



## Hackensack RIVERKEEPER<sup>®</sup>, Inc.

**Captain Bill Sheehan**  
Riverkeeper & Executive Director  
231 Main Street  
Hackensack, NJ 07601

Phone: 201-968-0808  
Fax: 201-968-0336  
info@HackensackRiverkeeper.org  
www.HackensackRiverkeeper.org

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March 3, 2010

Governor Christopher J. Christie  
Office of the Governor  
PO Box 001  
Trenton, NJ 08625-0001

**RE:** Department of Environmental Protection Transition  
Subcommittee Final Report

Dear Governor Christie,

We write you to convey our impressions of the Final Report of the Department of Environmental Protection Transition Subcommittee, issued on January 15, 2010. We read the report with significant trepidation. We feel that the recommendations contained in the report are, on balance, misguided and destructive; their effect, if not their intent, will be to make the DEP significantly less effective and make New Jersey's environment significantly worse.

I submit these comments on behalf of Hackensack Riverkeeper. Hackensack Riverkeeper is a 501 (c) (3) nonprofit group dedicated to protecting, preserving and restoring the Hackensack River Watershed. Since 1997, we have used all the tools at our disposal to fight for New Jersey, its citizens and its natural environment; acting as a stand-in for the New Jersey Department of Environmental Protection (DEP) when it failed to prioritize

environmental protection. Convincing the DEP to do its job in a consistent, conscientious and professional way is a core goal for Hackensack Riverkeeper as we work to achieve our mission. New Jersey requires a DEP that is an active partner and deserves a DEP that is a leader in environmental protection.

### **DEP's Mission**

A foundational problem for both the DEP and the Transition Subcommittee is a lack of clarity as to the DEP's mission. The Subcommittee has misinterpreted the DEP's mission and consequently misconstrued how the DEP could improve its practices. In fact, it is something of a mystery as to just what, specifically, the DEP's mission is. The DEP website contains a vision statement that lacks any apparent statutory or regulatory source:

We preserve the ecological integrity of the Garden State and maintain and transform places into healthy, sustainable communities.

Another choice is contained in NJSA 13:1D-9, which describes the DEP's powers:

Formulate comprehensive policies for the conservation of the natural resources of the state, the promotion of environmental protection and the prevention of pollution of the environment of the state.

The Subcommittee suggests its own mission statement, though perhaps suggests is the wrong word. The Subcommittee declares a mission statement, one apparently torn from whole cloth:

Protecting our State's vital natural resources while taking into consideration economic vitality.

Either of the DEP website or the NJSA missions, if consistently and conscientiously applied, would clarify the DEP's agenda and allow it to move forward. It is hard to accomplish your

mission if you do not know what your mission is. The Transition Subcommittee, however clearly and perhaps willfully misapprehends the DEP's mission. If there is a basis for appending "while taking into consideration economic vitality" to the DEP mission, we are unaware of it. The Transition Subcommittee, largely devoid of environmental and scientific expertise, cannot recreate or change the mission a major agency of New Jersey's state government.

The idea, however, that the DEP's mission is to encourage economic vitality permeates the remainder of the report. The foundational mission of the Department of Environmental Protection is to *protect the environment*. That the Subcommittee points to no authority in support of their proposed mission statement should give the governor's office significant pause as it considers the remainder of the Subcommittee's recommendations.

### **Economic Cost/Benefit of Environmental Regulation**

The policy judgment of whether the benefits of environmental regulation justify the costs of environmental regulation is generally one made by the legislature. The idea that the Transition Subcommittee could unilaterally re-argue that policy judgment is anti-democratic. The DEP must enforce the law – giving it the Sisyphean task of judging each enforcement action and regulation against purported economic harm is procedurally impossible, economically indefensible and constitutionally problematic.

Considering the economic impacts of environmental regulation is a fraught process. Even the best economists struggle to quantify environmental benefits in dollar terms; their best efforts, with the benefit of hindsight tend to underappreciate environmental value at the time of

quantification tragically and repeatedly. Economists struggle with correctly finding and valuing the external impacts of economic transactions, discount rates and contingent values for natural resources; most ecosystem services are not captured in market transactions and are thus of indeterminate value. There is simply no economically viable way for the DEP to say, for example, that 15 shopping malls are of equal value to New Jersey as a self-sustaining osprey population.

