

FRIENDS OF HOLLAND HIGHLANDS

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April 23, 2008

Mr. Lawrence J. Baier
Director, Division of Watershed Management
Department of Environmental Protection
P.O. Box 418
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RE: Proposed Amendment to Upper Delaware Water Quality Management Plan for Adoption of Holland Township Wastewater Management Plan

Mr. Baier:

Our local environmental group, composed of citizens of Holland Township, has followed the issues associated with our Township's Wastewater Management Plan (WMP) closely for the past two years. We would like to offer comments on both the content of the plan as well as the process at the DEP.

Our group enthusiastically supports the section of the WMP (pages 36-42) that recommends determining lot size in the unsewered portions of Holland not by groundwater recharge but rather by nitrate dilution. We applaud the conclusion on page 42 that "the minimum recommended lot size is controlled by nitrate-dilution modeling and not by aquifer recharge/carrying capacity for domestic water supply." We agree that using nitrate-dilution modeling to meet the desired target groundwater quality standards employs the most up-to-date scientific standards and properly focuses on water quality, not just quantity.

We wholeheartedly approve the conservative assumptions suggested in the WMP. Because 20% of the residents in Holland Township live in households with four or more people, we agree that an assumption of four persons per household is the safest way to go. And with Holland criss-crossed by Category One (C-1) streams, we agree that the nitrate dilution "target value should be based upon a policy of non-degradation of local surface and subsurface waters."

With the appropriately conservative assumptions of four persons per household and a target value for nitrate dilution of 1.0 mg/l, the minimum lot sizes would be 11.8 to 14.2 acres. Thus, the WMP provides scientific support for larger-lot zoning in Holland, a move that was promised nearly seven years ago when

Holland's Master Plan was adopted in May 2001. We hope that the Township will use the WMP as a foundation to move to larger-lot zoning as soon as possible.

In contrast to the WMP sections about septic systems, our group has many problems with the sections on the Sewer Service Area, and we see many elements that need correction and clarification. Our comments are grouped within three categories: Huntington Knolls; Galloway Farm; and the Suite of Ordinances.

HUNTINGTON KNOLLS (Block 24, Lots 3 and 13)

The DEP's treatment of the Huntington Knolls project has been one of the most mystifying and disappointing aspects of the WMP process. When the DEP first offered comments on Holland's draft submission in an October 3, 2006 letter from Terry Pilawski to Gerald Philkill, Holland Township Engineer (*Attachment 1*), the Department found not a single problem with extending sewer service to Huntington Knolls.

Yet only 14 months later, when the Highlands Council staff reviewed the project for consistency with the draft Highlands Regional Master Plan (RMP), they determined,

"The site contains numerous sensitive environmental resources including steep slopes, Highlands Open Waters Protection Areas, Riparian Areas, Critical Habitats, Forests, Prime Ground Water Recharge Areas, Wellhead Protection Areas, and Agricultural Resources. These areas should be excluded from the sewer service area and development activities should avoid these areas." (*December 2, 2007 Highlands Council staff memorandum*)

The Council staff even admonished the DEP for not using Landscape Project data version 3 that identified habitat for the state-threatened Cooper's Hawk. This failure to use the latest data that comes from the DEP's own Landscape Project certainly undermines the public's faith in the WMP approval process, as does the stark contrast between the DEP's judgment that there were no problems with extending sewer service and the Highlands Council's identification of a host of problems, leading the Council to recommend denial of a sewer extension to this property.

A March 25, 2008 letter that you, Mr. Baier, wrote to the developer of Huntington Knolls, Vincent Jiovino (*Attachment 2*), further undermines faith in the DEP's process because it indicates you are already considering "work-arounds" for the Highlands Council's objections and recommendation to deny the sewer extension. For example, you admit, "Conflicts with the Highlands Open Water

buffers are significant." However, you take refuge in the fact that the DEP already issued a stream encroachment permit for this project.

