December 30, 2006

Gary J. Brower, Esq.
Office of Legal Affairs
NJ DEP
PO Box 402
Trenton, NJ 08625

**Attn: DEP Docket Number16-06-08/70**
**Via email and US mail**

Dear Mr. Brower:

The following comments on the subject proposal are submitted on behalf of Public Employees for Environmental Responsibility (PEER). New Jersey PEER is a state chapter of a national alliance of state and federal agency resource professionals working to ensure environmental ethics and government accountability.

We share the concerns of and incorporate by reference the technical comments submitted by Abbie Fair of the Association of New Jersey Environmental Commissions (ANJEC). In any cases of conflict between the below comments and the ANJEC comments, the below comments are controlling.

1. **Less then 50 acre headwater drainages**

It appears that the proposed rules do not regulate in less than 50 acre drainages where no defined stream bed or bank is discernable (personal communication w/NJDEP; 11/17/06 meeting). Upon adoption, the Department should include additional field criteria to allow the Department to assert jurisdiction over these critical less than 50 acre headwater drainages and apply the riparian environmental requirements to these areas. Rules should allow the Department, local governments, or the interested public to require that an applicant do site specific identification of these drainages. This is not a substantive change on adoption, as the new field criteria are within the legal and technical jurisdiction and scope, respectively, of the original proposal.

2. **Encroachment in "special water resource protection area" – closing 300 foot buffer loopholes (NJAC 7:8-5.5(h)1.ii.)**

We understand that it is the Department's intent that the proposed steam encroachment riparian zone rules will close certain loopholes created by the Department's interpretation of the stormwater rules' **"special water resource protection area" 300 foot buffers for category one waters.** (personal communication w/NJDEP, 11/17/06 meeting). We understand that the 300 foot riparian buffer requirements of the proposed rule would operate to close that loophole and preclude encroachments and disturbances that are now being approved under the stormwater rules, as discussed below. **We ask that this issue be clearly addressed in the adoption document.**

Our concern is that the Department has seriously misinterpreted and is violating the stormwater management rules by allowing disturbance and new development to encroach in the 300 foot buffer upon conversion of agriculturally "disturbed lands" to new development.

Specifically, we understand that the Department has interpreted the stormwater rules to allow disturbance and development to occur in the portion of the buffer between 150 and 300 feet, if the buffer was disturbed by prior agricultural activity. This interpretation conflicts with the plain wording of the regulation, which strictly limits encroachments to disturbed portions of the buffer caused by "active uses" or "previous development". Even those encroachments are only allowed upon demonstration by the applicant that the functional values of the 300 foot buffer are met.

In terms of the intent of the regulation, it was our understanding that the intent of the 300 foot buffer rule "encroachment" provision was to allow existing "active agriculture" and other "active" uses such as "maintained law area", to continue to disturb the buffer, as long as those uses remained active and exclusive to those uses. Upon change in these active land uses or cessation of an active use, the 300 foot buffer would be triggered and apply to new non-agricultural "major development" regulated by the rules. For uses that were no longer active, for example an abandoned farm, the rule was designed to allow natural succession to re-vegetate the buffer. The key policy objective driving this rule text was to NOT take existing tilled lands out of agricultural production or grazing, and to promote economically beneficial agricultural land practices for farmers, as an incentive to remain in farming.

It also was our understanding that the only other allowable encroachment in the 300 buffer rule was designed to grandfather existing developed lands so that new development associated with those lands would not be required to actually rip up and re-vegetate developed portions of the site located in the buffer, such as the "parking areas" cited in the rule text. I personally participated in policy discussions with DEP Management about this issue, regarding whether the Department should include new regulatory policies to require site restoration as part of the redevelopment approval process. This rule was written in that context. The policy decision at the time was NOT to require restoration as a condition of redevelopment approval, and that policy is reflected in the text of this rule, i.e. the use of the term "previous development".

