Testimony to the Clean Water Council
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A public investment strategy and regulatory agenda to protect public health, quality of life, drinking water and preserve remaining high quality streams, lakes, rivers, wetlands, forests, & farms.

Need for Public Investment - Financing environmental infrastructure deficits

The first priority of the Clean Water Council should be a strong recommendation to the next Administration to get the environmental infrastructure deficit issue on the political and policy radar screens. The Council should focus on the fact that environmental infrastructure deficits are a serious and long ignored problem that threaten NJ's economic future, quality of life, public health, and ecological integrity. The Council needs to emphasize that water resource and environmental infrastructure expenditures are investments. The Council should recommend the absolute need to establish creative new funding sources to finance this critical deficit.

Straw man proposal: The FY06 State budget appropriated $20 million to front end finance and subsidize developers to implement the controversial "Fast Track" legislation. Just weeks later, in mid-July, Acting Governor Codey issued an Executive Order that established a moratorium on implementation of Fast track. Pending small "water tax" legislation went nowhere.

If NJ can afford $20 million to subsidize developers, we can invest $100 million/year in water resource and environmental infrastructure. An Executive Branch administrative option to do so would be to deploy joint DEP/BPU regulatory and rate setting powers to increase regulated water, sewer, solid waste and energy user rates to generate a $100 million/year revenue target. This revenue stream could be securitized to finance debt service on a long term capital investment program. The $20 million allocated to "Fast Track" could be transferred (diverted) to front end finance the design and startup costs to implement the program.

Supporting Rationale: It is accepted wisdom among economists and policy experts that strategic public investments in physical and environmental infrastructure stimulate private sector investment, enhance productivity, increase profitability, and spur economic growth and vitality. Such public investments generate economic activity and tax revenues that offset the public expenditures. These public sector investments are viewed as pre-requisites for sustaining both private sector economic vitality, quality of life, and ecological and public health.

Yet NJ's political leaders have lost sight of this wisdom while immersed in an expanding policy crisis. It appears that we are entering a period of fiscal austerity at precisely the moment when NJ needs to make dramatic new public investments in NJ's strategic assets.

It is our professional obligation to restate this wisdom, identify threats, and pose solutions. We allow failures in leadership to continue at our peril. We need only look to the decline of public institutions, public services, social ethic, and educational and economic opportunity in post-Proposition 13 California (the Post World War II model of progressive government) to see where NJ is headed (or perhaps more dramatically to New Orleans and the response to hurricane Katrina, a failure of public sector capability related to current Republican National strategy of privatization, disinvestment, and "starving the beast" in order to "get government down to a size where we can drown it in the bathtub").

The current crisis atmosphere is driven by the convergence of numerous problems, including historic over-reliance on high local property taxes, a multi-billion structural State budget deficit, escalating bond debt repayments resulting from shortsighted "borrow and spend" policies, court imposed school construction and affordable housing constitutional remedial mandates, abdication of federal and private sector roles, and the looming expiration of both the Transportation and Green Acres Trust Funds.

Despite widespread perceptions of "bloated Trenton budgets" and "waste, fraud and abuse", the reality is that serious economic and environmental problems are compounded by years of under-funding: budget cuts, deferred maintenance, and inadequate capital investments in crumbling, public roads, ports, rail, transit, educational, energy, sewer, water, parks, and "green" infrastructure. For example, NJ's Clean Water Act Capital Needs Assessment has identified over $7 billion to meet current requirements. Safe Drinking Water Act and Clean Water Act mandates are projected to cost billions more. Necessary energy conservation/efficiency and diversified and alternative supplies will require state investments. Deferred maintenance at existing State Parks exceeds $250 million, while additional local and state parks are needed to meet existing and projected growth in recreational demand. Open space acquisition and lands management capital and operating needs are in the billions of dollars. Flood protection, shore protection, port expansion and maintenance, and rehabilitation of aging urban water and sewer systems will cost billions more. These are NJ's strategic assets. Problems are getting worse and the costs are only growing.

Perhaps even worse, the environmental quality and other public benefits of historic public infrastructure investments have been offset, if not wiped out, by the demands and impacts of new growth and over-development. At the same time that these problems are becoming more severe and visible to the public, NJ is approaching development "buildout" and experiencing a crisis of vanishing open space, expanding threats to water resources and public health, and transportation gridlock.

Local governments already lack adequate funds to implement mandated environmental programs and are exerting political pressure on "state mandate/state pay" grounds. Local water and sewer authorities and private purveyors resist much needed user fee rate increases to make necessary investments. The Board of Public Utilities' ratepayer protection role has served to temper necessary user fee increases. The private sector has dodged and not met its fair share obligations, while federal funding has all but disappeared. NJ's Environmental Infrastructure Trust, for a variety of reasons, is completely inadequate to meet these demands.