Cost benefit analyses of environmental regulation, when attempted, are invariably wrong, invariably non-confirmable and invariably minimize the benefit while maximizing the cost. Including such cost benefits in the regulatory process is an important decision for any statute, and legislatures are well aware of the importance of deciding on whether an act will impel or forbid such a process. Inappropriately applying cost benefit analyses is a common and fatal mistake many levels of government make; one that often puts them on the wrong end of an environmental lawsuit.

We take exception to the subcommittee's suggestion that the DEP "do less with less." This sentiment may make sense if one believes that the primary purpose of the DEP is to create red tape, but in a state with as much legacy pollution as New Jersey, the DEP can and must do *more*. The amount of hazardous pollution in the state's land and water is unacceptable. If we come to understand the DEP as something other than a permit factory, it becomes easy to see that the Department has done *far* too little, not too much.

The statement "the DEP has created new programs and regulatory requirements that provide little to no environmental benefit, but drastically add to the responsibilities of an already

overburdened staff” requires specific annotation. We do not trust the Transition Subcommittee’s judgment to determine between programs and requirements that provide significant environmental benefit and those that do not.

We object to creating an Office of Economic Analysis for the reasons specified above. To the extent that “the DEP has consistently failed to accurately estimate the economic impact that their rules have had on both the regulated community and the economy of our state,” that failure likely occurred for two reasons: the DEP is not empowered to make such estimations; and that such estimations are beyond the power of economists to make reliably. We likewise oppose all three recommendations listed on page 10 under “Economic Impact” as each would *add* significantly to red tape, and none would effectively improve the Commissioner’s ability to make sound decisions.

Requiring the DEP to make economic calculations is procedurally burdensome, intellectually misguided, unsupported by the DEP’s directives and powers and usurps the legislature’s constitutional role to legislate.

### **Uniform Environmental Protection**

Foundational to fair government, made mandatory to New Jersey by the 14<sup>th</sup> Amendment<sup>1</sup>, is the equal protection of citizens under the law. Yet the Transition Subcommittee makes the following recommendation:

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<sup>1</sup> “... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

“The DEP cannot have a ‘one size fits all’ regulatory structure that treats both urban and rural New Jersey’s environmental baselines the same. Some areas of our State may be irreversibly degraded while others may be impaired at a level that is largely recoverable. These resources should be managed differently and not necessarily held to one universal standard.”

This recommendation is legally indefensible, as the federal Clean Water Act does not allow a state to decide that some waters are not worth cleaning to statutory standards, some air should remain unhealthy and some soil should stay hazardous.

More so, it is morally indefensible. The people who live in the purportedly “irreversibly degraded” areas are mostly poor and largely minority. We hope that the governor’s office finds the idea that the DEP can and should leave poor minority communities to suffer the health effects of New Jersey’s industrial legacy as repugnant as we do. A state government cannot simply give up on the health and welfare of any of its residents. Shame on the Transition Subcommittee for suggesting – or even hinting – otherwise.

As the premier environmental group protecting one of the most urbanized estuaries in the world, we strongly and resolutely oppose the Subcommittee’s suggestion to “reexamine buffer requirements in urban/disturbed areas.” We again fail to see why the Subcommittee thinks that poor, urban and minority New Jerseyans deserve a lower quality of life and less environmental protection than those who can afford to live in the regions of the state that the Subcommittee believes worthy of protection. The areas of New Jersey that have suffered disproportionate damages from our industrial legacy deserve *more* protection and *more* remediation, not less.

**Department of Permits**

From the standpoint of a developer, it may seem that the central role of the DEP is to issue permits for development. The Transition Subcommittee suggests, “The state must create an office that provides a single point of entry with an accountable person to shepherd companies pursuing complex projects through the regulatory process.” This suggestion, and the corresponding attitude of our straw-man developer, is fundamentally incorrect. The DEP’s role is not to “shepherd companies... through the regulatory process,” as it is not a permit mill; the DEP’s role is to protect New Jersey’s natural environment.

The DEP’s role, all too often, is to stand against “complex projects” if their impacts unacceptably or illegally affect New Jersey’s health, habitats or natural resources. Further, the idea that there would be a single accountable person for each permit application seems very burdensome for a Department the Subcommittee expects to do “less with less.”

The Transition Subcommittee hopes the DEP will increase its permit output further by expanding Permits-by-Rule and General Permits. Permits-by-Rule and General Permits, as they currently exist, strain legality under federal law. Expanding these programs would place the state in legal jeopardy and allow significant erosion in environmental quality. The state should refine and improve existing Permit-by-Rule and General Permit policies to be sure that the requirements are sufficient to protect environmental quality; that they are only used in cases where applicants are genuinely similarly situated and genuinely cause little to no environmental harm when adhering to the terms of their mass-market permits.

