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March 10, 2011

VIA HAND DELIVERY

Ocean County Section Chief
Division of Land Use Regulation
Department of Environmental Protection
501 East State Street - 2nd Floor
Post Office Box 420 501-02A
Trenton, New Jersey 08625

Re: CAFRA Application #1500-04-0001.2 - CAF090001

**Wal-Mart, Ocean County
Block 505, Lots 14 & 15
Toms River Township, Ocean County
Block 44, Lots 2, 3, 4 & 5
Manchester Township, Ocean County**

Dear Sir:

NJCF is strongly opposed to the proposed settlement between the NJDEP and Jaylin Holdings, LLC, in regard to a certain project for a Wal-Mart Super Center located on the above described property.

The New Jersey Conservation Foundation (NJCF) has been engaged in protecting the natural resources of the New Jersey Pine Barrens for over 40 years. NJCF was a leader in advocating for the Pinelands Protection Act and the establishment of the Pinelands Comprehensive Management Plan. We are a major conservation landowner in Ocean County, as we own and manage over 4000 acres within Lacey and Ocean Townships. We have also been a member of the New Jersey Natural Lands Trust since its inception about 30 years ago, and we assist the Trust in managing populations of rare plant and animal species at the Crossley Preserve in Berkeley Township, Ocean County.

The Northern Pine Snake habitat in the Crossley Preserve is contiguous with habitat being utilized by the meta-population of Northern Pine Snakes that occur on the site of the proposed Wal-Mart. NJCF staff has been participating in long-term ecological research on this meta-population of Northern Pine Snakes for over 20 years with Dr. Joanna Burger of Rutgers University and the research staff of Herpetological Associates. NJCF has been a member of the New Jersey Endangered and Non-Game Species Advisory Committee for 15 years, and we concurred with and supported the determination by the NJ Endangered and Non-Game Species Program Pine Snake stratus Assessment in 2008.

NJCF is in full and complete agreement with the comments submitted by the Pinelands Preservation Alliance in opposition to this proposed settlement, in a letter dated 10 March 2011 from the law office of Gasiorowski and Holobinko. We are also in full and complete agreement with the expert report regarding the protection of the Northern Pine Snake population and its habitats at and near the proposed

Wal-Mart project site, which was prepared by Dr. Joanna Burger of the Department Ecology and Evolution and Natural Resources at Rutgers University, and included in the comments submitted by the Pinelands Preservation Alliance.

On 16 March, 2010, the New Jersey Department of Environmental issued a denial of the CAFRA permit that is required to construct a Wal-Mart at this site, based on the habitat protection provisions for threatened and endangered species in the CAFRA rules, as well as other grounds. NJCF was quick to applaud NJDEP Commissioner Martin and other DEP staff for their steadfast protection of the habitat of rare species. Within one week, Governor Christie was quoted in the Asbury Park Press on 23 March 2010, indicating that NJDEP staff would be working on “*a way around*” the CAFRA regulations (Asbury Park Press article attached). The sequence of events raises the appearance that the Department is proposing this settlement because of a political directive, regardless of the regulations and the rule of law.

When compared to the proposal that was denied on 16 March 2010, the proposed settlement includes absolutely no changes to the project design or enhanced protections for the population of Northern Pine Snakes which occur on or near the proposed Wal-Mart site. The proposal to conduct speculative, unproven enhancements on possible Northern Pine Snake habitat miles away, which the NJ DEP maps as disconnected by complete habitat barriers from the meta-population which occurs at the Wal-Mart site, does not conform to the requirements of the CAFRA rules, will not result in local or regional improvements to the conservation of the threatened Northern Pine Snake, and will set a terrible precedent for ignoring the protection of critical habitats and local populations of rare species in the vicinity of developing areas.

The New Jersey Conservation Foundation has closely studied the methodology used in creating this off-site mitigation scheme, which cannot benefit the meta-population of Northern Pine Snakes that lives at the Wal-Mart proposed site, the Crossley Preserve, and in general south of State Highways 70 and 37. The methodology uses subjective rankings of habitats and habitat improvements that have no basis in any objective research and quantitative study, and cannot be tracked or followed to determine success or failure, since there is no baseline data. They have simply been ‘conjured-up’ from very general concepts on Northern Pine Snake ecology, as, in Governor Christie’s words, “a way around” the CAFRA requirements.

The properties proposed for mitigation were chosen out of convenience of land acquisition, and have little to offer toward improving the conservation status of the Northern Pine Snake. In fact, the Beckerville Road abandoned sewage sludge-dump/farm property, proposed for habitat restoration even though the soils are so nutrient-enriched that they cannot be converted back to Pine Barrens habitat, is located within a heavily-traveled 3 road triangle (two roads are busy highways). This triangle contains no living pine snake records, only “dead-on-road” data records near the intersection of highway 539 and 70. The chance that Northern Pine Snakes could ever successfully colonize and maintain a population within this highway triangle is virtually zero, yet many of the subjectively-assigned mitigation points come from this ill-fated restoration proposal at Beckerville.

