FHACA) rules, the "Department shall issue an individual permit for a channel modification *only if . . . [a] bridge is constructed rather than a culvert, where feasible.*" N.J.A.C. 7:13-11.1(c)(2) (emphasis added). The lack of anything in the "agency record to indicate the Department ever considered the question" of feasibility, "much less decided it," is alone enough to warrant remand and vacatur. See Matter of Proposed Constr. of Compressor Station, 476 N.J. Super. 556, 561 (App. Div. 2023).

The DEP attempts to provide the required feasibility determination and rationale in its legal brief, post hoc, and without any citation to the record. The DEP claimed in its brief that the agency "determined that a bridge is not feasible," DEP Rb18, but there is no citation to the record. The DEP injected several new justifications for the missing feasibility determination in its brief, including that the "DEP was aware that spanning the channel could result in adverse environmental impacts," and that "compared to a pipe culvert, constructing a bridge span would disturb more area beyond the channel due to its spanning requirements," and "could result in more erosion and sediment transfer within the tributary." DEP Rb18. Each of these justifications is entirely missing from the record and permit decision, and the DEP's attempt to fill the gap in the record with post hoc argument makes the record's deficiency even more plain. The DEP's decision may be upheld solely on the basis it articulated in the record, "[n]or are 'appellate counsel's post hoc rationalizations for agency orders' an adequate substitute for administrative factfinding." Morgan Stanley Servs. Co. v. N.J. Dep't of Envtl. Prot., No. A-5703-08T1, 2011 N.J. Super. Unpub. LEXIS 182, at *17 (App. Div. Jan. 26, 2011)[4] (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).

Bridge Point accurately identifies that the "crux of Appellant's challenge" rests on the failure to make the section 11.1(c)(2) feasibility determination, BP

[4] While this case is unpublished, this principle is well settled and Appellant is unaware of any contrary unpublished opinions. R. 1:36-3.

Rb22, but never explains how the feasibility requirement was met. Bridge Point instead argued that the satisfaction of other regulatory criteria is sufficient. BP Rb23-24. There is nothing in the rules to support the notion that the section 11.1(c)(2) feasibility determination is extraneous and need not be satisfied, and "courts should avoid construction of [a] statute that would render any word inoperative, superfluous, redundant, or meaningless." Twp. of Pennsauken v. Schad, 160 N.J. 156, 174 (1999). Bridge Point's reading of the rules would render the requisite feasibility determination as "mere surplusage." N.J. Dep't of Envtl. Prot. v. Alloway Tp., 438 N.J. Super. 501, 512 (App. Div. 2015).

Even if the court found that the feasibility determination was extraneous and unnecessary, which it cannot, the DEP also failed to justify a pipe culvert because the rules require that the "invert of the culvert shall be installed at least two feet below the invert of the natural channel [and] filled with native substrate up to the invert of the natural channel" unless this is not possible "due to unstable substrate or other physical constraints." N.J.A.C. 7:13-12.7(h). The DEP argued in its brief that the pipe culvert cannot be installed two feet below the invert because for "a pipe culvert two feet in diameter" this would mean "burying the entire culvert into the sediment." DEP Rb19. This facilely assumes that the DEP was limited to considering the two-foot pipe culvert proposed by the applicant, rather than something larger. Nor did the DEP explain in the record why a circular culvert of

any size could not be filled to the invert of the channel with native substrate due to unstable substrate or other physical constraints.[5]

Bridge Point argued that there is little or no flowing water and thus there is no need to meet the construction requirements for circular culverts. BP Rb26-27. But there is no such exception to the construction requirements in section 12.7(h). Further, Bridge Point misconstrued the purpose of the construction requirements for circular culverts as solely concerned with fish passage. BP Rb26. The DEP has made clear that standards governing the construction of "a single circular, elliptical, or box culvert . . . are intended to ensure that construction will not adversely affect the environment or *exacerbate flooding*." 47 N.J.R. 1041(a) (June 1, 2015) (rule proposal). The rules governing culverts must be followed because "[i]mproperly designed bridges and culverts can result in *increased flooding*"[6] and "[s]tructures that are improperly built in flood hazard areas are subject to flood damage and threaten the health, safety, and welfare of those who use them."[7]

Finally, on this record, the DEP has not demonstrated that the over 9,000 square feet of riparian zone impacts have been minimized to only the disturbances

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[5] Only where the culvert cannot be installed two feet below the invert, which has not been shown, do the low-flow treatments in section 12.7(h)(2) apply. The DEP also failed to make any factual findings about the specific drainage area served by this stream and the associated functionality of the size and placement of the proposed pipe culvert.

[6] NJ DEP, Technical Manual, Flood Hazard Area Control Act Rules N.J.A.C. 7:13, page 229, https://dep.nj.gov/wlm/lrp/flood-hazard-areas (emphasis added).