The Transition Subcommittee's recommendation to "Create a Single Land Use Permit that would encompass a multitude of cross-program standards" is a confusing and perhaps dangerous proposition.

If the Subcommittee is suggesting that an applicant should require but one comprehensive approval from the DEP rather than seeking a multitude of permits as is now sometimes required, then the suggestion is merely misguided. We support a simplification of the permit process, but many approvals for complicated projects are beyond the DEP's power to provide. A marine development, for example, will still need approvals from the Army Corps of Engineers, the United States EPA, the Coast Guard and many other federal entities.

If the Subcommittee is suggesting that all land use proposals use a single uniform application form, then the suggestion is dangerous. As the Subcommittee notes, New Jersey's environmental baseline varies wildly, and the DEP must consider each land use decision individually to properly balance impact and utility against legal requirements. We suspect that the Subcommittee has not thought out this proposal very well and we suggest that the Governor take careful heed of the complexities that the Subcommittee elides.

We agree with the subcommittee, however, that streamlined state permitting for renewable energy and green building projects, assuming that the energy is actually renewable and the building actually green. We note, as we did *supra*, that DEP approval is likely to be only a small part of the administrative hurdles for such projects.

We also agree that moving as much of the permitting process as possible online would benefit all parties; as would increasing transparency in the permitting process.

### **DEP Leadership**

We agree with the Transition Subcommittee that the DEP would benefit from better management and leadership. A leader must lead an organization *to* something. The DEP seems to lack direction and perhaps too often shares the Subcommittee's view of itself as a permit factory. We strongly agree that the "Department needs to establish clear environmental goals and policies and focus on its core mission, absent of politics." While increased user-friendliness is a laudable goal and the maximum of online permitting and archiving should be encouraged, we stand strongly opposed to increased use of General Permits and Permits by Rule. One-size-fits-all solutions are not solutions at all, and deprive New Jerseyans of the effective environmental protection they deserve.

### **Environmental Enforcement**

Enforcement of environmental statutes and regulation, civilly and criminally, should make up a larger portion of the DEP's workload. The subcommittee seems to believe that the DEP should reign in civil enforcement while the Department of Justice should expand criminal enforcement. With due respect to the yeoman's work performed by the Environmental Crimes Bureau, civil violations cause far more damage to the environment than criminal violations. The Subcommittee suggests, however, that the DEP "evaluate pending litigation where the purpose and benefits of the litigation are not readily apparent." The state, if it is legitimate, has a

continuing and inalienable duty to enforce the law. We believe that continuing and inalienable duty is a sufficient purpose, and the rule of law a sufficient benefit, to support litigation that enforces the laws of the State of New Jersey.

We do strongly agree that the Environmental Crimes Bureau at the Division of Criminal Justice should be allotted additional staff to “rigorously pursue those who purposely flout the law and whose actions result in actual or potential environmental harm.” We note, however, that the Attorney General cannot replace a functioning DEP. The two must work in concert.

### **Rulemaking and Administrative Process**

The Transition Subcommittee offers a wealth of suggestions on different aspects of DEP procedure. These suggestions, like the rest of the Transition Report, are marked by fragmentary, internally inconsistent suggestions aimed at straw men.

The Transition Subcommittee seeks to wage a battle on the use of agency guidelines. While the issue has been contentious, we believe that the New Jersey Courts have already amply developed the law dividing guidance documents from regulations. To the extent that the Transition Subcommittee finds that line to be “improper” or illegal, it is because it has a different interpretation of the law than do the Courts. We believe that in a contest between the Subcommittee and the New Jersey Courts on what is legal, the Courts must prevail.

The Subcommittee is dedicated to removing red tape, yet they propose that

“for every rule proposal, (the governor should) require a comprehensive discussion and peer review of the science the DEP considered in support of each element of the

proposal, and for every rule adoption, the science relied upon by those commenting to support different policy choices, and any agreement, disagreement and uncertainty regarding the science.”

This, to us, sounds like a red tape bonanza. If such a recommendation were adopted, would the DEP ever accomplish anything again?

The idea that DEP enforcement and permitting staff should periodically shift roles is interesting, but we fear that its costs may outweigh its benefits because of decreased efficiency and disruption at the Department. On balance, we believe that this proposal is unnecessarily disruptive and that the DEP, through training, could accomplish its benefits in a less dramatic process.