Effective solutions have been stymied lack of vision and political leadership in light of strong opposition to vitally needed revenue increases. Despite the shared risks to economic and ecological and public health, in the current political climate, critical environmental and public health issues essentially get ignored.

A Bold Regulatory Agenda

1. Control septic based sprawl development

Adopt DEP rules to establish a DEP environmental review process (with enforceable standards) and mandate revised design standards for small-scale residential and commercial developments that reply on septic systems. Rules should require that DEP review of these currently unregulated projects assures that site specific, secondary, and cumulative impacts from septic systems discharging to groundwater protect water supplies and comply with water quality standards. Environmental reviews should also prevent, reduce and mitigate adverse impacts to critical wildlife habitat, minimize forest fragmentation, preserve stream buffers, enhance headwaters and wetlands, maintain natural stream base flows, reduce flooding risk, protect aquifer recharge areas, prohibit and restrict disturbance of steep slopes, prevent soil compaction, and limit impervious cover. New rules could include incentives to promote compact, pedestrian friendly mixed land uses, and require that low impact and energy efficient site planning, building design, construction, and mitigation/restoration practices were followed and funded by builders.

Mechanisms: Repeal Whitman Executive Order #109 and re-propose revised septic rule (Subchapter 8 of the Water Quality Management Planning rules, NJAC 7:15-1 et seq.) struck down by courts on procedural grounds in 2002. Propose new regulatory definition of "environmentally sensitive areas", "steep slopes", and "low impact design and construction" and expand DEP jurisdiction to regulate these areas. Incorporate the Highlands "Interim Rule" septic density, location, and design standards in statewide rules.

2. Limit water and wastewater infrastructure in environmentally sensitive lands

Adopt DEP rules to ban construction of new sewage treatment plants and wastewater infrastructure located in environmentally sensitive areas. Limit the extension and connection (TWA permits) of potable water and sewer lines to serve new development in environmentally sensitive areas. Limit the expansion of existing sewage treatment plants, new sewer line connections to these plants, and TWA permits that serve new development in environmentally sensitive areas, or that discharge to "impaired" or "Category One" waters. Eliminate environmentally sensitive lands from areas mapped for growth under the State Plan, and mapped and/or approved for new sewer service by DEP.

3. Get water supply on a budget

Adopt DEP rules to establish enforceable numeric standards and watershed specific water budgets to assure that existing and new potable water uses regulated by DEP do not exceed: a) sustainable water supplies, b) prevent salt water intrusion, c) avoid accelerating pollutant migration and increased human exposure potential from toxic waste sites, and d) protect ecological, recreational, and fisheries uses of our streams and rivers. Reduce DEP "water supply planning threshold" in deficit or environmentally sensitive watersheds from 20% of available recharge to 10%. Establish protective passing flows and safe yields. Enforce violations of existing water allocation permits. Rescind unused water allocations that were allocated to support growth in environmentally sensitive areas. Control cumulative impacts of currently unregulated water uses and diversions, or under-regulated diversion, such as agricultural registrations. Mandate water conservation and increase water users fees. Establish an environmental and antidegradation review process to evaluate and limit adverse impacts, including secondary land use impacts, of inter-basin transfers of water.

4. Strengthen water quality standards

Establish new surface and groundwater quality standards that regulate non-point source pollution and authorize DEP to consider cumulative and secondary impacts to better protect natural resources. New SWQS/GWQS rules and antidegradation policies are necessary. DEP should upgrade waterbody classifications (adopt C1 "candiate Waters list" noticed in the April 2003 NJ Register), strengthen policies, tighten standards, and authorize DEP to consider ecological impacts and protection of natural resources and public health from the secondary and cumulative impacts of land use/land cover changes, loss of natural recharge, and increased pollutant discharges associated with development.

5. Protected vegetated stream buffers

Establish 150 foot naturally vegetated buffers around all lakes, streams and rivers. Where these buffers are currently fragmented and disturbed by existing development, require that they are restored over time by imposing mandatory restoration requirements as a condition of DEP approvals.

6. Implement Source Water Protection

Design and implement a Source Water Protection Program. Such a program would include prohibitions, location restrictions, and new land use and pollution discharge standards to assure that activities protect and minimize impacts on potable well head protection areas (including individual residential wells), reservoir watersheds, and waters directly upstream of surface water potable water supply intakes. Reconsider existing and pending DEP approved: a) "NJPDES discharge to groundwater" permits, b) groundwater "classification exception areas", c) "passive groundwater remediation" and d) "remedial action plans". These regulatory approvals impacting Source Waters need to be recalled, reconsidered and amended to assure enforcement of permanent remedies and active groundwater cleanup are implemented to prevent and protect impacts on public water supplies.