[7] Technical Manual at 1.

that are necessary to accomplish the basic purpose of the development, N.J.A.C. 7:13-11.1, because it did not properly consider whether a bridge spanning the channel was feasible, and thus, whether it would lessen disturbances. The DEP claims, again post hoc, that "constructing a bridge for this specific road crossing could result in greater impacts to riparian zone and wetlands, given the close proximity of wetlands, (Ra54), and riparian zone to this road crossing, (Aa31)." DEP 18. These record citations discuss wetlands and riparian zones near the road crossing, but no analysis or finding by the DEP regarding whether constructing a bridge would have greater riparian zone impacts than a culvert.

III. THE DEP DID NOT NEED NEW REGULATIONS TO EMPLOY THE BEST AVAILABLE PRECIPITATION DATA AND ASSOCIATED FLOOD ELEVATION PREDICTIONS IN ITS ASSESSMENT OF BRIDGE POINT'S METHOD 6 ENGINEERING CALCULATIONS (Aa001)

The DEP argued "Rulemaking Was Required Before the Cornell Studies Could Be Applied to Permit Applications." DEP Rb23. This is incorrect because the regulations in effect at the time the DEP reviewed this permit required the DEP to take into account the most likely and realistic anticipated increases in precipitation and flooding at this property. As the Appellant argued in its initial brief, see Ab31-24, the Appellant does not claim that the IFPR should have governed the procedures for the DEP's permit decision in this case. Rather, it was necessary for the DEP to make the requisite factual findings, including

consideration of the Cornell Studies, in its assessment of Bridge Point's "Method 6" engineering calculations and associated flood elevation predictions for the 100-year flood.

It is undisputed that, "The flood hazard area design flood elevation means the peak water surface elevation *that will occur* during a one hundred-year flood *plus an additional amount of water to account for future increases* in flows due to development and other factors." N.J.A.C. 7:13-1.2, DEP Rb23 (emphasis added). Critically, the DEP and Bridge Point's calculation of anticipated peak water surface elevations is entirely dependent on the "100-year flood." N.J.A.C. 7:13-1.2. The peak water surface elevation associated with the 100-year flood is not tied to any particular data set. Ibid. DEP's regulations never prohibited the DEP from employing the Cornell Studies in its prediction of the 100-year flood and the associated peak water surface elevation. Ibid.

Therefore, in the DEP's assessment of the public health and safety concerns that *will occur* in the future, as a required element of anticipating peak flood elevations during a 100-year flood, the DEP needed to account for the "*additional amount of water*" that it could reasonably foresee flowing onto and off of the subject property. See N.J.A.C. 7:13-1.2 (definitions of "flood hazard area design flood elevation" and "100-year flood"). The inevitable conclusion from an application of these critical regulatory definitions is that the DEP was required to

employ the most reasonable precipitation and flood elevation forecasting information available to it at the time it issued this permit.

Bridge Point argued that the FHACA "requires that all rules delineating and updating flood hazard areas undergo formal rulemaking pursuant to the Administrative Procedures Act." BP Rb30. However, in this case, because the flood hazard areas were not already delineated, Bridge Point needed to employ "Method 6," which uses unique engineering calculations (based on the anticipated 100-year flood) to forecast specific peak flood elevations. DEP Rb24-25. Therefore, Bridge Point's argument that the statute forbids the DEP from considering unique calculations is in direct contradiction to the DEP's rules, which required Bridge Point's permit application to be supported by unique engineering calculations and a case-specific flood forecasting methodology.

Similarly, the DEP argued that "rulemaking was required to use the adjustment and change factors from the Cornell Studies." DEP Rb30. But this Court should reject the DEP's attempted sleight of hand here because the DEP was required, by the statute itself, N.J.S.A. 58:16A-52(a), *and* the regulations which provide for Method 6 flood forecasting, to protect the public health and safety from reasonably anticipated flooding situations.

Here, the Cornell Studies were scientifically accepted, highly relevant, and available to the DEP during its review of Bridge Point's permit application. Thus,

the DEP was required to consider the Cornell Studies in relation to its assessment of Bridge Point's unique engineering calculations and flood elevation forecasts. It was arbitrary and capricious for the DEP to ignore the Cornell Studies when it assessed Bridge Point's Method 6 calculations, see Aa012, and issued this permit, see Aa001. Science-based decision making required the DEP to take an honest and clear-eyed view of all the facts.

A. The DEP Failed To Explain Or Justify Its Decision To Remove The Floodway Lines From The Approved Plans
(Aa001)

The DEP argued that it "concurred with Bridge Point's calculations that the Project's flood storage displacement requirements in N.J.A.C. 7:13-11.4 were met and thus concluded knowledge of the exact floodway location was not required." DEP Rb14-15. But this was arbitrary for the following three reasons. First, the Project's flood storage displacement potential ought to have been based on the most realistic data and flood forecasting information contained in the Cornell Studies, and the DEP failed to do so. The DEP instead deleted the applicant's demarcation of floodway lines from the site plans so there would be no record at all of the approximate location of the floodway.