The Subcommittee’s proposal that the DEP research the feasibility of a “self-sustaining Department of Natural Resources” is a bad idea. If the Department’s revenue stream is based on issuing permits, the Department will issue permits. We stress again, as we have stressed often *supra*, that the Department must be a Department of *Environmental Protection*, it cannot and must not be allowed to be a Department of *Environmental Permitting*.

The Subcommittee’s recommendation that the DEP contain a “business ombudsman to overcome existing regulatory hurdles” is interesting. Better would be an environmental ombudsman to fight for environmental protection when developers seek variances or otherwise to avoid environmental regulation designed to protect the public health and welfare.

Perhaps the worst recommendation in the Subcommittee report is to “allow qualified environmental consultants ... to oversee cleanups at contaminated sites without the need for DEP

approvals at every step of the way.” Would the state allow criminal suspects to hire their own judges? If convicted, could they pay for their own wardens? The proposal only makes sense if one views the central role of the DEP as to enable development regardless of environmental impact. The conflict of interest for an environmental consultant hired by a polluter to oversee the polluter’s remediation is so great as to make a mockery of the concept of a Department of Environmental Protection. It is directly analogous to allowing a defense attorney to sentence and monitor punishment for a defendant. In the context of a hazardous remediation, the DEP stands as an advocate for the people of New Jersey. The State cannot replace that role with a contractor whose salary the responsible company pays.

### **Adjudication**

The Subcommittee has a much higher opinion of alternative dispute resolution than is warranted. We object to common use of alternative dispute resolution, particularly in environmental disputes. Arbitration is most commonly a recipe for Solomonic baby-splitting and is unlikely to create results that please anyone. It is almost inconceivable that it would lead to results based on science, sound or otherwise. In arbitration, the parties come before a hired third party who helps decide the outcome of the dispute. The third party is nominally independent, but his or her employment on the next case is only likely if she or he pleases the party responsible for the hiring. Being an arbitrator, then, is an exercise in pleasing one party just enough that they will hire you again while not so irritating the other party that they will veto your next appointment. Arbitration does not produce the *right* result; it produces the *safe* result, the

median result. It is bad policy. The DEP already has an alternative dispute resolution process – the administrative courts.

We approve of giving the Appellate Division direct jurisdiction over administrative court decisions.

### **Sound Science**

We strongly support sound science; it is among our very favorite clichés. We appreciate that a Subcommittee whose scientific expertise is unquestionable – because it has none – has decided to make the implicit determination that the DEP relies on less than sound science. If only the DEP had an office, whose mission was to make sure that the Science they use was the best science available. And given that there *is* such an office, we wish that the Subcommittee didn't recommend its elimination. That strikes us as less than sound.

Given the Transition Subcommittee's repeated desire to improve the DEP's reliance on "sound science," (which we support!) we find it surprising that the Subcommittee recommends elimination for the Office of Policy, Planning and Science. The Office of Policy, Planning and Science is responsible for Climate & Energy; Coastal Management; Science, Research & Technology; and Environmental Justice. These programs actually *are* vital to the DEP's mission, and should receive increased funding. The Subcommittee offers no justification for the proposed elimination.

The report leaves the Subcommittee members' qualifications unclear; our understanding is that most members are from the business community, are former politicians, are advocates or

are all three. We have no reason to believe that the committee members possess any particular scientific expertise. We have been given no basis to understand what objection the Subcommittee has to the DEP's current science staff, why they think the staff should be reorganized or eliminated or just what, precisely is less than sound about the DEP's current practice. We believe that in the context of the Subcommittee's report, "sound science" means science that supports a stridently pro-development agenda.

We believe that sound science – independently generated and peer reviewed – supports the contention that hazardous waste causes adverse health and environmental effects and should be removed as a matter of policy whether it occurs in a densely populated industrial sector or on a rural farm.

### **Open Government**

We wholeheartedly agree with the Transition Subcommittee that the DEP should improve its transparency. It should be easy for anyone to find information about DEP rules documents (though, we note, it already *is* easy as the DEP posts its proposed rules for comment on its website<sup>2</sup>). The bigger issue is that the DEP could effectively eliminate its OPRA budget if it merely scanned all its disclosable documents and made the archive Web-searchable. Creating such a process is less costly today (in terms of both time and funds) than ever before. We agree that New Jersey will only benefit from the DEP meeting with stakeholders to discuss rulemaking and

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<sup>2</sup> <http://www.state.nj.us/dep//rules/notices.html>

policy. New Jersey would benefit even more if the DEP opened these meetings to the public and posted their minutes on the Web.

