

Heritage Minerals, Inc.

February 16, 2011

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Ocean County Section Chief
Division of Land Use Regulation
NJDEP
P. O. Box 420 501-02a
Trenton, NJ 08625

Re: Jaylin Holdings, LLC
DEP File No. 1500-04-0001.2, APL 100001, FWW 090001
Toms River and Manchester, Ocean County

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LAND USE REGULATION

Dear Ocean County Section Chief:

I am writing to you on behalf of Hovsons, Inc., and Heritage Minerals, Inc (collectively "Hovsons"), neighboring property owners to the above referenced application for the construction of a WalMart. We understand that DEP is entering into a settlement which will allow a permit to be issued for the construction of the WalMart store. Since Hovsons is an interested party which submitted comments on the original application it is my understanding based upon the attached email and notice forward to me by Eric Virostek that is has been given an additional 30 days to submit comments. As such, kindly accept these comments regarding the settlement.

Hovsons first notes that it is pleased to see that while its property is noted in the amended reports, it does not appear that it is being used or considered for mitigation purposes. To the extent it is being relied upon it must be pointed out that the deed restrictions contained in the Heritage Settlement Agreement have not yet been put in place and Hovsons maintains the right to void the settlement at regular periodic intervals if its development does not move forward. That being said, Hovsons applauds DEP for embracing the "common sense principles" of Governor Christie's Executive Order No.2. Specifically, DEP's proposed settlement promotes "transparency and predictability regarding regulatory activity, consistency of business regulation

with the State, appropriate flexibility, and a reasonable balance between the underlying regulatory objectives and the burdens imposed by the regulatory activity.” This settlement is precedent setting; and in order to promote predictability and consistency in future matters, Hovsons expects DEP to treat similarly situated developers the same way Jaylin Holdings is being treated here.

Specifically, Hovsons notes the following precedent setting aspects of the settlement with Jaylin Holdings, and expects such aspects to be available to future developers in appropriate circumstances:

1. Northern Pine Snake habitat, upon which two snakes have been documented to be residing, is now deemed by DEP to be compatible with, and can be located directly adjacent to, a proposed shopping center development provided that a physical “snake wall” (here, measuring 3,319 feet long) minimizes conflicts between humans and snakes.
2. Whereas in the past, once a site was determined to be an actual threatened or endangered species habitat, the site was basically off limits to development absent unusual circumstances. Under this settlement, notwithstanding that the entire 42 acre site has been found to be northern pine snake habitat with actual snakes present), the DEP is permitting development of about half the site, with the remainder of the site to be preserved as snake habitat (with assistance from the “snake wall”).
3. DEP is no longer taking a “one size fits all” approach to threatened and endangered species habitat. In the past, development was prohibited if a site was determined to

be an actual T&E habitat. Under this new approach, DEP is utilizing a new methodology, the Habitat Evaluation Method (HEM), to assess the quality of habitat, and to measure how much mitigation (which can be either on or off-site) will be required as the price of approving development. Thus, in the future, development should be permitted in T&E habitat if the habitat is not of sufficiently high quality, or if mitigation is provided.

4. In utilizing HEM, DEP is properly following the lead of the US Fish and Wildlife Service, which has for years made decisions about development based upon the relative value of habitat quality under its Habitat Evaluation Procedures. DEP acted with expedition to develop, and implement for the first time in this matter, its HEM approach, recognizing that rational proposals which are “outside the box” of the existing DEP regulatory framework can be approved without the need to have those proposals be incorporated into the regulations under the rulemaking provisions of the Administrative Procedures Act. Accordingly, the DEP is setting a precedent that it will approve similar rational, but “outside the box”, proposals in the future.
5. DEP properly determined that the value of pine snake habitat lost by development of the WalMart could be offset, and mitigated, by creating and enhancing pine snake habitat not only on and adjacent to the project site, but also at sites up to 6.5 miles away. In this case, roughly half (20.9 ac) of the project site is being preserved, along with an adjacent 21.1 acre parcel which is contiguous to the project site. In addition, four tracts comprising 192 ac are being preserved/enhanced for pine snakes, even though they are located nowhere near the project site and are up to 6.5 miles away.