Second, the only part of the record that reflects the DEP's purported concurrence with Bridge Point's flood storage calculations is an email from the DEP on November 30, 2022, where the DEP said "this [floodway] line cannot be

on there to be approvable. Is it possible for you to remove the floodway line from the applicable plans?" Aa050. There is no support in the record for its late decision to exclude and remove the floodway lines from the applicant's site plans.

Third, the DEP's late attempt to alter its final agency decision, after its issuance on December 1, 2022, is highly unusual and constitutes a violation of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-3.1(a), and the DEP's Flood Hazard regulations, N.J.A.C. 7:13-21.3(e). The DEP's permit, issued on December 1, 2022, expressly approved the plans "last revised **November 29, 2022**." Aa009 (emphasis in original). This Court's review of the DEP's issuance of its final decision on December 1, 2022, must be constrained to the plans identified in the permit itself.[8]

IV. THE APPELLANT HAS A CONSTITUTIONAL RIGHT TO RAISE ALL THESE ARGUMENTS IN ITS APPEAL OF THE DEP'S PERMIT DECISION AND NEVER WAIVED ITS RIGHTS (Aa001)

The DEP argued, "TWI cannot now be heard to complain that DEP did not address the issues," that were not raised during the DEP's relatively short public comment period,[9] "and such claims can be dismissed." DEP Rb2. But the DEP is

[8] It is undisputed that "The ninety-day flood hazard permitting deadline was later extended thirty days, N.J.A.C. 7:13-21.3(b), to December 1, 2022, (Ra15)." DEP Rb8. It was not extended beyond December 1, 2022.

[9] Generally, the DEP provides only a 30-day public comment period on a land use permit application such as this. See N.J.A.C. 7:7A-19.6. Nor does the public have access to a draft permit at that time.

wrong because such a holding would unduly impede on TWI's constitutional rights to challenge the DEP's final permit decision. In addition, there is no legal requirement to preserve rights during an administrative public comment period, in contrast to certain federal laws. Finally, the Appellant had no actual notice of the DEP's erroneous final decision before its issuance.

Under the New Jersey State Constitution, Art. VI, Sec. V, Para. 2, the Appellate Division does not have the authority to preclude the Appellant from raising arguments in an "as of right" appeal of a final agency action, R. 2:2-3(a)(2), when the Appellant had no opportunity to raise any arguments in an adjudicative type hearing or trial below. It has been held that "Although rights may be waived, courts 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 505 (2012) (internal quotation omitted). "To be valid, waivers must be knowing, intelligent, and voluntary." Ibid. Therefore, the DEP's position, that all arguments must be raised in writing during a short public comment period, or be waived thereafter, should be rejected as unconstitutional.

Respondents attempt to impose a waiver concept often found in federal environmental laws, e.g., 15 U.S.C.S. 717r(b) (Natural Gas Act requirement that objections not raised in rehearing before FERC cannot be appealed to DC Circuit), but New Jersey's FHACA and APA contain no analogous provisions that expressly

give notice of the potential for waiver and preclusion. Nor is this a process in which there is a draft permit made available for public review and comment followed by a final permit. E.g. 40 C.F.R. 124.10 (requiring public notice of draft NPDES permit and at least 30-day comment period); 40 C.F.R. 124.19 (limiting petition for review to persons who filed comments or participated in a public hearing on NPDES draft permit). The permit that Appellant timely appealed was the first opportunity to review the agency's final decision and reasoning. While TWI was not required to comment during the agency's deliberation to preserve its right to appeal the permit decision, it did engage and proactively raise any issues it could, and it should not now be penalized for attempting to improve the outcome of the DEP's permit decision.

Finally, Appellants did not have notice of the DEP's flawed determinations, despite the DEP's attempts to indicate the contrary. DEP Rb9. The documents provided by the DEP did not contain the deficient Consistency Assessment decision, nor did they show that the DEP would fail to consider the feasibility of a bridge or hold the applicant to the construction requirements for circular culverts.

In addition, the DEP argued, "That TWI took issue with DEP's WQMP consistency determination is not even made clear by its Case Information Statement." DEP Rb34. But the DEP is wrong because a review of the Appellant's notice of appeal and related CIS reveals that Appellant specifically identified the

DEP's final agency decision, Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 460 (App. Div. 2002), and broadly expressed each of the issues raised in the Appellant's briefs in this matter. This is all that is required, and there is simply no precedent upon which to strike the Appellant's argument.

CONCLUSION

For all these reasons, the Court should reverse the DEP's final permit decision.

Respectfully submitted this 11th day of March, 2024,

/s/ Daniel A. Greenhouse
Daniel A. Greenhouse (ID #016102005)
Eastern Environmental Law Center

/s/ Kaitlin Morrison
Kaitlin Morrison (ID #433092023)
Eastern Environmental Law Center

Attorneys for Appellant The Watershed Institute