7. Implement Clean Water Act required effluent limitations

Implement water quality based effluent limits (WQBELs) in NJPDES water pollution discharge permits for all regulated parameters present in the discharge. Stricter effluent limitations are necessary in order to protect water quality and drinking water, especially for un regulated or under–regulated pollutants such as nutrients (phosphorus and nitrate), persistent or bioaccumulative toxics, human carcinogens, endocrine disruptors, and currently unregulated compounds such as the Toms River cancer cluster contaminants and a variety of pharmaceuticals that were recently discovered in NJ waters by USGS' national water quality monitoring program. Mandate new monitoring, pollution prevention, pretreatment, and pollutant source trackdown programs to reduce discharge of toxics. Require that NJPDES permits that have "monitor only" conditions for certain parameters are called up and amended to include new effluent limitations for these "monitor only" parameters.

8. Reform the TMDL program

DEP has engaged in bureaucratic "bean-counting" and created masked deficient performance of the TMDL program via re-negotiation and watering down commitments under the USEPA TMDL MOA oversight agreement. The Whitman Administration TMDL agreement with USEPA was re-negotiated by Commissioner Campbell. The renegotiated agreement is small bore. It substitutes about 150 simple, cheap, and limited spatial and water quality impact related fecal coliform and lake TMDLs for more complex, regional, costly, and beneficial commitments under the Whitman agreement.

The Clean water Council should expose this scam and recommend that the TMDL program be strengthened and get back on track.

In order to accelerate and expand implementation, DEP should cap current pollution discharges and prohibit new connections and expansions of NJPDES permitted wastewater treatment facilities discharging to impaired rives that do not have an approved

TMDL. DEP needs to allocate resources needed to complete all TMDL's within 2 years. Create new program for compliance monitoring and enforcement of TMDL requirements, including new non-point source pollutant controls, stormwater management retrofit requirements for existing development and stormwater facilities, and impose additional development restrictions in impaired watersheds.

9. Reduce persistent flood risks

Prevent, reduce, and mitigate flood risk by strengthening implementation of the Flood Hazard Area Control Act stream encroachment permit program, as recommended by DEP staff in 2003.

10. Protect the Coast

Protect the coast from over-development by seeking legislative amendment to closing CAFRA jurisdiction threshold and other loopholes. Rescind proposed CAFRA rules that would extend Coastal Centers. Repeal some CAFRA rules (e.g. impervious cover limits in centers, allowance of high rises on piers in Atlantic City). Enforce current laws and regulatory standards, including restrictions on salt water intrusion, extensions of water supply lines, and the "Gibson bill" moratorium on issuance of new or expanded water allocation permits in Cape May. Shift the CAFRA program from a site specific permit orientation to a regional ecological coastal protection planning program. Plan for sea level rise and global warming climate change adaptation, including emergencvy evacuation and response.

11. Strengthen wetlands protections

Improve protections of wetlands by: a) establish biological and hydrological surface water quality standards to control all activities, including those located outside regulated wetlands, that could impact wetlands, such as DEP water allocation, land use, and stormwater management permits; b) increase resource based field compliance and enforcement efforts to reduce illegal wetlands fills and disturbance/destruction of protected transition areas, for permitted and non-permitted activities; c) upgrade wetland classification standards to consider habitat and sensitive natural resource features; d) eliminate the failed wetlands mitigation program and fully implement the recommendations of DEP's 2002 Wetlands Mitigation Research Report; e) require that Letters of Interpretation (LOI's) that map and classify wetlands, and wetlands permits are re-examined in light of changed filed conditions, instead of automatically renewed under current DEP "reliance" policy.

12. Protect water supply - Require carbon filtration and advanced treatment

Phase in new requirements for all public/community water supply systems to install carbon filtration and other advanced treatment systems. First priority should be to **r**equire carbon filtration for water supply systems identified as vulnerable by the Source Water Assessment Program. Residential wells in vulnerable aquifers should be notified of the

risks (prior to land transaction), eligible for State funding, and required to install POETs.

13. Assure Natural Resource Damage Program is implemented

Extend the statute of limitations on natural resource damage injuries. Expand implementation of program, dedicate funds to restoration of natural resources, and restrict distribution of NRD funds to the communities that have suffered the harm.

14. Protect wildlife and ecological communities

Propose new rules to protect the habitat of rare, threatened or endangered species (Landscape Project) or unique ecological communities (Natural Heritage Program).

15. Upgrade protections of surface and ground waters

Upgrade antidegradation classifications for all DEP's "Category One Candidate Waters" on the list published for public comment in the March 2003 NJ Register. Close loopholes in applicability, grand-fathering, exemptions, agricultural use, disturbance, stream crossing, and hardship waivers in current 300 foot buffers for Category One "Special resource protection areas" adopted in stormwater rules. Implement related groundwater classification upgrades (Class I).