Four permits were issued on November 16, 2004 (*Attachment 3*), after the Stormwater Regulations went into effect in February 2004, but before Commissioner Jackson on January 2, 2007, issued Administrative Order No. 2007-01, which provided clear guidance for the requirements of a Functional Value Analysis. In the period from February 2004 until January 2007, during which the permits for Huntington Knolls were issued, the department appears to have automatically and unjustifiably allowed intrusions into the 300-foot buffer when there had been any prior disturbance.

A member of our group spoke on the phone to the DEP engineer who reduced the buffer on the C-1 stream on the Huntington Knolls property to 150 feet, and he said that he relied only on an aerial photograph that showed that the fields adjacent to the C-1 stream had been mowed. On that basis, he allowed half of the proposed 44 apartments in phase 1 of Huntington Knolls to be built in the outer 150 feet of the Special Water Resources Protection Area (SWRPA).

The 2004 Stormwater Regulations in effect when this judgment was made clearly require that a Functional Value Analysis (FVA) had to be submitted to demonstrate that placing apartments within the SWRPA would be no more degrading of the stream than mowing the fields. N.J.A.C 7:8 5.5 (h) 1 ii says:

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. (*Emphasis added*)

It is clear that the DEP was mandated to demand a Functional Value Analysis from February 2004 onward, even in the absence of the clear guidelines for its staff issued in January 2007. Mr. Jiovino should have been required to demonstrate that putting apartments within the outer 150 feet was no more degrading to the water quality than mowing next to the stream, surely a hard case to make.

Something even more egregious appears to have occurred. The permit document (*Attachment 3*) says, "Under this permit, the transition areas shall be reduced by 3,207 square feet and compensated by 3,207 square feet in order to

construct the residential structures." Yet N.J.A.C 7:8 5.5 (h) 1 ii mandates, "In no case shall the remaining special water resource protection area be reduced to less than 150 feet . . ."

So in addition to failing to require an FVA from the developer, the Department appears to have allowed construction of the residential structures within the inner 150 feet of the SWRPA, in clear violation of the administrative code.

It saddens our group to see that the Department remains unwilling to revisit this flawed decision from November 2004, despite the Highlands Council's insistence that the 300-foot buffer be respected. The March 25 letter to Mr. Jiovino says, "Thus a reevaluation by the Department under this same set of regulations having a different outcome would be unfair."

Unfair to whom? Apparently, unfair to the builder. What about unfair to the water users of New Jersey, who rightfully expect that "Category One waters are to be protected from measurable changes in water quality" (N.J.A.C. 7:9B-1 et seq.)? What about unfair to all the citizens of New Jersey who expect the Department to follow its own regulations and protect the quality of our purest streams?

It seems certain that a "reevaluation by the department" which this time around actually follows "this same set of regulations" would have a different outcome, restoring the full SWRPA and certainly not allowing the apparent intrusion into the inner 150 feet. We ask the DEP to rigorously adhere to the Department's own regulations, to respect the Highlands Council's guidance, to enforce the Highlands Open Waters Protection Areas and the riparian area of C-1 Spring Mills Brook, and to deny Holland's WMP until Huntington Knolls is redesigned.

Similarly, the March 25 letter to Mr. Jiovino looks for ways to get around the Highlands Council's insistence that only 20% of the Huntington Knolls site in the Conservation Zone should be developed, with the remaining 80% dedicated for agriculture and environmental protection purposes. The current development plan misses this goal by a mile:

"Clustering to 20% of the total site area (87 acres) would be 17.4 acres of developed area. The proposed site plan indicates the development footprint is approximately 30-35 acres (34-40% of the site). The proposed site plan indicates a dedication of approximately 32 acres (36.4%) of the site to open space." (*January 12, 2008 Highlands Council staff memorandum*)

The letter proposes that the WMP "affords an opportunity to counterbalance the Conservation Zone inconsistencies on this site with additional protection measures in other parts of Holland Township, which can meet with Highlands Council approval." That statement is so vague that it's impossible for our group to comment on this new suggestion for "improving" the WMP. This statement

implies that the DEP is contemplating further changes to the WMP, working in concert with the Highlands Council, so the WMP upon which we are commenting is a work in progress. We trust that the public will have an opportunity to comment on the contemplated "counterbalance" measures in a revised WMP at some future date.