This precedent will allow developers to utilize distant sites to provide mitigation for T&E habitat in the future.

6. DEP is willing to utilize new techniques to provide mitigation for T&E habitat. For example, in his January 11, 2011 report regarding this matter, David Golden of DEP indicates that “To my knowledge the intentional creating of pine snake nesting habitat by ‘importing’ sandy soil to an area has not been attempted in New Jersey,” although he notes that such a method has been used to create wood turtle habitat. Golden report at p.4. It is precedent setting that the DEP will permit the use of untested habitat creation technology.
7. DEP’s HEM process, as outlined in the above referenced report by Mr. Golden, allows destroyed T&E habitat to be mitigated by providing an equivalent habitat value on a 1:1 basis. In other words, here the total habitat value lost is 51.8 HUs, and Jaylin is providing 53 HUs in mitigation, according to DEP’s calculations. While DEP has required greater mitigation ratios in the wetland context (often 2:1 or greater), a reasonable 1:1 requirement here is precedent setting.
8. DEP’s approach in this settlement does not focus exclusively on the specific pine snakes residing on the WalMart site, but on the regional population in general. For example, at p. 8 of the Golden report, DEP acknowledges that “most of [the] improvements in pine snake habitat gained by implementing the enhancement activities would benefit members of the regional pine snake population other than those individual snakes that would experience losses in habitat.” DEP emphasizes “substantial improvements to pine snake habitats in this general area.” The test,


apparently, is whether “there will be no net loss to pine snake habitat value in this region,” as opposed to an unduly narrow focus upon the snakes on site. We welcome DEP’s broad brush approach and assume it will be applied equally to other threatened and endangered species.

9. The Golden report calls for the implementation of habitat enhancement to be carried out and completed prior to the initiation of any development of the WalMart site. Golden report at 8. The report does not, however, address what “completion” means. After the sand is brought into the sites, and vegetation is planted or thinned as appropriate, how long must the vegetation thrive before the enhancement is declared complete? And after enhancement is complete, will there be a new HEM analysis to insure that the assumed HU habitat values have been achieved? And will all this be done prior to the commencement of actual construction of the WalMart? These are issues that need clarification so we can know what conditions are placed on Walmart as those conditions will set the precedent for how others are to be treated.
10. The proposed settlement shows the DEP’s willingness to take previous applications on a site into account when determining impervious coverage requirements. Originally, the applicant calculated impervious cover based upon the Toms River Regional Center designation for the Toms River portion of the site (80% impervious cover allowed) and the Suburban Planning Area for the Manchester portion of the site (30% impervious cover allowed). The Toms River portion of the project is 15.665 acres, and the Suburban portion is 21.002 acres, for a total impervious cover allowance of 18.8 acres, where 14.8 acres of impervious cover is proposed. The

problem is that the Toms River Regional Center expired in February, 2005. When it was extended by DEP rulemaking in 2006, the extension carried conditions, one of which is that T&E areas “shall not be considered part of a mainland coastal center.” NJAC 7:7E-5B.6(e). As such, the 80% impervious cover allowance for centers would no longer be applicable, and the project is therefore would be in excess of the impervious cover limit for the underlying Suburban area (i.e., 30% of the total development area of 36.6 acres equals 11 acres of impervious cover, where 14.8 acres of impervious is proposed). However the DEP is allowing Jaylin holdings to “relate back” to its earlier application, despite it being substantially different then the current application. Thus the DEP is acknowledging that previous applications and I would assume previous activities that may have taken place in conjunction with previous applications, should be factored in when determining the appropriate impervious coverage requirements.

Thank you for the opportunity to submit these comments on the Jaylin Holdings settlement. I appreciate your consideration.

Very truly yours,



Chad Warnken
General Counsel

Cc: Eric M. Virostek