We understand that the Department has not adopted technical guidance or review practices to determine compliance with the regulation, which requires only allows such encroachment where the

"*applicant demonstrates that the functional value and overall condition of the special water resource protection area will be maintained to the maximum extent practicable"* **(NJAC 7:8-5.5(h)1.ii.)**

We urge the Department to develop this "functional value" review Guidance or promulgate a Technical Manual governing this demonstration. In the interim, in the absence of such guidance, we urge all such case-by-case approvals to stop immediately. We cite the applicable regulatory text in its entirety below, and highlight the key language.

*ii. Encroachment within the designated special water resource protection area under (h)1i above* ***shall only be allowed*** *where previous development or disturbance has occurred (for example,* ***active*** *agricultural use, parking area or maintained lawn area). The encroachment* ***shall only be allowed where applicant demonstrates that the functional value and overall condition of the special water resource protection area will be maintained to the maximum extent practicable****. In no case shall the remaining special water resource protection area be reduced to less than 150 feet as measured perpendicular to the top of bank of the waterway or centerline of the waterway where the bank is undefined. All encroachments proposed under this subparagraph shall be subject to review and approval by the Department.*

3. Derivation of allowable disturbance to riparian zone vegetation (**Table B – NJAC 7:13-10.2**)

We understand that the allowable regulated activities and the derivation of disturbance limits for each allowable regulated activity were derived and based upon what was approved in prior stream encroachment permits (personal communication w/NJDEP, 11/17/06 meeting).

If this is true, and the allowable activities and the allowable disturbance limits reflect historic permit and development practices, then how does the proposed rule additionally limit disturbance, establish protected riparian buffers, or increase environmental protections more stringent or broad in scope than those that were afforded historically by the stream encroachment permit program? The Department should clarify this upon adoption, and explain specifically how the proposed new rule would reduce regulated activities, narrow the scope of regulated activities, impose additional technical requirements, and increase environmental protection, compared to the status quo.

Have activities that historically were approved by the stream encroachment program been eliminated in the riparian zone by the proposed rule? Have additional activities that were not historically regulated been regulated? Are historic activities regulated more stringently? If so, how? For example, if a developer historically received stream encroachment permit approvals for private driveways, infrastructure and development, and the regulated activities and disturbance limits in the proposed new rule is based on the approved site plans for those developments, how does the new rule provide additional protections?

Also, are the specific regulated activities listed in the rue and Table B the only allowable disturbances in the riparian zone?

4. **Fast track light - Automatic approval provision** (**NJAC 7:13-9.3(h))**

This provision should be deleted on adoption. It could result in approval of permits that conflict with or violate applicable state and federal laws. For example, it is our understanding that federal entities, such as NOAA, in overseeing federally delegated and/or funded programs, have raised written objections and identified deficiencies in the implementation of automatic permit approvals by the Department for State permits that may involve federal jurisdiction or federally delegated programs, such as CZMA.

Automatic approval is a **"Fast track" policy** that sacrifices environmental protection solely for the expediency and economic interests of the development community. In addition to raising serious potential conflicts with federal and state requirements and federally delegated programs, t is poor public policy.

5. **7:13-2.3(a)1 Regulated Areas (this comment applies to several provisions throughout the rule)**

We understand that the Department intend to clarify the current loophole in the stormwater rules with respect to the  should clarify on adoption exactly how the proposed rules impact a flaw in the Department's interpretation of the applicability of the stormwater rules' field definition of "special water resource protection areas" and the proposed rules' definition of riparian areas.

As the Department is aware, maps and GIS data layers often do not accurately reflect actual field conditions or the actual presence of natural resources. The Department is required by law to protect and regulate the conditions, existing and designated uses of he waterbody, and the natural resources that actually exists in the field. Accordingly, the actual field condition supersedes any mapped or assumed condition.

Both the stormwater rules and the proposed stream encroachment rules should apply to intermittent or ephemeral headwater streams that exist in the field based on presence or evidence of discernable stream characteristics, but are not mapped on USGS or County Soil Survey maps. If regulated features, conditions or resources are shown to exist in the field, regardless of whether they are mapped, such intermittent or ephemeral headwater streams shall be regulated.