It appears that the DEP is so anxious to make changes to the WMP to accommodate the present design of Huntington Knolls (rather than requiring the builder to be consistent with the RMP) because "this is an inclusionary affordable housing development" (according to the March 25 letter to Mr. Jiovino). This is the same reasoning used to justify backing off on protecting critical habitat on the Galloway Farm (Block 6, Lot 61) site.

To be clear, the affordable housing proposed for Huntington Knolls and Galloway Farm is not part of any builder's remedy action nor are the courts in any way involved. Only four units proposed for Huntington Knolls are even part of any COAH-certified plan.

We are disappointed that the DEP is so willing to subvert its primary mission to protect the environment in order to accomplish the mission of another state agency, the Council on Affordable Housing. The Department seems to have forgotten the admonition of the N.J. Supreme Court in its 1983 Mount Laurel decision when the Court said that it "intend[ed] nothing in this opinion to result in environmentally harmful consequences." In a complete perversion of the Court's intent, today the DEP stands ready to sacrifice critical habitat, to degrade a C-1 stream, and to abandon the preservation of high-quality farmland the moment anyone utters the magical incantation "inclusionary affordable housing development."

The sad truth is that the affordable elements of the Huntington Knolls development were designed long before the new Round 3 COAH rules were formulated, so the project will provide at most only 10 affordable units out of a potential 158 residential units plus retail and office space. Thus, Huntington Knolls will create far more future affordable housing obligations than it satisfies. From the point of view of the township's budget, it would be better for the citizens of Holland if the project were drastically scaled back or not built at all – which is exactly what should happen if the DEP were to respect the Highlands Council's recommendation instead of concocting "work-arounds" with the developer.

GALLOWAY FARM (Block 6, Lot 61)

It appears to our group that the Department's treatment of the Galloway Farm project has been a disheartening and lamentable process of backing off from doing the right thing.

The Department first commented on Holland's February 2006 draft WMP in a letter dated October 3, 2006 (*Attachment 1*). In strict adherence to DEP rules, Number 15 in that letter said, "Please remove all Threatened and Endangered Species Habitat Landscape Project Ranked 3, 4 and 5 and the Natural Heritage Priority Site Habitat from the proposed Sewer Service Area (SSA)."

Following that instruction would have meant disallowing the extension of sewer service to the back portion of the Galloway Farm property because that part of the lot is mapped for Rank 3 critical habitat for bobolink and wood turtles. Township officials began a lobbying campaign on behalf of this private development to convince the DEP that the property was improperly ranked. This included submission of a January 24, 2007 Habitat Assessment prepared by David Grossmueller of the Holland Township Environmental Commission that attempted to demonstrate that the Galloway lot did not contain suitable habitat for the two species. On February 19, 2007, our group submitted a letter to DEP that pointed out misrepresentations and omissions in that Habitat Assessment.

While there were subsequent non-public meetings, phone calls and email exchanges going on in the background (some of which we have obtained through OPRA requests), the next step open to public scrutiny was a letter dated May 29, 2007 from Terry Pilawski to Gerald Philkill, Holland Township Engineer (*Attachment 4*). That letter said that the Galloway Farm site "is not suitable habitat for Bobolinks; however, the Department is unable to disregard the site's suitability for wood turtle habitat."

Rather than again ordering the site removed from the SSA, the letter began a process of back-peddling that has continued until the present time. A sewer extension would be allowed if the loss of wood turtle habitat were mitigated by preservation of developable land to the west that is also mapped as wood turtle habitat. The same May 29, 2007 letter also ordered adoption of five ordinances "intended to provide sufficient protections to the Township's natural resources in order to offset the impact to those resources within the Township's proposed sewer service areas." (We have to wonder if those already-mandated ordinances will now do extra duty and "counterbalance" the failure to preserve 80% of the Huntington Knolls property.)