In its comments submitted today, 10 March 2011, the Pinelands Preservation Alliance (PPA) touches on numerous flaws regarding this Notice of Settlement in this CAFRA proceeding. As stated earlier, New

Jersey Conservation Foundation agrees with the entire comments document and expert report submitted by PPA. Here we wish to emphasize two of these critical points.

First, the proposed settlement is based on the premise that CAFRA rules permit off-site mitigation to justify destruction or degradation of on-site threatened and endangered wildlife species habitats. This is patently not the case. The CAFRA rules state that “Development of endangered or threatened wildlife or plant species habitat is prohibited unless it can be demonstrated, through an Endangered or Threatened Wildlife or Plant Species Impact Assessment as described at N.J.A.C. 7:7E-3C.2, that endangered or threatened wildlife for plant species habitat would not directly or through secondary impacts on the relevant site or in the surrounding area be adversely affected.” N.J.A.C. 7:7E-3.38. The CAFRA regulation’s discussion of Habitat Impact Assessments also does not permit off-site mitigation, but states that a Habitat Impact Assessment “shall demonstrate that the proposed development will not negatively affect the population(s) or habitat of the endangered or threatened wildlife species that resulted in identification of the site, or an area abutting the site, as endangered or threatened wildlife species habitat” N.J.A.C. 7:7E-3C.2. These provisions do not mention or permit off-site mitigation as proposed here. In fact, the CAFRA rules do expressly permit and provide standards for mitigation with respect to other regulatory standards, such as wetlands. The fact that they do not include mitigation in the threatened and endangered wildlife provisions means the proposed settlement violates these regulations.

Second, the settlement relies on a new, untested, and flawed model of habitat value for Northern Pine Snake habitats. The expert report of Dr. Joanna Burger shows that the model and its application in this case are not a scientifically valid basis for the proposed settlement. As summarized in PPA’s comments, Dr. Burger’s findings include the following:

- a. The proposed mitigation plan is fatally flawed because, even if it worked as claimed, it will not mitigate the impacts of the development on the Pine Snake population using the proposed Wal-Mart development site. All but one of the mitigation properties are disconnected from proposed Wal-Mart development site by distances and roads that create barriers to Pine Snake movement.
- b. All but one of the mitigation properties are also separated from the pine snake population in question by the very large Heritage Minerals tract, which has no permanent protection and could be developed in the future in ways that would further separate the development site from the mitigation properties.
- c. The No Net Loss of Habitat Value model proposed for use in this case is not accepted in the scientific community.
- d. The model has never been tested in the field.
- e. The model has not been subjected to peer review, has not been discussed by the Endangered and Nongame Species Advisory Committee, and has not been subjected to public review and comment.

- f. The model, and the approach it embodies, has never been adopted by the state of New Jersey as a means to protect rare species populations of any species of snake, either under CAFRA or any other state program or regulation.
- g. The model has numerous flaws, detailed in Dr. Burger's report.
- h. As applied by NJDEP and the developer in this case, the model assumes the Wal-Mart development will reduce but not eliminate the habitat value of the existing critical habitat on site. But, as noted above, NJDEP has previously concluded that it is unlikely the existing Pine Snake population will tolerate the proposed development, thus eliminating the existing habitat values on the property.
- i. The proposed habitat improvements to be carried out on the mitigation properties are flawed, unproven, and unlikely to succeed. Dr. Burger's report includes a detailed analysis of each mitigation site and habitat improvement measure.

Moreover, these flaws in the modeling are especially telling because there is no evidence that any Northern Pine Snakes are present on or finding critical habitat within the proposed mitigation sites.

There are vast stretches of New Jersey, outside of the Pinelands, Highlands, and CAFRA zones, where no regulatory mechanism exists to protect habitats and populations of threatened and endangered species that utilize uplands. The concept of "improving nearby habitat value" has been proposed as a mechanism to assist rare species where their acreage of critical habitat is about to be lost. This approach has not been proposed, tested, or shown to be reliable enough to be used, as here, to justify destruction or damage to known critical habitats of specific rare wildlife populations. Here, in the CAFRA zone, threatened and endangered species populations and their habitats are clearly protected from destruction by the existing CAFRA regulations. Proposing to assist a distant meta-population, even if it could be shown to be successful, will not protect this particular meta-population of Northern Pine Snake whose habitat is clearly protected by CAFRA regulations.

It is the opinion of the New Jersey Conservation Foundation that the proposed Notice of Settlement, which proposes 1) the loss of Pine Snake habitat acreage at the proposed Wal-Mart site, and 2) the mitigation of habitat "value" for Northern Pine Snake in a disconnected meta-population elsewhere within the range of Northern Pine Snake in New Jersey, ignores and circumvents habitat protection afforded to the Northern Pine Snake by CAFRA.

New Jersey Conservation Foundation respectfully requests that the proposed Notice of Settlement be abandoned.

Respectfully submitted,



Dr. Emile DeVito
Manager of Science and Stewardship, NJCF