6. **The rules must provide for uniform protection of all Category One waters and tributaries - 7:13-4.1(c)2.i.  Riparian zone widths need to be 300 feet.**

The proposal explicitly applies to tributaries to "trout production" (TP) based "Category One" (C1) waters .It appears that the Department omitted the implicit applicability of the proposed rule to all "Category One" waters designated on the basis of other exceptional criteria. The Department should clarify on adoption that the rules shall apply to all tributaries to Category One waters designated on the basis of "exceptional water supply", "exceptional ecological", "exceptional recreational" and all other C1 designation criteria  pursuant to the Surface Water Quality Standards (NJAC 7:9B-1 et seq.). The clarification on adoption clearly should state that all C1 tributaries shall be regulated by the proposed rules and shall receive 300 foot riparian zone protections as a "buffer" under the Stream encroachment rules.

The Department may not provide differential protection to Category One waters. By regulating only the tributaries of TP based C1 waters, the Department would not be providing an equivalent protection of other designated exceptional C1 waters. This under-protects these important C1 waters and is

inconsistent with and in violation of applicable requirements. See analysis in point #4 below that supports this conclusion.

7. **The proposal is in violation of and fails to implement federally mandated State antidegradation policies and implementation procedures (40 CFR 131; NJAC 7:9B-1 et seq.)**

The following specifically outlines the regulatory basis for concluding that the environmental and water quality related provisions of the proposal, including the riparian buffers, must apply uniformly to all Category One waters. The following regulatory framework also provides a clear basis to modify on adoption other flawed provisions of the rule with respect to protections of Category Two waters, as further set forth in these comments.

The Department lacks authority under the Water Pollution Control Act and the applicable federal and state Surface Water Quality Standards and antidegradation policies, to provide differential and unequal protection to C1 waters. Such differential protections are not authorized and would impermissibly violate and conflict with applicable federal and state SWQS requirements.

Please follow the logic to reach this conclusion:

a) The environmental requirements of the proposed rules are promulgated pursuant to the authority of the NJ Water Pollution Control Act (WPCA). State adoption of the NJ WPCA was required to receive delegation of programs under the federal Clean Water Act. Additionally, federal Surface Water Quality Standards and antidegradation policies apply independently to the Department, to the waters of the state, and to the activities regulated by the proposed rules.

b) The NJ SWQS are promulgated pursuant to the WPCA, as required by the federal Clean Water Act and implementing regulations. The proposed rules may not violate protections established by the WPCA

c) The SWQS, established pursuant to the federal Clean Water Act and NJ WPCA, provide for uniform regulation and protection of all exceptional C1 waters (**40 CFR 131.12**; **NJAC 7:9B-1.5**). Because the proposed rules do not uniformly regulate C1 waters, or provide a rational basis and evidence to support this differential protection, adoption of the proposal would violate the SWQS and federal requirements and would be arbitrary, respectively.

d) The NJ "Surface Water Quality Standards" are mandated by the federal Clean Water Act and implementing regulations. The NJ SWQS include antidegradation policies, but do not include the federally mandated implementation procedures (see 40 CFR 131.12(a)). The buffer, water quality, and environmental provisions of the proposed rule constitute "*cost-effective and reasonable best management practices for nonpoint source control*", and therefore are the functional and legal equivalent to satisfy implementation procedures, analogous to the recently adopted stormwater management rules' "special water resource protection area" buffer.

e) Federal antidegradation rules require:

*Sec. 131.12 Antidegradation policy.*

*(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart.*

*The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:*
*(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.*
*(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.*
*(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.*
*(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.*

f) The SWQS "*apply to all surface waters of the state*" (**NJAC 7:9B-1.5(a)1**.). Accordingly, the SWQS apply to and protect all waters regulated by the proposal and to all activity regulated by the proposal. Actions of the Department that may impact water quality are subject to the SWQS, including proposal and adoption of the subject regulation. The proposal fails to state that the SWQS apply. The proposal also fails to state that the environmental and water quality related provisions of the rules legally and technically constitute antidegradation implementation procedures mandated by applicable federal and state SWQS.