### **DEP Authority**

We agree that the DEP should clearly link its regulations to their enabling statutes. Clear statements of statutory authorization would help regulated entities understand the basis for regulation, and prevent DEP decision-making from seeming so arbitrary. We also agree that political interference has too frequently influenced DEP decision-making, and clear links to statutory and regulatory authority could, perhaps, insulate the DEP from such pressures. The implication on page two that DEP staff is or should be “trying to issue permits” is outrageous. The purpose of the DEP, whatever it is, is clearly not to issue permits; its purpose is ultimately to protect the environment.

### **Specific Recommendations for Specific Programs**

#### *Endangered Species*

We suspect that the Subcommittee has little understanding of the Endangered Species Act, as conflicts between endangered species and developers occur less in New Jersey than they do in many other states. The idea that the state should “Immediately suspend the inappropriate use of the Landscape Project mapping of purported Threatened and Endangered species habitat” again would be one that places the state in immediate legal peril.

The Endangered Species Act requires states to provide for the survival and recovery of listed species. Central to recovery is the truism that a species cannot recover if its habitat is destroyed. Any state process that catalogues critical habitat for listed species recovery is not “inappropriate”; it is “legally required.”

According to the Landscape Project Website, “The Landscape Project is a pro-active, ecosystem-level approach for the long-term protection of imperiled species and their important habitats in New Jersey. The (New Jersey) Division of Fish and Wildlife's Endangered and Nongame Species Program (ENSP) began the project in 1994. Its goal: to protect New Jersey's biological diversity by maintaining and enhancing imperiled wildlife populations within healthy, functioning ecosystems.” This sort of proactive approach is *exactly* what the DEP should encourage. That the Subcommittee attacks the Project further reveals that they look at the DEP as a place from which developers receive permits, not a place that protects New Jersey's environment.

#### *Public Access Rules*

Regarding Public Access Rules, *Borough of Avalon v. DEP*, 403 N.J. Super. 590 (2008) determined that DEP lacked the power to require the Borough of Avalon to set aside parking spaces for access to a public beach. *Bubis v. Kassin*, 404 N.J. Super. 105 (2008) is a childish dispute between feuding neighbors about how much of a public beach is open to the public under the Public Trust Doctrine. Neither has much to do with public access rules for riparian development. They certainly do not invalidate the majority of the Public Access Rules. Citing

these decisions in the context of the Public Access Rules without explanation is confusing and misleading.

### *Water Quality*

Because our mission is the protection, preservation and restoration of our river and its watershed, Hackensack Riverkeeper takes particular interest in Transition Report recommendations that directly affect water quality. The DEP should not adopt the Transition Subcommittee's recommendation to reduce 300-foot stream buffers to 150 feet. Three-hundred-foot stream buffers are extremely valuable – they protect drinking water quality, reduce flood damage, preserve riverine habitat, and help restore aquatic ecosystems. As our climate warms, and as extreme weather situations become more common, keeping development out of flood plains will increase in importance. We recognize that the buffer zones, especially where they are undeveloped, make attractive targets for developers, but the Subcommittee's suggestion is unsound.

Of similar quality is the Subcommittee's suggestion that off-site mitigation be forbidden permits. Many permits, especially Clean Water Act section 404 permits require mitigation under federal law; immediate suspension of offsite mitigation would be foolish, and would essentially outlaw many types of development requiring dredge or fill.

### **CONCLUSION**

In summation, the Transition Subcommittee Report is fundamentally flawed. It mischaracterizes the Department's mission, at the most basic level, it misunderstands the

purpose of the Department and it presents a series of recommendations that would make DEP procedure substantially worse.

We suggest that composing a Subcommittee that – as far as we can tell – is entirely devoid of serious scientific or environmental expertise was unwise. With all respect due to Mr. Mauro and Mr. Pringle, they are lobbyists; our understanding is that they do not deal with the DEP or development interests from the trenches. Based on the quality of the report the Subcommittee generated, it is clear to us that their presence was insufficient to present the Subcommittee with the balanced perspective necessary to produce an effective document.

We regret that the Governor's Office was not supplied with a well-reasoned, articulate, scientifically or legally defensible accounting of the DEP's successes and failures. We recommend that the best course of action is to disregard the Report in its entirety. We hope that in the future, we will be able to work with the Governor's Office to ensure that New Jerseyans receive the proactive, successful and efficient DEP that they deserve.

Sincerely,

Captain Bill Sheehan  
Hackensack Riverkeeper

Cc: Lisa Jackson, US EPA  
Judith Enck, US EPA Region 2  
Bob Martin, NJDEP