In the months following that May 29, 2007 letter, the DEP's process became increasingly frustrating and disconcerting. We entered a period characterized by a lack of transparency. In early summer, we heard that Holland officials were proposing township-owned land that was already preserved with Green Acres funding as the mitigation property. We worked with the Highlands Coalition to send a letter on July 12, 2007, pointing out that such a move would not be permissible under the Green Acres rules at N.J.A.C. 7:36-25.2(c).

By September, we began to hear at meetings of the Holland Township Planning Board and the Holland Township Committee that the DEP had backed off the

mitigation requirement entirely. Various environmental groups made inquiries at the DEP, but never got a straight answer. Finally, on October 31, 2007, letters were sent by you, Mr. Baier, to both our group and Ken Grisewood, an abutter to the Galloway Farm development who had also communicated with the Department (*Attachment 5*). Those letters revealed that despite the judgment in the May 29, 2007 letter that the Galloway Farm property contained suitable habitat for wood turtles, the Department had now determined that "the habitat value of this site was only marginally suitable for the identified species." The letters also said that since it is the developer who causes harm to the environment, the developer should be responsible for mitigation, not the taxpayers of Holland Township.

So within a year, we had back-slid from "take the property out of the SSA" in October 2006, to "it's OK to extend sewer into critical habitat, but the township has to mitigate" in May 2007, to "it's not such critical habitat after all, and the developer will have to mitigate through some unspecified future means" in October 2007.

Our group is one of the grassroots members of the New Jersey Highlands Coalition, and I sit on the Board of Trustees of that organization, so we had kept the Coalition informed of these matters. They saw this latest development as setting a precedent for the Department to start declaring critical habitat across the state as "only marginally suitable," and doing so with no apparent guidelines or transparency to the public. On November 14, 2007, the Rutgers Environmental Law Clinic (RELC) wrote a letter to the DEP on behalf of the Coalition, New Jersey Audubon Society and New Jersey Conservation Foundation (*Attachment 6*).

That letter made several critical and fundamental points that we reiterate here:

- The Department has provided no scientific basis for the conclusion that the property has only "marginally suitable" habitat and failed to identify what review occurred that resulted in the change.
- Neither the Fair Housing Act nor any other State law authorizes the DEP to balance its obligation to protect threatened and endangered species against the Constitutional obligation to provide affordable housing.
- Even if the DEP had that authority, it could not simply accept Holland's word that the Galloway Farm development is necessary but would have to determine whether any less environmentally intrusive alternative exists.
- The suite of municipal ordinances ordered should not be viewed as an "offset" to the loss of critical habitat at Galloway Farm; rather, they are part of ordinary sound planning and water quality protection.

On December 11, 2007, you, Mr. Baier, replied to the November 14 letter from RELC, offering the latest information on this matter (*Attachment 7*). There are several aspects of that letter that require some discussion.

In the first paragraph, the letter offers further information on why the property was determined "not to be of critical importance" as wood turtle habitat. One of the reasons offered is that including this land in the SSA "does not appear to result in any habitat fragmentation based on available information, as there exists an adjacent connectivity of habitat."

On this topic, we must point out that Map #1a in the WMP entitled "Parcel Map & USGS Map" (*Attachment 8*), is flawed because it has a strange omission that could influence any judgment about how much undisturbed wood turtle habitat lies near the Galloway Farm property. This map purports to show all lot lines, but a property on the west side of Route 519 (Block 10, Lot 44) that lies diagonally across from the Galloway Farm and directly across from Block 6, Lots 61.01 and 61.02 and the Holland School is shown as apparently undeveloped, with no lot lines. The reality is that this lot was subdivided into seven lots back in 2002 by the same developer who intends to build on Galloway Farm.

The Holland Township Natural Resources Inventory dated March 2007 shows in Figure 7e entitled "Landscape Project – Bald Eagle Foraging Habitat & Wood Turtle Habitat" (*Attachment 9*) that Block 10, Lot 44 is wood turtle habitat. And that same map also correctly shows the seven lots into which the property was subdivided back in 2002. Houses have been built on all those lots.