The applicability of the federal and NJ SWQS must be clarified on adoption – we suggest the same approach and language below as adopted in the stormwater rules. The Department adopted the stormwater C1 buffers as generic BMP's designed to satisfy site specific antidegradation review requirements and implementation procedures for C1 waters. The same approach in these rules has the benefit of reserving the Department's authority to make case by case protective decisions to implement the antidegradation policies and enforce SWQS. **This also would be the basis upon which the Department could clarify on adoption that the proposed environmental and water quality requirements apply uniformly to all tributaries to C1 waters**:

*7:8-1.5 Relationship to other regulatory programs*

*(a) Nothing in this chapter shall be construed as preventing the Department or other agencies or entities from imposing additional or more stringent stormwater management*

*requirements necessary to implement the purposes of any enabling legislation including those measures necessary to achieve the Surface Water Quality Standards at N.J.A.C. 7:9B*.

g) The SWQS set forth governing antidegradation designations and antidegradation policies (**NJAC 7:9B-1.5.(d)**.) .

The antidegradation policies mandate that "*existing uses shall be maintained and protected*" for all waters (**NJAC 7:9B-1.5(d)2**.).

The proposal fails to mandate that activity regulated under the proposed rules shall comply with these requirements. The Department fails to demonstrate in the proposal that these requirements are attained. The proposal fails to require that permit applicants conduct scientifically valid studies that can demonstrate compliance with these requirements. Accordingly, the proposal is inconsistent with applicable SWQS.

h) The SWQS mandate that C1 waters "*shall be protected from any measurable change to existing water quality*" (**NJAC 7:9B-1.5(d)6.iii.**)

The antidegradation policy clearly applies uniformly to all C1 waters, regardless of the basis for designating those waters (i.e. trout production, water supply, exceptional ecological, fisheries, recreational values, etc.) In fact, the regulatory basis for designating waters that sustain naturally reproducing trout populations as C1 has its roots in the criteria in the definition of C1 to protect fisheries and ecological values (see definition of C1 @ **NJAC 7:9B-1.4**). The proposal does not regulate all C1 waters uniformly and is therefore in conflict with current regulatory requirements that all C1 waters be protected uniformly.

i) The SWQS mandate that C 2 waters "*shall be maintained to protect the existing/designated uses, as **determined by studies acceptable to the Department**, relating existing/designated uses to water quality. Where such studies are not available or are inconclusive, water quality shall be protected from changes that **might be detrimental** the attainment of the designated uses or maintenance of the existing uses. Water quality characteristics that are generally worse than the water quality criterion **shall be improved** to meet the water quality criteria*." (**NJAC 7:9B-1.5(d)6.iv. – emphasis added** )

The proposal does not mandate that "**studies acceptable to the Department relating existing/designated uses to water quality**" be conducted as required by applicable rules. Applicable federal rules The proposal must be modified on adoption to provide for these requirements and retain the Department's authority to require such studies.

The proposal does not mandate the existing and designated uses be protected from changes in water quality that "**might be detrimental**" – an extremely conservative and precautionary standard. The proposal must be modified on adoption to provide for these requirements and retain the Department's authority to require such protections. .

Despite these gaps, the proposal itself does reflect and is structured based on antidegradation policies. For example, Category Two (C2) and Category One (C1) waters are recognized and differential

regulatory requirements are established on the basis of the antidegradation designation. Accordingly, the proposed rule is in fact and law an implementation procedure for the antidegradation policy. The same rational was used by the Department as the basis for the just like the stormwater rules' special water resource protection areas" (@ **NJAC 7:8-5.5** - Stormwater runoff quality standards).

8. **The cost benefit test based hardship waiver is a huge loophole. That hardship waiver is inconsistent with, not authorized by, and therefore violates applicable federal and state requirements**

The Department must repeal the proposed hardship waiver provision related to cost benefit test. The proposed cost benefit test conflicts with federal Clean Water Act and NJ SWQS regulations which have no such hardship waiver. Not only do federal and state rules have no hardship waiver, such a waiver is inconsistent with those rules and would allow applicants to avoid compliance with water quality requirements solely on the basis of economic hardship.