16. Preserve the Highlands

Propose "Final" Highlands rules that close loopholes, correct flaws, and strengthen weaknesses identified in "interim rule" proposal. See the Highlands Council's recommendation letter to Commissioner Campbell concerning the Interim Rules and the Highlands Coalition for ideas.

17. Monitor groundwater at old landfills

Adopt rules to reinstate groundwater monitoring requirements at old landfills that operated prior to 1982. DEP groundwater monitoring requirements at these and other sites were stripped by a 1989 Court decision ("*Vi-concrete*"). The Court essentially directed DEP to promulgate rules, but DEP never followed through and did so. Enforce current violations of groundwater quality standards.

18. Regulate junkyards

Adopt a regulatory program to control the adverse environmental impacts of junkyards. See the Ocean County Grand Jury Presentment for ideas.

19. Subject water diversion to Clean Water Act permit requirements

Regulate the diversion and allocation of water under the Clean Water Act NJPDES permit program. Require NJPDES permits for water pumped to a reservoir or inter-basin transfers of water.

20. Strengthen pesticide protections

Regulate the aquatic application of pesticides under the Clean Water Act. Require that aquatic or upland applications are subject to NJPDES permit requirements that comply with water quality standards.

21. Reform water quality standards

Strengthen Surface Water Quality Standards. See attached letter to Commissioner Campbell for some ideas.

22. Create stormwater utilities and control impacts from existing development

Adopt rules to create and fund stormwater management utilities. Require retrofits of existing development and stormwater facilities. Require that new and existing development share the costs equitably, based on an impact fee per unit of impervious surface.

23. Regulate mining, forestry, and agricultural activities

Strengthen regulation of mining, forestry, and agricultural activities, including water use registration, soil erosion & sediment control, and stormwater permitting. Require individual NJPDES permits for mining, forestry, and agricultural application of animal wastes, residuals, and agricultural chemicals and fertilizers that are known to pollute surface and groundwater.

24. Establish standards and protections for public lands

Adopt new rules mandating protective environmental performance standards for publicly owned or funded lands.

25. Enforce toxic site cleanup requirements

Years of experience have demonstrated that voluntary compliance does not work when compliance costs conflict with the economic bottom line. Yet NJ's toxic site cleanup program predominately relies on a voluntary mechanism known as a Memorandum of Agreement. (MOA). MOAs have been issued at thousands of sites, are not enforceable, and have led to years of delays and failures to implement protective soil and groundwater cleanups. To remedy this egregious problem, DEP must amend the "Technical Requirements for Site Remediation" regulations to set performance standards and revoke non-performing "Voluntary Cleanup Program" Memoranda of Agreements (MOAs). Revoked MOAs must be replaced by enforceable Spill Act Directives, Administrative Consent Orders, and stipulated penalties for non-performance.

26. Protect minority and disadvantaged school children in urban "Abbott" districts

DEP has entered into a Memorandum of Agreement (MOA) with the Schools Construction Corporation (SCC). This MOA sets lax DEP oversight and establishes absolute minimal "due diligence" (site investigation), planning, and public involvement in SCC acquisition, cleanup, and construction of schools on lands contaminated by toxic chemicals, and even radioactive federal Superfund sites. The MOA establishes a unit in DEP dedicated to streamlined SCC project reviews, staffed and financed by the SCC, raising major conflict of interest concerns.

This MOA is a major contributing factor to the waste of what the Governor's Inspector General's Report identifies as about $250 million spent on acquisition of grossly contaminated lands and inappropriate schools sites. It ahs also led to the controversy in Trenton, where DEP regulated contaminated soils were imported as "clean fill" on a previously contaminated site.

The MOA must be rescinded and replaced by DEP school siting criteria, children's health based cleanup standards, community involvement, strict DEP oversight, transparent decision-making, and enforceable regulations. The policy must be that school siting on contaminated land is an option of absolute last resort, allowed only after it is demonstrated by SCC, through a public process that involves the community in siting and cleanup decisions, that no alternative non-contaminated sites are available. If this can be demonstrated, then contaminated land must be either cleaned up to new more stringent children's health based cleanup standards, or permanent remedies that remove all contaminated soil, groundwater, and building structures.

27. Integrate Science and monitoring data in standards and permit programs

DEP conducts research and collects ambient monitoring data at thousands of locations. The Division of Science and Research, the NJ Geological Survey, and the water quality standards Bureau are understaffed and lack adequate resources.

However, perhaps more significant that lack of resources, this scientific and data collection work is very poorly integrated into the body of water quality standards and regulatory program requirements. One highly visible example is the 2002 research report demonstrating failure of the wetlands mitigation program. DEP issued a press release announcing these research findings, but has yet to make changes to standards and wetlands regulations. There are many more examples of this lack of integration.

The Council should make adequate resources for and better integration of science and data collection a priority for the next DEP Commissioner.