Map #1a in the WMP must be corrected to show this subdivision. The omission of the lot lines on this property is a matter of serious consequence. The DEP should revisit its judgment that there is sufficient other undisturbed wood turtle habitat in the vicinity of Galloway Farm, because this lot is not undisturbed habitat but instead contains seven homes. The destruction of habitat on Galloway Farm would be cumulative to the destruction already inflicted by the same developer across the street.

The second paragraph of the December 11 letter repeats the assertion that mitigation will be the responsibility of the developer "under a regulatory program with authority over that activity." We would like to know more details. Is the DEP saying that when the developer eventually applies for any permits needed to develop the planned 12 apartments on Galloway Farm, he will be required to purchase land to mitigate the loss of critical habitat? What specific permits would trigger such an obligation? Would the same requirements apply as set forth in the DEP's May 29, 2007 letter (*Attachment 4*): contiguous to the stream on the west of Route 519; developable land within the primary wood turtle habitat; at least twice the size of the subject property? The public deserves to see clear rules for how this newly-proposed mitigation by the developer would actually be enforced.

The final paragraph of this December 11 letter gets into a topic that will be the last major comment section of this letter.

THE SUITE OF ORDINANCES

We agree with RELC that adoption of these ordinances should simply be viewed as good government, not something to be rewarded by allowing destruction of critical habitat. Another municipality with a greater sense of environmental responsibility might have already adopted a Riparian Conservation ordinance or a Cluster ordinance. They would not be able to use the promise of ordinances as a bargaining chip. In essence, Holland is being rewarded because they lack forward-thinking environmental ordinances.

The whole matter of these ordinances is another example of the lack of transparency in the WMP process. The DEP's May 29, 2007 letter (*Attachment 4*) called for five ordinances. But Mr. Baier's October 31, 2007 letter to Ken Grisewood (*Attachment 5*) mentions only four, and because he uses different titles, it may be that one May ordinance (Environmental Assessment ordinance and Environmental Assessment Checklist) has been split into two by Mr. Baier. It is clear that missing from Mr. Baier's October list is a much-needed Wellhead Protection ordinance and the Water Conservation ordinance, both listed in the May 29, 2007 letter.

More disturbing, the final paragraph of the December 11 letter says, "As evidenced by Holland Township's adoption of these ordinances, Holland Township has been willing to do what is required for sound land use and water quality planning." That sounds like Mr. Baier is under the impression that the suite of ordinances (whatever their number) have already been adopted. They have not.

Only the Environmental Impact Assessment ordinance has been adopted, and even that has now proven to have flaws and will have to be amended. The other required ordinances had a first reading, but have not been adopted. In fact, I inquired at the February 19, 2007 Township Committee meeting about the status of the remaining ordinances. Township Attorney Richard Dieterly said that he had sent revised drafts back to the DEP, but had heard nothing back. In short, the Township is representing to the public that the ball is in the DEP's court.

I have to assume that the rules set forth in the DEP May 29, 2007 letter (*Attachment 4*) still apply. That letter said that the DEP may proceed to public notice of Holland's WMP and tonight's hearing if the Township shows a commitment to adopting the ordinances by doing a first reading. That was done. But the letter says, "Ordinances required for adoption by Holland Township prior to adoption of the Wastewater Management Plan are listed below." That seems

to say the WMP cannot be adopted until the ordinances are adopted. All of the ordinances have not been adopted. Therefore, the WMP cannot be adopted.

Because different lists of ordinances have been put forth, the public deserves some clarity on what ordinances are required. As well, the Department needs an accurate understanding of what has actually been adopted, and to make clear to the Township that this is a requirement for adoption of the WMP.

These comments have been longer than I would like to write or you would like to read. However, this is a complex and consequential matter that does not lend itself to brevity. I trust that the Department will give serious consideration to the objections we have raised. And I hope that the several matters on which we have requested clarification will be addressed so that the public can have the answers they deserve about Holland's Wastewater Management Plan.

Sincerely,

Michael Keady
President

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Attachments (9)