As noted above, federal and state SWQS and antidegradation requirements apply for two basic reasons: a) first, the Department's own proposed rules are based on the antidegradation designations of streams, i.e. the proposed buffer widths and other technical requirements vary based solely on whether a stream is designated C1 or C2. Those stream designations are made pursuant to the authority and SWQS definitions. The text of the definitions are linked to implementation of the antidegradation policies. The SWQS and the policies are applicable directly as well. The Department may not selectively pick and choose to apply the designation of a stream for the purposes of stream encroachment permit requirements, without recognizing all the protections afforded that C1 or C2 designation; and b) second, the SWQS and antidegradation policies apply directly to all waters of the state, even in the absence of the proposed rule. Even if the proposal did not base stream encroachment permit and environmental and water quality protections on the antidegradation designations of a waterbody, those SWQS and policies would still apply to activities regulated by the stream encroachment rules. Equally, those SWQS and antidegradation policies apply to actions by the Department that may impact water quality, including proposal and adoption of regulations – so the Department's rulemaking activity is regulated by these SWQS rules.

According to USEPA SWQS Economic Guidance: (link: http://www.epa.gov/waterscience/econ/ )

"*Pursuant to the Water Quality Standards Regulation (40 CFR 131), States must define statewide water quality goals by: 1) designating water uses and 2) adopting water quality criteria that protect the designated uses. When designating uses, States must consider the use and value of the waterbody for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. The designated use may or may not coincide with the existing use, but it cannot reflect lower water quality than the existing use. As described in the* Water Quality Standards Handbook*, if the designated use of a water body is also an existing use, the designated use cannot be downgraded to one that requires less stringent water quality criteria. If, however, the designated use is not an existing use the States may, under certain circumstances, remove the designated use, create new subcategories of the use, or grant a water quality standard.*
*[clip]*

*States are also required to adopt an antidegradation policy to protect existing uses, high-quality waters, and water quality in waters that are considered to be outstanding national resources. The antidegradation policy allows States to lower water quality in higher-quality waters only if it is necessary to accommodate important economic or social development. The use of the term "important" communicates a general sense of the level of economic and social development. This provision is intended to permit degradation of high-quality water bodies in only a few extraordinary cases where the benefits of the economic or social development unquestionably outweigh the costs of lowering water quality. Under no circumstances, however, may water quality fall below that required to protect existing or designated uses.*"

The proposal fails to comply with these federal requirements. The proposed hardship waiver is inconsistent with these requirements. The hardship waiver would allow a lowering of water quality without any public demonstration of justification, as required by federal rules that require that:

"*The antidegradation policy allows States to lower water quality in higher-quality waters* ***only if it is necessary to accommodate important economic or social development****"*

The proposal does not require any public demonstration of justification for lowering water quality as necessary to accommodate important economic or social development. .

9. **Site specific map revisions prone to abuse**

The Department should delete on adoption the proposed opportunity for a site specific map revision process. Given the cost and complexity of this process, it is likely to work in one direction only: to relax instead of strengthen protections. It is not likely that public sector or public interest oriented groups would have the resources to propose map revisions that reflect current actual conditions and expand necessary protections. The only entities with the resources and economic incentives to accomplish this are likely to be those that seek an economic benefit in revising maps in order to reduce the scope of regulatory control and allow even more development in harms way.

10. **Map updates are required – current maps greatly under-estimate flood risks and allow inappropriate development to continue to occur**

Given the age of the current maps and the fact that land use/land cover changes have and hydrological factors have changed dramatically since the maps were adopted, in the adoption document, the Department should make specific commitments to secure resources to DEP Bureau of Floodplain Management to update existing floodplain delineations to reflect current hydrological and land use/land cover conditions and to adopt new flood plain maps where none currently exist.

11 **Threatened and endangered species are an "existing use" that must be protected from secondary & cumulative impacts**

Do the proposed T&E protections apply to secondary and cumulative impacts of the full project on T&E and their habitat? Do the rules apply to Natural Heritage Priority sites?

For example, if an application for a road crossing stream encroachment permit is reviewed, and the stream crossing itself does not disturb T&E habitat, but the upland development served by the road does, how would the rules protect T&E?

The presence of aquatic, aquatic dependent, or T&E plant or animal species or their habitat in the riparian zone - including rare plants and ecological communities recognized and mapped under the Natural Heritage Program - are existing uses that must be protected under the antidegradation policies.

12. **Project segmentation and "silo" review practices need to be addressed**

The proposal appears to allow and encourage flawed project segmentation and continue the Department's program by program piecemeal site characterization, regulatory review, and permit approval practices.

The Department needs to begin a move to site-wide integrated permit review practices. For example, the Highlands Act was a major step forward in mandating site wide resource characterization and consolidated DEP site side approval.

For example, under these rules, a developer could come in for stream encroachment permit approval for infrastructure and stream crossings, without disclosing the full upland project to be served by the infrastructure and road crossing the stream. The Department recently was embarrassed by this is a major project associated with the issuance of a stormwater permit for a road that would serve a massive controversial DOT and mall project.

Such segmentation practices completely frustrate meaningful public participation and DEP review of the totality of the impacts associated with a project, including site wide impacts, regional impacts, and secondary and cumulative impacts. Additionally, developers often use DEP permit approvals to whipsaw and leverage the land use review of local governments, for example by arguing that DEP has signed off on the development or that any local site plan modifications would force new DEP permit review and modification.

The Department needs to change approach – and an begin to do so starting with acknowledging the problem and pledging to make reforms in the adoption document of this rule.

13. **Time of decision approach flawed (NJAC 7:13-1.3 (c))**

In the adoption document, the Department should make a statement of intent to propose new rules, within 6 months, to revise current time of decision policy so that any changes in rules or standards apply to projects in all phases of the review pipeline prior to final permit issuance.

**14. Delegation to counties is flawed approach (7:13-1.4)**

Delegation to counties should be discouraged. Counties lack the professional staff resources and expertise, institutional capability, and incentives to appropriately manage protections that are obligations of the Department. Counties are inordinately influenced by political considerations.

15**. Inconsistent buffers – proposed 50 foot buffer would weaken current protections**

**7:13-4(c)3**. The proposed riparian zone of 50 feet along C2 waters is inconsistent with the Department's technical guidance, review practices, and model riparian buffer ordinance as currently implemented under the Water Quality Management Rules (**NJAC 7:15-1 et seq**.) and EO 109. Under WQMP policy, guidance and review practices, the riparian zone is 75'. The Flood Hazard Area Rules should be consistent and require, at a minimum, 75-150 feet' instead of the proposed 50' riparian zones.

16. Legal and technical basis for Passaic Basin trading and "net fill" trading approach

Please identify and provide the specific legal basis and statutory provisions that the Department believes authorize the Passaic Basin fill credit trading program. We question whether this program has any statutory authorization and is *ultra vires*.

It appears that the "net fill" approach established under the proposal in essence establishes a fill credit and trading program. Please identify and provide the statutory authorization for this program.

17. In the adoption document, the Department should explain the differences and regulatory implications between a "buffer" (i.e. as required by the freshwater wetlands, CAFRA, and stormwater rules) and the proposed "riparian zone".

It appears that the concept of a protective "buffer" is inconsistent with the proposed "riparian zone" concept. Basically, a "buffer" has key characteristics, it: a) separates regulated activity from the resource; b) does not allow encroachment or disturbance; and c) is designed to protect the resource. However, the proposed "riparian zone"; a) does not separate the resource to be protected from the regulated activity; b) explicitly allows significant encroachment, disturbance, and development; and c) is not specifically designed to protect the resource.

Based on these characteristics, it is a misnomer to equate the proposed "riparian zones" with buffer protections, as some have done. The Department should clarify any confusion along these lines in the adoption document.

We appreciate the Department's timely and favorable consideration of these comments.

Sincerely,

Bill Wolfe, Director
NJ PEER